No. 13-___

In the Supreme Court of the United States

XANODYNE PHARMACEUTICALS, INC.,
Petitioner,

v.

MARGALIT CORBER, *ET AL.,*
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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February 21, 2014 *Counsel of Record

QUESTION PRESENTED

In 2005, Congress enacted the Class Action Fairness Act ("CAFA") to curb abuses of the class action device that undermined the rights of both plaintiffs and defendants by permitting lawsuits having nationwide and multi-state ramifications to proceed in state courts. Cognizant that plaintiffs often side-stepped class action treatment by joining numerous unrelated plaintiffs in a single action without seeking class certification even though the plaintiffs' claims presented common questions of law or fact, Congress included a provision in CAFA permitting removal of "mass actions" to federal court. That provision permits removal of "any civil action…in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the grounds that the plaintiffs' claims involve common questions of law or fact…." 28 U.S.C. §1332(d)(11)(B)(i); 28 U.S.C. §1453(b).

The question presented is:

Whether plaintiffs' request, pursuant to state court procedures, to coordinate numerous multi-plaintiff lawsuits involving claims of more than 100 persons against dozens of non-resident defendants for all purposes constitutes a "mass action" removable under CAFA.

LIST OF PARTIES

A. Defendant-Appellant

Xanodyne Pharmaceuticals, Inc.

B. Plaintiffs-Appellees

Corber, Margalit
Caro, Rene
Dantzler, Steve
Sowards, Linda
Huisman, Lori
George, Johnny, Sr.
Perry, Terry
Rackley, William
Young, Angela
Rodriguez, Pamela
Syverson, Steven
Caicoya, Olga
Carroll, Janet
Cash, Rose
Celentano, Ulad
Costanzo, Virginia
Filligim, Kimberly
Smith, Armeldia
West, Carla
Bierzynski, Joanne, Individually and as
Next of Kin to Eleanor Wojcik
Morris, Sharley
Timmons, Wyomia
Reinking, Dean
Thorne, Daniel
Ashby, Wendelen
Bedford, Carmen
Commodore, Claude

Henson, James
Locke, Nancy
Scott, Mildred
Burnett, Billie
Hall, Sheena
Roberge, Brenda, Individually and as Next
of Kin to Ernest Roberge
Woodsum, Deborah
Pascuito, Richard

CORPORATE DISCLOSURE STATEMENT

As required by the Court's Rule 29.6:

Petitioner Xanodyne Pharmaceuticals, Inc., hereby discloses that it does not have a parent corporation and there is no publicly held corporation that owns ten percent or more of its stock.

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INTRODUCTION

This lawsuit, along with 40 other lawsuits that were joined under California's coordination procedures, are poster-children of the abuses Congress sought to end when it passed CAFA. The vast majority of plaintiffs in this and the other lawsuits are not California residents. The defendants, save one, are not California residents; they are not incorporated in California and they do not have a principal place of business in California. The injuries alleged by the vast majority of plaintiffs did not occur in California. The products they allege caused their injuries were not bought, sold, or used in California. Yet, the lawsuits were filed in California state courts and, at plaintiffs' request through California's court procedures, joined in one court, before one judge for "all purposes." A clearer example of "gaming the system" – a tactic that Congress sought to curb, if not end, through CAFA – is difficult to envision.

The litigation involving propoxyphene-containing products began in November 2010, after the federal Food and Drug Administration ("FDA") requested Xanodyne Pharmaceuticals, Inc., the holder of the new drug applications ("NDA") for Darvon and Darvocet, and the various manufacturers and sellers of generic pharmaceutical products containing propoxyphene, to withdraw those products from the market. Not long after the products were withdrawn, plaintiffs began filing lawsuits against the manufacturers and sellers of those products. The initial lawsuits were filed in federal courts throughout the country, and shortly thereafter, plaintiffs requested the Judicial Panel on Multidistrict Litigation ("JPML") coordinate the

cases in a multi-district litigation ("MDL") for pretrial proceedings, promising that several hundred cases eventually would be part of the proposed MDL. Plaintiffs indeed filed additional cases in both federal and state courts, and defendants removed the state court cases based on diversity jurisdiction. The JPML granted plaintiffs' request, coordinating the cases before Judge Danny Reeves in the United States District Court for the Eastern District of Kentucky.

The vast majority of plaintiffs in those cases filed boilerplate complaints that identified neither the propoxyphene-containing product the plaintiff took nor the manufacturer of the product. As a result, the MDL Court required plaintiffs to provide that information. During that time, defendants began filing motions to dismiss. The manufacturers and sellers of brand-name products, including Xanodyne and Eli Lilly, moved to dismiss those lawsuits in which the plaintiff ingested only generic versions of the product based on lack of product identification and because they do not owe a duty towards consumers of other manufacturers' products. The defendants who manufactured and sold generic versions of the products moved to dismiss because the claims against them are preempted by federal law as this Court held in *PLIVA, Inc. v. Mensing*, 564 U.S. ---, 131 S. Ct. 2567 (2011) and, again, later in *Mutual Pharm. Co. v. Bartlett*, --- U.S. ---, 133 S. Ct. 2466 (2013). Following a series of unfavorable rulings from Judge Reeves dismissing all the plaintiffs' claims against the manufacturers of generic propoxyphene-containing products as well as the vast majority of the plaintiffs' claims against the manufacturers of the brand-name products,

plaintiffs' counsel here (the same attorneys who held leadership roles in the MDL litigation) sought a "friendlier" forum for their cases.

By that time, California state courts had issued rulings in other pharmaceutical litigation that permitted newly-minted purported state-law claims involving generic pharmaceutical products to proceed in contravention of this Court's decision in *Mensing* that claims involving generic drugs are preempted, while other courts around the country had rejected the very same attempts. *Compare In re Reglan/Metoclopramide Cases,* JCCP Proceeding No. 4631 (Cal. Sup. Ct. May 22, 2012); *Pikerie v. Merck*, No. 30-2012-00535583 (Cal. Sup. Ct. May 3, 2012), *with, e.g., Morris v. PLIVA, Inc.*, 713 F.3d 774, 777 (5th Cir. 2013). In addition, contrary to the national consensus, California courts have permitted claims against brand-name drug manufacturers to proceed even though the plaintiff never used the brand-name drug product. The plaintiff-friendly rulings issued by California state courts make California a magnet for pharmaceutical and other mass tort litigation.[1]

The MDL Court's ruling in *Freitas v. McKesson Corporation, et al.*, Case No. CGC-11-515537, originally filed in the Superior Court of San Francisco County, California, cemented plaintiffs' counsel's choice of forum. *Freitas* joined the claims of

[1] Currently, there are at least four mass tort proceedings involving pharmaceutical products pending in California state courts, other than this one: Litigation involving metoclopramide, alendronate, isotretinoin, and drospirenone. In all four instances, the lawsuits were coordinated, like this one, under California's coordination procedures. And, in all four instances the lawsuits were filed predominantly by out-of-state plaintiffs against out-of-state defendants.

numerous unrelated individuals from various states with those of a single California resident plaintiff, against 28 non-resident manufacturers, sellers, and distributors of propoxyphene-containing products. The *Freitas* lawsuit included a single California defendant, distributor McKesson Corporation. The defendants removed *Freitas* on diversity grounds, arguing McKesson was fraudulently joined, but Judge Reeves remanded the case. *See In re Darvocet, Darvon and Propoxyphene Prods. Liab. Litig.*, 889 F. Supp. 2d 931 (E.D. Ky. 2012). In the wake of that decision, plaintiffs' attorneys remarked publicly that the remand decision "is important because it provides plaintiffs with a roadmap for keeping propoxyphene cases in state court." Steven M. Sellers, Plaintiffs win remand to state court in drug labeling case, despite *Mensing*, Am. Ass'n for Justice (Aug. 2, 2012).[2]

That "roadmap" led to the filing of numerous other multi-plaintiff cases on behalf of over 1,500 plaintiffs in various California state courts. (App.293-455.) McKesson was named in every lawsuit to destroy diversity jurisdiction. To avoid federal jurisdiction and reduce the cost of filing fees, plaintiffs' counsel arbitrarily joined dozens of unrelated plaintiffs in a single lawsuit (often grouped in alphabetical order), each naming dozens of non-California resident defendants. (*See id.*) Like their previously-filed boilerplate complaints in the MDL, the complaints filed in California state courts failed to identify which products each plaintiff took or the manufacturer of the product, but more egregiously, the complaints generally joined one identified

[2] Available at http://www.justice.org/cps/rde/xchg/justice/hs.xsl/18936.htm.

California-resident plaintiff together with numerous unrelated plaintiffs hailing from various states around the country or whose states of residence were conspicuously and deliberately omitted.

Each complaint purposefully listed shy of 100 plaintiffs; however, to gain a tactical advantage and assert pressure on defendants to settle the lawsuits,[3] plaintiffs' counsel brought all plaintiffs together in one mass action by moving to join all the lawsuits into a single proceeding for all purposes and have them designated as complex. All told, over 40 lawsuits involving more than 1,500 randomly-

[3]In California superior courts, the coercion of mass action settlements, quite aside from the merits, is furthered by mandatory filing fees imposed on named defendants. No matter how many plaintiffs are gathered under a single caption, they pay only a single filing fee per complaint. Each named defendant, however, must pay a filing fee simply for the privilege of appearing to defend itself. The fees vary from county to county, but most California superior courts impose a $1,000 fee if a case is designated "complex," as mass actions invariably are, while that fee is imposed just once "for all plaintiffs." Fees are imposed to obtain commissions and subpoenas to compel attendance at out-of-state depositions and to secure medical records or other documents, which frequently is necessary given often most plaintiffs are not California residents. California superior courts impose fees for filing any motion (whether challenging pleadings, compelling and resisting discovery, or even seeking counsel's pro hac admission), and a premium fee is the tariff for summary judgment motions, which defendants file more often than plaintiffs. The "fee load" on California defendants will bankrupt a defendant of modest means quickly, driving early settlements for reasons entirely separate from the merits of plaintiffs' claims. In mass actions, the problem is especially acute because, as here, all plaintiffs routinely sue every participant in a particular market, rather than perform the necessary due diligence to limit the named defendants to those with a verifiable connection to the claimed injury.

grouped, unrelated plaintiffs from across the country against dozens of non-resident defendants were filed in California state courts, and those lawsuits, at plaintiffs' request, became part of a single state-court mass action.

Congress was quite clear in its intentions when it enacted CAFA: "To assure fair and prompt recoveries for [plaintiffs] with legitimate claims"; to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction"; and to "benefit society by encouraging innovation and lowering consumer prices." P.L. 109-2, §2(b). Congress also was quite clear why the legislation was necessary:

> Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are –
>
> (A) keeping cases of national importance out of Federal court;
>
> (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
>
> (C) making judgments that impose their view of the law on other

> States and bind the rights of the residents of those States.

Id., §2(a)(4).

In enacting CAFA, Congress recognized that "'mass actions' are simply class actions in disguise" that involve multiple plaintiffs who seek to join their claims, even though they "have little to do with each other [to] confuse the jury into awarding millions of dollars to individuals who have suffered no real injury." S. Rep. 109-14, 2005 U.S.C.C.A.N. 44. Left to stand, the decision in this case and in the companion case *Romo* will merely encourage plaintiffs' counsel to follow their "roadmap" while undermining the policy and purpose behind CAFA's enactment and rendering its removal provisions meaningless and useless. In short, while "CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction," *Freeman v. Blue Ridge Paper Prods. Inc.*, 551 F.3d 405, 407 (6th Cir. 2009), decisions like the majority's below will assure plaintiffs can do exactly that. This Court should not countenance that result.

Moreover, the decisions of the United States Court of Appeals for the Ninth Circuit, and the district courts, that concluded the "mass action" provisions of CAFA are not implicated here stand in stark contrast to decisions from the Seventh and Eighth Circuit Courts of Appeals in *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012), and *Atwell v. Boston Scientific Corp.*, --- F.3d. ---, 2013 WL 6050762 (8th Cir. 2013). There is no demonstrable difference between what occurred here and what occurred in either *Abbott* or *Atwell*. True those cases

were filed in different state courts and used the procedures of those state courts, but the tactic and ensuing effect are the same: File multiple lawsuits with multiple plaintiffs in each lawsuit and then, using the state court's procedures, join those actions in a single tribunal before a single judge as one mass action. Or, in CAFA's terms, join "civil action[s] … in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the grounds that the plaintiffs' claims involve common questions of law or fact…." 28 U.S.C. §1332(d)(11)(B)(i); 28 U.S.C. §1453(b). As in *Abbott* and *Atwell*, that is what occurred here, and as the Seventh and Eighth Circuit held, that "tactic" creates a "mass action" removable under CAFA.

The Court should grant this petition to provide clear guidance to the federal courts regarding the application of the "mass action" provision of CAFA and resolve the circuit split, but may hold it in abeyance pending *en banc* rehearing, which is scheduled for the week of June 16, 2014 (*see* n.5, *infra*).

OPINIONS BELOW

The Ninth Circuit Court of Appeals' decision in *Corber v. McKesson Corp.*, No. 13-56306, is unreported and reprinted at App.1-2. The Ninth Circuit Court of Appeals' decision in *Romo v. Teva Pharms. USA, Inc.*, on which the Ninth Circuit relied in *Corber*, is reported at 731 F.3d 918 (9th Cir. 2013), and reprinted at App.7-28. The district court's decision in *Corber v. McKesson Corp.*, No. CV12-9986 PSG (Ex) (C.D. Cal. 2013), is reprinted at App.3-6. The district court's decision in *Romo v. McKesson Corp.*, No. CVB 12-2036 PG (Ex), on which the

district court relied in *Corber*, is reprinted at App.29-57.

JURISDICTION

The Ninth Circuit Court of Appeals rendered its decision on September 24, 2013, App.1-2. On December 9, 2013, Xanodyne was granted an extension of time to file its petition for writ of certiorari to February 21, 2014. This Court has jurisdiction under 28 U.S.C. §1254.[4]

STATUTORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in the Appendix. (App.61-81.)

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[4] Xanodyne timely filed a petition for rehearing *en banc* in the Ninth Circuit on October 8, 2013. On February 10, 2014, that petition was granted. (App.58-60.) In an abundance of caution, Xanodyne files this petition now before the Ninth Circuit completes its *en banc* review of the panel majority decision. Due to the interplay under 28 U.S.C. §1453, which requires that a court of appeals render judgment within 60 days of granting the appeal and the timeframe for petitioning for a writ of certiorari after timely seeking rehearing in the court of appeals, Xanodyne wishes to eliminate any argument regarding timely filing of a petition for review in this Court of the panel decision. Under the Court's rules, the filing of a petition for rehearing in the court of appeals tolls the time for filing a petition for writ of certiorari in this Court. This Court already has determined that the 60-day time limit in CAFA does not impact this Court's jurisdiction, *see Hertz Corp. v. Friend*, 559 U.S. 77, 83-84 (2010), and Xanodyne submits the same is true with respect to an appellate court's *en banc* review.

That issue need not be decided, however, as this Court has the authority to grant a petition for writ of certiorari before judgment is entered by the Court of Appeals pursuant to 28 U.S.C. §1254, or this Court may hold Xanodyne's petition in abeyance until the Ninth Circuit concludes its *en banc* review.

STATEMENT OF THE CASE

A. THE CLASS ACTION FAIRNESS ACT

In 1997, Congress first began to consider ways to stem the abuses that plagued class action litigation. Recognizing that plaintiffs' counsel routinely tried to keep nationwide, multi-plaintiff lawsuits in state courts where sympathetic courts certify classes and approve settlements with little to no regard for the actual plaintiffs' interests and complete disregard of the defendants' due process rights, Congress sought to establish a mechanism that would place lawsuits with interstate ramifications in the proper forum—federal court. Congress's efforts culminated in the passage of CAFA in 2005. P.L. 109-2.

The abuses Congress sought to curb through CAFA were numerous and prevalent resulting in lawyers, rather than plaintiffs, benefitting from the lawsuits; forcing defendants to settle frivolous lawsuits to avoid expensive litigation, thereby driving up consumer prices; trampling defendants' constitutional due process rights; and encouraging expensive and predatory copy-cat actions that forced defendants to litigate the same claims in multiple jurisdictions, further increasing consumer costs. *See* S. Rep. 109-14, p. 14. Forum shopping was chief among the abuses Congress sought to end. It was common for plaintiffs' counsel to file lawsuits in class-action friendly state courts or to file the same lawsuits in multiple different courts in an effort to find a receptive judge who would certify a class quickly. The result was always the same – counsel benefitted, plaintiffs received little to no compensation; defendants' due process rights were

completely disregarded and they were forced to spend exorbitant amounts defending and settling lawsuits with little to no merit; and, the American public paid the price.

But "class actions" in the classical sense were not the only lawsuits riddled with abuses. Congress recognized that oftentimes, plaintiffs' counsel amassed multiple plaintiffs, with no relation to one another, in a single lawsuit resulting in the same, or worse, abuses as those that plagued the class action device. As the Committee noted,

> mass actions are simply class actions in disguise. They involve a lot of people who want their claims adjudicated together and they often result in the same abuses as class actions. In fact, sometimes the abuses are even worse because the lawyers seek to join claims that have little to do with each other and confuse a jury into awarding millions of dollars to individuals who have suffered no real injury.

S. Rep. 109-14, p. 47.

To end "class action" and "mass action" abuses, Congress amended the diversity statute to broaden federal diversity jurisdiction. It expanded 28 U.S.C. §1332 to permit class actions filed in state court to be removed to federal court if the requirements in the statute were satisfied. More importantly for purposes here, Congress included a provision in §1332 allowing for removal of "mass actions" in the same manner as class actions. 28 U.S.C.

§1332(d)(11) ("For purposes of this subsection, and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.").

A "mass action" is "any 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)(i). Congress was careful, however, to preserve for state-court adjudication those lawsuits that involve "local controversies." Toward that end, the statute excludes from the definition of "mass action" those lawsuits involving claims that arise from an occurrence in the state where the lawsuit is filed, as well as those brought on behalf of the general public under a state statute authorizing the claim. *Id.* §1332(d)(11)(B)(ii)(I), (III).

In furtherance of the "local controversy" exceptions, Congress included two provisions. One grants the district courts discretion to decline to exercise jurisdiction over those actions in which "greater than one-third but less than two-thirds of the [plaintiffs] and the primary defendants are citizens of the State in which the action was originally filed…." 28 U.S.C. §1332(d)(3). The other outlines when a district court must decline to exercise jurisdiction.

To assist district courts in determining whether to exercise their discretion to decline jurisdiction under the first provision, CAFA includes

factors for the court to consider in those circumstances:

> (A) whether the claims asserted involve matters of national or interstate interest;
>
> (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
>
> (C) whether the [] action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
>
> (D) whether the action was brought in a forum with a distinct nexus with the [plaintiffs], the alleged harm, or the defendants;
>
> (E) whether the number of citizens of the State in which the action was originally filed in all [joined actions] in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the [plaintiffs] is dispersed among a substantial number of States; and
>
> (F) whether, during the 3-year period preceding the filing of that [] action, 1 or more other [] actions asserting the same or similar claims on behalf of the same or other persons have been filed.

28 U.S.C. §1332(d)(3)(A)-(F).

Those instances in which a district court is required to decline jurisdiction are detailed in 28 U.S.C. §1332(d)(4). That section provides that a "district court shall decline to exercise jurisdiction"

> (A) (i) over a[n] [] action in which—
>
> > (I) greater than two-thirds of the [plaintiffs] in the aggregate are citizens of the State in which the action was originally filed;
> >
> > (II) at least 1 defendant is a defendant—
> >
> > > (aa) from whom significant relief is sought by … the plaintiff[s];
> > >
> > > (bb) whose alleged conduct forms a significant basis for the claims asserted by the [] plaintiff[s]; and
> > >
> > > (cc) who is a citizen of the State in which the action was originally filed; and
> >
> > (III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

> (ii) during the 3-year period preceding the filing of that [] action, no other [] action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or
>
> (B) two-thirds or more of the [plaintiffs] in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

28 U.S.C. §1332(d)(4).

Congress also was careful to ensure the legislation did not turn the tables in favor of defendants. To achieve that goal, Congress excluded from the definition of "mass action," "any civil action in which … the claims are joined upon motion by a defendant." *Id.* §1332(d)(11)(B)(ii)(II).

Finally, so as not to infringe state courts from efficiently handling numerous lawsuits properly filed in their courts, Congress excluded from the definition of "mass action" those civil actions in which the claims are consolidated or coordinated "solely for pretrial purposes." *Id.* §1332(d)(11)(B)(ii)(IV).

B. CALIFORNIA'S COORDINATION PROCEDURE

Virtually every state-court system has provisions that in some manner permit the coordination or consolidation of lawsuits that involve common questions of law or fact. California is no exception. In California, the parties may request lawsuits be "coordinated" or "consolidated" under

California's Code of Civil Procedure. Lawsuits pending in the same judicial district are "consolidated," whereas lawsuits pending in different judicial districts are "coordinated." Here, plaintiffs employed the coordination rules to join their lawsuits filed in several different judicial districts in a single tribunal, before a single judge "for all purposes."

California Code of Civil Procedure §404.1, the provision plaintiffs invoked here provides the criteria for coordination of lawsuits in California state court:

> One judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether common questions of fact or law are predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of the duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

Because a fundamental criterion for coordination is that it is "for all purposes," a coordination petition necessarily proposes the claims be "tried jointly" and once coordinated, the coordination judge automatically has all attendant powers.

The California Rules of Court set forth a coordination judge's powers and responsibilities and charge the coordination judge to actively manage all aspects of the litigation, including trial and resolution of the coordinated proceedings. *See* Cal. R. Ct. 3.501(9) (providing a coordination trial judge is assigned to "hear and determine coordinated actions"); 3.540(b) ("[T]he coordination trial judge may exercise all the powers over each coordinated action that is available to a judge of the court in which that action is pending."); 3.541(a)(4) (providing that coordination judge must take an active role in managing proceedings, with an eye toward "expedit[ing] the disposition of the coordinated actions"); 3.541(b)(3) ("The coordination trial judge must assume an active role in managing all steps of the pretrial, discovery, and trial proceedings to expedite the just determination of the coordinated actions without delay" and may "[o]rder any issue or defense to be tried separately and before trial of the remaining issues.").

Based on the statutory provisions and rules, once a petition proposing coordination of multiple lawsuits is granted, the coordination judge is fully empowered to conduct the coordinated lawsuits through pre-trial, trial, and post-trial proceedings. There is no provision in the California rules that permits the plaintiffs to specify or request coordination of lawsuits for any limited purpose, including only or solely for pre-trial purposes.

C. THE PROCEEDINGS BELOW

1. Plaintiffs' Allegations

Plaintiffs seek to recover compensatory and punitive damages from numerous entities they allege were involved in the manufacture, sale, and/or distribution of brand-name and generic propoxyphene-containing products.[5] (App.92-110, ¶¶20-99.) Plaintiffs assert claims against the Brand Defendants and Generic Defendants for injuries allegedly sustained as a result of their alleged use of such products. (*See generally* App.83-292.) Plaintiffs' complaint includes various causes of action as to all defendants titled as follows: strict liability – design defect; strict products liability – failure to warn; strict liability in tort; negligent design; negligence; negligent failure to warn; fraudulent nondisclosure; negligent misrepresentation; fraudulent misrepresentation and concealment; negligence per se; breach of express warranty; breach of implied warranty; violation of California Civil Code §§1709 and 1710; violation of California Business and Professions Code §17200; violation of California Business and Professions Code §17500; violation of California Consumers Legal Remedies Act §1750 et seq. (*Id.*) In addition, the complaint includes several causes of action against only the Brand Defendants, followed by several causes of actions under various state laws. (*Id.*) At the root of every cause of action, however, is an alleged failure to provide adequate warnings regarding the use of propoxyphene-containing products: "Plaintiffs allege that Defendants … knowingly or negligently

[5] The defendants who manufactured, sold, or distributed generic versions of products containing propoxyphene are referred to as "Generic Defendants." The defendants who manufactured, sold, or distributed the brand-name version of products containing propoxyphene are referred to as "Brand Defendants."

manufactured, distributed, and sold defectively designed Propoxyphene Products without adequate warnings." (App.87-88.)

2. The Petition for Coordination

On October 23, 2012, plaintiffs' counsel filed a petition with the California Judicial Council pursuant to California Code of Civil Procedure §404, *et seq.*, and California Rules of Court 3.500, *et seq.*, to establish a coordinated proceeding before a single trial judge. (App.475-503.) In plaintiffs' words, their petition was based on the criteria in California Code of Civil Procedure §404.1. (App.477.)

Plaintiffs initially sought to coordinate seven lawsuits that were then pending but told the Judicial Council that "scores of additional propoxyphene related injury cases will be filed within the next weeks [and] [p]etitioners will seek to join those additional cases via 'Add-On Petitions.'" (App.478, 488 ("Petitioners' counsel plans to file additional similar cases in California Superior Courts within the next several weeks. Further, counsel is informed that, aside from the additional cases that we will file shortly, scores of similar cases will be filed soon involving consumption of the Darvocet Products….").) On November 20, 2012, plaintiffs' counsel confirmed that the various propoxyphene actions, including this one, would be included in their request for coordination. (App.523-24.)

Plaintiffs' stated reason for coordination of the propoxyphene lawsuits was that "each case shares the same general liability facts and issues against the defendants, the same scientific facts and issues

concerning the Darvocet Products and consequent injuries, and the same or similar treatment protocols for the Darvocet injuries." (App.495.) The petition was not limited to pretrial or discovery purposes. (App.497.) Nor could it be. The statute provides coordination is "for all purposes." As a result, when plaintiffs proposed coordination, they necessarily proposed that their claims be "tried jointly." *See* Cal. Code Civ. Proc. §404.1; *see also* Cal. R. Ct. 3.501, 3.541(a)(4), 3.541(b)(3). And, in line with the provisions of the coordination statute, plaintiffs' counsel represented that the coordination request sought uniform liability determinations. In support of their proposed coordination, plaintiffs told the Judicial Council:

- "Absent coordination of these actions by a single judge, there is a significant likelihood of duplicative discovery, waste of judicial resources and possible inconsistent judicial rulings on legal issues." (App.495.)
- "One judge hearing all of the actions for all purposes in a selected site will promote the ends of justice…." (App.497.)
- "[I]ssues likely to be raised in this action include issues pertaining to liability, allocation of fault and contribution, as well as the same wrongful conduct of defendants." (App.501.)
- "Failure to coordinate these actions creates a risk of inconsistent or

duplicative judgments and orders." (App.512.)

- "Without coordination, two or more separate courts will decide essentially the same issues and may render different rulings on liability and other issues. Coordination of these actions in a single court would avoid this possibility." (*Id.*)

3. Removal of the Actions and the District Court's Decision

On November 21, 2012, Xanodyne removed this case to the United States District Court for the Central District of California under the "mass action" provision of CAFA and on the basis of federal question and supplemental jurisdiction. (App.456-74.) The other lawsuits also were removed on the same basis. Plaintiffs promptly filed motions to remand. In support of their motions, plaintiffs conceded that coordinated pharmaceutical cases typically use an exemplar case process, in which a determination of liability might be binding on all matters. However, plaintiffs claimed for the first time that their request for coordination would be limited to pre-trial proceedings, a statement both contrary to and found nowhere in their coordination petition – and, futile in any event as the statutory criteria of any coordination is "for all purposes."

As did the other district courts, the district court granted the motion to remand. It held the case was not removable under CAFA for reasons stated in its order as well as its earlier order in *Romo, et al. v.*

McKesson Corp., et al., C.D. Cal. Case No. CV 12-2036 PSG (Ex) (App.3-6, 29-57.) Specifically, the district court ruled that this case was not a "mass action" under CAFA, finding that plaintiffs had not "proposed to try their cases jointly." (App.36.) However, the district court's order was not based on a determination that plaintiffs had not "proposed" to try their cases jointly, but rather that plaintiffs had not "decided" to try their cases jointly. (App.39 ("Based on the Petition, it does not appear to the Court that Plaintiffs have made the decision to try the case jointly or that the trial itself would address the claims collectively.") The district court concluded that the phrase "for all purposes" in plaintiffs' request to coordinate was merely echoing the language of coordination under the California statute, and that plaintiffs "should not be penalized because Coordination Counsel provided the court reviewing the Petition with the standard by which the Petition should be analyzed." (App.39.) The district court distinguished *In re Abbott Labs., Inc.*, 698 F.3d 568, 572-73 (7th Cir. 2012), in which the Seventh Circuit had found CAFA's "mass action" requirements met under facts substantially similar to those here, concluding that plaintiffs' coordination petition differed from that in *Abbott* because plaintiffs' petition focused on pretrial matters while the plaintiffs' consolidation request in *Abbott* specifically sought consolidation through trial, even though, in reality, plaintiffs' petition requested coordination "for all purposes."

The district court also found that bellwether or exemplar trials most likely would be used to resolve plaintiffs' claims: "[T]he Court is sympathetic to Plaintiffs' assessment that joint trials in cases such

as this one are rare, while the more common practice—which is also the approach Plaintiffs indicate they may take—is to conduct bellwether trials." (App.40.) Subsequently, in its order in this case, the district court addressed the use of bellwether trials more specifically and, inconsistent with its earlier ruling in *Romo*, stated that there was no support for the argument that plaintiffs' petition would result in bellwether trials. (App.5.) The district court declined to adopt the Seventh Circuit Court of Appeals' conclusion in *Abbott*, 698 F.3d at 572-73, that bellwether trials do try jointly the claims of the joined plaintiffs within the meaning of CAFA. (App.4-5.)

Xanodyne timely sought permission to appeal pursuant to 28 U.S.C. §1453(c), and its petition was granted.

4. The Ninth Circuit's Decision

The Ninth Circuit issued decisions affirming remand in this case and *Romo*, by a two to one vote, on the same day – the sixtieth day after the appeals were accepted. The majority decision in this case states that "Plaintiff's [sic] petition for coordination was not a proposal to try the cases jointly. *See Judith Romo, et al. v. Teva Pharmaceutical USA, Inc.*, No. 13-80036 (9th Cir. Sept. 24, 2013)." (App.2.) Circuit Judge Gould dissented in *Romo* and similarly adopted his dissent and reasoning in this case. (*Id.*)

The majority began its opinion by suggesting that "removal statutes are to be strictly construed" and that it must "construe any uncertainty as to removability in favor of remand." (App.12.) Then,

applying the concept that "plaintiffs are the 'masters of their complaint,'" the majority stated that "plaintiffs can structure actions in cases involving more than one hundred potential claimants so as to avoid federal jurisdiction under CAFA." (App.13.)

The majority concluded that "the plaintiffs' petition for coordination stopped far short of proposing a joint trial," notwithstanding its recognition that under California's coordination procedure, actions are coordinated "for all purposes." (App.13.) Rather than focus on California's provisions governing coordination, the majority focused on the pre-trial discovery aspects of plaintiffs' coordination petition to "discern whether plaintiffs proposed that the claims of 100 or more persons were 'to be tried jointly.'" (App.14.) In doing so, the majority not only ignored the fact that plaintiffs had requested coordination reaching far beyond pre-trial discovery, but also improperly grafted an "intent" element into both CAFA's requirements and California's coordination procedure that simply does not exist. Although CAFA does not require a "joint trial," but only that "the claims of 100 or more persons are proposed to be tried jointly," 28 U.S.C. §1332(d)(11)(B)(i), the majority concluded that plaintiffs' petition did not evidence any intent that there be a "joint trial" of the claims. (App.16.) Similarly, even though CAFA requires only that the claims are "proposed to be tried jointly," the majority concluded that plaintiffs did not "request" a "joint trial." (App.16-17.)

Again inserting an intent element into CAFA's requirements, and again ignoring the nature of coordination proceedings under California's

procedures, the majority declined to follow the Seventh Circuit's decision in *Abbott*, 698 F.3d 568. In the majority's view, *Abbott* "involve[d] a completely different procedure, consolidation as opposed to coordination, [and] the plaintiff's request in that case explicitly and expressly referenced 'consolidation of the cases through trial and not solely for pretrial proceedings,' thereby removing any question of the plaintiffs' intent." (App.16.)

Finally, the majority relied on rulings from three different district court judges that remanded some of the other lawsuits subject to plaintiffs' coordination petition in concluding that California's procedural rules are "not the equivalent of a request for a joint trial." (App.17.) The majority never analyzed, however, whether California's procedural rules are the equivalent of a proposal to "tr[y] jointly" the coordinated cases.

In his dissent, Circuit Judge Gould concluded that "this case fits CAFA removal like a glove" under a reasonable assessment of what is a proposal that claims be tried jointly. (App.23.) He properly identified the issue as "whether plaintiffs' petition to coordinate actions under California Code of Civil Procedure 404 constitutes a proposal for these actions in California state court to be tried jointly, making the actions a "mass action" subject to federal jurisdiction under CAFA." (App.20.) And, he recognized that this case was the same as *Abbott,* concluding that in both instances the question was whether the plaintiffs' request under the state's procedures constituted a proposal that the claims be "tried jointly." (App.21.) Judge Gould stated that the majority's decision "misinterpret[ed] CAFA and [did]

so in a way that creates a circuit split, for practical purposes, with the Seventh Circuit's decision in *Abbott*." (App.21.)

Judge Gould recognized that the substance of what was done is controlling, and that the court must consider "the reality" of the proposal, and "not [] how a party may characterize its own actions." (App.22.) As Judge Gould noted, plaintiffs sought to coordinate the actions, "in part to avoid inconsistent judgments" or "different rulings on liability and other issues," and while the majority focused only on the pretrial aspects of the coordination procedure, the majority did not, and could not, conclude that the petition for coordination was "limited" to pretrial matters. (App.22-23.)

Judge Gould understood that the "natural and probable consequences" of coordinating the actions—indeed an inevitable result—is that the actions would be tried together, or coordinated in a way to avoid inconsistent results. (App.27.) "If the natural and probable consequences of coordination of separate actions has an impact indistinguishable from joint trial, then it is sensible to treat such a petition for coordination as a proposal for a joint trial." (App.27.) Judge Gould concluded that the petition presented a proposal for the claims to be tried jointly within the meaning of CAFA and would have reversed the district court's order remanding the case.

REASONS FOR GRANTING THE PETITION

A. The Court Should Grant This Petition to Provide Guidance to Lower Courts as to the Proper Application of CAFA's Mass Action Provision

Having been thwarted in their attempts to pursue class actions of nationwide importance in state courts by CAFA, plaintiffs' counsel have employed other vehicles to achieve the same result. To avail themselves of friendly state-courts and at the same time reduce their overall cost of pursuing mass tort lawsuits, plaintiffs' counsel increasingly have resorted to filing complaints, like those in this mass action, joining together dozens of plaintiffs, but less than 100, and then seeking coordination or consolidation of the lawsuits under state-court procedures. Yet, while plaintiffs' counsel focused on the form of the lawsuits that they file and subsequently seek to join as one mass action, defense counsel focused on the substance and began removing those mass action lawsuits to federal courts. Of course, plaintiffs seek to remand the cases to state court leaving federal district courts to grapple with the application of the "mass action" provision of CAFA.

The crux of the uncertainty stems from the lack of definition or direction in CAFA of when "the 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…." While the question of whether the "plaintiffs' claims involve common questions of law or fact," is often easily discernible, the question of what

constitutes a "propos[al] for [the claims] to be tried jointly," has posed greater difficulties.

Plaintiffs maintain that there is no "propos[al] [for the claims] to be tried jointly" unless there actually will be a single trial of all claims of all plaintiffs. Yet, there is no indication in the statute or in the legislative history that supports a conclusion that the "mass action" provision is satisfied only where all claims of all plaintiffs would be tried simultaneously before a single trier of fact. And, in fact, that overly narrow view of the phrase "tried jointly" conflicts with the stated intention of CAFA's sponsors who stressed that the "mass action" "provision is intended to mean a situation in which it is proposed or ordered that claims be tried jointly in any respect – *that is, if only certain issues are to be tried jointly* and the case otherwise meets the criteria set forth in this provision …." Class Action Fairness Act of 2005, Proceedings and Debates of the 109th Congress, First Session, February 17, 2005, 151 Cong. Rec. H723-01, 2005 WL 387992, at H729 (emphasis added).

Similarly, plaintiffs contend that their intentions when they request the claims of more than 100 plaintiffs be coordinated under state court procedures are relevant to the analysis and override the state's provisions. Yet, again, there is no indication in the statute or CAFA's legislative history that plaintiffs' intention (including those spun post-removal in arguing for remand) plays any role in the determination. As the state's provisions provide that coordination is "for all purposes," the mere act of requesting coordination constitutes a "propos[al] [for the claims] to be tried jointly."

The Ninth Circuit majority, however, chose to focus on plaintiffs' stated "intent" – one that did not appear in their coordination petition papers, but appeared for the first time when they sought to remand the action – that coordination was sought for "pretrial purposes only." Then to support its decision, the majority cherry-picked those phrases in plaintiffs' petition papers that referenced pre-trial matters (e.g., "[u]se of committees and standardized discovery, avoid "duplicate discovery"), and all the while, as Judge Gould pointed out, ignored those phrases that clearly would require that the claims be tried jointly (e.g., "danger of inconsistent judgments and conflicting determinations of liability"). Yet, at the same time, the majority maintained that isolating phrases such as "for all purposes," "inconsistent judgments," and "conflicting determinations of liability" to "support a conclusion that the plaintiffs sought a joint trial completely ignores all references to discovery…." (App.15.) So, while the majority was willing to *ignore* those phrases that evidence a "propos[al] [for the claims] to be tried jointly," it found it inappropriate to ignore those phrases addressing discovery – a dichotomy it did not even attempt to explain. Clearly though, the majority's balancing of phrases in and of itself demonstrates that plaintiffs' proposal was not "only" or "solely" for pre-trial purposes.

Neither plaintiffs nor the Ninth Circuit majority offered any explanation why plaintiffs purported "intent" is relevant or how it alters California's coordination statute and rules. The reason is simple – it does not. Of relevance to the determination of the appropriateness of the removal

under CAFA are the definition of "mass action" and California's coordination statute. In short, what is relevant is the substance of what occurred: Plaintiffs proposed the actions be coordinated (satisfying CAFA's requirement that it not be defendants who sought joinder of the actions); California's coordination procedures provide that lawsuits will be coordinated for all purposes (satisfying CAFA's requirement that the claims are proposed to be tried jointly); and the number of plaintiffs in the coordinated lawsuits exceeds 100 (satisfying CAFA's "100 or more persons" requirement).

That Congress recognized state court coordination and consolidation procedures can, and will, result in the creation of "mass actions" within the meaning of CAFA is indisputable and evidenced in 28 U.S.C. §1332(d)(11)(B)(ii)(IV), which excludes from the definition of "mass action" claims that are "consolidated or coordinated solely for pretrial purposes." That exception must be considered to determine whether an action has been properly removed under the "mass action" provision of CAFA. Here, that determination is made by reference to California's coordination statute and rules that provide coordination, by definition, "for all purposes" and not solely for pre-trial proceedings.

It is undeniable that when plaintiffs seek to coordinate or consolidate the claims of 100 or more persons for more than pre-trial purposes, it is a proposal to try jointly the claims of those plaintiffs and is removable under CAFA where the other requirements are satisfied. The majority below erred in holding otherwise.

B. The Court Should Grant This Petition to Resolve the Existing Split Among the Circuits As to CAFA's Mass Action Provision

The fact that the lower courts need guidance from this Court as to the proper application of CAFA's "mass action" provision is evidenced by the conflict that exists among the circuit courts. Currently, the Ninth Circuit's decision directly conflicts with decisions from both the Seventh and Eighth Circuit Courts of Appeals. *See In Re: Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012); *Atwell v. Boston Scientific Corp.*, --- F.3d. ---, 2013 WL 6050762 (8th Cir. 2013).

In *Abbott*, the Seventh Circuit held that separate cases may constitute a mass action where, as here, plaintiffs propose that the claims in the constituent cases be tried jointly. *Abbott*, 698 F.3d at 573. The Ninth Circuit majority distinguished *Abbott* notwithstanding its virtually identical facts, albeit involving a different state's procedure.

In *Abbott*, numerous multi-plaintiff cases were filed in different state courts in Illinois. The plaintiffs in those lawsuits alleged injuries from the same drug. As here, the plaintiffs then sought to bring those lawsuits to one court under one judge pursuant to a procedure termed "consolidation" in Illinois,[6] citing common questions of fact in the cases.

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[6] Illinois Supreme Court Rule 384, upon which the *Abbott* motion to consolidate was based, is similar to the California coordination statute. It provides: "When civil actions involving one or more common questions of fact or law are pending in different judicial circuits, and the supreme court

Id. at 571. The defendant removed the cases under CAFA's mass action provisions. *Id.* Relying on *Bullard v. Burlington N. Santa Fe Ry. Co.,* 535 F.3d 759, 762 (7th Cir. 2008), and *Koral v. Boeing Co.*, 628 F.3d 945, 947 (7th Cir. 2011), the Seventh Circuit concluded CAFA's mass action requirements were satisfied based on the plaintiffs' request for consolidation in state court "through trial" because that consolidation "'would also facilitate the efficient disposition of a number of universal and fundamental substantive questions applicable to all or most Plaintiffs' cases without the risk of inconsistent adjudication in those issues between various courts.'" *Abbott*, 698 F.3d at 573 (emphasis in original).

Like the *Abbott* plaintiffs' efforts to avoid inconsistent adjudication, plaintiffs here moved for coordination under the California statute to avoid "duplicate and inconsistent rulings, orders, or judgments." (App.500.) Similarly, plaintiffs here requested coordination "for all purposes" (App.477), which, under California procedure, includes coordination for trial. There is no difference between a request for consolidation "through trial" and a request for coordination "for all purposes," for each entails a proposal for the joint determination of the actions. The Ninth Circuit majority's attempted distinction of *Abbott* based on the formal use of the word "trial" there cannot support remand.

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determines that consolidation would serve the convenience of the parties and witnesses and would promote the just and efficient conduct of such actions, the supreme court may, on its own motion or on the motion of any party filed with the supreme court, transfer all such actions to one judicial circuit for consolidated pretrial, trial, or post-trial proceedings." (App.81.)

Moreover, the stated basis for consolidation in *Abbott* was to "facilitate the efficient disposition of a number of universal and fundamental substantive questions applicable to all or most plaintiffs' cases without the risk of inconsistent adjudication on those issues between various courts," which the Seventh Circuit held necessarily proposes joint trial. *Abbott*, 698 F.3d at 573. Plaintiffs' express request for coordination to avoid "inconsistent adjudication" here is indistinguishable from the request in *Abbott*.

Abbott followed the reasoning of *Bullard* and *Koral*, and recognized that the proposal that claims be tried jointly need not seek one massive trial in which all plaintiffs simultaneously appear and provide testimony. "The question is not whether 100 or more plaintiffs answer a roll call in court, but whether the 'claims' advanced by 100 or more persons are proposed to be tried jointly." *Bullard*, 535 F.3d at 762 (quoting 28 U.S.C. §1332(d)(11)(B)(i)), cited with approval in *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009). In other words, the Seventh Circuit recognized that if plaintiffs propose a procedure and "liability," "allocation of fault," or "wrongful conduct" issues apply to all plaintiffs' claims and are resolved jointly, their request constitutes a CAFA proposal that the claims be "tried jointly" as those are not simply "pretrial" or "discovery" issues. As the *Abbott* Court held, "[i]t is difficult to see how a court could consolidate the cases as requested by plaintiffs and not hold a joint trial or an exemplar trial with the legal issues applied to the remaining cases. In either situation, plaintiffs' claims would be tried jointly." *Abbott,* 698 F.3d at 573.

The Ninth Circuit majority found *Abbott* to be distinguishable because there the plaintiffs had specifically used the words "through trial," while here, plaintiffs had not used those precise words, but instead sought consolidation "for all purposes." Those requests, however, are not materially different. Furthermore, it is difficult to discern how a rule that provides that actions may be consolidated in one judicial circuit for consolidated pretrial, trial, and post-trial proceedings is different from a rule that provides actions may be coordinated "for all purposes." Where lawsuits are concerned, "pretrial, trial, and post-trial proceedings" are "all purposes."

The Eighth Circuit Court of Appeals in *Atwell* similarly found CAFA's "mass action" requirements satisfied under facts substantially similar to those here. *Atwell* involved three groups of plaintiffs who sued four medical device manufacturers in Missouri state courts. *Atwell*, --- F.3d ---, 2013 WL 6050762 at *1. Subsequently, the plaintiffs moved to have the cases assigned "to a single Judge for purposes of discovery and trial" under the court's rule that permitted reassignment of three or more actions involving claims of personal injury by multiple plaintiffs against the same defendants if the presiding judge determines the administration of justice would be served by the reassignment.

At the hearing on their motion, the plaintiffs' counsel made clear that consolidation was being sought for both trial and pretrial purposes. *Id.* at *4. Following the hearing, the defendant removed the cases to federal courts, which subsequently remanded the cases finding the plaintiffs had not proposed the claims be "tried jointly." The Eighth Circuit reversed finding the district courts erred in

failing to follow or properly apply the Seventh Circuit's decision in *Abbott*.

The Eighth Circuit expressly agreed with the Seventh Circuit's decision in *Abbott* and with Judge Gould's dissenting opinion interpreting CAFA and the *Abbott* decision. *Id.* at *5. The Eighth Circuit found the plaintiffs urged the state court to assign the claims of more than 100 plaintiffs to a single judge who could handle these cases for consistency of rulings, judicial economy, and administration of justice, notwithstanding that the plaintiffs tried to disavow a desire to consolidate the cases for trial. *Id.* at *5. The court explained that "it is difficult to see how a court could consolidate the cases as requested by plaintiffs and not hold a joint trial or an exemplar trial with the legal issues applied to the remaining cases." *Id.* at *5 (*quoting Abbott Labs.*, 698 F.3d at 573). As a result, the court vacated the orders remanding the cases to state court.

The facts here are not distinguishable from those in *Abbott* or *Atwell*. As was true in *Abbott* and *Atwell*, plaintiffs assert their claims involve common questions of law and fact. As was true in *Abbott* and *Atwell*, plaintiffs sought to join the claims of all plaintiffs to avoid inconsistent judgments and rulings. As was true in *Abbott* and *Atwell*, plaintiffs sought to join the actions using state-court procedures. As was true in *Abbott* and *Atwell*, plaintiffs sought to have their claims "tried jointly."

The Ninth Circuit majority's attempt to distinguish this case from *Abbott* based on the consolidation of the cases (in *Abbott*) versus the coordination of cases (here) simply is a distinction without a difference. The nomenclature applied by

states to their procedures does not render the procedures different in any way but name.

Similarly, the distinction the Ninth Circuit majority attempts to draw between *Abbott* and this case based on the express request by the *Abbott* plaintiffs that their cases be consolidated "through trial" is illusory. Plaintiffs here invoked California's coordination procedure (and recited those provisions in their petition for coordination), which provides that the actions will be coordinated before one judge "for all purposes" where the factors for coordination are satisfied. There is no option to coordinate cases "solely for pretrial purposes." Once coordinated, the coordination judge has the power to conduct the pre-trial, trial, and post-trial proceedings. Plaintiffs' petition to coordinate these actions under California's coordination procedures can be construed only as a "propos[al] [for the claims] to be tried jointly." The Ninth Circuit majority erred to hold otherwise.

CONCLUSION

The Court should grant this petition for a writ of certiorari to correct the Ninth Circuit's error and resolve the circuit split, but may hold it in abeyance pending the Ninth Circuit's decision *en banc*.

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