No. _____

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

PETITION FOR WRIT OF CERTIORARI

EDWIN V. WOODSOME, JR.
D. BARCLAY EDMUNDSON
ANDREW S. WONG
ORRICK, HERRINGTON SUTCLIFFE LLP
777 South Figueroa Street, Suite 3200
Los Angeles, CA 90017
Tel: (213) 629-2020

E. JOSHUA ROSENKRANZ
ORRICK, HERRINGTON SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Tel: (212) 506-5000

MICHAEL L. BREM
Counsel of Record
SCHIRRMEISTER DIAZ-ARRASTIA BREM LLP
Pennzoil Place, North Tower
700 Milam Street, 10th Floor
Houston, TX 77002
Tel: (713) 221-2530

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. The Class Action Fairness Act of 2005 ("CAFA") for the first time permitted removal of mass civil actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(A)-(B)(i). In light of CAFA's purpose to facilitate, rather than hinder, removal of such mass actions, can removal be avoided by arbitrarily and deliberately dividing a single mass action into several, identical cases, each with less than 100 plaintiffs?

2. Does CAFA require a removing party to demonstrate that at least 100 plaintiffs will be parties to an actual trial of the removed action or is removal determined at the time of filing, regardless of how the case is eventually tried?

RULE 14.1(B) LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant-Appellant and Petitioner: The Dow Chemical Company.

Plaintiffs-Appellees and Respondents: Aka Raymond Tanoh, Assye Eugene Tanoh, Otchoumou Jean Marie Tanoh, Tiraogo Paul Taonsa, Issiaka Jean Pierre Tapsoba, Noraogo Salfo Tarbagdo, Noaga Tarihidiga, Sanoyo Tidiane, Berte Tiecoura, Traore Tiediougou, Kone Tiegbe, Norago Michel Tiendrebego, Zani Togola, Tomindreau Philippe Toman, Ouambi Tonde, Lalle Tougouma, Abou Dramane Traore, Adama Traore, Arouna Traore, Boureima Traore, Daouda Traore, Issa Traore, Kalifa Traore, Lancine Traore, Salia Traore, Salifou Traore, Sekou Traore, Abdulai Umaru, Darius Kouassi Vangah, Say Francis Vangah, Degui Vognin, Soumalia Wango, Fifou Jean Marie Waongo, Tilado Waongo, Anibe Laurent Wogne, Ahimi Wognes, Anibe Maurice Wognin, Kouamenan Joseph Wognin, Kraidy Emile Wognin, N'taye Wognin, Paul Wognin, Paul Wognin, Christophe Yama, Yemdaogo Yamma, Alle Felix Yangra, Joseph Yangue, N'taye Cesestin Yao, Afori Yaw Ouattara Ybroyman, Koudsi Yerbanga, Bigo Yoro, Karim Yougbare, Konate Youssouf, Oued Ahmed Youssouf, Idrissa Zabre, Lamoussa Zagre, Arzoura Augustin Zangre, Bassirou Zare, Bokare Zeba, Mogtar Zeba, Pawendsagre Zembo, Moumouni Zerbo, Sekou Mahamadou Zerbo, Yacouba Zerbo, Tanh Theophile

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Zian, Soulemane Zoanga, Mahamoudou Zogona, Pamoussa Zogona, Lokre Zomodo, Boukare Zongo, Kagari Albert Zongo, Koudbi Zongo, Kouka Zongo, Koulibi Dit Jean Zongo, Nobile Zongo, Patignma Zongo, Piregma Remi Zongo, Tibo Zongo, Yaobgoamda Zongo, Boureima Zongona, Saidou Zongona, Tapha Zoromi, Bila Issiaka Zougmore, Athanase Zougnore, Tilado Zougnore, Ganoaga Adama Zougrana, Jean Marie Zougrana, Konate Zoumana, Ouamnanegba Zoundi, Passamwinde Zoundi, Poupoin Jean Pimma, Dansine Plea, Achiedo Jonas Pokou, Koukoua Francois Popouin, Soumalia Porgo, Issiaka Porogo, Abdou Quedraogo, Gnissiri Ramde, Raogo Randwidi, Tienoko Sagnon, Traore Saidou, Irissa Sakande, Noraogo Salou, Moussa Samake, Idrissa Sana, Salfo Sana, Saoumaila Sana, Edmond Sandwidi, Irissa Sandwidi, Larba Hamado Sandwidi, Lebende Sandwidi, Nongma Sandwidi, Noufou Sandwidi, Ramane Sandwidi, Saydou Sandwidi, Emmanuel Sanga, Abdoulaye Sangare, Adama Sangare, Birama Sangare, Brahima Sangare, Mamadou Sangare, Salifou Sangare, Sidiki Sangare, Souleymane Sangare, Hamade Sankara, Marou Sankara, Lanoussa Sanke, Youssoufi Sanogo, Kodjo Amboise Santin, Adama Sarba, Dariquio Rasmane Savadogo, Karim Savadogo, Leonard Savadogo, Ratogzita Marcel Savadogo, Ardoul Rahin Sawadogo, Hanidou Sawadogo, Issa Sawadogo, Ousseni Sawadogo, Palikidi Sawadogo, Raphael Sawadogo, Seidou Bodgo Sawadogo, Toukoumnogo Sawadago, Yabre Hamado Sawadogo, Zanlem Karin

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Sawadogo, Moussa Sedogo, Ouattara Seidou, Konta Sekou, Naud Serge, Kone Siaka, Abdourahame Sidibe, Satigui Sidibe, Yaya Sidibe, Mamourou Sidide, Berthe Sidiki, Moussa Simpore, Paki Nweogo Simpore, Yamba Sinare, Toure Siramana, Dogobie Siribie, Lassina Siribie, Yaya Siribie, Noufou Sodre, Sekou Sogodogo, Kissi Antoine Somahin, Samour Somda, Tikora Somda, Alfred Some, Anyel Some, Beliyan Jean Pierre Some, Dar Some, Francois Xavier Some, Gnonouor Some, Kounyere Some, Wineyel Some, Winidema Some, Salifou Sondo, Moussa Sore, Songda Sorgho, Boureima Soro, Sidiki Sougue, Konate Souleymane, Lamine Outtara Souleymane, Boukare Soulga, Zoumana Soumahoro, Kone Soumaila, Jerome Tade, Bi Tah Rene Tah, Camara Tamba, Kallilou Diarrassouba, Hado Diatin, Djakaridja Diourie, Irissa Dipama, Vonan Marcel Djaidji, Jean Djamble, Diakiro Djibougou, Camara Djibril, Edja Djiriko, N'gatta Georges Djonwan, Lebenidiou Dolo, Idrissa Doulkom, Amadou Doumbia, Bourlaye Doumbia, Chio Doumbia, Dable Douti, Aka Ehive, Assale Ehole, Assemien Ehoussou, Able Pierre Ekra, Moh Andre Elidje, Germain Ello, Vangah Elloh, Adjroufou Maurice Essey, Etkeri Etekri, Kouassi Ives Francois Xavier Eya, Kassouri Fane, Yao Benjamin Foto, Ousmane Ganame, Moctar Gansagne, Kouakou Ganzan, Konate Lamine Gnamy, Laya Boniface Gniminou, Adama Kone Gomon, Zila Guel, Ablasse Guiatin, Edmond Guiatin, Kouka Guiatin, Lamoussa Guiatin, Ousmane Guiatin, Yaya Guiatin, Hamidou

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Guire, Soumaila Guire, Tassare Guire, Kpale Jules Hahoba, Seini Baba Hamadou, Bomane Hebie, Barbey Hema, Hanou Francois Hema, Mouonnoumon Hien, Winyel Hien, Ahoua Arsene Holly, N'guessan Holly, Houa Teke Houa, Yehou Jules Houetchemou, Innocent Houndonougbo, Dassamsso Ilboudo, Pagnimdi Ilboudo, Raogo Ilboudo, Tibyande Ilboudo, Yabre Boureima Ilboudo, Koyate Issa, Traore Issa, Kpole Jean, Niangue Jean, Lancina Kabagate, Boureima Kabolom, Boudnoma Kabore, Francois Xavier Kabore, Karin Kabore, Mamadou Kabore, Ousmane Kabore, Passigbamba Tassere Kabore, Passingue Yaoba Kabore, Ratamalgda Alfred Kabore, Sibiri Kabore, Tibila Kabore, Toussaga Kabore, Sandaogo Kabre, Kraidi Frederic Kacou, Nogbou David Kacou, N'tah Jules Kacou, N'taye Emile Kacou, Assohoun Yacinthe Armel Kadio, Ahoulou Moise Kadjo, Ayemou Laurent Kadjo, Ayemou Raymond Kadjo, Miessan Denis Kadjo, Rene Kadjo, Vangah Kadjo, Tanga Rasmane Kafando, Amon Barthelemy Kakjo, Esse Kakou, Ompire Kambou, Mamadou Kanate, Aka Georges Ayemou, Atteke Adolphe Ayemou, Kadjomou Raphael Ayemou, Nogbou Anatole Ayemou, Yacouba Ba, Ouattara Babala, Doungasse Babem, Noaga Baboloum, Badiou Bado, Baguibdue Bado, Oumarou Badolo, Yacouba Badolo, Kwasi Badu, Wahabo Bagagnan, Adama Bagayogo, Koudougou Denis Bagre, Bah Albert Bah, Vanga Francois Baka, Ouattara Bakari, Konate Bakary, Konate Bakary, Bagnon Dit Mathias Bako, Kayoure Issaka Balima, Bakary Ballo, Francois Balma,

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Sylvain Balma, Gbeguele Bamba, Lacina Bamouni, Mahamoudou Bangre, Boulboure Banse, Hamidou Barry, Touni Baye, Bouilion Bayeli, Balele Bazie, Dramane Belem, Bila Beogo, Boureima Bere, Melan Bile, Amangoua Moise Ble, Bah Emile Ble, Koffi Bohoussou, Houinsou Joanie Bokpe, Niamke Bommoa, Pierre Bonnin, Tanoh Bony, N'taye Raymond Bosson, Kindo Boubacou, Koudaogo Boudau, Gueu Christophe Boueu, Hamado Bougma, Saidou Bougma, Kone Bourana, Diakite Bourlaye, Gourassa Boussim, Zaboure Hamadou Boussim, Adje Brou, Brou Roger Brou, Moussa Camara, Tiefini Camara, Doumbia Chio, Issouf Compaore, Raogo Compaore, Rasmane Compaore, Souleymane Compaore, Tilagagnande Compaore, Patende Congo, Sidik Coulibaly, Silambo Da, Brou Justin Dabire, Donbor Dabire, Milo Dabire, Anona Dabiri, Kounou Bernard Dadegnon, Moussa Dagnogo, Martin Emerite Dah, Craidy Antoine Daikri, Koffi Antoine Dainguy, Kraidi Joseph Dainguy, Augustine Danquah, Kouassi Clement Dede, Guehi Martin Dehe, Djakaridja Dembele, Yacouba Dene, Kovao Albert Dgri, Karamoko Diabate, Mady Diabate, Bozan Diakite, Mamadou Diakite, Aboudramane Diallo, Alhassane Diallo, Issoufou Diallo, Moctar Diallo, Tinbila Diallo, Ukiebie Dianou, Bakary Diarra, Yaya Diarra, Ahoulou Raphael Kanagah, Kany Jacob Kany, Adama Karene, Dembele Kassoum, Noraogo Kayende, Ganda Kayorgo, Issa Kayorgo, Mamadi Keita, Oumar Keita, Sibiri Keregue, Somlouguia Keregue, Nogbou Jean Kidri, Noraogo Francois Kiema,

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Daouda Kinda, Mahama Kindo, Ouango Koalga, Ousseni Koanda, Saidou Dit Tinkienga Koanda, Kouassi Pierre Kocogni, Abieley Kodia, Abli Jerome Koffi, Abri Firmin Koffi, Assamoi Koffi, Kacore Basile Koffi, N'guessan Fernand Koffi, Patrice Koffi, Yao Koffi, Nogbou Norbert Kohobo, Ayemou Francois Kokogni, Adiko Jean Marie Kokohi, Amani Etienne Konan, N'goran Konan, Abdoulaye Konate, Bocary Konate, Diakaridia Konate, Dramane Konate, Dramane Konate, Idrissa Konate, Issa Konate, Kah Konate, Kassim Konate, Kotigui Konate, Mamadou Konate, Moriba Konate, Moridje Konate, Souleymane Konate, Tiedian Konate, Tienakan Konate, Karawa Konda, Yamangole Konda, Abdoulaye Kone, Adama Kone, Adama Kone, Anadou Kone, Diaby Kone, Dramane Kone, Inza Kone, Issa Kone, Lassina Kone, Oumar Kone, Siaka Kone, Souleymane Kone, Soumaila Kone, Tiekoro Kone, Yaya Kone, Zakaria Kone, Issa Konkisre, Yetassida Konkobo, Ibrahima Konta, Basga Korsaga, Kadjo Edmond Koua, Kouassi Edmond Koua, Opokou Denis Koua, Marc Kouadio, Atsain Peter Kouadjo, Koffi Hilaire Leon Kouakou, Kouame Kouame, Kouassi Kouame, Michel Kouame, Raymond Kouame, Ahimin Denis Kouamelan, Assemian Kouamelan, Antonin Kouassi, Ebia Paul Kouassi, Germain Ahou Kouassi, Nogbou Kouassi, Otron Severin Kouassi, Yao Djess Kouassi, Sanga George Kouassy, Bawaya Kouda, Zambende Koudougou, Aka Germain Koumelan, Adama Kouraogo, Rasmane Kouraogo, Soumane Kouraogo, Aka Francois Kovassi, Kradi Marcelin Kredi,

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Baore Salif Laguempendo, Wennemi Laguempendo, Outtara Lamine, Keita Lassane, Abdoulaye Loure, Paul Macouima, Hamadou Maiga, Diomande Mamadou, Ouattara Mamadou, Ousseini Mande, Tano Jerome Mandessou, Soumaila Mariko, Diarassouba Matie, Kalfa Millogo, Sian Millogo, Mtikpon Fidele Minavoa, Kraidy Eugene Mossoun, Moh Mossoun, Mossoun Raymond Mossoun, Cisse Mourinou, Kone Moussa, Soumare Moussa, Kountombasba Nana, Dibiri Dramane Nana, Tiga Boureima Nana, Tinga Gilbert Nana, Tingra Nana, Rassablega Nanema, Yamba Nasere, Daogo Nasre, Raogo Natama, Yabre Natama, Ousmane Nebie, Edmond Clement Timoleon Nebout, Anoh Alphonse N'gatta, Kouadio Eric N'goran, Bomouan Frederic N'guessan, Kokobo Etienne N'guessan, Assi Michel Niama Essy Niamien, Dangui Eloi Niamke, Ousmane Kone Nidiantien, Koudougou Francois Nikiema, Lougri Nikiema, Tegawinde Denis Nikiema, Tiga Nikiema, Camara Ningou, Aka Raphael Nintin, Amou Nintin, Anoh Louis N'ko, Leon Nobou, Akebo Abagninin, Amangoua Abli, Miessan Etienne Abli, Aba Abou, Yapo Pierre Aboua, Koffi Antoine Abri, Ampoh Adama Toure Abry, Haruna Abubakaray, Kroya Aca, Simplice Achiepo, Avenie Adja, Behira Venance Adja, Naoule Adja, Wognin Barthelemy Adja, Anouman Vanance Adje, Aka Francois Adjobi, Pascal Adjobi, Assmoi Lambert Adjoby, Assi Adon, Adja Bernard Adouko, Anibe Adouko, Kouassi Antonin Adouko, Michel Adoukok, Kouame Emile Agney, Kadjo Daniel Ahicoh, Cheikh Ahmed-Ould, Atche Ahoba,

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Baka Joachin Ahoga, Kova Gregoire Ahossin, Aka Pierre Ahoua, Koffi Noel Ahoua, Adia Ahoulou, Guy Huston De Lacosta Ahoussi, Adje Lazare Ahoze, Vincent Aime, Abel Aka, Abli Etienne Aka, Alfred Aka, Allangba Bernard Aka, Assohoun Raymond Aka, Bognini Aka, Koua Aka, Niangra Joseph Aka, Ohouman Venance Aka, Wedje Denis Aka, Soumahin Joseph Akohi, Kraidi Marcelin Akredi, Kouame Alla, Aka Jaques Allangba, Kouassi Jerome Allangba, Amon Jean Baptiste Allouan, Anhobo Ernest Allouan, Wognin Seraphin Allouan, Ayenou Alphonse Alou, Damo Alou, Diakite Amadou, Essi Alphonse Amangoua, Kouame Ambroise Amangoua, Vanga Jacques Amangoua, Kouassi Arsene Amani, Demele Amara, Kone Amara, Adouko Amon, Baka Amon, Kadjo Amon, Kadjo Blai Amon, Elidje Ampoh, Bangoura Amsoumany, Denis Angbeni, Elloh Blaise Anibe, Holy Leon Anibe, N'taye Jacques Clotaire Anibe, N'taye Marc Anibe, Aka Marius Anoh, Anoh Felix Anoh, Kraidi Etienne Anoh, Ngatta Anoh, Niamke Anoma, Aka Emmanuel Assale, Motche Assale, Bissie Bruno Assamoi, Koffi Assamoi, Vanga Assamoi, Kraiody Thomas Assemien, N'choh Assemien, Anguie Jean Claude Asi, Yebi Daniel Assi, Kouamelan Josepoh Assohoun, Dominique Assongba, Gbetondji Assouan, Otchoumou Mathias Assouhoun, Bomoi Ateke, Yapo Jean Atsain, Anon Joseph Atse, Adepo Attie, and Abeu Julien Aye.

RULE 29.6 CORPORATE DISCLOSURE

The Dow Chemical Company has no parent company, and no publicly held company owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

The Dow Chemical Company ("Dow") respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, *Tanoh v. Dow Chemical Co.*, dated March 27, 2009, is officially reported at 561 F.3d 945, and is reproduced in the Appendix ("App.") to this Petition. *See* App. at 1–26. The unreported Remand Order of the United States District Court for the Central District of California in *Tanoh v. AMVAC Chemical Corp.* was entered in Civil Minutes dated October 21, 2008 and is reproduced in App. at 27–39.

JURISDICTION

The Court of Appeals entered an opinion on March 27, 2009. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion sought to be reviewed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332(d)(11)(B)(i) of the Class Action Fairness Act of 2005 provides in relevant part that federal removal jurisdiction applies to civil actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." The statutes involved in this case, 28 U.S.C. § 1332 and 28 U.S.C. § 1453, are reproduced at App. 40–51.

INTRODUCTION

This case presents a direct conflict between two Circuit Courts of Appeal, the Sixth and Ninth, on an issue of national importance regarding application of key provisions of the Class Action Fairness Act of 2005 ("CAFA"). CAFA was intended to "restore the intent of the framers" by extending federal court jurisdiction over "interstate cases of national importance under diversity jurisdiction." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (2005). In enacting CAFA, Congress intended to correct abuses of the class action device, including gamesmanship by plaintiffs' counsel designed to defeat removal jurisdiction.

Two cases have recently confronted a question of first impression under CAFA: whether plaintiffs may arbitrarily and deliberately divide their claims into several identical state court complaints for the sole

purpose of avoiding CAFA removal. In *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008), the Sixth Circuit reversed the district court's remand, holding that where there was no "colorable argument" that the division into separate complaints was for any purpose other than avoiding CAFA removal, such division constituted the very sort of gamesmanship CAFA was intended to prevent.

In the case below, the Ninth Circuit considered the same type of arbitrary division of claims to avoid CAFA removal and came to the diametrically opposite conclusion, affirming the remand of the cases to state court. The Ninth Circuit's opinion expressly endorses the very type of deliberate procedural gamesmanship that CAFA intended to abolish. It provided a roadmap to avoid CAFA mass action removal, simply by filing multiple, identical lawsuits with less than 100 plaintiffs each. Although the Ninth Circuit attempted to distinguish the *Freeman* opinion on the ground that it concerned removal of a *class* action, whereas this action involves removal of a *mass* action, that is a distinction without a difference. The issue in both cases was whether CAFA permits plaintiffs to manipulate complaints to avoid removal: the Sixth Circuit answered "no" and the Ninth Circuit answered "yes."

In addition, the opinion below held that no mass action may be removed under CAFA unless the trial would encompass claims of 100 or more plaintiffs. That is an unnecessary and impractical interpretation of CAFA that would render meaningless the right to remove mass actions in virtually all cases.

These erroneous interpretations of CAFA frustrate Congress' intention to broaden the ability of defendants to remove significant mass actions for uniform resolution in federal court. The Ninth Circuit's opinion would render the mass action provisions of CAFA meaningless. That was not the intent of Congress. This Court should intervene to address this circuit conflict and to eliminate the ability of plaintiffs to avoid the intent of the mass action removal jurisdiction provided by CAFA.

STATEMENT OF THE CASE

The plaintiffs in this case are 664 West African foreign nationals who allege that they were exposed to a Dow product containing 1,2-dibromo-3-chloropropane ("DBCP") while working on banana and pineapple plantations in the villages of Ono and Kakoukro in the Ivory Coast. The plaintiffs claim to have suffered various injuries as a result of the exposure to DBCP, including sterility and infertility. The 664 plaintiffs, all represented by the same attorneys, filed seven separate actions in Los Angeles Superior Court on September 27, 2006, each of which included fewer than 100 plaintiffs. The complaints were identical save for the names of the plaintiffs. The 664 plaintiffs were divided among the seven cases alphabetically.

On the same day that the 664 plaintiffs filed their seven state court actions, the same plaintiffs,

represented by the same attorneys, also filed a single action in United States District Court (C.D. Cal) alleging violations of the Alien Tort Claims Act, 28 U.S.C. § 1350, arising out of the same operative facts as those alleged in the state actions. In doing so, they invoked federal jurisdiction under the "mass action" provisions of the Class Action Fairness Act.[1]

Dow removed the seven state court actions alleging, *inter alia*, that the United States District Court had jurisdiction under the "mass action" provisions of the CAFA. Dow argued that the same attorney could not deliberately avoid mass action removal jurisdiction "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact" by arbitrarily dividing a single mass action claim into several complaints, each with fewer than 100 plaintiffs.

On October 21, 2008, the District Court remanded these cases, holding that no CAFA jurisdiction existed. App. at 39. The District Court stated, "Defendants cite no authority holding that plaintiffs may not endeavor to work within the confines of CAFA to keep their state law claims in state court and the Court declines to do so." App. at 38. The

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[1] The Ninth Circuit affirmed the district court's dismissal of the plaintiffs' federal Alien Tort Claims Act lawsuit in an opinion dated September 24, 2008, *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733 (9th Cir. 2008).

District Court further stated that "allowing removal in this case would effect an end-run around the limits Congress itself has imposed on removal pursuant to CAFA." App. at 38.

On October 30, 2008, Dow filed a petition for permission to appeal under CAFA's discretionary review of remand orders, 28 U.S.C. § 1453(c)(1). The Ninth Circuit granted Dow's petition for permission to appeal on January 29, 2009, heard argument on this expedited appeal on March 10, 2009, and issued its opinion on March 27, 2009.

In its opinion, the Ninth Circuit affirmed the District Court's remand of plaintiffs' seven identical state court actions stating that even in these circumstances, "Congress intended to allow suits filed on behalf of fewer than one hundred plaintiffs to remain in state court." App. at 19. The Ninth Circuit attempted to distinguish the other circuit authority relied on by Dow (*Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 406 (6th Cir. 2008)), stating that it was inapplicable because there were other "concerns" present, and noting that the *Freeman* case "involved class actions rather than mass actions." App. at 23.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for three reasons.

First, the opinion below conflicts with the Sixth Circuit in *Freeman*, which held that the arbitrary division of a single class action into separate state court suits solely for the purpose of avoiding CAFA removal jurisdiction should be disregarded and the separate cases should be viewed as a single action for purposes of CAFA removal.

Second, the opinion below, which permits evasion of the CAFA mass action removal by the simple expedient of dividing a single mass action arbitrarily into several cases each with less than 100 plaintiffs, violates the clear Congressional purposes in enacting CAFA to facilitate removal of mass actions and to prevent the use of gamesmanship to defeat removal.

Third, the opinion below erroneously interprets CAFA mass action removal to require actual trial together of the claims of 100 or more plaintiffs, which is an impossible standard to meet at the removal stage.

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER PLAINTIFFS MAY ARTIFICIALLY STRUCTURE THEIR SUIT FOR THE SOLE PURPOSE OF AVOIDING CAFA FEDERAL COURT JURISDICTION.

A. There Is An Irreconcilable Conflict Between The Sixth And Ninth Circuits As To Whether Plaintiffs May Arbitrarily Split Their Claims Into Separate State Court Complaints For The Sole Purpose Of Avoiding Removal Under CAFA.

CAFA was enacted in 2005 in large part to "restore the intent of the framers" by extending federal court jurisdiction over "interstate cases of national importance under diversity jurisdiction." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (2005). CAFA loosened the rules governing removals of class actions and mass actions, to facilitate the uniform resolution of major multi-party disputes in federal court.[2] This expansion of federal diversity

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[2] CAFA governs two different types of claims – large class actions asserting $5 million or more in damages and mass actions brought by 100 or more plaintiffs. 28 U.S.C. § 1332(d)(11)(A). Both class actions and mass actions seek to adjudicate claims of a large number of individuals who were all allegedly harmed in the same manner. The difference is that in a class action named plaintiff(s) represent the interests of others while in a mass action all of those affected are named plaintiffs. Under CAFA, mass actions are deemed to be class actions for removal purposes. 28 U.S.C. § 1332(d)(11)(A). The term "mass action" is

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jurisdiction is incredibly rare, as CAFA marks the first time that Congress acted to *expand* diversity jurisdiction since it enacted the First Judiciary Act of 1789. In short, CAFA "work[ed] a sea change in diversity jurisdiction." *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1193 (11th Cir. 2007).

Although CAFA was intended to increase the ability of defendants to remove large interstate class and mass actions into federal court for resolution, plaintiffs have increasingly been manipulating their claims in order to avoid CAFA removal. Two of these cases have made their way to circuit courts, which have reached diametrically opposite views of whether CAFA permits such manipulation of claims.

Freeman v. Blue Ridge Paper Products, Inc., 551 F.3d 405 (6th Cir. 2008), involved a class action for water pollution from a paper mill brought on behalf of approximately 300 landowners. *Id.* at 406. "Plaintiffs divided their suit into five separate suits covering distinct six-month time periods, with plaintiffs' limiting the total damages for each suit to less than CAFA's $5 million threshold." *Id.* (citing 28 U.S.C. § 1332(d)(2)). Viewing the five complaints as separate claims, each of which fell below the CAFA jurisdiction threshold, the district court remanded them to state court. On appeal, the Sixth Circuit reversed.

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defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i).

> The $5 million CAFA threshold appears to be met in this case because the $4.9 million sought in each of the five suits must be aggregated. The complaints are identical in all respects except for the artificially broken up time periods. Plaintiffs put forth no colorable reason for breaking up the lawsuits in this fashion, other than to avoid federal jurisdiction .... *If such pure structuring permits class plaintiffs to avoid CAFA, then Congress's obvious purpose in passing the statute – to allow defendants to defend large interstate class actions in federal court – can be avoided almost at will, as long as state law permits suits to be broken up on some basis.*

Id. at 407 (emphasis added).

The action below considered essentially the same issue of "structuring" of complaints by the plaintiffs' attorney in order to avoid CAFA removal jurisdiction. However, instead of dividing their actions to avoid the $5 million CAFA threshold, the attorneys in this case divided their nearly 700 plaintiffs into seven different complaints with less than 100 plaintiffs in each, in order to evade the mass action requirement of 100 plaintiffs per case. Each of the seven actions makes the same allegations verbatim – other than the names of the plaintiffs. As in *Freeman*, there is no "colorable reason for breaking up the lawsuits in this fashion, other than to avoid federal jurisdiction." The Ninth Circuit acknowledged that "CAFA was designed primarily to curb perceived abuses of the

class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state courts." 561 F.3d at 952. Nevertheless, relying on the "well-established rule that plaintiffs, as masters of their complaint, may choose their forum by selecting state over federal court and . . . the equally well-established presumption against federal removal jurisdiction" (*Id.* at 953), the Ninth Circuit affirmed the remand of these seven cases.

The Ninth Circuit distinguished *Freeman* because it involved "class actions rather than mass actions." 561 F.3d at 955. The Court also relied on the CAFA provision defining the term mass action as not including "any civil action in which . . . the claims are joined upon motion of a defendant" (28 U.S.C. § 1332(d)(11)(B)(ii)(II)) to suggest that Congress had specifically rejected the notion that separate state court complaints could be considered to be a single mass action for removal. *Id.* at 953. However, these distinctions are ephemeral. Plaintiffs' manipulation of their complaint in this case is no different from the gamesmanship rejected in *Freeman*. "CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction." *Freeman*, 551 F.3d at 47.[3] For these reasons, the two opinions are simply irreconcilable.

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[3] *See also Proffitt v. Abbott Labs.*, No. 2:08-cv-151, 2008 WL 4401367, at *5 (E.D. Tenn. Sept. 23, 2008) (cited with approval

(Continued on following page)

B. CAFA's Text And Legislative History Demonstrate That Its Purpose Was To Liberalize Removal Of Interstate Class And Mass Actions And To Prevent Plaintiffs From Manipulating Their State Court Complaints To Avoid Removal.

As noted above, courts have uniformly recognized that CAFA's removal provisions were designed to facilitate removal of large, interstate class and mass actions to federal court and to prevent plaintiffs from manipulating their claims to avoid federal removal. For example, CAFA removes the strict diversity requirement, which permitted the addition of a single plaintiff with the same state of citizenship as any defendant to prevent removal. 28 U.S.C. § 1332(d)(2). CAFA added a requirement for class action removal that the aggregated amount in controversy must exceed $5 million (*id.*), to ensure that removals under this provision would be limited to major disputes. It also added an entirely new provision for mass action removal (28 U.S.C. § 1332(d)(11)), to prevent plaintiffs

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by *Freeman*) (denying a remand motion in eleven lawsuits that were also identical except that they were divided by one-year time periods in order to allow a similar damages disclaimer of $4.9 million); *Brook v. UnitedHealth Group, Inc.*, No. 06-cv-12954, 2007 WL 2827808 (S.D.N.Y. Sept. 27, 2007) (cited with approval by *Proffitt*) (The court denied plaintiffs' motion to remand and held "[p]laintiffs cannot simply evade federal jurisdiction by defining the putative class on a state-by-state basis, and then proceed to file virtually identical class action complaints in various state courts. Such conduct is precisely what the CAFA legislation was intended to eradicate.").

from avoiding removal through the expedient of naming numerous individual plaintiffs, rather than filing a representative class action.

All of these provisions of CAFA were designed to (a) facilitate the removal of large, interstate and international class and mass actions from state to federal court and (b) to prevent plaintiffs from frustrating such removal by gaming the system. CAFA's "obvious purpose" was to "allow defendants to defend large interstate actions in federal court." *Freeman*, 551 F.3d at 407. Courts repeatedly have recognized that this paramount purpose was to sweep into federal court "most major interstate class actions." *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 47 (1st Cir. 2009); *see also Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 761 (7th Cir. 2008) (CAFA "creates federal jurisdiction over . . . multistate class actions with substantial stakes."). Put simply, CAFA enabled defendants to remove high-stakes litigation clearly implicating interstate commerce. *Lowery*, 483 F.3d at 1193 (CAFA "broaden[s] federal diversity jurisdiction over class actions with interstate implications."). This statutory purpose is at the very heart of CAFA and can be gleaned from the face of the statute.

This statutory purpose applies as much to mass action removal as to class action removal. Nothing in the definition of mass action requires that all of the similar claims constituting the mass action must be brought in one state court complaint. Indeed, the CAFA definitions make clear that the controlling

issue in determining removability is not the individual *complaint*, but the *claims* constituting the mass action. In 28 U.S.C. § 1332(d)(11)(B)(ii)(II),[4] CAFA specifically contemplates that claims from separate state court complaints could be joined together (other than on motion by the defendant) and still constitute a single mass action. It follows that nothing in CAFA prevents a court from considering the identical claims which were brought in different state court complaints to be a part of a single mass action for removal purposes.

1. Its legislative history confirms that one of CAFA's goals is to prevent gamesmanship.

CAFA's legislative history is replete with examples of its intent to correct abusive practices by plaintiffs' counsel. Explaining CAFA's purposes, the Senate Report states that prior law allowed "'lawyers to game' the procedural rules and keep nationwide or multi-state class actions in state courts." S. Rep. No. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6. CAFA was intended to make it "harder for

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[4] The Court below cites this provision to support its argument that Congress willingly permitted plaintiffs to slice up their claims into separate complaints to avoid removal. App. at 12. However, this exception was clearly added to prevent defendants from forcing together a group of tangentially-related claims to get over the 100 plaintiff mark. It was never intended to be used as a sword by plaintiffs to manipulate their complaints to avoid CAFA removal.

plaintiffs' counsel to 'game the system'" by defeating diversity jurisdiction. *Id.* at 5. In short, CAFA was intended to ensure that large, complex mass actions such as this one would be removable, without regard to the "gamesmanship" of plaintiffs and their counsel in avoiding removal.

2. Plaintiffs' gamesmanship in this case.

The Ninth Circuit ignored the fact that plaintiffs have gerrymandered their case (dividing themselves alphabetically) to avoid CAFA removal. There is nothing in the facts or legal theories asserted in the complaints that would justify filing these as separate actions. The arbitrariness of plaintiffs' divisions is especially pronounced here because plaintiffs, on the same day that they filed the seven separate lawsuits in state court, also filed a single federal lawsuit alleging jurisdiction under CAFA's "mass action" provisions. The irrefutable inference is that plaintiffs intentionally divided the state court claims into seven suits for the express purpose of avoiding CAFA removal. Nowhere in their pleadings do plaintiffs deny this obvious fact. In this circumstance, where plaintiffs do not even make a colorable argument that the division of the mass action into separate complaints was for a legitimate purpose, it is contrary to the intent of Congress to permit the plaintiffs' manipulation to frustrate CAFA removal.

While a plaintiff is ordinarily master of the complaint and may plead his complaint to avoid removal,

that principle was changed by CAFA, which has a purpose to facilitate, not frustrate, removal. Since there is no explanation for the division of these claims into seven actions other than to deliberately avoid removal, the Court should recognize the reality of these cases as a single mass action and permit removal, just as the Sixth Circuit did in *Freeman*.

C. The Issue Of Whether Plaintiffs Can Arbitrarily Divide Class And Mass Claims To Avoid CAFA Removal Jurisdiction Requires Definitive Resolution.

As noted above, the CAFA removal provisions had two purposes: to make it easier to remove major multi-plaintiff actions (either class or mass actions) to federal court and to prevent the sort of "gamesmanship" previously used by class counsel to avoid removal. The decision below seriously misunderstands and misapplies these Congressional reforms. Rather than recognizing that CAFA was intended to facilitate removal of substantial interstate class and mass actions, the court below chose to apply the pre-CAFA presumption that all doubts about removability should be resolved against removal. This is flatly inconsistent with CAFA's removal reforms. The Sixth Circuit in *Freeman* did not adopt any such pre-CAFA presumption; as pointed out by the dissent in that case, if it had, the result would have been different. 551 F.3d at 411. By contrast, the Ninth Circuit expressly relied on the anti-removability doctrine in ruling that these seven cases should not be

conglomerated for purposes of determining CAFA removal. 561 F.3d at 952.

This action is a paradigm for actions that CAFA envisions would be removable to federal court. It was brought by 664 foreign plaintiffs against six defendants hailing from several different states, and it alleges a minimum $49 million in alleged damages. Allowing counsel in this case to avoid CAFA removal by subdividing their single mass action into several smaller (but identical) complaints has already had the effect of gutting the effectiveness of the CAFA removal scheme.

Even more significantly, the published opinion below provides a roadmap on how to avoid removal to federal court under CAFA. Following this roadmap, any plaintiffs' counsel can avoid mass action removal simply by dividing their claims into separate complaints of less than 100 plaintiffs each. This has the effect of eviscerating the CAFA reforms and thwarting the Congressional goal of making it easier to remove large, interstate mass actions.

This is not a theoretical or academic concern. While this case was on appeal to the Ninth Circuit, Dow was served with no less than thirty copycat lawsuits with similar allegations as here, each identical except also divided alphabetically by plaintiffs, and each just under CAFA's 100-plaintiff numerosity requirement. Dow removed these actions, but they were also remanded on the basis that plaintiffs had successfully plead around CAFA. *See, e.g., Obregon v.*

Dole Food Co., Inc., No. 2:09-cv-00186, 2009 WL 689899, at *4 (C.D. Cal. Mar. 9, 2009). The fact that other plaintiffs are already applying the lesson of the decision below demonstrates why this issue needs to be resolved definitively at the earliest possible moment, in order to validate CAFA's purpose to facilitate removal of appropriate actions to federal court.

II. THE COURT SHOULD ALSO GRANT REVIEW TO DETERMINE WHETHER "MASS ACTION" JURISDICTION REQUIRES AN ACTUAL TRIAL OF AT LEAST 100 PLAINTIFFS AS THE NINTH CIRCUIT HELD.

Instead of merely deciding the numerosity question, the Ninth Circuit's decision also presents an overarching view that under CAFA, "mass actions" are somehow "the children of a lesser god" in the CAFA pantheon. For the first time in any published decision analyzing the "mass action" provisions, the Ninth Circuit held that "[a]lthough CAFA thus extends federal diversity jurisdiction to both class actions and certain mass actions, the latter provision is fairly narrow." App. at 16. The Ninth Circuit explained the narrow scope of the mass action provisions by reasoning that the CAFA Congress "intended to limit the numerosity component of mass actions quite severely by including only actions in which the trial itself would address the claims of at least one hundred plaintiffs." App. at 19.

A. The Ninth Circuit Incorrectly Found That A "Mass Action" Requires A Physical Trial Of At Least 100 Plaintiffs.

The Ninth Circuit's interpretation of CAFA's "mass action" definition as requiring an actual trial of 100 plaintiffs is unfounded and incorrect. *See* 28 U.S.C. § 1332(d)(11)(B)(i) (as including civil actions in which the "monetary relief claims of 100 or more persons are *proposed to be tried jointly*" (emphasis added)). First, by requiring an actual trial as a pre-condition for CAFA jurisdiction, the Ninth Circuit's rule omits the word "proposed," instead requiring actual trial, and fails to give effect to each word in the statute. *See Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect.").

Second, the clause "monetary relief claims of 100 or more persons are proposed to be tried jointly" must be read in light of CAFA's text as a whole, and also cannot lead to any absurd results. *U.S. v. Morton*, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole."); *see also Reno v. Nat'l Transp. Safety Bd.*, 45 F.3d 1375, 1379 (9th Cir. 1995) (stating that courts do not construe statutes in ways that "would lead to absurd results"). Requiring nothing short of an actual trial to trigger removal jurisdiction would be an absurd result.

The Ninth Circuit's determination, which would only allow CAFA removal jurisdiction to attach on the

eve of an actual trial of 100 claimants, departs from the long-standing rule that jurisdictional facts should be assessed at the time of removal, not late in litigation when the parties consider trial. CAFA did not alter the general rule that once properly removed, "the federal court's jurisdiction cannot be ousted by later events." S. Rep. No. 109-14, at 70–71. CAFA's legislative history also foresaw that the "mass action" provision might not result in an actual trial of 100:

> If a mass action satisfies the criteria set forth in the section . . . it may be removed to a federal court, which is authorized to exercise jurisdiction over the action. Under the proviso, however, it is the Committee's intent that any claims that are included in the mass action that standing alone do not satisfy the jurisdictional amount requirements of Section 1332(a) [$75,000], would be remanded to state court. Subsequent remands of individual claims not meeting the section 1332 jurisdictional amount requirement may take the action below the 100-plaintiff jurisdictional threshold or the $5 million aggregated jurisdictional amount requirement. *However, so long as the mass action met the various jurisdictional requirements at the time of removal, it is the Committee's view that those subsequent remands should not extinguish federal diversity jurisdiction over the action.*

S. Rep. No. 109-14, at 45 (2005) (emphasis added). In other words, Congress intended CAFA jurisdiction to exist even if enough plaintiffs are later remanded to

bring the total below 100 and even if no joint trial of 100 plaintiffs actually ensues.

B. The Ninth Circuit Is In Conflict With Two Other Circuits' Interpretation Of CAFA's "Mass Action" Provisions.

The other circuits to have addressed this provision have rejected the argument that the language "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly," requires all 100 plaintiffs to proceed to simultaneous trial. The Eleventh Circuit sensibly concluded that the "proposed to be tried jointly" clause is part of a larger "commonality requirement." *Lowery*, 483 F.3d at 1202–03, where the court of appeals declared:

> [W]e now have identified at least four requirements for an action to be deemed a mass action. These requirements are: (1) an amount in controversy requirement of an aggregate of $5,000,000 in claims; (2) a diversity requirement of minimal diversity; (3) a numerosity requirement that the action involve the monetary claims of 100 or more plaintiffs; and (4) *a commonality requirement that the plaintiffs' claims involve common questions of law or fact.*

Id. (emphasis added).

Similarly, the Seventh Circuit examined the phrase "proposed to be tried jointly" in *Bullard v.*

Burlington Northern Santa Fe Railway Co., 535 F.3d 759 (7th Cir. 2008), where plaintiffs argued that defendants could remove "only on the eve of trial, once a final pretrial order or equivalent document identifies the number of parties to the trial." *Id.* at 761. Rejecting plaintiffs' argument, the Seventh Circuit emphasized the word "proposed:"

> It does not matter whether a trial covering 100 or more plaintiffs actually ensues; the statutory question is whether one has been proposed. This complaint, which describes circumstances common to all plaintiffs, proposes one proceeding and thus one trial.

Id. at 762.

The *Bullard* court also recognized that "trial" can be broadly interpreted, noting that "the question is not whether 100 or more persons answer a roll call in court, but whether the 'claims' advanced by 100 or more persons are proposed to be tried jointly." *Id.* The statute could be satisfied if, for example, a trial of 10 exemplary plaintiffs was followed by issue preclusion to the remaining plaintiffs without trial. *Id.* The Ninth Circuit missed this important point, especially since under California procedure, there are a panoply of mechanisms that are deemed to be "trials." For instance, in California, a "trial" may include, among other things, "trials of issues of law." *E.g.*, *Franklin Capital Corp. v. Wilson*, 148 Cal. App. 4th 187, 197 (2007). Far from requiring an actual simultaneous trial of 100 plaintiffs, the CAFA phrase "proposed to be tried jointly," therefore, reflects the practical

concern that for any "mass action," the issues of law must be sufficiently common.

Similarly, a Florida district court denied a remand even where the removing defendants had "the premeditated intent of contending that the case should be severed and each plaintiff's case should be tried individually." *Cooper v. R.J. Reynolds Tobacco Co.*, 586 F. Supp. 2d 1312, 1318 (M.D. Fla. 2008). Using the common definition of "proposed" to mean "to form or declare a plan or intention," the court found that plaintiffs "proposed" to try their cases jointly by "filing a complaint in state court . . . and requesting one jury trial." *Id.* at 1320–22; *see also Bullard*, 535 F.3d at 762 (stating that "one complaint implicitly proposes one trial"). The court reasoned that any other construction would omit the word "proposed" from the statutory text altogether. *Cooper*, 586 F. Supp. 2d at 1320.

Contrary to the Ninth Circuit's treatment of "mass actions" as somehow a "poor cousin" under CAFA, the Seventh Circuit in *Bullard* was particularly concerned with plaintiffs' counsel finding ways to "devise close substitutes [in state court] that escape the statute's application." *Bullard*, 535 F.3d at 761. The *Bullard* court viewed the "mass action" device as just such a class action substitute:

> Plaintiffs' lawyers, who want to avoid federal court, have designed a class-action substitute. Their complaint alleges that several questions of law and fact are common to all 144 plaintiffs; it provides no more information

> about each individual plaintiff than an avowed class complaint would do. No one supposes that all 144 plaintiffs will be active, a few of them will take the lead, just as in a class action, and as a practical matter counsel will dominate, just as in a class action.

Id. In other words, the Seventh Circuit recognized that a "mass action" functions very similarly to a class action and is subject to the exact same abuses.

The CAFA Congress was aware of this point, and was just as concerned with "mass actions" as it was with class actions. The Senate Report expressly observes that "mass actions are simply class actions in disguise. They involve a lot of people who want their claims adjudicated together and they often result in the same abuses as class actions." S. Rep. No. 109-14, at 47, *reprinted in* 2005 U.S.C.C.A.N. 3, 44. The legislative history actually rebuffs the Ninth Circuit's characterization, finding that mass actions may even be "worse because the lawyers seek to join claims that have little to do with each other and confuse a jury into awarding millions of dollars to individuals who have suffered no real injury." S. Rep. No. 109-14, at 45 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46. Finally, the statute itself defines "class actions" as including "mass actions," so the two are functionally indistinguishable under the statute. *See* 28 U.S.C. § 1332(d)(11)(A). In sum, the Ninth Circuit's analysis of CAFA's "mass action" provisions is contrary to both the statute and the legislative history.

Moreover, as the *Bullard* court recognized when it reviewed the CAFA statute as a whole, the Ninth Circuit's construction creates a tension within the statutory provisions. The problem is that, on the one hand, § 1332(d)(11)(B)(i) defines a "mass action" as any civil action "in which monetary relief claims of 100 or more persons are proposed to be *tried jointly*," and on the other hand, § 1332(d)(1)(B) defines a "class action" as a suit when it is "filed." The Ninth Circuit's rule that an actual trial must trigger "mass action" removal jurisdiction cannot be correct, because any construction that refuses to recognize a mass action until close to trial would be at odds with a "class action" occurring at the date of filing. *See Bullard*, 535 F.3d at 762.

In sum, both of these questions as decided by the Ninth Circuit effectively eliminate CAFA's "mass action" provisions if unaddressed by this Court: the first would allow a plaintiff – with no other purpose other than dodging federal court jurisdiction – to splinter a suit that otherwise would be squarely within CAFA's ambit. The second question, by requiring nothing short of an actual trial to trigger CAFA "mass action" removal jurisdiction, would effectively make these actions impossible to remove.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWIN V. WOODSOME, JR.
D. BARCLAY EDMUNDSON
ANDREW S. WONG
ORRICK, HERRINGTON SUTCLIFFE LLP
777 South Figueroa Street, Suite 3200
Los Angeles, CA 90017
Tel: (213) 629-2020

E. JOSHUA ROSENKRANZ
ORRICK, HERRINGTON SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Tel: (212) 506-5000

MICHAEL L. BREM
SCHIRRMEISTER DIAZ-ARRASTIA BREM LLP
Pennzoil Place, North Tower
700 Milam Street, 10th Floor
Houston, TX 77002
Tel: (713) 221-2530

Attorneys for Petitioner