

No.

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**In the Supreme Court of the United States**

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AT&T MOBILITY LLC AND  
AT&T MOBILITY CORPORATION,

*Petitioners,*

v.

CHARLENE SHORTS AND  
PALISADES COLLECTIONS LLC,

*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Congress enacted the Class Action Fairness Act of 2005 (CAFA or Act), Pub. L. No. 109-2, 119 Stat. 4, to ensure that interstate class actions can be litigated in federal court, where Congress believed they belong. Toward that end, the Act expands diversity jurisdiction and liberalizes removal practice. As relevant here, CAFA’s removal provision states that a qualifying class action filed in state court “may be removed to a district court of the United States \* \* \* by *any* defendant.” 28 U.S.C. § 1453(b) (emphasis added). In this case, a divided panel of the Fourth Circuit held that, when a qualifying (and otherwise-removable) class action is pleaded as a counterclaim rather than an independent suit, the Act prohibits the removal of the class action by a counterclaim defendant—even one that is not an original plaintiff and instead is joined as an “additional” counterclaim defendant.

The question presented is whether CAFA authorizes removal by a counterclaim defendant.

**RULE 29.6 STATEMENT**

Petitioner AT&T Mobility LLC, a Delaware limited liability company, is an indirect, wholly owned subsidiary of AT&T Inc., a publicly held company. AT&T Mobility LLC is owned by: SBC Long Distance, LLC; SBC Alloy Holdings, Inc.; AT&T Mobility Corporation; New BellSouth Cingular Holdings, Inc.; and BellSouth Mobile Data, Inc. All five of AT&T Mobility LLC's owners are subsidiaries of AT&T Inc., and none is publicly held.

Petitioner AT&T Mobility Corporation, a Delaware corporation, has one owner: BellSouth Mobile Systems, Inc., an indirect, wholly owned subsidiary of AT&T Inc., a publicly held company.

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners, AT&T Mobility LLC and AT&T Mobility Corporation (together, ATTM), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals and its order denying rehearing en banc (App., *infra*, 1a-37a) are reported at 552 F.3d 327. The memorandum opinion and order of the district court (App., *infra*, 38a-59a) is not published in the *Federal Supplement* but is available at 2008 WL 249083.

### JURISDICTION

The judgment of the court of appeals was entered on December 16, 2008. The petition for rehearing en banc was denied on January 15, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in the Appendix: Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4-5; 28 U.S.C. § 1332; 28 U.S.C. § 1441; 28 U.S.C. § 1446; and 28 U.S.C. § 1453. App., *infra*, 60a-78a.

### STATEMENT

This case involves the scope of the removal provision of the Class Action Fairness Act of 2005 (CAFA or Act), Pub. L. No. 109-2, 119 Stat. 4. A divided panel of the Fourth Circuit 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 CAFA 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 (here, a suit to collect a debt of less than \$1,000). The court of appeals' decision is fundamentally mistaken in two separate respects.

For one thing, as Judge Niemeyer demonstrated in his comprehensive panel dissent, the majority's interpretation is "demonstrably at odds" with the "plain language" of CAFA, which authorizes "any defendant" to remove. App, *infra*, 23a, 24a. That "broad language" easily covers a *counterclaim* defendant. *Id.* at 23a. For another, the majority's interpretation undermines CAFA's essential purpose. While Congress adopted the Act to ensure that plaintiffs' lawyers cannot manipulate pleadings to keep a class action in state court, the decision below invites them to do just that, simply by filing the class action as a counterclaim rather than a stand-alone suit.

As Judge Niemeyer observed in his dissent from the denial of rehearing en banc, the question whether a counterclaim defendant may remove a qualifying class action under CAFA "is an important issue of statutory interpretation," and the majority's interpretation "creates an unfortunate loophole in the \* \* \* Act" that plaintiffs' lawyers are exploiting. App., *infra*, 37a. Rather than requesting a poll of the Fourth Circuit on whether to grant rehearing en banc, Judge Niemeyer "prefer[red] to release this case to the early consideration of the Supreme Court." *Id.* at 36a-37a. The Court should accept his invitation to decide this recurring and important question of federal law.

### A. Statutory Background

Since the adoption of the Judiciary Act of 1789, § 12, 1 Stat. 79-80, federal statutes have authorized the removal to federal court of certain actions that are filed in state court. The general removal statute currently in force, 28 U.S.C. § 1441(a), 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 [a] district court of the United States.” A nearby provision, 28 U.S.C. § 1446, sets forth the procedures for removal. When Congress adopted CAFA in 2005, it added a specific removal provision, 28 U.S.C. § 1453(b), for class actions that are covered by the Act.

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 of the abuses that prompted Congress to act was the practice of filing interstate class actions in state court. Congress found that state-court judges frequently apply procedural rules “in a manner that contravenes basic fairness” and that class-action lawyers often “effectively control the litigation” in state court, S. REP. NO. 109-14, at 4 (1st Sess. 2005), to the benefit of the lawyers but to the detriment of both “class members with legitimate claims” and “defendants that have acted responsibly,” CAFA § 2(a)(2)(A). It was also common for class-action lawyers to “game the system” by manipulating their pleadings to “defeat diversity jurisdiction,” thereby ensuring that defendants could not remove class actions to federal court. S. REP. NO. 109-14, at 5.

Congress’ main objective in enacting CAFA was to ensure that interstate class actions could be liti-

gated in federal court, so as to prevent the abuses that are prevalent in state court. CAFA § 2(a)(4)(A), (b)(2); S. REP. NO. 109-14, at 4-5. Congress explicitly found that “[a]buses in class actions” undermine “the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution,” in that state courts are “keeping cases of national importance out of Federal court,” sometimes “acting in ways that demonstrate bias against out-of-State defendants,” and “making judgments that impose their view of the law on other States and bind the rights of the residents of those States.” CAFA § 2(a)(4). Consistent with that finding, the Act specifically states that one of CAFA’s purposes is to “provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction.” CAFA § 2(b)(2).

To effectuate that purpose, Congress amended 28 U.S.C. § 1332 in Section 4 of CAFA “to allow federal courts to hear more interstate class actions on a diversity jurisdiction basis,” and it added 28 U.S.C. § 1453 in Section 5 of CAFA “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). 28 U.S.C. § 1332(d)(2), (6). 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. 28 U.S.C. § 1453(b).

Subsection (b) of Section 1453, the provision at issue here, 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.

### **B. Proceedings In State Court**

Respondent Charlene Shorts had a contract for wireless telephone service with ATTM's predecessor in interest. Shorts was permitted to terminate her service at any time and for any reason before the contract term 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, which totaled \$794.87, to respondent Palisades Collections LLC (Palisades). Palisades attempted to collect the debt but was unable to do so. App., *infra*, 2a-3a, 39a.

Palisades subsequently commenced an action against Shorts to collect the debt in the Magistrate Court of Brooke County, West Virginia. Shorts filed an answer and counterclaim. Palisades then removed the action to the Circuit Court of Brooke County. App., *infra*, 2a-3a, 20a, 39a.

The case lay dormant for more than ten months, until a district court in the Northern District of West

Virginia issued its decision in *CitiFinancial, Inc. v. Lightner*, No. 5:06CV145, 2007 WL 1655225 (N.D. W. Va. June 6, 2007). In that case, the plaintiff removed a collection action it had filed in West Virginia state court after the defendant served it with a putative class-action counterclaim. The district court granted the defendant's motion to remand, finding that CitiFinancial, the plaintiff and counterclaim defendant, did not have the right to remove. *Id.* at \*2-\*3.

Just a few weeks later, putative class counsel in *CitiFinancial* entered an appearance on behalf of Shorts in this case and filed a motion for leave to file an amended counterclaim. The circuit court granted the motion. The amended counterclaim (1) joined ATTM as an "additional counterclaim defendant" and (2) asserted putative class-action claims alleging that the ETFs violated 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. App., *infra*, 3a-4a, 20a-21a, 39a-40a.<sup>1</sup>

### **C. Proceedings In The District Court**

After being joined as a counterclaim defendant, ATTM removed the action to the United States District Court for the Northern District of West Virginia. Shorts filed a motion to remand the case to state court, citing *CitiFinancial* and arguing that ATTM had no right to remove. The district court granted the motion. App., *infra*, 38a-59a.

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<sup>1</sup> Although Palisades was on the same side of the case as ATTM in the lower courts, it is named as a respondent here pursuant to this Court's Rule 12.6.

As an initial matter, the court found that (1) the aggregated amount in controversy easily exceeds \$5 million, (2) there is minimal diversity among the parties, and (3) none of CAFA’s exceptions to diversity jurisdiction applies. App., *infra*, 52a-55a. The court therefore agreed with ATTM that “this putative class action meets the jurisdictional requirements of CAFA”; that “federal subject matter jurisdiction exists”; and that the court may “retain jurisdiction if it determines that ATTM has the authority to remove.” *Id.* at 42a; see also *id.* at 52a, 54a-55a. The court decided, however, that ATTM does not have the authority to remove. The court reasoned that a counterclaim defendant—even an “additional” counterclaim defendant like ATTM (one that is not a plaintiff and has not chosen to litigate in state court)—“may not remove [a] case to federal court” under the general removal statute, 28 U.S.C. § 1441(a), and that “CAFA does not create independent removal authority.” App., *infra*, 47a, 59a. The court therefore ordered that the case be remanded to state court.<sup>2</sup>

#### **D. The Court Of Appeals’ Decision**

1. Under CAFA, a court of appeals “may accept an appeal from an order of a district court granting

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<sup>2</sup> Shorts’ amended counterclaim named only petitioner AT&T Mobility LLC as an “additional” counterclaim defendant. C.A. J.A. 26. But her motion for leave to file the amended counterclaim and the state court’s order granting the motion named both petitioner AT&T Mobility LLC and petitioner AT&T Mobility Corporation. *Id.* at 17, 24. In an abundance of caution, therefore, both AT&T Mobility LLC and AT&T Mobility Corporation removed the case to federal court. *Id.* at 33. The two petitioners have remained parties in the federal proceedings ever since. See App., *infra*, 3a n.1.

or denying a motion to remand a class action,” 28 U.S.C. § 1453(c)(1), and ATTM filed a petition for permission to appeal the order remanding Shorts’ class action. The Fourth Circuit granted the petition. App., *infra*, 5a. On the merits, however, a divided panel of the court of appeals affirmed. *Id.* at 1a-36a.

The majority held that a counterclaim defendant may not remove under CAFA. App., *infra*, 13a-19a. It reasoned that, under this Court’s decision in *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 cover 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. App., *infra*, 13a-19a. The majority also rejected ATTM’s alternative argument that, even if CAFA incorporates the holding of *Shamrock Oil*, its holding is limited to counterclaim defendants that—unlike ATTM—invoked the jurisdiction of the state court as plaintiffs. *Id.* at 9a-13a.

Judge Niemeyer wrote a lengthy dissent. App., *infra*, 20a-36a. 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 majority’s contrary conclusion is “demonstrably at odds” with the statutory text. *Id.* at 22a, 23a. 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 interpre-

tation of the phrase “the defendant” in the predecessor to Section 1441(a). *Id.* at 23a-26a. Judge Niemeyer also concluded that *Shamrock Oil*’s holding is in any event limited to counterclaim defendants that were plaintiffs. *Id.* at 27a n.3.

2. ATTM filed a petition for rehearing en banc. The Fourth Circuit denied the petition, but Judge Niemeyer again dissented. App., *infra*, 36a-37a. In its entirety, his dissenting opinion read as follows:

While I find the petition for rehearing persuasive, I do not request a poll of the court. Because there is a respectable division of opinion on the issue of whether a party joined as an additional defendant to a counterclaim has rights under the Class Action Fairness Act, I prefer to release this case to the early consideration of the Supreme Court. This is an important issue of statutory interpretation, and the majority’s interpretation creates an unfortunate loophole in the Class Action Fairness Act that only the Supreme Court can now rectify.

*Ibid.*<sup>3</sup>

### REASONS FOR GRANTING THE PETITION

The court of appeals majority held that, when a qualifying (and otherwise-removable) class action is pleaded as a counterclaim rather than an independent suit, CAFA prohibits removal by a counterclaim defendant—even an “additional” one like ATTM. The court of appeals’ decision is fundamentally inconsistent both with the unambiguous text of the Act

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<sup>3</sup> The proceedings in state court have been held in abeyance while ATTM pursues its appellate remedies in federal court.

and with its undisputed purpose. The question presented—whether plaintiffs’ lawyers may circumvent an important federal statute through a pleading device—is a recurring one of great consequence. And this case is an ideal vehicle for deciding it.

Although this is the first case in which a court of appeals has squarely addressed whether CAFA authorizes a counterclaim defendant to remove a qualifying class action, that is not a reason to deny review. This Court will ultimately have to decide the question if it agrees that the Fourth Circuit’s decision is seriously flawed: either the error will be replicated in other circuits or a conflict will develop. The issues have been fully ventilated by the panel majority and dissent here. Awaiting another case would merely encourage expensive, wasteful, and—if our position is correct—unjustified litigation. Those harms would be compounded by the inevitability of coerced settlements following class certification in state court, which is precisely what CAFA was intended to prevent. There is no need to wait for a circuit conflict when an erroneous statutory decision threatens nationwide harm. See E. Gressman et al., SUPREME COURT PRACTICE § 4.13 (9th ed. 2007). The Court should accept Judge Niemeyer’s invitation to grant review now.

#### **A. The Court Of Appeals’ Decision Is Manifestly Erroneous**

The Fourth Circuit majority’s interpretation of CAFA is clearly wrong for two independent reasons. First, in authorizing removal by “any” defendant, the Act unambiguously authorizes removal by a *counterclaim* defendant. Second, even if the statutory text were somehow deemed ambiguous, the ambiguity would have to be resolved in favor of a counterclaim

defendant’s right to remove, because the contrary interpretation would undermine the congressional objectives to authorize qualifying class actions to be litigated in federal court and to prevent plaintiffs’ lawyers from defeating removal through manipulation of pleadings.

1. *The court of appeals’ decision is inconsistent with CAFA’s clear text*

As Judge Niemeyer explained in his panel dissent, the “plain language” of CAFA “unambiguously grants [ATTM] removal authority” and “clearly provides” that “this interstate class action [may] proceed in federal court.” App., *infra*, 31a, 36a.

a. CAFA’s removal provision, 28 U.S.C. § 1453(b), states that a class action “may be removed by any defendant.” As this 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); accord *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980). “[R]ead naturally,” the word “any” means “one or some indiscriminately of whatever kind.” *Ali*, 128 S. Ct. at 835-836 (internal quotation marks omitted). And a counterclaim defendant “is certainly a ‘kind’ of defendant and falls easily within ‘indiscriminately of whatever kind’ of defendant.” App., *infra*, 24a (Niemeyer, J., dissenting). The court of appeals majority offered no persuasive responses to this straightforward reading of the statute; each of them was decisively refuted by Judge Niemeyer’s panel dissent.

For example, the majority believed 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. App., *infra*, 16a-17a. As Judge Niemeyer explained, however, “[t]he article ‘the’ *restricts* the noun that follows, while the article ‘any’ *expands* its meaning.” *Id.* at 27a (emphasis added).

The Fourth Circuit majority also thought that CAFA incorporates this Court’s holding in *Shamrock Oil* that a counterclaim defendant could not remove under the general removal provision then in effect. App., *infra*, 9a-10a, 14a, 16a. But as Judge Niemeyer explained, *Shamrock Oil*’s holding was based on the interpretation of the phrase “*the* defendant” in the statute at issue there. *Id.* at 27a (emphasis added). Because CAFA uses expansive language, Congress could not have meant to incorporate a judicial interpretation of restrictive language.

The 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. App., *infra*, 17a. 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.” App., *infra*, 25a.<sup>4</sup>

Finally, in interpreting CAFA narrowly, the court of appeals majority relied on the federalism-based interpretive canon that removal statutes are strictly construed. App., *infra*, 13a, 17a-18a. 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 29a. 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 30a; see also S. REP. NO. 109-14, at 23 (“*National Class Actions Belong in Federal Court Under Traditional Notions of Federalism*”).

b. There is another clear indication in the statutory text—apart from the phrase “any defendant”—that CAFA authorizes a counterclaim defendant to remove. 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). This Court has

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<sup>4</sup> Even if CAFA does incorporate the *Shamrock Oil* rule, the rule is limited to counterclaim defendants that—unlike ATTM—invoked the jurisdiction of the state court as plaintiffs. See *infra* pp. 25-26.

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, 102-103 (1979). So too 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 court of appeals 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. App., *infra*, 14a. On the basis of that language, the majority concluded that Congress “did not intend to extend the right of removal [in Section 1453(b)] to parties other than ‘defendant[s].’” *Ibid.* As Judge Niemeyer explained in his panel dissent, however, Section 1446 “neither creates nor alters removal authority, being entirely procedural, as suggested by its title, ‘Procedure for Removal.’” *Id.* at 25a n.1. That removal under 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 court of appeals’ decision undermines CAFA’s essential purpose*

There is a separate reason why the court of appeals’ interpretation of CAFA is wrong: it undermines Congress’ objective to ensure that class actions like this one can be litigated in federal court. A stat-

ute should not be interpreted in a way that defeats its purpose unless there is clear statutory language that leaves a court with no choice; and there is no such language in CAFA. Even if the statutory text does not unambiguously *authorize* removal by counterclaim defendants—and, as we explain above, it does—the text certainly does not unambiguously *prohibit* removal by counterclaim defendants. For that reason, “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 here, the goal is “part of the statutory text.” App., *infra*, 30a (Niemeyer, J., dissenting).

a. 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 text, Section 2 of the Act 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.” CAFA § 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.<sup>5</sup> The President made a similar point when he signed the Act into law.<sup>6</sup> And courts interpreting the Act have likewise recognized that CAFA’s purpose is to prevent plaintiffs’ lawyers from gaming the system to keep interstate class actions in state court.<sup>7</sup>

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<sup>5</sup> 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.”); 151 CONG. REC. H723-01, 726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (“The bill before the House today offers commonsense procedural changes that will end the most serious abuses by allowing more interstate class actions to be heard in Federal courts.”).

<sup>6</sup> 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.”).

<sup>7</sup> See, e.g., *Johnson v. Advance Am., Cash Advance Ctrs. of S.C., Inc.*, 549 F.3d 932, 935 (4th Cir. 2008); *Estate of Pew v.*

b. What Congress enacted CAFA to prevent is precisely what the court of appeals' decision permits.

The district court found—and neither Shorts nor the Fourth Circuit majority disputed—that the putative class action here satisfies CAFA's jurisdictional requirements (*i.e.*, minimal diversity and an amount in controversy of more than \$5 million). App., *infra*, 42a, 52a, 54a-55a; see also *id.* at 32a (Niemeyer, J., dissenting). It would therefore have been removable if it had been filed as a freestanding suit. The 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.” *Id.* at 22a (Niemeyer, J., dissenting).

The consequence of the court of appeals' 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 in this case, 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. Congress could not have intended to enable plaintiffs' lawyers to circumvent CAFA through the simple expedient of recruiting a defendant in a state-court action to serve as a “counterclaim plaintiff” in an otherwise-removable class action. And courts should not “interpret[] th[e] Act as containing a loophole that Congress could not have intended to create.” *Morse v. Republican Party of*

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*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).

*Va.*, 517 U.S. 186, 239 (1996) (Breyer, J., concurring in the judgment).

Indeed, “loophole” is probably not an adequate term. The rule adopted by the district court is tantamount to a determination that CAFA’s removal provisions have no application to the very substantial proportion of class actions—including the type at issue here—that can be pleaded as counterclaims. See, *e.g.*, Emery G. Lee III & Thomas E. Willging, *THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS* 4 (2008) (finding that 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). It is inconceivable that Congress intended to leave such a large category of class actions in state court. On the contrary, that result is so “anomalous” that—to put it mildly—it “[can]not easily [be] attributable to congressional intent.” *Cedar Rapids Cmty. School Dist. v. Garret F.*, 526 U.S. 66, 78 n.10 (1999).

c. Remarkably, neither Shorts nor the court of appeals majority took issue with any of this. Neither denied 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. And neither denied 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 *cannot* be litigated in federal court.

Nor did Shorts or the Fourth Circuit majority suggest any countervailing consideration that might have led Congress to enact a law that allows such easy circumvention of its core purpose. Indeed, nei-

ther made any attempt to explain why the rule the court adopted even *makes sense*—why a putative class action seeking to recover tens of millions of dollars on behalf of tens of thousands of class members should be removable if it is filed as a freestanding action but not if it is appended as a “counterclaim” to a suit to collect a small debt.

An academic defender of the class-action-as-counterclaim tactic—and, not coincidentally, a consultant to Shorts—has asserted that, after CAFA, the choice between filing a qualifying class action as an independent suit and filing it as a counterclaim depends upon whether class counsel “wishes to litigate in federal or state court.” 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, 197 (2007); *see id.* at 193 n.\*. But the whole point of CAFA is that it is the class-action *defendant* that gets to decide whether to litigate a qualifying case in federal or state court.

As for the Fourth Circuit majority, while tacitly acknowledging that its decision will leave a large number of class actions in state court, it suggested that that result is not inconsistent with Congress’ intent, because “§ 1332(d) itself leaves many class actions in state courts.” App., *infra*, 18a. But those cases, by definition, are not *qualifying* class actions under CAFA, and Congress had good reason to leave them 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 court of appeals majority suggested any—why Congress would have intended to leave *qualifying* class actions in state court

whenever counsel chooses to plead them as counter-claims rather than independent suits.

d. As Judge Niemeyer observed in his panel dissent, this Court “recently relied upon \* \* \* statutory \* \* \* purposes in rejecting an artificial reading” of another statute enacted to stem abusive class actions. App., *infra*, 30a. That case—*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006)—involved the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227 (1998), which prohibits the filing of certain securities-fraud class actions premised on state law. Plaintiffs’ lawyers had begun to employ that tactic after Congress placed limits on securities-fraud class actions premised on *federal law* in the Private Securities Litigation Reform Act of 1995 (1995 Reform Act), Pub. L. No. 104-67, 109 Stat. 737 (1995).

In *Dabit*, the court of appeals interpreted SLUSA narrowly, finding that a category of state-law class actions was not covered by the statute and thus was not preempted. This Court unanimously reversed. It explained that “[t]he presumption that Congress envisioned a broad construction” follows, in part, from “the particular concerns that culminated in SLUSA’s enactment.” *Dabit*, 547 U.S. at 86. The Court believed that “[a] narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA’s stated purpose, viz., ‘to prevent certain State private securities class action lawsuits \* \* \* from being used to frustrate the objectives’ of the 1995 Act.” *Id.* (quoting SLUSA § 2(5)).

So too here. The presumption that Congress envisioned a broad construction of CAFA follows, in

part, from the particular concerns that culminated in its enactment. A narrow reading of CAFA would allow plaintiffs' lawyers to litigate interstate class actions in state court and thus run contrary to one of its stated purposes, *viz.*, to "provid[e] for Federal court consideration of interstate cases of national importance." CAFA § 2(b)(2).<sup>8</sup>

### **B. The Question Presented Is A Recurring One Of Great Importance**

Apart from being manifestly erroneous, the court of appeals' decision warrants review because the question in the case—whether plaintiffs' lawyers may defeat removal by pleading class actions as counterclaims—is a recurring one of great importance. That is why Judge Niemeyer urged this Court to decide the question. As he put it in his opinion dissenting from the denial of rehearing en banc, whether CAFA authorizes a counterclaim defendant to remove "is an important issue of statutory inter-

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<sup>8</sup> At the merits stage in the court of appeals, Shorts claimed for the first time that, regardless of whether CAFA grants ATTM the *authority* to remove a counterclaim class action, it does not grant a district court *jurisdiction* over a counterclaim class action (even though a district court would have had jurisdiction over Shorts' class action if it had been filed as an independent suit). Shorts argued that the term "civil action" in 28 U.S.C. § 1332(d)(2), which grants district courts jurisdiction over class actions in which the amount in controversy exceeds \$5 million and there is minimal diversity, does not encompass a counterclaim. See App., *infra*, 32a. The court of appeals majority did not address that argument, see *id.* at 13a n.3, but Judge Niemeyer did, and he correctly rejected it, see *id.* at 31a-35a. A "civil action" is simply a "civil \* \* \* judicial proceeding," BLACK'S LAW DICTIONARY 31 (8th ed. 2004), and a counterclaim is no less a part of a "judicial proceeding" than the claims raised in the complaint.

pretation,” and the majority’s holding that it does not “creates an unfortunate loophole in the \* \* \* Act.” App., *infra*, 37a. Rather than requesting a poll of the Fourth Circuit’s judges on whether to rehear the case en banc, Judge Niemeyer “prefer[red] to release this case to the early consideration of the Supreme Court.” *Id.* at 36a-37a.

The question presented is important for the same reason (or one of the reasons) that the decision below is clearly wrong: the court of appeals’ interpretation undermines CAFA’s basic purpose. See *supra* Point A.2. By allowing plaintiffs’ lawyers to manipulate their pleadings to keep class actions in state court, the Fourth Circuit’s decision has ratified the very tactic that CAFA was enacted to prevent.

The question presented is also a recurring one. As the practices that led to CAFA’s enactment amply demonstrate, plaintiffs’ lawyers in general, and class-action counsel in particular, have proven themselves adept at exploiting loopholes—including the loophole that is the subject of this petition. Class counsel can be expected to take advantage of every opportunity to keep a case in state court, so as to obtain the benefits of litigating there (including a higher likelihood of class certification) and thus increase—perhaps dramatically—the settlement value of the suit.<sup>9</sup>

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<sup>9</sup> For example, in a putative class action that AT&T Wireless, a predecessor of ATTM, did successfully remove, the district court compelled arbitration of the plaintiff’s claims notwithstanding his contention that the arbitration provision was unconscionable under West Virginia law. *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 689-691 (N.D. W. Va. 2005). By contrast, a West Virginia state court subsequently declared AT&T Wireless’s arbitration provision unconscionable and refused to

That is what putative class counsel did here; and it is what counsel have done in many other cases since CAFA's enactment.<sup>10</sup> Indeed, as Shorts' consultant has correctly observed, the cases in which the class-action-as-counterclaim tactic has already been employed are likely "just the tip of an approaching iceberg." Tidmarsh, *supra*, at 199. And both the size and the speed of that iceberg are sure to increase as a consequence of the tactic's ratification by the court of appeals majority, which has provided a guide to counsel on how to circumvent the Act.

CAFA has been described as "the most significant legislative reform of complex litigation in American history," Lonny Sheikopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409, 410 (2008), and, more generally, as "arguably the most important tort reform in recent years," Anthony J.

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enforce it. *Paetzold v. Palisades Collections, LLC*, No. 07-C-272 (Ohio Cty., W. Va. Cir. Ct. Dec. 26, 2007). About a year later, ATTM successfully removed a putative class action, and the district court enforced ATTM's arbitration provision, rejecting the plaintiffs' unconscionability arguments. *Strawn v. AT&T Mobility, Inc.*, 593 F. Supp. 2d 894 (S.D. W. Va. 2009). The marked difference between state and federal courts in the enforcement of arbitration provisions is just one of many ways in which the forum matters greatly.

<sup>10</sup> See, e.g., *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007) (insurance); *Unifund CCR Partners v. Wallis*, No. Civ. A 06-CV-545-GRA, 2006 WL 908755 (D.S.C. Apr. 7, 2006) (credit card); *CitiFinancial, Inc. v. Lightner*, No. 5:06CV145, 2007 WL 1655225 (N.D. W. Va. June 6, 2007) (consumer loan); *Ford Motor Credit Co. v. Jones*, No. 1:07CV728, 2007 WL 2236618 (N.D. Ohio July 31, 2007) (automobile lease). Like the Fourth Circuit majority here, the court in each of these cases reached the erroneous conclusion—albeit with little or no analysis of the statutory text or purpose—that a counterclaim defendant may not remove a class action under CAFA.

Sebok, *What Do We Talk About When We Talk About Mass Torts?*, 106 MICH. L. REV. 1213, 1216 n.14 (2008). A court of appeals' decision that severely undermines the purpose of such a statute should not be permitted to stand without consideration by this Court—particularly when neither the court of appeals nor the party for which it ruled denied that the decision has that effect. That is all the more true when the court of appeals' decision is issued over a powerful dissent. Because of the “clear misreading by the lower courts of \* \* \* [an] important federal statute,” *Stevens v. Dep't of Treasury*, 500 U.S. 1, 5 (1991), the Court should accept Judge Niemeyer's invitation to grant review.

### **C. This Case Is An Ideal Vehicle For Deciding The Question Presented**

For at least three reasons, this case is an ideal vehicle for deciding whether CAFA authorizes a counterclaim defendant to remove a qualifying class action.

*First*, as far as ATTM's ability to have Shorts' class action litigated in federal court is concerned, the rule adopted by the court of appeals is outcome-determinative. As Judge Niemeyer pointed out in his panel dissent, “[t]he district court concluded and Shorts acknowledges that the class action counterclaim in this case meets the [jurisdictional] requirements of [CAFA] insofar as it alleges the jurisdictional amount (\$5 million) and diversity of citizenship (minimal diversity).” App., *infra*, 32a. As Judge Niemeyer also pointed out, 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 independ-

ent action.” *Id.* at 22a. If this Court were to hold that CAFA grants counterclaim defendants the same removal authority as original defendants, therefore, this case would proceed in federal court.

*Second*, because ATTM is an “additional” counterclaim defendant, the rule adopted by the court of appeals is the broadest possible one, excluding from the reach of CAFA’s removal provision both counterclaim defendants that were plaintiffs in state court and those that were not. Contrary to the Fourth Circuit majority’s assertion, therefore, its holding is hardly a “narrow” one. App., *infra*, 20a.

Indeed, even if the majority were correct in its belief that CAFA incorporates the holding of *Shamrock Oil* (despite the differences in statutory language), its conclusion that an “additional” counterclaim defendant may not remove a qualifying class action would still be wrong. As Judge Niemeyer pointed out in his panel dissent, *Shamrock Oil* “denied a [counterclaim] defendant *who was also a plaintiff* the authority to remove,” App., *infra*, 28a n.3 (emphasis added), and the holding of *Shamrock Oil* depended on the counterclaim defendant’s status as a plaintiff. The rationale for the 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.<sup>11</sup> A number of lower courts have recognized as

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<sup>11</sup> *Shamrock Oil* framed the “question for decision” as “whether the suit in which the counterclaim is filed, is one removable *by the plaintiff* to the federal district court.” 313 U.S. at 103 (emphasis added). The stated justification for the Court’s holding that the suit was not removable was that “the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal.” *Id.* at 106. Quoting the legislative history, the Court emphasized that the

much, and—unlike the court of appeals majority here—have therefore declined to extend *Shamrock Oil's* holding to “additional” counterclaim defendants.<sup>12</sup>

*Third*, both sides of the important issue of statutory interpretation in this case have been comprehensively explored in the majority and dissenting opinions of the court of appeals. Their exhaustive treatment of the issue both makes this case an ideal vehicle for deciding the question presented and obviates the need to await further developments in the lower courts. That is why, rather than requesting an en banc poll of the Fourth Circuit, Judge Niemeyer “release[d] this case to the early consideration of the Supreme Court.” App., *infra*, 36a-37a.

### CONCLUSION

The petition for a writ of certiorari should be granted.

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reason the statute restricted the right to remove to “the defendant” was that Congress believed it to be “just and proper to require the plaintiff to abide his selection of a forum” and that, if the plaintiff “elects to sue in a State court when he might have brought his suit in a Federal court,” there was “no good reason to allow him to remove the cause.” *Id.* at 106 n.2 (quoting H.R. REP. NO. 49-1078, at 1 (1st Sess. 1887)). The Court also relied, *id.* at 105-06, 108, on its prior decision in *West v. Aurora City*, 73 U.S. 139 (1868), which held that “[t]he right of removal is given only to a defendant who has not submitted himself to [the State court’s] jurisdiction; not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State laws to a cross-action.” *Id.* at 141.

<sup>12</sup> See *State of Tex. v. Walker*, 142 F.3d 813, 816 (5th Cir. 1998); *Mace Sec. Int'l, Inc. v. Odierna*, No. 08-60778-CV, 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).

Respectfully submitted.

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