Nos. 13-6287, 13-6288, 13-6289, 13-6290, 13-6291,
13-6292, 13-6293, 13-6294, 13-6295, 13-6296, & 13-6297

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: JOHNSON & JOHNSON, *et al.*

On Appeal from the United States District Court
for the Western District of Oklahoma
Nos. 13-832-L, 13-833-L, 13-834-L, 13-836-L, 13-838-L. 13-839-L,
13-840-L, 13-841-L, 13-844-L, 13-845-L, & 13-846-L
(Leonard, J.)

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN FAVOR OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel of record for Amicus Curiae American Association for Justice hereby certifies the following:

Amicus Curiae American Association for Justice has no parent companies and there is no publicly held corporation holding 10% or more of its stock.

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GLOSSARY OF TERMS

AAJ	American Association for Justice
CAFA	Class Action Fairness Act

STATEMENT OF IDENTITY & AMICUS INTEREST

The American Association for Justice ("AAJ") submits this brief as amicus curiae in support of Plaintiffs-Appellees Kathleen Teague, *et al.*, and in support of affirmance of the October 18, 2013 order of the United States District Court for the Western District of Oklahoma remanding each of these 11 lawsuits to Oklahoma state court. All parties to this appeal have consented to the filing of this brief.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. As a representative of the plaintiffs' bar, AAJ has long defended the principle that "plaintiffs, as masters of their complaint, may choose their forum" in which to litigate. *Tanoh v. Dow*, 561 F.3d 945, 953 (9th Cir. 2009). AAJ was actively involved in lobbying in connection with congressional enactment of the Class Action Fairness Act ("CAFA") and worked diligently to limit the extent to which that act, and in particular its "mass action" provision, would permit defendants to override plaintiffs' forum choices. Defendants-Appellants here, and their amici, now seek to obtain through litigation what they were unable to achieve through legislation, the

[1] Copies of letters of consent from counsel for both Defendants-Appellants and Plaintiffs-Appellees will accompany the filing of this brief. No party's counsel authored this brief in whole or in part and no party nor its counsel contributed money for the preparation or submission of this brief. No person other than AAJ, its members, or its counsel contributed money for the preparation or submission of this brief.

ability to override plaintiffs' preferred choice of forum in civil actions involving fewer than 100 named plaintiffs.[2]

SUMMARY OF ARGUMENT

This should be an easy case. CAFA defines a "mass action" for purposes of federal jurisdiction as a "civil action in which monetary relief claims of 100 or

[2] This brief does not address the second issue raised by Johnson & Johnson and its amici, the issue of fraudulent joinder, because this Court should not even consider it. Orders remanding a case to state court for want of federal jurisdiction are not normally appealable. 28 U.S.C. § 1447(d). This Court has jurisdiction of this appeal only because of CAFA's special statutory exception to the normal ban on appellate review of remand orders. 28 U.S.C. § 1453(c)(1). Such review is not mandatory, but discretionary. *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1247 (10th Cir. 2009). As CAFA's legislative history explains, "[t]he purpose of [this discretionary appellate review] is to develop a body of appellate law interpreting [CAFA] without unduly delaying the litigation." S. Rep. No. 109-14, at 49 (2005). This Court has previously declined to exercise its discretionary authority under § 1453(c)(1) to review asserted bases for federal jurisdiction other than CAFA, because such review "does not fit with the reasons behind § 1453(c)(1)." *Coffey*, 581 F.3d at 1248 (declining to consider appellate jurisdiction under CERCLA). Amicus believes the Court should take the same action here. *Cf. Anderson v. Bayer Corp.*, 610 F.3d 390, 394 (7th Cir. 2010) (concluding that Court of Appeals lacks jurisdiction under § 1453(c)(1) to consider fraudulent joinder as basis for federal jurisdiction).

In their briefs to this Court, Johnson & Johnson and its amici repeatedly accuse plaintiffs of attempting to "game the system" to avoid federal jurisdiction under CAFA. Appellants' Opening Br. 14-15; Amicus Curiae PLAC Br. 5, 9-11, 15-16, 21, 24; Amicus Curiae WLF Br. 11-12; Amicus Curiae U.S. Chamber of Commerce Br. 24-17. But it is Johnson & Johnson that is seeking to "game the system" of limited appellate review created by CAFA to obtain review of the District Court's ruling that the alleged "fraudulent joinder" of non-diverse plaintiffs did not provide a basis for federal jurisdiction, a ruling that has nothing to do with CAFA and that is not normally appealable under 28 U.S.C. § 1447(d). For this reason as well, this Court should decline its discretionary authority to review that non-CAFA ruling.

more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). There are no such actions before the Court. Instead, there are 11 separate lawsuits filed against Johnson & Johnson and its subsidiary, Ethicon, Inc. (hereinafter jointly referred to as "Johnson & Johnson"), each with between 48 and 76 named plaintiffs. Appellants' Opening Br. 2, n.1. Plaintiffs have taken no steps to coordinate or consolidate these 11 separate actions even for purposes of pretrial discovery, let alone for trial. As the district court correctly held, these circumstances do not constitute a "mass action" under CAFA's clear statutory language. The Supreme Court recently endorsed such a plain-meaning reading of the mass action provision. *Mississippi ex rel. Hood v. AU Optronics Corp.*, ---U.S. ----, 134 S. Ct. 736 (2014).

Every court to consider the question on comparable facts has ruled that the filing of multiple, similar lawsuits each with fewer than 100 plaintiffs, without more, is insufficient to confer federal jurisdiction as a CAFA mass action. *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009); *Anderson v. Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010); *Abrahamsen v. ConocoPhillips, Co.*, 503 Fed. Appx. 157 (3d Cir. 2012); *Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013). These decisions—from four sister circuits—all hold that the filing of multiple lawsuits, by itself, does not constitute a proposal to try the separate suits jointly, but rather "the exact opposite." *Scimone*, 720 F.3d at 883. Moreover, defendants' attempts to

join these separate suits through removal cannot confer jurisdiction, because Congress expressly excluded from CAFA's definition of a mass action "any civil action in which . . . the claims are joined upon motion of a defendant." 28 U.S.C. § 1332(d)(11)(B)(ii)(II).

By contrast, the cases on which Johnson & Johnson and its amici rely involve significantly different facts. *In re Abbott Laboratories, Inc.*, 698 F.3d 568 (7th Cir. 2012), and *Atwell v. Boston Scientific Corp.*, Nos. 13-8031, 13-8032, 13-8033, 2013 WL 6050762 (8th Cir. Nov. 18, 2013), both involved motions by plaintiffs seeking coordination or consolidation of separate lawsuits through trial. They have no bearing on a case in which no similar motion has been made by plaintiffs. *Standard Fire Insurance Co. v. Knowles*, --- U.S. ----, 133 S. Ct. 1345 (2013); *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008); and *Proffitt v. Abbott Laboratories*, No. 2:08-CV-148, 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008), are even further afield. None involved CAFA's mass action provision at all.

Because plaintiffs in these 11 lawsuits did not seek to try the claims of 100 or more plaintiffs jointly, the district court properly ruled that it lacked federal jurisdiction and remanded these cases to state court. That ruling should be affirmed.

ARGUMENT

THE DISTRICT COURT PROPERLY REMANDED EACH OF THESE CASES TO STATE COURT

I. CAFA'S "MASS ACTION" PROVISION EXPRESSLY LIMITS REMOVAL TO CASES IN WHICH 100 OR MORE PLAINTIFFS PROPOSE TO TRY THEIR CLAIMS JOINTLY.

CAFA confers federal jurisdiction over certain "mass actions." The statute defines a mass action as 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." 28 U.S.C. § 1332(d)(11)(B).[3] None of the 11 cases before this Court includes claims for more than 76 plaintiffs. Therefore, the central issue for removal jurisdiction under CAFA, as the district court properly recognized, "is whether the eleven cases can be considered as one for purposes of the 100 person requirement and whether the claims of more than 100 persons are 'proposed to be tried jointly.'" Court Order dated Oct. 18, 2013, Docket No. 19, at 11 (hereinafter "Court Order") (attached in addendum to Appellants' Opening Br.).

The 11 separate lawsuits should not be viewed collectively for purposes of CAFA's 100-person requirement. Plaintiffs have quite intentionally filed separate

[3] CAFA also requires at least minimal diversity among the parties and at least an aggregate amount of $5 million in controversy for federal jurisdiction. 28 U.S.C. § 1332(d)(2). There is no dispute that those requirements are satisfied here.

actions with fewer than 100 named plaintiffs in each. That is their prerogative as "masters of their complaints." *See, e.g.*, *Knowles*, 133 S. Ct. at 1350. Nor have they in any way proposed that the 11 cases be joined for trial. As the district court properly recognized, "'[e]very step the plaintiffs took was plainly directed toward achieving the exact opposite.'" Court Order 13 (quoting *Scimone*, 720 F.3d at 883).[4]

The United States Supreme Court offered guidance just last month on the proper construction of CAFA's mass action provision which is instructive here. *Mississippi ex rel. Hood v. AU Optronics Corp.*, --- U.S. ----, 134 S. Ct. 736 (2014), involved a *parens patriae* suit brought by Mississippi's attorney general under the state's antitrust and consumer protection laws against the manufacturers and distributors of liquid crystal display panels for price-fixing. Even though the state attorney general was the only named plaintiff, defendants removed the case to federal court under the mass action provision, contending that there were more than 100 persons who were the "real parties in interest," the consumers who had purchased the panels.

[4] Indeed, the plaintiffs in each of the 11 cases even disclaim an intent to jointly try the claims of all named plaintiffs in a particular action. *See, e.g.*, Teague Pet. dated July 8, 2013, Docket No. 1, Exh. 1, at ¶ 17 ("Joinder of Plaintiffs' claims is for the purpose of pretrial discovery and proceedings only and is not for trial.").

The Supreme Court rejected defendants' CAFA argument and ordered the case remanded to state court. The Court explained that the only persons who count for purposes of the mass action provision's 100-person numerosity requirement are those "persons who propose to try [their monetary] claims jointly as named plaintiffs." *Id.* at 739. The Supreme Court saw great virtue in reading the statutory language in accordance with its ordinary meaning: "interpreting 'plaintiffs' in accordance with its usual meaning—to refer to the actual named parties who bring an action—leads to a straightforward, easy to administer rule." *Id.* at 744.[5]

The Court took special note of a limitation on the mass action provision enacted by Congress. 28 U.S.C. § 1332(d)(11)(B)(ii)(II) specifies that "the term 'mass action' shall not include any civil action in which . . . the claims are joined upon motion of a defendant." The Supreme Court instructed:

> By prohibiting defendants from joining unnamed individuals to a lawsuit in order to turn it into a mass action, Congress demonstrated its focus on the persons who are actually proposing to join together as named

[5] The Supreme Court also considered the context in which the mass action provision was enacted as support for reading that provision narrowly:

> Congress' overriding concern in enacting CAFA was with class actions. The mass action provision thus functions largely as a backstop to ensure that CAFA's relaxed jurisdictional rules for class actions cannot be evaded by a suit that names a host of plaintiffs rather than using the class device.

Hood, at 744. (citations omitted).

> plaintiffs in the suit. Requiring district courts to pierce the pleadings . . . would run afoul of that intent.

134 S. Ct. at 746.

Defendants-Appellants here, just like the defendants in *Hood*, ask this Court to "pierce the pleadings" and divine an intent on the part of plaintiffs to jointly try these 11 separately filed actions based on nothing more than a purported inference from the judicial makeup of the jurisdiction in which the cases were filed. The district court properly declined that invitation and instead straightforwardly applied CAFA's mass action provision in accordance with its unambiguous terms. The Supreme Court's recent decision in *Hood* affirms the correctness of that approach.

II. EVERY COURT TO CONSIDER THE ISSUE HAS CONCLUDED THAT THE FILING OF MULTIPLE, CLOSELY RELATED LAWSUITS, EACH WITH FEWER THAN 100 PLAINTIFFS, DOES NOT CONSTITUTE A "MASS ACTION" UNDER CAFA.

Although the district court did not have the benefit of the Supreme Court decision in *Hood*, it did have guidance from persuasive authority from a number of this Court's sister circuits. No fewer than four federal courts of appeals have considered the precise question presented in this case on virtually identical facts. Each has ruled that the filing of multiple, similar lawsuits each with fewer than 100 plaintiffs, without more, is insufficient to confer federal jurisdiction as a CAFA mass action. *Tanoh*, 561 F.3d 945; *Anderson*, 610 F.3d 390; *Abrahamsen*, 503 Fed. Appx. 157; *Scimone*, 720 F.3d 876.

In *Tanoh*, the Ninth Circuit had to consider whether CAFA's mass action provision applied to Dow Chemical Company's removal of seven separate state toxic tort suits, each with fewer than 100 plaintiffs, but collectively presenting the claims of 664 plaintiffs. The court began its analysis by observing that CAFA's mass action provision is "fairly narrow," applying "only to civil actions in which the 'monetary relief claims of 100 or more persons are proposed to be tried jointly.'" 561 F.3d at 953 (quoting 28 U.S.C. § 1332(d)(11)(B)(i)). The Ninth Circuit concluded that this clear statutory language resolved the issue:

> By its plain terms, § 1332(d)(11) therefore does not apply to plaintiffs' claims in this case, as none of the seven state court actions involves the claims of one hundred or more plaintiffs, and neither the parties nor the trial court has proposed consolidating the actions for trial. . . . We therefore hold that CAFA's "mass action" provisions do not permit a defendant to remove to federal court separate state court actions, each involving the monetary claims of fewer than one hundred plaintiffs.

Id.

As in this case, Dow argued that, despite this statutory language, the court should read the mass action provision expansively in order to effectuate the congressional purpose behind CAFA and to prevent plaintiffs from "'evad[ing]' CAFA by 'artificially structur[ing]' their lawsuits to avoid removal to federal court." *Id.* The Ninth Circuit rejected this argument as well:

> Congress appears to have foreseen the situation presented in this case and specifically decided the issue in

> plaintiffs' favor. In addition to requiring that a "mass action" include the claims of at least one hundred plaintiffs "proposed to be tried jointly," § 1332(d)(11) specifically provides that "the term 'mass action' shall *not* include any civil action in which . . . the claims are joined upon motion of a defendant." § 1332(d)(11)(B)(ii)(II) (emphasis added). Congress anticipated, in other words, that defendants like Dow might attempt to consolidate several smaller state court actions into one "mass action," and specifically directed that such a consolidated action was not a mass action eligible for removal under CAFA. . . . Congress intended to allow suits filed on behalf of fewer than one hundred plaintiffs to remain in state court, notwithstanding defendants' wishes for consolidation, however expressed.

Id. at 953-54 (emphasis in original).

The Seventh Circuit came to the same conclusion in *Anderson*. That case involved product liability claims against Bayer on behalf of 171 plaintiffs divided into five separate state court actions. Bayer removed all five suits as a mass action under CAFA, but the district court remanded the four suits with fewer than 100 named plaintiffs.[6] On appeal, the court of appeals affirmed that CAFA did not provide federal jurisdiction over these suits: "The mass action provision gives plaintiffs the choice to file separate actions that do not qualify for CAFA

[6] Plaintiffs had intended to include only 99 plaintiffs in the fifth suit, but accidentally named two co-executors as plaintiffs in the same paragraph, for a total of 100, thereby rendering that suit removable as a mass action under CAFA. 610 F.3d at 392.

jurisdiction. The instant cases contain fewer than 100 plaintiffs and thus are not removable under the plain language of the statute." 610 F.3d at 393.

Like the Ninth Circuit, the *Anderson* court found it significant that § 1332(d)(11)(b)(ii)(II) of CAFA excludes cases in which a defendant moves to join claims from the definition of a mass action:

> Congress appears to have contemplated that some cases which could have been brought as a mass action would, because of the way in which the plaintiffs chose to structure their claims, remain outside of CAFA's grant of jurisdiction. This is not necessarily anomalous; after all, the general rule in a diversity case is that "plaintiffs as masters of the complaint may include (or omit) claims or parties in order to determine the forum." . . . Bayer's argument that these separate lawsuits be treated as one action is tantamount to a request to consolidate them—a request that Congress has explicitly stated cannot become a basis for removal as a mass action.

Id. at 393-94 (citations omitted).

The Third Circuit joined this growing consensus in *Abrahamsen*, in which 123 plaintiffs sued Conoco, in four separate actions, for injuries sustained while working on its North Sea oil facilities:

> The plain text of CAFA clearly precludes jurisdiction in this case. Despite the similarities of their claims, Plaintiffs did not propose to try their claims jointly. Because each suit includes fewer than one hundred persons, none of Plaintiffs' four suits meets CAFA's definition of a "mass action" and therefore no suit qualifies for removal jurisdiction.

503 Fed. Appx. at 160. Most recently, the Eleventh Circuit reached the same result in *Scimone*, in which 104 passengers sued Carnival cruise line, in two separate actions with fewer than 100 plaintiffs each, for damages resulting from the Costa Concordia shipwreck off the coast of Italy. The court of appeals agreed with plaintiffs that CAFA's mass action provision did not confer jurisdiction where plaintiffs neither filed a complaint with 100 or more plaintiffs nor moved to consolidate or join the two smaller cases for trial. 720 F.3d at 880-87.

Thus, there is unanimity among this Court's fellow courts of appeals on the jurisdictional issue presented in this case. Four separate federal circuits have ruled that plaintiffs may avoid federal jurisdiction over their similar claims against a common defendant by dividing their claims into multiple lawsuits with fewer than 100 plaintiffs each and not seeking to join those separate suits for trial. No case of which amicus is aware has reached a contrary result. The plain language of CAFA's mass action provision dictates this result. Plaintiffs are the masters of their complaint and are free to structure their cases so as to avoid federal jurisdiction if that is their preference. That is precisely what plaintiffs here have done. AAJ urges this Court to join this unanimous body of precedent and affirm the district court's order of remand.

III. THE CASES ON WHICH JOHNSON & JOHNSON AND ITS AMICI RELY ARE DISTINGUISHABLE.

Johnson & Johnson and its amici cannot dispute that *Tanoh*, *Anderson*, *Abrahamsen*, and *Scimone* all reject their reading of CAFA's mass action provision. Instead, they point to other case law that they claim supports their removal arguments. But each of the cases they cite involves completely different facts from the present suits and is readily distinguished.

Defendants-Appellants first rely on a couple of decisions—and one dissent—that have upheld removal under CAFA's mass action provision *only after plaintiffs* in the underlying actions had *filed motions to consolidate or coordinate* the actions. *See In re Abbott Labs., Inc.*, 698 F.3d 568; *Atwell*, 2013 WL 6050762; and *Romo v. Teva Pharms. USA, Inc.*, 731 F.3d 918 (9th Cir. 2013) (Gould, J., dissenting). In *Abbott Laboratories*, for example, plaintiffs in multiple cases moved for consolidation of the cases "through trial" and "not solely for pretrial proceedings." *Id.* at 571. The Seventh Circuit concluded that this language was sufficient to constitute a proposal for a joint trial. *Id.* at 573. The court was careful to explain how this situation differed from that in *Anderson*, where the plaintiffs had not sought to consolidate their separate lawsuits:

> Under the reasoning of *Anderson*, plaintiffs were not in danger of having their cases removed when they filed eleven similar complaints in state court. But when they moved the Supreme Court of Illinois to consolidate their

> cases through trial—reasonably construed by Abbott as a proposal for a joint trial—*Anderson* no longer controlled.

Id. at 572.

Atwell is similar. In that case, three groups of plaintiffs filed similar motions requesting assignment "to a single judge for purposes of discovery *and trial*." 2013 WL 6050762, at *3 (emphasis added). The Eighth Circuit found these motions—combined with plaintiffs' representations at the oral argument on those motions—sufficient to constitute requests for joint trial under CAFA. *Id.* at *5. As in *Abbott Laboratories*, the *Atwell* court was careful to distinguish cases, such as this one, in which plaintiffs in separate actions made no efforts to consolidate them for trial: "[S]tate court plaintiffs with common claims against a common defendant may bring separate cases with fewer than 100 plaintiffs each to avoid federal jurisdiction under CAFA—unless their claims are 'proposed to be tried jointly.'" *Id.* at *2.

In *Romo*, the Ninth Circuit reached the opposite result from *Abbott Laboratories* and *Atwell*, concluding that plaintiffs' state-court petition for coordination of more than forty separate product liability suits under the California Code of Civil Procedure did not constitute a proposal that those cases be tried

jointly. 731 F.3d at 924. Judge Gould disagreed about the import of the coordination petition, and dissented. *Id.* at 925.[7]

But there was no dispute between *Romo*'s majority and dissent on the core issue here: if plaintiffs had simply filed their separate actions, each with fewer than 100 plaintiffs, and had not moved for coordination, there would have been no basis for federal jurisdiction under CAFA. *Compare id.* at 922 ("plaintiffs can structure actions in cases involving more than one hundred potential claimants so as to avoid federal jurisdiction under CAFA") *with id.* at 926-27 (Gould, J., dissenting) ("plaintiffs are the 'masters of their complaint,' and do not propose a joint trial simply by structuring their complaints so as to avoid the one hundred-plaintiff threshold").

Thus, *Abbott Laboratories*, *Atwell*, and *Romo* are all factually distinguishable from the present appeal, where plaintiffs have never taken any actions that could be construed as a proposal to try these 11 cases jointly. And language in all three rulings makes clear that the Seventh, Eighth, and Ninth Circuits would agree with the district court's remand order on these facts.

The other cases cited by Johnson & Johnson and its amici are even less relevant. Neither *Standard Fire Insurance Co. v. Knowles*, --- U.S. ----, 133 S. Ct.

[7] Just yesterday, the Ninth Circuit granted rehearing en banc to resolve this disagreement. *Romo v. Teva Pharms. USA, Inc.*, 731 F.3d 918 (9th Cir. 2013), *reh'g granted*, --- F.3d ---- (9th Cir. Feb. 10, 2014).

1345 (2013), nor *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008), nor *Proffitt v. Abbott Laboratories*, No. 2:08-CV-148, 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008), even involved CAFA's mass action provision. To the contrary, all of these cases involved class actions and attempts by the named plaintiffs to evade federal jurisdiction under CAFA's class action provisions by limiting class damages to below CAFA's $5 million minimum requirement, either through a non-binding stipulation on the prospective class's damages (*Knowles*) or by dividing the single class's claim into multiple lawsuits covering separate, consecutive time periods (*Freeman* and *Proffitt*). They have no bearing on the proper construction of CAFA's separate, and very different, mass action provision.

Indeed, the precise arguments about the relevance of these decisions were considered and rejected in *Tanoh*, 561 F.3d at 955-56, *Anderson*, 610 F.3d at 393, and *Scimone*, 720 F.3d at 885-86. Moreover, Johnson & Johnson's attempt to extract a broader principle applicable to all CAFA cases from the Supreme Court's use of the expression "exalt form over substance" in *Knowles*, Appellants' Opening Br. 14, 18, is undermined by the Court's careful, narrow reading of the mass action provision in its more recent decision in *Hood.*

The bottom line remains: the plain language of CAFA's mass action provision permits plaintiffs to avoid federal jurisdiction by limiting their suits to

fewer than 100 plaintiffs each. Every court to consider the issue on facts comparable to those before this Court has found no federal jurisdiction and ordered remand. Johnson & Johnson and its amici can identify no contrary rulings. This Court should join this unanimous consensus.

CONCLUSION

For the foregoing reasons, amicus curiae AAJ urges this Court to affirm the ruling of the district court and to remand each of these cases to Oklahoma state court.

Date: February 11, 2014

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CERTIFICATE OF COMPLIANCE WITH TENTH CIRCUIT RULE 25.5

This brief complies with the privacy redaction requirement of Tenth Circuit Rule 25.5 because this brief contains no private data that is required to be redacted.

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 4,094 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 point font.

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1. This brief complies with the requirements of the ECF User Manual, Section II, Policies and Procedures for Filing via ECF, Part I(b), pages 11-12, because the hard copies to be submitted to the Court are exact copies of the version submitted electronically.

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From: Farrell, Cherie
Sent: Wednesday, February 05, 2014 9:21 AM
To: Chichester, Melba
Subject: FW: In re Johnson & Johnson

Please save to correspondence.

From: Brody, Steve [mailto:sbrody@omm.com]
Sent: Tuesday, February 04, 2014 10:51 AM
To: Farrell, Cherie; Goetz, Richard
Cc: Bograd, Lou
Subject: RE: In re Johnson & Johnson

Cherie:

Thanks for you note. As Lou and I just discussed, we will not oppose AAJ's motion for leave to file an amicus brief, but appreciate any effort AAJ can make to file its brief earlier than the February 11 deadline for amicus briefs in support of appellees in this matter. Pursuant to the compressed briefing schedule set by the Court, our reply brief is due on February 19, which would leave minimal time to respond to arguments raised by AAJ if its brief is not filed until the deadline.

Stephen D. Brody
O'Melveny & Myers LLP
1625 Eye Street N.W.
Washington, DC 20006
202-383-5167

From: Farrell, Cherie [mailto:Cherie.Farrell@cclfirm.com]
Sent: Tuesday, February 04, 2014 10:13 AM
To: Goetz, Richard; Brody, Steve
Cc: Bograd, Lou
Subject: In re Johnson & Johnson

Mr. Goetz & Mr. Brody,

As you are aware, the American Association for Justice intends to file an *amicus curiae* brief in the U.S. Court of Appeals for the 10th Circuit in support of Appellees. We would very much appreciate it, if on behalf of your client, Appellants Johnson & Johnson and Ethicon, you would consent to the filing of the AAJ brief. It is my understanding that Julie Rhoades informed us of your consent, however, I would like to have a written copy for our records. If you do consent, please indicate so by return email at your earliest possible convenience.

Thank you for your prompt attention with regard to this matter.

Best regards,

Cherie J. Farrell
Appellate Paralegal
Center for Constitutional Litigation, P.C.
777 6th Street, N.W.
Suite 520
Washington, DC 20001
Telephone: (202) 944-2803
Fax: (202) 965-0920
cherie.farrell@cclfirm.com

Chichester, Melba

From: Farrell, Cherie
Sent: Wednesday, February 05, 2014 2:52 PM
To: Chichester, Melba
Subject: FW: In re Johnson & Johnson

Please save.

From: Julie Rhoades [mailto:jrhoades@thematthewslawfirm.com]
Sent: Wednesday, February 05, 2014 2:32 PM
To: Farrell, Cherie
Subject: RE: In re Johnson & Johnson

Yes, I consent. And thank you.

From: Farrell, Cherie [mailto:Cherie.Farrell@cclfirm.com]
Sent: Wednesday, February 05, 2014 1:00 PM
To: Julie Rhoades
Cc: Bograd, Lou
Subject: In re Johnson & Johnson

Julie,

It is my understanding, pursuant to your conversations with Lou, that you provided your consent to the filing of an amicus curiae brief on behalf of the American Association for Justice in the above-referenced matter. For the purposes of our records, I am sending you this email requesting your consent in writing. If you do consent, please indicate so by return email at your earliest possible convenience.

Thank you for your prompt attention with regard to this matter.

Best regards,

Cherie J. Farrell
Appellate Paralegal
Center for Constitutional Litigation, P.C.
777 6th Street, N.W.
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message is prohibited. If you received this message in error, please notify the sender immediately by return email or at (202) 944-2803. Thank you.