No. 17-257

IN THE

Supreme Court of the United States

CORDIS CORPORATION,

Petitioner,

v.

JERRY DUNSON, *ET AL.*,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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October 2017

QUESTION PRESENTED

Whether a proposal that separate cases, each involving fewer than 100 plaintiffs, be coordinated for pretrial purposes, followed by a "bellwether-trial process," is a proposal that the cases be "tried jointly" and transforms them into a "mass action" removable to federal court under the Class Action Fairness Act?

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INTRODUCTION

The Class Action Fairness Act (CAFA), 28 U.S.C. §§ 1332(d), 1453, provides for federal jurisdiction, including removal jurisdiction, over some large, multistate class actions. It also provides that a narrowly defined set of non-class actions—"mass actions"—are to be treated as class actions for purposes of CAFA jurisdiction. *Id.* § 1332(d)(11). Cases are mass actions under CAFA only when they involve "monetary relief claims of 100 or more persons" that are "proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." *Id.* § 1332(d)(11)(B)(i).

In this case, both the district court and the Court of Appeals for the Ninth Circuit agreed that the plaintiffs had not brought a mass action when they proposed consolidating their claims only for pretrial purposes, to be followed by individual "bellwether" trials rather than joint trials. That factbound ruling reflects a straightforward application of CAFA's plain language to the particular circumstances of this case. And it implicates no conflict among the circuits: All the courts of appeals agree that when plaintiffs propose *pretrial* consolidation without joint trial of their cases, the cases do not become a mass action under CAFA.

Cordis Corporation's petition for certiorari, however, asserts that any reference to the possibility of bellwether trials is, as a matter of law, a proposal that cases be tried jointly. Cordis further contends that the contrary ruling in this case conflicts with rulings of other circuits that, it says, have accepted the blanket proposition that a bellwether trial is, necessarily, a joint trial. Again, there is no conflict: No court has

adopted Cordis's position that "bellwether" is a magic word that creates federal jurisdiction under CAFA.

As the court of appeals explained below, "bellwether trial" is not a term with a rigidly defined meaning. It may refer to a procedure in which claims in a representative case are tried with the agreement of the parties that the result will bind both the plaintiffs and the defendant in the other cases as to liability issues. More commonly, however, it refers to a procedure that serves as a means of sequencing individual resolution of the cases. In such cases, the outcome of the bellwether trial binds only the individual plaintiff or plaintiffs involved in that trial, and, as to other plaintiffs, the trial serves principally to provide information and guidance to the parties about whether and how to settle or try the remaining cases.

The court of appeals recognized, consistently with its own precedents and decisions of other circuits, that a proposal for the first type of bellwether trial—the kind that is binding on the plaintiffs in other cases—proposes a joint trial for purposes of CAFA's mass action provision. By contrast, the second type of bellwether trial, in which the outcome of the trial has no greater effect than any other individual trial, "does not constitute a proposal to try the plaintiffs' claims jointly, for the verdict will not be binding on the other plaintiffs and will not actually resolve any aspect of their claims." Pet. App. 7a.

Cordis does not contend that the court of appeals' fact-specific holding that the plaintiffs' proposal in this case fell into the second category itself merits review by this Court. And Cordis points to no court of appeals that has held that a proposal for a bellwether trial that will *not* bind other plaintiffs creates a CAFA

mass action. Moreover, in the opinion below and in a recent en banc decision, the Ninth Circuit has expressly agreed with the analysis of the courts with which Cordis says its decision is in conflict. Absent a conflict among the small handful of court of appeals decisions that have mentioned bellwether trials in the context of CAFA's mass action provisions, there is no reason for this Court to review the Ninth Circuit's balanced approach to the question, which is faithful to the text and purposes of CAFA and recognizes the reality that bellwether trials have different possible uses and consequences in different cases.

STATEMENT

1. CAFA's Mass Action Provision—The Class Action Fairness Act provides for original and removal jurisdiction over certain "class actions" involving multistate parties and large amounts in controversy. 28 U.S.C. §§ 1332(d), 1453. With one exception, that jurisdiction is limited to "civil action[s] filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." *Id.* § 1332(d)(1)(B).

The singular exception to CAFA's limitation to such traditional class actions is its provision stating that a "mass action shall be deemed to be a class action" for removal purposes. *Id.* § 1332(d)(11)(A). "Mass action," a term without a preexisting meaning comparable to "class action," is specifically and narrowly defined by CAFA. A "mass action" under CAFA is a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." *Id.* § 1332(d)(11)(B)(i). CAFA jurisdiction

over mass actions is further narrowed by the limitation that it applies only to plaintiffs whose individual claims satisfy the jurisdictional amount requirement for conventional diversity jurisdiction. *Id.*

CAFA further provides that mass actions do not include cases where all the claims arise from an occurrence in the forum state and involve injuries there or in neighboring states, *id.* § 1332(d)(11)(B)(ii)(I), cases brought under statutes authorizing private attorney general actions, *id.* § 1332(d)(11)(B)(ii)(III), and, of particular relevance here, cases where the defendant proposes joinder, *id.* § 1332(d)(11)(B)(ii)(II), or where "claims have been consolidated or coordinated solely for pretrial proceedings," *id.* § 1332(d)(11)(B)(ii)(IV).

This Court has considered CAFA's mass action provision once, in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014). There, the Court emphasized that CAFA's plain language limits the scope of jurisdiction over mass actions to cases "that are brought jointly by 100 or more named plaintiffs who propose to try their claims together," *id.* at 741, and does not extend to cases not fitting that description.

2. Facts and Proceedings Below—Respondents Jerry Dunson, Cheryl Grech, Robert Flanagan, Carol Flanagan, Joseph Gieber, Mary Eldeb, Dayna Currie, and Harlowe Currie are eight individuals who joined in an action against petitioner Cordis Corporation in the Superior Court of California for Alameda County. The action asserted product liability claims against Cordis seeking recovery for injuries resulting from defective medical devices manufactured by Cordis—filters implanted in veins to prevent pulmonary embolisms. Respondents' complaint comprised only their own claims and did not request that those

claims be tried jointly with those of plaintiffs in any other cases.

At about the same time, other plaintiffs filed similar actions against Cordis in the same court, none involving 100 or more plaintiffs, and none requesting a joint trial with plaintiffs in the other pending cases. In May 2016, plaintiffs in one of those cases filed a motion requesting that the cases be coordinated before a single judge. Because the en banc Ninth Circuit had recently held that a request for coordination not limited to pretrial purposes constituted a proposal for a joint trial under CAFA's mass action provisions, *see Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (2014), the plaintiffs specified that their request was "for all pretrial purposes, including discovery and other proceedings." Pet. App. 4a. The plaintiffs did not propose a joint trial, but did state that their request contemplated "the institution of a bellwether-trial process." *Id*. The plaintiffs' proposal of a bellwether trial process reflected another recent Ninth Circuit decision, *Briggs v. Merck Sharpe & Dohme*, 796 F.3d 1038 (2015), which had indicated that "a bellwether trial is not, without more, a joint trial within the meaning of CAFA," if its results will not be binding on plaintiffs who do not participate directly in the trial. *Id*. at 1051.

Cordis responded to the request for pretrial coordination and bellwether trials by removing the case to the United States District Court for the Northern District of California on the theory that the plaintiffs had proposed a joint trial and transformed their separate cases into a CAFA mass action. The plaintiffs moved to remand, and the district court granted the motion.

Cordis sought leave to appeal under 28 U.S.C. § 1453(c), which allows permissive appeals of CAFA remand orders. The Ninth Circuit accepted the appeal, and the panel unanimously affirmed. The court began by observing that a request for pretrial consolidation, unlike a request for consolidation through trial or for all purposes, is not a proposal for a joint trial—a point Cordis did not dispute. Because the only respect in which the plaintiffs' request in this case differed from any other request for pretrial coordination was its mention of a bellwether-trial process, the court went on to consider "whether the plaintiffs' proposal for a bellwether-trial process amounts to a proposal to try their claims jointly." Pet. App. 6a.

The court's nuanced consideration of that issue reflected its understanding that the term "bellwether trial" may have multiple meanings. In some circumstances, the court noted, parties propose bellwether trials that are intended to resolve questions of liability for all plaintiffs, even those who nominally do not participate in the trial. Citing a Seventh Circuit precedent, *Bullard v. Burlington Northern Santa Fe Railway Co.*, 535 F.3d 759, 762 (2008), the court stated that "[i]f 100 or more plaintiffs propose holding a bellwether trial … in which the results of the trial will be binding on the plaintiffs in the other cases, they have proposed a joint trial of their claims for purposes of § 1332(d)(11)(B)(i)." Pet. App. 7a.

The court pointed out, however, that there is a "second (and far more common) type of bellwether trial," in which "the claims of a representative plaintiff or plaintiffs are tried, but the outcome of the trial is binding only as to the parties involved in the trial itself," and "[r]he results of the trial are used in the other cases purely for informational purposes as an

aid to settlement." *Id.* at 6a–7a. In such a case, the court held, "a proposal to hold a bellwether trial … does not constitute a proposal to try the plaintiffs' claims jointly, for the verdict will not be binding on the other plaintiffs and will not actually resolve any aspect of their claims." *Id.* at 7a.

The court therefore closely examined what the plaintiffs had proposed to determine whether they had "said something more in their consolidation motion to indicate that when they referred to 'a bellwether-trial process,' they meant a process in which the results of the bellwether trial would have preclusive effect on the plaintiffs in the other cases." *Id.* The court rejected Cordis's attempt to parse the plaintiffs' statements to find that their allusions to the benefits of pretrial coordination implicitly indicated that they were proposing a bellwether-trial process whose results would bind other plaintiffs. The court found that the plaintiffs' statements were consistent with the view that they were seeking only the advantages of pretrial coordination, and because "Cordis bears the burden of showing that the plaintiffs proposed a joint trial of their claims, … the inconclusive nature of the plaintiffs' statements cuts against its position." *Id.* at 9a.[1]

Moreover, the court stressed that the plaintiffs had unambiguously disclaimed proposing a binding bellwether trial process when they stated: "To be clear,

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[1] The court also rejected Cordis's contention that the plaintiffs must, like the plaintiffs in *Xanodyne*, have been proposing consolidation for purposes including trial because the California statutory authority the plaintiffs invoked did not permit consolidation only for pretrial purposes. The court found that nothing in the statute or California case law supported the argument that cases could not be coordinated for pretrial purposes only. *See* Pet. App. 8a–9a.

Moving Plaintiffs are not requesting a consolidation of Related Actions for purposes of a single trial to determine the outcome for all plaintiffs, but rather a single judge to oversee and coordinate common discovery and pretrial proceedings." *Id.* at 10a–11a. "That statement," the court found, "negates any notion that the plaintiffs were speaking of a bellwether trial whose results would have preclusive effect in the other cases." *Id.* at 11a. Underscoring the point, the court cited other statements in which the plaintiffs had indicated that the purpose of the bellwether trials was to facilitate settlement, not to resolve the claims of the plaintiffs jointly. *Id.*

Because the court found that neither the plaintiffs' proposal for pretrial coordination nor their reference to bellwether trials proposed that claims of 100 or more plaintiffs be tried jointly, it held that the actions were not properly removable under CAFA's mass action provision.

REASONS FOR DENYING THE WRIT

I. There is no conflict among the circuits.

Cordis contends that the Ninth Circuit's decision conflicts with decisions of the Seventh, Eighth, and Third Circuits. None of those decisions, however, addresses the circumstances here: a proposal for pretrial consolidation only, followed by one or more bellwether trials that will decide the outcome only of the specific cases tried rather than controlling the claims of all plaintiffs. Indeed, the Ninth Circuit, sitting en banc, has expressly agreed with two of the decisions Cordis cites (and agreed with them again in the decision below), and the third is likewise fully consistent with the Ninth Circuit's case law. Moreover, to the extent the decisions Cordis cites discuss bellwether trials, none

of them suggests that trials whose outcome would *not* be binding on plaintiffs in other cases are "joint" trials for purposes of CAFA's mass action provisions.

Cordis's reliance on the Seventh Circuit's decision in *In re Abbott Laboratories, Inc.*, 698 F.3d 568 (2012), exemplifies the flaws in its argument. In *Abbott Labs*, the plaintiffs had filed 10 state-court actions, each with fewer than 100 plaintiffs but collectively involving several hundred claimants. The plaintiffs had requested that the state courts consolidate the cases "through trial," and had expressly stated that the consolidation they sought was "*not* solely for pretrial purposes." *Id.* at 571 (emphasis added). The defendant removed the cases on the ground that the request for consolidation through trial made them a CAFA mass action.

Holding that a request for a joint trial may be implicit as well as express, the Seventh Circuit concluded that a proposal that expressly requested consolidation "through trial" was at least an implicit proposal of a joint trial. *Id.* at 573. The court then went on to note that the possibility that the trial court might employ a bellwether approach in which a subset of plaintiffs were selected for an initial trial *with the results binding on the other plaintiffs* did not alter its conclusion that the requested consolidation through trial proposed that the cases be tried jointly. The court stated that "it is difficult to see how a trial court could consolidate the cases as requested by plaintiffs [*i.e.*, through trial] and not hold a joint trial or an exemplar trial with the legal issues applied to the remaining cases," and "[i]n either situation, plaintiffs' claims would be tried jointly." *Id.*

The Seventh Circuit's view does not in any way conflict with the result below or the law of the Ninth Circuit more generally. In *Corber v. Xanodyne Pharmaceuticals*, the en banc Ninth Circuit held, consistently with *Abbott Labs*, that a proposal for consolidation for all purposes, including trial, proposed a joint trial. *See* 771 F.3d at 1223. The en banc court repeatedly stated its agreement with *Abbott Labs*' holding, *see id*. at 1225, while noting that the result did not preclude the possibility that (as in this case) plaintiffs could request consolidation for pretrial purposes, *see id*. at 1224. Likewise, nothing in the decision below suggests disagreement with the holding of *Abbott Labs* (or with the Ninth Circuit's own controlling precedent in *Corber*) that a request for consolidation *through trial* is a proposal that cases be tried jointly for purposes of CAFA's mass action provision. Indeed, like *Xanodyne*, the opinion below approvingly cited *Abbott Labs* and other Seventh Circuit precedent. Pet. App. 5a, 7a.

To the extent *Abbott Labs* touched on the significance of bellwether trials, its discussion of that subject is also fully consistent with the decision of the court of appeals in this case. The court in *Abbott Labs* concluded that, in the context of the request in that case for consolidation through trial, any possible bellwether trial procedure would necessarily be one where the outcome of the bellwether trial would control all of the consolidated cases, making it a joint trial. 698 F.3d at 573. Here, the court of appeals *agreed* with *Abbott Labs* that a proposal for that type of bellwether trial would be a proposal of a joint trial for CAFA purposes, Pet. App. 7a, but it concluded that the plaintiffs in this case proposed a different type of bellwether trial: one

that resolved only the claims of the particular plaintiffs involved and that was a bellwether only in the sense that it would come first and serve as an example of likely results in other cases. *Abbott Labs* did not hold that a request for pretrial consolidation only, followed by bellwether trials that did *not* bind other plaintiffs, would suffice to create a CAFA mass action. On the contrary, it expressly stated that the key requisite of a "joint trial" is that "the plaintiffs' claims are being determined jointly." 698 F.3d at 573.[2]

Cordis's invocation of the Eighth Circuit's decision in *Atwell v. Boston Scientific Corp.*, 740 F.3d 1160 (2013), fails to demonstrate inter-circuit conflict for the same reasons. In *Atwell*, the Eighth Circuit found that state-court plaintiffs who had requested that their cases be assigned jointly to a single judge who would "ultimately try the case," *id.* at 1164, had brought a mass action removable under CAFA. Invoking the reasoning of *Abbott Labs*, the Eighth Circuit held that this proposal—unlike earlier proposals by the same plaintiffs that were limited to pretrial coordination—was a proposal that the cases be tried jointly. As in *Abbott Labs*, the court further concluded that references by the plaintiffs to the possibility of a bellwether trial, in the context of their request for assignment to a single judge who would "try the case,"

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[2] Cordis also cites the Seventh Circuit's decision in *Koral v. Boeing Co.*, 628 F.3d 945 (2011), but all the court held in that case was that removal was improper because a *prediction* that cases might be tried jointly was not a *proposal* that they be tried jointly. *Id.* at 947. Beyond that, Judge Posner's discussion of exemplary trials was dicta and did nothing more than anticipate *Abbott*'s view that an exemplary trial that determined liability for all plaintiffs would be a joint trial, *see id.*, a view fully consistent with that of the court of appeals in this case.

could only be understood as referring to "a joint trial or an exemplar trial *with the legal issues applied to the remaining cases*." *Id.* at 1166 (quoting *Abbott Labs*, 698 F. 3d at 573) (emphasis added).

Atwell, like *Abbott Labs*, is fully consistent with the law of the Ninth Circuit. The Ninth Circuit's en banc decision in *Corber* that a proposal for consolidation through trial implicitly proposed a joint trial relied on *Atwell* as well as *Abbott Labs* for its holding. 771 F.3d at 1225. And the panel below agreed that the kind of bellwether trial discussed in *Atwell*, with results applied to all the plaintiffs, would constitute a joint trial. Pet. App. 7a. By contrast, *Atwell* does not suggest that a request for pretrial coordination only, followed by bellwether trials with results *not* binding on other plaintiffs, transforms a set of distinct cases into a mass action. Indeed, *Atwell* expressly holds that requests for pretrial coordination without joint trial do not by themselves create CAFA mass actions. *See* 740 F.3d at 1162.

Cordis's claim that the decision below conflicts with the Third Circuit's decision in *Ramirez v. Vintage Pharmaceuticals, LLC*, 852 F.3d 324 (2017), is equally baseless. In *Ramirez*, unlike this case, more than 100 plaintiffs joined in one complaint that requested one jury trial. The Third Circuit found that the filing of a complaint in which claims were joined for all purposes "contemplate[d] a single joint trial," *id.* at 330, particularly in light of the fact that the applicable court rules "explicitly presume[d] that persons who join as plaintiffs in a single action based upon a common question of fact or law will have their claims tried jointly." *Id.* at 331. The court therefore held that the complaint both implicitly and explicitly proposed that the claims be tried jointly, and thus that the case was

a mass action under CAFA. The Third Circuit's decision in *Ramirez* accords with Ninth Circuit precedent holding that a complaint joining claims of more than 100 plaintiffs and proposing a joint trial creates a removable mass action. *See Visendi v. Bank of Am., N.A.*, 733 F.3d 863, 867–68 (9th Cir. 2013).

At the same time, *Ramirez* acknowledges the correctness of the Ninth Circuit's view that when plaintiffs explicitly limit requests for coordination to pretrial matters, their claims do not constitute a mass action subject to removal under CAFA. *See* 852 F.3d at 330 (citing *Xanodyne*, 771 F.3d at 1224). Thus, the court recognized that even plaintiffs who file their claims together in a single complaint may "shield [their] action from removal" by "a clear and express statement … evincing an intent to limit coordination of claims to some subset of pretrial proceedings." *Id.*

The only mention of bellwether trials in *Ramirez* came in the context of the court's discussion of the plaintiffs' argument that their motion to admit their case to Pennsylvania's "Mass Tort Program" took the case out of the mass action category because it created the *possibility* that the claims would not be tried jointly. The court rejected that argument as legally irrelevant because the plaintiffs' complaint had already proposed a joint trial, bringing their case within CAFA's mass action definition. *Id.* at 331. The court went on to note that acceptance to the "Mass Tort Program" would not in any event prevent a joint trial, even though that program generally limited the number of cases that could be tried together. The court cited *Abbott Labs*' statement that a trial involving a subset of plaintiffs would still be a joint trial of all the plaintiffs' claims if its outcome would necessarily apply to them "without another trial." *Id.* at 332 (quoting

Abbott Labs, 698 F.3d at 573). The court further stated, in dicta, that other circuits had found bellwether trials to be forms of joint trials. *Id*. Finally, the court said that if a trial involving a subset of the plaintiffs were treated as binding on all of the plaintiffs, "[s]uch a sequence of events would be regarded as a joint trial." *Id*.

The statements in *Ramirez* about bellwether trials were unnecessary to its holding—that a complaint *expressly* proposing a joint trial of more than 100 claims meets CAFA's mass action definition—but, more importantly here, they were fully consistent with the court of appeals' decision in this case. Like *Abbott Labs* and *Atwell*, *Ramirez* suggested only that a bellwether trial is a joint trial *if its results will be binding on other plaintiffs*, a point the court below acknowledged. *Ramirez* did not address whether a bellwether trial that does not bind other plaintiffs is a joint trial under the mass action definition, still less hold that it is. Indeed, *Ramirez*'s approving quotation of *Abbott Labs*' observation that "a joint trial can take different forms *as long as the plaintiffs' claims are being determined jointly*," *id*. at 332 (quoting *Abbott Labs*, 698 F.3d at 573) (emphasis added), strongly supports the Ninth Circuit's ruling that a proposal for bellwether trials that would not determine the plaintiffs' claims jointly is not a proposal for a joint trial, and does not render otherwise separate cases a removable CAFA mass action.

Thus, Cordis's claim of a conflict among the circuits is baseless. No circuit has held that a request for pretrial coordination only, followed by bellwether trials that will not be binding on other plaintiffs, is a proposal that claims of 100 or more plaintiffs be tried

jointly within the meaning of CAFA's mass action provision. Indeed, Cordis cites no other decision that has even discussed the distinction the court of appeals drew in this case between types of bellwether trials, and no decision holding that the term "bellwether trial" can refer only to a trial whose outcome binds other plaintiffs. Rather, Cordis relies solely on decisions stating a proposition with which the court below agreed: Bellwether trials whose results would bind other plaintiffs are a form of joint trial. But those same decisions recognize that a procedure is a joint trial only "as long as the plaintiffs' claims are being determined jointly." *Abbott Labs*, 698 F.3d at 573. It follows from that very observation that the type of bellwether trial proposed here is not a joint trial. Unless and until some court of appeals holds otherwise, there is no conflict among the circuits that requires resolution.

The absence of any need for review is underscored by the small number of cases that have even touched upon bellwether trials in discussing CAFA's mass action provisions. The petition cites nearly every appellate decision that has used both the word "bellwether trial" and the term "mass action." The only additional case is the Tenth Circuit's decision in *Parson v. Johnson & Johnson*, 749 F.3d 879 (2014), which held, consistently with the decision below, that the filing of separate actions in state court was not an implicit proposal for a joint trial "even given the likelihood that measures of judicial economy, scheduling, and organization such as bellwether trials may eventually be

employed." *Id.* at 889.[3] And as explained above, the few other cases that have discussed the subject have turned on other dispositive considerations, and only the decision below and the earlier decision in *Briggs* have considered the significance of the different possible uses of bellwether trials. At a minimum, the small number of opinions that have even touched on the issue indicates that it merits further consideration by the lower courts before this Court takes it up. If such further consideration continues to yield consistent results, there will be no need for this Court ever to address the subject.

II. The court of appeals' decision does not "decimate" CAFA's mass action provision.

Cordis asserts that the decision below merits review irrespective of whether it creates a genuine conflict because it would "turn[] mass action removal's protective purpose on its head," Pet. 15, by permitting plaintiffs to "thwart removal," *id.* at 22. That argument reflects a fundamental misunderstanding of the mass action removal provision. By its design, the provision always permits plaintiffs to avoid removal by not proposing a joint trial. If they do not do so, the defendant's view that the prospect of individual trials is as undesirable as a joint trial does not bring the case within CAFA's definition of a mass action. As this

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[3] The one other decision that turns up in a Westlaw search for federal appellate decisions using the terms "bellwether" and "mass action" is the panel opinion in *Romo v. Teva Pharmaceuticals USA, Inc.*, 731 F.3d 918 (9th Cir. 2013), which was vacated, taken en banc, and overturned by the Ninth Circuit in *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218, which is cited in the petition and discussed above.

Court has held, CAFA's mass action provision "encompasses suits that are brought jointly by 100 or more named plaintiffs who propose to try their claims together," *Hood v. AU Optronics Corp.*, 134 S. Ct. at 741, not actions that fail to meet that definition but arguably are similar in other respects to a mass action. *See id*. at 742–45.

Congress's intent to give plaintiffs the ability to avoid having their cases treated as a mass action by not proposing a joint trial could not be clearer from the statutory text. The statute's basic definition of a mass action applies only to cases in which "monetary relief claims of 100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). To underscore the point, the statute provides explicitly that a mass action does not include any case in which "the claims have been consolidated or coordinated solely for pretrial proceedings." *Id*. § 1332(d)(11)(B)(ii)(IV). And it makes the *plaintiffs'* choices about the nature of the proposed proceedings dispositive by stating that a mass action does not include any case in which "the claims are joined upon motion of a defendant." *Id*. § 1332(d)(11)(B)(ii)(II).

In keeping with the statute's plain language, decisions of the courts of appeals—including the very decisions Cordis touts in its petition—agree that the view that plaintiffs may prevent removal if they "avoid proposing a joint trial of all their claims" rests on "a solid legal foundation." *Ramirez*, 852 F.3d at 330. "As masters of their Complaint, Plaintiffs may structure their action in such a way that intentionally avoids removal under CAFA." *Id*. Specifically, they may do so if they "expressly seek[] to limit [their] request for coordination to pre-trial matters," *id*. (quot-

ing *Xanodyne*, 771 F.3d at 1224), or otherwise "expressly disclaim[] the intention to try their claims jointly." *Id.* (citing *Parson*, 749 F.3d at 888 n.3). The plaintiffs here did exactly that.

These principles do not mean that plaintiffs can evade the mass action provision merely by proposing a trial, ostensibly limited to some group of less than 100 plaintiffs, that directly controls the claims of more than 100 plaintiffs. The Ninth Circuit below, in agreement with the other circuits, acknowledged that such a trial would be a joint trial. Because that principle does not aid Cordis here, Cordis demands more: It urges that an individual trial whose outcome is *not* binding on other plaintiffs must be considered a joint trial if, by ordinary principles of preclusion law, its results might be binding on the *defendant* as a matter of non-mutual issue preclusion or collateral estoppel.

Cordis's argument stretches the concept of a joint trial beyond recognition. It is one thing to say that a trial that will control the claims of other plaintiffs is a joint trial of their claims. It is something else entirely to suggest that a trial that will *not* bind other plaintiffs is a joint trial just because its judgment will bind the defendant in exactly the same way that the judgment in any individual trial binds the defendant. Cordis's view would suggest that as long as more than 100 similar damages claims are pending against a defendant, a request by any plaintiff to have his or her case tried would be a proposal for a joint trial merely because of the possibility that plaintiffs in other cases might assert non-mutual, offensive issue preclusion against the defendant if the first plaintiff succeeds.

Nothing in CAFA, its history, or any judicial decision cited by Cordis suggests that the mass action definition was intended to apply to proposals to try cases individually merely because of the possibility of issue preclusion against the defendant. As the court of appeals put it: "True, a verdict favorable to the plaintiff in the bellwether trial might be binding on the *defendant* under ordinary principles of issue preclusion, but that is not enough. … To constitute a trial in which the plaintiffs' claims are 'tried jointly' for purposes of § 1332(d)(11)(B)(i), the results of the bellwether trial must have preclusive effect on the plaintiffs in the other cases as well." Pet. App. 7a. Cordis cites no authority from any circuit holding that the potential for issue preclusion against a defendant is enough to make a trial a joint trial. And its complaint that the potential for one-way preclusion is unfair to defendants (an argument that runs counter to currently prevailing principles of issue preclusion, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)) is irrelevant: CAFA's mass action provision is directed at actions where plaintiffs seek to try claims *jointly*, not at assertedly unfair preclusion principles applicable to *individual* trials.

Moreover, Cordis's attempt to bypass the mass action provision's limitation to proposals for joint trials by asserting that any proposal that refers to use of bellwether trials necessarily proposes a joint trial would not achieve the goals Cordis claims it seeks to advance even if the Court were to accept it. If the Court adopted Cordis's proposed rule, plaintiffs in future cases who wished to avail themselves of the benefits of pretrial coordination while avoiding removal—a result that CAFA expressly countenances—would avoid using the term "bellwether trial" by proposing

that cases be coordinated for pretrial purposes only, followed by the sequencing of individual trials (or trials of groups of fewer than 100 plaintiffs) in a manner to be determined by the court. Substantively, such a proposal would be identical to what the Ninth Circuit found the plaintiffs proposed here, but it could not conceivably be considered a request that claims of 100 or more plaintiffs be tried jointly.

Thus, a ruling for Cordis on its theory would do nothing to spare defendants in future cases the possible effects of issue preclusion that go along with individual trials. Instead, it would accomplish nothing more than penalizing the plaintiffs in this case for following existing circuit precedents and failing to anticipate that the Court would view "bellwether" as a magic word denoting a joint trial even in circumstances where that was not the plaintiffs' intent. Such a ruling would neither be faithful to CAFA's language nor advance its purposes, and would have no lasting impact once plaintiffs learned to avoid the form of words to which Cordis seeks to attach talismanic significance. Granting review in such circumstances would not only be unwarranted by any of the normal considerations governing consideration of petitions for certiorari, but would result in a pointless waste of this Court's time.

Finally, Cordis's assertions that the Ninth Circuit should have held that plaintiffs were really seeking a *binding* bellwether trial proceeding because they referred to the benefits of coordination in avoiding inconsistent adjudications are not only unfounded for the reasons stated by the court of appeals, but provide no basis for review by this Court. Whether the court of appeals erred in discerning the intent of plaintiffs' proposals is a fact-specific issue that does not merit

consideration by this Court. *See* S. Ct. R. 10. Cordis's additional argument that the plaintiffs proposed a joint trial by requesting that a single judge issue pretrial rulings resolving evidentiary and merits issues that would control all trials in the cases is likewise factbound, and the court of appeals did not address any such argument. The argument is also flatly inconsistent with the statute's express provision that *pretrial* consolidation cannot render a case a mass action, 28 U.S.C. § 1332(d)(11)(B)(ii)(IV)—a provision that has no exception for pretrial legal rulings that might affect subsequent trials. Even if Cordis's contrary view had any arguable merit, the question whether proposals that contemplate consolidated pretrial legal or evidentiary rulings are properly characterized as proposals that cases be jointly *tried* for purposes of CAFA is one that this Court should consider, if at all, only when lower courts have addressed it and reached conflicting decisions.

CONCLUSION

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

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October 2017