No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

This action was commenced when Citibank, N.A. filed a routine state-court collection action against respondent George W. Jackson. Petitioner Home Depot U.S.A., Inc. was not an original party to that action and never became a party to that collection dispute. Jackson then filed a counterclaim against Citibank asserting class-action consumer-protection claims. In addition to naming Citibank, Jackson named Home Depot and another company as original defendants to that counterclaim class action. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, permits "any defendant" in a state-court class action to remove the action to federal court if it satisfies certain jurisdictional requirements. Petitioner Home Depot is an original defendant in the class action at issue here and was never a plaintiff in any claim associated with this case. The questions presented are:

1. Whether this Court's holding in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—should extend to third-party counterclaim defendants.

2. Whether an original defendant to a class-action claim can remove the class action if it otherwise satisfies the jurisdictional requirements of the Class Action Fairness Act when the class action was originally asserted as a counterclaim against a co-defendant.

PARTIES TO THE PROCEEDINGS

Petitioner Home Depot, U.S.A., Inc. was an original defendant to the class action brought as a counterclaim in the state court and in the district court and was the appellant in the court of appeals.

Respondent George W. Jackson was the original defendant and the counterclaim plaintiff in state court and in the district court and was the appellee in the court of appeals.

Citibank, N.A. was the original plaintiff in state court and the counterclaim defendant in the state court and in the district court; it did not participate in the proceedings in the court of appeals; it is no longer a party to this case.

Carolina Water Systems, Inc. was an original defendant to the class action brought as a counterclaim in the state court and in the district court; it did not participate in the proceedings in the court of appeals.

RULE 29.6 STATEMENT

Petitioner Home Depot U.S.A., Inc. is wholly owned by The Home Depot, Inc., a publicly traded company on the New York Stock Exchange. The Home Depot, Inc. has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.3d 165. The opinion of the district court (Pet. App. 16a-23a) is not published in the *Federal Supplement* but is available at 2017 WL 1091367.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2018. Pet. App. 1a. The petition for a writ of certiorari was filed on April 23, 2018, and was granted on September 27, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in an appendix to this brief.

INTRODUCTION

Removal is about fairness: fairness to out-of-state litigants and fairness to state-court defendants in cases over which state and federal courts exercise concurrent jurisdiction. When the Framers created diversity jurisdiction in federal courts, they sought to protect out-of-state litigants from state-court biases. A plaintiff can invoke that protection by filing a qualifying case in federal court at the outset; but a defendant has no say in the plaintiff's initial choice of forum. To even the playing field, the first Congress granted to out-of-state defendants the right to remove a case that would qualify for original diversity jurisdiction. With removal in play, the plaintiff and defendant each have one opportunity to invoke the jurisdiction of a federal court.

When this Court held in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), that a plaintiff that files suit in state court cannot remove a case in response to a counterclaim, it maintained the balance established by the first Congress: the original plaintiff had one opportunity to invoke the jurisdiction of the federal court and, having waived that right when it instead filed in state court, it was not afforded a second opportunity to invoke federal jurisdiction in response to a counterclaim. But *Shamrock Oil*'s original-plaintiff rule has no application to a party that is brought into state court involuntarily as a defendant to a counterclaim. Such a party would have *zero* opportunities to invoke federal jurisdiction if not permitted to remove. Such a party should therefore be entitled to remove a qualifying counterclaim.

Congress codified that fairness principle in plain language, giving the right of removal to "the defendant or the defendants" in the general removal statute, 28 U.S.C. § 1441(a), and to "any defendant" in the class-action removal provision, 28 U.S.C. § 1453(b). The questions in this case present the same fundamental issue: whether a party that is brought involuntarily into state-court proceedings as a defendant is a defendant. The answer is yes. A defendant that did not voluntarily subject itself to state-court jurisdiction has the right to remove a qualifying claim—and that is true whether the defendant was named in the original plaintiff's complaint or, as here, was brought into a case as a defendant to claims asserted as counterclaims.

The courts of appeals have undermined that balanced system by prohibiting third-party counterclaim defendants from removing—without any basis in the

text, structure, purposes, or history of the relevant statutory provisions. Courts of appeals' "original-defendant" rule is not supported by the text of any removal provision or by any of this Court's decisions construing those provisions. And it is particularly perverse as applied to removal under the Class Action Fairness Act of 2005, which was enacted for the express purpose of expanding the category of defendants entitled to remove qualifying class actions. This Court should reverse the decision below and abrogate the other circuit decisions that have misconstrued 28 U.S.C. § 1441(a) and § 1453(b).

STATEMENT

1. a. The general removal statute, 28 U.S.C. § 1441, establishes the default rules governing removal of actions from state to federal court. It provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the [appropriate] district court of the United States" when certain requirements not in issue here are satisfied. *Id.* § 1441(a). It further provides that, when diversity jurisdiction provides the basis for removal, an action "may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." *Id.* § 1441(b)(2). When an action involves both state- and federal-law claims, Section 1441 provides that the entire matter may be removed and further provides that any claim over which the federal district court cannot exercise jurisdiction—either because the claim is "not within the original or supplemental jurisdiction of the district court" or because it

"has been made nonremovable by statute"—may be severed and remanded to state court. *Id.* § 1441(c).

The procedures governing removal are set out in 28 U.S.C. § 1446. That section establishes timing requirements for a defendant's exercise of its right to remove. *Id.* § 1446(b)(1), (b)(2)(C), (b)(3), and (c)(1). It further states that, when Section 1441(a) provides the sole basis for removal, "all defendants who have been properly joined and served must join in or consent to the removal of the action." *Id.* § 1446(b)(2)(A).

b. In 2005, Congress enacted the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, to address what it perceived as "abuses" of the class-action system. S. Rep. No. 109-14, at 4 (2005) (Senate Report). In particular, the Senate Report explained that Congress was concerned that "most class actions" were being "adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements." *Ibid.* The Senate Report observed that existing "law enable[d] lawyers to 'game' the procedural rules and keep nationwide or multistate class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests"—and that, as a result, "consumers are the big losers." *Ibid.* To address those problems, Congress amended the provisions governing federal diversity jurisdiction over class actions. As relevant here, Congress "modifie[d] the federal removal statutes to ensure that qualifying interstate class actions initially brought in state courts may be heard by federal courts

if any of the defendants so desire." *Id.* at 5; *see id.* at 6 ("This Committee believes that the current diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses . . . .").

By enacting CAFA, Congress sought to change existing laws that "enable[d] 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." Senate Report 10. "In order to enable more class actions to be removed to federal court," Congress "amend[ed] the diversity jurisdiction and removal statutes applicable to" large class actions by "incorporat[ing] the concept of balanced diversity." *Id.* at 28, 29. Specifically, CAFA amended 28 U.S.C. § 1332, which governs diversity jurisdiction, to give federal courts original jurisdiction over, *inter alia*, most class actions in which the amount in controversy exceeds $5 million and "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A).

CAFA also enacted 28 U.S.C. § 1453, which establishes rules and procedures for the removal of class actions. Although Section 1453 incorporates many of the general removal procedures set forth in Sections 1441 and 1446, it intentionally deviates from some of the limits in those provisions in order to expand the range of state-court class actions that are removable. Three changes are particularly relevant here. First, whereas Section 1441(a) authorizes removal by "the defendant or the defendants," Section 1453(b) authorizes removal by "any defendant." Second, Section 1453(b) dispenses with the rule that all defendants must consent to removal. Third, Section 1453(b) authorizes removal even when one or more defendants is a citizen

of the State in which the suit was filed. 28 U.S.C. § 1453(b). In construing CAFA's application to removal proceedings, this Court has noted that "no anti-removal presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014).

c. The questions presented in this case involve the application of removal rules set out in Sections 1441 and 1453 to parties that, although not originally involved in a civil action filed in state court, become involved as third-party defendants to a counterclaim. Neither statute expressly addresses its application to third-party defendants.

In *Shamrock Oil & Gas Corp. v. Sheets*, this Court confronted the question whether an original state-court plaintiff who faced a counterclaim from the original defendant could remove the action to federal court under the predecessor to Section 1441(a). 313 U.S. 100, 103 (1941). The removal provision at issue in that case authorized removal of a state-court action "of which the district courts of the United States are given original jurisdiction" when removal was sought "by the defendant or defendants therein." *Id.* at 104 n.1 (quoting 28 U.S.C. § 71 (1940)). The Court held that that provision did not authorize removal of a counterclaim by a party who was the original plaintiff (and became the counterclaim defendant) in the state-court action. *Id.* at 104-109. The Court explained that removal provisions in place between 1867 and 1887 had authorized removal by "either party"—but that nearly every other removal statute enacted since 1789 had limited "the privilege of removal to 'defendants' alone." *Id.* at 105; *id.* at 104-106. The Court viewed the "alterations in

the statute" to be of "controlling significance as indicating the Congressional purpose to narrow the federal jurisdiction on removal," *id.* at 107, and "to restrict the jurisdiction of the federal courts on removal," *id.* at 108. Concluding that the removal provision must be subject to a "strict construction," the Court found "no basis for saying that Congress, by omitting from the [operative] statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others." *Ibid.*

The Court had no occasion in *Shamrock Oil* to address the removal rights of a third-party counterclaim defendant (*i.e.*, a party who joined the case as a defendant to a counterclaim but was not an original plaintiff or defendant). But courts of appeals have consistently construed potentially overly broad language in *Shamrock Oil* to deny the right of removal under Section 1441(a) to such defendants. *See*, *e.g.*, *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332 (4th Cir. 2008) ("For more than fifty years, courts applying *Shamrock Oil* have consistently refused to grant removal power under § 1441(a) to third-party defendants . . . ."). Building on those cases, courts of appeals have unanimously held that a third-party class-action counterclaim defendant is not entitled to remove under Section 1453(b), even though that provision does not use the same language as Section 1441(a) and was enacted as part of a concerted effort to expand the removal rights of class-action defendants. *See* Pet. App. 9a; *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355 (7th Cir.), *cert. denied*, 137 S. Ct. 2138 (2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012); *Westwood Apex v. Contreras*, 644 F.3d

799, 804-805 (9th Cir. 2011); *Palisades*, 552 F.3d at 334-335 & n.4 (4th Cir.).

2. a. This case arises out of a debt-collection action filed in June 2016 in North Carolina state court by Citibank, N.A. against respondent George W. Jackson. Pet. App. 2a. Citibank alleged that Jackson had failed to pay for a water-treatment system he purchased using a Citibank-issued credit card. *Id.* at 2a-3a.

In his August 2016 answer to the complaint, Jackson asserted what he styled as a class-action "counterclaim" against Citibank and "class action third-party claims" against petitioner Home Depot U.S.A., Inc. and Carolina Water Systems, Inc. (CWS), neither of which was a party to the original collection dispute. Pet. App. 2a; JA18. Jackson alleged that Home Depot and CWS had engaged in unfair and deceptive trade practices by misleading consumers about the water-treatment systems sold by CWS as part of an agreement with Home Depot and that Citibank was jointly and severally liable because Home Depot "'directly sold or assigned the transaction to' Citibank." Pet. App. 3a (citation omitted). In September 2016, Citibank voluntarily dismissed its collection claims against Jackson without prejudice. *Ibid.*

In October 2016, Home Depot filed a notice of removal, relying on CAFA. Pet. App. 3a. Because the only controversy remaining in the case was the class action filed by Jackson, Home Depot then filed a motion to realign the parties to denominate Jackson as plaintiff and Home Depot, CWS, and Citibank as defendants. *Ibid.* On November 8, 2016, Jackson filed a motion to remand. *Ibid.* On November 18, Jackson amended his class-action complaint to remove any

reference to Citibank. *Ibid.* At that point, the only remaining controversy was Jackson's class-action claims against Home Depot and CWS, neither of which was a plaintiff in (or even a party to) the original debt-collection action filed in state court by Citibank.

In March 2017, the U.S. District Court for the Western District of North Carolina denied Home Depot's motion to realign the parties, explaining that "[t]his is not a situation where there are antagonistic parties on the same side" and noting that Citibank had "dismissed its claim against Jackson *without prejudice*." Pet. App. 22a. The court also granted Jackson's motion to remand, reasoning that, because Home Depot was not an original defendant in the collection action that started the case, it was not entitled to remove what remained of the case (*i.e.*, the class action). *Id.* at 19a-21a.

b. Home Depot appealed, and the U.S. Court of Appeals for the Fourth Circuit affirmed. Pet. App. 1a-15a.

The court of appeals first affirmed the district court's remand order. Pet. App. 4a-14a. The court of appeals explained that 28 U.S.C. § 1441(a) limits the right of removal to "the defendant or the defendants." Pet. App. 4a. Relying on *Shamrock Oil*, which construed similar language, the court held that Section 1441(a) does not authorize removal by a defendant to a claim asserted as a counterclaim—even when that defendant was not an original plaintiff in the suit. *Id.* at 4a-9a.

The court of appeals rejected Home Depot's argument that CAFA, which allows removal by "any defendant," 28 U.S.C. § 1453(b), expands the class of

defendants who can remove a case to include a third-party defendant to a class action asserted as a counterclaim when the defendant was not an original plaintiff (or any kind of plaintiff) in the case. Pet. App. 8a-14a. The court relied on circuit precedent—and decisions from two other circuits—holding that CAFA does not permit removal by a defendant to a counterclaim even when the defendant was not an original plaintiff. *Id.* at 7a (citing *Tri-State Water Treatment*, 845 F.3d at 355-356; *Westwood Apex*, 644 F.3d 799; *Palisades*, 552 F.3d at 334-336). The court further rejected Home Depot's argument that this Court's decision in *Dart Cherokee*, *supra*—which clarified that CAFA eliminates any antiremoval presumption for covered class actions—undermines the viability of those circuit court decisions. Pet. App. 9a-11a.

The court of appeals also rejected Home Depot's argument that the holdings of *Shamrock Oil* and of the circuit cases applying CAFA to counterclaim defendants do not apply to Home Depot because it is not a counter-defendant or a third-party defendant, but is simply a defendant in the only dispute remaining in this case. Pet. App. 11a-14a. In so holding, the court relied on the fact that, at the time Home Depot filed its notice of removal, Jackson had not yet dismissed his claims against Citibank (the original plaintiff). *Id.* at 12a. The court reasoned that accepting Home Depot's argument would permit gamesmanship because it would permit an original plaintiff to remove an otherwise unremovable counterclaim class action by dismissing its original claims. *Id.* at 13a-14a.

Finally, the court of appeals affirmed the district court's refusal to realign the parties. Pet. App. 14a-15a. Although the court of appeals acknowledged that

it "employs the 'principal purpose' test, in which [the court] determine[s] the primary issue in controversy and then align[s] the parties according to their positions with respect to that issue," *id.* at 14a, it refused to make such an alignment in this case because no party was attempting to evade limits on diversity jurisdiction, *id.* at 15a.

c. Home Depot filed a petition for a writ of certiorari, asking the Court to consider what is now the second question presented. On September 27, 2018, this Court granted the petition and asked the parties to also address what is now the first question presented.

SUMMARY OF ARGUMENT

I. The statutory provision governing general removal jurisdiction gives the right to remove to "the defendant or the defendants." 28 U.S.C. § 1441(a). Home Depot is undoubtedly a defendant in this litigation: it was brought into the case through service of process to face claims for relief against it. Home Depot should therefore be entitled to remove if all the other requirements of removal were satisfied. But courts of appeals have universally held the opposite—that a third-party counterclaim defendant has no right to remove because it does not qualify as one of "the defendants." That is incorrect.

Courts have premised that holding on a misreading of this Court's decision in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). That decision carved out an exception to the statutory rule that a defendant can remove a qualifying action, holding that an original plaintiff cannot remove based on a counterclaim asserted by the original defendant. The Court explained that an original plaintiff should be

made to abide its voluntarily invocation of the state court's jurisdiction, that the evolution of the general removal provision confirms its focus on the rights of defendants, and that the statutory text provides no basis for distinguishing between plaintiffs who can remove and plaintiffs who cannot remove. But the Court had no occasion to consider whether a counterclaim defendant that is *not* also a plaintiff can remove. That is the issue this Court asked the parties to address.

The same considerations that supported the Court's holding in *Shamrock Oil* dictate that a third-party counterclaim defendant qualifies as one of "the defendants"—and therefore has the right to remove a qualifying action—under Section 1441(a). The text of the statute does not support the original-defendant rule adopted by the courts of appeals. Nothing in Section 1441(a) or the other provisions governing general removal provides a basis for distinguishing among parties that are solely defendants. To the contrary, the rule necessarily speaks from the perspective of the claim at issue; if a party is an out-of-state defendant to a claim that otherwise qualifies for removal, that party has the right to remove.

The only exception to that common-sense rule is when the defendant is also the original plaintiff. But, as this Court explained in *Shamrock Oil*, that exception is grounded in the history and purposes of removal jurisdiction. The Founders created diversity jurisdiction in order to protect out-of-state parties from any local biases in state courts. But the first Congress recognized that the right of parties to invoke diversity jurisdiction required different forms of protection for plaintiffs and defendants. A plaintiff can invoke diversity jurisdiction by filing a qualifying case in federal

court at the outset. But an out-of-state defendant requires a right of removal in order to invoke the same protection. From the beginning, Congress has thus viewed removal jurisdiction as a defendant-friendly counterbalance to a plaintiff's right to choose the initial forum. And because the first Congress also respected state courts' concurrent jurisdiction over diversity matters, it limited the right of removal to defendants, requiring that a plaintiff that voluntarily submits itself to state-court jurisdiction must abide by its choice.

The original-plaintiff rule of *Shamrock Oil* perfectly reflects those considerations. But this Court should not extend the original-plaintiff exception to prohibit removal by a third-party counterclaim defendant. The text, structure, and history of the general removal provision instead dictate that a party involuntarily brought into state-court proceedings as a defendant to a qualifying claim can remove it.

II. Because a third-party counterclaim defendant qualifies as one of "the defendants" for purposes of removal, it follows *a fortiori* that such a party qualifies as "any defendant" for purposes of the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4. But even if this Court disagrees with our position on the Section 1441 question, it should hold that a third-party defendant to a qualifying class-action counterclaim can remove that claim under 28 U.S.C. § 1453(b).

Our argument boils down to this: "any defendant" means any defendant. Congress could hardly have chosen clearer or more expansive language to define the class of defendants entitled to remove under Section 1453(b). This Court has repeatedly held that the

word "any" is expansive—and under any ordinary definition of the words, a third-party counterclaim defendant qualifies as any defendant. In enacting Section 1453(b), Congress expressly departed from several of the rules governing general removal. To the extent this Court finds that the phrase "the defendants" does not include a third-party counterclaim defendant for purposes of Section 1441(a), it should hold that the broader phrase "any defendant" in Section 1453(b) *does*.

Nothing in the other provisions governing removal supports a contrary conclusion. Courts of appeals have relied on 28 U.S.C. § 1446 to confine the class of defendants that qualify as "any defendant." But that provision merely sets out the procedures governing removal; it does not define *which defendants* are entitled to invoke those procedures. In any case, Congress expressly *departed* from certain aspects of Section 1446 in the text of Section 1453(b).

A plain-text reading of Section 1453(b) is also consistent with the purpose of CAFA, which was enacted to combat class-action abuses observed in state courts, and specifically to combat state-court biases against out-of-state defendants. The courts of appeals' constrained reading of CAFA's expansive language has created a huge loophole in the protections Congress intended and should be corrected by this Court with a reversal in this case.

ARGUMENT

Home Depot's argument is simple: a defendant is a defendant and "any defendant" means "any defendant." That is all you need to know to answer both questions presented. When a party is involuntarily brought into a state-court action as a defendant to a counterclaim, that party is a defendant and is entitled to remove a qualifying claim pursuant to 28 U.S.C. § 1441(a). When a party is involuntarily brought into a state-court action as a defendant to a class-action counterclaim, that party qualifies as "any defendant" and is entitled to remove a qualifying class action pursuant to 28 U.S.C. § 1453(b). The history and purposes of those provisions confirm that the statutory text means what it says.

I. This Court's Holding In *Shamrock Oil* That An Original Plaintiff Cannot Remove A Counterclaim Against It Should Not Apply To Third-Party Counterclaim Defendants.

The question presented in *Shamrock Oil & Gas Corp. v. Sheets* was whether the general removal statute then in operation authorized an original plaintiff in a state-court action to remove on the basis of diversity jurisdiction a counterclaim asserted by the defendant. 313 U.S. 100, 102-104 (1941). The answer was no. *Id.* at 106-109. In so holding, the Court relied on the text and purposes of the operative statute. The Court did not purport to address the removal rights of third-party counterclaim defendants—because no such defendant was present in that case. But the same considerations that led the Court to hold in 1941 that an original plaintiff cannot remove based on a counterclaim should lead the Court to hold now that a third-

party counterclaim defendant can remove an action that otherwise qualifies for removal under 28 U.S.C. § 1441.*

A. The Holding of *Shamrock Oil* Is Limited to the Removal Authority of an Original Plaintiff.

By its terms and reasoning, the holding of *Shamrock Oil* is limited: an original state-court *plaintiff* may not unilaterally remove a case based on a defendant's counterclaim. The rule of *Shamrock Oil* is an

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* As noted, when the Court granted the petition for a writ of certiorari, it directed the parties to address whether *Shamrock Oil*'s holding should "extend to third-party counterclaim defendants." Given the context of this case—and of the other question on which the Court granted review—Home Depot understands the Court's use of the term "third-party counterclaim defendant" to encompass a defendant that is brought into a case as a co-defendant to a counterclaim asserted against the original plaintiff. That is the sense in which Home Depot uses the term in this brief. We note, however, that Federal Rule of Civil Procedure 14 contemplates that a third-party defendant is one that "is or may be liable to" an original defendant "for all or part of the claim against it." Fed. R. Civ. P. 14(a)(1). Because Home Depot is not alleged to be liable for some or all of Jackson's debt to Citibank, it does not qualify as a third-party defendant under that definition. Home Depot was joined in this action pursuant to North Carolina Rule of Civil Procedure 13(h), which is closely modeled on Federal Rule of Civil Procedure 13(h). The Advisory Committee's historical notes to the federal rule clarify that Home Depot should be considered simply a "defendant" to the counterclaim. *See* Fed. R. Civ. P. 13(h) advisory committee's note to 1966 amendment ("[F]or the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be.").

original-plaintiff rule, not an original-defendant rule. The focus of the decision is on the rights of a plaintiff, the reasoning of the decision addresses the role of the plaintiff as distinct from the defendant, and the actual holding is therefore limited to addressing the removal rights of a plaintiff. But, as Judge Bybee explained in his concurring opinion in *Westwood Apex v. Contreras*, "[o]ver time, the holding of *Shamrock Oil*—that an original plaintiff could not remove the case after a counterclaim was filed—transformed [in the courts of appeals] into a rule that only the original defendant could remove the case." 644 F.3d 799, 808 (9th Cir. 2011). That extension is unjustified and incorrect. "*Shamrock Oil* does not compel" adoption of the original-defendant rule, *id.* at 807, and neither does the text of the general removal provision at issue in that case. This Court should clarify that a third-party counterclaim defendant—*i.e.*, a party that is a defendant to a counterclaim but is not a plaintiff in any capacity—has the same removal rights as other defendants in the case.

In *Shamrock Oil*, a Delaware corporation sued Texas citizens in Texas state court for an overdue bill, and the defendants responded with a counterclaim for an unrelated breach of contract. *Sheets v. Shamrock Oil & Gas Corp.*, 115 F.2d 880, 881 (5th Cir. 1940). Although the Delaware corporation had elected to file its claim in the Texas state court, it removed the action to federal court in response to the counterclaim. The question before this Court—a "question of statutory construction"—was whether the general removal provision then in effect authorized an original plaintiff to remove a case based on a counterclaim filed by the original defendant. *Shamrock Oil*, 313 U.S. at 103-

104. The Court answered that question by examining the text, history, and purposes of the operative removal statute.

The removal provision at issue in *Shamrock Oil*—like the general removal provision in operation today, 28 U.S.C. § 1441(a)—authorized removal "by the defendant or defendants" when certain other requirements were met. 313 U.S. at 104 & n.1 (quoting 28 U.S.C. § 71 (1940)); *see* 28 U.S.C. § 1441(a) (authorizing removal by "the defendant or the defendants"). In discerning the meaning of the statutory phrase "the defendant or defendants," the Court briefly surveyed the history of removal provisions. 313 U.S. at 104-106. The Court explained that Section 12 of the Judiciary Act of 1789 (1789 Act), ch. 20, § 12, 1 Stat. 73, 79, had similarly limited the right of removal to "the defendant"—and that nearly all revisions of the general removal provision since 1789 had limited "the privilege of removal to 'defendants' alone." 313 U.S. at 105; *id.* at 105-106. The only exceptions, the Court noted, were found in the general removal provisions in effect between 1867 and 1887. The 1867 act authorized removal by an out-of-state litigant, "whether he be plaintiff or defendant, if he" filed an affidavit attesting "that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court." Act of Mar. 2, 1867, ch. 196, 14 Stat. 558, 559. The provision put in place in 1875 similarly authorized removal by "either party" and specified that removal based on diversity jurisdiction may be invoked by "any one or more of the plaintiffs or defendants." Removal of Causes Act, ch. 137, § 3, 18 Stat. 470, 471 (1875); *Shamrock Oil*, 313 U.S. at 105-106. But Congress amended that provision in

1887 to once again limit the right of removal to "the defendant or defendants," Act of Mar. 3, 1887 (1887 Act), ch. 373, § 1, 24 Stat. 552, 553, a limitation that remained in the version of the statute at issue in *Shamrock Oil* and continues in nearly identical form today, *see* 28 U.S.C. § 1441(a) (limiting removal to "the defendant or the defendants").

Relying on the House Report that accompanied the 1887 Act, the Court explained that the purpose of the amendment was "to narrow the federal jurisdiction on removal" by "'requir[ing] the plaintiff to abide his selection of a forum'" when a plaintiff sues in state court. *Shamrock Oil*, 313 U.S. at 106 n.2, 107 (quoting H.R. Rep. No. 49-1078, at 1 (1886)). In light of that statutory purpose, the Court construed the statute's restriction of removal authority to "the defendant or defendants" *not* to include an original plaintiff who later became a counterclaim defendant. *Id.* at 106-109. Such a party, although technically a defendant to the counterclaim, could not be considered "the defendant" in the case because that party had *chosen* the state-court forum. *Id.* at 107-108. The Court thus found "no basis for saying that Congress, by omitting from the [then-operative] statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others." *Id.* at 108.

The reasoning of *Shamrock Oil* makes sense as applied to an original plaintiff who becomes a counterclaim defendant. Because that party voluntarily submitted himself and his claim to the jurisdiction of the state court, it is perfectly fair to make that party "abide his selection of a forum," H.R. Rep. No. 49-1078, at 1. The Court's rule also avoids creating a textual mess of the removal statute by attempting to distin-

guish among different types of *plaintiffs* when determining who qualifies as "the defendant." But, for the reasons set out below, precisely the same considerations that justified the original-plaintiff rule announced in *Shamrock Oil* counsel *against* expanding *Shamrock Oil* to encompass an original-defendant rule.

B. The Text of Section 1441(a) Gives Third-Party Counterclaim Defendants the Right to Remove.

1. The text of Section 1441(a) is unambiguous in assigning the right of removal to defendants. Nothing in that provision—or in any other provision governing the rules and procedures of removal in diversity cases—even suggests that a third-party counterclaim defendant in a qualifying state-court action should not be treated as one of "the defendants" entitled to remove. 28 U.S.C. § 1441(a). And no provision governing removal limits the right of removal to an "original defendant." A third-party counterclaim defendant is brought into a suit through service of process, just as any other defendant, including the original defendant. And, as this Court reaffirmed in *Shamrock Oil*, the right of removal is granted to "a defendant against whom the suit is brought by process served upon him." 313 U.S. at 106; *see West v. Aurora City*, 73 U.S. (6 Wall.) 139, 142 (1868).

The holding in *Shamrock Oil* was motivated in part by the Court's inability to find a textual basis for permitting some, but not all, plaintiffs to remove. 313 U.S. at 108. The same consideration requires that the Court refrain from distinguishing among non-plaintiff defendants in determining which qualify as

"the defendants" under Section 1441(a). Any party that is brought into the state-court forum involuntarily as a defendant should qualify as a defendant that is entitled to remove where the rest of the removal requirements are satisfied.

Indeed, it is already the case that the right to remove is *not* limited to the parties originally named as defendants in the state-court action. Section 1446 provides that, "[i]f defendants are served at different times," a "later-served defendant" still has the right to remove. 28 U.S.C. § 1446(b)(2)(C). That rule applies to later-added defendants (*i.e.*, defendants not included in the plaintiff's original complaint). As Congress explained when it added Subsection (b)(2)(C) in 2011, "[f]airness to later-served defendants, whether they are brought in by the initial complaint or an amended complaint, necessitates that they be given their own opportunity to remove, even if the earlier-served defendants chose not to remove initially." H.R. Rep. No. 112-10, at 14 (2011). The lower courts' adoption of the original-defendant rule is atextual in part because it would distinguish between later-joined defendants who are joined by the original plaintiff (and can remove) and later-joined defendants who are joined by an original defendant (and cannot remove)—even though nothing in any statutory provision governing removal provides a basis for that distinction. Those provisions distinguish between plaintiffs and defendants.

2. Adopting a common-sense interpretation of the phrase "the defendants"—one that recognizes a third-party counterclaim defendant as a defendant—also would not materially undermine existing restrictions on the right of plaintiffs to remove. Under

Shamrock Oil, a plaintiff who is the only defendant to a counterclaim has no right to remove but must instead abide his choice of forum. Because Section 1446 requires that all defendants consent to removal, 28 U.S.C. § 1446(b)(2)(A), a plaintiff who becomes one of multiple defendants to a counterclaim would still lack the right to unilaterally remove the action to federal court.

Under a correct reading of the statute, an original plaintiff that prefers removal based on a counterclaim will be able to take advantage of federal jurisdiction only when all the third-party defendants to the counterclaim file notices of removal or otherwise consent to removal. But that result is much more consistent with the federal removal scheme than a rule that would prevent third-party counterclaim defendants from removing. For one thing, the statutory scheme *already* allows certain parties that have no right to remove on their own to enjoy the benefit of removal by other parties they are aligned with. Section 1446 provides that a defendant that fails to file a notice of removal within the prescribed 30-day window (and therefore waives its right to remove) can nevertheless enjoy the benefits of removal if it acquiesces to a removal notice filed by a later-added defendant that does not miss its deadline. 28 U.S.C. § 1446(b)(2)(B), (C). That calculus reflects how important the right of removal is to every party brought into state-court proceedings against its will.

In addition, this Court has explained that one reason a plaintiff is not entitled to remove in response to a counterclaim is that the plaintiff should understand when he files in state court that a defendant has the right to assert a counterclaim—and when the plaintiff opts to file in state court anyway, he should be made

to stick with his choice. *West*, 73 U.S. (6 Wall.) at 142. The same can be said of an original defendant who asserts a counterclaim against the plaintiff *and* against third-party defendants: he should know that the third-party defendants have the right to remove if they all agree.

Determining whether a particular claim can form the basis of removal and who has the right to remove it should be made from the perspective of the claim itself. If a counterclaim satisfies the criteria for removing a case on the basis of diversity jurisdiction—a determination that will require assessment of, *inter alia*, the amount in controversy as to that claim and the extent to which the parties to that claim are diverse—it can provide the basis for removal. By the same token, if a party is an out-of-state *defendant* to a claim that can provide the basis of removal, that party is entitled to remove (assuming the timing and unanimity requirements are satisfied), even if the claim is asserted as a counterclaim. The only *exception* to that rule is when the defendant voluntarily invoked the jurisdiction of the state court by filing the original action in state court; such a party cannot later reject the state court's jurisdiction. Courts should determine which parties qualify as a "defendant" for removal purposes from the perspective of the claim—and should permit removal by defendants to a qualifying claim when those defendants did not voluntarily choose the state-court forum.

In sum, the federal statutes governing removal textually confer that right on "the defendants" in qualifying cases. The text in no way limits the right of removal to original defendants. Because a third-party counterclaim defendant is indisputably a defendant, it

should be entitled to remove under Section 1441(a) in the same way that any other defendant brought involuntarily into state-court proceedings can.

C. The History and Purposes of General Removal Provisions Confirm That Third-Party Counterclaim Defendants Have the Right to Remove Under Section 1441(a).

In addition to examining the text of the operative removal provision, the Court in *Shamrock Oil* considered the context that gave rise to that text: the history and purposes of federal removal statutes. 313 U.S. 104-109. That approach was consistent with how this Court addressed removal questions during the first century of the Republic. In keeping with that tradition, an examination of the history and purposes of removal compels the conclusion that the text of Section 1441(a) means what it says: a party that is a defendant and only a defendant has the right to remove.

1. The history of federal removal provisions is directly tied to the history of federal jurisdiction more generally, and to federal diversity jurisdiction in particular. The creation in Article III, Section 2 of federal judicial jurisdiction over "Controversies . . . between Citizens of different States" was animated by a concern about local prejudices that might disadvantage out-of-state litigants. U.S. Const. art. III, § 2. Indeed, the creation of federal courts more generally was in part a response to "the friction between individual states which came to the surface after the danger of the common enemy had disappeared." Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 8 (2d ed. 2007). In the debates surrounding the Constitu-

tional Convention, James Madison argued that federal jurisdiction over disputes between citizens of different States was important because "a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them." 3 *Elliot's Debates* 533 (2d ed. 1836). Alexander Hamilton echoed that concern, arguing that "the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens" because a federal court "will be likely to be impartial between the different states and their citizens." *The Federalist No. 80*, at 537 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). This Court has also explained, in reference to the 1789 Act, that "[o]ne great object in the establishment of the Courts of the United States and regulating their jurisdiction was, to have a tribunal in each state, presumed to be free from local influence; and to which all who were nonresidents or aliens might resort for legal redress." *Gordon v. Longest*, 41 U.S. (16 Pet.) 97, 104 (1842). As a matter of logic, the Framers' concern about local bias extends equally to original out-of-state defendants and to out-of-state third-party defendants.

Although the Framers established in the Constitution the jurisdictional boundaries of the lower federal courts, they left it to Congress to determine both how to structure those courts and how much of the federal judiciary's potential jurisdiction to actualize at any point in time. The first Congress turned to that task immediately by enacting the 1789 Act. Because the Act reflected a compromise between Federalists and Anti-Federalists, *see* Scott R. Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609, 616-617 (2004), it did not authorize lower federal courts to exercise the full range of jurisdiction recog-

nized in the Constitution, instead leaving significant areas of potential federal jurisdiction in the hands of state courts. With respect to diversity jurisdiction, Section 11 of the 1789 Act gave federal courts concurrent (with state courts) jurisdiction over "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars" and "the suit is between a citizen of the State where the suit is brought, and a citizen of another State." § 11, 1 Stat. at 78.

2. In the same Act that first endowed lower federal courts with diversity jurisdiction, Congress created the right of removal in cases that would have satisfied the criteria for diversity jurisdiction but were filed in state court. Section 12 of the 1789 Act provided that "if a suit be commenced in any state court . . . by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, . . . the defendant" may file a petition of removal to the appropriate federal court and "the cause shall there proceed in the same manner as if it had been brought there by original process." § 12, 1 Stat. at 79.

This Court has repeatedly held that Congress's goal in creating removal jurisdiction was to protect a defendant's right to invoke the protections afforded by federal jurisdiction in appropriate cases. As the Court explained in *Martin v. Hunter's Lessee*:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised

> exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

14 U.S. (1 Wheat.) 304, 348 (1816). The Court has also explained that Congress initially created removal jurisdiction in part for the same reason it created lower federal courts: to protect against local bias and prejudices that might disadvantage an out-of-state party in state-court litigation. *See Gaines v. Fuentes*, 92 U.S. 10, 19 (1876); *Ry. Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 289 (1872). An out-of-state third-party defendant is just as susceptible to bias as any out-of-state defendant.

Even when Congress amended the general removal provision in 1867 and again in 1875 to permit both plaintiffs and defendants to remove, it sought to protect against local prejudice. As this Court explained at the time, in reference to the 1867 statute, "the experience of parties immediately after the [Civil W]ar, which powerfully excited the people of different States, and in many instances engendered bitter enmities, satisfied Congress that further legislation was required fully to protect litigants against influences of that character." *Gaines*, 92 U.S. at 19. In 1887, when that heightened risk of local prejudice had subsided, Congress restored earlier removal restrictions by once again expressly limiting the right of removal to out-of-state defendants. 1887 Act § 1, 24 Stat. at 553. That restriction remains today. 28 U.S.C. § 1441.

Although the 1887 version of the general removal provision referenced local prejudice as an alternative

ground for removing a suit between citizens of different States, 24 Stat. at 553, modern versions of the general removal statute no longer provide that alternative or require an express showing of reason to fear local prejudice as a justification for giving defendants the right to remove. As the "Historical and Revision Notes" to Section 1441 explain, when the laws governing general removal were codified as Section 1441, "[a]ll the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, [were] discarded" because they "have no place in the jurisprudence of a nation since united by three wars against foreign powers." 28 U.S.C. § 1441 note. But modern removal continues to guard against potential prejudice by authorizing diversity-based removal by out-of-state defendants. And some specialized removal provisions are still designed to combat local prejudice. *See* p. 43, *infra*. More generally, modern removal provisions continue to serve the other longstanding animating purpose of removal: protecting a defendant's right to invoke original federal jurisdiction in a suit over which state and federal courts have concurrent jurisdiction.

3. Significantly, the Court has long understood that *both* plaintiffs and defendants should have the right to invoke federal diversity jurisdiction in a qualifying case—*but* that a plaintiff's right to do so is protected in a different manner than a defendant's. In controversies over which a federal court would have diversity jurisdiction, a plaintiff may protect its right to invoke federal jurisdiction by filing the suit in federal court. But when such a plaintiff instead invokes the concurrent jurisdiction of a state court, Congress

has sought through removal jurisdiction to protect the defendant's right to invoke federal diversity jurisdiction. Discussing the earliest forms of removal jurisdiction, the Court explained that the "protection" that diversity jurisdiction provides "to non-residents of a State was originally supposed to have been sufficiently secured by giving to the plaintiff in the first instance an election of courts before suit brought; and where the suit was commenced in a State court a like election to the defendant afterwards." *Ry. Co.*, 80 U.S. (13 Wall.) at 289. With respect to Section 12 of the 1789 Act in particular, the Court has noted that the right of removal was "given to the defendant only, as the plaintiff, when he initiates his suit, may elect in which of the two concurrent jurisdictions he prefers to go to trial." *Case of the Sewing Mach. Cos.*, 85 U.S. (18 Wall.) 553, 573-574 (1874).

The original-plaintiff rule of *Shamrock Oil* perfectly reflects the essential nature of removal: the right of removal is limited to defendants brought into state court involuntarily as a counterbalance to the plaintiff's preexisting right to elect the judicial forum at the outset. If a plaintiff were entitled to remove after choosing the state forum, it would get two bites at the federal-election apple. Congress could have created that type of removal scheme (and did between 1867 and 1887), but it has chosen instead to give each party one opportunity to elect a federal forum for an action over which state and federal courts have concurrent jurisdiction. A party that "voluntarily resort[s], as [a] plaintiff[], to the State court . . . [is] bound to know of what rights the defendants to [its] suit might avail themselves under" the rules governing proceedings in that State. *West*, 73 U.S. (6 Wall.)

at 142. When such a plaintiff "[s]ubmit[s]" itself to the state court's "jurisdiction [it] submit[s itself] to it in its whole extent." *Ibid.* Appropriate respect for "[t]he power reserved to the states under the Constitution to provide for the determination of controversies in their courts," *Shamrock Oil*, 313 U.S. at 108-109, has prompted Congress to preserve concurrent jurisdiction and to grant to federal courts something *less* than the full extent of original jurisdiction allowed by the Constitution. The same respect supports the rule that a party that voluntarily invokes state process should abide by its choice.

But the exact same considerations explain why the original-plaintiff rule of *Shamrock Oil* should not be misconstrued as an original-defendant rule—*i.e.*, should not be extended to prevent removal by a third-party counterclaim defendant. A third-party defendant to a counterclaim is not a plaintiff under any definition of that word. It is a defendant and only a defendant, brought into a case through service of process just like any other defendant. *See West*, 73 U.S. (6 Wall.) at 141, 142. A third-party counterclaim defendant has no role in choosing a state-court forum. And, just like any other state-court defendant in a suit over which a federal court could exercise original jurisdiction, a third-party counterclaim defendant has a statutory right to elect to proceed in federal court.

This Court has long understood the importance of an out-of-state defendant's right to remove. More than a century ago, in holding that a state-court plaintiff cannot frustrate an out-of-state defendant's removal right by failing to correctly identify the defendant's State of citizenship, the Court explained that a plaintiff "cannot cut off defendant's constitutional *right* as

a citizen of a different State than the plaintiff, *to choose a Federal forum*." *Tex. & Pac. Ry. Co. v. Cody*, 166 U.S. 606, 609 (1897) (emphases added). The Court later explained that the 1888 predecessor to modern removal provisions "withheld the right of removal from the plaintiff, who always has a choice of forums, and gave the right to the [out-of-state] defendant." *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 660 (1923).

The purpose of the federal removal scheme is *not* to protect a plaintiff's right to choose a state forum; it is to give to the *defendant* the same right to choose a federal forum where original federal jurisdiction exists that the plaintiff has when he files the initial suit. A plaintiff can waive his right to choose a federal forum by filing suit in state court—and under *Shamrock Oil*, that waiver applies both to the plaintiff's claims against the defendant and to the defendant's counterclaims against the plaintiff. But a plaintiff's election of an initial state forum should not have the effect of waiving a *different* party's right to elect a federal forum to adjudicate a counterclaim when that party is involuntarily brought into the case as a third-party defendant.

Treating *Shamrock Oil*'s original-plaintiff rule as an original-defendant rule—as nearly all federal courts of appeals have done—makes no sense in light of the history and purposes of removal. It also has no basis in the text of Section 1441(a) or its predecessor statutes. The original defendant is not the only defendant who is hauled into state court against its will. And the original defendant is not the only defendant who has a right to have a qualifying controversy adjudicated in federal court. Third-party counterclaim

defendants and original defendants are in *exactly the same situation* with respect to such considerations. And unless or until Congress provides a statutory basis for distinguishing between the two groups, third-party counterclaim defendants should have the same removal rights as original defendants. This Court should therefore hold that the rule of *Shamrock Oil* does not extend to third-party counterclaim defendants.

II. The Class Action Fairness Act Of 2005 Independently Authorizes A Third-Party Class-Action Counterclaim Defendant To Remove A Qualifying Class Action.

If this Court holds, as it should, that a third-party counterclaim defendant has the right to remove under Section 1441(a)—because it is a defendant and therefore qualifies as one of "the defendants"—it follows *a fortiori* that a third-party defendant to a qualifying class-action counterclaim is entitled to remove pursuant to 28 U.S.C. § 1453(b), which was enacted as part of the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, and gives "any defendant" the right to remove. The courts of appeals' unanimous holdings to the contrary are premised on the misperception that *Shamrock Oil* defined the word "defendant" in all removal provisions to mean only a defendant to the original plaintiff's claims. For the reasons discussed above, that interpretation is incorrect. But even if this Court were to hold that a third-party counterclaim defendant cannot remove under Section 1441(a) because the phrase "the defendant or the defendants" includes only defendants to the original plaintiff's claims, that would not answer the other question presented. Regardless of how the Court

resolves the Section 1441 issue, it should hold that a third-party counterclaim defendant to a qualifying class action *can* remove under Section 1453(b)—because that provision uses a different phrase to describe the parties entitled to remove and was enacted for the express purpose of making it easier for class-action defendants to remove.

A. The Text of Section 1453(b) Confirms That a Third-Party Defendant to a Class-Action Counterclaim Can Remove.

The Fourth, Sixth, Seventh, and Ninth Circuits agree: the statutory term "any defendant" in Section 1453(b) does not mean what it says. Those courts are wrong and their decisions should be reversed or abrogated.

1. The courts of appeals' narrow interpretation of removal authority under CAFA has no basis in the text of that statute or in the text of any related removal provision. As always, statutory interpretation must begin with the plain text of a statute, "assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009)) (brackets in original). In that endeavor, the Court has emphasized that it "must enforce plain and unambiguous statutory language according to its terms." *Ibid.*

As relevant here, CAFA provides that a class action satisfying certain requirements "may be removed to a district court of the United States in accordance with" 28 U.S.C. § 1446, "except that such action may be removed *by any defendant* without the consent of

all defendants," *id.* § 1453(b) (emphasis added). The statutory language at issue—"any defendant"—could scarcely be clearer. The word "any" means "one or some indiscriminately of whatever kind," *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)); the word "defendant" means "[a] person sued in a civil proceeding," *Black's Law Dictionary* 508 (10th ed. 2014); *see also* Fed. R. Civ. P. 20(a)(2)(A) (providing that persons "may be joined in one action as defendants if . . . any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction[or] occurrence"). This Court held in *Mississippi ex rel. Hood v. AU Optronics Corp.*, that when Congress used "plaintiffs" in CAFA, it intended the term to have its ordinary meaning as used in the Federal Rules of Civil Procedure. 571 U.S. 161, 169-170 (2014). There is no reason "defendant" in CAFA's removal provision should be given any different treatment—and the Rules plainly consider a third-party defendant that is an original defendant to a counterclaim to be a "defendant." *See*, *e.g.*, Fed. R. Civ. P. 12. Home Depot indisputably qualifies as "any defendant" under the ordinary meaning of that phrase.

By granting the right of removal to "any defendant" in Section 1453(b), Congress significantly departed from Section 1441(a), which restricts removal power to "the defendant or the defendants." When Congress enacted Section 1453(b), courts of appeals had overwhelmingly held that Section 1441(a) does not permit third-party counterclaim defendants to remove. *See Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332 (4th Cir. 2008) ("For more than fifty

years, courts applying *Shamrock Oil* have consistently refused to grant removal power under § 1441(a) to third-party defendants . . . .”). But Congress chose to use a *different* phrase to define the class of defendants entitled to remove in Section 1453(b). “[U]sually at least, when [this Court is] engaged in the business of interpreting statutes [the Court] presume[s] differences in language like this convey differences in meaning.” *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017).

In choosing to depart from the language of Section 1441(a), Congress could hardly have chosen a more expansive word than “any” to define the class of defendants entitled to remove. “[I]t is a rule of law well established that the definite article ‘the’ particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of ‘a’ or ‘an.’” *Am. Bus Ass’n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (quoting *Brooks v. Zabka*, 450 P.2d 653, 655 (Colo. 1969) (en banc)). In contrast, as noted, “[r]ead naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” *Gonzales*, 520 U.S. at 5 (quoting *Webster’s Third*, *supra*, at 97). Accordingly, “Congress’ use of ‘any’ to modify ‘[defendant]’” in CAFA “is most naturally read to mean [defendants] of whatever kind.” *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008). Home Depot is a defendant “of whatever kind” in this matter—in fact, its *only* role in this litigation is as a defendant to class-action claims. Under the plain meaning of Section 1453(b), therefore, Home Depot should have been permitted to remove this case to federal court.

2. The reasons offered by the courts of appeals to support their contrary conclusions do not hold water.

a. First, courts of appeals have unanimously misconstrued *Shamrock Oil* as defining the word "defendant" in all removal statutes to include only defendants to an original plaintiff's claims. As discussed, that is an incorrect interpretation of *Shamrock Oil*. But even if this Court views *Shamrock Oil* as precluding removal by a third-party counterclaim defendant, that rule would apply only to Section 1441(a) (the successor to the provision at issue in *Shamrock Oil*), which uses the phrase "the defendant or the defendants," not "any defendant."

Because of potentially overly broad language in *Shamrock Oil*, courts of appeals have erroneously viewed that decision as defining the word "defendant" in removal provisions. *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355 (7th Cir.) (explaining that *Shamrock Oil* "established" the meaning of "the term 'defendant'"), *cert. denied*, 137 S. Ct. 2138 (2017); *Westwood Apex*, 644 F.3d at 804 (9th Cir.) (noting that *Shamrock Oil* "established [the] meaning of 'defendant' in Chapter 89 of the Judicial Code"); *see* Pet. App. 9a; *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012); *Palisades*, 552 F.3d at 334-335 & n.4 (4th Cir.). The circuit courts' understanding of the holding of *Shamrock Oil*—which extends beyond both the question presented and the statutory text at issue in *Shamrock Oil*—is based on a misunderstanding of particular language in the Court's opinion. In the course of explaining the evolution of the general removal statute, for example, the Court noted that Congress had for the most part "given the privilege of

removal to 'defendants' alone." *Shamrock Oil*, 313 U.S. at 105; *see id.* at 107.

Of course, the Court in *Shamrock Oil* had no occasion to consider whether the statutory term "the defendants" would encompass a party who was not an original plaintiff, did not voluntarily submit itself to the jurisdiction of the state court on a claim that could be heard in federal court, and could not be described as a "plaintiff" in any sense of that word. Moreover, none of the reasoning the Court employed to explain its holding that an original *plaintiff* could not remove a case under the general removal statute would apply to a party that was brought into a matter through service of process as an original defendant to a counterclaim: such a party did not select the state-court forum, *Shamrock Oil*, 313 U.S. at 106 n.2, and permitting removal by such a party would not "save a right of removal to some plaintiffs and not to others," *id.* at 108. Thus, regardless of how the Court resolves the application of Section 1441(a) to third-party counterclaim defendants, the Court should not view *Shamrock Oil* as defining "defendant" in all removal statutes going forward.

Because courts of appeals view *Shamrock Oil* as setting in stone the definition of "defendant" (albeit an incorrect definition) for all removal statutes, they have felt bound to ignore the plain meaning of the phrase "any defendant." *See*, *e.g.*, *Tri-State Water Treatment*, 845 F.3d at 354 (relying on explanation in *First Bank v. DJL Properties, LLC*, that "'[a]ny' is inclusive, to be sure, but the word that it modifies remains 'defendant' [as defined] under *Shamrock Oil*," 598 F.3d 915, 917 (7th Cir. 2010)). The Seventh Circuit has explained that, "[i]f the drafters of [CAFA] wanted to negate

Shamrock Oil, they could have written 'defendant (including a counterclaim defendant)'" but instead "chose the unadorned word 'defendant,' a word with a settled meaning." *First Bank*, 598 F.3d at 917; *see Tri-State Water Treatment*, 845 F.3d at 354 ("*First Bank* does much of the work that is necessary to resolve the present appeal."). This Court has expressly *rejected* that type of could-have reasoning to circumvent the plain meaning of statutory text. In the course of interpreting the phrase "any other law enforcement officer" in *Ali*, this Court explained:

> Petitioner would require Congress to clarify its intent to cover all law enforcement officers by adding phrases such as "performing any official law enforcement function," or "without limitation." But Congress could not have chosen a more all-encompassing phrase than "any other law enforcement officer" to express that intent. We have no reason to demand that Congress write less economically and more repetitiously.

Ali, 552 U.S. at 221. So too here: there is no reason to demand that Congress specify each type of defendant who may remove under CAFA when Congress has already specified that *any defendant* may remove under CAFA. Home Depot is a defendant. Indeed, from Home Depot's perspective, the class action claims are not "counter" to anything—they are simply class-action claims asserted against Home Depot and other defendants. Home Depot is the defendant to those claims under any ordinary meaning of that term. *See* Fed. R. Civ. P. 12; *see also* Fed. R. Civ. P. 13(h) advisory committee's note to 1966 amendment (noting that, "for the purpose of determining who must or may

be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be").

b. Second, courts of appeals have reasoned that the word "defendant" in Section 1453(b) must be construed to mean the same thing that it means in 28 U.S.C. § 1446(b), which sets forth the procedures for removal and uses the phrase "the defendant." *See*, *e.g.*, *Tri-State Water Treatment*, 845 F.3d at 354; *Westwood Apex*, 644 F.3d at 806; *Palisades*, 552 F.3d at 334-335. That explanation ignores the structure and text of the operative statutes.

As a structural matter, it makes little sense to limit the scope of Section 1453(b)'s definition of the class of defendants eligible to remove based on the language of Section 1446, which prescribes the procedures for effectuating a removal. Unlike Sections 1441(a) and 1453(b), Section 1446 does not define, expand, or restrict the category of defendants entitled to remove. Section 1446 simply establishes the procedures under which a qualifying defendant can remove. Section 1453(b) establishes which defendants can remove a qualifying class action ("any defendant"); Section 1441(a) establishes which defendants can remove a qualifying civil action ("the defendant or the defendants"); and Section 1446(a) provides the mechanism for removal by "[a] defendant or defendants desiring to remove any civil action from a State court." If either Section 1453(b) or Section 1441(a) empowers a defendant to remove a case, that defendant must follow the procedures in Section 1446(a).

Courts' reliance on Section 1446 also makes little sense in light of Section 1453(b)'s express instruction

that courts should *depart* from the default rules in Section 1446(b). Section 1453(b) provides that a class action may be removed "in accordance with" Section 1446 "*except that* such action may be removed by *any defendant* without the consent of all defendants." 28 U.S.C. § 1453(b) (emphases added). Congress could not have been clearer in expressing its intent to establish removal authority for class actions that is *different* in scope from the general removal authority set forth in Sections 1441 and 1446.

Some courts of appeals, including the court below, Pet. App. 7a (citing *Palisades*, 552 F.3d at 335), have dismissed Congress's use of an "except" clause by noting that the phrase following "except" has the effect of departing from Section 1446's baseline rule that a defendant cannot remove a case without the consent of all other defendants. It is true that part of the text that follows "except" accomplishes that goal—by specifying that a defendant can remove an eligible class action "without the consent of all defendants." 28 U.S.C. § 1453(b). But Congress *also* used the phrase "any defendant" to describe the degree to which CAFA removal is "except[ed]" from the background removal principles. The introduction of the phrase "any defendant" (rather than "the defendant" as used in Sections 1441(a) and 1446(b)) would have no purpose—indeed, would be superfluous—if Congress's only goal was to depart from the unanimity rule, a goal it accomplished unambiguously with different statutory text.

c. Finally, the court of appeals below justified its counter-textual reading of "any defendant" by hypothesizing that construing the phrase "any defendant" in its ordinary sense (*i.e.*, to include any defendant) would "invite gamesmanship" by permitting a class-

action defendant that was an original plaintiff "to disrupt unfavorable proceedings in state court." Pet. App. 13a. That reasoning is wrong for two reasons.

First, it ignores that Congress's purpose in enacting CAFA was to permit "any" class-action "defendant" to disrupt unfavorable state-court class-action proceedings. As this Court recently explained in *Dart Cherokee Basin Operating Co. v. Owens*, any anti-removal presumption that might exist with respect to ordinary diversity jurisdiction does not "attend[] cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." 135 S. Ct. 547, 554 (2014).

Second, as explained more fully below, the rule adopted by four courts of appeals invites gamesmanship by class-action plaintiffs, not by class-action defendants. A wily plaintiffs' attorney need only wait for a potential class-action defendant—or, as here, for any other party loosely affiliated with such a potential defendant—to file a run-of-the-mill state-court collection action that can then be transformed into a vehicle for a non-removable class action. That cannot be what Congress intended when it enacted CAFA—and it cannot be what this Court intended when it decided *Shamrock Oil*.

B. Preventing Third-Party Counterclaim Defendants from Removing Class Actions Under Section 1453(b) Significantly Undermines the Purpose of CAFA.

Congress enacted CAFA because the existing "diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses" by preventing large class actions from being adjudicated

in federal court. Senate Report 6. Because existing "law enable[d] 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," *id.* at 10, Congress eased the requirements of removal in the hope of "minimiz[ing] the class action abuses taking place in state courts and ensur[ing] that these cases can be litigated in a proper forum," *id.* at 27; *see id.* at 26 ("Under current law, . . . plaintiffs' lawyers can easily manipulate their pleadings to ensure that their cases remain at the state level.").

This Court directed in *Dart Cherokee* that "CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'" 135 S. Ct. at 554 (quoting Senate Report 43). But the lower courts' narrow reading of Section 1453(b) significantly undermines Congress's purpose by creating a giant "loophole" in CAFA's protections "that only [this] Court can now rectify." *Palisades*, 552 F.3d at 345 (Niemeyer, J., dissenting from the denial of rehearing en banc). Indeed, one commenter has noted that the term "'loophole' may not be an adequate term" because the "rule adopted by" the courts of appeals "is tantamount to a determination that CAFA's removal provision simply has no application to the very substantial proportion of class actions that can be pleaded as counterclaims." Dan Himmelfarb, *Fourth Circuit Ruling Permits Broad Circumvention of Class Action Fairness Act*, Legal Opinion Letter (Wash. Legal Found.), Apr. 10, 2009, at 2 (Himmelfarb).

In particular, as with early versions of the general removal statute, one of CAFA's principal aims was to combat prejudice against out-of-state defendants.

CAFA § 2, 119 Stat. at 5 (codified at 28 U.S.C. § 1711 note) ("Findings" of CAFA include that "State and local courts are . . . sometimes acting in ways that demonstrate bias against out-of-State defendants"). The Senate Report accompanying CAFA explained that the Framers viewed diversity jurisdiction as essential in guarding against such prejudice. Senate Report 8-9. After cataloguing the types of anti-defendant class-action abuses observed in state courts, the Report explained that, "[g]iven the range and severity of class action abuse, it is not surprising that defendants find it necessary to remove actions against them to a federal forum—a forum where the threat of prejudice is significantly lower." *Id.* at 26. To combat the observed biases against out-of-state defendants, Congress expanded both the reach of diversity jurisdiction and the category of defendants entitled to remove in qualifying class actions.

CAFA has been described as "the most significant legislative reform of complex litigation in American history." Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 Ala. L. Rev. 409, 410 (2008). But the decisions of the Fourth, Sixth, Seventh, and Ninth Circuits provide a roadmap for circumventing the clear purpose of the Act. A plaintiffs' attorney need not even be particularly enterprising to find a debt-collection proceeding or other minor state-court litigation to use as a vehicle for asserting an interstate class-action claim against an entity that is not even a party to the state-court action. The risk of such behavior is particularly high for class actions asserting consumer-protection claims—a category that comprises a significant percentage of all class actions eligible for federal jurisdiction. Himmelfarb 2. From the perspec-

tive of that class-action defendant, the commencement of a class action as a counterclaim is no different from the commencement of a stand-alone state-court class action—*except* that the counterclaim class action is not removable under the prevailing view of CAFA.

Experience shows that the "unfortunate loophole" Judge Niemeyer warned about in his opinion dissenting from the court's denial of rehearing in *Palisades*, 552 F.3d at 345, has significantly undermined the goals of CAFA. Shortly after CAFA was enacted, a consultant who advised the class-action plaintiff (*i.e.*, the original defendant) in *Palisades* published a law review article encouraging class-action lawyers to exploit this loophole by filing their claims as counterclaims. Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193 (2007) (Tidmarsh). The author explains that "a consumer wishing to hold onto the state forum" for his class-action claim can evade CAFA's removal provisions by "filing a counterclaim class action." *Id.* at 198. Using that "tactic," the article boasts, "the state case suddenly transforms from an individual action with $75,000 or less at stake into a class suit with more than $5,000,000 at stake." *Id.* at 199. The author noted that, although that tactic had already been employed a number of times in the first two years after CAFA's enactment, those cases represented "just the tip of an approaching iceberg." *Ibid.*

The stakes for retailers such as Home Depot are high. Home Depot did not choose the state-court forum in this case and had no control over whether or where the original plaintiff filed its collection action. But because Jackson used the counterclaim tactic to

avoid the removal jurisdiction that CAFA affords, Home Depot is stuck litigating a large class action in a state court of someone else's choosing. Indeed, this is the second class action filed against Home Depot in less than a year that uses this removal-avoiding technique—and the other one was filed in Madison County, Illinois, one of the jurisdictions Congress identified as a "'magnet' jurisdiction[]" for abusive class actions. Senate Report 13; *Tri-State Water Treatment*, 845 F.3d at 352. The stakes for financial institutions are just as high. As the class-action consultant warned in his 2007 article, "financial institutions will need to think carefully before they file collection actions in state courts in which they do not wish to defend their credit and lending policies" against class-action claims. Tidmarsh 199. In this very case, Citibank (the original plaintiff) ultimately abandoned its collection action to avoid being enmeshed in the state-court class action. Class actions were not created for the purpose of deploying that type of coercive pressure—and Congress certainly did not intend to facilitate such behavior when it cracked down on class-action abuses by enacting CAFA.

In the end, this case is a perfect illustration of the gamesmanship prompted by the courts of appeals' misreading of Section 1453(b). After Citibank dropped its collection claims against Jackson, Jackson dropped his class-action claims against Citibank. That leaves us with *only* Jackson's class-action claims against Home Depot and CWS. That is precisely the type of class action Congress intended to be removable under CAFA. But because Jackson was able to initiate his claims as a counterclaim, the courts below held that the class

action must stay in state court. Those holdings should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 1441 provides in relevant part:

§ 1441. Removal of civil actions

(a) GENERALLY.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original 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. § 1446 provides in relevant part:

§ 1446. Procedure for removal of civil actions

(a) GENERALLY.—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending 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.

(b) REQUIREMENTS; GENERALLY.—(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) REQUIREMENTS; REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3)(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an "other paper" under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

* * *

28 U.S.C. § 1453 provides in relevant part:

§ 1453. Removal of class actions

* * *

(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) 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.

* * *