No. 17-332

IN THE

Supreme Court of the United States

CORDIS CORPORATION,

Petitioner,

v.

MICHAEL BARBER, *ET AL.*,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a proposal that separate cases, each involving fewer than 100 plaintiffs, be consolidated for pretrial purposes only, 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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STATEMENT

A. Introduction

The Class Action Fairness Act (CAFA), 28 U.S.C. §§ 1332(d), 1453, provides federal jurisdiction, including removal jurisdiction, over some jurisdiction over a large, multi-state class actions. It also provides for a narrowly defined set of non-class actions, labeled "mass actions", which are to be treated as class actions for purposes of CAFA jurisdiction. *Id.* § 1332(d)(11). CAFA expressly excludes from "mass action" removal, however, cases in which "the claims have been consolidated or coordinated *solely* for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV) (emphasis added).

In these actions and in *Dunson* (presently on Petition for Writ of Certiorari before this court as *Cordis Corp. v. Dunson, et al.*, docket number 17-257), both the district court and the Ninth Circuit Court of Appeals agree that Plaintiffs did not bring a mass action when they proposed consolidating their claims *only for pretrial purposes* with individual "bellwether" trials rather than joint trials. This fact-bound ruling reflects a straightforward application of CAFA's plain language to the particular circumstances of these cases. Cordis Corporation's (hereinafter referred to as "Cordis") Petition, however, asserts that *any* reference to the possibility of bellwether trials is, as a matter of law, a proposal that cases be tried jointly.

Simply stated, this issue implicates no conflict among the circuits: All courts of appeal agree that when plaintiffs propose *pretrial* consolidation without joint trial of their cases, the cases do not become a mass action under CAFA. Any perceived conflict alleged by Cordis is quickly dispelled by cursory review of the facts in those cases. Nor is there conflict between the ruling

in these cases and the rulings of other circuits, which Cordis claims have accepted the blanket proposition that a bellwether trial is, necessarily, a joint trial. However, no court has adopted Cordis's position that "bellwether" is a magic word that confers 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. Pet. App. 47a-48a. In such cases, the outcome of the bellwether trial binds only the individual plaintiffs or plaintiffs involved in the particular trial, and, as to other plaintiffs, the trial serves principally to provide information and guidance to the parties about case value and whether and how to settle or try the remaining cases.

The court of appeals recognized, consistent with its own precedents and the 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. 48a.

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. Thus, 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.

B. CAFA's Mass Action Provision

CAFA provides for original and removal jurisdiction over certain "class actions" involving multistate parties and large amounts in controversy. 28 U.S.C. §§ 1332(d), 1452. With one exception, that jurisdiction is limited to "civil action[s] filed under rule 23 of the Federal Rules of Civil Procedures 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" is specifically and narrowly defined by CAFA. A "mass action" 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 further provides that mass actions do not include cases where, in pertinent part, "claims have been consolidated or coordinated solely for pretrial proceedings," *id.* § 1332(d)(11)(B)(ii)(IV).

Upon prior review of CAFA's mass action provision, this Court has held that the 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*." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S.Ct. 736, 744 (2014)(emphasis added). This is congruent with the below opinion here.

C. Facts and Proceedings Below

Respondents are individuals who joined in an action against petitioner Cordis in the Superior Court of California for Alameda County. The action asserts product liability claims against Cordis for injuries resulting from defective medical devices manufactured by Cordis – filters implanted into veins to prevent pulmonary embolisms.

These Plaintiffs filed similar actions against Cordis in the same court, *none* involving 100 or more Plaintiffs, and *none* requesting a *joint* trial with other Plaintiffs in the other pending cases. In May 2016, Plaintiffs in one of these cases filed a motion requesting that the cases be consolidated before one 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, here, expressly specified that their request was "for *pretrial* matters only." *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014). Plaintiffs did not propose a joint trial but did seek the use of bellwether trial(s) for informational purposes. Plaintiffs' proposal was made in accordance with Ninth Circuit precedent indicating that "a bellwether trial is not, without more, a joint trial within the meaning of CAFA." *Briggs v. Merck Sharpe & Dohme*, 796 F.3d 1038, 1051 (9th Cir. 2015).

Cordis responded to Plaintiffs' request for pretrial consolidation and bellwether trials by removing the cases 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. Plaintiffs moved to remand, and the district court granted the motion.

Cordis sought leave to appeal under 28 U.S.C. § 1453(c). The Ninth Circuit accepted the appeal, and the panel unanimously affirmed the Northern District of California's ruling. The court first observed 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. The court then considered "whether the plaintiffs' proposal for a bellwether-trial process amounts to a proposal to try their claims jointly." Pet. App. 47a.

The court's nuanced consideration of that issue reflected its understanding that the term "bellwether trial" may have multiple meanings. The court noted that in some instances, 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. The court, having reviewed other circuit's rulings, agreed with the Seventh Circuit which has held "[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)." *Bullard v. Burlington Northern Santa Fe Railway Co.*¸ 535 F.3d 759, 762 (7th Cir. 2008); Pet. App. 48a.

The court pointed out that there is also 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 "[t]he results of the trial are used in the other cases purely for information purposes as an aid to settlement." *Id.* at 47a-48a. In these instances, "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 48a.

The court closely examined what Plaintiffs intended when seeking bellwether trials. In doing so, it rejected Cordis's attempt to parse Plaintiffs' statements to suggest that their allusions to the benefits of pretrial consolidation implicitly indicated that Plaintiffs were proposing a bellwether-trial process whose results would bind other plaintiffs. The court found that Plaintiffs' statements were consistent with the view that they were seeking only the advantages of pretrial consolidation, 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 50a.[1]

In so holding, the court stressed that Plaintiffs had unambiguously disclaimed proposing a binding bellwether trial process: "To be clear, Moving Plaintiffs

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[1] The court also rejected Cordis's contention that Plaintiffs must, like the plaintiffs in *Corber*, have been proposing coordination for purposes including trial because the California statutory authority 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. 49a-50a.

are not requesting a consolidation for 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 51a-52a. "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 52a. 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 Plaintiffs jointly and therefore did not invoke removal under CAFA. *Id.*

REASONS FOR DENYING THE WRIT

There is no reason for this Court to entertain an appeal to clarify what is already clear under the plain language of CAFA and the circuit courts' clear precedent. Cordis attempts to dress up a routine and fact-specific CAFA jurisdictional question in this case as a novel and emergent situation featuring circuit conflicts. In reality, it is nothing more than a fact-based jurisdictional analysis wherein the below courts, using well-reasoned analysis, have properly remanded Plaintiffs' cases back to their original forum.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Cordis alleges the Ninth Circuit's decision conflicts with decisions of the Seventh, Eighth, and Third Circuits and that it is the only circuit that diverges in interpretation. This is not so. The cited conflicting decisions do not address the factually distinct circumstances here: a proposal for consolidation for pretrial matters *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. Differences in outcome attributable to different facts do not constitute a conflict in law requiring appellate review.

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. Indeed, none of the decisions cited by Cordis suggest trials are considered "joint" for purposes of CAFA's mass action provisions where the outcome does not bind plaintiffs in other cases.

Cordis's reliance on the Seventh Circuit's decision in *In Re Abbott Laboratories, Inc.*, 698 F.2d 568 (2012), exemplifies the flaws in its own argument. In *Abbott Labs*, the plaintiffs filed 10 state-court actions, each with fewer than 100 plaintiffs but collectively involving several hundred claimants. The plaintiffs requested that the state court consolidate the cases "through trial," and *expressly stated* that the consolidation they sought was "*not* solely for pretrial purpose." *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.

In reaching its decision, the Seventh Circuit found it significant that, in their motion to consolidate, plaintiffs had expressly requested consolidation, "through trial" and "not solely for pretrial proceedings." 698 F.3d at 571, 573. Not surprisingly, the court concluded that a proposal which expressly requests consolidation "*through* trial" was at least an implicit proposal of a joint trial. *Abbott*, at 573 (emphasis added). The court stated "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 position in no way conflicts with the results below or the law of the Ninth Circuit. In fact, the Seventh Circuit's view and reasoned analysis for reaching its final decision in *Abbott* is in accord with that of the Ninth Circuit.

In *Corber v. Xanodyne Pharmaceuticals,* the en banc Ninth Circuit held, consistently with *Abbott Labs*, that a proposal for coordination 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, while noting that the result did not preclude the possibility that (as in the instant cases) plaintiffs could request coordination for pretrial purposes. *Corber,* at 1224-25. 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 coordination *through trial* is a proposal that cases be tried jointly for purposes of CAFA's mass action provision. But those are not the facts at hand.

Here, the court of appeals *agreed* with *Abbott Labs* that a proposal for that specific type of bellwether trial would be a proposal of a joint trial for CAFA purposes, Pet. App. 48a, but it concluded that Plaintiffs, in this case, proposed a different type of bellwether trial: one that resolved only the claims of the particular plaintiff(s) involved and served as a bellwether only in the sense that it would come first and serve as an example of likely results in other cases. *Abbott Labs* 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] This is not and was never the intent of Plaintiffs here. That factual distinctions exist between the present case and a Seventh Circuit case does not mean that there is a conflict among circuits as to the either the rule of law or how it has been applied. If the facts of the present matter were identical (or even more similar) to the facts in *Abbott*, it is reasonable to assume the Ninth Circuit would have come to the same conclusion in this case as the Seventh Circuit did in *Abbott Labs*.

Cordis's invocation of the Eighth Circuit's decision in *Atwell v. Boston Scientific Corp.*, 740 F.3d 1160 (2013), also fails to demonstrate inter-circuit conflict. In *Atwell*, the Eighth Circuit found that state-court plaintiffs who requested their cases be assigned jointly to a single judge that would "ultimately try the case," had brought a mass action removable under CAFA. *Id.* at 1164. Citing to the reasoning of *Abbott Labs*, the Eight Circuit held that this proposal – unlike earlier proposals by the same plaintiffs that were limited to pretrial coordination – was a proposal for the cases be tried jointly. Importantly, the jurisdictional question turned on oral representations made by plaintiffs' counsel during a state court motions hearing. Counsel asked the state court to assign their case "to a single

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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 trial jointly. *Id*. at 947. Beyond that, Judge Posner's discussion of exemplary trials was dicta and did nothing more than anticipate *Abbott Lab's* view that an exemplary trial that determined liability for all plaintiffs would be a joint trial, a view fully consistent with that of the court of appeals in this case. *See id.*

Judge for purposes of discovery *and trial*." 740 F.3d at 1161 (emphasis added).

Atwell, like *Abbott Labs*, is fully consistent with the law of the Ninth Circuit. Indeed, the Ninth Circuit's en banc decision in *Corber* relied on *Atwell* and *Abbott Labs* for its holding that a proposal for consolidation through trial implicitly proposed a joint trial. *Corber*, at 1225. The panel below agreed that the kind of bellwether trial discussed in *Atwell*, with results applied to all the plaintiffs, constitutes a joint trial. Pet. App. 48a. 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.

Cordis's additional 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 meritless. In *Ramirez*, unlike this case, more than 100 plaintiffs joined in one, single complaint that requested one, single 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," 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 330-31. The court, therefore, held that the complaint both implicitly and explicitly proposed that the claims be tried jointly, and thus that the case was deemed 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., 738 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 Ramirez*, 852 F.3d at 330 (citing *Corber*, 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* appears in 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 plaintiffs' complaint had already proposed a joint trial, bringing their case within CAFA's mass action definition. *Id.* at 331. 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 applied to them "without another trial." *Id.* at 332 (quoting *Abbott Labs*, 698 F.3d at 573). The court additionally stated 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, the statements are fully consistent with the court of appeals' decisions in this case. Like *Abbott Labs* and *Atwell*, *Ramirez* suggests 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. 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.

Therefore, Cordis's suggestion of circuit conflict is unsubstantiated. Indeed, no circuit has held that a request for pretrial consolidation 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. Tellingly, Cordis cites to no such decision.

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 *Parsons v. Johnson & Johnson*, 749 F.3d 879 (2014), which held, consistent 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 insignificant number of opinions that have even touched on the issue indicates that it merits further consideration by the lower courts before this Court expends its time and resources into its review of the issue.

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 "turn[s] mass action removal's protective purpose on its head," thereby rendering defendants' statutory right of mass action removal dead letter in the Ninth Circuit. Pet. 5, 15. This reflects a fundamental misunderstanding of the mass action removal provision and a disregard for the Ninth Circuit's reasoned analysis.

By design, the CAFA mass action 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

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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*, 771 F.3d 1218, which is discussed above.

as a joint trial does not bring the case within CAFA's definition of a mass action. As this 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. The Ninth Circuit opinion is consistent with this principle.

Congress's intent to give plaintiffs the ability to avoid having their cases treated as a mass action by not proposing a joint trial is abundantly clear 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 pre-trial proceedings." *Id.* at § 1332(d)(11)(B)(ii)(IV). Additionally, Plaintiffs' choice about the proposal is dispositive as a mass action does not include any case in which "the claims are joined upon motion of a defendant." *Id.* at § 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 cites 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.2d 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.* (quoting *Corber*, 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). Plaintiffs here did exactly that.

Cordis demands the courts take a more aggressive role expanding the breadth of removal and consequently limiting plaintiffs' forum choice. 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 the confines of what Congress intended. The suggestion that a trial that does not in any way bind other plaintiffs is a joint trial simply because the defendants will be bound as they would be in any individual trial that binds the defendant is preposterous. 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 case 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 be applied in this manner. As the court of appeals stated: "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. 48a. 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 runs counter to current prevailing principles of issue preclusion. *See Parklane Hosiery Co. v. Shore*, 438 U.S. 322 (1979).

A ruling for Cordis on its theory would do nothing to spare defendants in future cases of the possible effects of issue preclusion that go along with individual trials. In actuality, it would accomplish nothing more than penalizing Plaintiffs for following existing circuit precedents and failing to anticipate that the Court would view the term, "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 purpose, and would have no lasting impact once plaintiffs learned to avoid the word, "bellwether," a word to which Cordis seeks to attach monumental significance. Granting review in such circumstances is not only unwarranted in this case, but would wasteful 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 consolidation 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.

CONCLUSION

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

Respectfully submitted,

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