No. 13-719

IN THE

Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC, *ET AL.*,
Petitioners,

v.

BRANDON W. OWENS,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE RETAIL LITIGATION CENTER, INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND BUSINESS ROUNDTABLE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

OTHER AUTHORITIES

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERIC*A*, THE RETAIL LITIGATION CENTER, INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("Chamber"), the Retail Litigation Center, Inc. ("RLC"), the National Federation of Independent Business ("NFIB") and Business Roundtable ("BRT") respectfully submit this brief as *amici curiae* in support of petitioners Dart Cherokee Basin Operating Company, LLC, *et al.*[1]

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing 300,000 direct members and an underlying membership of more than three million U.S. businesses and professional organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community.

The Chamber's members operate in nearly every industry and business sector in the United States.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that petitioners and respondents have both filed blanket consents to the filing of *amicus* briefs on the Court's docket in this case.

These members have an interest in ensuring that the rules governing removal of class actions to federal court are applied fairly and consistently and in keeping with Congress's intent to establish federal courts as the forum of choice for class actions of national importance.

The RLC is a public policy organization that identifies and engages in legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietorships to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. To fulfill its role as the voice for small business, the NFIB frequently files *amicus* briefs in cases that will affect small businesses.

BRT is an association of chief executive officers of leading U.S. companies with $7.4 trillion in annual revenues and more than 16 million employees. Member companies comprise more than a third of the total value of the U.S. stock markets and invest $158 billion annually in research and development – equal to 62 percent of U.S. private R&D spending. Established in 1972, Business Roundtable applies the expertise and experience of its CEO members to the major issues facing the nation. Through research and advocacy, Business Roundtable promotes policies to improve U.S. competitiveness, strengthen the economy and spur job creation.

Amici are concerned that the district court's ruling (and the Court of Appeals' refusal to grant review) establish a requirement that defendants sued in state court in the Tenth Circuit amass voluminous evidence *before* removing a case to federal court – all within thirty days of receiving the complaint. Such a ruling ignores the text and history of the general federal removal statute and the Class Action Fairness Act of 2005 ("CAFA"). Accordingly, *amici* believe that reversal of the judgment below is necessary to restore proper removal practice in the Tenth Circuit and ensure appropriate access to federal courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court – in a decision implicitly endorsed by the Tenth Circuit – ignored clear statutory language and long-established caselaw in holding that a defendant removing a suit to federal court is required to submit evidence to prove jurisdictional facts in conjunction with the filing of a notice of removal. Reversal is necessary to check the Tenth

Circuit's wayward approach and bring it into line with the considered precedent of this Court and several courts of appeals.[2]

First, the district court's decision imposes a novel burden on removing defendants that is wholly unmoored from the text of the removal statute and imposes an unfair burden on removing defendants. By requiring a removing defendant to file a notice of removal "containing a short and plain statement of the grounds for removal," 28 U.S.C. § 1446(a), Congress deliberately tracked the *pleading* requirements of Federal Rule of Civil Procedure 8(a). The district court disregarded these statutory parallels in requiring removing defendants to carry an *evidentiary* burden that plaintiffs do not bear in bringing suit. The result is a double standard that ignores Congress's clear intent. Not only does the district court's decision contravene long-standing principles of removal, but it introduces unnecessary complexity to the jurisdictional inquiry by demanding that defendants produce evidence to support federal jurisdiction in *every* removed case where the jurisdictional prerequisites are not established on the face of the plaintiff's pleading – even those where (as here) the plaintiffs do not dispute that the statutory prerequisites to federal jurisdiction have been satisfied.

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[2] Five circuits have held that a removing defendant is not required to supplement its notice of removal with evidence proving jurisdictional facts. *See Hartis v. Chi. Title Ins. Co.*, 694 F.3d 935, 944-45 (8th Cir. 2012); *Janis v. Health Net, Inc.*, 472 F. App'x 533, 534 (9th Cir. 2012); *Ellenburg v. Spartan Motors Chassis Inc.*, 519 F.3d 192, 199-200 (4th Cir. 2008); *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 772-74 & n.29 (11th Cir. 2010).

Second, the district court's refusal to assert jurisdiction over this class action is particularly misguided given the expansive sweep of CAFA. Congress enacted CAFA to afford class-action defendants ready access to a federal forum, instructing courts to interpret the statute broadly in favor of federal jurisdiction. The district court ignored this congressional mandate by strictly construing CAFA's amount-in-controversy requirement and resolving all doubts in favor of remand. In the process, the court sanctioned the kind of gamesmanship that CAFA's drafters sought to stamp out. Under the district court's ruling, a clever plaintiff need only plead vague allegations of damages and run out the clock for thirty days to forestall removal of an action that indisputably belongs in federal court.

For these reasons, *amici* respectfully submit that the Court should reverse the judgment below.

ARGUMENT

I. THE DISTRICT COURT'S DECISION IMPOSES A NOVEL BURDEN ON DEFENDANTS THAT CONFLICTS WITH THE TEXT AND PURPOSE OF THE REMOVAL STATUTE.

In holding that a removing defendant must "incorporate . . . evidence" into the notice of removal to "establish by a preponderance of the evidence that the amount in controversy exceeds" the jurisdictional threshold, *Owens v. Dart Cherokee Basin Operating Co., LLC*, No. 12-4157-JAR-JPO, 2013 WL 2237740, at *4 (D. Kan. May 21, 2013), the district court misapplied the language of the general removal statute. That statute requires only that a defendant include a

"short and plain statement of the grounds for removal" in the notice of removal, mirroring the jurisdic-jurisdictional burden placed on plaintiffs bringing suit initially in federal court. The district court's contravention of clear statutory text imposes an arbitrarily heightened burden at the time of removal. It also serves to multiply and complicate proceedings related to removal, where simplicity has always been preferred. This Court should reverse the judgment below to ensure that the Tenth Circuit's approach to removal comports with the statutory text, congressional intent, and practical considerations.

A. Requiring Defendants To Submit Evidence With Notices Of Removal Conflicts With The Text Of Section 1446.

The general removal statute directs defendants seeking to remove an action to federal court to file "a notice of removal . . . containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). The requirement of a "short and plain statement of the grounds for removal" tracks the requirement in Federal Rule of Civil Procedure 8(a) that a plaintiff include in a complaint "a short and plain statement of the grounds for the court's jurisdiction." This statutory parallel is no accident. In 1988, Congress rejected the decisions of courts that had "require[d] detailed pleading" of the grounds for removal, by amending § 1446 to mandate "that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement establish[ed] by [Rule 8(a)]." H.R. Rep. No. 100-889, at 71-72 (1988). Congress thus instructed courts to "apply the same liberal rules that are applied to other mat-

ters of pleading," in an effort to "simplify the 'pleading' requirements for removal." *Id.* at 71.

Heeding the directives of Congress, several circuit courts of appeal have deemed it "inappropriate" for a court to "require[] a removing party's notice of removal to meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint." *Ellenburg*, 519 F.3d at 200; *see also Janis*, 472 F. App'x at 534-35; *Spivey*, 528 F.3d at 986. As the Fourth Circuit has explained, "just as a plaintiff's complaint sufficiently establishes diversity jurisdiction if it alleges that the parties are of diverse citizenship and that '[t]he matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332,' so too does a removing party's notice of removal sufficiently establish jurisdictional grounds for removal by making jurisdictional allegations in the same manner." *Ellenburg*, 519 F.3d at 200 (citations omitted).

Congress recently reaffirmed that courts should liberally construe the jurisdictional allegations in a notice of removal when it enacted the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA"), which amended 28 U.S.C. § 1446(c) "to address issues relating to uncertainty of the amount in controversy when removal is sought." H.R. Rep. No. 112-10, at 15 (2011). Congress stressed that "defendants do not need to prove to a legal certainty that the amount in controversy requirement has been met"; it is enough to "simply allege or assert that the jurisdictional threshold has been met." *Id.* at 16. Only "[i]n case of a dispute" must the district court

"make findings of jurisdictional fact to which the preponderance standard applies." *Id.*[3]

Section 1446 comports with long-standing principles regarding allocation of the burden to show federal jurisdiction. As this Court has recognized, the party asserting jurisdiction must support each element "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Consequently, a defendant need only "allege" in the notice of removal "the facts essential to show jurisdiction," *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936), a requirement satisfied by "general factual allegations," *see Lujan*, 504 U.S. at 561. Only where these allegations are "challenged by his adversary[,]" is a defendant required to proffer evidence supporting the allegations in the removal notice. *McNutt*, 298 U.S. at 189; *see also Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010) ("*When challenged on allegations of jurisdictional facts*, the parties must support their allegations by competent proof.") (emphasis added).

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[3] Although the text of amended § 1446(c) expressly mentions the general diversity statute, 28 U.S.C. § 1332(a), and not CAFA, "'[t]here is no logical reason why [courts] should demand more from a CAFA defendant than other parties invoking federal jurisdiction.'" *Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.3d 1234, 1238 (10th Cir. 2013) (Hartz, J., dissenting) (citation omitted). Indeed, if a CAFA defendant's removal burden were to differ from that of other defendants, it should be *less* onerous, given the explicit congressional directive that CAFA be construed broadly in favor of federal jurisdiction.

The district court failed to appreciate Congress's intent in enacting § 1446 and overlooked the statute's parallels with the pleading requirements of Rule 8. In effect, its decision resurrected the "hyper-technical, code-pleading regime of a prior era" from which Rule 8 (and § 1446) "marks a notable and generous departure." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This Court should clarify that the district court's demand that a defendant present evidence at the time of removal goes far beyond what § 1446 requires.

B. Requiring Defendants To Submit Evidence With Notices Of Removal Creates An Impermissible Double Standard.

The district court's failure to interpret § 1446 in a manner that is consistent with Rule 8 also produces an unfair double standard under which defendants face a higher burden of establishing federal jurisdiction on removal than plaintiffs do in pleading federal jurisdiction in their complaints. Congress authorized the removal of suits to federal court "almost contemporaneously with the adoption of the Constitution." *Tennessee v. Davis*, 100 U.S. 257, 265 (1879). As this Court recognized long ago, diversity jurisdiction was conceived to mitigate "State prejudices [that] might affect injuriously the regular administration of justice in the State courts." *Chicago & N.W.R. Co. v. Whitton's Adm'r*, 80 U.S. 270, 289 (1871). Congress sought to guarantee the protections of diversity jurisdiction by, in part, affording defendants the option of removing a diversity case from state court to federal court. *Id.* at 289; *see also Case of Sewing Mach. Cos.*, 85 U.S. 553, 573-74 (1873).

Soon after ratification of the Constitution, this Court explained the role of removal in securing equal access to federal courts to both plaintiffs and defendants. "The constitution of the United States was designed for the common and equal benefit of all the people of the United States," the Court wrote, and is "not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights . . . before the same forum." *Martin v. Hunter's Lessee*, 14 U.S. 304, 348 (1816). Without the possibility of removal, the Court continued, "the defendant may be deprived of all the security which the constitution intended in aid of his rights" because "the plaintiff may always elect the state court." *Id.* at 348-49. "Such a state of things can, in no respect, be considered as giving equal rights." *Id.* at 349. The Court's opinion in *Martin* thus "views removal as a procedural device intrinsically necessary for the protection of a defendant's *equal* and *constitutional* right to litigate certain claims in federal court." Scott R. Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609, 618 (2004).

In holding petitioners to an evidentiary burden not imposed on plaintiffs seeking to litigate in federal court, the district court overlooked the fact that "Congress created removal as a procedural vehicle . . . to level the playing field between plaintiffs and defendants." *Id.* Instead of leveling the playing field, the Tenth Circuit's approach imposes a heavy evidentiary burden on defendants seeking removal any time the jurisdictional prerequisites are not established on the face of the plaintiff's pleading. After all, a de-

fendant has only thirty days after receipt of the complaint – or, "if the case stated by the initial pleading is not removable," thirty days after receipt "of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case" is removable – to file a notice of removal. 28 U.S.C. § 1446(b). As a result, the district court's ruling will force defendants to compile evidence to support federal jurisdiction within thirty days. And defendants who are unable to complete that task in such a short period will face a difficult decision: remove based on an incomplete record, uncertain whether the federal court will consider it sufficient to prove the amount in controversy, or risk losing the opportunity to remove the case at all by waiting until more evidence has been compiled.

The burden placed on defendants is all the more pronounced given their general lack of access to the discovery necessary to support jurisdictional allegations when a suit is first commenced. *See, e.g.*, Kan. R. Civ. P. 60-226(b)(6)(C) (providing that, absent court direction, expert disclosures need not be made until ninety days before the trial date). In some cases, amassing the evidence necessary to support jurisdictional allegations within thirty days will be an impossible task, wholly depriving defendants of their right to litigate indisputably federal cases in federal court.

For all of these reasons, reversal is required to ensure that courts in the Tenth Circuit are "equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction," *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907).

C. Requiring Defendants To Submit Evidence With Notices Of Removal Needlessly Complicates The Jurisdictional Inquiry.

The Tenth Circuit's approach will also make removals far more complicated, undermining "the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Hertz*, 559 U.S. at 80. "Simple jurisdictional rules [ ] promote greater predictability," which "is valuable to corporations making business and investment decisions." *Hertz*, 559 U.S. at 94; *see also, e.g.*, *Carden v. Arkoma Assocs.*, 494 U.S. 185, 197 (1990) (explaining that "complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction"); *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) ("'It is of first importance to have a definition . . . [that] will not invite extensive threshold litigation over jurisdiction.'") (citation omitted). Put another way: "[j]urisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources.'" *Navarro*, 446 U.S. at 464 n.13 (citation omitted).

The need for simple jurisdictional standards extends with full force to the removal context. Indeed, Congress made just this point three years ago when it enacted the JVCA in response to judges' expressed frustration that "the current rules force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation." H.R. Rep. No. 112-10, at 1-2. Judge Wilkinson has echoed similar concerns with respect to class-action removals specifically:

> Although [the removing defendant] bears the ultimate burden of proving by a preponderance of the evidence that the jurisdictional amount is in controversy, it need not produce reams of personnel records simply to present a prima facie case. To require more would lead to voluminous discovery requests and document production at the preliminary stages of what is itself a preliminary jurisdictional issue. Encouraging this sort of deluge adds more litigiousness to already litigious class action undertakings.

Bartnikowski v. NVR, Inc., 307 F. App'x 730, 740-41 (4th Cir. 2009) (Wilkinson, J., dissenting).

The district court's decision turns these principles on their head. Even though respondents did not dispute that this action satisfies the requirements for the assertion of federal diversity jurisdiction, *see Owens*, 2013 WL 2237740, at *3 ("Plaintiff offers no affidavit, declaration or other evidence challenging Defendants' calculation."), the court still required petitioners to submit evidence of the amount in controversy with their notice of removal. Absent reversal, the result will be that defendants in cases falling within the ambit of CAFA will feel obligated to assemble voluminous evidence in virtually every removable action, as "one can assume that an attorney representing a defendant in a case involving at least $5 million . . . would have substantial incentive to be diligent," *Dart*, 730 F.3d at 1235 (Hartz, J., dissenting).

In short, the district court's misguided decision will complicate jurisdictional determinations, "eating

up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims," producing "appeals and reversals, encourag[ing] gamesmanship, and . . . diminish[ing] the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz*, 559 U.S. at 94. For this reason, too, the Court should reverse the judgment below.

II. THE DISTRICT COURT'S DECISION IGNORES CAFA'S SWEEPING EXPANSION OF JURISDICTION.

Congress enacted CAFA to curb the abuses riddling the nation's class-action system by loosening jurisdictional requirements and guaranteeing a federal forum to defendants litigating interstate cases. The district court's ruling is not only contrary to the removal statute itself but also to the fundamental objectives underlying CAFA.

In enacting CAFA, Congress sought to "ensur[e] 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (citation omitted). Indeed, the "overall intent" of CAFA was "to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications." S. Rep. No. 109-14, at 35 (2005).

Congress's remedial objective was expressly extended to CAFA's amount-in-controversy provision, which the legislature intended "to be interpreted expansively." *Id.* at 42. According to the Senate Report, "if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of

$5,000,000,' the court should err in favor of exercising jurisdiction over the case." *Id.*

Courts of Appeals and commentators have taken note of Congress's command to give CAFA a liberal construction. *See, e.g.*, *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) ("'The language and structure of CAFA . . . indicate that Congress contemplated broad federal court jurisdiction with only narrow exceptions.'") (citation omitted); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) ("The language and structure of CAFA itself indicates that Congress contemplated broad federal court jurisdiction."); H. Hunter Twiford, III *et al.*, *CAFA's New "Minimal Diversity" Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 Miss. C. L. Rev. 7, 9, 60 (2005) (remarking that CAFA ushered in "fundamental changes" to diversity jurisdiction that "greatly liberalize and invite . . . federal court jurisdiction over class actions"); Sara S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1617, 1641, 1643 (2006) (observing that CAFA "expanded federal jurisdiction in a major way" and "represents the largest expansion of federal jurisdiction in recent memory").

Despite the impressive body of statutory text, case law, and legislative history insisting that courts should construe CAFA's provisions expansively, the district court here did just the opposite. As a preliminary matter, the court announced that it "narrowly construes removal statutes" and resolves all doubts "in favor of remand," *Owens*, 2013 WL 2237740, at *1. The court made this statement even though CAFA

demands that courts give its provisions a broad interpretation and resolve doubts in favor of federal jujurisdiction, not remand. *See, e.g.*, S. Rep. 109-14, at 43 ("Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.").

To be sure, "[t]he burden of persuasion for establishing diversity jurisdiction . . . remains on the party asserting it." *Hertz*, 559 U.S. at 96 (citation omitted). But congressional intent, as reflected through the statutory text, determines the appropriate mode of interpreting a removal statute. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-98 (2003). Hence, while strictly construing a removal statute is appropriate when its text suggests such a restrained approach, *see, e.g.*, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (relying on the "Congressional purpose to restrict the jurisdiction of the federal courts on removal" to justify strictly construing the general removal statute), "an expansive interpretation of the nature of the right to remove" should accompany a statute evincing an "unusually strong preference for adjudication of [certain claims] in the federal court system," *In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1243 (3d Cir. 1994); *see also Acosta v. Master Maint. & Constr. Inc.*, 452 F.3d 373, 377 (5th Cir. 2006). Because Congress indicated an "unusually strong preference" for adjudication of class actions in federal courts, CAFA's removal provisions should receive "an expansive interpretation." *See Tex. E.*

Transmission Corp., 15 F.3d at 1243 (applying this rationale to removal provision of the Foreign Sovereign Immunities Act based on Congress's clearly expressed intent).

The district court's cramped interpretation of CAFA in conjunction with § 1446 also rewards gamesmanship, despite this Court's admonition that plaintiffs' use of clever pleading and subterfuge must not be allowed to forestall removal to federal court, *see Standard Fire*, 133 S. Ct. at 1350; *see also* S. Rep. No. 109-14, at 10 ("[C]urrent law enables plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court."). Class-action plaintiffs wishing to remain in state court have every incentive under the Tenth Circuit's approach to allege damages as vaguely as possible. A lack of concrete damages information in the complaint will make it all the more difficult for defendants to compile the necessary quantum of evidence to remove an action to federal court in a timely manner. For this reason too, the district court's ruling should be reversed.

CONCLUSION

For the foregoing reasons, and those stated by petitioners, the Court should reverse the judgment below.

Respectfully submitted,

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