No. 08-1589

IN THE

# Supreme Court of the United States

THE DOW CHEMICAL COMPANY,
*Petitioner,*

*v.*

AKA RAYMOND TANOH, ET AL.,
*Respondents.*

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

## MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN CHEMISTRY COUNCIL FOR LEAVE TO FILE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

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## MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN CHEMISTRY COUNCIL FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") and The American Chemistry Council ("ACC") hereby move this Court, pursuant to Rule 37.2, for leave to file the attached brief *amici curiae* in support of petitioner in this case. While the petitioner has consented to the filing of this brief, respondents Aka Raymond Tanoh, *et al.*, have not consented. Correspondence reflecting

the consent of the petitioner has been lodged with the Clerk.

The Chamber is the world's largest business federation, with an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber is well positioned to assist the Court in its evaluation of the parties' arguments because the Chamber regularly advances the interests of its members in courts throughout the country on issues of critical concern to the business community, and has participated as amicus curiae in numerous cases addressing jurisdictional issues, including, for example, *Hertz v. Friend*, No. 08-1107 (cert. granted June 8, 2009).

The ACC represents the leading companies engaged in the business of chemistry. The business of chemistry – a $689 billion enterprise – is a key element of the nation's economy, accounting for ten cents of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The Chamber's members and the firms represented by the ACC are frequently defendants in individual cases and class actions in which the existence of federal diversity jurisdiction is at issue. In addition, the Chamber was involved – on behalf of its members – in organizing support for the much-needed class action reforms reflected in the Class Action Fairness Act of 2005 ("CAFA"). As a result, the organization has a wealth of experience in

interpreting the jurisdictional requirements set forth in CAFA and is uniquely suited to provide the Court with significant guidance in addressing the policy goals and intent of the legislation – an issue not addressed in detail in the parties' briefs that might otherwise escape the Court's attention.

The Chamber and the ACC have a strong interest in seeking review of the Ninth Circuit's March 27, 2009 opinion, which both eroded federal jurisdiction under CAFA by applying a presumption against removal and invited gamesmanship by eliminating federal jurisdiction over mass actions as long as such actions are filed piecemeal in state courts. The Ninth Circuit's opinion, if left undisturbed, will significantly restrict the ability of defendants to remove mass actions to federal court – in direct contravention of their constitutional and statutory rights. The Ninth Circuit's opinion will also blunt the effectiveness of CAFA, wherein Congress specifically provided for expanded federal jurisdiction over, and relaxed the impediments to removal of, certain interstate class actions and mass actions. The Ninth Circuit's decision will have far-reaching effects on companies that do business in the United States, many of which are members of the Chamber and/or represented by the ACC, by denying them the ability to avail themselves of diversity jurisdiction.

For the foregoing reasons, the motion of the Chamber and the ACC to file a brief *amici curiae* in support of petitioner should be granted.

Respectfully submitted,

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July 27, 2009

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## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN CHEMISTRY COUNCIL *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") and The American Chemistry Council ("ACC") respectfully submit this brief *amici curiae* in support of the petition for a writ of certiorari in this case.[1]

## INTERESTS OF AMICI CURIAE

The interests of *amici curiae* are set forth in the foregoing Motion for Leave to File.

## QUESTIONS PRESENTED

This brief addresses the following questions presented in the petition for a writ of certiorari:

1. Does the Ninth Circuit's opinion contravene Congress's desire, as reflected in the Class Action Fairness Act, to greatly expand diversity jurisdiction over mass actions?

2. Does the Ninth Circuit's opinion improperly promote jurisdictional gamesmanship in contravention of the Class Action Fairness Act?

## SUMMARY OF THE ARGUMENT

Approximately four-and-a-half years ago, our nation took a critical step toward ending class action

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. No party or its counsel, nor any other person or entity other than the Chamber and its members and the ACC, made a monetary contribution intended to fund the preparation or submission of this brief.

abuse with the enactment of the Class Action Fairness Act of 2005 ("CAFA"). The decade preceding CAFA's passage had seen an exponential increase in the number of class actions brought in the United States, as plaintiffs' attorneys exploited a loophole in federal diversity jurisdiction to bring interstate class actions involving tens or even hundreds of millions of dollars in certain state courts that came to be known as "magnet jurisdictions." S. Rep. No. 109-14, at 13 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 13-14. These magnet jurisdictions engaged in numerous abusive practices, such as certifying class actions on an *ex parte* basis and approving class settlements in which plaintiffs' attorneys received millions of dollars in fees while class members received coupons of little – if any – value. *Id.* at 13-23. CAFA ended many of these abusive practices by creating federal jurisdiction over most large interstate class actions or "mass actions" and setting standards for coupon settlements. The results have been dramatic: the so-called class action "magnet jurisdictions" have seen a marked drop in class action activity, and reports of class action abuse are waning.

The Ninth Circuit's decision here threatens to undo these advances by eliminating federal jurisdiction over mass actions as long as such actions are filed piecemeal in state courts. In this case, 664 plaintiffs have filed seven separate (though identical) complaints in state court in California – all seeking damages based on the allegation that each was exposed to a Dow product containing 1,2-dibromo-3-chloropropane. The plaintiffs filed all of their claims

on the same date and in the same court – Los Angeles Superior Court – presumably with the intent that the state court would ultimately treat all of the claims as a unitary group. Plaintiffs thus created the functional equivalent of a mass action in California state court. But the collective action at issue here is precisely the type of mass action for which Congress intended to create federal jurisdiction under CAFA. Had the Respondents filed the collective action as a single, 664-plaintiff action, there can be little doubt that Petitioner could have successfully removed this case to federal court. Nonetheless, the Ninth Circuit held that the mere fact that plaintiffs' counsel divided this collective action – which involves numerous counts brought by nearly seven hundred foreign nationals – into seven separate suits of less than one hundred plaintiffs each rendered removal improper. If the Ninth Circuit's decision is left undisturbed, the plaintiffs' bar will have a tool for rendering CAFA's mass action provision inert – simply divide any collective action into separate suits of less than one hundred plaintiffs and the federal courthouse door is slammed shut.

That result is directly contrary to the goals of Congress in enacting CAFA and to the Sixth Circuit's finding that parties cannot splinter suits to evade federal jurisdiction. Certiorari should be granted and the ruling reversed.

## REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision merits review because it is directly at odds with Congress's intent in enacting CAFA – to expand federal diversity juris-

diction to cases with a clear impact on interstate commerce and to end the gamesmanship and manipulative pleading tactics that kept many such actions in state court. Contrary to this intent, the Ninth Circuit eroded federal jurisdiction by applying a presumption against removal, and it invited gamesmanship by eliminating federal jurisdiction over mass actions as long as such actions are filed piecemeal in state courts. In so doing, it elevated form over substance and failed to accept this case for what it obviously is – the functional equivalent of a mass action. It also created a conflict with the Sixth Circuit's proper holding that parties should not be allowed to "splinter . . . lawsuits solely to avoid federal jurisdiction." *Freeman* v. *Blue Ridge Paper Products, Inc.*, 551 F.3d 405, 408 (6th Cir. 2008).

The Court should grant review to correct the Ninth Circuit's error and to prevent the wholesale subversion of CAFA's mass action provision.

## I. THE NINTH CIRCUIT'S RULING UNDERMINES CONGRESS'S INTENT TO EXPAND FEDERAL JURISDICTION OVER MASS ACTIONS.

The Ninth Circuit's cramped reading of CAFA reflected an improper presumption against removal that has no place in the mass action context. In affirming remand, the Ninth Circuit ratified the district court's express holding that, "[a]s a general matter, '[t]he removal statute is strictly construed against removal jurisdiction and any doubt must be resolved in favor of remand.'" Pet. App. 38 (quoting *Hofler* v. *Aetna U.S. Healthcare of Cal., Inc.*, 296

F.3d 764, 767 (9th Cir. 2002)). Such hostility to the expansive jurisdictional principles codified in CAFA is plainly erroneous. Under traditional principles of statutory interpretation, the CAFA-specific removal statute, 28 U.S.C. § 1453, actually requires the opposite presumption – that CAFA's terms should be interpreted and applied broadly and that any doubts about whether removal is appropriate should be resolved in favor of removal. And as applied in this case, removal was proper under § 1453.

The presumption against removal to which the lower courts referred derives from 28 U.S.C. § 1441, the removal rule that applies to traditional diversity cases. *See Hofler*, 296 F.3d at 767-68 (analyzing removal under § 1441). The interpretive canon mandating "strict construction" of removal jurisdiction under § 1441 reflects this Court's analysis in *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100 (1941) and *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), of Congressional intent in enacting and amending that particular statute. In those cases, the Court examined the context surrounding the statute and concluded that Congress meant for it to be construed narrowly. *See Shamrock Oil*, 313 U.S. at 108 ("Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation."); *St. Paul Mercury*, 303 U.S. at 288 ("The intent of Congress drastically to restrict federal jurisdiction in contro-

versies between citizens of different states has always been rigorously enforced by the courts.").

Notably, on other occasions, the Court has indicated that, had Congress been motivated by a different, more expansive purpose, the interpretive canon it adopted might have been different. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003) (noting that construction of removal statute is influenced by later Congressional enactments evidencing different Congressional policy regarding removal). *Cf. Shamrock Oil*, 313 U.S. at 106 (observing that an earlier removal statute had greatly liberalized removal practice).[2]

The very same principles of statutory construction that led the Supreme Court to employ a presumption in favor of remand when applying § 1441 compel the opposite result here. To begin, the text of CAFA explicitly states that the purpose of enacting the statute was to address the problem of state and local courts "keeping cases of national importance

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[2] This approach – *i.e.*, interpreting a statute consistent with legislative intent – is fundamental to statutory interpretation. *United States v. N.E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 53 (1942) ("The question here, as in any problem of statutory construction, is the intention of the enacting body."); *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (noting that canons of statutory construction are merely guides "designed to help judges determine the Legislature's intent as embodied in particular statutory language").

out of Federal court" and to develop a jurisdictional regime that would "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 2(a)(4)(A), 2(b)(2), 119 Stat. 4 (2005). Thus, Congress explicitly stated in CAFA that the statute's purpose was to broaden (not limit) federal jurisdiction.

The legislative history confirms Congressional intent that the entire statute, including § 1453, be construed broadly.[3] In a colloquy that took place on the House floor moments before passage of CAFA, one of the bill's key sponsors, then-House Judiciary Committee chairman F. James Sensenbrenner, stated: "[t]he bottom line is that [CAFA] is intended to substantially expand Federal court jurisdiction over class actions" and its provisions "should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if properly removed by a defendant." 151 Cong. Rec. H723, 730 (daily ed. Feb. 17, 2005).[4] Likewise, ac-

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[3] As other courts have recognized, CAFA's legislative history is probative on the question of how ambiguity in CAFA's provisions should be interpreted. *See Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1093 (9th Cir. 2006) (noting in the context of construing 28 U.S.C. § 1453(c) that "when we interpret a statute, our purpose is always to discern the intent of Congress") (quotations omitted).

[4] This colloquy among key House sponsors of the legislation is entitled to particular deference because it reflects

cording to the Senate Report, "[t]he Committee believes that the federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy." S. Rep. No. 109-14, at 27 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 27. *See also* S. Rep. No. 109-14, at 35, *as reprinted in* 2005 U.S.C.C.A.N. at 34 (the intent of CAFA "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications").

In addition to CAFA's legislative history, the structure of the statute and the text of its other provisions clearly demonstrate that the purpose of CAFA was to create a new set of jurisdictional rules for class actions and mass actions that would provide for federal jurisdiction over large-scale interstate ac-

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the intentions of the bill's drafters and because of its proximity to the House vote. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) ("Although the statements of one legislator made during debate may not be controlling . . . Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.") (internal citation omitted); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 727 (1995) (Scalia, J., dissenting) ("evidence of what those who brought the legislation to the floor thought it meant [is] evidence as solid as any ever to be found in legislative history"); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980) ("In trying to learn Congressional intent by examining the legislative history of a statute, we look to the purpose the original enactment served . . . and the remarks in debate preceding passage.").

tions and ensure that defendants facing such large-scale interstate suits could remove them to federal court. *See* Sarah S. Vance, *A Primer On The Class Action Fairness Act Of 2005*, 80 Tul. L. Rev. 1617, 1630 ("CAFA's broadened diversity jurisdiction over class actions commensurately expands defendants' opportunities to remove class actions."); *id.* at 1639-40 ("CAFA was no doubt intended to liberalize removal for cases within its scope by eliminating some of the statutory limitations on removal").

For example, the statute's text eliminates several long-standing hurdles to removing interstate class actions and mass actions to federal court – such as the previous requirement that each class member separately meet the $75,000 amount in controversy requirement. *See Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973). Under CAFA, the claims of putative class members are aggregated to determine if the new $5,000,000 amount is satisfied. 28 U.S.C. § 1332 (d)(6). CAFA's requirement that there be only minimal diversity between any member of the putative class and any defendant – a departure from the previous rule that required complete diversity – also eases an important restriction on removing class actions and mass actions to federal court.

As already noted, CAFA also established an entirely new removal provision – 28 U.S.C. § 1453 – applicable only to the removal of diversity class actions and mass actions. Pursuant to section 1453, class actions may be removed without the consent of any co-defendant, may be removed without regard to the one-year time limit in 28 U.S.C. § 1446(b), and

may be removed without regard to whether any defendant is a citizen of the State in which the suit was originally filed. Taken together, these new provisions "substantially expand federal jurisdiction over class actions" and "drastically liberalize[] rules for removal of class actions." H. Hunter Twiford, III, et al., *CAFA's New "Minimal Diversity" Standard For Interstate Class Actions*, 25 Miss. C. L. Rev. 7, 7-8 (2005); *see also id.* at 60 ("These fundamental changes greatly liberalize and invite, rather than discourage, federal court jurisdiction over class actions within the scope of CAFA.").

Indeed, courts and commentators have recognized that "CAFA represents the largest expansion of federal jurisdiction in recent memory." Vance, *supra*, at 1643. Through CAFA, Congress "expressly reflect[ed] a goal of changing the jurisdictional status quo for class actions" by extending "federal jurisdiction over interstate class actions which, prior to CAFA's enactment, could not be maintained in or removed to federal court under the existing" regime. Twiford, *supra*, at 9. Put simply, the "language and structure of CAFA itself indicates that Congress contemplated broad federal court jurisdiction." *See Evans v. Walter Indus.*, 449 F.3d 1159, 1163-64 (11th Cir. 2006).

Despite this overwhelming evidence that CAFA was intended to liberalize removal requirements for class actions and mass actions, reduce the hurdles defendants face in removing such cases to federal court, and prevent manipulative pleadings intended to evade jurisdiction, the Ninth Circuit's decision

promotes the opposite result and would make it more difficult for defendants to remove mass action cases.

In sum, although both § 1441 and § 1453 grant parties the right to remove state cases to federal court, they are different statutes, enacted at different times and for different purposes. Congress did not need to create § 1453 – it could have simply amended 28 U.S.C. § 1332 and then allowed the traditional removal statute to govern CAFA removals. Instead, Congress enacted an entirely new removal statute, evidencing a clear desire to expand access to federal court for qualifying cases and to have CAFA removals treated differently from other removals. The Ninth Circuit's cramped reading of CAFA is contrary to this intent and reflects an improper presumption against removal that "defeat[s] Congress's clear intent in crafting this special-purpose statute." Twiford, *supra,* at 10.

## II. THE NINTH CIRCUIT'S RULING UNDERMINES CAFA'S PURPOSES BY INVITING GAMESMANSHIP.

The Ninth Circuit's ruling also defies Congressional intent by establishing strong incentives for gamesmanship by plaintiffs' attorneys. One of the primary goals of CAFA was to close loopholes in the federal diversity jurisdiction statute and thereby end the jurisdictional gamesmanship employed by plaintiffs' attorneys who sought to litigate class actions in "magnet courts." S. Rep. No. 109-14, at 10-11. But the decision below creates a new loophole, providing plaintiffs' attorneys with a simple tool for evading

CAFA's reach over mass actions – simply carve up any collective action lawsuit into multiple, identical, 99-plaintiff lawsuits.

There can be no question that one key goal of CAFA was to eliminate jurisdictional loopholes. As one of the bill's key sponsors, then-House Judiciary Committee chairman F. James Sensenbrenner, stated on the House floor, CAFA was not intended "to create loopholes." 151 Cong. Rec. H723, 730 (daily ed. Feb. 17, 2005). Likewise, the Senate Committee Report observes that Congress was prompted to reform class actions because "current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts." S. Rep. No. 109-14, at 4; *see also id.* at 10 ("[C]urrent law enables plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court."). The Committee Report documented the extent to which "plaintiffs' counsel frequently and purposely evade federal jurisdiction by" using pleading tactics such as adding parties "simply based on their state of citizenship" to avoid federal jurisdiction. *Id.* at 10. After an extensive review of the abuses that resulted from leaving national interstate class actions in state courts, the Committee reiterated that these problems arise because "plaintiffs' lawyers can easily manipulate their pleadings to ensure that their cases remain at the state level." *Id.* at 26. Congress thus enacted CAFA to "provid[e] for Federal court consideration of interstate cases of national importance." CAFA 2(b)(2); *see also* S. Rep. No. 109-14, at 27 (explaining that

the purpose of the statute was to "help minimize the class action abuses taking place in state courts and ensure that these cases can be litigated in a proper forum").

"These purposes support reading CAFA not to permit the splintering of lawsuits solely to avoid federal jurisdiction in the fashion done in this case." *Freeman,* 551 F.3d at 408.; *see also id.* at 407 ("CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction.").

The decision below will once again empower plaintiffs' attorneys to "manipulate their pleadings" in order to "game the system" and close the federal courthouse doors to mass actions under CAFA. The gamesmanship in the present case is laid bare by the fact that plaintiffs filed all seven of the lawsuits at issue in the same state court – presumably intending that the state court would ultimately treat the suits as one collective "mass action." Under the Ninth Circuit's ruling, that will be the norm: attorneys will be able to defy Congress's directive that federal courts are the proper forum for "interstate cases of national importance" by simply carving up mass actions into multiple, identical, 99-plaintiff suits. The Court should grant certiorari to avoid that result.

## CONCLUSION

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

Respectfully submitted,

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