No. 12-1036

In the
Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

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

BRIEF OF AMICI CURIAE ACCESS TO COURTS INITIATIVE, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The Access to Courts Initiative (ACI) is an advocacy organization dedicated to promoting the common interests of its members in fair and expeditious access to the federal courts for resolving interstate disputes, as envisioned by those who framed and ratified Article III, section 2 of the Constitution.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Its mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

Amici believe that an unduly constrained view of federal jurisdiction has helped fuel the litigation explosion of the last fifty years, contributing to the imposition of billions of dollars of costs on American consumers, the loss of hundreds of thousands of American jobs, reduced foreign investment, increased medical costs, and fewer potentially lifesav-

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[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than amici, their members, or their counsel, make a monetary contribution to the preparation or submission of this brief. *See* SUP. CT. R. 37.6; *id.* 37.3(a).

ing medical products being made available to the public. Several of Amici's officers and members were involved in the coalition that promoted enactment of the Class Action Fairness Act ("CAFA"), the jurisdictional statute at issue in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article III was designed to establish a federal judiciary "competent to the determination of matters of national jurisdiction." THE FEDERALIST No. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Framers, apprehensive of actual or perceived state court bias in favor of local interests, considered a neutral federal tribunal necessary in some cases to the peace and harmony of the union, and they took care to extend federal jurisdiction to "cases in which the State tribunals cannot be supposed to be impartial." THE FEDERALIST No. 80, at 478 (Hamilton). In particular, Article III, Section 2 mandates that "[t]he judicial Power shall extend to," among other things, "Controversies between two or more States;—*between a State and Citizens of another State*;—*between Citizens of different States*;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

Thus, although the Framers generally left undisturbed the jurisdiction of state courts over cases arising under state law, they established concurrent jurisdiction in federal courts over cases in which the

impartiality of state courts would be most directly tested: those cases in which the interests of the State itself, or its citizens, were adverse to the interests of other States, foreign countries, or their citizens. Of particular concern to the Framers in establishing federal jurisdiction over such disputes was the crippling effect that judicial bias favoring in-state interests, whether real or perceived, would have on interstate commerce. By ensuring that a neutral federal forum was available in such cases, the Framers were animated by much the same spirit that resulted in the various substantive constitutional protections against state interference with interstate and foreign commerce. *See* U.S. CONST. art. I, § 8, cl. 3; *id.* § 10; art. IV, § 2, cl. 1.

Whether this case is viewed as a *parens patriae* action on behalf of the State alone or as an action on behalf of a host of Mississippi citizens as the real parties in interest, it is indisputably either a controversy "between a State and Citizens of another State" or a controversy "between Citizens of different States." It is therefore squarely within the clear text of Article III providing that the judicial power of the United States "shall extend" to just such controversies. These constitutional provisions were not intended "to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816).

Petitioners contend, however, that CAFA, the removal statute at issue here, should be interpreted

with a presumption against federal jurisdiction. Because the State is at least a nominal plaintiff, Petitioner argues, construing CAFA to interfere "with the State's authority to pursue actions in its own courts under its own laws … would risk trampling on the sovereign dignity of the State." Pet. Br. at 12. Amici States, likewise, assert that CAFA should be narrowly construed because removal of a case brought by a State under its own laws in its own courts "is an affront to established principles of federal-state comity." Br. of Ill., *et al.* at 5-6.

But, as we demonstrate in detail below, it is precisely this type of case—one brought by a State or its citizens *against citizens of other States*—that the Constitution expressly brings within the jurisdiction of the federal courts, the "tribunal[s] which, having no local attachments, will be likely to be impartial between the different States and their citizens." THE FEDERALIST No. 80, at 478 (Hamilton). We are aware, of course, that neither Congress nor this Court has interpreted Article III to *require* that federal jurisdiction extend to every case or controversy falling within the language of Article III, and our purpose here is not to ask this Court to revisit this longstanding interpretation. But in light of the plain language of Article III specifically extending federal jurisdiction to controversies such as this one and the important purposes such jurisdiction was intended to serve, we submit that CAFA should, at a minimum, be interpreted without any presumption against removal. Indeed, it should be interpreted generously, with a presumption *favoring* removal, to effectuate the constitutional design.

ARGUMENT

I. This Case Falls Squarely within the Central Purpose of Article III's Diversity Provisions—To Provide a Neutral Federal Tribunal for Resolving Interstate Disputes.

Article III provides that the federal "judicial Power shall extend … to Controversies … between a State and Citizens of another State [and] between Citizens of different States." U.S. CONST. art. III, § 2, cl. 1. The history of the framing and ratification of these diversity clauses makes clear that they were designed to ensure that a case brought by a State or its citizens against a citizen of a different State could be litigated in a presumably neutral federal court rather than in a possibly biased state court. It is undisputed that this case is brought by either the State of Mississippi or its citizens against citizens of other States. It thus falls squarely within the language of Article III and the purposes for which the diversity clauses were adopted.

1. Under the Articles of Confederation, commerce between the States had been shackled by local prejudice and corresponding distrust. *See, e.g.*, *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979); THE FEDERALIST No. 7 (Hamilton). The Framers well understood that if the fledging nation was to succeed, it would have to overcome these tendencies. The new national government was thus given ultimate legislative power over the regulation of interstate commerce, the citizens of each State

were guaranteed all of the privileges and immunities of citizens in all of the States, and the States were expressly barred from enacting such then-common discriminatory measures as tender laws and laws impairing the obligation of debts and other contracts. *See* U.S. CONST. art. I, §§ 8, 10; art. IV, § 2. The new federal judiciary was correspondingly designed to provide a neutral tribunal, not beholden to local interests, in which interstate controversies could be adjudicated. By enabling individuals, investors, and commercial enterprises to cross state lines with confidence that their legal disputes would be fairly adjudicated, diversity jurisdiction went hand-in-hand with other constitutional provisions designed to foster development of a truly national economy and identity.

The call for federal diversity jurisdiction first appeared in the Constitutional Convention on May 28, 1787, in the Virginia Plan, designed by James Madison and proposed by Edmund Randolph. *See* Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 475, 477 (2010). The Virginia Plan lacked a grant of general subject matter jurisdiction over disputes arising under federal law, favoring instead specific grants of jurisdiction over the collection of national revenue, the impeachment of national officers, certain maritime criminal and property matters, and disputes involving "foreigners or citizens of other States." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (M. Farrand ed., 1911) ("FARRAND'S RECORDS"). The Virginia Plan also proposed to vest federal courts with juris-

diction generally over all "questions which may involve the national peace and harmony." *Id.*

On June 13, 1787, Randolph moved to boil down the resolution to its essence, leaving to a subcommittee "the business of … detail[ing] it" in specific terms. *Id.* at 238. Apart from revenue collection and impeachment, all of the Virginia Plan's other specific jurisdictional grants were subsumed, Randolph explained, in the "national harmony" provision at its conclusion. It is thus clear that the disputes involving foreigners or citizens of other States referenced by the initial proposal were considered a species of those "questions which involve the national peace or harmony," and that the judiciary's function of protecting "the harmony of states and that of the citizens thereof" would be preserved by that provision. *Id.*

Not until July 18 did the Convention adopt a proposal extending federal jurisdiction to "cases arising under laws passed by the general Legislature." 2 FARRAND'S RECORDS 39. This provision, combined with the provision concerning cases "involv[ing] the national Peace and Harmony," was then taken up by the Committee of Detail. *Id.* at 132-33. In keeping with Randolph's expectation, the Committee provided the "detail[s]" of federal jurisdiction, eliminating the general language regarding cases of "national peace and harmony" and replacing it with specific jurisdictional grants over particular types of cases, including "Controversies between … a State and a Citizen or Citizens of another State, [and] between Citizens of different States." *Id.* at 173. These proposed jurisdictional grants over interstate disputes,

with only slight stylistic modification, ultimately became the diversity clauses at issue here.

2. When the Convention adjourned and sent the new Constitution to the States for ratification, the Antifederalists argued that the proposed federal judiciary would "utterly annihilate … state courts." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot ed., 1901) ("ELLIOT'S DEBATES") (George Mason); *see also id.* at 527. The diversity clauses would result, they argued, in ordinary citizens being forced to endure the expense and inconvenience of litigating their disputes in distant federal courts, especially if appeals had to be taken to the faraway Supreme Court. *See, e.g.*, *id.* at 526 (Mason); 4 ELLIOT'S DEBATES 138-39 (Samuel Spencer).[2]

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[2] The Antifederalists also contended that Article III's provision for federal jurisdiction over controversies "between a State and Citizens of another State" would subject States to suit without their consent, abrogating traditional principles of sovereign immunity. *See, e.g.*, 3 ELLIOT'S DEBATES 526-27 (Mason); FEDERAL FARMER NO. 3, Oct. 10, 1787, *reprinted in* 2 THE ANTIFEDERALIST 234, 245 (Herbert Storing ed., 1981); BRUTUS NO. 13, Feb. 21, 1788, *reprinted in* 2 THE ANTIFEDERALIST 428, 429-31. Leading advocates of the Constitution responded that this provision would not abrogate the States' sovereign immunity but would authorize only suits brought by States *against* citizens of other States and suits by such citizens against States *that had consented to suit*. *See, e.g.*, 3 ELLIOT'S DEBATES 533 (James Madison); *id.* at 555-56 (John Marshall); THE FEDERALIST NO. 81, at 487-88 (Hamilton); *Alden v. Maine*, 527 U.S. 706, 715-19 (1999).

The leading advocates of federal jurisdiction over interstate disputes included some of the leading Framers. James Madison defended diversity jurisdiction by succinctly stating its obvious rationale:

> It may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective, administration of justice has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.

3 ELLIOT'S DEBATES 533. Madison maintained that the specific constitutional provision for suits brought by States against citizens of other States would likewise "give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts." *Id.*

John Marshall placed these points in larger context, echoing Randolph's argument at the Constitutional Convention that a neutral federal forum for resolving interstate disputes was needed to preserve the peace and harmony of the union:

> To preserve the peace of the Union only, its jurisdiction in this case ought to be recurred to. Let us consider that, when citizens of one state carry on trade in another state, much must be due to the one from the other, as is the case be-

> tween North Carolina and Virginia. Would not the refusal of justice to our citizens, from the Courts of North Carolina, produce disputes between the states?

Id. at 557.

James Wilson likewise defended the Constitution's grant of jurisdiction over interstate and international disputes: "[I]s it not necessary, if we mean to restore either public or private credit," asked Wilson, "that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort?" 2 ELLIOT'S DEBATES 491. Indeed, Wilson saw diversity jurisdiction as essential to the "important object [of] extend[ing] our manufactures and our commerce." *Id.* at 492. Wilson also provided a robust defense of the specific constitutional provision authorizing suits *"[b]etween a state and citizens of another state*," *id.* at 491:

> When this power is attended to, it will be found a necessary one. Impartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing.

Id.[3]

[3] Less prominent supporters of the Constitution like-

The most influential defense of the new federal judiciary, however, was provided by Alexander Hamilton in his classic series of essays on Article III in the *Federalist Papers*. In *Federalist No. 80*, Hamilton emphasized the critical importance of a neutral forum for resolving disputes "in which the State tribunals cannot be supposed to be impartial and unbiased." *Id*. at 475. As he explained:

> No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens.

Id. at 478.

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wise defended the diversity clauses. In the North Carolina convention, for example, William Davie, who had attended the Constitutional Convention, defended federal jurisdiction over controversies "between a state and citizens of another state" on the ground that federal "jurisdiction in these cases is necessary to secure impartiality in decisions, and preserve tranquility among the states." 4 ELLIOT'S DEBATES 159. As Davie explained, "It is impossible that there should be impartiality when a party affected is to be judge." *Id.* Davie argued that "[t]he security of impartiality" was likewise "the principle reason for giving up the ultimate decision of controversies between citizens of different states" and that diversity jurisdiction was "essential to the interest of agriculture and commerce." *Id.*

As Hamilton further elaborated, "in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens." *Id.* As Hamilton explained, only "that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded." *Id.* Like Marshall and Randolph, Hamilton also emphasized that "[t]he power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is … essential to the peace of the Union." *Id.* at 477; *see also id.* at 475, 480.

3. This Court has consistently confirmed this understanding of the purpose of the diversity clauses. In one of its earliest examinations of diversity jurisdiction, the Court stated:

> However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controver-

> sies between aliens and a citizen, or between citizens of different states.

Bank of U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809), *overruled in part on other grounds*, *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844); *see also, e.g.*, *Martin*, 14 U.S. (1 Wheat.) at 347 ("The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.").

This Court has likewise acknowledged that by ensuring that a neutral federal forum was available for adjudicating disputes between a State or its citizens and citizens of other States, those who framed and ratified Article III sought to preserve national harmony and promote interstate commerce. Federal jurisdiction

> is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. Trade barriers, recriminations, intense commercial rivalries had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war.

Georgia v. Pa. R.R. Co., 324 U.S. 439, 450 (1945) (internal citations omitted). Because the Constitution barred these "traditional methods" to the States, federal jurisdiction over controversies between States and between a State and citizens of another State "was provided as an alternative." *Id.* And, in the words of Justice Joseph Story, "Nothing can conduce more to general harmony and confidence among all the states, than a consciousness, that controversies are not exclusively to be decided by the state tribunals; but may, at the election of the party, be brought before the national tribunals." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1685 (1833).

In short, whether the true plaintiff in this controversy is Mississippi, its citizens, or some combination of the two, this case falls squarely within the purposes for which federal diversity jurisdiction was established.

II. Article III Provides that Federal Jurisdiction "Shall Extend" to Controversies Such As This One.

Article III provides that "[t]he judicial Power of the United States, *shall be vested* in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1 (emphasis added). Article III likewise directs that "[t]he judicial Power *shall extend*" to various enumerated categories of cases and controversies, including "Controversies … between a State and Citizens of another State [and] between Citizens of different States." *Id.* § 2, cl. 1 (emphasis added). On its face, this unequivocal language plain-

ly counsels against narrowly construing a jurisdictional statute, such as CAFA, not to extend to a case falling squarely within the clear language of Article III.

1. In his landmark opinion in *Martin v. Hunter's Lessee*, Justice Story forcefully argued that "[t]he language of [Article III] throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation." 14 U.S. (1 Wheat.) at 328; *see also* 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 612-14 (1953).

Just as Section 1 of Article III provides that the federal judicial power "*shall be vested* (not may be vested)" in a supreme court and congressionally established inferior courts, Justice Story noted, it also provides that "[t]he judges, both of the supreme and inferior courts, *shall hold* their offices during good behaviour, and *shall*, at stated times, receive, for their services, a compensation which shall not be diminished during their continuance in office." *Martin*, 14 U.S. (1 Wheat.) at 328. Justice Story argued that "[t]he language, if imperative as to one part, is imperative as to all." *Id.* at 330. Congress thus may no more refuse to vest the judicial power than it may "create or limit any other tenure of the judicial office" (besides tenure "during good behaviour") or "refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office." *Id.* at 328-29.

Justice Story also noted that the language of Article III vesting the judicial power mirrors that of Articles I and II:

> The first article declares that "all legislative powers herein granted *shall be vested* in a congress of the United States." Will it be contended that the legislative power is not absolutely vested? that the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that "the executive power *shall be vested* in a president of the United States of America." Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?

Id. at 329-30; *see also* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 842 (1984).

Justice Story then turned to the language of Section 2 providing that "the judicial power *shall extend*" to the enumerated cases and controversies. *Martin*, 14 U.S. (1 Wheat.) at 331. These words too, said Justice Story, are "used in an imperative sense," and "import an absolute grant of judicial power." *Id*.

Thus, he urged, the "duty of congress to vest the judicial power of the United States" must be understood as "a duty to vest the *whole judicial power*," else "congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all." *Id.* at 330.

In short, the plain language of Article III, Justice Story concluded, makes clear that the federal "judicial power shall extend to all the cases enumerated in the constitution." *Id.* at 333; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) ("The constitution vests the *whole* judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish." (emphasis added)).

2. While Justice Story's mandatory view of federal jurisdiction has not prevailed, *see infra* at 26-30, amici respectfully submit that his textual analysis has great force and has never been satisfactorily answered. To be sure, after identifying the classes of cases and controversies to which the judicial power shall extend and prescribing the Supreme Court's original jurisdiction, Article III provides that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*." *Id.* § 2, cl. 2 (emphasis added). Given that Article III appears to commit the creation of inferior federal courts to Congress's discretion, this Exceptions Clause could be understood to permit Congress to defeat the judicial power over certain cases or controversies simply by

excepting them from the Supreme Court's appellate jurisdiction and then declining to create inferior courts with jurisdiction over those matters.

Whatever force this reading might have if the Exceptions Clause is viewed only in conjunction with Congress's apparent discretion regarding the creation of inferior federal courts, it is in undeniable tension with Article III's dual commands that the judicial power "shall be vested" in the Supreme Court and congressionally created inferior courts and that this power "shall extend" to the cases and controversies identified in Section 2. Article III should be read as a whole in a manner that gives effect to all of its provisions, and any reading of some of its provisions that would render others meaningless should be avoided if reasonably possible.

Such a reading is clearly possible: although the provisions of Article III vesting and extending the federal judicial power require that the *entire* judicial power be vested *somewhere* in the federal judiciary, Congress's authority over the inferior Courts and its ability to make exceptions to the Supreme Court's appellate jurisdiction give Congress substantial discretion over where in the federal judiciary that power is vested. Thus, Congress may choose not to grant inferior federal courts jurisdiction over certain cases or controversies enumerated in Article III (or may even choose not to create inferior federal courts at all), so long as the Supreme Court retains appellate jurisdiction over any cases or controversies not cognizable in the inferior federal courts. Alternatively, Congress may except certain enumerated cases or controversies from the Supreme Court's appel-

late jurisdiction, so long as it creates inferior federal courts with jurisdiction over those matters. But Congress may not, consistent with this reading of Article III, remove any of the enumerated cases or controversies from the federal judiciary entirely, *both* by excepting it from the Supreme Court's appellate jurisdiction *and* by declining to create an inferior federal court with jurisdiction to consider it. As summarized by Alexander Hamilton in *Federalist No. 82*, "[t]he evident aim of the plan of the convention is that *all* the causes of the specified classes shall, for weighty public reasons, receive their *original or final* determination in the courts of the Union." THE FEDERALIST No. 82, at 494 (Hamilton) (emphasis added); *see also, e.g.*, *Martin*, 14 U.S. (1 Wheat.) at 333 ("The judicial power shall extend to all the cases enumerated in the constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.").

This reading of Article III both respects its mandatory language vesting and extending the federal judicial power and serves its central purposes, including providing a neutral tribunal for resolving "cases in which the State tribunals cannot be supposed to be impartial." THE FEDERALIST No. 80, at 478 (Hamilton). And it still accords Congress substantial control over the *allocation* of federal judicial power, consistent with Congress's evident control over the existence of inferior federal tribunals and with the express terms of the Exceptions Clause.

Further, this reading is completely consistent with the justification for the constitutional provisions regarding inferior federal courts advanced by leading Framers of the Constitution. *See, e.g.*, THE FEDERALIST No. 81, at 485 (Hamilton) ("The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance."); 1 FARRAND'S RECORDS 124 (Madison) ("[U]nless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree.") And it is truer to the plain language of the Exceptions Clause—which by its terms grants Congress power to make exceptions only to the "*supreme Court*['*s*] *appellate Jurisdiction*," not to "[*t*]*he judicial Power of the United States*"—than is the alternative reading, which would allow Congress to remove broad classes of cases and controversies from the federal judicial power entirely. *See, e.g.*, CROSSKEY, *supra*, at 616.[4]

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[4] Some have argued that Article III establishes mandatory federal jurisdiction over some of the classes of cases and controversies it identifies (such as cases arising under the Constitution, laws, and treaties of the United States), but not over others (such as controversies between States and citizens of other States or between citizens of different States). Indeed, Justice Story suggested such a distinction in *Martin* itself, albeit in dicta upon which he did not "place any implicit reliance." 14 U.S. (1 Wheat.) at 336. As Justice Story noted, by its terms, Section 2 extends some heads of federal judicial power to "all cases" but extends others only to "controversies," not "*all* controversies." *Id.* at 334. "From this difference of phraseology," he surmised, "perhaps, a difference of constitutional intention may, with propriety, be inferred." *Id.* "In respect to the first class," Justice Story suggested,

> it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to *all cases*; and in the latter class to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

Id. Justice Johnson, in a separate opinion, answered this argument:

> "Shall extend to controversies," appears to me as comprehensive in effect, as "shall extend to all cases." For, if the judicial power extends "to controversies between citizen and alien," &c., to what controversies of that description does it not extend? If no case can be pointed out which is excepted, it then extends to *all controversies*.

Id. at 375.

Furthermore, it appears that at the time the Constitution was drafted and ratified, the term "cases" was understood to include both criminal and civil cases, while the term "controversies" was understood to denote civil cases only. *See, e.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431-32 (1793) (Iredell, J.); 1 BLACKSTONE COMMENTARIES App. 420 (St. George Tucker ed., 1803). Accordingly, it seems likely that Article III uses the term "cases" to refer to both civil and criminal judicial proceedings, but uses the term "controversies" to refer more narrowly only to civil proceedings. *See, e.g.*, CROSSKEY, *supra*, at 614; John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 220 (1997). Indeed, as discussed below, the Constitutional Convention's Committee on Detail rejected a proposal that would have made federal question jurisdiction mandatory but diversity jurisdiction subject to congressional regulation. *See infra* at 22.

III. A Mandatory Reading of Article III Is Supported by the History of Its Framing and Ratification.

Justice Story's conclusion—that the plain text of Article III mandates jurisdiction in federal courts in all enumerated cases or controversies—is also supported by the historical evidence from the Constitutional Convention and the ratification debates.

1. As discussed above, *see supra* at 7-8, much of the specific language of Article III was developed by the Committee of Detail. Accordingly, it bears emphasis that this committee specifically considered and rejected a draft proposal that would have extended federal jurisdiction "1. to all cases, arising under laws passed by the general Legislature[,] 2. to impeachments of officers, and 3. to *such* other cases, *as the national legislature may assign*, as involving the national peace and harmony, [*inter alia*] in disputes between citizens of different states [and] in disputes between a State & a Citizen or Citizens of another State." 2 FARRAND'S RECORDS 146-47 (last emphasis added). The committee thus "considered and then rejected a proposal which would have given Congress power to particularize the jurisdiction" of the federal courts. Clinton, *supra*, at 773.

On August 6, 1787, the Committee of Detail reported a draft constitution to the Convention. After providing in its first section that "[t]he Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States," and providing

in its second section for tenure "during good behaviour" and undiminished compensation, this draft identified the scope of the federal jurisdiction in a third section as follows:

> The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior

> Courts, as it shall constitute from time to time.

2 FARRAND'S RECORDS 186-87.

On August 27, the Convention made a number of important amendments to this draft provision, three of which strongly suggest that although Congress could allocate the judicial power between the Supreme Court and any inferior federal courts it chose to create, it could not eliminate all federal jurisdiction over any of the specified cases and controversies. Perhaps most importantly, the Convention considered and rejected a motion to insert, after the specification of the Supreme Court's original jurisdiction, language providing that "[i]n all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct." *Id*. at 425, 431. Thus, the delegates considered but rejected a proposal that would have explicitly permitted broad legislative control over federal jurisdiction. As one commentator has observed, "A clearer rejection of congressional authority over judicial powers is hard to imagine." Clinton, *supra*, at 791.

The Convention next voted unanimously to strike the entire last sentence of this section, which would have authorized Congress to "assign any part of the jurisdiction above mentioned … in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time." *See* 2 FARRAND'S RECORDS 425, 431. Any inference that this language may have granted Congress authority to curtail federal jurisdiction was thus eliminated.

To be sure, the Convention did not eliminate the provision authorizing Congress to make exceptions to the Supreme Court's appellate jurisdiction. It did, however, change the draft language at the beginning of the section that would have extended "*the jurisdiction of the Supreme Court*" to the enumerated cases and controversies to provide instead that "*[t]he Judicial Power*" shall extend to these cases and controversies. *Id.* at 425, 431 (emphasis added). These amendments strongly suggest that the Exceptions Clause was understood by its framers to authorize exceptions only to the Supreme Court's appellate jurisdiction, not to the federal judicial power as a whole.

2. The state ratification debates likewise support a mandatory reading of Article III. Indeed, "the antifederalist attacks on the breadth of the judicial power of the United States prescribed by the Constitution and on the costs, inconvenience, and potential threat to state courts posed by article III produced almost no suggestions by federalists that Congress could delimit the sphere of federal court jurisdiction." Clinton, *supra*, at 810. To the contrary, as discussed above, *see supra* at 19, leading Framers and supporters of the proposed Constitution, including Alexander Hamilton, acknowledged that the federal jurisdiction set forth in Article III was mandatory, *see, e.g.*, THE FEDERALIST No. 82, at 494 (Hamilton); THE FEDERALIST No. 81, at 485 (Hamilton).

Furthermore, the Antifederalists proposed amendments in the state ratifying conventions that ranged from abolishing diversity jurisdiction alto-

gether, to eliminating original diversity jurisdiction in cases at common law, to restricting it to cases involving a minimum amount in controversy. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 499-503 (1928). That the Antifederalists uniformly sought to achieve these goals by constitutional amendment reflects a common understanding that such restrictions could not be enacted by statute. None of the amendments designed to restrict the scope of federal jurisdiction, including diversity jurisdiction, succeeded in the First Congress. To the contrary, "the Federalists won a complete victory." *Id.* at 503.

3. We recognize, of course, that the First Congress did not fully vest in the federal courts all of the cases and controversies enumerated in Article III. For example, the Judiciary Act of 1789 limited diversity jurisdiction to cases in which the amount in controversy exceeded five hundred dollars. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79. The first Judiciary Act also limited diversity jurisdiction to controversies where one of the parties was a citizen of the State where the suit was brought and barred jurisdiction over suits brought by the assignee of "any promissory note or other chose in action," except "foreign bills of exchange" unless the federal courts would have had jurisdiction "if no assignment had been made." *Id.* Removal jurisdiction was likewise subject to a five hundred dollar amount-in-controversy requirement and was limited to cases where the defendant was a citizen of a State other than that where the action was brought. *See id.* § 12, 1 Stat. at 79-80.

In addition, consistent with the language of Article III, the first Judiciary Act vested the Supreme Court with "original but not exclusive jurisdiction" over "all controversies of a civil nature … between a state and citizens of other states, or aliens," *id.* § 13, 1 Stat. at 80. That Act did not, however, establish concurrent jurisdiction over such controversies in any other federal court, nor did it provide for removal to federal court or for federal appellate review of such suits if commenced in state court. *See Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 516-17 (1898). These omissions from the Judiciary Act cannot be squared with the indisputable principle that the federal "judicial power … was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum." *Martin*, 14 U.S. (1 Wheat.) at 348.

While these limitations imposed by the First Congress constitute "weighty evidence of [the] true meaning" of Article III and, therefore, of congressional authority to control the jurisdiction of the federal courts, *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888), they are hardly dispositive. There is substantial evidence that "in the First Congress, certain of the Constitutional provisions relating to these matters [federal jurisdiction] were not scrupulously regarded." CROSSKEY, *supra*, at 618; *see generally* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986). Indeed, the First Congress's com-

pliance with Article III was demonstrably imperfect in at least some respects. For example, Congress plainly exceeded its constitutional authority, perhaps inadvertently, in purporting to extend federal jurisdiction to all cases, subject to a jurisdictional minimum, in which "an alien is a party." Judiciary Act of 1789, § 11, 1 Stat. at 78. This Court narrowly interpreted this provision to apply only "to suits *between citizens and foreigners*" in order to reconcile it with the plain language of Article III. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800); *see also Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809). And, of course, the First Congress improperly attempted to expand the original jurisdiction of this Court. *See Marbury v. Madison*, 5 U.S. (1 Cranch) at 173-76.

4. We also acknowledge that this Court implicitly upheld the constitutionality of one of the First Congress's statutory limitations on diversity jurisdiction not long after it was adopted. In *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799), an assignee challenged the provision restricting jurisdiction in cases of assignment on the ground that its suit was "between citizens of different states," as prescribed by Article III, and that the statute "imposed a limitation upon the judicial power, not warranted by the constitution." *Id.* at 9; *see also id*. (arguing that "congress can no more limit, than enlarge the constitutional grant"). Although the Court's opinion did not address this argument, it relied on the statute in holding that the circuit court lacked jurisdiction over the case. *Id*. at 10. The Court thus implicitly held that this limitation on the jurisdiction prescribed by Article III was constitutional. The re-

port of this decision, moreover, records the following statement by Justice Chase, a former antifederalist, during oral argument:

> The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise[;] and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant.

Id. at 9 n.a. A half century later, this Court relied on this comment in expressly upholding the constitutionality of the same statutory limitation. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850).

Later still, this Court upheld Congress's partial provision for federal jurisdiction over suits between a State and citizens of other States, specifically rejecting the argument that "the judicial power of the United States … cannot be so distributed that a state court may take cognizance of a case or controversy to which that power is extended, if its determination thereof is not made by congress subject to re-

examination by some court of the United States." *Plaquemines Tropical Fruit*, 170 U.S. at 513; *see also id*. at 516-17, 520-21. Further, this Court has rejected the view that it "must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another even though the dispute may be one over which this Court does have original jurisdiction." *Ohio v. Wyandotte Chems. Corp*., 401 U.S. 493, 497 (1971). Indeed, despite its indisputable constitutional and statutory jurisdiction over such cases, this Court has sometimes declined to hear them even when the only alternative is litigation in state court without opportunity for removal or federal appellate review. *See id*. at 495, 498 n.3.

Regardless of whether these precedents upholding congressional authority to curtail federal jurisdiction can be reconciled with the text, history, and purposes of Article III, it is unnecessary to revisit them to reject Petitioner's claim that principles of federalism require a presumption against federal jurisdiction over a case falling squarely within Article III's scope. Amici urge only that these precedents not be extended or somehow construed to support a grudging view of federal jurisdiction that would be inimical to the text of Article III and its core purposes.

IV. A Presumption Against Removal Under CAFA Would Contradict the Constitutional Design.

Any presumption against removal in a case, such as this one, brought by a State or its citizens

against citizens of other States, would run flatly contrary to the constitutional design. At a minimum, then, the jurisdictional provisions of CAFA should be interpreted without any thumb on the scale against removal. Indeed, these provisions should be interpreted generously, to effectuate the important purposes underlying the diversity clauses.

1. Petitioner, however, argues that "[d]ue regard for the rightful independence of state governments" mandates "a policy of 'strict construction' of removal statutes." Pet. Br. 27. In support of this purported "policy," Petitioners invoke dictum in this Court's decision in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).[5] This dictum rested on inferences drawn by the Court from its contemporaneous understanding of "Congressional purpose [and] policy" reflected in the removal statutes as they existed at the time. 313 U.S. at 108. But as this Court has subsequently recognized, "whatever apparent force this [reasoning] might have claimed when *Shamrock* was handed down has been qualified by later statutory development." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003). This Court has thus squarely rejected the *Shamrock Oil*

[5] Like the courts of appeals rejecting federal jurisdiction in cases similar to this one, Petitioners also invoke dicta in subsequent cases repeating the *Shamrock Oil* dictum. *See* Pet. Br. at 27-28 (quoting *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002), and *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-32 (2002)); *see also Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 667 (9th Cir. 2012) (quoting *Syngenta*); *LG Display Co. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011) (same).

dictum, holding instead that "whenever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception." *Id.* at 698.

In all events, any reliance on a supposed congressional policy requiring strict construction of removal statutes is especially inappropriate in this case. In enacting the statute at issue here, Congress acted to redress state court litigation "[a]buses" that had

> undermine[d] 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 [*inter alia*] keeping cases of national importance out of Federal court[, and] sometimes acting in ways that demonstrate bias against out-of-State defendants ….

CAFA, § 2(a)(4), Pub. L. 109-2, 118 Stat. 4, 5. CAFA was thus intended 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." *Id.* § 2(b)(2). In light of these congressional findings and purpose, it is not surprising that, in enacting CAFA, Congress expressly rejected any presumption against removal. As the CAFA Senate report explains, "there is no such presumption. In fact, the whole purpose of diversity jurisdiction is to preclude any such presumption by allowing state-law based claims

to be removed from local courts to federal courts, so as to ensure that all parties can litigate on a level playing field and thereby protect interstate commerce interests." S. REP. NO. 109-14, at 57 (2005).

More fundamentally, any general presumption against removal is fundamentally at odds with the text, history, and purposes of Article III, as demonstrated above. As this Court has explained before,

> the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.

Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 186 (1907).[6]

[6] It is true, of course, that the burden of persuasion for establishing diversity jurisdiction—or any other type of federal jurisdiction—is borne by the party asserting it. *See, e.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2009). Contrary to Petitioner's apparent suggestion, *see* Pet. Br. at 28 (citing *Hertz Corp.*), this unremarkable rule means only that the party invoking federal jurisdiction must allege (and, if its allegations are controverted, prove) *facts* establishing federal jurisdiction. In no way does this rule speak to how the *law* governing removal should be interpreted, let alone support an interpretive presumption against removal.

2. Echoing court of appeals decisions denying federal jurisdiction in cases similar to this one, Petitioner also invokes this Court's statement in *Franchise Tax Board v. Construction Laborers Vacation Trust* that "considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." 463 U.S. 1, 21 n.22 (1983), (quoted in Pet. Br. at 31); *see also Bank of Am. Corp.*, 672 F.3d at 676 (quoting *Franchise Tax Bd.*); *LG Display Co.*, 665 F.3d at 774 (same); *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 392 (4th Cir. 2012) (following *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (2011)); *McGraw*, 646 F.3d at 179 (quoting *Franchise Tax Bd.*). This Court's statement, buried in a footnote and unsupported by citation or argument, is, however, the purest of dictum. Furthermore, the text and purposes of Article III make plain that cases brought by States against citizens of other States are within the federal jurisdiction. Accordingly, any presumption against removal of such a case based solely on the fact that the State is a plaintiff turns the constitutional design on its head. To the extent the *Franchise Tax Board* dictum suggests such a presumption, this Court should repudiate it.

3. Nor do sovereign immunity principles in any way support a presumption against removal of a suit brought by a State against citizens of other States. *See* Pet. Br. 29-31. As a textual matter, the Eleventh Amendment's language—"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against* one of the United States" (em-

phasis added)—does not speak to, let alone limit, Article III's grant of jurisdiction over a suit brought *by* "a State" *against* "Citizens of another State," U.S. CONST. art. III, § 2, cl. 1. The Eleventh "amendment, therefore, extend[s] to suits commenced or prosecuted by individuals, but not to those brought by States." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 407 (1821). Nor is sovereign immunity implicated by federal removal of a suit commenced by a State in its own court against a citizen of a different State. As this Court explained in upholding its jurisdiction over an appeal of a state court decision by an individual appellant:

> If a suit, brought in one Court, and carried by legal process to a supervising Court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a State. It is clearly in its commencement the suit of a State against an individual, which suit is transferred to this Court ….

Id. at 409. Significantly, this Court has followed *Cohens* and invoked the same analysis in rejecting the claim that the "constitution exempts the states from [the] operation" of the removal statutes in a suit commenced by a State against private citizens. *Ames v. Kansas*, 111 U.S. 449, 470 (1884).[7]

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[7] Although Petitioner quotes a number of this Court's abstention cases, *see* Pet. Br. 31-33, it does not make any serious attempt to show that this case satisfies the elements of any established abstention doctrine, nor could it do so. And regardless of whether this case involves "open questions" of state law

* * *

In short, a presumption against removal in this case—either in general or because the State is at least a nominal plaintiff—cannot be squared with the plain text and fundamental purposes of Article III. Accordingly, this Court should interpret CAFA's removal provision fairly, without any thumb on the scales against removal, for in the words of Chief Justice Marshall,

> The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.

Deveaux, 9 U.S. (5 Cranch) at 87; *see also Cohens*, 19 U.S. (6 Wheat.) at 404 ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. … We have no more right to decline the exercise of jurisdiction which is given, than to usurp that

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that Petitioner wishes the state courts "to articulate," *id*. at 32-33, "difficulties and perplexities of state law are no reason for referral of the problem to the state court," *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 673 n.5 (1963).

which is not given. The one or the other would be treason to the constitution.").

CONCLUSION

For the foregoing reasons, amici curiae respectfully submit that this Court should, at a minimum, construe the jurisdictional provisions at issue in this case without any presumption against removal. Indeed, given that this case falls squarely within the scope of the Constitution's jurisdictional provisions, we submit that the statute here should be construed generously to effectuate the important purposes for which those who framed and ratified Article III established diversity jurisdiction.

Respectfully submitted,

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