No. 13-1016

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondents argue the question posed by Xanodyne Pharmaceuticals, Inc.'s petition does not warrant this Court's consideration for four "separate and independent reasons."

Respondents' first reason for denying the petition is that it is premature because the Ninth Circuit Court of Appeals granted Xanodyne's petition for rehearing *en banc* and that, under this Court's Rule 13.3, the clock for filing a petition for writ of certiorari will begin anew once the *en banc* Court issues its decision. (Brief in Opposition ("Br. Opp."), p. 5.) Xanodyne acknowledges that under Rule 13.3, where an appellate court grants rehearing or rehearing *en banc*, the time for filing a petition in this Court runs from the date the decision on rehearing is issued. As noted in Xanodyne's petition, however, the timing of Xanodyne's petition rests on an interpretation of the limitation Congress included in 28 U.S.C. §1453(c)(2). Although Xanodyne believes *en banc* review is not precluded by the limitation in §1453(c)(2), Respondents "have not taken a position" on that issue. (Br. Opp., p.7 n.6.) However, if the *en banc* court reverses the panel and Respondents seek this Court's review, they likely will "take a position" that the Ninth Circuit was precluded from rehearing the panel decision *en banc*. If this Court agrees, without its current petition, Xanodyne could be foreclosed from seeking review of the panel's decision. As the question has not been posed to or explicitly decided by this Court or any

federal appellate court,[1] Xanodyne filed its petition to preclude any later untimeliness argument. This Court, of course, has the discretion to hold Xanodyne's petition in abeyance pending the Ninth Circuit's *en banc* decision.

Respondents' other reasons for denying Xanodyne's petition miss the mark. Respondents argue that the question presented "is predominantly an issue of state law" and that this Court "rarely grants certiorari to decide questions of state law." (*Id.*, pp. 9, 11.) Quite the contrary, Xanodyne's petition poses a question of federal law; i.e., the interpretation and application of the "mass action" removal provision of the Class Action Fairness Act ("CAFA")—a federal statute—which Congress enacted to curb abuses occurring through the filing of lawsuits in state courts under state-court procedures. It is axiomatic that an interpretation and application of CAFA's provisions involves state-court procedural rules and laws. Moreover, questions presented to and accepted for review by this Court routinely require analysis of state laws. That the Court must consider state procedural rules or laws in deciding the question does not turn it into one "predominantly of state law."

Under Respondents' theory, this Court should not review decisions involving federal statutes that implicate state procedural rules or laws, including

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[1] *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), could be read to have implicitly recognized that *en banc* review is not precluded by the timing requirements of §1453(c)(2).

deciding whether state mass actions that are "proposed to be tried jointly" through a state's court procedures satisfy CAFA's mass action removal provision. Instead, Respondents argue the issue should be left to federal district and circuit courts, even where, as here, a conflict exists among the federal circuit courts. Yet, one of this Court's main functions in reviewing lower court decisions is to ensure consistency in the interpretation and application of federal law nationwide.

That leads to Respondents' next reason Xanodyne's petition should be denied—the purported lack of a conflict among federal circuit courts. Respondents argue no conflict exists between the decision below and those in *In re: Abbott Laboratories, Inc.*, 698 F.3d 568 (7th Cir. 2012), and *Atwell v. Boston Scientific Corp.*, 740 F.3d 1160 (8th Cir. 2013). The distinctions Respondents try to draw are illusory. The facts in *Abbott* and *Atwell*, as well as the respective state-court procedural mechanisms for combining the mass actions before a single judge for all purposes, are substantively identical to those here.

Finally Respondents argue this Court should suspend further review of CAFA cases to afford lower courts an opportunity to apply the teachings of this Court's decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*, --- U.S. ---, 134 S. Ct. 736 (2014). Yet, *Hood* does not address the issue which is the source of the circuit split created by the panel decision below. The issue in *Hood* was whether a lawsuit by one named plaintiff, who sought

restitution for injuries suffered by the State's citizens, was an action involving 100 or more persons. That is not an issue here—the lawsuits here involve the claims of over 1,500 specifically-named persons.

The Court should hold Xanodyne's petition in abeyance pending the Ninth Circuit's *en banc* ruling or grant the petition and reverse the panel majority's decision.

ARGUMENT

A. Xanodyne Filed Its Petition to Avoid Any Issue of Untimeliness

The timing of Xanodyne's petition turns on the interpretation of 28 U.S.C. §1453(c)(2) which mandates that a federal court of appeals must "complete all action on [an] appeal [accepted under §1453(c)(1)], including rendering judgment, not later than 60 days after the date on which [the] appeal was filed, unless an extension was granted under paragraph (3)." This Court accepted an appeal and ruled on the merits in *Hertz,* which arrived at this Court after the Ninth Circuit's *en banc* decision of the case, a decision rendered more than 60 days after the Ninth Circuit accepted that appeal. Nevertheless, this Court addressed only whether the 60-day requirement in §1453(c)(2) barred it from entertaining a petition for writ of certiorari outside the 60-day time limitation—not whether a petition for writ of certiorari filed within 90 days of the *en*

banc court's decision was timely under 28 U.S.C. §2101.

The potential that Respondents would argue, at some point, either that the Ninth Circuit was foreclosed from rehearing the panel majority's decision *en banc* or that a petition filed within 90 days of the *en banc* court's decision was untimely due to the limitation in §1453(c)(2) is why Xanodyne filed its petition before the Ninth Circuit completed its *en banc* review. Xanodyne is cognizant that 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. And, Xanodyne submits that just as this Court determined in *Hertz* that the 60-day time limit in CAFA does not impact this Court's jurisdiction, it does not impact an appellate court's *en banc* review. But, to avoid any issue of untimeliness, Xanodyne timely filed its petition to the panel majority's decision.

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 it may hold Xanodyne's petition in abeyance until the Ninth Circuit concludes its *en banc* review.

B. The Question Presented Is Squarely One of Federal Law

While acknowledging that the question presented by Xanodyne's petition requires the interpretation and application of CAFA's mass action

provision, Respondents argue that because that question also involves consideration of the coordination provisions of California's Code of Civil Procedure and California Rules of Court, it becomes a question of state law that this Court should not review. (Br. Opp., pp. 9-11.) That contention is meritless.

Congress enacted CAFA specifically to curb abuses of state-court procedural rules and statutes that prevented defendants from accessing federal forums. *See* S. Rep. 109-14. Given CAFA is a *removal* statute, it is axiomatic that actions subject to its provisions will begin in state court and that the state's laws and court rules will be the mechanisms plaintiffs use to file in state court. Indeed, the fact that Congress excepted appellate review of CAFA remand orders from the general prohibition against appellate review of remand orders demonstrates its contemplation that federal courts, including this Court, ultimately would address the propriety of CAFA removals. *Compare* 28 U.S.C. §1453(c) with 28 U.S.C. §1447(d).

Furthermore, the interplay between California's rules and law and federal law here is not unique. This Court routinely entertains issues that require analysis of state laws. For instance, every preemption analysis involves an interplay between state and federal laws—what does state law require, what does federal law require, do they conflict (implied preemption) or does the state law impose a requirement different from or additional to that imposed by federal law (express preemption). The

same is true of numerous other issues; e.g., whether a state's laws or procedures deny equal protection or due process rights; whether a state's laws impinge on Congress's authority to regulate interstate commerce; or whether a state's laws run afoul of the comity clause, to name a few.

Diversity jurisdiction exists pursuant to Article III, §2 of the United States Constitution. As with other constitutional rights and privileges, questions involving diversity jurisdiction sometimes involve questions of state law. For example, whether removal is appropriate where a plaintiff improperly names (fraudulently joins) a resident or non-diverse defendant turns on an analysis of state law; i.e., whether the plaintiff has stated a cause of action against the resident or non-diverse defendant.

The situation here is no different. Through CAFA, Congress broadened the reach of diversity jurisdiction. *See* 28 U.S.C. §1332(d)(11)(B)(i); 28 U.S.C. §1453(b). Given a case is removable to federal court only if it is first filed in state court, it is beyond dispute that the state's laws and court rules will become an issue when actions are removed under CAFA. Here, Respondents invoked California's coordination provisions to join their lawsuits in a single tribunal, before a single judge "for all purposes." Under California's procedure, coordination is "for all purposes." *See* Cal. Code of Civ. Proc. §404.1. As such, a petition to coordinate necessarily proposes the claims be "tried jointly" and the coordination judge then is empowered automatically to actively manage all aspects of the

litigation. *See* Cal. Rules of Court 3.540, 3.541. That the question Xanodyne posed for this Court's review requires analysis and interpretation of California court rules does not turn the question into one "predominantly of state law" or warrant denial of its petition.

Respondents' reliance on California Code of Civil Procedure §1048(a) is misleading—it is not applicable in coordination proceedings. Section 1048(a) applies to actions that are pending in the *same* superior court and thus may be "consolidated"; it does not address actions filed in *different* superior courts that have been "coordinated." California Rules of Court 3.300 sets out the process for coordinating and consolidating cases in California superior courts that involve common questions of law or fact. Cases designated as complex pending in *different* superior courts "must [] follow[]" the "procedures in Code of Civil Procedure section 404 *et seq*. and rules 3.501 *et seq*." (which is what occurred here). Cal. Rules of Court 3.300(h)(2)(B). The rule differentiates those cases pending in the *same* superior court and provides that "[i]f the procedures for relating pending cases under this rule [regarding related cases pending in the same superior court] do not apply, the procedures under Code of Civil Procedure section 1048 and rule 3.350 must be followed to consolidate cases pending in the same superior court." *Id.*, 3.300(h)(1)(E). Section 1048 simply does not apply to actions coordinated under California's coordination procedure.

In the end, that interpretation of a state court rule or law is required to determine a question of federal law that this Court is asked to review is no impediment to the grant of a petition seeking review.

C. The Ninth Circuit Panel Majority's Decision Directly Conflicts with Decisions from the Seventh and Eighth Circuit Courts of Appeals

Respondents attempt to distinguish *Abbott* by quibbling with Illinois' particular nomenclature. Respondents argue that the cases in *Abbott* were "consolidated" whereas here Respondents employed California's "coordination" procedure and "never requested consolidation" or made any statement "about the manner in which any eventual trials might be conducted." (Br. Opp., pp.13-14.)

Two points on Respondents' attempted distinction of *Abbott*. First, the fact the Illinois rules use the term "consolidate" to join multiple actions pending in "different judicial circuits" in one circuit rather than "coordinate" (as used in California) is a distinction of terminology only. The result is the same—actions pending in different state courts are joined together in one court before one judge.

Second, California's coordination procedures—by their straight-forward terms—automatically join all actions in one court before one judge "for all

purposes."[2] *See* Cal. Code of Civ. Proc. §404.1. By virtue of its operation, California's coordination procedures encompass pretrial, trial, and post-trial proceedings. And, as Judge Gould recognized in his dissent below, the substance of what was done is controlling; the court must consider "the reality" of the proposal, and "not [] how a party may characterize its own actions." (App.22.) Respondents sought to coordinate the actions "for all purposes" and, "in part to avoid inconsistent judgments" or "different rulings on liability and other issues." While the petition also included pretrial aspects, Respondents cannot, after-the-fact, maintain that the petition for coordination was "limited" to pretrial matters, nor could it be, because "[t]he coordination ***trial*** judge ***must*** assume an active role in managing all steps of the pretrial, discovery, ***and trial proceedings***…." California Rules of Court 3.541(b) (emphasis added).

Respondents' attempt to distinguish *Atwell* is equally unavailing. They base their distinction on oral representations the plaintiffs' counsel in *Atwell* made during a hearing on their motion to have the actions assigned to a single trial judge, which made "clear the extent of the consolidation being sought." (Br. Opp., p.13.) Respondents argue that like the motion to assign the cases to a single judge in *Atwell*, their petition for coordination did not "disclose any

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[2] Indeed, that further illustrates the inapplicability of California Code of Civil Procedure §1048(a) in "coordination" proceedings. There is no need for such a provision in coordination proceedings, as the coordination judge has "all purpose" powers from the outset.

basis for federal jurisdiction," and that unlike *Atwell*, their counsel did not make any "oral representations that might have arguably revealed an intent to obtain a joint trial that was not apparent in the petition itself." (*Id.*, p.14.) But, Respondents ignore a simple fact: Their proposal for coordination itself was sufficient to trigger CAFA removal. That is so because California's procedures coordinate actions in one court before one judge "for all purposes." There is no option to coordinate cases "solely for pretrial purposes." Once coordinated, the coordination judge is empowered to conduct the pre-trial, trial, and post-trial proceedings. *See* Cal. Rule of Court 3.541(b). Respondents' petition sought coordination "for all purposes" and "to avoid inconsistent judgments" or "different rulings on liability." Respondents' 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.

D. *Hood* Does Not Address the Question Presented by Xanodyne's Petition

Finally, Respondents contend Xanodyne's petition should be denied to permit the Ninth Circuit and other lower courts to "absorb" and "apply the teachings" of this Court's decision in *Hood* before this Court again addresses CAFA's mass action provision. (Br. Opp., pp.15, 17.) Yet, *Hood* resolved a different question: Whether both named and un-named plaintiffs are counted to satisfy CAFA's "100 persons" requirement. It did not address whether a request to

join actions involving more than 100 named-plaintiffs under state court procedures in a single court before a single judge for all purposes constitutes a "mass action" removable under CAFA.

Respondents also argue that *Hood* "should resolve any doubts about the correctness of the Ninth Circuit panel's decision in this case." (Br. Opp., p.15.) Respondents rest their argument on the Court's conclusion that district courts should not be required to "pierce the pleadings" to determine if CAFA's "100 or more persons" requirement is satisfied. According to Respondents, Xanodyne "essentially asks this Court to 'pierce the pleadings' and divine an intent on the part of Respondents, and other California propoxyphene plaintiffs, to jointly try their separately filed personal injury suits, even though plaintiffs' petition for coordination 'stopped far short of proposing a joint trial.'" (Br. Opp., p.16.) That simply is not so.

Assuming it even extends to the issue presented by Xanodyne's petition, the Court's conclusion in *Hood* that district courts should not be required to "pierce the pleadings" supports Xanodyne, not Respondents. CAFA's mass action provision does not include the word "intent," much less require a court to divine whether plaintiffs intend the "monetary relief claims of 100 or more persons…be tried jointly" when they seek to coordinate actions under state procedures. CAFA merely requires the claims be "proposed to be tried jointly," not that they are intended to or actually are eventually tried jointly. In truth, it is Respondents,

not Xanodyne, that ask the Court to pierce the pleadings and consider their "intent" in seeking coordination, voiced for the first time when they sought to remand the action.

This Court's decision in *Hood* does not address the question raised in Xanodyne's petition and should not impact this Court's decision to grant Xanodyne's petition.

CONCLUSION

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

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