No. 23-1024

In the Supreme Court of the United States

COUNTRY MUTUAL INSURANCE COMPANY,
PETITIONER,

v.

ANGELA SUDHOLT, ET AL., RESPONDENTS.

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

BRIEF OF THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The National Association of Mutual Insurance Companies ("NAMIC") consists of more than 1,500 member companies, including seven of the top ten property/casualty insurers in the United States.[1] It supports local and regional mutual insurance companies on main streets across America as well as many of the country's largest national insurers. NAMIC member companies represent 68 percent of homeowner, 56 percent of automobile, and 31 percent of the business insurance markets. Through its advocacy programs, NAMIC promotes public policy solutions that benefit member companies and the policyholders they serve and fosters greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

The American Property Casualty Insurance Association ("APCIA") is a leading national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 63 percent of the U.S. property-casualty insurance market, including 50 percent of all personal lines and 73 percent of all commercial lines. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits amicus curiae briefs in

[1] In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief pursuant to Rule 37.2.

significant cases before federal and state courts, including this Court.

SUMMARY OF ARGUMENT

Congress enacted the Class Action Fairness Act ("CAFA") because companies across the country—and insurance companies in particular—were being forced to litigate class actions with interstate reach in state courts that were often ill-equipped to handle these cases appropriately, and sometimes hostile to or biased against defendants. Plaintiffs were forum-shopping class actions affecting multiple different states to so-called "magnet" jursidictions where they knew they would enjoy a strategic advantage and could extract significant settlements for weak or even frivolous claims.

CAFA sought to fix this problem by vastly broadening federal jurisdiction over class actions with an interstate reach so that these cases could (and would) be heard in federal court. Indeed, as this Court has recognized, this is CAFA's "primary objective." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013). Congress, moreover, was specifically concerned that insurance class actions with interstate implications would be heard in federal court. This concern is evidenced by the fact that one of the primary examples of abuse cited by the Senate Report on CAFA is an insurance case out of Illinois. It is also evidenced by Congress's finding that insurance class actions were at special risk for undue settlement pressure. Therefore, it is eminently clear that this case is one that Congress intended to be heard in federal court. It meets the requirements for jurisdiction—amount in controversy greater than $5 million and minimal diversity—and has significant interstate reach because the relief requested would affect Country

Mutual's surplus in states beyond Illinois, and thus directly affects policyholders in those other states.

The decision below is contrary to this purpose. It reads broadly two exceptions to federal jurisdiction, even as Congress instructed courts to interpret these provisions narrowly so that federal jurisdiction would apply except in rare circumstances where disputes were truly local in nature. First, it gives too wide a scope to the home-state exception. Under that exception, a district court must decline jurisdiction if the "primary defendants" are all citizens of the state in which the action was filed. 28 U.S.C. § 1332(d)(4)(B). The decision below, however, held that an individual defendant is not a "primary defendant" if the class plaintiffs also sued another defendant with deeper pockets, i.e., Country Mutual as opposed to its former officer who is indisputably a citizen of another state, Massachusetts. That interpretation cannot be squared with Congress's objective, as it would frequently allow plaintiffs to avoid federal jurisdiction simply by suing individuals alongside an insurance company. Second, the decision below reads the internal affairs exception too broadly. That exception applies where the class claims all relate to the "internal affairs or governance of a corporation." *Id.* § 1332(d)(9)(B). The lower court interpreted this to mean that if plaintiffs allege garden-variety contract and statutory claims that are built on the same nucleus of facts as a claim about internal governance, then the case must be heard in state court. But Congress never intended this. Congress wanted to ensure that claims focused *entirely* on corporate governance stayed in state court, not provide a loophole for class actions to avoid federal jurisdiction over standard breach of contract and consumer protection claims.

Because both of these interpretations deepen splits among the circuits, the decision below increases the risk that insurance companies will be forced to litigate in "magnet" jurisdictions. Unless this Court intervenes, insurance companies will face unwarranted barriers to removal in many circuits—and deep uncertainty in others—which will both increase pressure to settle unmeritorious cases and increase the risk of excessive judgments. That is a significant issue for not only insurance companies, but more importantly for their policyholders, who are disadvantaged when finite resources must be diverted to satisfy the exorbitant costs of abusive class litigation.

ARGUMENT

I. The decision below deprives insurance companies of the federal forum that Congress intended.

A. CAFA was the product of Congress's substantial concerns with state courts adjudicating class actions of interstate reach and national importance.

Congress enacted CAFA in 2005 to address "abuses of the class action device" that "adversely affected interstate commerce" and "undermined public respect for our judicial system." CAFA, Pub. L. No. 109-2, § 2(a)(2)(B)-(C), 119 Stat. 4 (2005). Some of these abuses occurred in federal court, but "compelling evidence" demonstrated that the most "serious abuses" were "occurring primarily in state courts," and specifically in a handful of "magnet" jurisdictions. S. Rep. No. 109-14, at 52-53 (2005) ("S. Rep."). State courts, Congress found, manage busy dockets with sparse resources, hampering their ability to adjudicate large, complex class actions with nationwide impact.

1. A primary impetus for enacting CAFA was Congress's determination that state courts were not appropriately adjudicating class action suits and were often favoring class action plaintiffs. State courts were "keeping cases of national importance out of Federal court," "acting in ways that demonstrate[d] bias against out-of-State defendants," and "making judgments that impose[d] their view of the law on other States and b[ound] the rights of the residents of those States." CAFA § 2(a)(4)(A)-(C).

Congress found, for example, that "state courts ignore the due process rights of out-of-state defendants by denying them the opportunity to contest the plaintiffs' claims against them." S. Rep. at 21-22. This included not only the merits of claims but adjudicating the class device itself. *See* 151 Cong. Rec. 2431 (Feb. 16, 2005) (statement of Rep. Goodlatte) (noting the preponderance of class actions in state courts that "are overwhelmingly biased and favorable to the plaintiffs in a class action").

Moreover, Congress was concerned that state courts "often are inclined to certify cases for class action treatment not because they believe a class trial would be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial." S. Rep. at 20-21. In one of the most "egregious" examples cited in the Congressional record, a "class [was] certified before the defendant ha[d] a chance to respond to the complaint, or in some cases, ha[d] even received the complaint." *Id.* at 22 (citing multiple examples, including "a Tennessee state court [that] certified a nationwide class just four days after the defendants were served with the complaint (and obviously without benefit of any input from defendants)").

When courts grant class certification, it puts significant pressure on defendants to settle even frivolous lawsuits. As Congress explained, "[b]ecause class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly." *Id.* at 20. "Hence, when plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success." *Id.* at 21.

While the great majority of state court judges undoubtedly did—and continue to do—their best to resolve all claims fairly and thus minimize structural pressure to settle, Congress nonetheless found that state court judges often lacked the resources and docket space to appropriately "deal with complex cases like class actions." *Id.* at 51. The Senate Report explained that state courts "have comparatively crushing caseloads," with the average state court judge being "assigned three times as many cases as his or her federal counterparts." *Id.* at 51-52. At the same time that state court judges have more cases, they also have "far fewer resources for dealing with huge, complex cases, like class actions." *Id.* at 52. "Federal court judges usually have two or three law clerks; state court judges often have none." *Id.* Moreover, "federal court judges usually can delegate aspects of their cases (e.g., discovery issues) to magistrate judges or special masters," whereas "state court judges typically lack such resources." *Id.* The end result is that "federal judges scrutinize class action allegations more strictly than state judges and deny certification in situations where a state judge might grant it improperly." *Id.* at 53.

2. With these identified abuses by some state court judges and the limited resources available to others came the strong incentive for plaintiffs to forum-shop. *See* 51 Cong. Rec. 2660 (Feb. 17, 2005) (statement of Rep. Smith) (describing "forum shopping" as "one of the worst problems in class actions today"). Congress found that class counsel not only sought to stay in state court but also sought out specific jurisdictions where the risk of abuse was highest. Class-action plaintiffs would frequently file in a small number of "magnet" jurisdictions, even when there was no material connection to the claim at issue. S. Rep. at 13; *see also* 151 Cong. Rec. 2636 (Feb. 17, 2005) (statement of Rep. Sensenbrenner) (noting that "[a] major element of the worsening crisis is the exponential increase in State class action cases in a handful of 'magnet' or 'magic' jurisdictions"); 151 Cong. Rec. 2652 (Feb. 17, 2005) (statement of Rep. Shays) ("Attorneys are increasingly filing interstate class actions in State courts, mostly in what are known as 'magnet' jurisdictions.").

Congress's forum-shopping findings were not merely speculation or guesswork. Congress cited studies demonstrating that state "venues with reputations as hotbeds for class action activity" showed exponential increases in the number of class actions filed in the years before CAFA was enacted. S. Rep. at 13. As one witness put it, "I think it is clear that the explosion of class action filings can only be attributed to the fact that certain members of the plaintiffs' bar have discovered that some of our state courts can be a fertile playing field for class litigation." *Id.* at 14 n.48 (quoting statement of Stephen G. Morrison).

B. Congress sought to cure the abuses it identified by greatly expanding the availability of a federal forum.

CAFA was Congress's solution for stopping both these abuses and plaintiffs' forum shopping to capitalize on them. Congress concluded that "the federal courts"—not the state courts—"are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy." S. Rep. at 27. The law's "primary objective" was accordingly simple: "ensuring '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)); *see also* S. Rep. at 74 ("[CAFA] targets activity with substantial effects on interstate commerce."); *id.* at 5 ("[CAFA] corrects a flaw in the current diversity jurisdiction statute . . . that prevents most interstate class actions from being adjudicated in federal courts").

CAFA achieves this objective by substantially lowering the barriers to entry into federal court. It confers federal jurisdiction over class actions "in which the matter in controversy exceeds the sum or value of $5,000,000" and where minimal diversity is present. 28 U.S.C. § 1332(d)(2). Minimal diversity occurs when at least *one* party's citizenship differs from the citizenship of one party on the other side of the case. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967). This is a departure from the complete diversity typically required for federal jurisdiction in which *no* plaintiff and *no* defendant may be citizens of the same state. *Id.* at 530-31. In addition to broadening federal jurisdiction as a substantive matter, CAFA made it procedurally easier

for litigants to obtain a federal forum. Among other things, it eliminated the bar on removal by in-state defendants in diversity actions, 28 U.S.C. § 1441(b)(2), and ensured that defendants had a right to appeal remand decisions, 28 U.S.C. § 1453(c)(1).

These provisions "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2); *see also* S. Rep. at 43 ("expand substantially federal court jurisdiction over class actions"). The Founders "believed that, consciously or otherwise, the courts of a state may favor their own citizens" resulting in "[b]ias against outsiders [becoming] embedded in a judgment of the state court." S. Rep. at 8 (Justice Frankfurter paraphrasing James Madison) (cleaned up). Therefore, Congress wanted to provide "the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court." *Id.* at 5 (quotation omitted); *id.* at 54 (Diversity jurisdiction is meant to "allow interstate businesses to have claims against them heard in federal court under diversity so as to avoid local biases and to promote and enhance, rather than hamper, interstate commerce.").

Because Congress, through CAFA, sought to provide a federal forum for class actions with interstate effects, Congress emphasized—and this Court has reiterated—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." *Id.* at 43 (quoted by *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014)*; see also Dart Cherokee*, 574 U.S. at 89 (stating that "no anti-removal presumption attends cases invoking CAFA").

C. This case—a significant insurance matter with substantial interstate effects on policyholders in multiple states—is precisely the type of matter that Congress intended to proceed in a federal forum.

When Congress enacted CAFA, it had cases like this one in mind as prime examples of class actions of national importance that deserve a federal forum.

Congress knew that class actions in which plaintiffs make allegations against insurance companies and seek remedies that affect their policyholders across the country are particularly prone to abuse. Indeed, the Senate Report uses an insurance class action case from Illinois—*Avery v. State Farm Mutual Automobile Insurance Co.*, 321 Ill. App. 3d 269, 746 N.E.2d 1242 (2001)—as a prime example of a suit for which CAFA is supposed to provide a federal forum. S. Rep. 24-25. In *Avery*, State Farm, as well as other auto insurers, had a practice of specifying the use of non-original equipment manufacturer ("OEM") parts for auto repairs. *Id.* at 24. Many states permit or even require insurers to specify the use of non-OEM parts in repairs, and State Farm disclosed the practice to policyholders. *Id.* Despite that, a group of State Farm policyholders sued, alleging breach of contract and fraud on behalf of a class of policyholders on the basis that the non-OEM parts were allegedly inferior to OEM parts. *Id.* Plaintiffs obtained a $1.3 billion class verdict against State Farm, affecting policyholders nationwide, and re-writing state insurance law. *Id.* at 25. To Congress, that type of case with interstate effects cried out for a federal forum.

Congress also highlighted that a federal forum for insurance class actions was critical because the insurance industry was particularly vulnerable to the types of

"blackmail settlements" prevalent in the state courts. *See supra* pp. 5-6. The Senate Report noted testimony from the D.C. Insurance Commissioner, who said that "insurance companies are often forced to settle lawsuits even though the challenged actions were fully in accordance with state law—or encouraged by state policies." *Id.* at 21. As an example, he cited a case in which automobile insurance companies, driven by "mounting legal expense and negative publicity," came to a $36 million settlement *Id*. Even if an insurance defendant prevails at least in some part on appeal, the costs to litigate even unmeritorious claims are often enormous, and there is always the risk that an unfair or erroneous judgment becomes final. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 835 N.E.2d 801 (2005) (affirming judgment in part and reversing in part after seven years of litigation).

This case is a prime example of a suit for which CAFA is supposed to provide a federal forum. Respondents in this case are four Illinois policyholders who allege that Country Mutual is obligated by their contracts to provide a class of policyholders with "at cost" insurance coverage and challenge Country Mutual's administration of its $3.5 billion surplus reserve designed to ensure the protection of all of Country Mutual's policyholders *nationwide*.[2] Pet.App.2a, 22a-23a. As Country Mutual explained to the district court, since this surplus "is not

[2] Mutual insurance companies maintain a surplus—the balance of their assets and liabilities—as a reserve for higher than expected claims payments. Julia Kagan, *Policyholder Surplus: What it is, How it Works*, Investopedia (Sept. 29, 2023), https://perma.cc/WU23-UQR6. Surplus is also used by rating companies to assess the financial health of insurers. *Id.*

allocated to any particular state . . . any injury resulting from its alleged failure to provide insurance at its cost would be felt by all Country Mutual policyholders throughout the country." *Id.* at 22a-23a Indeed, 45% of Country Mutual premiums were paid by non-Illinois policyholders, and Country Mutual does business in 18 states other than Illinois. *Id.* at 23a. Any verdict or settlement of this case would necessarily have national impact and, as in *Avery*, affect policyholders and the operation of law in other states. Specifically it could drain the surplus reserve that exists for the benefit of those out-of-state policyholders as well. However, the risks inherent in litigation, and particularly costly litigation in an unfavorable forum, put pressure on Country Mutual—as it would any other similarly situated insurer—to consider settlement.

That this case arises from St. Clair County, Illinois, and one of the primary defendants resides outside the state only further demonstrates that the Seventh Circuit should have affirmed the district court's decision to avoid the risk of abuse and to satisfy CAFA's purposes. Congress specifically identified St. Clair County as a class action "magnet" prone to abuse, and thus concluded that cases like this one need a federal forum to escape this and other such state forums. S. Rep. at 13; *id.* at 52 (explaining that CAFA would "leave[] most legitimately local disputes in state court, while ensuring that large, interstate class actions like those typically brought in Madison and St. Clair counties and other magnet courts can be heard in federal court"). This is especially true given the risk of bias against out-of-state defendants like Defendant Robert H. Bateman, former Chief Financial Officer of Country Mutual, who is a citizen of Massachusetts. Pet.App.3a, 53a.

II. The Seventh Circuit's decision to apply the home-state and internal affairs exceptions is contrary to Congress's intent and encourages the very problems CAFA intended to cure.

Although CAFA includes exceptions for certain cases to remain in state court, those exceptions are narrow and should not be interpreted contrary to CAFA's primary objective–namely, broadening federal jurisdiction. The Seventh Circuit's decision nonetheless construed both the home-state exception and the internal affairs exception expansively and contrary to CAFA's text and purpose. This error sets a dangerous precedent that will eliminate a federal forum for many class actions—including class actions against insurance companies, to the detriment of both those companies and their policyholders.

A. The lower court's interpretation of the home-state exception is inconsistent with CAFA's objective.

CAFA's home-state exception provides a narrow exception to federal jurisdiction that applies when, despite the technical existence of minimal diversity, concerns about state-court abuse are lessened because the primary defendants are from the same state as the plaintiff and the court. *See* S. Rep. at 36. The exception thus does *not* apply where a primary defendant against whom relief is sought is from another state. By holding that a plaintiff seeking to hold the defendant's former CFO liable for a massive amount of damages nevertheless qualifies for this exception, the lower court disregarded CAFA's *raison d'etre* and opened the door for abuse.

The home-state exception states that a district court "shall decline to exercise jurisdiction" over a class action in which "two-thirds or more" of the proposed plaintiff

class and the "primary defendants" are all citizens of the state in which the action was originally filed. 28 U.S.C. § 1332(d)(4)(B). The decision below construes "primary defendants" exceedingly narrowly to exclude defendants against whom full relief is sought on claims of direct liability, so long as there is another defendant with "deepe[r] pockets." *Sudholt v. Country Mut. Ins. Co.*, 83 F.4th 621, 629 (7th Cir. 2023) (holding that former CFO was not a primary defendant because he did "not stand as [an] equal defendant[] alongside Country Mutual," which "no doubt" has the "deepest pocket in the case"); Pet.App.14a. That is directly contrary to CAFA's objective of providing a federal forum when a case has diverse defendants and interstate effects, particularly in light of Plaintiffs' allegations and the office Defendant Bateman held during his tenure at Country Mutual.

Congress "intend[ed] that 'primary defendants' be interpreted to reach those defendants who are the real 'targets' of the lawsuit–i.e., the defendants that would be expected to incur most of the loss if liability is found." S. Rep. at 43. This undoubtedly includes any defendant who would be liable to a significant portion of the class, or for a significant portion of the judgment. In other words, anyone who is a "real target" of the litigation. *Vodenichar v. Halcón Energy Props., Inc.*, 733 F.3d 497, 505 (3rd Cir. 2013). But to the extent that was not already clear, Congress further explained that "the term 'primary defendants' should include "*any* person who has *substantial exposure* to significant portions of the proposed class in the action, particularly any defendant that is allegedly liable to the vast majority of the members of the proposed classes (as opposed to simply a few individual class members)." S. Rep. at 43 (emphasis added).

That "primary defendants" must include any defendant with potential and substantial direct liability to the class is confirmed by CAFA's local controversy exception. That exception requires class plaintiffs to establish four things: (1) more than two-thirds of the class members are citizens of the state in which the case was originally filed, (2) at least one defendant from whom "significant relief is sought" and whose "alleged conduct forms a significant basis for the claims" is a citizen of that state, (3) the "principal injuries" sustained by class members were incurred in that state, and (4) "no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons" within the previous three years. 28 U.S.C. § 1332(d)(4)(A). By delineating four specific conditions (all of which must be satisfied) for when a controversy is truly local, Congress made clear that defeating federal jurisdiction on grounds that a controversy does not raise issues of interstate concern and does not pose bias risks *should* be difficult. *Cf. Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state."). The decision below, however, would allow class plaintiffs—including the class plaintiffs here—to bypass the local controversy exception's strict rules and instead rely on an expansive reading of the home-state exception to the detriment of "CAFA's purpose of preventing "bias against out-of-State defendants." CAFA § 2(a)(4)(B).

The facts of this case only highlight the danger of expansively reading the home-state exception. Were it to stand, the decision below would deprive insurance companies and their policyholders of the benefit of a law that

was designed to protect them, and, by extension, their policyholders (which include a significant number in other states). Class plaintiffs who sue an insurance company and diverse defendants on issues of interstate importance could, at least in some Circuits, avoid federal jurisdiction simply by speculating that the insurance company defendant will be better able to satisfy any judgment. That is not interpreting CAFA "broadly, with a strong preference that interstate class actions should be heard in a federal court." *Dart Cherokee*, 574 U.S. at 89 (quoting Senate Report at 43).

B. The lower court's interpretation of the internal affairs exception is inconsistent with CAFA's objective.

The lower court also interpreted the "internal affairs" exception to federal jurisdiction expansively and without proper regard for Congress's objective of ensuring a federal forum except in rare circumstances.

Under the internal affairs exception, a class action over which there is otherwise federal jurisdiction must be heard in state court if it "*solely* involves a claim" that "relates to the internal affairs or governance of a corporation" and "arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized." 28 U.S.C. § 1332(d)(9)(B) (emphasis added). The decision below construed this exception to mean that so long as each of a plaintiff's claims in some way relates to an internal corporate governance issue, the case must be heard in state court. *Sudholt*, 83 F.4th 627-28. The panel reasoned that although class plaintiffs brought garden-variety breach of contract, unjust enrichment, and Illinois consumer-protection act claims against the insurer in addition to purported breach of fiduciary duty claims against individual

director and officer defendants, it saw "no way to adjudicate any of these claims without immersion into the boundaries of the discretion afforded by Illinois law to officers and directors of a mutual insurance company to set capital levels and make related decisions about surplus distributions to policyholder members." *Id.* at 623-24.

This interpretation is contrary to how Congress intended the exception to apply. First and foremost, Congress "intend[ed] that this exemption be narrowly construed." S. Rep. at 45. That alone indicates that the decision below was in error, as there is nothing "narrow" about construing an exception applying to litigation "solely" involving corporate governance claims as also applying to run-of-the-mill contract and consumer-protection claims.

Second, and relatedly, Congress included this exception to CAFA in deference to established doctrine that "only one State should have the authority to regulate a corporation's internal affairs . . . because otherwise a corporation could be faced with conflicting demands." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) (citing Restatement (Second) of Conflict of Laws § 302 cmt. b (1971)); *see* S. Rep. at 45 n.129 (citing *Edgar*). Congress thus had competing preferences: to move class actions involving interstate disputes or effects to federal court, while keeping in state court cases that involve issues of internal corporate governance. Congress decisively resolved that tension, however, by making clear that the exception only applies when the litigation *solely* involves issues related to how a corporation governs its own internal affairs. As the Senate Report explained, the exception applies "only" to "litigation based solely on (a) state statutory law regulating the organization and

governance of business enterprises . . .; (b) state common law regarding the duties owed between and among owners and managers of business enterprises; and (c) the rights arising out of the terms of the securities issued by business enterprises." S. Rep. at 45. By instead holding that breach of contract and consumer protection claims cannot be litigated in federal court simply because they implicate some facts and issues asserted in a breach of fiduciary duty claim, the lower court's decision is contrary to CAFA's objectives. There is simply nothing in the Senate Report's rationale for the internal-affairs exception that contemplates the holding articulated by the court below.

This error poses a particular problem for mutual insurance companies. "Mutual companies do not have shareholders," rather "in addition to being customers, mutual policyholders possess distinct governance and other control rights in the company." Lawrence S. Powell, *What It Means to be Mutual*, NAMIC 2, 18 (2017), https://perma.cc/JB7W-5ZNY. Because policyholders also have certain governance and control rights in their capacity as members of the mutual company, policyholders who allege ordinary breach of contract claims and claims that the insurer violated a governing consumer-protection statute also often seek to characterize their claims as implicating their governance and control rights, as was done here. If the lower court's decision were to stand, mutual insurance companies—that CAFA was designed to help protect—would be required to litigate in "magnet" jurisdictions claims about how they treat policyholders in their capacity as customers anytime those policyholders claim that they are entitled to additional rights by virtue of their status as members of the mutual. *Cf. LaPlant v. Northwestern Mut. Life Ins.*

Co., 701 F.3d 1137, 1140 (7th Cir. 2012) (observing that "[o]ne logical implication of holding that a dispute between annuitants and mutual insurers [about annuitants' entitlement to payments under their policies] relates to the insurer's internal affairs would be that any dispute about the meaning of *any* of the issuer's policies relates to the firm's internal affairs.").

III. The decision below increases the risk that insurance companies will be forced to litigate in "magnet" jurisdictions, which ultimately harms policyholders.

The now-deepened split of authority with respect to both the home-state exception and the internal affairs exception makes it more difficult for insurance companies to obtain a federal forum in a circuit where many of these companies are based, and it foments confusion in district courts within the circuits that have not yet taken sides on the issues. The uncertainty and increased vulnerability to adverse jurisdictional decisions harms not only insurance companies, but also their policyholders.

As Petitioners explain in their petition for certiorari, the Circuits are split as to whether a defendant's ability to pay should be considered when assessing whether that defendant qualifies as a "primary defendant." *See* Pet.16-21. Before the decision below, the Third, Ninth, and Eleventh Circuits said "no," opting instead to evaluate a broader range of considerations to identify the "target defendant," whereas the Fifth Circuit said "yes." *Id.* Now, however, the split is sharpened, with a 2-3 split that will only cause more confusion and uncertainty for insurance companies in the seven circuits that have not yet addressed the question. Without this Court's intervention, the district courts in these circuits will be left to

grapple with the issue themselves, thus leading to more confusion and uncertainty. *See Brook v. UnitedHealth Grp. Inc.*, No. 06 CV 12954, 2007 WL 2827808, *5 (S.D.N.Y. Sept. 27, 2007) (collecting cases showing that "courts have taken varying approaches" including analyzing which defendant "is most able to satisfy a potential judgment"); *McCracken v. Verisma Sys., Inc.*, No. 6:14-CV-06248(MAT), 2017 WL 2080279, at *4 (W.D.N.Y. May 15, 2017) (implicitly taking the side of the Third, Ninth, and Eleventh Circuits by *rejecting* the notion that only the defendant with the "deepest pockets" is a "primary defendant").

Likewise, the split on the internal affairs question that this Petition presents is deepened by the Seventh Circuit's decision. The Seventh Circuit joined the Second and Ninth Circuits in holding that class actions must be remanded to state court when run-of-the-mill claims (like a breach of contract or consumer-protection claim) are predicated, at least in part, on facts that implicate corporate governance, leaving the Fourth Circuit as the only other Circuit to have reached the opposite conclusion. In those circuits with no binding authority, district courts are understandably confused. *See, e.g.*, *Johnson v. W2007 Grace Acquisitions I, Inc.*, No. 13-2777, 2014 WL 12514892, at *4 (W.D. Tenn. July 28, 2014) (denying motion to remand where plaintiffs brought insider trading claims, which were considered outside of the definition of "internal affairs"); *see also Tuttle v. Sky Bell Asset Mgmt., LLC*, No. C 10-03588 WHA, 2011 WL 208060, at *6 (N.D. Cal. Jan. 21, 2011) ("[F]ederal jurisdiction under CAFA cannot be defeated by adding a claim that falls within a § 1332(d)(9) exception to a class action complaint advancing one or more other claims." (citation omitted)).

This increased risk of class actions being remanded to state court has profound implications for insurance companies and their policyholders, especially as class plaintiffs inevitably seek to game the circuit splits with forum-shopping and creative pleading. Insurance companies are more likely to settle class plaintiffs' claims, even if those claims are entirely unmeritorious, in order to avoid the heightened risk of remand. The insurance companies that choose to fight for a federal forum and lose will inevitably pay an even higher settlement price. And companies faced with either the prospect or the reality of remand to a "magnet" jurisdiction like St. Clair County, Illinois, will likely feel pressure to pay yet an even higher settlement price. This is, of course, a substantial harm to insurance companies. But more importantly, it is a substantial harm to the policyholders that these companies serve, as they are adversely impacted by the decrease in surplus intended to satisfy valid claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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