No. 18-1578

IN THE
# Supreme Court of the United States

PFIZER, INC.,
*Petitioner,*
v.

ALIDA ADAMYAN, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit**

## BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Richard A. Samp
(Counsel of Record)
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Date: July 25, 2019

## QUESTION PRESENTED

Congress adopted the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2, to broaden federal court diversity jurisdiction so as to encompass "interstate cases of national importance," CAFA § 2(b)(2), including both class actions and mass actions. CAFA defines a "mass action" as a 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 fact or law." 28 U.S.C. § 1332(d)(11)(B)(i). The federal appeals courts are sharply divided over the meaning of the phrase "proposed to be tried jointly." The question presented is:

When a proposal to coordinate the identical claims of more than 4,300 products-liability plaintiffs is made not by the plaintiffs but by state trial judges, are the plaintiffs' claims "proposed to be tried jointly" within the meaning of § 1332(d)(11)(B)(i)—and thus removable to federal court as CAFA "mass actions?"

## TABLE OF CONTENTS

**Page**

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases:**

**Page(s)**

**Statutes:**



**Miscellaneous:**

## INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.[1] WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared in this and other federal courts to support the right of a defendant in a state-court action to remove the case to federal court. *See, e.g., Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014). In particular, WLF has frequently filed briefs in support of the right of defendants to remove class actions and mass actions to federal court under the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2. *See, e.g., Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019); *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014) (*en banc*).

Congress adopted CAFA to ensure that a state-court defendant would have the option of removing its case to federal court if the suit is substantial and involves many plaintiffs, and minimal diversity exists. WLF is concerned that the decisions below unduly restrict CAFA's intended application.

Indeed, if the decisions below stand, no state-

---

[1] Under Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days before filing this brief, WLF notified all counsel of record of its intent to file. All parties have provided written consent to the filing.

court defendant in any of the nine states comprising the Ninth Circuit will ever again successfully remove a mass action to federal court under CAFA. The decisions below provide plaintiffs' attorneys with a roadmap for keeping their coordinated claims in state court, even when (as here) the consolidation/ coordination involves thousands of plaintiffs.

The order denying Petitioner Pfizer, Inc.'s petition to appeal cited *Coleman v. Estes Express Lines, Inc.*, 627 F.2d 1096 (9th Cir. 2010), which sets out the Ninth Circuit's standards for evaluating CAFA-appeal petitions. That citation, along with statements included in prior Ninth Circuit's decisions, make clear the Ninth Circuit's reason for denying the petition: it agrees with the rationale articulated by the district court for its remand order. Because the remand was based on a clear error of law, the Ninth Circuit abused its discretion in denying review. WLF urges the Court to grant review to correct that error, resolve the inter-circuit conflict over the meaning of 28 U.S.C. § 1332(d)(11)(B)(i), and restore to mass-action defendants the removal rights Congress granted to them under CAFA.

## STATEMENT OF THE CASE

Congress adopted CAFA in 2005 to broaden federal diversity jurisdiction so as to encompass "interstate cases of national importance," CAFA § 2(b)(2), including both class actions and "mass actions," a type of multi-plaintiff lawsuit that CAFA includes within the definition of "class action." 28 U.S.C. § 1332(d)(11)(A).

Congress found that over the preceding decade there had been "abuses of the class action device," including acts by "State and local courts" designed to "keep[ ] cases of national importance out of Federal court" and that "demonstrated bias against out-of-State defendants." CAFA §§ 2(a)(2), 2(a)(4)(A), & 2(a)(4)(B). The legislative history explained, "Current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts." S. Rep. No. 109-14 (2005) at 4. Congress adopted CAFA to, among other things, "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." *Id.* at 7.

CAFA permits the removal to federal court of a "mass action" that meets requirements imposed by 28 U.S.C. § 1332(d)(2)-(11). Respondents Alida Adamyan, *et al.*, do not dispute that most of those requirements are met here: Respondents assert that their claims involve common questions of law and fact, and each claim exceeds the jurisdictional amount, § 1332(d)(11)(B)(i); the aggregate amount in controversy exceeds $5,000,000, § 1332(d)(2)(A); not all parties are citizens of the same State, § 1332(d)(2)(A)(i); almost all of the claims arose outside California (the forum State), § 1332(d)(11)(B)(ii)(I); and the claims were not joined at the behest of the defendant, § 1332(d)(11)(B)(ii)(II). Respondents contend, however, that their claims are not removable to federal court because any "propos[al]" that the claims of 100 or more plaintiffs "be tried jointly" originated with state court judges, not with the plaintiffs themselves. They contend, and the district court agreed, that "the claims of 100 or more persons" are *not* "proposed to be tried jointly," within the

meaning of § 1332(d)(11)(B)(i), unless it is the plaintiffs who make the proposal. Pet. App. 10-13.

Respondents are 4,300 individuals who allege that use of the drug Lipitor (manufactured by Pfizer) caused them to develop Type II diabetes. Beginning in late 2013, Respondents' lawyers filed 156 separate lawsuits in California raising substantially identical claims on behalf of each Respondent. But when divvying up the claimants among the lawsuits, lawyers made sure that no one lawsuit included more than 99 claimants, a strategy designed to forestall removal under CAFA.

Although the 156 lawsuits were never consolidated into a single case, Respondents' lawyers ("JCCP Counsel") in the ensuing years repeatedly took steps to ensure that the lawsuits would be heard together by a single state-court judge. That process began when, on August 13, 2013, they filed (on behalf of a group of Respondents that eventually numbered 65) a petition with the California Judicial Council to have their claims coordinated in a Joint Council Coordinated Proceeding ("JCCP") under California Code of Civil Procedure § 404. Pet. App. 30. The petition sought coordination "for all purposes" and "repeatedly" explained that coordination was "need[ed] to avoid inconsistent judgments and rulings on issues of liability." *Id.* 38, 40. After the petition was granted, JCCP Counsel told the judge overseeing the coordinated proceedings they expected at least 1,855 more Lipitor plaintiffs would join the proceedings. *Id.*

33, 43.[2] In March 2014, the judge established a procedure to facilitate adding more Lipitor cases to the JCCP.

In response, Pfizer removed the Lipitor cases to federal court under CAFA. JCCP Counsel filed a remand motion, which the district court granted in May 2017. Pet. App. 29-48. The court held, based on the Ninth Circuit's *Corber* decision, that Respondents' Section 404 petition constituted "a proposal for a joint trial." *Id.* 37-41. Indeed, the court said that Respondents "could ... not seriously challenge" that holding, noting that the petition "clearly stressed the need for coordination beyond pre-trial proceedings." *Id.* 38-39.[3]

---

[2] When JCCP Counsel filed their Section 404 coordination petition, Ninth Circuit case law held that filing such petitions did not trigger CAFA removal rights. *Romo v. Teva Pharmaceuticals USA, Inc.*, 731 F.3d 918, 923-24 (9th Cir. 2013). But the Ninth Circuit vacated its *Romo* decision in February 2014, granted rehearing *en banc*, and ultimately held that a petition seeking coordination under Section 404 "for all purposes" does, indeed, constitute a proposal that claims "be tried jointly" and thus triggers CAFA. *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014) (*en banc*).

[3] CAFA expressly exempts from the definition of "mass action" any claims that are being coordinated "solely for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV). There is considerable doubt that California law *ever* permits Section 404 coordination of civil actions "solely for pretrial purposes"; one of the statutory prerequisites for granting a coordination petition is a showing that "one judge hearing all of the actions *for all purposes* in a selected site or sites will promote the ends of justice." Cal. Code of Civil Pro. § 404.1 (emphasis added).

The court nonetheless ordered remand after concluding that "100 or more plaintiffs did not propose a joint trial." Pet. App. 41-48.[4] It noted that only 65 Respondents formally joined the Section 404 petition. Although JCCP Counsel told the state-court judge that thousands more Lipitor plaintiffs would be joining the JCCP, the district court characterized those statements as "merely suggestions or predictions," not a CAFA-prescribed "propos[al]." *Id.* 45.

Following remand, JCCP Counsel studiously avoided renewing their Section 404 coordination petition, well aware of the danger that doing so would (per *Corber*) trigger a second removal petition. Indeed, Judge Carolyn Kuhl (the judge overseeing the JCCP) explicitly told the parties that, under California law, cases coordinated under Section 404 are "coordinated for all purposes," not simply for discovery and related pre-trial procedures. Pet. App. 5.

Not surprisingly, state-court judges began to recognize the great difficulties they would face in administering thousands of virtually identical Lipitor claims if the cases remained uncoordinated in the absence of a formal request for coordination by

---

[4] Throughout its two remand orders, the district court repeatedly states that CAFA removal requires a "joint trial" proposal. Many Ninth Circuit opinions include the same phrase. That phrasing inaccurately quotes CAFA, which limits mass actions to proceedings in which 100 or more claims are proposed to be "tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). The inaccurate phrasing likely contributed to the lower courts' erroneous construction of CAFA. A "joint trial" connotes one and only one trial; "tried jointly" conveys no similar connotation.

Respondents. In November 2017, a Los Angeles County Superior Court judge entered an order requesting that Judge Kuhl add 62 cases (involving thousands of Lipitor claimants) to the JCCP even in the absence of a formal Section 404 petition "because it would be 'extremely burdensome' for the state court to handle the cases outside of a coordinated proceeding." Pet. App. 7. When Judge Kuhl solicited the parties' views on the request, JCCP Counsel raised no objection—and helpfully informed her that there were another 81 non-coordinated Lipitor cases (involving thousands more claimants) pending in California state courts. *Id.* 8. Without opposition from the parties, Judge Kuhl issued orders adding all of the Lipitor claims to the JCCP proceedings. *Ibid.*

Those orders led Pfizer to remove the cases to federal court a second time. The district court again remanded them, agreeing with Respondents that "only a proposal by *the plaintiffs*, and not a judge's *sua sponte* order can trigger" mass-action removal rights under § 1332(d)(11)(B)(i). Pet. App. 10.

The court concluded alternatively that although Judge Kuhl's orders brought more than 4,300 Lipitor claims into a single Section 404 coordination proceeding, "she gave no indication that the coordination would be for purposes of a joint trial." Pet. App. 14. It noted that a year earlier she had expressed doubts that a judge would ever attempt to try the claims of 100 claimants simultaneously in a "joint trial" or even before a single jury. *Id.* 5. Based on that statement, the district court concluded that Judge Kuhl could not have contemplated that all 4,300 coordinated claims would be tried simultaneously, and

thus that she should not be understood as having proposed a "joint trial" for CAFA-removal purposes. The court made no effort to reconcile that conclusion with *Corber* or its 2017 finding that Respondents had proposed a "joint trial" when they filed their initial Section 404 petition.

A two-judge Ninth Circuit panel denied Pfizer's petition to appeal the remand order. Its two-sentence denial stated that its decision was based on the factors set out in *Coleman*. Pet. App. 1.

## SUMMARY OF ARGUMENT

This case provides a textbook example of the gamesmanship that Congress sought to eliminate when it adopted CAFA. Congress explained that pre-CAFA law "enable[d] lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state court." S. Rep. No. 109-14 (2005) at 4. CAFA amended removal rules to ensure the availability of a federal forum for defendants in "interstate cases of national importance." CAFA § 2(b)(2).

A "mass action" qualifies as a removable "interstate case of national importance" if, among other things, the monetary claims of 100 or more persons are brought together for trial. By any measure, this case falls easily within the class of cases that CAFA had in mind. Plaintiffs' lawyers rounded up more than 4,300 Lipitor users from across the country and filed virtually identical claims in a single State's courts. They then repeatedly took steps to ensure that all claims would be heard by a single judge. But they insist that because it was a judge, not they, who

proposed that all 4,300 claims be formally coordinated under Section 404, the claims are not removable under CAFA. That contention cannot be squared with the Court's admonition that "CAFA's 'provisions should be read broadly.'" *Dart Cherokee*, 135 S. Ct. at 554 (quoting S. Rep. 109-14 at 43).

Review is warranted because the decisions below conflict both with CAFA's statutory language and with the decisions of two other federal appeals courts. Review is also warranted because the decisions below effectively prevent *all* mass-action removals within the Ninth Circuit. If 4,300 identical claims filed by plaintiffs nationwide and coordinated "for all purposes" by a single judge do not qualify for "mass action" status, it is difficult to imagine any claims that would qualify.

The Ninth Circuit denied a petition to appeal the remand order (filed under 28 U.S.C. § 1453(c)(1)) without addressing the merits of Pfizer's claims. *Dart Cherokee* determined that the Court possesses appellate jurisdiction to review both the denial of a petition to appeal and the underlying remand order. 135 S. Ct. at 555-58.

The Ninth Circuit's decision is subject to review under an abuse of discretion standard. A court abuses its discretion when it bases a ruling on a clear error of law. Such an error occurred here; the circumstances of this case make plain that the Ninth Circuit denied review because it agreed with the district court that CAFA removal is impermissible when the proposal that claims be tried jointly emanates from judges and not the plaintiffs. As the Petition fully explains, both

courts badly misread CAFA.

The Ninth Circuit's agreement with the district court's interpretation of CAFA is evident from its citation to *Coleman*, 627 F.3d at 1100-01. *Coleman* sets out factors for deciding whether the Ninth Circuit should accept a § 1453(c)(1) appeal from a remand order. *Dart Cherokee* sets out a similar set of factors. 135 S. Ct. at 555. All those factors strongly indicate that review was warranted in this case, with one possible exception. The possible exception: *Coleman*'s statement that granting an immediate appeal is appropriate when the question is "unsettled, ... particularly when the question appears to be either incorrectly decided [by the court below] or at least fairly debatable." *Id.* at 1100 (quoting *College of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 38 (1st Cir. 2009)).

Because the Ninth Circuit denied review on the basis of the *Coleman* factors, the only plausible explanation for its denial is a conclusion that Pfizer failed to satisfy the factor listed above—it concluded that the district court's narrow construction of § 1332(d)(11)(B)(i) was correct and was not even fairly debatable. This Court should grant review to determine whether the Ninth Circuit adopted an erroneous interpretation of § 1332(d)(11)(B)(i) and thereby abused its discretion.

Indeed, the Ninth Circuit may very well have already decided the issue against Pfizer in an earlier decision. In *Dunson v. Cordis Corp.*, 854 F.3d 551, 554 (9th Cir.), *cert. denied,* 138 S. Ct. 471 (2017), the appeals court said, "Before separate actions may be

removed to federal court as a 'mass action,' 100 or more plaintiffs must take the affirmative step of proposing to try their claims jointly." While that statement was likely *dicta*—who must do the proposing under § 1332(d)(11)(B)(i) was not at issue—it is a clear indication of the Ninth Circuit's views on the issue raised here. The combination of *Dunson* and the decision below sends a strong message to litigants and district judges alike that a proposal to jointly try claims does not trigger CAFA removal rights within the Ninth Circuit if the proposal emanates from state-court judges.

Delaying review to allow the issue to percolate in the Ninth Circuit would serve no useful purpose. If the Ninth Circuit denied review from a ruling that CAFA removal is unwarranted in a case involving 4,300 identical claims brought together by the state courts "for all purposes," there is no reason to conclude that it will grant future § 1453(c)(1) petitions seeking review of similar remand orders. And Pfizer will have lost all possibility of relief if this Court denies review; it cannot realistically hope to vindicate its removal rights in post-trial proceedings.

## REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Congress adopted CAFA to ensure that large, interstate class actions and mass actions can be removed from state court to federal court. CAFA § 2(b)(2). Yet the right of defendants to remove mass actions will be largely extinguished in the Ninth Circuit if the decisions below are allowed to stand.

It is widely acknowledged that attorneys representing products-liability plaintiffs generally prefer to have their cases heard in state courts selected for their perceived friendliness to tort claims. Congress determined that such favoritism resulted in "abuses" in forum-selection for multi-plaintiff lawsuits, including acts by "State and local courts" designed "to keep[ ] cases of national importance out of Federal court" and that "demonstrated bias against out-of-State defendants." CAFA §§ 2(a)(2), 2(a)(4)(A), & 2(a)(4)(B). Congress adopted CAFA to counter those abuses. CAFA's "primary objective" was to "ensur[e] 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013) (quoting CAFA § 2(b)(2)). CAFA permits removal to federal court of "mass action[s]," whose prerequisites are set forth in 28 U.S.C. § 1332(d)(2)-(11).

Attorneys seeking to prevent removal of multi-plaintiff suits to federal court have focused their arguments on two of CAFA's mass-action prerequisites, both contained in § 1332(d)(11)(B)(i): (1) the action must involve "the monetary relief claims of 100 or more persons"; and (2) the claims must be "proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." By routinely filing multiple lawsuits, each with fewer than 100 plaintiffs, and then taking steps to ensure coordination of the claims through trial, plaintiffs' attorneys seek to prevent a defendant from satisfying CAFA's 100-person prerequisite. They rarely file formal coordination petitions; rather, they generally inform a state judge that many identical claims are pending, and then informally suggest that the court order coordination.

If the state court ultimately orders coordination, they insist that CAFA removal is nonetheless impermissible because they are not the ones who "propose[d]" that the claims "be tried jointly."

The Petition explains why the Ninth Circuit's interpretation of § 1332(d)(11)(B)(i) is in considerable tension with the Tenth Circuit's and Eleventh Circuit's understanding of that statute. WLF writes separately to focus on why it is appropriate for the Court to review an appeals court's denial of a § 1453(c) petition—as it did in both *Dart Cherokee* and *Standard Fire*.

## I. THE COURT SHOULD NOT HESITATE TO REVIEW THE NINTH CIRCUIT'S DENIAL OF PFIZER'S PETITION TO APPEAL THE REMAND ORDER

Most district court orders remanding a case to state court "[are] not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). But because of its desire to ensure the availability of a federal forum for large class actions and mass actions, Congress enacted an exception to nonreviewability in cases removed under CAFA. In CAFA cases, "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand." 28 U.S.C. § 1453(c)(1).

### A. The Court Has Jurisdiction to Review the Ninth Circuit's Decision

In *Dart Cherokee* and *Standard Fire*, the Court granted certiorari petitions in cases in which a district court ordered remand and the court of appeals denied an appeal from the remand order. In each instance,

the Court reached the merits of the remand order and held that the order was based on a misinterpretation of CAFA. In *Dart Cherokee*, the respondent and a supporting *amicus curiae* argued that the Court lacked appellate jurisdiction because the merits of the remand order were not "in" the appeals court, within the meaning of 28 U.S.C. § 1254(1).

*Dart Cherokee*'s rejection of that jurisdictional argument, 135 S. Ct. at 555-58, establishes that the Court possesses jurisdiction to grant Pfizer's certiorari petition. As the Court explained in "find[ing] no jurisdictional barrier" to its review of the remand order, "The case was 'in' the Court of Appeals because of Dart's leave-to-appeal application, and we have jurisdiction to review what the Court of Appeals did with that application." *Id.* at 555.

Section 1453(c)(1) granted the Ninth Circuit discretion in deciding whether to hear Pfizer's appeal from the remand order ("a court of appeals *may accept* an appeal ..."). But as *Dart Cherokee* notes, "Discretion to review a remand order is not rudderless." 135 S. Ct. at 555. Matters of discretion are reviewable for abuse of discretion, and the Ninth Circuit "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Ibid.* As explained below, the evidence indicates that the Ninth Circuit denied the petition to appeal because it has adopted the district court's narrow construction of § 1332(d)(11)(B)(i). Review is warranted to determine whether the Ninth Circuit's interpretation of CAFA is "an erroneous view of the law" and thus whether the Ninth Circuit abused its discretion by basing its ruling on that error.

### B. Review of an Appeals Court's Exercise of Discretion Is Appropriate When, as Here, the Legal Reasoning Underlying the Court's Action Is Clear

The Ninth Circuit provided a succinct explanation of its decision to deny Pfizer's petition for permission to appeal remand. It stated, "*See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010)." Pet. App. 1. *Coleman* sets out factors for deciding whether the Ninth Circuit should accept a § 1453(c)(1) appeal from a remand order. An examination of those factors leads to only one conclusion: the Ninth Circuit denied the petition because it agreed with the district court's restrictive interpretation of § 1332(d)(11)(B)(i). A statement in the Ninth Circuit's 2017 *Dunson* decision reinforces that conclusion. Review is warranted to determine whether the appeals court erred in adopting (and acting on) an interpretation of CAFA that largely forecloses mass-action removals in the Ninth Circuit.

The Ninth Circuit's *Coleman* factors[5] are largely similar to the ones on which this Court focused in *Dart*

---

[5] The Ninth Circuit borrowed its list of factors from the First Circuit's *College of Dental Surgeons* decision. 585 F.3d at 38-39. At about the same time, the Tenth Circuit also borrowed the list. *BP America, Inc. v. Oklahoma*, 613 F.3d 1029, 1034-35 (10th Cir. 2010) (Gorsuch, J.). *Dart Cherokee* cited approvingly to both *College of Dental Surgeons* and *BP America* and used the factors cited in those opinions in attempting to discern the Tenth Circuit's rationale for denying Dart Cherokee's petition to appeal a remand order. 135 S. Ct. at 555.

*Cherokee*—is the CAFA question: (1) "important," (2) "unsettled," and (3) "recurrent"; and (4) "in the absence of interlocutory appeal, will the question in all probability escape meaningful appellate review." 135 S. Ct. at 555.

There is little dispute that all but one of the factors described in *Dart Cherokee* and *Coleman* tipped decidedly in favor of hearing Pfizer's appeal from the remand order:

***Important and Recurrent.*** The appeal raises an important CAFA-related question: is CAFA removal permitted in cases in which the state court (not the plaintiff) proposed that 100+ claims be tried jointly? The issue is CAFA-related; its importance is highlighted by the frequency with which it has arisen in removal disputes and the likelihood that it will recur. Moreover, the issue is outcome-determinative. Whether Judge Kuhl's decision to add thousands of claims to a JCCP proceeding initiated by Respondents' counsel constitutes a § 1332(d)(11)(B)(i) "propos[al]" determines whether 4,300 claims will be heard in federal court or state court.

***Unreviewability.*** The question will evade effective review if interlocutory appeal is denied and the question is left for consideration only after final judgment. According to the Ninth Circuit, when a district court orders remand, "[t]he probability that a state court or the Supreme Court will review the federal jurisdictional question after the merits of the case have been decided is almost non-existent." *Coleman*, 627 F.3d at 1101.

Because the appeals court expressly relied on the *Coleman* factors, and because all but one of those factors indicated that Pfizer's petition should be granted, the only reasonable inference is that the Ninth Circuit determined that the remaining factor (is the question "unsettled" and "fairly debatable"?) pointed strongly in the opposite direction. That is, the court agreed with the district court's construction of CAFA and did not even think the issue was "fairly debatable." *Coleman*, 627 F.3d at 1100.[6]

*Dart Cherokee* teaches that when, as here, an appeals court denies a § 1453(c) petition because it agrees with the district court's construction of CAFA, this Court may properly address *both* whether the appeals court abused its discretion in declining to hear the petition *and* whether the district court's remand order was erroneous. 574 U.S. at 558. Under those circumstances, the two issues "do not pose genuinely discrete questions." *Ibid.* Rather, they both ask whether the lower courts erroneously interpreted CAFA. *Ibid.* If so, the proper course is to rule that the appeals court abused its discretion and to remand with directions for the appeals court to decide the case based on a proper construction of CAFA.

---

[6] This Court reasoned similarly in *Dart Cherokee* when faced with an appeal court's summary denial of a § 1453(c)(1) appeal petition. After examining the factors that the Tenth Circuit (per *BP America*) customarily considers in addressing such petitions, it concluded that the appeals court must have "thought the District Court got it right" when it ordered remand because all of the other factors weighed heavily in favor of accepting Dart Cherokee's appeal. 135 S. Ct. at 556.

Any doubt that the Ninth Circuit's decision was premised on its agreement with the district court's construction of CAFA is largely eliminated by the following statement in a 2017 Ninth Circuit decision: "Before separate actions may be removed to federal court as a 'mass action,' 100 or more plaintiffs must take the affirmative step of proposing to try their claims jointly." *Dunson*, 854 F.3d at 554. That statement leaves no room for an argument that the proposal can come from someone other than the plaintiff, such as the state court. Following *Dunson*, district courts throughout the Ninth Circuit have gotten the message that a tried-jointly proposal is relevant only when it comes from the plaintiff. *See, e.g., Agnello v. Twin Hill Acquisition Co.*, 2018 WL 3972022 at *5-*7 (N.D. Cal. 2018).

Respondents may suggest an alternative basis for the Ninth Circuit's denial of permission to appeal: the appeals court may have concluded that not even the state court's Section 404 coordination order constituted a proposal that Respondents' claims be "tried jointly." Any such assertion is without merit. The *en banc* Ninth Circuit held in *Corber* that when, as here, 100+ cases are coordinated in California state court under Section 404 "for all purposes," the prerequisites of § 1332(d)(11)(B)(i) are satisfied, and CAFA permits mass-action removal. 771 F.3d at 1223. The two-judge panel that denied Pfizer's petition was bound by *Corber* and thus was not free to endorse the district court's alternative holding that the establishment of a 4,300-claim JCCP (whether proposed by the court or the plaintiffs) does not

constitute a proposal that the claims be tried jointly.[7]

## II. WITHOUT IMMEDIATE REVIEW OF THIS IMPORTANT CAFA ISSUE, PFIZER WILL BE DENIED ANY POSSIBILITY OF RELIEF

The importance of the Question Presented and the frequency with which it arises in CAFA-removal cases is widely acknowledged. This case is a good vehicle for resolving the inter-circuit conflict over the issue, and there is no reason to delay that resolution.

Delaying resolution to permit additional "percolation" of the issue within the Ninth Circuit would serve no useful purpose. District courts within the Ninth Circuit are unanimous that only "propos[als]" emanating from the plaintiffs are sufficient to trigger CAFA mass-action removal rights. The Ninth Circuit's 2017 *Dunson* decision is a very strong indicator that the Ninth Circuit agrees with the district courts' statutory construction, and its denial of review in this case confirms that indication. If the Ninth Circuit denied review from a ruling that CAFA removal is unwarranted in a case involving 4,300 identical claims brought together "for all purposes," there is no reason to conclude that it will ever grant future § 1453(c) petitions seeking review of similar remand orders.

The petition squarely presents the Question

---

[7] The district court's alternative holding directly contradicted its earlier holding that Respondents "could ... not seriously challenge" that their Section 404 petition constituted "a proposal for a joint trial." Pet. App 38.

Presented, and resolution of that question is outcome-determinative. If the Court determines that CAFA removal rights can be triggered by a "propos[al]" emanating from a state court, then Pfizer's right to remove this case to federal court will be clear. (The Ninth Circuit determined in *Corber* that coordinating 100+ claims under Section 404 "for all purposes" meets § 1332(d)(11)(B)(i)'s "tried jointly" requirement.) If, on the contrary, the Court determines that only a plaintiff's proposal can trigger CAFA removal, then the Respondents' claims will be tried in state court.

Moreover, the importance of the Question Presented to Pfizer and similarly situated defendants cannot be overstated. Pfizer will have lost all possibility of relief if this Court denies review; it cannot realistically hope to vindicate its removal rights in post-trial proceedings.

## III. REVIEW IS WARRANTED BECAUSE THE DECISIONS BELOW ARE INCONSISTENT BOTH WITH CAFA'S PLAIN TEXT AND ITS PURPOSES

Review is also warranted because the decisions below are inconsistent both with CAFA's plain text and its purposes. Pfizer has explained at length why closing the federal courthouse door to Pfizer contravenes Congress's express desire to provide a federal forum for large multi-plaintiff lawsuits of this sort. Rather than repeating those arguments here, WLF focuses on several points that warrant special emphasis.

First, § 1332(d)(11)(B)(i) defines "mass action" 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." (Emphasis added.) The word "any" is all-encompassing. Had Congress intended to limit mass actions to only a subset of civil actions in which "claims are proposed to be tried jointly," it would not have included the word "any." Similarly, use of the passive verb phrase "are proposed" implies that more than one category of persons may do the proposing. If Congress had intended the narrow interpretation of § 1332(d)(11)(B)(i) adopted by the courts below, it most likely would have said so directly, as follows: " ... in which *the plaintiffs* propose that monetary relief claims of 100 or more persons be tried jointly ..." It did not, and the Ninth Circuit may not re-write the statute.

Second, CAFA lists four categories of cases that are excepted from the definition of a "mass action." One of those four exceptions is based on the identity of the person proposing that multiple claims be joined:

> [T]he term "mass action" shall not include any civil action in which ... (II) the claims are joined upon motion of a defendant.

28 U.S.C. § 1332(d)(11)(B)(ii)(II). That exception is inapplicable here; Pfizer played no role in the decision to coordinate Respondents' claims. But the existence of the exception demonstrates that Congress focused on the who-is-doing-the-proposing issue. By creating an exception for claims coordination brought about at the behest of defendants while creating no other similar exceptions, CAFA signals that coordination brought about at the behest of entities other than the defendants (such as state courts) are not excepted.

Third, the district court's alternative holding—that even if CAFA removal can be triggered by a "propos[al]" emanating from a state court, the state court in this case never proposed a "joint trial"—was based on a misreading of § 1332(d)(11)(B)(i). CAFA's "tried jointly" prerequisite does not limit removal to those instances in which someone proposes that the claims of all plaintiffs be tried simultaneously in a single proceeding. That prerequisite is satisfied whenever, as is mandated in Section 404 proceedings, the claims are coordinated "for all purposes" and not simply for purposes of discovery and other pre-trial proceedings. Requiring more would spell the end of all removals of mass actions to federal court.[8] And, as noted earlier, the Ninth Circuit's *Corber* decision rejected the district court's narrow definition of "tried jointly"—a clear indication that the appeals court did not base its denial of the § 1453(c)(1) petition on the district court's alternative holding.

---

[8] As Judge Kuhl explained in a JCCP ruling that the district court quoted at length, although California law contemplates that claims coordinated under Section 404 will be "coordinated for all purposes," it simply is not possible for the coordinating judge to try the thousands of coordinated cases "together, either at the same time or before one jury." Pet. App. 5. Because of insurmountable logistical obstacles, no one would ever propose a "joint trial" of the sort that Respondents insist is necessary to meet § 1332(d)(11)(B)(i)'s "tried jointly" requirement. Respondents' counsel are well aware of this.

## CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Dated: July 25, 2019