No. 06-1471

IN THE

Supreme Court of the United States

DENNIS W. GAY, ET AL.,
Petitioners,

v.

SARAH MORGAN, ET AL.,
Respondents.

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

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("the Chamber") hereby moves this Court, pursuant to Rule 37.2, for leave to file the attached brief amicus curiae in support of petitioners in this case. While the petitioners have consented to the filing of this brief, respondents Sarah Morgan, *et al.*, have not consented. Correspondence reflecting the consent of the petitioners has been lodged with the Clerk.

The Chamber is the world's largest business federation, with an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber is well positioned to assist the Court in its evaluation of the parties' arguments because the Chamber regularly advances the interests of its members in courts throughout the country on issues of critical concern to the

business community, and has participated as amicus curiae in numerous cases addressing jurisdictional issues, including recently in *Kircher v. Putnam Funds Trust*, 547 U.S. ---, 126 S. Ct. 2145 (2006).

The Chamber's members are frequently defendants in individual cases and class actions in which the existence of federal diversity jurisdiction is at issue. In addition, the Chamber was involved – on behalf of its members – in organizing support for the much needed class action reforms reflected in the Class Action Fairness Act of 2005 ("CAFA"). As a result, the organization has a wealth of experience in interpreting the jurisdictional requirements set forth in CAFA and is uniquely suited to provide the Court with significant guidance in addressing the policy goals and intent of the legislation – an issue not addressed in detail in the parties' briefs that might otherwise escape the Court's attention.

The Chamber and its members have a strong interest in seeking review of the Third Circuit's December 15, 2006 opinion, which substantially raised the burden on defendants removing cases to federal court by requiring defendants to establish federal jurisdiction by a "legal certainty" and allowing district courts to consider non-binding, post-removal statements by plaintiffs regarding the value of their claims when determining whether the amount in controversy requirement has been met. The Third Circuit's opinion, if left undisturbed, will significantly restrict the ability of defendants to remove cases to federal court – in direct contravention of their constitutional and statutory rights. The Third Circuit's opinion will also blunt the effectiveness of the recent Class Action Fairness Act, wherein Congress specifically provided for expanded federal jurisdiction over, and relaxed the impediments to removal of, certain interstate class actions. The Third Circuit's decision will have far-reaching effects on companies that do business in the United States, many of which are members of the Chamber, by

denying them the ability to avail themselves of diversity jurisdiction.

For the foregoing reasons, the Chamber's motion to file an *amicus* brief in support of petitioners should be granted.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* is set forth in the foregoing Motion for Leave to File.

QUESTIONS PRESENTED

This brief addresses the following questions presented in the petition for a writ of certiorari:

1. Does the Third Circuit's opinion improperly limit federal diversity jurisdiction by increasing the standard of proof by which removing defendants must prove the amount in controversy and by allowing district courts to consider non-binding, post-removal damage limitations when determining whether the amount in controversy requirement has been met?

2. Does the Third Circuit's opinion directly and improperly contravene Congress's intent in enacting the Class Action Fairness Act?

SUMMARY OF THE ARGUMENT

Since our nation's founding, diversity jurisdiction has existed to ensure that proceedings involving parties from different states and sufficiently large quantities of money can be fairly adjudicated in a federal court. In furtherance of that goal, Congress recently amended the diversity statute, in the

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the Chamber and its members, made a monetary contribution to the preparation and submission of this brief.

form of the Class Action Fairness Act of 2005 ("CAFA"),[2] and greatly expanded defendants' access to a federal forum in certain class action and "mass action" cases.

The Third Circuit's ruling in this case undermines both the long-standing constitutional right of defendants to litigate diverse cases in federal court as well as Congress's more recent conclusion that large, interstate class actions should be litigated in a federal forum. Specifically, the Third Circuit's decision in this matter substantially increases the burden on defendants removing cases to federal court by: (1) holding that such defendants must establish to a "legal certainty" that federal diversity jurisdiction exists over a removed case or face remand; and (2) allowing the district court to rely on a non-binding damages limitation in a plaintiff's complaint and/or plaintiff's non-binding, post-removal statement regarding the worth of his or her claims when considering whether those claims exceeded the jurisdictional threshold for diversity jurisdiction.

Taken together, the Third Circuit's rulings would severely restrict defendants' ability to remove cases to federal court, thereby denying defendants their constitutional and statutory right to a federal forum in interstate cases. The ruling should be reviewed and reversed.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION NULLIFIES THE STATUTORY RIGHT TO REMOVE CASES BASED ON DIVERSITY JURISDICTION.

The Third Circuit's ruling would nullify the diversity jurisdiction and removal statutes enacted by Congress to establish a federal forum for interstate cases. *See generally* 28 U.S.C. §§ 1332, 1441.

[2] Pub. L. 109-2, 119 Stat. 4 (2005).

The concept of diversity jurisdiction has its roots in Article III of the Constitution. The Framers were concerned that some state courts might discriminate against out-of-state businesses engaged in interstate commerce. In short, they feared that non-local defendants might be "hometowned" in state courts. *See Douglas Energy of N.Y., Inc. v. Mobil Oil Corp.*, 585 F. Supp. 546, 548 (D. Kan. 1984) (noting that it is a "familiar notion that Congress has created diversity jurisdiction and the right of removal . . . for the purpose of protecting out-of-state litigants from local prejudice"). By allowing cases involving diverse parties to be heard in federal court, the Framers sought to ensure the availability of a fair, uniform, and efficient forum for adjudicating interstate commercial disputes.[3]

The Framers also believed that federal jurisdiction over diverse claims was necessary to ensure cohesiveness among the states and to strengthen national unity. In establishing diversity jurisdiction, the Framers "sought to prevent even

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[3] *See Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) ("[Even if] tribunals of states will administer justice as impartially as those of the nation, to the parties of every description . . . the Constitution itself . . . entertains apprehensions on this subject . . . [such] that it has established national tribunals for the decision of controversies between . . . citizens of different states."), *overruled in part on other grounds by Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844); *Barrow S.S. Co. v. Kane,* 170 U.S. 100, 111 (1898) ("The object of the [diversity jurisdiction] provisions . . . conferring upon the [federal courts] ... jurisdiction [over] controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides."); *Pease v. Peck,* 59 U.S. (18 How.) 595, 599 (1856) (same); *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 346 (1816). *See also* The Federalist No. 80, at 537-38 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("[I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens.").

the perception of bias" by state courts against out-of-state defendants "because they feared that if litigants believed they had suffered discrimination" in another state's court "they would develop prejudices against other states, thereby destroying the federal comity principles upon which our Union is founded." *Class Action Jurisdiction Act of 1998: Hearing on H.R. 3789 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. at 80 (1998) (statement of John L. McGoldrick). *See also The Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 100 (1999) (prepared statement of Prof. E. Donald Elliott, Yale Law School) (noting that "diversity jurisdiction not only was designed to protect against bias, but to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents"); James William Moor & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1, 16 (1964).

In short, since the nation's inception, diversity jurisdiction has served to guarantee that parties of different state citizenship have a means of resolving their legal differences on a level playing field in a manner that nurtures interstate commerce. In fact, constitutional scholars have argued that:

> *[n]o power exercised under the Constitution . . . had greater influence in welding these United States into a single nation [than diversity jurisdiction]*; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts.

John J. Parker, *The Federal Constitution and Recent Attacks Upon It*, 18 A.B.A. J. 433, 437 (1932) (emphasis added)

The Third Circuit's decision in this case would torpedo the intent of the Framers in establishing diversity jurisdiction and nullify the efforts of Congress to codify it. Taken together, the Third Circuit's holding that removing defendants must establish the amount in controversy requirement to a "legal certainty" closes the doors of the federal courthouses in the Third Circuit to removing defendants, and its finding that district courts may consider non-binding, post-removal statements by plaintiffs purporting to limit the value of their claims nails those doors shut. The ruling should be reviewed and reversed.

A. The "Legal Certainty" Test Employed By The Circuit Court Improperly Restricts Federal Jurisdiction.

The Third Circuit's ruling that removing defendants must demonstrate that the amount in controversy in plaintiffs' claims satisfies the jurisdictional threshold to a "legal certainty" will severely limit the ability of defendants to remove cases to federal court by holding defendants to a much higher standard than that recognized by the majority of circuit courts and enabling plaintiffs to easily thwart removal efforts by filing evasive complaints.

Courts around the country have long applied a "preponderance of the evidence" standard in cases where jurisdiction is contested, requiring that a removing defendant show that it is more likely than not that the amount in controversy exceeds the jurisdictional minimum. As these courts have recognized, the preponderance of the evidence standard is neither too lenient nor too strict: it ensures that the plaintiff is "to some extent, still the master of his own claim," *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1411-12 (5th Cir. 1995), while, at the same time, protecting the defendant's statutory right to a federal forum. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1357 (11th Cir. 1996) (noting that the preponderance standard strikes the "proper balance between a plaintiff's right to choose his

forum and a defendant's right to remove"); *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 160 (6th Cir. 1993) (employing the preponderance test because "[w]e believe that the mean between the extremes unsettles to the least extent the balance struck between the defendant's right to remove and the federal interest in limiting diversity jurisdiction").[4] *See also Landmark Corp. v. Apogee Coal Co.*, 945 F. Supp. 932, 935 (S.D. W. Va. 1996) (endorsing the preponderance of evidence standard and observing that "the closest Supreme Court dictum on point suggests that a defendant need only prove by a preponderance of the evidence that the requisite amount exists") (citing *McNutt v. GMAC of Ind.*, 298 U.S. 178, 189 (1936)); *Bolling v. Union Nat'l Life Ins. Co.*, 900 F. Supp. 400, 404 (M.D. Ala. 1995) (preponderance of the evidence standard "properly balance[s] the plaintiff's right to pursue her action in the forum of her choosing and the defendant's right to a federal forum in those cases where federal jurisdiction exists").

The preponderance standard has been embraced by courts and commentators alike because that standard appropriately balances a plaintiff's interest in selecting the forum for his or her action and the defendant's right to avoid the potential for bias and prejudice in another state's courts.

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[4] Prior to the Third Circuit's ruling in this case, district courts within the Third Circuit viewed the preponderance of the evidence standard favorably because it "properly balances the congressional intention to limit removal and diversity jurisdiction with the protection of the defendant's statutory right to remove in appropriate circumstances." *Penn v. Wal-Mart Stores, Inc.*, 116 F. Supp. 2d 557, 562 (D.N.J. 2000) (adopting the preponderance of the evidence standard "after considering alternative standards of proof used by other courts"); *Hayfield v. Home Depot U.S.A., Inc.*, 168 F. Supp. 2d 436, 454 n.12 (E.D. Pa. 2001) ("Though the Third Circuit has not ruled specifically on the appropriate evidentiary standard, many courts in our Circuit and nationally have held that a preponderance of the evidence is sufficient to establish the amount in controversy for the purpose of establishing federal diversity jurisdiction.").