No. 07-1246

IN THE

Supreme Court of the United States

HANNA STEEL CORP., *et al.*,

Petitioners,

v.

KATIE LOWERY, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* DRI IN SUPPORT OF PETITIONERS

CARTER G. PHILLIPS*
JACQUELINE G. COOPER
RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

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INTEREST OF *AMICUS CURIAE* DRI[1]

The Defense Research Institute ("DRI") is an international organization that includes more than 22,000 attorneys engaged in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—especially on national issues—consistent.

To promote its objectives, DRI participates as *amicus curiae* in cases that raise issues of vital concern to its membership and the judicial system. This is just such a case. DRI believes that resolution of the important federal jurisdiction and procedural issues that the Petition squarely presents is critical because the lower courts have fractured severely over the burden of proof that a defendant must carry in establishing the amount in controversy for removing a diversity suit to federal court and over the means for obtaining the necessary proof. The issues presented affect a substantial number of cases that are removable on the basis of diversity jurisdiction, as well as class and mass actions that are removable

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief. Petitioners and respondents have consented to the filing of this brief and letters reflecting their consent have been filed with the Clerk of Court.

under the recently-enacted Class Action Fairness Act of 2005 ("CAFA"). Indeed, the confusion fostered by the divergent and conflicting standards applied by the lower courts, as well as the outcomes that will result from the stringent standard adopted by the court of appeals below, create the very impediments to federal court review of cases with national implications that Congress sought to eliminate with the passage of CAFA. Because the right of removal is an issue of particular significance to defendants, DRI's members are frequently confronted with the precise issues raised by the Petition, and their clients are affected by the lack of a clear, uniform rule.

DRI opposes the stringent standard adopted by the court of appeals below for evaluating the amount-in-controversy minimum and its categorical rule disallowing jurisdictional discovery for those seeking to establish it. But what is of paramount importance now is that this Court should grant review in order to resolve the conflict in the lower courts. Adoption of a uniform rule that governs all future federal courts in their review of removal petitions is essential, and will prevent unseemly and unfair forum-shopping and bring consistency and predictability to removal actions.

INTRODUCTION

Petitioners have presented a thorough statement of the case (which DRI will not repeat) and have demonstrated persuasively the split among lower courts on the issues presented, as well as various reasons why this Court should grant the Petition. *Amicus* DRI fully supports review of these issues and submits this brief to highlight significant additional reasons why this Court should grant certiorari.

This case squarely implicates a long-standing and well-defined circuit split. This mature conflict presents a compelling case for intervention by this Court as it falls squarely within the Court's traditional duty to ensure uniformity on issues of federal court jurisdiction and procedure. In addition, the recent adoption of CAFA renders the need for intervention even more urgent, as the disparate standards used by the circuits disrupt the very purposes of CAFA, which creates an additional class of cases in which the amount-in-controversy issue is of central importance.

Furthermore, the lack of uniformity on the important issues of jurisdiction and procedure raised by the Petition will lead to inappropriate forum-shopping, particularly in class and mass actions governed by CAFA. Indeed, the stark disparity between the Eleventh Circuit's standard, as well as others like it, and the more defendant-favorable standards in other circuits inevitably will cause plaintiffs who desire to remain in state court to file in Circuits whose rules favor plaintiffs. Such forum-shopping merely to defeat defendants' rights of removal serves no useful purpose and should not be countenanced. The Court has regularly granted certiorari to establish uniformity on issues of federal jurisdiction and procedure and should do so now.

REASONS FOR GRANTING THE PETITION

I. THE WELL-ACKNOWLEDGED AND LONG-STANDING CONFLICT ON THE BURDEN A DEFENDANT SEEKING REMOVAL MUST SATISFY IN PROVING THE AMOUNT IN CONTROVERSY WHEN DAMAGES ARE UNSPECIFIED COMPELS THIS COURT'S INTERVENTION.

1. As the Petition demonstrates, this Court has not confronted the standard for establishing the amount-in-controversy minimum in removal cases since *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938). See Pet. at 18-21. *St. Paul* addressed only the standard for defeating removal based on diversity jurisdiction when the plaintiff's complaint specifies damages, *St. Paul*, 303 U.S. at 288-89, and did not address the specific issues presented in the Petition.

Critically, this Court did not have occasion to address the first issue presented because it has arisen as a result of standards adopted by the Federal Rules of Civil Procedure (in the same year that the Court decided *St. Paul*) and state rules patterned after the Federal Rules. Specifically, two types of state rules have a significant impact on removal and have given rise to the issue presented. First, many States permit notice pleading and do not require plaintiffs to plead a sum certain in their complaints; indeed, many flatly prohibit plaintiffs from claiming a specific amount of damages. See, *e.g.*, Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 Mo. L. Rev. 681, 686-90 (1997); see also *Singer* v.

State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 375-76 (9th Cir. 1997); *De Aguilar* v. *Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995).

Second, and relatedly, most States have adopted the standard embodied in Federal Rule 54(c), which permits plaintiffs to recover well in excess of any amounts stated in their complaints. See Am. Law Inst., *Study of the Division of Jurisdiction Between State and Federal Courts* § 1381(c), at 345 (1969) (explaining that construction of "Rule 54(c) and corresponding state provisions" to permit "recovery of damages in excess of those demanded … is nearly universal"); Noble-Allgire, *supra*, at 686-90 (noting the problem of state statutes that do not require plaintiffs to specify damages, but then allow recovery in excess of any amount stated in the complaint); 14C Charles Alan Wright et al., *Federal Practice & Procedure* § 3725, at 96 (3d ed. 1998). As a result, defendants frequently are saddled with a heavy burden when they attempt to remove diversity cases based only on bare pleadings, even as they face potential damages well in excess of any jurisdictional threshold.

As the Petition demonstrates in detail, in the seven decades since this Court decided *St. Paul*, lower courts have deeply fractured over the precise burden a removing defendant must carry when damages are unspecified. See Pet. at 10-14 (describing the various standards employed). Indeed, Wright & Miller's *Federal Practice & Procedure* and *Moore's Federal Practice*—two authoritative treatises on federal jurisdiction—devote no fewer than 31 pages and six pages, respectively, to listing the divergent decisions on this issue. 14C Wright et al., *supra* § 3725, at 89-95; *id.* § 3725, at 45-68 (2007 suppl.); 16 James Wm. Moore et al., *Moore's Federal Practice* § 107.14[2][g],

at 107-86.1 to 107-86.4 (3d ed. 2008). Accordingly, it would be hard to find a more compelling example of a clear division in the lower courts that results in disparate outcomes.

2. The current lack of uniformity on this issue of federal jurisdiction and procedure especially warrants this Court's review. It goes without saying that standards for federal jurisdiction and procedure should be uniform. This Court has proclaimed unequivocally that "there should be a consistent practice in dealing with jurisdictional questions." *McNutt* v. *Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178, 188 (1936). Indeed, there is nothing more wasteful than having to litigate over where to litigate. Moreover, the very purpose of the Federal Rules was to create a single uniform system of procedure, Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 Mercer L. Rev. 757, 780 (1995) (quoting Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 Cornell L.Q. 443, 448 (1935)), and, indeed, Congress charged this Court with the responsibility to "prescribe uniform Rules to govern the 'practice and procedure' of the federal district courts and courts of appeals," *Burlington N. R.R.* v. *Woods*, 480 U.S. 1, 5 n.3 (1987) (quoting 28 U.S.C. § 2072).

Further, this Court has not hesitated to grant certiorari to resolve legal conflicts about the standards governing removal to federal court. See, *e.g.*, *Murphy Bros., Inc.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999); *Wis. Dep't of Corr.* v. *Schact*, 524 U.S. 381, 392 (1998); *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 126 (1995); *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), *abrogated on other grounds by Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996);

Shamrock Oil & Gas Corp. v. *Sheets*, 313 U.S. 100, 103 (1941). It should do so now.

3. Heightening the real-world impact of this conflict and the urgent need for this Court's review is Congress's recent enactment of CAFA. CAFA establishes original jurisdiction in the district courts over diversity-of-citizenship class and mass actions in which the amount in controversy exceeds $5,000,000. 28 U.S.C. § 1332(d)(2). Thus, CAFA creates another category of cases in which the "amount in controversy" is a decisive issue in determining the appropriate judicial forum.

Significantly, a key purpose of CAFA was to amend "current law" which "enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." S. Rep. No. 109-14, at 4 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 5-6. Indeed, Congress intended CAFA to "make[] it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction," *id.* at 5, *as reprinted in* 2005 U.S.C.C.A.N. at 6, noting that "class action lawyers typically misuse the jurisdictional threshold to keep their cases out of federal court," *id.* at 10-11, *as reprinted in* 2005 U.S.C.C.A.N. at 11-12.

This problem, however, is exacerbated by the current conflict in the lower courts because courts use the same standard for determining whether the $5,000,000 threshold is satisfied in CAFA removal cases that they use in determining whether the $75,000 threshold is satisfied in diversity removal cases. See, *e.g.*, 28 U.S.C. § 1453(b) (removal under CAFA follows the procedures of § 1446); *Guglielmino* v. *McKee Foods Corp.*, 506 F.3d 696, 699-700 (9th Cir.

2007) (noting the application of prior standards to CAFA cases). Because of this, CAFA cases immediately became embroiled in the lower courts' fractured approaches to establishing federal jurisdiction. See, *e.g.*, Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. Pa. L. Rev. __ (forthcoming June 2008), draft at 17-20, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014966 ("If anything, the CAFA cases have added to the confusion.").

The lack of a uniform standard runs counter to Congress's intent in enacting CAFA. Congress was concerned with plaintiffs "gaming the system" by employing procedural rules to defeat jurisdiction. But the split among courts will allow plaintiffs to continue to game the jurisdictional system. Indeed, as demonstrated below, plaintiffs will gravitate toward those jurisdictions that make removal more difficult and, thus, engage in rank forum-shopping. This will create "magnet" jurisdictions that will attract CAFA cases purely because the standards to defeat removal are friendlier to plaintiffs. Only review and a decision by this Court can prevent this unseemly process and waste of resources.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE THE SPLIT AT ISSUE, IF LEFT UNRESOLVED, WILL INCREASE FORUM-SHOPPING.

Variant practices on important issues of jurisdiction and procedure, like those here, inevitably give rise to forum-shopping. The more that significant rules of procedure and jurisdiction "vary, the greater the amount of likely forum shopping." Chemerinsky & Friedman, *supra* at 782. And lack of uniformity and forum-shopping result in inefficien-

cies and added costs on the parties and courts. *Id.* at 782-83.

The conflicts here concerning the standard a removing defendant must meet to establish the amount in controversy and the methods it may employ in doing so make the danger of forum-shopping especially acute.

1. The removal statute operates amid the competing desire of plaintiffs to have their forum of choice and the importance of federal jurisdiction over cases of federal significance. Generally, plaintiffs control the content of the complaint and the choice of forum. At least one recent study suggests that plaintiffs' attorneys often choose to file in state court because they believe that the state forum will result in more favorable outcomes for their clients: "data reveal that one of the strongest factors in [a plaintiff] attorney's choice of [a state] forum is the attorney's perception of a judicial predisposition to rule in favor of interests like those of the attorney's client." Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 599 (2006); *id.* at 611 (concluding, in a study of attorney choices between state and federal forums, that plaintiffs' "[a]ttorneys tended to file in the jurisdiction they thought would be predisposed to their clients' interests").

However, defendants have a statutory "right of removal" when the enumerated statutory requirements for removal are satisfied. *E.g.*, *St. Paul*, 303 U.S. at 293. The reasons for this critical right inhere in the Founders' rationales for creating a federal court system in the first place. As Chief Justice Marshall explained:

> However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of United States v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), *overruled on other grounds*, *Louisville, Cincinnati & Charleston R.R.* v. *Letson*, 43 U.S. (2 How.) 497 (1844); see also *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) (Story, J.) ("The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."). In other words, "[a]s seems to be true of the original diversity of citizenship jurisdiction of the federal courts, the right of removal probably was designed to protect nonresidents from the local prejudices of state courts." 14B Wright et al., *supra* § 3721, at 289.

Befitting a mechanism that ensures against local bias, the removal statute, as this Court has acknowledged, "is nationwide in its operation" and "was intended to be uniform in its application." *Shamrock Oil & Gas Corp.*, 313 U.S. at 104; *Grubbs* v. *Gen. Elec. Credit Corp.*, 405 U.S. 699, 705 (1972) ("[T]he removal statutes and decisions of this Court are intended to have uniform nationwide application."). Indeed, recognizing a defendant's right to

removal, as well as the need for a uniform national rule, this Court has warned against burdens on establishing the amount in controversy that would subject the "right of removal … to the plaintiff's caprice." *St. Paul*, 303 U.S. at 294. A "plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election." *Id.*; see also *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 397 n.2 (1981) ("courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum'").

2. Yet the current division among lower courts concerning a removal defendant's burden to establish the amount in controversy, as well as the means for doing so, inevitably gives rise to forum-shopping because the standards adopted by the Eleventh Circuit, but not other courts, allow plaintiffs to defeat defendants' removal rights by artful pleading in order to retain their preferred state forum. The stringent standard adopted by the Eleventh Circuit and other jurisdictions that have adopted the "legal certainty" test gives plaintiffs a clear incentive to file state-court actions in those jurisdictions. That is, filing within those jurisdictions "would be encouraged by the divergent effects that the litigants would anticipate from" defendants' virtual inability to remove a particular case there. *Semteck Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001) (citing *Hanna* v. *Plummer*, 380 U.S. 460, 468 (1965)).

The Eleventh Circuit, in establishing a strict test for determining whether the amount-in-controversy requirement has been met, essentially has provided a roadmap for plaintiffs who desire to keep cases in state court. The jurisdictional amount must be "either stated clearly on the face of the documents before the court, or readily deducible from them …. If

not, the court *must* remand." Pet. App. at 61a (emphasis added). Moreover, jurisdiction can only be established when a "document received by the defendant *from the plaintiff*" "contain[s] an unambiguous statement that clearly establishes federal jurisdiction." *Id.* at 66a, 67a n.63 (emphasis added); see also *id.* at 85a (rejecting evidence of damages recoveries in other cases because that evidence "was not received from the plaintiffs").

To defeat removal, then, a plaintiff need only take the simple step of refraining from turning over any document to the defendant that contains an unambiguous statement of the damages sought. This is not difficult, particularly since, in typical diversity cases, the plaintiff need only delay until the one-year removal period for such cases has run. See 28 U.S.C. § 1446(b) ("a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action"); see also *Guglielmino*, 506 F.3d at 700 n.3 ("We acknowledge that the one-year removal period presents a significant potential for 'games-manship' in that a plaintiff can wait until the removal period has closed and then amend their complaint to seek higher damages.").

Indeed, the Eleventh Circuit's rule effectively leaves defendants without any means to combat plaintiffs' tactics to remain in state court—unless they are willing to run the risk of Rule 11 sanctions. The court of appeals stated that it is "highly questionable whether a defendant could ever file a notice of removal on diversity grounds in a case … where the defendant … has only bare pleadings containing unspecified damages on which to base its notice … without seriously testing the limits of compliance with Rule 11." Pet. App. at 67a n.63. The

court adopted this almost per se rule even as it candidly acknowledged that "a plaintiff who has chosen to file her case in state court will generally wish to remain beyond the reach of federal jurisdiction, and as a result, she will not assign a specific amount to the damages sought in her complaint." *Id.* at 67a-68a n.63. And, the court of appeals adopted this rule notwithstanding state rules that allow plaintiffs to conceal the true value of their claims and, ultimately, to recover damages well in excess of the amount-in-controversy requirement for diversity jurisdiction (that is, even though the case in fact satisfies the criteria for removal).

The harmfulness of the court of appeals' almost per se rule is compounded by its rejection of any possibility for defendants to conduct discovery once they have sought removal. According to the court, not only is jurisdictional discovery absolutely unavailable, but the mere "request for discovery is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists. The natural consequence of such an admission is remand to state court." Pet. App. at 78a.

In stark contrast to the Eleventh Circuit, other courts have recognized the potential for plaintiffs who desire to remain in state court to engage in gamesmanship and artful pleading and have adopted legal standards specifically intended to prevent such conduct. For example, in *Brill* v. *Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), the Seventh Circuit observed that "[w]hen the plaintiff prefers to be in state court … the complaint may be silent or ambiguous on one or more of the ingredients needed to calculate the amount in controversy." *Id.* at 449. Accordingly, the court of appeals held that the defendant must only show "a reasonable probability

that the stakes exceed the minimum" required under CAFA. *Id.* In applying this standard, the court extrapolated from the number of allegedly violative acts committed (the number was admitted in the removal notice), the possible statutory award for each, and the fact that the sum could be trebled to find that "recovery exceeding $5 million for the class as a whole is not 'legally impossible.'" *Id.* Hence, the court concluded that federal jurisdiction existed, and it permitted removal.

Similarly, the Ninth Circuit has affirmed, under the preponderance-of-the-evidence standard, a district court's calculation that the amount in controversy was met by adding the "economic damages … accounted for, … attorneys' fees (measured by a 'conservative' *estimate* of 12.5% of economic damages) …, and … punitive damages ('conservatively *estimated*, at a 1:1 ratio to economic damages)." *Guglielmino*, 506 F.3d at 698, 701 (emphases added).

In like fashion, the Sixth Circuit, in *Gafford* v. *General Electric Co.*, 997 F.2d 150 (6th Cir. 1993), adopted the preponderance standard and eschewed any more stringent burden as contrary to the proper balance struck by Congress in enacting the amount-in-controversy requirement. *Id.* at 158-59; see also *Rogers* v. *Wal-Mart Stores, Inc.*, 230 F.3d 868, 871 (6th Cir. 2000) ("State counterparts to Fed. R. Civ. P. 54(c) might enable a plaintiff to claim in her complaint an amount lower than the federal amount in controversy but nevertheless seek and recover damages exceeding the amount prayed for"). In *Gafford*, the court concluded that the burden was satisfied by testimony from the *defendant's* senior counsel, who testified that, if plaintiff prevailed on her claims, the amount of backpay, "attorney fees[,]

and other damages" would exceed the jurisdictional threshold. *Gafford*, 997 F.2d at 160-61.

As these exemplary cases and others make clear, not only will courts outside of the Eleventh Circuit look beyond whether the *plaintiff* has turned over a document with an "unambiguous" statement as to damages, but frequently will consider the nature of the claims and evidence in the form of prior complaints, similar judgments, affidavits, interrogatories, or other "'summary-judgment-type evidence'"—the very evidence the Eleventh Circuit banned absolutely—in evaluating whether a defendant has carried its burden. *E.g.*, *Singer* v. *State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) (quoting *Allen* v. *R&H Oil & Gas Co.*, 63 F.3d 1326, 1335-36 (5th Cir. 1995)).[2] The Eleventh Circuit's approach thus starkly conflicts with that of these other circuits.

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[2] *Singer*, and *Allen* upon which it relies, specifically permits courts to "require parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal." 116 F.3d at 377 (internal quotation marks omitted). And as the Petition illustrates, the Eleventh Circuit's decision to disallow all discovery conflicts with this Court's precedent and the decisions of multiple lower courts. Pet. at 22-24. Indeed, this Court has stated specifically in reviewing a jurisdictional dispute over whether the amount in controversy was met that "the trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist." *Wetmore* v. *Rymer*, 169 U.S. 115, 120 (1898). As this Court also observed in *Land* v. *Dollar*, 330 U.S. 731 (1947), district courts "as a general rule … have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings" because "when a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion … the court may inquire by affidavits or otherwise, into the facts as they exist." *Id.* at 735 & n.4.

Courts that have adopted lesser burdens of proof have rejected stringent standards like the one adopted by the Eleventh Circuit precisely because they have recognized that such a heavy burden allows plaintiffs to "game the system" in order to remain in state court. The Fifth Circuit, for example, eschewed too stringent a standard because it would "fail[] adequately to protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court following remand." *De Aguilar*, 47 F.3d at 1411; *id.* at 1410 (recognizing that state "rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading").

Similarly, the Sixth Circuit adopted the preponderance standard specifically because it "does not place upon the defendant the daunting burden of proving, to a legal certainty, that the plaintiff's damages are not less than the amount-in-controversy requirement. Such a burden might well require the defendant to research, state and prove the plaintiff's claim for damages." *Gafford*, 997 F.2d at 159; see also *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir. 1993) (noting the "comic scene [of] plaintiff's personal injury lawyer protest[ing] up and down that his client's injuries are as minor and insignificant as can be, while attorneys for the manufacturer paint a

sob story about how plaintiff's life has been wrecked.").[3]

The stark disparity between the standards adopted by the Eleventh Circuit and courts in other circuits—if left uncorrected—inevitably will draw plaintiffs who desire to remain in state court to file in that Circuit. As one commentator has remarked, "the state courts within the Eleventh Circuit are now ideal locations for astute plaintiffs' counsel to file numerous complaints in an effort to avoid federal court." Penelope A. Dixon & David J. Walz, *Removal After* Lowery v. Alabama Power Co*.: A Whole New Bag of Tricks*, 26 No. 4 Trial Advoc. Q. 39, 43 (2007). This is particularly disheartening because many of the state courts within the Eleventh Circuit have been consistently considered among the most plaintiff-friendly forums, approving enormous recoveries based on arguably dubious claims and novel theories of recovery.[4]

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[3] District courts too have noted, in rejecting harsh standards like the one adopted by the Eleventh Circuit, that the "important issue of whether a federal court has jurisdiction over a lawsuit on the basis of the amount in controversy should be decided on the basis of substance, not gamesmanship." *Bolling* v. *Union Nat'l Life Ins. Co.*, 900 F. Supp. 400, 405 (M.D. Ala. 1995). A plaintiff should not be able "to 'have his cake and eat it too'" by preventing "federal jurisdiction by failing to demand a specific monetary figure, while making it possible for the jury to return a verdict well in excess of" the threshold amount. *Steele* v. *Underwriters Adjusting Co.*, 649 F. Supp. 1414, 1416 (M.D. Ala. 1986).

[4] *See, e.g.*, Am. Tort Reform Ass'n, *Judicial Hellholes 2007*, at 5-7, 25 (2007), *available at* http://www.atra.org/reports/hellholes/report.pdf (naming south Florida as one of the most plaintiff-friendly judicial forums and giving Georgia dishonorable mention); Am. Tort Reform Ass'n, *Judicial Hellholes 2005*, at 28-30, 32-34 (2005), *available at* http://www.atra.org/reports/

The inevitable forum-shopping that will result purely as a result of the conflict in the lower courts serves no useful purpose and will unfairly deprive defendants of the federal forum that the Constitution and Congress meant to provide. Moreover, it will result in inefficiency and increased costs on parties and the courts. In particular, divergent approaches among federal courts will spawn "lengthy and costly fights over the location of the litigation." Chemerinsky & Friedman, *supra* at 783.

The potential for forum-shopping is particularly significant with respect to class and mass actions governed by CAFA. The Eleventh Circuit has provided a roadmap for plaintiffs (such as the plaintiffs here) to avoid the $5,000,000 jurisdictional minimum and thereby to avoid federal court. As a result, state courts in the Eleventh Circuit will become magnets for class and mass actions, in clear contravention of Congress's purpose in passing CAFA to prevent class action lawyers from "misus[ing] the jurisdictional threshold to keep their cases out of federal court." S. Rep. No. 109-14, at 10-11, *as reprinted in* 2005 U.S.C.C.A.N. at 11-12.

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hellholes/2005/hellholes2005.pdf (naming south Florida and eastern Alabama).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS*
JACQUELINE G. COOPER
RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

May 1, 2008 * Counsel of Record