No. 08-2188

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PALISADES COLLECTIONS LLC,
Plaintiff,

v.

CHARLENE SHORTS,
Defendant-Appellee,

v.

AT&T MOBILITY LLC and
AT&T MOBILITY CORPORATION,
Counter-Defendants-Appellants.

PETITION FOR REHEARING EN BANC

On Appeal from the United States District Court for the Northern
District of West Virginia in Case No. 5:07-cv-00098-IMK (Keeley, J.)

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form need be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil or bankruptcy case, corporate defendants in a criminal case, and corporate amici curiae. Counsel has a continuing duty to update this information. Please file an original and three copies of this form.

No. 08-2188 Caption: Palisades Collections, LLC v. Shorts

Pursuant to FRAP 26.1 and Local Rule 26.1,

AT&T Mobility who is Counter-Defendant-Appellant
(name of party/amicus) (appellant/appellee/amicus)

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☒ YES ☐ NO
2. Does party/amicus have any parent corporations?
☒ YES ☐ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
See attachment.
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
☒ YES ☐ NO
If yes, identify all such owners:
See attachment.
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
☐ YES ☒ NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question)
☐ YES ☒ NO
If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:
6. Does this case arise out of a bankruptcy proceeding?
☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

s/Evan M. Tager December 29, 2008
(signature) (date)

ATTACHMENT TO DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

2. Does the party/amicus have any parent corporation?

   YES.

   AT&T Inc. (NYSE Ticker: T) is the ultimate parent company of AT&T Mobility LLC and AT&T Mobility Corporation. AT&T Inc. has no parent company, and there are no publicly held entities that own 10% or more of AT&T Inc.'s stock.

3. Is 10% or more of the stock of the party/amicus owned by a publicly held corporation or other publicly held entity?

   YES.

   AT&T Mobility LLC f/k/a Cingular Wireless LLC is a Delaware limited liability company ("LLC") with its principal place of business in Atlanta, Georgia. AT&T Mobility LLC is an indirect, wholly owned subsidiary of AT&T Inc. AT&T Mobility has five members: (1) SBC Long Distance, LLC; (2) SBC Alloy Holdings, Inc.; (3) AT&T Mobility Corporation f/k/a Cingular Wireless Corporation; (4) BellSouth Mobile Data, Inc.; and (5) New BellSouth Cingular Holdings, Inc. The ownership of the five members is as follows: (1) SBC Long Distance, LLC is wholly owned by SBC Telecom, Inc. SBC Telecom, Inc. is a Delaware corporation with no employees and no physical assets and with the majority of its corporate officers located in San Antonio, Texas; (2) SBC Alloy Holdings, Inc. is a Delaware corporation with its principal place of business in San Antonio, Texas; (3) AT&T Mobility Corporation f/k/a Cingular Wireless Corporation is a Delaware corporation with its principal place of business in Atlanta, Georgia; (4) BellSouth Mobile Data, Inc. is a Georgia corporation with its principal place of business in Atlanta, Georgia; and (5) New BellSouth Cingular Holdings, Inc. is a Delaware corporation with its principal place of business in Atlanta, Georgia. None of the companies listed above is publicly traded. All of the companies listed above are subsidiaries of AT&T Inc.

   AT&T Mobility Corporation f/k/a Cingular Wireless Corporation is a Delaware corporation with its principal place of business in Atlanta, Georgia. AT&T Mobility Corporation is an indirect, wholly owned subsidiary of AT&T Inc. AT&T Mobility Corporation has two shareholders, AT&T Inc. and BellSouth Corporation. BellSouth Corporation is a Georgia corporation with its principal place of business in Atlanta, Georgia. BellSouth Corporation is a wholly owned subsidiary of AT&T Inc.

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Over a 20-page dissent by Judge Niemeyer, the panel majority decided that an interstate class action seeking tens of millions of dollars on behalf of tens of thousands of class members can be removed to federal court under the Class Action Fairness Act of 2005 ("CAFA" or "Act"), Pub. L. No. 109-2, 119 Stat. 4, if it is pleaded as an independent action, but not, as in this case, if it is pleaded as a counterclaim to an existing action that seeks to collect an $800 debt. The principal question in this case—whether the panel majority erred in holding that a counterclaim defendant may not remove a qualifying class action under CAFA—is a recurring one of exceptional importance. *See* FED. R. APP. P. 35(b)(1)(B). Congress enacted CAFA to prevent plaintiffs' lawyers from manipulating pleadings to keep a class action in state court, and the panel majority's decision enables them to do just that, simply by filing the class action as a counterclaim rather than a stand-alone suit. The panel majority has thus ratified the very sort of tactic that CAFA was enacted to prevent, and it has provided a guide to counsel on how to circumvent the Act.

But the panel majority's decision does not merely undermine CAFA's purpose. As Judge Niemeyer demonstrated in his comprehensive dissent, it also is inconsistent with CAFA's clear text, which authorizes "any" defendant to remove. For these reasons, rehearing en banc is warranted.

STATEMENT

1. Congress enacted CAFA in response to a decade's worth of "abuses of the

class action device” by plaintiffs’ lawyers. CAFA § 2(a)(2). One abuse that prompted Congress to act was the practice of filing large class actions in state court. Congress found that state-court judges frequently apply procedural rules “in a manner that contravenes basic fairness” (S. REP. NO. 109-14, at 4 (1st Sess. 2005)), to the benefit of lawyers but to the detriment of both “class members with legitimate claims” and “defendants that have acted responsibly” (CAFA § 2(a)(2)(A)). Congress’ main objective in enacting CAFA, therefore, was to ensure that large class actions could be litigated in federal court, where class-action abuses are far less prevalent. *Id.* § 2(a)(4)(A), (b)(2); S. REP. NO. 109-14, at 4-5.

To effectuate that purpose, Congress amended 28 U.S.C. § 1332 “to allow federal courts to hear more interstate class actions on a diversity jurisdiction basis,” and it added 28 U.S.C. § 1453 “to ensure that qualifying interstate class actions initially brought in state courts may be heard by federal courts.” S. REP. NO. 109-14, at 5. As amended by CAFA, and subject to certain exceptions not applicable here, Section 1332 grants original jurisdiction to district courts over class actions in which (a) the amount in controversy exceeds $5 million (aggregating the claims of all putative class members) and (b) minimal diversity exists (*i.e.*, any member of the putative class and any defendant are citizens of different States). Section 1453, in turn, authorizes the removal of putative class actions filed in state court and eliminates a number of restrictions that apply to the removal of other types of

cases. The provision at issue here, Section 1453(b), provides, in full, as follows:

> A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

2. Charlene Shorts had a contract for wireless telephone service with a predecessor in interest of AT&T Mobility ("ATTM"). Shorts was permitted to terminate her service at any time and for any reason before the contract expired, as long as she paid an early termination fee ("ETF"). When Shorts failed to make timely payments, her account was terminated and she was charged an ETF. ATTM's predecessor in interest subsequently sold Shorts' account debt to Palisades Collections ("Palisades"). Slip op. 3-4.

Palisades eventually commenced an action against Shorts in West Virginia state court to collect the debt, which totaled $794.87. Shorts answered the complaint and filed a counterclaim. After class counsel entered an appearance, Shorts filed, and the trial court granted, a motion for leave to file an amended counterclaim. The amended counterclaim (1) joined ATTM as an "additional" counterclaim defendant and (2) asserted putative class-action claims alleging violations of the West Virginia Consumer Credit & Protection Act, W. VA. CODE §§ 46A-1-101 *et seq.*, and seeking tens of millions of dollars on behalf of tens of thousands of ATTM subscribers. Slip op. 3-5, 25.

ATTM removed the action to district court, but Shorts filed a motion to remand it to state court. The district court granted the motion. It concluded that it had jurisdiction over the case, but held that a remand was nevertheless required because ATTM had no authority to remove. Slip op. 5-6, 25-26.

3. After this Court granted ATTM's petition for permission to appeal, *see* 28 U.S.C. § 1453(c)(1), a divided panel affirmed.

In an opinion by Chief Judge Williams, the panel majority held that an "additional" counterclaim defendant may not remove under CAFA. Slip op. 16-22. The panel majority reasoned that, under *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), the phrase "may be removed by the defendant" in the general removal provision, 28 U.S.C. § 1441(a), does not include a counterclaim defendant, and that the phrase "may be removed by *any* defendant" in CAFA's removal provision, 28 U.S.C. § 1453(b) (emphasis added), should be interpreted the same way. The panel majority also rejected ATTM's two alternative arguments. It ruled that *Shamrock Oil*'s holding extends even to an "additional" counterclaim defendant like ATTM (slip op. 11-16); and it declined to realign the parties so that ATTM is treated as a true defendant with authority to remove (*id.* at 22-23).

Judge Niemeyer filed a lengthy dissent. He concluded that "CAFA does indeed authorize [ATTM] to remove this interstate class action, even though [ATTM] was sued as a counterclaim defendant, not as an original defendant," and

that the panel majority's contrary conclusion is "demonstrably at odds" with the statutory text. Slip op. 27. In authorizing removal by "*any* defendant," Judge Niemeyer explained, the "plain language of § 1453(b)" expands removal authority "beyond the limits of § 1441(a)" and abolishes the *Shamrock Oil* rule, which was based on an interpretation of the phrase "the defendant" in the predecessor to Section 1441(a). *Id.* at 29-31. Judge Niemeyer also concluded that *Shamrock Oil*'s holding is in any event limited to counterclaim defendants that (unlike ATTM) are plaintiffs. *Id.* at 33 n.3. He did not address the issue of realignment.

ARGUMENT

A. The Panel Majority's Decision Undermines CAFA's Purpose

1. Every piece of evidence in the legislative record demonstrates that Congress enacted CAFA to ensure that plaintiffs' lawyers cannot manipulate pleadings to defeat removal of qualifying class actions and that all such class actions can be litigated in federal court at the defendant's option. To begin with the statutory text, Section 2 of CAFA sets forth the "finding[]" of Congress that "there have been abuses of the class action device" that have "undermine[d] the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction," in that class-action counsel have been "keeping cases of national importance out of Federal court." CAFA § 2(a)(2), (4)(A). Consistent with that finding, one of the legislative "purposes" set forth in the Act is to "provid[e] for Federal court

consideration of interstate cases of national importance under diversity jurisdiction." *Id.* § 2(b)(2).

The Senate Judiciary Committee's Report includes more detailed findings and purposes. The Report observes that prior law enabled lawyers to "'game' the procedural rules" by "manipulat[ing] their pleadings" to keep class actions in state court—for example, by adding parties to defeat complete diversity or alleging that no individual class member was seeking damages above the jurisdictional threshold. S. REP. NO. 109-14, at 4, 26. The Report explains that CAFA addresses this problem by amending the law to ensure that interstate class actions can be litigated in "the proper forum—the federal courts," where the Committee "firmly believes" such actions belong. *Id.* at 5.

While CAFA was being debated, virtually every sponsor of the legislation—in both Houses, and of both parties—expressed the same view.[1] The President made a similar point when he signed the Act into law.[2] And courts—including this one—have likewise recognized that CAFA's purpose is to prevent plaintiffs' lawyers

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[1] *See, e.g.*, 151 CONG. REC. S1086-02, 1099 (daily ed. Feb. 8, 2005) (statement of Sen. Kohl) ("Our bill attempts to * * * ensure that cases with a national scope are heard in Federal court."); *id.* at 1105 (statement of Sen. Grassley) ("[CAFA] will allow nationwide class actions to be heard in a proper forum, the Federal courts.").

[2] *See* Remarks on Signing the Class Action Fairness Act of 2005, 41 WEEKLY COMP. PRES. DOC. 265, 266 (Feb. 18, 2005) ("[CAFA] moves most large, interstate class actions into Federal courts. This will prevent trial lawyers from shopping around for friendly local venues.").

from engaging in jurisdictional gaming to keep large class actions in state court.[3]

2. What Congress enacted CAFA to prevent is precisely what the panel majority's decision permits. Although the panel majority characterized its holding as "narrow" (slip op. 23), therefore, its decision is in fact extraordinarily far-reaching.

The district court found (JA 49, 61, 64)—and neither Shorts nor the panel majority disputes—that the putative class action here satisfies CAFA's jurisdictional requirements. It would thus have been removable if it had been filed as a freestanding suit. As Judge Niemeyer explained, the panel majority held that ATTM may not remove the class action "because, *and only because*, [ATTM] was sued as an additional defendant in a counterclaim, as distinct from being named an original defendant in an independent action." Slip op. 27.

The consequence of the panel majority's decision is that a putative class action that seeks tens of millions of dollars on behalf of tens of thousands of class members may be removed if it is pleaded as an independent action but not, as here, if it is pleaded as a "counterclaim" to an action brought by a single debt collector to recover a few hundred dollars from a single customer. The panel majority's decision thus enables plaintiffs' lawyers to circumvent the removal contemplated by CAFA through the simple expedient of finding a defendant in a state-court action

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[3] *See, e.g., Johnson v. Advance Am., Cash Advance Centers of S.C., Inc.*, 2008 WL 5194301, at *2 (4th Cir. Dec. 12, 2008); *Estate of Pew v. Cardarelli*, 527 F.3d 25, 26 (2d Cir. 2008); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1197 (11th Cir. 2007); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1097 (10th Cir. 2005).

to serve as a "counterclaim plaintiff" in an otherwise-removable class action.

That is what happened here; and it is what has happened in many other cases since CAFA's enactment.[4] Indeed, as an academic defender of the tactic—and, not coincidentally, a consultant to Shorts—has correctly observed, these cases are likely "just the tip of an approaching iceberg." Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. ST. U. L. REV. 193, 199 (2007); *see id.* at 193 n.*. And both the size and the speed of that iceberg are sure to increase as a consequence of the tactic's ratification by the panel majority. The rule adopted by the panel majority is thus tantamount to a determination that CAFA's removal provision has no application to the very substantial proportion of class actions that can be pleaded as counterclaims.[5]

3. Remarkably, neither Shorts nor the panel majority takes issue with any of this. Neither denies that Congress enacted CAFA to ensure that plaintiffs' lawyers

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[4] *See, e.g., Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007) (insurance); *Unifund CCR Partners v. Wallis*, 2006 WL 908755 (D.S.C. Apr. 7, 2006) (credit card); *CitiFinancial, Inc. v. Lightner*, 2007 WL 1655225 (N.D. W. Va. June 6, 2007) (consumer loan); *Ford Motor Credit Co. v. Jones*, 2007 WL 2236618 (N.D. Ohio July 31, 2007) (automobile lease).

[5] One category of class actions that are easily pleaded as counterclaims—so-called "consumer protection/fraud class actions"—constituted more than one fifth of all class actions filed in or removed to federal court in the first half of 2007. Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* 4 (2008).

cannot manipulate pleadings to defeat removal of qualifying class actions and that all such class actions can be litigated in federal court at the defendant's option. And neither denies that their interpretation of CAFA ensures that plaintiffs' lawyers *can* manipulate pleadings to defeat removal of qualifying class actions and that many such class actions can*not* be litigated in federal court at the defendant's option. A panel decision that severely undermines the purpose of an important federal statute should not be permitted to stand without consideration by the full Court, particularly when neither the panel majority nor the party for which it has ruled denies that the decision has that effect. That is all the more true when, as in this case, the panel decision is issued over a powerful dissent.[6]

B. The Panel Majority's Decision Is Inconsistent With CAFA's Clear Text

1. That the panel majority's decision undermines CAFA's basic purpose not only shows that this case is sufficiently important to justify review by the full Court; it goes a long way towards demonstrating that the decision is wrong. A stat-

[6] While tactitly acknowledging that its decision will leave a large proportion of class actions in state court, the panel majority suggested that that result is not inconsistent with Congress' intent, because "§ 1332(d) itself leaves many class actions in state courts." Slip op. 21. But those, by definition, are not *qualifying* class actions under CAFA, and Congress had good reason to leave those cases in state court—namely, its determination that they are not "interstate cases of national importance." CAFA § 2(b)(2). By contrast, there is no reason—and neither Shorts nor the panel majority has suggested any—why Congress would have intended to leave in state court *qualifying* class actions that class counsel choose to plead as counterclaims rather than independent suits.

ute should not be interpreted in a way that undermines its purpose unless there is unambiguous statutory language that leaves the court with no choice. If there is no such language, "the interpretation that is consistent with [the Act's] goal is permissible as well as preferable." *Springman v. AIG Mktg., Inc.*, 523 F.3d 685, 688 (7th Cir. 2008) (Posner, J.). That is particularly true when, as with CAFA, the stated purpose is "part of the statutory text." Slip op. 37 (Niemeyer, J., dissenting). Nothing in CAFA's text unambiguously requires the paradoxical result that a defendant has the right to have a class action litigated in federal court if the plaintiff chooses to plead the action as a freestanding suit but not if she chooses to plead it as a counterclaim. That is reason enough why the panel majority's decision is erroneous.

But there is not merely an absence of explicit language in CAFA prohibiting removal by counterclaim defendants; there is explicit language in the Act that affirmatively allows it. As Judge Niemeyer explained, "the plain language of § 1453(b) unambiguously grants [ATTM] removal authority." Slip op. 38.

a. CAFA's removal provision, Section 1453(b), states that a class action "may be removed by any defendant." As the Supreme Court recently observed, a statutory phrase introduced by the word "any" is ordinarily interpreted to have "a broad meaning." *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 835 (2008). "[R]ead naturally," the word "any" means "one or some indiscriminately of whatever kind." *Id.*

at 835-36 (internal quotation marks omitted). As Judge Niemeyer explained, "[a] counterclaim defendant is certainly a 'kind' of defendant and falls easily within 'indiscriminately of whatever kind' of defendant." Slip op. 29. The panel majority offered no persuasive responses to this straightforward reading of the statute; each of them was decisively refuted by Judge Niemeyer's dissent.

For example, the panel majority concluded that the phrase "may be removed by any defendant" in CAFA's removal provision has the same meaning as the phrase "may be removed by *the* defendant" in the general removal provision, 28 U.S.C. § 1441(a) (emphasis added), which has been interpreted to exclude a counterclaim defendant. Slip op. 18-20. As Judge Niemeyer explained, however, "[t]he article 'the' *restricts* the noun that follows, while the article 'any' *expands* its meaning." *Id.* at 32 (emphasis added).

The panel majority also believed that CAFA incorporates the Supreme Court's holding in *Shamrock Oil* that a counterclaim defendant could not remove under the general removal provision then in effect. Slip op. 11-12, 17, 19. But as Judge Niemeyer explained, *Shamrock Oil*'s holding was based on the Court's interpretation of the phrase "*the* defendant" in the general removal statute. *Id.* at 33 (emphasis added). Because CAFA uses expansive language, Congress could not have meant to incorporate a judicial interpretation of restrictive language.

The panel majority also took the position that, because the phrase "may be

removed by any defendant" immediately precedes the phrase "without the consent of all defendants," the sole purpose of the "any defendant" language in Section 1453(b) was to abrogate the requirement that defendants unanimously consent to removal. Slip op. 20. As Judge Niemeyer explained, however, the unanimous-consent rule, which was adopted in *Chicago, Rock Island & Pacific Railway v. Martin*, 178 U.S. 245 (1900), was based on the same language as the *Shamrock Oil* rule—"the defendant or defendants"—and the different language in Section 1453(b) could not have been meant to "abolish[] the *Martin* rule while leaving untouched the *Shamrock Oil* rule." Slip op. 30.

Finally, in interpreting CAFA narrowly, the panel majority relied on the federalism-based interpretive canon that removal statutes are strictly construed. Slip op. 15-16, 21. But as Judge Niemeyer explained, an interpretive canon "cannot defeat the plain meaning of the statutory language," and, in any event, "the justifications for th[is] canon are not present [here] in view of Congress' explicit purposes for enacting CAFA." *Id.* at 35. As to the latter, CAFA "unquestionably expand[s] federal jurisdiction and liberalize[s] removal authority," and it makes clear—in Section 2(b)(2)—that that expansion and liberalization is intended "to *further* the proper balance of federalism." *Id.* at 36.

b. There is another clear indication in the statutory text—apart from the phrase "any defendant"—that a counterclaim defendant may remove under CAFA.

Section 1453(b) begins with the broad statement that "[a] class action may be removed to a district court of the United States," without specifying which parties are authorized to remove. It thus differs from Section 1441(a), which specifies that "any civil action * * * may be removed *by the defendant or the defendants*[] to [a] district court of the United States" (emphasis added). The Supreme Court has held that, because a statute providing generally that "rights * * * may be enforced by civil actions in appropriate United States district courts" contains "no particular statutory restrictions on potential plaintiffs," the statute does not contemplate a "restricted class of plaintiffs." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 102-03 (1979). The same is true here. Because the opening phrase of Section 1453(b) contains no particular statutory restrictions on who may remove, the provision does not contemplate a restricted class of defendants with removal authority.

The panel majority rejected this argument because Section 1453(b) states that a class action may be removed "in accordance with section 1446," and Section 1446(a) in turn provides that "[a] defendant or defendants" must file a notice of removal. Slip op. 17. On the basis of that language, the panel majority concluded that Congress "did not intend to extend the right of removal [in Section 1453(b)] to parties other than 'defendant[s].'" *Id.* As Judge Niemeyer explained, however, Section 1446 "neither creates nor alters removal authority, being entirely procedural, as suggested by its title, 'Procedure for Removal.'" *Id.* at 30 n.1. That removal un-

der Section 1453(b) must be "in accordance with" Section 1446 simply means that removal of class actions is governed by the *procedures* set forth in Section 1446 (except insofar as Section 1453(b) provides otherwise).

2. The panel majority also erred in rejecting ATTM's alternative arguments.

First, even if CAFA does incorporate the holding of *Shamrock Oil*, as the panel majority believed, that holding does not extend to an "additional" counterclaim defendant like ATTM. The counterclaim defendant in *Shamrock Oil* was the plaintiff, and the clearly expressed justification for the Court's decision was that it would be unfair to allow the party that had chosen to litigate in state court to remove the case to federal court. *See Shamrock Oil*, 313 U.S. at 105-06 & n.2, 108. As Judge Niemeyer correctly recognized (slip op. 33 & n.3), *Shamrock Oil* thus interpreted "the defendant" with removal authority to mean a party that is not a plaintiff. The panel majority made no attempt to explain how a decision that employed such reasoning could bar removal by a counterclaim defendant that is not a plaintiff. *See id.* at 11-16.[7]

Second, even if CAFA incorporates the holding of *Shamrock Oil*, and even if

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[7] The decisions cited by the panel majority that prohibited removal by an "additional" counterclaim defendant (slip op. 14) made no attempt to do so either. Other decisions, not acknowledged by the panel majority, have declined to extend *Shamrock Oil*'s holding to "additional" counterclaim defendants. *See State of Tex. v. Walker*, 142 F.3d 813, 816 (5th Cir. 1998); *Mace Sec. Int'l, Inc. v. Odierna*, 2008 WL 3851839 at *4 (S.D. Fla. Aug. 14, 2008); *H & R Block, Ltd. v. Housden*, 24 F. Supp. 2d 703, 706 (E.D. Tex. 1998).

that holding extends to "additional" counterclaim defendants, ATTM should be treated as a defendant *simpliciter*. As the district court correctly recognized (JA 56-57), a court may realign parties in deciding who is a defendant with authority to remove, and the plaintiff in that circumstance is the party whose intent to achieve a particular result is the "mainspring" of the proceedings and who is responsible for the continued existence of the action. It is Shorts' class action, which seeks tens of millions of dollars on behalf of tens of thousands of ATTM subscribers, not Palisades' collection action, which seeks less than $800 from Shorts on its own behalf, that is the "mainspring" of the litigation and responsible for its continued existence. The true plaintiff here, therefore, is Shorts, and ATTM is a true defendant.[8]

CONCLUSION

The petition for rehearing en banc should be granted.

[8] In declining to realign the parties, the panel majority relied on the erroneous notion that a court may not consider counterclaims in deciding whether to realign. Slip op. 23. The panel majority mistakenly followed a Fifth Circuit decision involving realignment when determining whether diversity jurisdiction exists (*id.*), while ignoring the many cases that realigned in the context of *removal* and treated the counterclaim defendant as the true defendant with authority to remove because the counterclaim was the "mainspring" of the proceedings (*see* ATTM Br. 42-43).

Dated: December 29, 2008

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2188 **Caption:** Palisades Collections LLC v. Shorts

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_________s/Evan M. Tager__________
Attorney for AT&T Mobility

Dated: December 29, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on the 29th day of December, 2008, a true and accurate copy of the foregoing Petition for Rehearing En Banc was filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users:

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Dated: December 29, 2008

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ADDENDUM
(Panel Opinion)

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2188

PALISADES COLLECTIONS LLC,

Plaintiff,

v.

CHARLENE SHORTS,

Defendant – Appellee,

v.

AT&T MOBILITY LLC; AT&T MOBILITY CORPORATION,

Counter-Defendants – Appellants.

CHAMBER OF COMMERCE OF THE UNITED STATES,

Amicus Supporting Appellants.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. Irene M. Keeley, District Judge. (5:07-cv-00098-IMK)

Argued: October 30, 2008 Decided: December 16, 2008

Before WILLIAMS, Chief Judge, and NIEMEYER and KING, Circuit Judges.

Affirmed by published opinion. Chief Judge Williams wrote the opinion, in which Judge King concurred. Judge Niemeyer wrote a dissenting opinion.

ARGUED: Dan Himmelfarb, MAYER BROWN, L.L.P., Washington, D.C., for Appellants. Christopher James Regan, BORDAS & BORDAS, Wheeling, West Virginia, for Appellee. **ON BRIEF:** William M. Connolly, Michael P. Daly, DRINKER BIDDLE & REATH, L.L.P., Philadelphia, Pennsylvania; Jeffrey M. Wakefield, Christina S. Terek, FLAHERTY SENSABAUGH & BONASSO, P.L.L.C., Charleston, West Virginia; Evan M. Tager, Charles A. Rothfeld, Jack Wilson, MAYER BROWN, L.L.P., Washington, D.C., for Appellants. Jonathan Bridges, SUSMAN GODFREY, L.L.P., Dallas, Texas; William R. H. Merrill, SUSMAN GODFREY, L.L.P., Houston, Texas, for Appellee. Robin S. Conrad, Amar D. Sarwal, NATIONAL CHAMBER LITIGATION CENTER, INC., Washington, D.C.; John H. Beisner, Jessica Davidson Miller, Charles E. Borden, Richard G. Rose, O'MELVENY & MYERS, L.L.P., Washington, D.C., for Amicus Supporting Appellants. William David Wilmoth, Karen Elizabeth Kahle, STEPTOE & JOHNSON, P.L.L.C., Wheeling, West Virginia; Joseph Anthony Curia, III, STEPTOE & JOHNSON, P.L.L.C., Charleston, West Virginia, for Palisades Collections, LLC, on the merits.

WILLIAMS, Chief Judge:

This case presents an issue of first impression — whether a party joined as a defendant to a counterclaim (the "additional counter-defendant") may remove the case to federal court solely because the counterclaim satisfies the jurisdictional requirements of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the United States Code). We hold that neither 28 U.S.C.A. § 1441(a) (West 2006) nor 28 U.S.C.A § 1453(b) (West 2006 & Supp. 2008) permits removal by such a party.

I.

On June 23, 2006, Palisades Collection L.L.C. ("Palisades"), a Delaware corporation, initiated a collection action in West Virginia state court against Charlene Shorts, a West Virginia resident, to recover $794.87 in unpaid charges plus interest on Shorts's cellular phone service contract.

The contract, originally entered into with AT&T Wireless Services, Inc., provided that Shorts would be charged a $150.00 early termination fee if she defaulted on her payment obligations before the end of the contract. In October 2004, Cingular Wireless L.L.C. ("Cingular") merged with AT&T Wireless Services, Inc. to become AT&T Mobility L.L.C. ("ATTM"). Before her contract term expired, ATTM determined that Shorts was in

default on her account, terminated her service, and charged her the early termination fee. In June 2005, ATTM assigned its right to collect on Shorts's default to Palisades.

After Palisades filed the collection action in state court, Shorts filed an answer denying the complaint's allegations. Shorts also asserted a counterclaim against Palisades, alleging "unlawful, unfair, deceptive and fraudulent business act[s] and practices," in violation of the West Virginia Consumer Credit & Protection Act (the "Act"), as codified at W. Va. Code Ann. § 46A-6-104 (LexisNexis 2006). (J.A. at 8). Almost one year later, the state court granted Shorts leave to file a first amended counterclaim joining ATTM as an additional counter-defendant.[1] The amended counterclaim alleged that Palisades and

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[1] We note that "[a] counterclaim is any suit by a defendant against the plaintiff including any claims properly joined with the claims against the plaintiff. A counterdefendant need not also be a plaintiff." Dartmouth Plan, Inc. v. Delgado, 736 F. Supp. 1489, 1491 (N.D. Ill. 1990); Starr v. Prairie Harbor Dev. Co., 900 F. Supp. 230, 233 (E.D. Wis. 1995) (agreeing with Delgado's conclusion that additional parties joined as defendants on a counterclaim are "properly characterized as 'counterclaim defendants' for removal purposes"). See also Grubbs v. General Electric Credit Corp., 405 U.S. 699, 705 (1972) (referring to a party as "the additional counter-defendant").

Also, the district court properly noted that there is "some confusion as to the identity of the counterclaim defendants." Palisades Collections L.L.C. v. Shorts, No. 5:07CV098, 2008 U.S. Dist. LEXIS 6354, at *3 n.2 (N.D. W. Va. Jan. 29, 2008). Although Shorts requested leave to amend her counterclaim to assert causes of action against Palisades Collections L.L.C., AT&T Mobility L.L.C., and AT&T Mobility Corporation and served
(Continued)

ATTM violated the Act by "systematically contract[ing] for, charg[ing], attempt[ing] to collect, and collect[ing] illegal default charges in excess of the amounts allowed by West Virginia Code § 46A-2-115(a) and impos[ing] unconscionable charges in violation of § 46A-2-121." (J.A. at 26.)

Shorts filed a motion for class certification, seeking to represent a class of individuals under similar contracts with Cingular and ATTM, but before the state court could rule on that motion, ATTM removed the case to the United States District Court for the Northern District of West Virginia. In response, Shorts filed a motion to remand, arguing that ATTM could not remove the case because it was not a "defendant" pursuant to the general removal statute, 28 U.S.C.A. § 1441. The district court granted Shorts's motion and remanded the case to state court, concluding that ATTM could not remove the case to federal court because: (1) "it [was] not a 'defendant' for purposes of removal under § 1441," Palisades Collections L.L.C. v. Shorts,

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both AT&T Mobility L.L.C. and AT&T Mobility Corporation with the amended counterclaim, she named only Palisades and AT&T Mobility L.L.C. in the actual counterclaim. Nevertheless, both AT&T Mobility L.L.C. and AT&T Mobility Corporation joined in the notice of removal and in the memorandum in opposition to Shorts's motion to remand. The district court treated AT&T Mobility Corporation as a counter-defendant and referred to both AT&T Mobility entities jointly as "ATTM." We will do the same.

No. 5:07CV098, 2008 U.S. Dist. LEXIS 6354, at *13 (N.D. W. Va. Jan. 29, 2008), and (2) CAFA does not create independent removal authority that would allow ATTM to "circumvent the long-standing requirement that only a true defendant may remove a case to federal court," id. at *29.

We granted ATTM permission to appeal, and we possess jurisdiction to review the district court's remand order under 28 U.S.C.A. § 1453(c)(1).

II.

ATTM makes two principal arguments. First, in its notice of removal, ATTM contended that the case is removable under the general removal statute, 28 U.S.C.A. § 1441.[2] Second, on appeal, ATTM now argues that, even if § 1441 does not permit removal by additional counter-defendants, §1453(b), added by CAFA,

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[2] In the jurisdictional statement portion of its notice of removal, ATTM demonstrated that the counterclaim satisfied the requirements of CAFA and then stated that "[b]ecause this action states a basis for original subject matter jurisdiction under 28 U.S.C. § 1332, this action is removable pursuant to 28 U.S.C. § 1441(a)." (J.A. at 37 (emphasis added).) In the procedural statement portion of its notice of removal, ATTM stated that, pursuant to 28 U.S.C.A. § 1453 (West 2006 & Supp. 2008), it could remove the case without obtaining the consent of all defendants and regardless of whether one of the defendants was a citizen of West Virginia, the state in which the action was brought; ATTM also relied on 28 U.S.C.A. § 1441(a) (West 2006) to establish that venue was proper in the Northern District of West Virginia.

constitutes a separate removal power authorizing ATTM to remove. ATTM also makes an additional argument that, if neither § 1441 nor § 1453(b) permits removal by additional counter-defendants, then we should realign the parties to make ATTM a traditional defendant.

ATTM's first two arguments raise questions concerning removal to federal court and issues of statutory interpretation, which we review de novo. Payne ex rel. Estate of Calzada v. Brake, 439 F.3d 198, 203 (4th Cir. 2006) (questions concerning removal); United States v. Abuagla, 336 F.3d 277, 278 (4th Cir. 2003) (issues of statutory interpretation). In resolving this case, we are mindful that "federal courts, unlike most state courts, are courts of limited jurisdiction, created by Congress with specified jurisdictional requirements and limitations." Strawn v. AT&T Mobility L.L.C., 530 F.3d 293, 296 (4th Cir. 2008). And, we are likewise cognizant that "[w]e must not give jurisdictional statutes a more expansive interpretation than their text warrants, but it is just as important not to adopt an artificial construction that is narrower than what the text provides." Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 558 (2005) (citation omitted).

"When interpreting statutes, we start with the plain language." United Seniors Ass'n, Inc. v. Social Sec. Admin., 423 F.3d 397, 402 (4th Cir. 2005) (internal quotation marks

omitted). We also recognize that "[s]tatutory construction is a holistic endeavor," Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004), and that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). See also United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1850) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (citations omitted).

A.

Before turning to the issues raised in this appeal, an overview of the relevant jurisdictional statutes is appropriate to place the following discussion in context.

The general removal statute, 28 U.S.C.A. § 1441, provides that "any civil action brought in a State court of which the

district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." § 1441(a) (emphasis added). Section 1446 of Title 28 of the United States Code establishes the procedures for removal of a case under § 1441. See 28 U.S.C.A. § 1446 (West 2006).

Through CAFA, Congress expanded federal diversity jurisdiction by amending 28 U.S.C.A. § 1332 to give federal district courts original jurisdiction of "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant." 28. U.S.C.A. § 1332(d)(2) (West 2006).

In addition to amending § 1332, Congress also added 28 U.S.C.A. § 1453(b), which provides:

> A class action may be removed to a district court of the United States in accordance with [28 U.S.C. §] 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

For purposes of § 1453(b), Congress defined a "class action" as "any civil action filed under rule 23 of the Federal Rules of

Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C.A. § 1332(d)(1)(B); see 28 U.S.C.A. § 1453(a) (explaining that, for purposes of § 1453, a class action has the meaning given in § 1332(d)(1)).

Section 1453(b) eliminates at least three of the traditional limitations on removal: (1) the rule that, in a diversity case, a defendant cannot remove a case from its home forum, § 1441(b); (2) the rule that a defendant cannot remove a diversity case once it has been pending in state court for more than a year, § 1446(b); and (3) the rule that all defendants must consent to removal, Chicago, Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 248 (1900) (concluding that "all the defendants must join in the application" for removal); Payne ex rel. Estate of Calzada, 439 F.3d at 203 ("Failure of all defendants to join in the removal petition . . . is . . . an error in the removal process."). See, e.g., Progressive W. Ins. Co. v. Preciado, 479 F.3d 1014, 1018 n.2 (9th Cir. 2007); see also S. Rep. No. 109-14, at 48 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 45 ("[Section 1453] establishes the procedures for removal of interstate class actions over which the federal court is granted original jurisdiction in new section 1332(d). The general removal provisions currently contained in Chapter 89

of Title 28 would continue to apply to class actions, except where they are inconsistent with the provisions of the Act. For example, like other removed actions, matters removable under this bill may be removed only 'to the district court of the United States for the district and division embracing the place where such action is pending.'").

Accordingly, with this framework in place, we now turn to ATTM's arguments.

B.

In its notice of removal, ATTM contended that § 1441(a), which permits removal of a civil action over which the federal district courts have original jurisdiction by "the defendant or the defendants," permits ATTM, an additional counter-defendant, to remove the case to federal court. We do not agree.

In Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941), the Supreme Court considered the question of "whether the suit in which [a] counterclaim is filed is one removable by the [original] plaintiff to the federal district court . . . ," id. at 103, under the statutory predecessor to § 1441(a), which provided that an action "may be removed by the defendant or defendants therein to the district court of the United States for the proper district," id. at 105 n.1. Although the Court acknowledged that, between 1875 and 1887, the removal statute allowed "either party" to remove the suit to federal court, id.

at 104-05, the Court concluded that Congress "narrow[ed] the federal jurisdiction on removal" by amending the statute in 1887 to allow removal only "by the 'defendant or defendants' in the suit," id. at 107. Noting that interpretation of removal statutes "call[ed] for . . . strict construction," id. at 108, the Court thus held that the original plaintiff against whom the original defendant had filed a counterclaim could not remove the case to federal court under § 1441(a)'s predecessor.

For more than fifty years, courts applying Shamrock Oil have consistently refused to grant removal power under § 1441(a) to third-party defendants—parties who are not the original plaintiffs but who would be able to exercise removal power under ATTM's interpretation. See Cross Country Bank v. McGraw, 321 F. Supp. 2d 816, 821-22 (S.D. W. Va. 2004) (noting that district courts within the Fourth Circuit have adopted the majority rule that "a third-party defendant is distinct from 'the defendant or defendants' who are permitted to remove cases pursuant to 28 U.S.C. § 1441(a)"); Galen-Med, Inc. v. Owens, 41 F. Supp. 2d 611, 614 (W.D. Va. 1999) ("The majority view, that third-party defendants are not 'defendants' for purposes of removal under 28 U.S.C. § 1441(a), is the better rule."); Hayduk v. UPS, 930 F. Supp. 584, 590 (S.D. Fla. 1996) ("Nearly every court that has considered the question whether third-parties may remove under § 1441(a) has determined that they may not."); Croy v. Buckeye

Int'l, Inc., 483 F. Supp. 402, 406 (D. Md. 1979) ("The overwhelming weight of authority indicates that a third party defendant is not entitled to removal of an entire case to federal court under 28 U.S.C. § 1441(a)."); Manternach v. Jones County Farm Serv. Co., 156 F. Supp. 574, 577 (N.D. Iowa 1957) (noting that courts "are not in disagreement as to the non-removability of a third-party claim [under § 1441(a)]").

As the Sixth Circuit more recently explained, "[a]lthough Shamrock Oil is not dispositive of the precise issue before us, it does dictate that the phrase 'the defendant or the defendants,' as used in § 1441(a), be interpreted narrowly, to refer to defendants in the traditional sense of parties against whom the [original] plaintiff asserts claims." First Nat'l Bank of Pulaski v. Curry, 301 F.3d 456, 462-63 (6th Cir. 2002) (noting that the American Law Institute has recommended that Congress "make[] clear what the present law merely implies: the right of removal applies only to the action as framed by the pleading that commences the action. Counterclaims, cross-claims, and third-party claims cannot be the basis for removal [under § 1441(a)]"); see also Florence v. ABM Indus., 226 F. Supp. 2d 747, 749 (D. Md. 2002) ("[I]n adopting the current language [of the removal statute], Congress intended to restrict removal jurisdiction solely to the defendant to the main claim.").

Of course, additional counter-defendants, like third-party defendants, are certainly not defendants against whom the original plaintiff asserts claims. Thus, we easily conclude that an additional counter-defendant is not a "defendant" for purposes of § 1441(a). See, e.g., Capitalsource Fin., L.L.C. v. THI of Columbus, Inc., 411 F. Supp. 2d 897, 900 (S.D. Ohio 2005) (concluding that "additional counterclaim defendants . . . are not defendants within the meaning of the removal statute . . . [and] do not have statutory authority . . . to remove this case"); Dartmouth Plan, Inc. v. Delgado, 736 F. Supp. 1489, 1492 (N.D. Ill. 1990) ("But just as a third-party has no special rights to remove, neither does a nonplaintiff counterdefendant. A counterdefendant is not a defendant joined in the original action and therefore not a party that can remove a state action to federal court."); Tindle v. Ledbetter, 627 F. Supp. 406, 407 (M.D. La. 1986) (noting that because the Justices, who were joined as defendants on the counterclaim under Louisiana's procedural equivalent to Fed. R. Civ. P. 13(h), "are [additional] counterclaim defendants, they cannot remove this suit to federal court"); see also 16 James W. Moore et al., Moore's Federal Practice § 107.11[1][b][iv] (3d ed. 1998) (noting that the "better view" is that counter-defendants, cross-claim defendants, and third-party defendants "are not defendants within the meaning of [§ 1441(a)]").

Congress has shown the ability to clearly extend the reach of removal statutes to include counter-defendants, cross-claim defendants, or third-party defendants, see 28 U.S.C. § 1452(a) (West 2006) ("A party may remove any claim or cause of action . . . [related to bankruptcy cases]." (emphasis added)). In crafting § 1441(a), however, Congress made the choice to refer only to "the defendant or the defendants," a choice we must respect. Thus, ATTM, as an additional counter-defendant, may not remove the case to federal court under § 1441(a).[3] This conclusion is consistent with the well-established principle that "[w]e are obliged to construe removal jurisdiction strictly because of the significant federalism concerns implicated" and that "if federal jurisdiction is doubtful, a remand to state court is necessary." Md. Stadium Auth. v. Ellerbe Becket Inc., 407 F.3d 255, 260 (4th Cir. 2005) (internal quotation marks, citations, and alterations omitted); see also Shamrock Oil, 313 U.S. at 109 ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that

[3] Shorts also contends that removal under § 1441(a) is impermissible because the district court does not have "original jurisdiction" over the case based on Palisades's complaint, which asserts only a state-law collection action for approximately $800, and because a counterclaim cannot serve as the basis for original jurisdiction in a diversity case such as this one. Given our conclusion that an additional counter-defendant may not remove under § 1441(a), we have no reason to address this argument.

they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." (internal quotation marks omitted)).

C.

Perhaps anticipating our conclusion that an additional counter-defendant may not remove under § 1441(a), ATTM argues that § 1453(b) provides a removal power independent of that conferred in § 1441(a). ATTM further argues that, under the broad language of § 1453(b), any defendant, including a counter-defendant, may exercise that removal power. We need not decide whether § 1453(b) grants such a power because, even assuming that § 1453(b) grants a power of removal, ATTM, as an "additional counter-defendant," may not exercise this power.

ATTM argues that the broad language of § 1453(b) permits an additional counter-defendant to remove a class action to federal court for two reasons. First, ATTM contends that because § 1453(b) provides only that a class action "may be removed to a district court," it does not limit the parties entitled to remove. Second, ATTM contends that, in overriding several traditional limitations on removal, § 1453(b) twice refers to "any defendant," a phrase it believes is broad enough to include counter-defendants.

We find neither argument convincing. First, ATTM's contention that § 1453(b) grants it removal power because it

does not expressly limit the parties who may remove simply does not comport with the language of § 1453(b) when the statute is read in its entirety. Given that the only reference in the statute as to a party who may remove is to a "defendant," and that the statute states that the class action may be removed "in accordance with [28 U.S.C. §] 1446," which specifically provides procedures for "[a] defendant or defendants" to remove cases to federal court, see § 1446(a), we think that Congress clearly did not intend to extend the right of removal to parties other than "defendant[s]." And, as discussed in Section II.B, "defendant" in the removal context is understood to mean only the original defendant.[4]

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[4] We note that ATTM's broad interpretation of § 1453(b) would necessarily allow an original plaintiff/counter-defendant to remove a class action asserted against it. The Ninth Circuit recently considered just such a situation in Progressive W. Ins. Co. v. Preciado, 479 F.3d 1014 (9th Cir. 2007), albeit in dicta. In that case, the plaintiff argued that CAFA should be interpreted as "allowing a plaintiff forced to defend a class action on the basis of a cross-complaint to have the same right to remove the class action as a defendant." Id. at 1017. Concluding that "CAFA is not susceptible to such an interpretation," id., the Ninth Circuit wrote:

> Although CAFA does eliminate three significant barriers to removal for qualifying actions, CAFA does not create an exception to Shamrock's longstanding rule that a plaintiff/cross-defendant cannot remove an action to federal court. CAFA's removal provision, section 1453(b), provides that "[a] class action may be removed to a district court . . . in accordance with section 1446." Section 1446, in turn, sets forth the removal procedure for "[a] defendant or defendants

(Continued)

Second, the use of the phrase "any defendant" also does not grant removal power to additional counter-defendants. Section 1453(b) uses "any defendant" twice—first stating that a class action may be removed "without regard to whether any defendant is a citizen of the State in which the action is brought" and then stating that "such action may be removed by any defendant without the consent of all defendants." §1453(b) (emphasis

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> desiring to remove any civil action . . . from a State court." The interpretation of "defendant or defendants" for purposes of federal removal jurisdiction continues to be controlled by Shamrock [Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)], which excludes plaintiff/cross-defendants from qualifying "defendants."
>
> Nor can we accept Progressive's invitation to read CAFA liberally as making a sub silentio exception to Shamrock. We have declined to construe CAFA more broadly than its plain language indicates. "Faced with statutory silence . . ., we presume that Congress is aware of the legal context in which it is legislating." This presumption is especially appropriate here, where "[t]he legal context in which the 109th Congress passed CAFA into law features a longstanding, near-canonical rule" that a state plaintiff forced to defend on the basis of a cross-complaint is without authority to remove.
>
> Therefore, we must conclude CAFA does not alter the longstanding rule announced in Shamrock that precludes plaintiff/cross-defendants from removing class actions to federal court.

Id. at 1017-1018 (emphasis in original) (internal citations omitted). We agree that § 1453(b) should not be read to allow removal by original plaintiffs.

added). The first provision eliminates the so-called "home-state defendant" restriction on removal found in § 1441(b), which is the rule that diversity actions "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." § 1441(b). Of course, under the normal rules of statutory construction, "the same terms [should] have the same meaning in different sections of the same statute." LaRue v. DeWolff, Boberg & Assocs., 128 S. Ct. 1020, 1027 (2008) (internal quotation marks and alterations omitted). Thus, given that we have already concluded that "defendant" in § 1441(a) means only an original defendant, we must likewise conclude that "defendant" in § 1441(b) means only an original defendant. Because "we presume that Congress legislated consistently with existing law and with the knowledge of the interpretation that courts have given to the existing statute," Strawn, 530 F.3d at 297, that the first reference to "defendant" in § 1453(b) is in relation to § 1441(b)'s "home-state defendant" rule only reinforces our conclusion that "defendant" in § 1453(b) also means only the original defendant. Cf. Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58 (2d. Cir. 2006) ("It is true that Congress displayed in CAFA an aim to broaden certain aspects of federal jurisdiction for class actions. However, we think that, rather than evincing an intent to make as drastic a change to

federal jurisdiction as Blockbuster proposes, CAFA's detailed modifications of existing law show that Congress appreciated the legal backdrop at the time it enacted this legislation.").

The statute's use of the word "any" to modify "defendant" does not alter our conclusion that additional counter-defendants may not remove under § 1453(b) because the use of the word "any" cannot change the meaning of the word "defendant." Likewise, § 1453(b)'s second use of the phrase "any defendant," i.e., "such action may be removed by <u>any defendant</u> without the consent of all defendants," § 1453(b) (emphasis added), eliminates the judicially-recognized rule of unanimous consent for removal; the use of the word "any" juxtaposed with the word "all" was intended to convey the idea of non-unanimity, not to alter the definition of the word "defendant."

Put simply, there is no indication in the language of § 1453(b) (or in the limited legislative history) that Congress intended to alter the traditional rule that only an original defendant may remove and to somehow transform an additional counter-defendant like ATTM into a "defendant" with the power to remove. Reading § 1453(b) to also allow removal by counter-defendants, cross-claim defendants, and third-party defendants is simply more than the language of § 1453(b) can bear.

Thus, we conclude that ATTM, as an additional counter-defendant, does not have a right to remove under either §

1441(a) or § 1453(b). Again, this conclusion is consistent with our duty to construe removal jurisdiction strictly and resolve doubts in favor of remand.[5] See Md. Stadium Auth., 407 F.3d at 260.

In an effort to overcome this plain language, ATTM stresses that "[i]t is inconceivable that Congress intended to leave [a] large category of class actions in state court." (Appellants' Br. at 25.) But, § 1332(d) itself leaves many class actions in state courts, see, e.g., Luther v. Countrywide Home Loans Servicing L.P., 533 F.3d 1031 (9th Cir. 2008) (affirming remand of a class action to state court); Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc., 485 F.3d 804 (5th Cir. 2007) (same), and

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[5] ATTM argues that this federalism-based canon of strict construction, which favors adjudication in state court, has no place in the interpretation of CAFA because Congress enacted CAFA to favor federal jurisdiction over qualifying class actions. This suggestion finds no support in our sister circuits. See Miedema v. Maytag Corp., 450 F.3d 1322, 1328-29 (11th Cir. 2006) ("Statements in CAFA's legislative history, standing alone, are a insufficient basis for departing from th[e] well-established rule [of construing removal statutes strictly and resolving doubts in favor of remand]."); Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 685 (9th Cir. 2006) (applying the rule of strict construction of removal statutes to interpretation of CAFA); see also Pritchett v. Office Depot, Inc., 420 F.3d 1090, 1097 n.7 (10th Cir. 2005) ("We are mindful of the fact that Congress' goal in passing [CAFA] was to increase access to federal courts, and we also recognize that the Senate report instructs us to construe the bill's terms broadly. But these general sentiments do not provide carte blanche for federal jurisdiction over a state class action any time the statute is ambiguous." (internal citations omitted)).

although we are cognizant of the fact that Congress clearly wished to expand federal jurisdiction through CAFA, we also recognize that it is our duty, as a court of law, to interpret the statute as it was written, not to rewrite it as ATTM believes Congress could have intended to write it. If Congress intended to make the sweeping change in removal practice that ATTM suggests by altering the near-canonical rule that only a "defendant" may remove and that "defendant" in the context of removal means only the original defendant, it should have plainly indicated that intent.

D.

Finally, ATTM argues that, if neither § 1441 nor § 1453(b) permits removal by an additional counter-defendant, then "the parties should be realigned so that ATTM is deemed a 'defendant' with the right of removal." (Appellants' Br. at 41.) Because the question of realignment concerns removal, and removal jurisdiction and realignment are "not severable for the purpose of determining the proper standard of review," U.S. Fid. & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1088 (6th Cir. 1992), we also review the district court's refusal to realign the parties de novo. Should our inquiry involve factual determinations made by the district court, we review those determinations for clear error. Prudential Real Estate

Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 872-73 (9th Cir. 2000).

In determining whether to realign parties, we apply the "principal purpose" test: First, we determine the primary issue in controversy, and then we align the parties according to their positions with respect to the primary issue. United States Fid. & Guar. Co. v. A & S Mfg. Co., 48 F.3d 131, 132-33 (4th Cir. 1995). "The determination of the 'primary and controlling matter in dispute' does not include the cross-claims and counterclaims filed by the defendants. Instead, it is to be determined by plaintiff's principal purpose for filing its suit." Zurn Indus., Inc. v. Acton Constr. Co., 847 F.2d 234, 237 (5th Cir. 1988) (emphasis added).

Here, Palisades's "principal purpose" in filing the suit was to collect Shorts's debt. On that issue, Palisades and Shorts were properly aligned. Thus, like the district court, we conclude that realignment was inappropriate.

III.

We reiterate that our holding today is narrow: Under both § 1441(a) and § 1453(b), a counter-defendant may not remove a class action counterclaim to federal court. Congress is presumed to know the current legal landscape against which it legislates, and we are merely applying those pre-existing

established legal rules. If Congress wants to overturn such precedent, it should do so expressly.

For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

NIEMEYER, Circuit Judge, dissenting:

Palisades Collections LLC, a collection agency, commenced this action in West Virginia state court by filing a state-law debt collection case against Charlene Shorts for a $794.87 debt incurred by Shorts under her cell phone service contract with AT&T Mobility LLC. Shorts filed a class action counterclaim against Palisades Collections and joined AT&T Mobility LLC and AT&T Mobility Corporation (collectively "AT&T") as defendants. In the class action counterclaim, Shorts purported to represent 160,000 citizens of West Virginia, alleging that AT&T's cell phone service contracts violated the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101 et seq. and demanding over $16 million in damages.

Relying on the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, AT&T removed the case to federal court. See 28 U.S.C. §§ 1332(d), 1453(b).

On Shorts' motion, the district court remanded the case to the West Virginia state court from which it was removed. The court found that Shorts' counterclaim class action met all of the jurisdictional requirements of CAFA embodied in 28 U.S.C. § 1332(d)(2) inasmuch as Shorts purported to represent a class of 160,000 West Virginia customers (well over the CAFA minimum of 100 class members); the class claimed in the aggregate a minimum of $16 million in damages (well over the CAFA minimum of $5

million); and minimum diversity, as required by § 1332(d)(2)(A), existed. Most of the class members are West Virginia citizens, whereas AT&T is a citizen of Georgia and Delaware, and Palisades Collections is a citizen of New Jersey and Delaware. See 28 U.S.C. § 1332(c)(1). The district court also found inapplicable CAFA's home-state exception, which only applies when most class members have the same citizenship as one of the defendants. See 28 U.S.C. § 1332(d)(4). Although the district court thus found that it had removal jurisdiction under § 1332(d), it nonetheless held that CAFA did not give AT&T, as a counterclaim defendant, removal authority under 28 U.S.C. § 1453(b).

AT&T filed this interlocutory appeal under 28 U.S.C. § 1453(c), challenging the district court's ruling that because AT&T was a counterclaim defendant, it did not have removal authority under CAFA. Shorts supports the district court's conclusion that CAFA did not provide AT&T with removal authority and also challenges the district court's finding of removal jurisdiction under § 1332(d).

The majority opinion agrees with the district court that a counterclaim defendant is not granted authority under CAFA, 28 U.S.C. § 1453(b), to remove a class action that otherwise meets the jurisdictional requirements of § 1332(d), and therefore it does not reach Shorts' jurisdictional argument.

For the reasons stated in this opinion, I conclude that CAFA does indeed authorize AT&T to remove this interstate class action, even though AT&T was sued as a counterclaim defendant, not as an original defendant. Section 1453(b), added by CAFA, expanded removal authority, conferring on "any defendant" the right to remove a "class action." And removal jurisdiction exists under 28 U.S.C. §§ 1332(d) and 1441, as found by the district court. Accordingly, I respectfully dissent.

I. Removal Authority

Removal of a case from state court to federal court is generally proper when (1) the federal court has removal jurisdiction and (2) the removing party has removal authority. Since the majority rests its judgment entirely upon AT&T's purported lack of removal authority, I begin with that issue.

The majority holds that AT&T may not remove the class action filed against it because, and only because, AT&T was sued as an additional defendant in a counterclaim, as distinct from being named an original defendant in an independent action. It concludes that because AT&T is a counterclaim defendant, it does not fall within the language "may be removed by any defendant" of § 1453(b) (emphasis added). The majority's conclusion, I respectfully submit, is demonstrably at odds with this broad language.

Section 1441(a) states the general rule for removal authority, that civil actions, "of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants." 28 U.S.C. § 1441(a) (emphasis added). This language is the basis for both the rule that all defendants must unanimously consent to removal, see Chicago, Rock Island & Pac. Ry. v. Martin, 178 U.S. 245, 247 (1900), and the rule that only original defendants can remove, see Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 106-08 (1941). But 28 U.S.C. § 1453(b), which was added by CAFA, provides a different rule for removal of class actions over which the district court has removal jurisdiction. It states that a class action "may be removed by any defendant without the consent of all defendants" (emphasis added). This language expands removal authority in the CAFA context.

Shorts and the majority agree that § 1453(b) does expand removal authority, but just not far enough to reach the present case. For example, § 1453(b) expands removal authority by allowing removal "without regard to whether any defendant is a citizen of the State in which the action is brought." They acknowledge that this modifies § 1441(b)'s home-state rule, which denies removal authority whenever at least one defendant resides in the State whose court has the case.

Similarly, I submit that § 1453(b), in authorizing removal "by <u>any</u> defendant," also expands removal authority beyond the limits of § 1441(a) so that it includes any defendant joined as an additional defendant to a counterclaim, as well as any counterclaim defendant. As the Supreme Court has repeatedly noted, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" <u>Ali v. Fed. Bureau of Prisons</u>, 128 S. Ct. 831, 835-36 (2008) (quoting <u>United States v. Gonzales</u>, 520 U.S. 1, 5 (1997) (quoting <u>Webster's Third New International Dictionary</u> 97 (1976))). A <u>counterclaim</u> defendant is certainly a "kind" of defendant and falls easily within "indiscriminately of whatever kind" of defendant. The plain language of § 1453(b) thus gives AT&T, as a kind of defendant, authority to remove the class action in this case from state court to federal court.

Both Shorts and the majority argue that we should read the word "any" narrowly, based upon the <u>exclusive</u> congressional purpose perceived to exist behind the entire clause. But neither Shorts nor the majority cite any statutory language or legislative history to support their articulation of CAFA's exclusive purpose in authorizing <u>any</u> defendant to remove a class action. They maintain simply that in using "any defendant" in § 1453(b), Congress intended to overrule <u>only</u> the long-standing requirement that defendants must unanimously consent to removal.

See Martin, 178 U.S. at 247. And in making this point, they argue that the "any defendant" language of § 1453(b), for some unexplained reason, does not modify the rule announced in Shamrock Oil, 313 U.S. at 106-08, that counterclaim defendants who are also plaintiffs cannot remove under § 1441(a).

I agree with Shorts and the majority that § 1453(b)'s "any defendant" language expands removal authority by abolishing Martin's unanimous consent rule in the CAFA context. But I maintain that the same clause also abolishes the Shamrock Oil rule for CAFA purposes. Not only is the language of § 1453(b) clear here, but also both Shamrock Oil and Martin were based on the exact same language in § 1441(a)'s predecessor.[1] It seems implausible at best that the § 1453(b) language abolished the Martin rule while leaving untouched the Shamrock Oil rule, especially when both rules depended on the same language.

[1] The decision in Progressive West Insurance Co. v. Preciado, 479 F.3d 1014, 1017 (9th Cir. 2007), is not persuasive to reach a contrary conclusion as it forces Shamrock Oil's interpretation of § 1441(a)'s "the defendant or defendants" onto § 1446(a)'s "a defendant or defendant," which Shamrock Oil did not interpret. Yet, "[i]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" American Bus Ass'n v. Slater, 231 F.3d 1, 4-5 (D.C. Cir. 2000). Section 1446, moreover, neither creates nor alters removal authority, being entirely procedural, as suggested by its title, "Procedure for Removal."

In both Martin and Shamrock Oil, the Supreme Court based its holding on the statutory interpretation of the wording "the defendant or defendants" in § 1441(a)'s prior codifications, 28 U.S.C. § 71 (1940) (the codification at the time of Shamrock Oil), and Act of August 13, 1888, 25 Stat. 433, ch. 866, § 2 (the location at the time of Martin).[2] The Martin court found the unanimity rule plain:

> It thus appears on the face of the statute that if a suit arises under the Constitution or laws of the United States, or if it is a suit between citizens of different States, the defendant, if there be but one, may remove, or the defendants, if there be more than one.
>
> * * *
>
> And in view of the language of the statute we think the proper conclusion is that all the defendants must join in the application . . . .

178 U.S. at 247, 248 (emphasis added). And Shamrock Oil relied upon Congress' deliberate replacement in 1887 of "either party" with "the defendant or defendants" in finding that counterclaim defendants who are also plaintiffs cannot remove. See 313 U.S. at 106-07.

Even though both the unanimity rule of Martin and the original defendant rule of Shamrock Oil derive from the same

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[2] Congress added the second "the" in "the defendant or the defendants" as part of a modernization of § 1441's language. See Act of June 25, 1948, ch. 646, 62 Stat. 937; 28 U.S.C.A. § 1441 note (2008).

language in § 1441(a), the majority asserts that § 1453(b)'s "any defendant" language abolishes one but not the other. We should hesitate before attributing such acrobatic skill to Congress.

Shorts and the majority contend that "defendant" should be read consistently throughout §§ 1441 and 1453 and that because "the defendant" in § 1441(a) refers to the original defendant, "any defendant" in § 1453(b) should also refer to the original defendant. See, e.g., ante at [13]. But reading "defendant" consistently does not mean we must read "any defendant" in § 1453(b) the same as "the defendant or the defendants" in § 1441(a). Surely one is not construing "defendant" differently when one finds "any defendant" has a different meaning from "the defendant or the defendants." The article "the" restricts the noun that follows, while the article "any" expands its meaning. See Reid v. Angelone, 369 F.3d 363, 367 (4th Cir. 2004); accord Warner-Lambert Co. v. Apotex Corp., 316 F.3d 1348, 1356 (Fed. Cir. 2003) ("the" has a narrowing effect, while "any" would have a broadening effect). Moreover, the majority seems to recognize the difference in meaning between "any defendant" and "the defendant" when it states that "any defendant" overrules the Martin rule, which had depended on the phrase, "the defendant." See ante at [15].

The majority's assertion that in both § 1441(a) and § 1453(b) the word "defendant" means only "original defendant" is both puzzling and potentially unsettling to existing interpretations of jurisdictional statutes. The majority opinion applies the logic that because "the defendant" in § 1441(a) refers to the original defendant, as held by Shamrock Oil, "any defendant" must likewise mean only original defendant because both terms use the word "defendant." I conclude that the majority takes this misstep only in an effort to import the Shamrock Oil rule into the CAFA context. Yet, Shamrock Oil did not state that the word "defendant" itself means "original defendant." Rather, it held that "the defendant or defendants," when adopted by Congress to replace "either party" in the earlier statute, refers to the original defendant and not a counterclaim defendant who was also the plaintiff. 313 U.S. at 106-08.[3]

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[3] Insofar as AT&T was first joined in the action by the filing of a class action complaint against it and by service of that complaint and process upon it, the action as to AT&T began with that class action complaint, in which it was joined only in its capacity as a defendant. Unlike Palisades, which commenced the collection action in state court and thus was both a plaintiff and a counterclaim defendant, AT&T in this case is only a defendant. Because AT&T was not also a plaintiff, the Shamrock Oil rule, which denied a defendant who was also a plaintiff the authority to remove, would appear not to be applicable to AT&T even apart from the amendments made by CAFA. See Shamrock Oil, 313 U.S. at 106-08; Fed. R. Civ. P. 13(h) note to 1966 Amendment (For purposes of applying joinder of (Continued)

The majority contends additionally that the language following "any defendant," which provides that a class action may be removed "without the consent of all defendants," was the basis by which § 1453(b) overruled Martin. To reach this conclusion, the majority finds that the text "without the consent of all defendants" somehow reads back and narrows the meaning of "any defendant." But such a reading is not grammatically supportable. The "without the consent of all defendants" language does not restrict "any defendant," but rather expands removal authority; "without the consent of all defendants" modifies the verb "may be removed" and not the noun "any defendant," thus eliminating the requirement that AT&T get "the consent of all defendants," a group that undoubtedly would include Shorts, who clearly did not want the case removed.

The error in the majority's reading of "without the consent of all defendants" becomes apparent when one takes the full clause of § 1453(b) and substitutes for "any" the Supreme Court's definition of "any," and for the parties, the names of the parties in this case. Thus, the full clause of § 1453(b) would provide that the class action "may be removed by ['one or

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

some indiscriminately of whatever kind' of] defendant [which includes the counterclaim defendant AT&T] without the consent of all defendants [which includes the defendant Shorts]."

Shorts and the majority argue that in adopting their construction of §§ 1441(a) and 1453(b) they are following the canon that courts strictly construe federal jurisdictional statutes and that their construction, in denying AT&T removal authority, eliminates the possibility of removal by all counterclaim defendants in qualifying class actions. But in purportedly applying the canon, they overlook the fact that the canon cannot defeat the plain meaning of the statutory language. "We must not give jurisdictional statutes a more expansive interpretation than their text warrants; but it is just as important not to adopt an artificial construction that is narrower than what the text provides." Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558 (2005) (citation omitted). Moreover, the canon applies with less force in this case because the justifications for the canon are not present in view of Congress' explicit purposes for enacting CAFA.

The Supreme Court first annunciated the canon of strict interpretation of federal jurisdictional statutes in Healy v. Ratta, 292 U.S. 263, 269-70 (1934), and reiterated it as an additional basis for its ruling in Shamrock Oil. In both Shamrock Oil and Healy, the Court gave two reasons for applying

the canon of strict construction. First, the Court observed that successive acts of Congress had constricted federal jurisdiction, evincing a clear congressional policy to narrow federal jurisdiction. See Shamrock Oil, 313 U.S. at 108; Healy, 292 U.S. at 269-70. Second, in both Shamrock Oil and Healy, the Court stated that federalism principles required strict construction of encroachment on state court jurisdiction. Shamrock Oil, 313 U.S. at 108-09; Healy, 292 U.S. at 270.

But neither of these rationales applies with any force in this case. First, CAFA unquestionably expanded federal jurisdiction and liberalized removal authority, see Johnson v. Advance America, Cash Advance Centers of South Carolina, Inc., No. 08-2186, slip op. at [7-8, 14-15], ___ F.3d ___ (4th Cir. Dec. 12, 2008), thus reversing the restrictive federal jurisdiction policies of Congress that both Healy and Shamrock Oil listed as the primary justification for application of the canon. Second, CAFA § 2 addresses the federalism principle, stating that Congress intended the extension of federal jurisdiction over large interstate class actions and liberalization of removal to further the proper balance of federalism and "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), Pub. L. No. 109-2, 119 Stat. 4-5

(2005); Johnson, slip op. at 7, 14-15. Unlike the generalized legislative history referenced in Shamrock Oil and Healy and by the majority, this stated purpose for expanding federal jurisdiction and liberalizing removal in the CAFA context is part of the statutory text, and federal courts surely have an obligation to heed it.

The Supreme Court recently relied upon similar statutory statements of findings and purposes in rejecting an artificial reading of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). In Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006), the Court interpreted the words "in connection with the purchase or sale" of securities, as contained in SLUSA. The plaintiff Dabit argued for an artificially narrow reading of the words, premised on the canon against finding federal preemption of state law. Id. at 84. That canon, like the canon of strict interpretation of jurisdictional statutes, derived partly from federalism concerns. But, based largely on SLUSA's purposes, as stated in SLUSA § 2, the Court unanimously gave the statute its natural reading, even though that reading had the effect of significantly preempting more state law. Id. at 82, 86, 87-88. Under a similar analysis, this court should give "any defendant" used in 28 U.S.C. § 1453(b) its natural reading.

I conclude that the plain language of § 1453(b) grants removal authority to AT&T in this case. Section 1453(b)'s "any defendant" language could not have overruled one rule derived from the phrase "the defendants" in § 1441(a) but not another rule derived from the same statutory language in the same statute. And when one also considers the expansive meaning given to "any" by the Supreme Court, the natural reading of the plain language of § 1453(b) unambiguously grants AT&T removal authority.

II. Removal Jurisdiction

Because I conclude that AT&T has removal authority, I must also determine whether the district court correctly found it had removal jurisdiction.

Section 1332(d)(2) confers original jurisdiction on district courts over "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class in which any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). The district court concluded and Shorts acknowledges that the class action counterclaim in this case meets the requirements of § 1332(d)(2) insofar as it alleges the jurisdictional amount ($5 million) and diversity of citizenship (minimal diversity). Shorts contends,

however, that the class action counterclaim in this case is not "any civil action" over which § 1332(d)(2) grants jurisdiction to district courts. She states, "A counterclaim is not a 'civil action.' Rather, a civil action arises from the plaintiff's original claims," citing Federal Rule of Civil Procedure 3 ("A civil action is commenced by filing a complaint with the court").

In state court, Palisades Collections, as a plaintiff, filed a collection claim against Shorts, as a defendant. Shorts, as a counterclaim plaintiff, then filed a class action against Palisades Collections, as a counterclaim defendant, and against AT&T, as an additional defendant joined under the West Virginia analog to Federal Rule of Civil Procedure 13(h). See Fed. R. Civ. P. note to 1966 Amendment ("the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be"). Thus, while Palisades Collections is the plaintiff and Shorts the defendant in the original collection action, Shorts is the class action plaintiff, representing 160,000 class plaintiffs against Palisades Collections and AT&T, as class action defendants. I conclude that Shorts' claim on behalf of 160,000 against Palisades Collections and AT&T is a class action over which CAFA confers jurisdiction.

In using the term "any civil action" in § 1332(d)(2), where Congress granted jurisdiction to the district courts in CAFA, Congress used a term of art created by the Federal Rules of Civil Procedure to merge all actions and causes of actions, whether claims for damages, injunctive relief, and other relief, and whether at law or in equity. With that merger, a plaintiff now claims, in one action, without stating separate "causes of action," claims for damages, injunctive relief and other relief. See Fed. R. Civ. P. 2 ("There is one form of action -- the civil action").

The effect of this rule was to streamline all pleading by eliminating the numerous earlier requirements such as stating causes of action and transferring claims between law and equity. At the same time Rule 2 was adopted, the Advisory Committee provided an instructional note to the Rule: "Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules." Fed. R. Civ. P. 2 note 2 (emphasis added). Congress complied with this instruction when referring in § 1332(d)(2) to a class action as a civil action.

That a class action in whatever form is a civil action was indicated early by the Supreme Court soon after it adopted the rules in 1937. As the Court stated, "The class suit was an invention of equity to enable it to proceed to a decree in suits

where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable." Hansberry v. Lee, 311 U.S. 32, 41 (1940). Thus, the class action, once a form of suit in equity, became with the enactment of Rule 2, a civil action. Indeed, the text of Rule 23, regulating class actions generally, confirms this. See, e.g., Fed. R. Civ. P. 23(c)(1)(A) ("whether to certify the action as a class action"); id. 23(d) ("Conducting the Action"); id. 23(d)(1) ("in conducting an action under this rule"); id. 23(d)(1)(B)(i) ("any step in the action"); id. 23(d)(1)(B)(iii) ("otherwise come into the action"); id. 23(g)(1)(A)(ii) ("the types of claims asserted in the action") (emphases added throughout). As recognized in Hansberry v. Lee from the history of class actions, a class action is available in conformity with the usual rules of procedure as practicable, whether by complaint, counterclaim, cross-claim, or third-party claim. Indeed, Shorts herself must recognize this as she brought her class action as a counterclaim.

Shorts, of course, does not maintain that her class action counterclaim is barred simply because she brought it as a counterclaim. She undertook, in filing the class action, to seek certification of "the action" as a class action. See West Virginia Rule 23(c)(1)(A) (containing the same language as the

Federal Rules counterpart). That rule provides that "the court must determine by order whether to certify the action as a class action." This applies to Shorts' class action counterclaim. Shorts therefore cannot credibly claim that her class action counterclaim is not an action and thus a "civil action" under Rule 2.

Courts have reached a similar conclusion in the context of 28 U.S.C. § 1442, which authorizes the removal of "a civil action" against federal officers and agencies. Implementing the authority granted by § 1442, which authorizes removal of "a civil action . . . commenced in a State court against" a federal official or agency, courts have found removal jurisdiction when those federal officials or agencies were first brought into the case through a third-party complaint. See Johnson v. Showers, 747 F.2d 1228 (8th Cir. 1984); IMFC Professional Servs. of Fla., Inc. v. Latin Am. Home Health, Inc., 676 F.2d 152 (5th Cir. 1982). While these holdings might be justified in part by the federal policy encouraging federal-court resolution of claims against federal officers and agencies, Congress has also announced a similar federal policy in CAFA in favor of federal-court resolution of class actions such as this one. Section 2(b) of CAFA states that Congress intended CAFA to "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." (Emphasis added).

Shorts' reliance on Federal Rule of Civil Procedure 3, stating that "[a] civil action is commenced by filing a complaint with the court," is misplaced, as that rule addresses when an action commences for purposes of federal statutes of limitations and similar time-related provisions. See 4 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §§ 1051, 1056 (3d ed. 2002).

As the district court concluded, the requirements for original jurisdiction set forth in 28 U.S.C. § 1332(d)(2) are fulfilled, and when combined with 28 U.S.C. § 1441(a), the district court is granted removal jurisdiction. Accordingly, I would conclude that the district court had removal jurisdiction over this interstate class action, a conclusion that is entirely consonant with Congress' purposes in enacting CAFA, expressed in the statutory text, at CAFA § 2, Pub. L. No. 109-2, 119 Stat. 4, 5 (2005).

III

The majority correctly recognizes that Congress does not sub silentio disturb preexisting legal principles for removal jurisdiction and authority. See Strawn v. AT&T Mobility LLC, 530 F.3d 293, 297 (4th Cir. 2008). But when new statutory

language, added by CAFA, modifies preexisting language, the new language must control. Id. The majority, however, fails to apply the new language. Section 1453(b), by authorizing "any defendant" to remove, makes Shamrock Oil inapplicable in the CAFA context, thus giving AT&T removal authority. And the language of §§ 1332(d)(2) and 1441 gives the district court removal jurisdiction. Accordingly, I would reverse the district court's remand order to let this interstate class action proceed in federal court, as CAFA clearly provides.