

THE IMPLEMENTATION OF “BALANCED DIVERSITY” THROUGH THE CLASS ACTION FAIRNESS ACT

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In 2005, Congress passed the Class Action Fairness Act (CAFA), which gave federal courts jurisdiction over class actions with both minimal diversity and an amount in controversy exceeding \$5 million. In the wake of CAFA, federal courts have struggled to formulate appropriate standards of proof when the defendant removes a class action to federal court and the plaintiff seeks to remand the case to state court. This Note argues that if a defendant looks to remove such a class action, it should have to demonstrate that the amount in controversy is met by a preponderance of the evidence—regardless of whether the plaintiff’s complaint requests a specific amount of damages. In addition, if a plaintiff wants to utilize either of CAFA’s “federalism exceptions” to federal jurisdiction, it should have the benefit of a rebuttable presumption that a class member’s state of residence is her state of citizenship. This two-part approach comes closest to effectuating the “balanced diversity” that Congress intended in CAFA.

INTRODUCTION

The debate over the Class Action Fairness Act of 2005 (CAFA) was fierce, with both congressional supporters and detractors of the bill dramatizing its impact.¹ CAFA is now codified in Title 28 of the United States Code, but the debate has continued over the Act’s interpretation.² CAFA, aiming to prevent certain “magnet” state

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¹ Compare Paul Barton, *Effects of Litigation Shift on Consumers Debated*, ARK. DEMOCRAT-GAZETTE, Feb. 21, 2005, at 1A (“States should be allowed to try cases in a courtroom in their state, decided by a jury of their peers. I do not support taking this important authority away from the states.” (quoting Rep. Michael Ross) (internal quotation marks omitted)), with Ken Herman, *Bush Praises Lawsuit Curbs; Measure Puts Class Actions in U.S. Courts*, ATLANTA J.-CONST., Feb. 19, 2005, at A3 (“Before today, trial lawyers were able to drag defendants from all over the country into sympathetic local courts, even if those businesses have done nothing wrong” (quoting Pres. George W. Bush)).

² The jurisdictional provisions of CAFA are codified at 28 U.S.C. §§ 1332(d), 1453 (2006). Class Action Fairness Act (CAFA) of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

courts from rubber-stamping the certification of national classes,³ gives the federal courts subject-matter jurisdiction over class actions with a total amount in controversy of more than \$5 million.⁴

Whether CAFA achieves its goal will depend on how the judiciary allocates the standards of proof and presumptions in the typical jurisdictional dispute, in which the plaintiff sues in and attempts to remain in state court while the defendant looks to remove the case to a federal forum. In particular, two interrelated aspects of CAFA pose pivotal doctrinal issues that have yet to be resolved satisfactorily by the courts.⁵

The first is how a defendant can demonstrate that the amount in controversy exceeds \$5 million when the plaintiff either does not include an amount in controversy in her complaint or intentionally pleads below the required amount.

The second issue is: Once the defendant successfully removes the case to a federal forum, how can the plaintiff remand the case via the Act's "home state" and "local controversy" provisions—the so-called federalism exceptions—if it is too difficult for the class counsel to determine the percentage of the class that are citizens of the forum state?⁶ The traditional method of determining citizenship requires plaintiffs to prove both residence and intent to remain in the state for each class member.⁷ This is problematic in the aggregate setting. If a class numbers in the thousands (or larger), it is easy to see how the need to make this fact-intensive demonstration for each class member could make the federalism exceptions impossible for the plaintiff to utilize. A recent Eleventh Circuit case highlights this problem. In *Evans v. Walter Industries, Inc.*, the court refused to remand a seemingly local controversy involving the defendant's release of waste substances near an eastern Alabama town.⁸ In doing so, the court

³ See *infra* notes 17–22 and accompanying text.

⁴ § 1332(d)(2). CAFA also has provisions that heighten the scrutiny of settlements, including so-called coupon settlements that typically give class plaintiffs a discount on the defendant's products while the class lawyers reap significant monetary fees. 28 U.S.C. §§ 1712–1715 (2006). Although these provisions are potentially significant and have federalism implications, see, e.g., Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971, 1991–95 (2008) (discussing efforts by state attorneys general to collaborate in light of CAFA's "primary state regulator" notice provision), the scope of this Note is confined to the original and removal jurisdiction sections of the bill.

⁵ Although these two issues—particularly the standard of proof for determining the amount in controversy—do not arise solely in the CAFA context, this Note looks only at these issues through the lens of CAFA to arrive at a potential solution in the context of national-market class actions.

⁶ See § 1332(d)(3)–(4).

⁷ See *infra* notes 141–42 and accompanying text.

⁸ 449 F.3d 1159 (11th Cir. 2006).

criticized the plaintiffs' attempt to infer each class member's citizenship by sampling her state of residence; it did not, however, suggest a viable template for future plaintiffs to use in such cases.⁹

The problems arising from the amount in controversy and federalism exceptions are tied together with an enigmatic thread: To what extent should CAFA's federalism concerns drive the standards for determining amount in controversy and citizenship?¹⁰ As for the amount in controversy, I conclude that strategic pleading by plaintiffs threatens to keep significant national class actions in state courts. Defendants, therefore, should only be required to satisfy a preponderance of the evidence standard—not a stricter standard of proof—to demonstrate that a case is removable to federal court. Courts also should be willing to conduct limited discovery, if appropriate, to determine if a defendant can fulfill its burden. For class plaintiffs attempting to prove their citizenship, however, powerful federalism concerns suggest a forgiving standard. In order to keep truly intra-state controversies in state tribunals, courts should utilize a rebuttable presumption that a class member's state of residence is also her state of citizenship.

With this approach, the amount-in-controversy standard can serve as a screening mechanism to keep clearly insignificant class actions out of federal court while allowing the federalism exceptions to vertically allocate significant cases between federal and state courts. This approach comes closest to effectuating the "balanced diversity" that Congress intended to achieve with CAFA.¹¹ It would place most significant, national-market class actions in federal tribunals while allowing state courts to adjudicate locally centered controversies. It also diminishes the need for Congress to amend the statute.

In Part I of this Note, I provide a summary of CAFA—both the text and the principles animating the statute. I then offer my proposals for how courts should determine whether the amount-in-controversy requirement is met (Part II) and if the statute's federalism exceptions apply (Part III); in doing so, I reconcile pre-CAFA prece-

⁹ See *infra* notes 167–70 and accompanying text.

¹⁰ There are other implications stemming from Congress's desire to effectuate a particular conceptualization of federalism in passing CAFA. See generally Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001 (2008) (arguing that, because CAFA aimed to eliminate parochialism of state choice-of-law principles, courts should formulate federal choice-of-law rule in CAFA cases).

¹¹ See S. REP. NO. 109-14, at 6 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 7 ("S. 5 addresses these concerns by establishing 'balanced diversity' a rule allowing a larger number of class actions into federal courts, while continuing to preserve primary state court jurisdiction over primarily local matters.").

dent with CAFA's purpose of moving national-market class actions into federal court.

I CAFA'S HISTORY

This Part analyzes CAFA, discussing both the statute and its legislative history. It concludes that the statute's clear purpose was to create "balanced diversity" between state and federal courts by placing class actions with significant national implications in federal court and leaving truly intrastate conflicts in state court.

Prior to CAFA, the jurisdictional rules for bringing class actions attempted to fit a square peg—the class action—into the round hole of 28 U.S.C. § 1332(a), the statutory grant of jurisdiction for diversity-of-citizenship cases.¹² Even before the promulgation of the modern Rule 23 of the Federal Rules of Civil Procedure in 1966,¹³ the Supreme Court held that only the citizenship of the *named* plaintiffs determined whether the action met the statutory requirement of complete diversity.¹⁴ This interpretation allowed plaintiffs to manufacture federal jurisdiction by strategically selecting certain plaintiffs to serve as class representatives.¹⁵ As for the amount in controversy, the Court rejected the notion that the plaintiff class could reach the statutory benchmark by aggregating the claims of all class plaintiffs.¹⁶

Combined, these dual requirements of complete diversity of citizenship and a disaggregated amount in controversy ensured that many

¹² 28 U.S.C. § 1332(a)(1) (2006) simply provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States."

¹³ See Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1851 (2008) (noting that 1966 amendments to Rule 23 "introduced . . . a new and expanded form of class action based on the presence of 'common issues' of law and fact").

¹⁴ Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 366–67 (1921).

¹⁵ See, e.g., Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1770 (2008) ("[I]n a class action, a lawyer could initially name only diverse class members and use the class device to broaden the case to include the nondiverse ones.").

¹⁶ Snyder v. Harris, 394 U.S. 332 (1969). The Court made it even more difficult for class actions to be brought in, or removed to, a federal court when it determined that even unnamed class members must satisfy the jurisdictional amount in order to meet the federal jurisdictional standard. Zahn v. Int'l Paper Co., 414 U.S. 291 (1973). Notably, the Court later held that 28 U.S.C. § 1367 (2006) overruled *Zahn* by allowing supplemental jurisdiction over unnamed plaintiffs who did not meet the individual jurisdictional amount. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005). CAFA makes *Allapattah's* interpretation of § 1367 irrelevant with respect to class actions that meet the statute's aggregate amount-in-controversy requirement.

class actions of a national scope could not be removed to federal court. As national-market class actions became increasingly common, members of the corporate community charged that certain local jurisdictions were impulsively and erroneously certifying these class actions. For example, Madison County, Illinois, gained notoriety as a “perfect example of . . . our runaway tort system.”¹⁷

Buoyed by numerous tales of state courts run amok,¹⁸ proponents of class action reform mustered the votes necessary to pass CAFA in early 2005.¹⁹ CAFA was meant to curtail these abuses by allowing class actions with minimal diversity to be brought in, or removed to, federal court.²⁰ The Act states that federal courts “shall have original jurisdiction” over any such class action (and many “mass actions”²¹) in which the total amount in controversy, aggregating the claims of all members of the class, is greater than \$5 million.²² There is little in the legislative history explaining why Congress chose to include an amount-in-controversy requirement in CAFA.

Fortunately for believers in maintaining “balanced diversity” between the state and federal judicial systems, Congress did not grant federal jurisdiction to every class action with minimal diversity and an amount in controversy exceeding \$5 million. Instead, it set forth two

¹⁷ E.g., Editorial, *Mayhem in Madison County*, WALL ST. J., Dec. 6, 2002, at A14. In one much-publicized case, for example, a Madison County judge certified a nationwide class of consumers alleging that AT&T collected fraudulent lease payments for telephones. Charles Bosworth, Jr., *Lawyer in Madison County Wins Right To Sue AT&T on Behalf of Thousands*, ST. LOUIS POST-DISPATCH, July 10, 1999, at 8. AT&T subsequently settled the suit, with the plaintiffs’ lawyers ultimately receiving \$84.5 million in fees even though class members claimed just \$8.4 million in damages. Trisha L. Howard, *Utility Regulator Challenges SBC Court Settlement*, ST. LOUIS POST-DISPATCH, July 6, 2004, at B1. Another notorious Madison County certification involved a class of nationwide consumers of light cigarettes against defendant Philip Morris USA, alleging various frauds. See, e.g., Editorial, *Plug the Hellhole*, ST. LOUIS POST-DISPATCH, Sept. 19, 2003, at B10 (noting that judge awarded plaintiffs \$10.1 billion in that case). The Illinois Supreme Court ultimately reversed the judgment, albeit on statutory grounds. *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 6 (Ill. 2005).

¹⁸ See, e.g., S. REP. NO. 109-14, at 20–21 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 20–22 (citing examples of frivolous suits).

¹⁹ David Rogers & Monica Langley, *Bush Set To Sign Landmark Bill on Class Actions*, WALL ST. J., Feb. 18, 2005, at A1.

²⁰ 28 U.S.C. § 1332(d)(2)(a) (2006) (granting federal jurisdiction over certain class actions where “any member of a class of plaintiffs is a citizen of a State different from any defendant”).

²¹ 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.” *Id.* § 1332(d)(11)(B)(i).

²² *Id.* § 1332(d)(2).

“exception[s]”²³ that either can permit or require a federal district court to decline jurisdiction over a class action. The first is the “home state” exception, which is subdivided into two subparts. The *mandatory* home state exception specifies that a district court must decline jurisdiction when at least two-thirds of class plaintiffs and the “primary defendants” are citizens of the forum state.²⁴ The *discretionary* home state exception allows a district court to decline jurisdiction, based on several factors,²⁵ if between one-third and two-thirds of the class plaintiffs are citizens of the forum state and the primary defendants are citizens of the forum state.²⁶

The other escape from federal court, the “local controversy” exception, presents another seemingly difficult task for plaintiffs. For this exception to apply, more than two-thirds of class plaintiffs must be citizens of the forum state, at least one “significant”²⁷ defendant must be a citizen of the forum state, and either the plaintiffs’ injuries or the defendants’ conduct must have occurred in the forum state.²⁸ The citizenship requirement for plaintiffs threatens to significantly curtail the utility of *both* exceptions. After all, a defendant often will not be a citizen of the forum state given that national corporations and unincorporated associations are citizens of at most two states in CAFA cases: their state of incorporation (often Delaware²⁹) and their principal place of business.³⁰

On its face, it might appear that the interrelationship between CAFA’s amount-in-controversy requirement and the federalism exceptions is unclear. However, it is worth noting that the first itera-

²³ The Senate Report uses the term “exception[s]” in describing these provisions, S. REP. NO. 109-14, at 28–29 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 27–29, although the text of CAFA itself does not mention the word.

²⁴ § 1332(d)(4)(B).

²⁵ These factors aim to identify a truly “local” controversy as compared to a national controversy in disguise. *See id.* § 1332(d)(3)(A)–(F) (asking, among other factors, “whether the claims asserted involve matters of national or interstate interest”). Whether these, or any possible enumeration of factors, can properly separate the wheat from the chaff is a question outside the scope of this Note.

²⁶ *Id.* § 1332(d)(3).

²⁷ For a discussion of the difference between a “primary defendant” and a “significant defendant,” see generally Amanda Coney, Comment, *Defining “Primary Defendants” in the Class Action Fairness Act of 2005*, 67 LA. L. REV. 903 (2007). The distinction, unexplained by Congress, might make charges that CAFA involved “sloppy drafting,” e.g., Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1565 (2008), seem too kind.

²⁸ § 1332(d)(4)(A)(i).

²⁹ Fifty-eight percent of Fortune 500 companies are incorporated in Delaware. MELVIN ARON EISENBERG, *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS* 202 (9th ed. 2005).

³⁰ § 1332(c)(1) (corporations); § 1332(d)(10) (unincorporated associations).

tion of the jurisdictional section of CAFA included an aggregate amount-in-controversy requirement of just \$2 million,³¹ which was increased to \$5 million in the 2003 version of CAFA.³² It is telling that the amendment to the bill increasing the amount was paired with the home state exception.³³ The fact that the drafters of this amendment connected these two provisions could indicate that Congress viewed the amount-in-controversy requirement as an additional mechanism to ensure that only significant, interstate class actions fell under CAFA's jurisdictional provisions. Furthermore, in the 2005 Senate Report recommending the version of CAFA that Congress ultimately passed, the Senate Judiciary Committee suggested that the presence of an amount-in-controversy requirement in CAFA helped ensure that the statute "regulates economic activity . . . that collectively has substantial effects on interstate commerce."³⁴

Although CAFA's text does not definitively state the motivations behind the bill, Congress consistently extolled the federalism virtues of CAFA throughout the statute's legislative gestation. The 2005 Senate Judiciary Committee Report continually returns to the affront to federalism that results when a state court adjudicates a nationwide class action.³⁵ These mentions of federalism were not aberrational: The report issued by the Senate Judiciary Committee in 2000, which positively recommended an earlier version of CAFA, also mentioned that CAFA aimed to effectuate the federalism-based underpinnings of diversity jurisdiction.³⁶

Despite this legislative history, a lingering question is whether mentions of federalism throughout the Congressional Record and the Senate Report were mere bluster.³⁷ Nevertheless, the mentions of "runaway" state courts throughout CAFA's legislative history are per-

³¹ S. 353, 106th Cong. (2000).

³² S. 1751, 108th Cong. (2003).

³³ 149 CONG. REC. 14,601-02 (2003) (statement of Rep. Sensenbrenner).

³⁴ S. REP. NO. 109-14, at 74 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 69-70.

³⁵ For example, the phrase "interstate class actions" occurs thirty-six times throughout the Senate Report. *See* S. REP. NO. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3.

³⁶ *See* S. REP. NO. 106-420, at 42 (2000) ("S. 353 has been carefully crafted to correct a problem in the current system that does not promote traditional concepts of federalism.").

³⁷ It is worth noting a possible motivation behind CAFA that casts doubt on the sincerity of Congress's stated federalism ideals—a sheer desire to thwart the certification of class actions against corporate defendants by any means necessary. This cynical view is supported by the rejection of an amendment to CAFA that would have prevented a federal judge from denying class certification on the ground that different state laws would be applied to different plaintiffs' claims, a practice that has been held to violate the Rule 23(b)(3) requirement that common questions of law predominate over individual questions. 151 CONG. REC. S1166, S1184 (daily ed. Feb. 9, 2005). This amendment would not have jeopardized CAFA's federalism fix because the law still would prevent a renegade state court from applying one state's law to a nationwide class. Instead, supposedly ubi-

vasive enough for congressional views to shed light on the difficult doctrinal issues of determining the amount in controversy and the plaintiffs' citizenship. Professor Stephen Burbank, who has criticized several aspects of CAFA, points out that "[s]ome state courts were clearly rubber-stamping multistate classes proffered by class counsel."³⁸ The fact that CAFA may have been driven partially by political motivations does little to differentiate it from most other statutes that call for judicial interpretation; if anything, perhaps the fact that seventy-two senators voted in favor of CAFA³⁹ signals a degree of legislative consensus. Thus, courts should consider the need to effectuate a jurisdictional balance to help guide their analysis on the pivotal—and often puzzling—issues presented in this Note.

II

THE NEED FOR A PREPONDERANCE OF THE EVIDENCE STANDARD TO DETERMINE THE AMOUNT IN CONTROVERSY IN CAFA CASES

In this Part, I first discuss how courts dealt with the uncertainty of determining the jurisdictional amount prior to CAFA. I will show that no clear standard existed for Congress to internalize as a background norm when passing the statute. As a result, courts considering the standard of proof should take into account Congress's intention to provide a federal forum for significant, national-market class actions. I conclude that defendants should bear the burden of demonstrating that the amount in controversy exceeds \$5 million by a preponderance of the evidence, regardless of whether the plaintiff's complaint

used federal courts could have accurately applied the relevant state law to each plaintiff or subclass of plaintiffs after certifying the class.

The amendment met a forceful rejection in the Senate. *Id.* at S1184. However, the justifications expressed by senators opposing the amendment did not speak to federalism concerns. When one senator did mention federalism, he erroneously characterized the amendment as altering federal courts' duty "to apply the proper State law when they hear claims between citizens of different States." *Id.* at S1174 (statement of Sen. Sessions). To be fair, it is possible that Senator Sessions was inadvertently referring to the original amendment proposed by Senator Bingaman, which gave judges discretion to apply the law of one state to an entire class. *Id.* at S1167 (statement of Sen. Bingaman).

As a result of this arguably malignant political purpose, some commentators have scoffed at CAFA's legislative history. Professor Stephen Burbank puts this skepticism bluntly, contending that CAFA's findings and purposes "meet the philosopher Harry Frankfurt's definition of 'bullshit,' because they are made with apparent indifference to their truth content." Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1942 (2006).

³⁸ Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1525 (2008). *But cf.* Marcus, *supra* note 15, at 1767 (treating Congress's enumerated justifications for CAFA seriously).

³⁹ 151 CONG. REC. S1249 (daily ed. Feb. 10, 2005).

includes an *ad damnum* clause.⁴⁰ Finally, I emphasize the need for courts to allow post-removal discovery and embrace what some courts pejoratively have called “speculative assertions”⁴¹ in order to calculate the true amount at stake.

A. *The Pre-CAFA Doctrine*

This Section highlights two arguably conflicting Supreme Court decisions evaluating the appropriate standard of proof for determining the amount in controversy and explains the difficulty that lower courts have had in reconciling these precedents. This uncertainty manifests itself in two situations—when a plaintiff does not include an *ad damnum* clause in her complaint, and when she specifically pleads below the jurisdictional amount. I discuss the pre-CAFA precedents for each of these scenarios in turn.

1. *McNutt and Red Cab*

Courts have had to grapple with amounts in controversy since the Judiciary Act of 1789 implemented the constitutional grant of diversity jurisdiction.⁴² There was little congressional debate over the first introduction of an amount-in-controversy requirement or the specific figure of \$500,⁴³ but the requirement has increased over time—culminating at the current value of \$75,000.⁴⁴

Although the amount is a bright-line rule, the means of determining whether it is met are far from obvious. Two Supreme Court decisions, both penned during the Great Depression, continue to serve as hazy guideposts for courts to use in deciding whether the amount in controversy exceeds the jurisdictional limit. The first, *McNutt v. General Motors Acceptance Corp.*, involved the plaintiff, General Motors (GM), bringing a constitutional challenge to a state regulatory statute.⁴⁵ GM pled over the amount-in-controversy requirement and contended that the party *challenging* federal jurisdic-

⁴⁰ An *ad damnum* clause indicates “the amount of damages claimed” by each plaintiff. BLACK’S LAW DICTIONARY 40 (8th ed. 2004).

⁴¹ See, e.g., *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1215 n.67 (11th Cir. 2007) (“If the court asserts jurisdiction on the basis of the defendant’s speculative assertions, it implicitly accepts rank speculation as reasonable inquiry.”).

⁴² Judiciary Act of 1789, ch. 20, §§ 11–12, 1 Stat. 73, 78–80.

⁴³ Thomas E. Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal To “Up the Ante” in Diversity Jurisdiction*, 102 F.R.D. 299, 304 (1984).

⁴⁴ See Jaren Casazza, Note, *Valuation of Diversity Jurisdiction Claims in the Federal Courts*, 104 COLUM. L. REV. 1280, 1283–84 (2004) (noting that Congress raised amount four times during twentieth century).

⁴⁵ 298 U.S. 178, 179 (1936). The case was brought under the grant of federal question jurisdiction, *id.* at 182, which had a parallel amount-in-controversy requirement of \$3000 at the time. Congress abolished any amount-in-controversy requirement for federal question

tion had the burden of demonstrating that the amount was not actually met.⁴⁶ The Court disagreed, holding that a party asserting federal jurisdiction has the burden of “justify[ing] his allegations by a preponderance of evidence.”⁴⁷ Although *McNutt* was a case of original—not removal—jurisdiction, the sweeping nature of the Court’s pronouncement unmistakably extended the holding into the removal context as well.

Less than two years later, the Court muddled *McNutt*’s seemingly clear rule with its decision in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*⁴⁸ In *Red Cab*, the plaintiff filed a breach of contract action in state court alleging \$4000 in damages.⁴⁹ The defendant removed the case to federal court given that the statutory amount in controversy for federal jurisdiction at the time was \$3000.⁵⁰ An exhibit attached to the plaintiff’s second amended federal complaint, however, provided a detailed list of damages that totaled only \$1380.89.⁵¹ The court of appeals dismissed the plaintiff’s claim *sua sponte*, holding that the amount in controversy was not satisfied.⁵² The Supreme Court reversed, determining that the subsequent reduction of the amount sought could not nullify federal jurisdiction.⁵³ The Court’s language is particularly noteworthy: “[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a *legal certainty* that the claim is really for less than the jurisdictional amount to justify dismissal.”⁵⁴ This “legal certainty” test, although arising in a different context, appears to be in tension with the preponderance standard in *McNutt*.

2. *The Uncertainty Concerning the Applicable Standard*

Understandably, in light of the arguably conflicting precedents of *McNutt* and *Red Cab*, courts struggled to decipher a standard of proof to determine the amount in controversy. This problem typically arises in two contexts. In what I call Scenario I, the plaintiff does not include an *ad damnum* clause in her complaint. In Scenario II, the defendant attempts to remove the case even though the plaintiff

jurisdiction in 1980. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (codified as amended at 28 U.S.C. § 1331 (2006)).

⁴⁶ *McNutt*, 298 U.S. at 181.

⁴⁷ *Id.* at 189.

⁴⁸ 303 U.S. 283 (1938).

⁴⁹ *Id.* at 284–85.

⁵⁰ *Id.* at 286.

⁵¹ *Id.* at 283.

⁵² *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 90 F.2d 229, 230 (7th Cir. 1937).

⁵³ *Red Cab*, 303 U.S. at 289–90, 295–96.

⁵⁴ *Id.* at 288–89 (emphasis added) (footnotes omitted).

includes an *ad damnum* clause that specifically pleads below the jurisdictional amount.⁵⁵

Even prior to CAFA, Scenario I had become increasingly common in both class and nonclass litigation. Although a civil complaint filed in federal court must include a demand for relief,⁵⁶ some state procedural rules forbid the inclusion of an *ad damnum* clause in certain circumstances.⁵⁷ In this situation, many circuits have adopted the *McNutt* standard by requiring the proponent of federal jurisdiction—here, the defendant—to demonstrate by a preponderance of the evidence that the amount in controversy is met.⁵⁸ The Seventh Circuit, however, instead required that the party asserting federal jurisdiction “show to a reasonable probability that more than [\$75,000] is in controversy.”⁵⁹ In addition, the Third Circuit attempted to reconcile *McNutt* and *Red Cab* by requiring that the proponent of federal jurisdiction prove: (1) disputed facts by a preponderance of the evidence and (2) that it is legally certain that the amount in controversy exceeds the statutory minimum.⁶⁰

Meanwhile, Scenario II—when the plaintiff specifically pleads below the jurisdictional amount and the defendant nonetheless removes the case⁶¹—is more difficult to reconcile because of the con-

⁵⁵ In lieu of pleading a specific amount in damages, plaintiffs hoping to stay in state court often just plead that the amount sought is less than the jurisdictional minimum—\$75,000 under 28 U.S.C. § 1332(a) (2006) and \$5 million under 28 U.S.C. § 1332(d)(2) (2006). See, e.g., *Toller v. Sagamore Ins. Co.*, 558 F. Supp. 2d 924, 926 (E.D. Ark. 2008) (noting that plaintiffs’ complaint did not allege specific amount in controversy but attempted to limit amount sought to less than \$4,999,999).

⁵⁶ FED. R. CIV. P. 8(a)(3).

⁵⁷ E.g., ALA. CODE § 6-5-483 (LexisNexis 2005) (“The *ad damnum* clause in complaints alleging medical liability shall be eliminated.”); COLO. R. CIV. P. 8(a)(3) (“No dollar amount shall be stated in the prayer or demand for relief.”); TEX. R. CIV. P. 47(b) (requiring “in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court”).

⁵⁸ *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 834 (8th Cir. 2003); *White v. FCI USA, Inc.*, 319 F.3d 672, 675 (5th Cir. 2003); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1357 (11th Cir. 1996); *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566–67 (9th Cir. 1992) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). The Tenth Circuit, in contrast, avoided the question but nevertheless required that “at a minimum . . . the jurisdictional amount be shown by a preponderance of the evidence.” *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290 (10th Cir. 2001).

⁵⁹ *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366–67 & n.2 (7th Cir. 1993). The Seventh Circuit changed this standard after CAFA’s enactment. See *infra* notes 85–86 and accompanying text.

⁶⁰ *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 397–98 (3d Cir. 2004).

⁶¹ Defendants can claim that the amount in controversy is higher than the stated amount because Rule 54(c) requires the decisionmaker to grant the relief to which a party is entitled regardless of the *ad damnum* in the complaint. See FED. R. CIV. P. 54(c). This allows a plaintiff to plead below the \$75,000 amount and introduce evidence at trial of

flicting forces at play: the traditional deference to plaintiff's choice of forum⁶² and a distaste for manipulative pleading.⁶³ Prior to CAFA, only one court of appeals had explicitly addressed the standard of proof for Scenario II cases—the Fifth Circuit in *De Aguilar v. Boeing Co.*⁶⁴

In *De Aguilar*, Texas law forbade the plaintiffs from including an *ad damnum* clause in their state-court complaint.⁶⁵ After removal they filed affidavits attempting to limit their demand for damages to a figure below the jurisdictional amount.⁶⁶ The court treated the plaintiffs' complaint as pleading a specific amount of damages.⁶⁷ Then, relying on the need to protect defendants from manipulative pleading, the court held that a removing defendant could demonstrate the amount in controversy by a preponderance of the evidence.⁶⁸ It is important to note that both the Scenario I cases and *De Aguilar* suggest that courts had not established a uniform standard in either situation prior to CAFA—ensuring that members of Congress could not have had a particular default rule in mind when drafting the statute.

B. Congressional Intent of CAFA

Given the pre-CAFA uncertainty regarding the standard of proof needed for a defendant to remove a case to a federal forum, I argue in this Section that courts should look to the statute's stated purpose of "balanced diversity" to help form the applicable standard for CAFA cases.

In evaluating whether courts should consider Congress's reasons for passing CAFA, it is instructive to compare this standard of proof problem to a similar quandary: Which party bears the burden of persuasion to determine whether a defendant can remove a class action

damages in excess of the listed figure—the reverse of the scenario in *Red Cab* when the plaintiff pled above the jurisdictional requirement but later introduced evidence suggesting its damages were below the threshold. See *St. Paul Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 285 (1938).

⁶² See, e.g., *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998–99 (9th Cir. 2007) (“[I]t is well established that the plaintiff is ‘master of her complaint’ and can plead to avoid federal jurisdiction.”).

⁶³ See, e.g., *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995) (“Such manipulation is surely categorized as bad faith.”).

⁶⁴ *Id.*

⁶⁵ *Id.* at 1406.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1408 (“Indeed, strictly speaking, plaintiffs have not alleged a specific amount of damages, as the amount they claim can range from \$1 to \$50,000. We will treat the claim, however, as one for a specific amount of damages.”).

⁶⁸ *Id.* at 1411–12 (choosing preponderance standard after rejecting both more stringent standard that would better protect plaintiff's choice of forum and more permissive standard that would better protect defendant against manipulative pleading).

under CAFA?⁶⁹ The Senate Report explicitly said that plaintiffs should have the burden of demonstrating that removal was improper⁷⁰—countering *McNutt*'s clear holding that the party asserting federal jurisdiction must bear this burden.⁷¹ At first, several district courts accepted this legislative history at face value,⁷² but every appellate court that has addressed the issue has dismissed the Senate Report statement as insufficient to alter the longstanding burden of persuasion on the removing defendant.⁷³

The decisive distinction between the default rules pertaining to the *burden* of proof and the *standard* of proof, respectively, is the entrenchment of a dominant rule for the former and the absence of one for the latter. While the Supreme Court clearly had placed the burden of proof on the party attempting to demonstrate federal jurisdiction prior to CAFA, the standard of proof that had emerged from *McNutt* and *Red Cab* remained far from settled.⁷⁴

Given this lurking uncertainty, it is indeed appropriate to look to CAFA's legislative history for guidance.⁷⁵ However, in the recently decided *Allapattah* case, which centered on the interpretation of

⁶⁹ For a thorough analysis of this issue, see generally Jeffrey L. Roether, Note, *Interpreting Congressional Silence: CAFA's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings*, 75 *FORDHAM L. REV.* 2745 (2007) (advocating use of traditional rule despite contrary statements in CAFA's legislative history).

⁷⁰ S. REP. NO. 109-14, at 42 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 40.

⁷¹ *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

⁷² See, e.g., *Berry v. Am. Express Publ'g, Corp.*, 381 F. Supp. 2d 1118, 1122–23 (C.D. Cal. 2005) (rejecting argument that because Congress did not include committee statements in statute they should not have interpretive weight).

⁷³ The Seventh Circuit was the first circuit to repudiate this use of legislative history. See *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (“To change such a rule, Congress must enact a statute with the President’s signature (or by a two-thirds majority to override a veto). A declaration by 13 Senators will not serve.”). The others have followed the Seventh Circuit’s lead. See *Amoche v. Guar. Trust Life Ins. Co.*, No. 08-2094, 2009 WL 350898, at *6 (1st Cir. Feb. 13, 2009); *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 297 (4th Cir. 2008); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006); *Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328 (11th Cir. 2006); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006) (per curiam).

⁷⁴ See *supra* notes 56–68 and accompanying text.

⁷⁵ The Court has given varying statements about when the use of legislative history is appropriate, but it has never foreclosed use of this tool. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (noting that extrinsic material may be used to resolve statutory ambiguity but warning against risks posed by legislative history). The Eleventh Circuit turned to legislative history to guide its interpretation of CAFA's “mass action” provision, 28 U.S.C. § 1332(d)(11) (2006). *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1205–07 (11th Cir. 2007) (looking to Senate Report as evidence of congressional intent).

another poorly worded jurisdictional statute—28 U.S.C. § 1367⁷⁶—the Supreme Court discussed two potential problems with the use of legislative history. The first is that such sources of congressional intent are “often murky, ambiguous, and contradictory.”⁷⁷ As discussed in Part I, however, the Senate Report recommending the passage of CAFA repeatedly referred to federalism concerns as motivating the statute—even in its early iterations.⁷⁸

The second *Allapattah* problem poses a greater hurdle for invoking legislative history to help resolve the standard-of-proof problem. The Supreme Court was wary of allowing a committee member, a staffer, or even a lobbyist to achieve a result for which Congress did not vote.⁷⁹ Such an attempt at rewriting longstanding precedent is found in CAFA’s legislative history: When there is uncertainty about the proper amount in controversy, the Senate Report claims that “the court should err in favor of exercising jurisdiction over the case.”⁸⁰ Because this is a transparent attempt to rewrite longstanding precedent through legislative history, courts should not consider this statement when interpreting the statute. However, the statements invoking federalism concerns, which resulted from a perception that state courts were unjustly certifying nationwide class actions, are a legitimate explanation of why a rational legislator would have voted in favor of CAFA.⁸¹ Thus, if we give legislators the benefit of the doubt that they did not repeatedly fabricate their desire to preserve a balance between federal and state courts,⁸² a purposivist method of interpretation could look to this underlying motivation as a

⁷⁶ 28 U.S.C. § 1367 (2006) allows a federal court to exercise supplemental jurisdiction over claims without an independent basis of federal jurisdiction so long as a “related” claim in the action meets the jurisdictional requirement.

⁷⁷ *Allapattah*, 545 U.S. at 568.

⁷⁸ See *supra* notes 35–36 and accompanying text.

⁷⁹ *Allapattah*, 545 U.S. at 568.

⁸⁰ S. REP. NO. 109-14, at 42 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 40.

⁸¹ Cf. Burbank, *supra* note 38, at 1446 (“[I]t was not unreasonable for Congress to assert a federal interest in regulating the process by which, and the forums in which, nationwide and multistate . . . class action decisions are made.”).

⁸² Several time-honored canons of statutory construction depend on a presumption that Congress acts reasonably. For example, the rule against surplusage presumes that Congress intends to give every aspect of a statute meaning. See, e.g., *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882) (“It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”). Another tool of statutory interpretation that serves this purpose is interpreting a statute to avoid constitutional questions; this “savings construction” presumes that members of Congress do not violate their oath to uphold the Constitution by passing unconstitutional laws. See, e.g., 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:11 (7th ed. 2007) (“It is presumed that the legislature acted with integrity and with an honest purpose to keep within constitutional limits.”).

pivotal source for guiding interpretation of the statute.⁸³ Courts should thus use this congressional intent to help formulate a manageable standard.

C. Deciphering the Proper Standard of Proof in CAFA Cases

I. Scenario I: The Absent Ad Damnum Clause

In this Section, I contend that courts have erroneously turned to a two-part burden-shifting standard in an attempt to reconcile *McNutt* and *Red Cab* in Scenario I cases. Courts should instead require the defendant to meet a preponderance of the evidence standard, which is consistent with both precedent and congressional intent.

Thus far, no circuit explicitly has delineated different standards of proof for CAFA and non-CAFA cases.⁸⁴ However, several circuits have taken the opportunity to clarify their standard of proof since CAFA's enactment. For example, the Seventh Circuit recently corrected what it considered an error in its standard of proof in Scenario I cases; the previous requirement, that a defendant show jurisdiction exists by a "reasonable probability," had arisen, according to the court, due to a mischaracterization of the preponderance of the evidence standard, which it unequivocally reinstated.⁸⁵ If the defendant

⁸³ Henry Hart and Albert Sacks, who proffered the "canonical statement of purposivism," John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 86 (2006), contend that legislative history should be one of the sources used to infer Congress's purpose. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1379 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (conditioning use of legislative history on fact that it is "examined for the light it throws on *general purpose*" and does not "contradict a purpose otherwise indicated"). Then, a court should interpret the statute as best it can to effectuate this purpose. *Id.* at 1374.

⁸⁴ The First Circuit could be headed in this direction after its recent decision in *Amoche v. Guarantee Trust Life Insurance Co.*, No. 08-2094, 2009 WL 350898 (1st Cir. Feb. 13, 2009). In *Amoche*, the court "address[ed] for the first time the burden on a removing defendant to establish the amount in controversy under CAFA," *id.* at *1, concluding that a removing defendant must show, to a "reasonable probability," that the amount in controversy exceeds \$5 million. *Id.* at *7. Somewhat puzzlingly, the court never mentioned that it had addressed a similar standard-of-proof issue in the non-CAFA context, in which it formulated the following test: "Once challenged, . . . the party seeking to invoke jurisdiction has the burden of alleging with sufficient particularity facts indicating that it is *not a legal certainty that the claim involves less than the jurisdictional amount.*" *Dep't of Recreation & Sports of P.R. v. World Boxing Ass'n*, 942 F.2d 84, 88 (1st Cir. 1991) (emphasis added). *Department of Recreation* is potentially distinguishable from *Amoche* because the plaintiff in *Department of Recreation* filed its complaint in federal court, *id.* at 87, not in state court. Nonetheless, the fact that the court in *Amoche* did not even refer to this—or any other—non-CAFA case law suggests that the "reasonable probability" standard might be confined to CAFA cases.

⁸⁵ *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 541–43 (7th Cir. 2006) (explaining that district courts mistakenly changed standards due to use of phrase "reasonable probability" in *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366–67 & n.2 (7th Cir. 1993)).

succeeds in removing the case, the plaintiff must then demonstrate that it is legally certain that she cannot recover the jurisdictional amount in order to remand the case to state court.⁸⁶ The Third Circuit also uses this two-part standard in Scenario I cases.⁸⁷

Although several courts have applied this dual standard in their opinions⁸⁸—with the preponderance of the evidence standard referring to factual disputes and the legal certainty standard referring only to the pleading itself⁸⁹—it is understandably difficult, if not impossible, to utilize in practice. Take, for example, a class action brought by insureds in state court against a personal-injury insurer. The plaintiffs allege that the insurer unlawfully sought reimbursement payments from them “even though [they] had not been made whole by a third party tortfeasor.”⁹⁰ The complaint does not specify an amount of damages, but the defendant insurer nonetheless removes the case to federal court. After the named plaintiff moves to remand, the defendant insurer presents an affidavit from its chief financial officer claiming that it recovered greater than \$5 million in reimbursement payments from insureds during the relevant time period. The named plaintiff deems this assertion insufficient.

The court then has two options. It can reject this “jurisdictional fact” as inconclusive because the class may be smaller than all of the individuals who reimbursed the insurance company during this time.⁹¹ Under this approach, the defendant presumably would fail to meet its burden of demonstrating jurisdictional facts by a preponderance of the evidence. On the other hand, the court can accept the defendant’s argument and conclude that the affidavit shows that the class’s claims exceed \$5 million in the aggregate. If the court makes this factual finding, how can the plaintiff subsequently demonstrate that it is legally certain that the judgment will be below \$5 million?

⁸⁶ *Id.* at 541, 543; *see also* *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008) (“Once the proponent of federal jurisdiction has explained plausibly how the stakes exceed \$5 million, then the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much.” (citation omitted)).

⁸⁷ *Frederico v. Home Depot*, 507 F.3d 188, 196–97 (3d Cir. 2007). But the Third Circuit follows the “inverted legal certainty” standard in Scenario II cases. *See infra* notes 96–99 and accompanying text.

⁸⁸ *See, e.g.*, *Miller v. CEVA Logistics, No. 07-0644*, 2008 WL 130847, at *1–2 (W.D. Mo. Jan. 10, 2008) (describing standard in non-CAFA case and finding that, after removing defendant demonstrated jurisdiction by preponderance of evidence, plaintiff did not meet legal certainty standard).

⁸⁹ *See supra* note 86.

⁹⁰ This scenario is based on *Myrick v. Nationwide Mutual Insurance Co.*, No. C07-1778, 2008 WL 53183, at *1 (W.D. Wash. Jan. 3, 2008).

⁹¹ The court in *Myrick* took this route. *See id.* at *2.

The Seventh Circuit indicated, albeit in dicta, that a class of plaintiffs could meet this seemingly insurmountable burden by capping the recovery in its complaint.⁹² Such a cap would seem to foreclose the defendant from demonstrating that the amount in controversy exceeds \$5 million by a preponderance of the evidence. But this result would make this situation functionally a Scenario II case. For a pure Scenario I case, however, it appears that the judge's determination of the significance of the defendant's affidavit would be decisive.

Given the importance of the decision, courts should abandon this redundant two-step approach.⁹³ Instead, the best standard is to allow the defendant to prove that the plaintiff's complaint exceeds the \$5 million jurisdictional amount by a preponderance of the evidence. This will give defendants, at least in CAFA cases, a chance to show that the amount in controversy exceeds \$5 million without creating the difficult-to-follow, two-step approach proffered by the Seventh Circuit and others.

Moreover, this approach adheres to the Court's statement in *McNutt* that "the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence."⁹⁴ The legal certainty standard in *Red Cab*, meanwhile, is distinguishable since the stringency of the standard was derived from the principle of deference to the plaintiff's complaint.⁹⁵ It is impractical to carry the Court's reasoning in *Red Cab* to a situation in which the complaint is silent on the matter. Overall, in Scenario I cases a preponderance of the evidence standard with the burden of proof on the defendant is best suited to effectuate CAFA's federalism ideals while remaining consistent with the precedents of *McNutt* and *Red Cab*.

2. Scenario II: The Complaint Below \$5 Million

A preponderance of the evidence standard is also ideal in Scenario II cases—despite the need to defer to the amount stated in the plaintiff's complaint—because of the overriding need to accurately price plaintiffs' claims for purposes of settlement. Plaintiffs also

⁹² *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005). In *Brill*, Judge Easterbrook also mentioned the possibility that a plaintiff could forgo a particular type of damages (such as treble) in the complaint in order to limit the amount of damages sought. *Id.*

⁹³ See *supra* notes 85–87 and accompanying text.

⁹⁴ *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

⁹⁵ See *St. Paul Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89 (1938) (“[I]n cases brought in the federal court . . . the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.” (emphasis added) (footnotes omitted)).

would have the option of stipulating to cap their recovery and attaching exhibits to their complaint to substantiate their damages allegations. Such steps would help ensure that defendants cannot remove a case to federal court.

In Scenario II cases arising under CAFA, the Third Circuit has endorsed what some district judges have deemed the “inverted legal certainty” test:⁹⁶ If the plaintiff’s complaint “specifically avers that the amount sought is less than the jurisdictional minimum,” the *defendant* must show that it is legally certain that the plaintiff can recover the requisite amount.⁹⁷ Although the Third Circuit has not explicitly held that this test is applicable to § 1332(a) diversity cases as well, it has intimated as much.⁹⁸ The Ninth Circuit has adopted the Third Circuit’s test, at least in the CAFA context.⁹⁹

Normatively, there are two crucial policies that must be considered when devising a standard for Scenario II CAFA cases. First, it has been long understood that a plaintiff can avoid federal jurisdiction by undercutting the jurisdictional amount if she so desires.¹⁰⁰ Therefore, since Congress did not expressly alter this presumption with CAFA, some deference must be conceded to the amount stated in a plaintiff’s complaint. Second, Rule 54(c)¹⁰¹ and its state counterparts¹⁰²—instructing the trier of fact to award a plaintiff the relief to which she is entitled regardless of the amount stated in her complaint—invite concerns that a plaintiff could manipulatively plead below an aggregate amount of \$5 million and ultimately recover much more.

There are multiple ways of addressing the legitimate and recurring concern of manipulative pleading in these situations. One solution is simply to rely on state courts to police this type of pleading through their procedural equivalents to Rule 11.¹⁰³ Empirical

⁹⁶ *E.g.*, *Margulis v. Resort Rental, LLC*, No. 08-1719, 2008 WL 2775494, at *4 (D.N.J. July 14, 2008).

⁹⁷ *Frederico v. Home Depot*, 507 F.3d 188, 196–97 (3d Cir. 2007).

⁹⁸ *Cf. id.* at 193 (citing CAFA and non-CAFA cases interchangeably in discussing Third Circuit’s quantum-of-proof requirement).

⁹⁹ *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 999 (9th Cir. 2007). In *Guglielmino v. McKee Foods Corp.*, the Ninth Circuit did not say if *Lowdermilk*’s inverted legal certainty standard applies in non-CAFA cases. 506 F.3d 696, 699 n.3 (9th Cir. 2007).

¹⁰⁰ *See, e.g.*, *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995) (“Of course, if a plaintiff pleads damages less than the jurisdiction amount, he generally can bar a defendant from removal. Thus, in the typical diversity case, the plaintiff remains the master of his complaint.” (footnote omitted)).

¹⁰¹ FED. R. CIV. P. 54(c); *see also supra* note 61.

¹⁰² *E.g.*, ARK. R. CIV. P. 54(c).

¹⁰³ Rule 11 aims to prevent attorneys from including unsubstantiated assertions in their pleadings. FED. R. CIV. P. 11(b). States have adopted different iterations of Rule 11.

research, however, suggests that Rule 11 sanctions are imposed less frequently in state court than in federal court.¹⁰⁴ Furthermore, CAFA was intended to prevent state judges from making potentially dispositive determinations about interstate class actions, and a biased trial judge could just as easily deny a Rule 11 motion as approve a motion for class certification.¹⁰⁵

Another protection against manipulative pleading is the self-detering feature of CAFA's removal provision. In a non-CAFA diversity case, a defendant has up to one year after the commencement of an action to remove a case to federal court.¹⁰⁶ CAFA explicitly repudiates this time limit and permits a defendant to remove a case at any point if it becomes removable, that is, if a defendant can satisfy its burden of proving that jurisdiction exists.¹⁰⁷ This change purposely aimed to quash manipulative pleading by preventing a plaintiff from amending her complaint and increasing the amount of damages shortly after the one-year deadline had passed.¹⁰⁸

The Ninth Circuit, in fact, recently mentioned the possibility of placing a *higher* standard of proof on defendants in CAFA cases than in non-CAFA cases because CAFA defendants are protected against manipulative pleading by having the ability to remove the case at any point.¹⁰⁹ However, the need for a lower standard is highlighted by the fact that class actions often settle once a class is certified—making a

Compare GA. CODE ANN. § 9-11-11 (2006) (reflecting pre-1983 version of Rule 11), with PA. R. CIV. P. 1023.1 (paralleling much of current Rule 11).

¹⁰⁴ See Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313, 325–27 (1992) (noting that sanctions were imposed following twenty-nine percent of federal court requests but just eight percent of state court requests).

¹⁰⁵ One of the underlying motivations for CAFA was a perception that some state judges were dependent on plaintiffs' lawyers in order to ensure their reelection, which turned these fora into hostile environments for national defendants. See, e.g., 151 CONG. REC. S1180 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch) (quoting notorious plaintiffs' lawyer Dickie Scruggs's statement that "magic jurisdictions . . . [are] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected").

¹⁰⁶ 28 U.S.C. § 1446(b) (2006). This time limit was added to the removal statute in order to "reduc[e] the opportunity for removal after substantial progress has been made in state court." H.R. REP. NO. 100-889, at 72 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 6032.

¹⁰⁷ 28 U.S.C. § 1453(b) (2006) ("A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply) . . .").

¹⁰⁸ See S. REP. NO. 109-14, at 50 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 47 ("By allowing class actions to be removed at any time when changes are made to the pleadings that bring the case within section 1332(d)'s requirements for federal jurisdiction, this provision will ensure that such fraudulent pleading practices can no longer be used to thwart federal jurisdiction.").

¹⁰⁹ See *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699 n.3 (9th Cir. 2007) (noting defendant's argument that inverted legal certainty standard of *Lowdermilk v. U.S. Bank*

prompt removal to federal court essential for defendants.¹¹⁰ Indeed, the Senate Report recognized settlement pressure as a driving force behind CAFA, claiming that “the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys’ fees have led to the filing of many frivolous class actions.”¹¹¹ The preponderance of the evidence standard best strikes the balance of adding an additional layer of security to combat manipulative pleading and settlement pressure while still providing the necessary deference to the plaintiff’s complaint.

Like in Scenario I, this approach adheres to the Supreme Court’s rule in *McNutt* that a party asserting jurisdiction must “justify his allegations by a preponderance of evidence.”¹¹² *Red Cab* is more difficult to reconcile for Scenario II cases, however, since it hinged on the principle of deference to the plaintiff’s complaint in the context of original jurisdiction.¹¹³ But in *Red Cab*, the Court could have expanded the legal certainty standard into the removal context and, tellingly, did not do so. Instead, the Court simply noted, “Of course, if, upon the face of the complaint, it is *obvious* that the suit cannot involve the necessary amount, removal will be futile and remand will follow.”¹¹⁴ But given that now, unlike in 1938, many states have followed Federal Rule 54(c)’s guidance by not restricting the plaintiffs’ recovery to the amount stated in the *ad damnum* clause, does the assertion of a claim for “less than \$5 million in the aggregate” make it obvious that plaintiffs cannot recover more? The fact that attorneys’ fees and punitive damages can be included in the aggregated amount in controversy further decreases the likelihood that the *ad damnum* clause accurately indicates the relief that a court would grant if plaintiffs prevailed at trial.¹¹⁵

Nat’l Ass’n, 479 F.3d 994, 999 (9th Cir. 2007), only applies in CAFA cases due to lack of removal time limit). The court did not resolve the question.

¹¹⁰ See, e.g., Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 172 (2009) (emphasizing importance of class certification as “last judicial checkpoint before the switch from litigation to serious settlement negotiation”).

¹¹¹ S. REP. NO. 109-14, at 21 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21.

¹¹² *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

¹¹³ See *supra* note 95 and accompanying text.

¹¹⁴ *St. Paul Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291–92 (1938) (emphasis added).

¹¹⁵ This interpretation of *Red Cab* would eliminate the case’s applicability to the removal context when the state court’s procedural rules allow a plaintiff to recover more than the amount stated in the complaint. Another way of distinguishing *Red Cab* would be to explicitly limit its statement concerning legal certainty to the original jurisdiction context. Cf. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 402 (9th Cir. 1996) (limiting *Red Cab* to cases of original jurisdiction and those brought in state court where plaintiff pleads above amount-in-controversy minimum).

Given these concerns, a preponderance of the evidence standard with the burden on the defendant is necessary to parry plaintiffs' manipulative pleading in CAFA-removed cases. Nonetheless, the longstanding deference to the plaintiff as master of her complaint continues to loom as an obstacle to this seemingly generous standard for defendants. But such a standard is far from fatal to the plaintiff's choice of forum. If a plaintiff fears that the defendant will have strong enough evidence of the actual amount in controversy—through, for example, admissions in court, settlement demands, or calculations based on the complaint's allegations¹¹⁶—to overpower her claim for relief and push for removal, she can attach an exhibit to her initial complaint supporting her contention.¹¹⁷ Should the plaintiff want to go further, she could stipulate that the class will not accept more than \$5 million in total recovery.¹¹⁸ Presuming that such a declaration would be constitutionally valid,¹¹⁹ this would make it impossible for a defendant to demonstrate, by any standard of proof, that the amount in controversy topped the \$5 million threshold.

D. *What Evidence Should Courts Review?*

Thus far, I have demonstrated why a preponderance of the evidence standard is best suited to counter manipulative pleading and implement Congress's vision of federalism. But such a standard will do little good if defendants are not given a legitimate opportunity to meet this burden. This Section argues that allowing courts to conduct

¹¹⁶ The Seventh Circuit enumerated these and other options as possible methods for the defendant to demonstrate what the plaintiff can recover. *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 541–42 (7th Cir. 2006); *see also infra* Part II.D (discussing post-removal discovery).

¹¹⁷ Rule 10(c) permits “[a] copy of any written instrument which is an exhibit to a pleading” to be considered part of the pleading. FED. R. CIV. P. 10(c). Many states allow the same. *E.g.*, N.Y. C.P.L.R. 3014 (McKinney 1991) (“A copy of any writing which is attached to a pleading is part thereof for all purposes.”).

¹¹⁸ In one recent case, in which the plaintiffs declined to make such a stipulation, the court found this omission noteworthy in holding that the defendants satisfied their burden of demonstrating that the amount in controversy exceeded \$5 million. *See McLoughlin v. People's United Bank, Inc.*, 586 F. Supp. 2d 70, 73–74 (D. Conn. 2008) (“Notably, Plaintiffs do not state that their damages are less than \$5,000,000. While the defendant banks have the burden of proof on this issue, they have submitted evidence that damages exceed \$5,000,000 . . .”).

¹¹⁹ One possible concern about a self-imposed cap on damages in the class action setting is the uncertainty about the number of plaintiffs that ultimately will receive relief. *See* Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 120–21 & n.205 (2007) (raising issue, but noting that courts deal with analogous problem in context of fixed-ceiling settlement agreements).

post-removal discovery and consider what some courts have termed “speculative” evidence can help solve this problem.

The Eleventh Circuit unnecessarily limited defendants’ ability to remove Scenario I and Scenario II cases in *Lowery v. Alabama Power Co.*¹²⁰ *Lowery* dealt with an allegation by residents of an Alabama county that the defendants had tortiously discharged particles and gases into the air and water supply.¹²¹ The plaintiffs’ complaint, as amended, fell into Scenario I, though it did assert that the damages exceeded the *state court* amount-in-controversy minimum of \$3000.¹²²

One of the defendants then removed the case to federal court and asserted that the \$5 million aggregate amount requirement was met despite the absence of an *ad damnum* clause.¹²³ The court dutifully applied the preponderance of the evidence standard to comport with circuit precedent, but it questioned the standard’s applicability to a removal case like this where there was no evidence to weigh.¹²⁴ The panel saved its strongest language for a footnote:

We think it highly questionable whether a defendant could ever file a notice of removal on diversity grounds in a case such as the one before us—where the defendant, the party with the burden of proof, has only bare pleadings containing unspecified damages on which to base its notice—without seriously testing the limits of compliance with Rule 11.¹²⁵

This approach threatens to place an impenetrable bar on the door leading to federal jurisdiction over class actions despite the seemingly forgiving preponderance standard utilized by the court.¹²⁶

¹²⁰ 483 F.3d 1184 (11th Cir. 2007).

¹²¹ *Id.* at 1187–88.

¹²² *See id.* at 1188 & n.6.

¹²³ *Id.* at 1188–89.

¹²⁴ *Id.* at 1210.

¹²⁵ *Id.* at 1213 n.63.

¹²⁶ The court noted that its preponderance of the evidence standard, solely based on the pleadings, is more akin to a tougher standard for the defendant, such as the inverted legal certainty standard. *Id.* at 1211 & n.59. Concededly, the *Lowery* court correctly judged the defendant’s evidence as insufficient. The defendant had contended that each plaintiff’s damages would have to average just \$12,500 in order to aggregate to \$5 million; however, the defendant failed to explain why each plaintiff’s damages would exceed this figure and heavily relied on the “general evidence” of jury verdicts from supposedly similar tort claims in Alabama. *Id.* at 1220–21. Courts are split on the probative value of awards in similar cases. *Compare, e.g.,* *Schlessinger v. Salimes*, 100 F.3d 519, 522 (7th Cir. 1996) (“Runaway juries occasionally return mammoth verdicts; this interesting social phenomenon does not effectively abolish the jurisdictional minimum in diversity litigation, as *Schlessinger* seems to believe.”), *with* *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005) (approving of district court’s consideration of damage awards in similar cases as helpful in determining amount in controversy).

The *Lowery* court's resistance to looking beyond the pleadings is not the best method of effectuating Congress's goal of placing class actions of national importance in federal courts. After all, in many states a named plaintiff can file a class action complaint in her local state court without even stating a specific amount of demanded relief.¹²⁷

There are multiple possible cures to this problem, none of which are mutually exclusive. One, which the Eleventh Circuit flatly rejected in *Lowery*,¹²⁸ allows the parties to conduct post-removal discovery in order for the district court to adjudicate the amount in controversy. This approach can be sensible—particularly in a tort case like *Lowery* where the defendant may be relegated to educated guesswork on the amount of damages suffered by countless plaintiffs.¹²⁹

Another option entails a more receptive attitude toward a defendant's attempt to decipher the amount in controversy, as recently evidenced by the Third Circuit in *Frederico v. Home Depot*.¹³⁰ In *Frederico*, like *Lowery*, the complaint omitted any prayer for relief, and the defendant removed the case. However, the appellate court—after raising the jurisdictional issue sua sponte—calculated the named plaintiff's compensatory damages at \$287.14. It then considered the possibility that each plaintiff could receive up to five times that amount in punitive damages. Attorney's fees also could add an additional thirty percent to the judgment.¹³¹ This boosted the named plaintiff's damages to \$2239.69, and, presuming that her injury was typical of the class, this would suggest that only a class size of approximately 2250 members would be needed to meet the \$5 million requirement—well under the “‘tens of hundreds of thousands’ of class members” specified in the complaint.¹³²

¹²⁷ See *supra* note 57.

¹²⁸ See *Lowery*, 483 F.3d at 1218 (“Post-removal discovery disrupts the careful assignment of burdens and the delicate balance struck by the underlying rules. . . . Doing so impermissibly lightens the defendant's burden of establishing jurisdiction.”).

¹²⁹ In *Abrego Abrego v. Dow Chemical Co.*, the court of appeals determined that the district court's denial of the defendant's request for jurisdictional discovery was not an abuse of discretion. 443 F.3d 676, 690–92 (9th Cir. 2006). However, the court suggested that the district court *could* have permitted discovery by noting that “[a]n appellate court will not interfere with the trial court's refusal to grant [jurisdictional] discovery except upon the clearest showing that the dismissal resulted in actual and substantial prejudice to the litigant.” *Id.* at 691 (alteration in original) (quoting *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430–31 n.24 (9th Cir. 1977)).

¹³⁰ 507 F.3d 188 (3d Cir. 2007); see also *Goddard v. Google Inc.*, No. C 08-2738, 2008 WL 4542792, at *2 (N.D. Cal. Oct. 10, 2008) (using “reasonable inference” to hold that defendant met preponderance standard).

¹³¹ *Frederico*, 507 F.3d at 198–99 & n.8.

¹³² *Id.* at 199.

Following in the footsteps of the Third Circuit in *Frederico*, courts should seriously consider what the *Lowery* court might call “speculative”¹³³ facts in order to prevent manipulative pleading from thwarting CAFA’s federalism ideals.¹³⁴ Although the *Lowery* court indicated it would permit a defendant to rely on a contractual provision to determine expectation damages,¹³⁵ its holding appears to foreclose defendants from making a legitimate attempt to extrapolate the true amount in controversy in many cases.

In one post-*Lowery* district court case, for example, the judge rejected calculations similar to those performed in *Frederico* as “impermissible speculation.”¹³⁶ Ironically, the defendant’s name in that case—Ark-La-Tex Financial Services, LLC—makes it reasonable to assume that the plaintiffs’ allegation extended to, at the very least, conduct taking place in Arkansas, Louisiana, and Texas. Using the amount in controversy as an unforgiving screening mechanism could leave cases like this—with a potentially significant effect on commerce in the national market—languishing in state courts, precisely the problem that Congress aimed to remedy when it passed CAFA.

¹³³ See *Lowery*, 483 F.3d at 1211 (“[A]ny attempt to engage in a preponderance of the evidence assessment at this juncture would necessarily amount to unabashed guesswork, and such speculation is frowned upon.” (citing *Lindsey v. Ala. Tel. Co.*, 576 F.2d 593, 595 (5th Cir. 1978))). In contrast with *Lowery*, see *Amoche v. Guar. Trust Life Ins. Co.*, No. 08-2094, 2009 WL 350898, at *8 (1st Cir. Feb. 13, 2009) (“Merely labeling the defendant’s showing as ‘speculative’ without discrediting the facts upon which it rests is insufficient.”).

¹³⁴ Congress’s distaste for manipulative pleading surfaced in the text of CAFA along with the legislative history: A judge applying the discretionary home state exception must consider “whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction.” 28 U.S.C. § 1332(d)(3)(C) (2006).

¹³⁵ *Lowery*, 483 F.3d at 1214 n.66.

¹³⁶ See *Cleveland v. Ark-La-Tex Fin. Servs., LLC*, No. 07-0444, 2007 WL 2460753, at *4 (S.D. Ala. Aug. 24, 2007) (“To reach such a conclusion, we would necessarily need to engage in impermissible speculation—evaluating without the benefit of any evidence the value of individual claims.” (quoting *Lowery*, 483 F.3d at 1220)). In *Cleveland*, the plaintiffs alleged that defendants violated the Telephone Consumer Protection Act, which allows statutory damages of \$500 for each violation. See 47 U.S.C. § 227(b)(3) (2000). The statutory damages can be trebled if the defendant “willfully or knowingly” violates the Act, *id.*, and the plaintiffs suggested that treble damages could apply to their claims, *Cleveland*, 2007 WL 2460753, at *3. Furthermore, the two named plaintiffs claimed a total of three violations. See *id.* (noting receipt of “a total of three faxes”). Thus, the two named plaintiffs together were alleging an average of \$2250 per person in damages, which would require a class size of 2223 plaintiffs to reach the \$5 million threshold if the named parties’ claims were typical of the class as required by Rule 23(a)(3). See FED. R. CIV. P. 23(a)(3). The plaintiffs alleged that the class numbered in the “thousands of persons.” *Cleveland*, 2007 WL 2460753, at *3. Whether this was sufficient evidence for a defendant to meet its preponderance of the evidence standard is open to debate. However, it deserved closer scrutiny by the court than *Lowery* appears to permit.

Although the statutory text does not support resolving all doubts in favor of accepting jurisdiction,¹³⁷ CAFA does counsel that defendants should have a legitimate opportunity to demonstrate a case's significance when faced with an ambiguous complaint. Allowing defendants to meet the amount-in-controversy requirement by a preponderance of the evidence is a workable approach only if defendants can introduce additional facts and make reasonable calculations to help them meet their burden.

A consequence of using the preponderance of the evidence standard is that it allows the amount in controversy to serve as a deferential screening mechanism. By not allowing manipulative pleading to obscure the fact that a class action is potentially significant, a federal court subsequently can evaluate whether a case is locally or nationally centered by examining CAFA's home state and local controversy exceptions. Proper application of these exceptions should promote the type of judicial federalism that Congress intended.

III

THE NEED TO PERMIT A RESIDENCE-TO-DOMICILE PRESUMPTION FOR THE PURPOSES OF CAFA'S FEDERALISM EXCEPTIONS

This Part argues that the citizenship requirement in CAFA's federalism exceptions requires a different judicial approach than that employed in individual actions. Recent case law, specifically two class actions brought by hospital patients alleging inadequate care in the wake of Hurricane Katrina, highlights the need for a presumption that class members' state of residence is their state of domicile for determining citizenship in CAFA cases. Such an approach, when combined with the preponderance of the evidence standard for the amount in controversy discussed in Part II, can best effectuate Congress's goal of achieving "balanced diversity" for class actions.

A. *The Pre-CAFA Standard for Determining Citizenship*

Just as federal courts have had to assess the amount in controversy since 1789, they have also had to deal with the equally thorny problem of determining each party's citizenship in order to ascertain whether diversity is present. The Constitution extends the judicial power to "all Cases . . . between Citizens of different States,"¹³⁸ and Congress quickly passed a statute enabling the federal courts to hear

¹³⁷ The legislative history, however, suggests that an interpretation of the statute should be guided by principles of federalism. See *supra* notes 75–83 and accompanying text.

¹³⁸ U.S. CONST. art. III, § 2.

diversity cases.¹³⁹ The now-famous *Strawbridge v. Curtiss* case interpreted the statutory diversity grant to require complete diversity, whereby all plaintiffs must be diverse from all defendants.¹⁴⁰ But the rule of complete diversity did not resolve what exactly state citizenship entailed, or by what criteria courts could make this determination. Courts ultimately decided that one's citizenship is equivalent to one's domicile,¹⁴¹ a legal term taken from conflict-of-laws doctrine signifying the place where an individual both resides and intends to remain.¹⁴² Because a determination of domicile can involve an evaluation of myriad pieces of information,¹⁴³ many courts have established presumptions based on factors like residence¹⁴⁴ and voting registration.¹⁴⁵

Comparatively little litigation addressed the standard of proof for diversity of citizenship prior to CAFA. The courts that did confront the issue tended to place the burden of persuasion on whether diversity existed on the proponent of federal jurisdiction, in line with *McNutt*.¹⁴⁶ A more complicated evidentiary issue arose when one party alleged a *change* in domicile.¹⁴⁷ Nonetheless, the difficult issue of determining citizenship in CAFA cases is distinct from these two concerns. CAFA's requirement that plaintiff's counsel inquire into the citizenship of *each* individual class member is a far more onerous burden than merely determining the citizenship of the named parties.

¹³⁹ Judiciary Act of 1789, ch. 20, §§ 11–12, 1 Stat. 73, 78–80.

¹⁴⁰ 7 U.S. (3 Cranch) 267, 267 (1806).

¹⁴¹ 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3611 (2d ed. 1984 & Supp. 2008).

¹⁴² *Id.* § 3612.

¹⁴³ These can include “current residence; voting registration and voting practices; location of personal and real property; location of brokerage and bank accounts; membership in unions, fraternal organizations, churches, clubs, and other associations; place of employment or business; driver's license and automobile registration; payment of taxes; as well as several others.” *Id.*

¹⁴⁴ *See, e.g.*, *District of Columbia v. Murphy*, 314 U.S. 441, 455 (1941) (“The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary.”).

¹⁴⁵ *See, e.g.*, *Messick v. S. Pa. Bus. Co.*, 59 F. Supp. 799, 801 (E.D. Pa. 1945) (“Voting raises a presumption that the voter is a citizen of the state in which he votes.”).

¹⁴⁶ *See Herrick Co. v. SCS Commc'ns, Inc.*, 251 F.3d 315, 322–23 (2d Cir. 2001) (“[I]t is well established that [t]he party seeking to invoke jurisdiction under 28 U.S.C. § 1332 bears the burden of demonstrating that the grounds for diversity exist and that diversity is complete.” (second alteration in original) (quoting *Advani Enters., Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 160 (2d Cir. 1998))).

¹⁴⁷ *Compare Ad Hoc Comm. of Equity Holders of Tectonic Network, Inc. v. Wolford*, 554 F. Supp. 2d 538, 548 (D. Del. 2008) (using preponderance of evidence standard for party asserting change of domicile), *with Hakkila v. Consol. Edison Co. of N.Y.*, 745 F. Supp. 988, 990 (S.D.N.Y. 1990) (using “clear and convincing” standard instead).

B. Giving Potency to CAFA's Federalism Exceptions

Both the home state and local controversy exceptions were necessary additions to CAFA for an overarching political reason: They allowed the bill to finally receive the sixty votes needed to invoke cloture.¹⁴⁸ But normatively these exceptions also support the federalism motivations of the bill's supporters. After all, a conception of federalism that removes every high-value class action to federal court hardly preserves a federal-state balance. Thus, while courts should ensure that manipulative pleading does not stand in the way of federal jurisdiction over significant, interstate class actions,¹⁴⁹ they must also take care to effectively enforce the congressional directive that situates "local" controversies in state fora.¹⁵⁰

Compounding the fact that it is next to impossible in many situations for plaintiffs to prove all of the criteria necessary to meet the statutory exceptions,¹⁵¹ the requirement that most threatens to derail the exceptions' utility is that the plaintiff must prove that two-thirds of the "members of all proposed plaintiff classes in the aggregate" are citizens of the forum state.¹⁵² As noted above, in a typical diversity case, determining a party's citizenship requires consideration of numerous factors in order to ascertain the state in which the party intends to remain.¹⁵³

¹⁴⁸ A previous form of the bill that failed to pass in 2001, S. 1712, included a narrower exception that denied federal jurisdiction over minimal diversity class actions when "the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed." 147 CONG. REC. 22,743 (2001) (statement of Sen. Grassley). In October 2003, the bill failed to reach sixty votes. 149 CONG. REC. 32,406 (2003) (statement of Sen. Dodd) ("I joined with 40 of my colleagues in opposing the motion to proceed."). Congress then added the mandatory and discretionary home state exceptions—known as the Feinstein Compromise—though the bill, then numbered S. 1751, still failed to overcome a filibuster. 149 CONG. REC. 25,202 (2003) (statement of Sen. Hatch) ("The bill balances the State's interest in local disputes by providing that class actions filed in the home State of the primary defendants would remain in State court subject to a triple-tiered formula that looks at the composition of the plaintiffs' class membership."). Finally, three Democratic senators insisted that the local controversy exception, among other changes, be included in the bill in order to receive their support. 149 CONG. REC. 32,406–10 (2003) (statement of Sen. Dodd).

¹⁴⁹ See *supra* Part II.

¹⁵⁰ See S. REP. NO. 109-14, at 36–37 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 35 ("If [national] issues are not identified and the matter appears to be more of a local (or intra-state) controversy, that point would tip in favor of allowing a state court to handle the matter.").

¹⁵¹ See *supra* notes 23–30 and accompanying text.

¹⁵² 28 U.S.C. § 1332(d)(3)–(4) (2006). However, the discretionary home state exception does allow a district court, "in the interests of justice and looking at the totality of the circumstances," to decline jurisdiction if between one-third and two-thirds of the class members are citizens of the forum state and the other (d)(3) requirements are met. *Id.* § 1332(d)(3); see also *supra* note 25 and accompanying text.

¹⁵³ See *supra* notes 143–45 and accompanying text.

The appellate courts, at least thus far, have placed the burden of persuasion to show that the elements of the exceptions are met squarely on the plaintiffs.¹⁵⁴ Although it might be sensible to determine the citizenship of each plaintiff in an individual litigation, doing so for enough class members to prove that two-thirds are citizens of the forum state threatens to dramatically increase the cost of bringing a class action. At worst, these uncertainties could make the exceptions impossible to utilize.

Thus, courts need to delineate rules that give plaintiffs a realistic chance of showing that one of the exceptions is applicable.¹⁵⁵ A simple solution that has been proposed would require the plaintiffs to show that two-thirds of the class are merely *residents* of the forum state; this would then give rise to a rebuttable presumption that those class members also are citizens of that state.¹⁵⁶ But most courts thus far have rejected such a presumption in favor of a more *ad hoc* approach.¹⁵⁷

¹⁵⁴ See, e.g., *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1023–24 (9th Cir. 2007) (relying on fact that prior to CAFA, plaintiff had burden of demonstrating exception to jurisdiction (citing *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003))). But see Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409, 436–41 (2008) (arguing that exceptions should be treated as “nonwaivable rules of jurisdiction, whose inapplicability must be shown by the party desiring to litigate in the federal forum”).

¹⁵⁵ Professor Richard Marcus floats the possibility that courts had to perform an analogous inquiry under *Zahn* when they had to ensure that all class members’ claims exceeded the jurisdictional amount. See Marcus, *supra* note 15, at 1787 (“[T]he jurisdictional determinations that must be made are not entirely different from those that were required previously.”); *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 301 (1973) (“Each plaintiff in a . . . class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case . . .”); see also *supra* note 16. However, there is a crucial practical difference between the two queries: Post-*Zahn* and pre-CAFA, plaintiffs desiring to stay in state court had the easy fix of defining the class to include members with claims below the jurisdictional amount. They could also thwart removal jurisdiction by joining a named plaintiff who had the same citizenship as one of the defendants. These valid, strategic maneuvers prevented defendants from even attempting to remove many national-market class actions. By contrast, plaintiffs (or their attorneys) have a much more difficult time guaranteeing that the home state or local controversy exceptions will be met under CAFA, particularly given that they bear the burden of demonstrating that their case falls under the exceptions.

¹⁵⁶ See Shapiro, *supra* note 119, at 135 (“If there are unusual circumstances that would make the presumption inapplicable, then it should be up to defendant to prove this.”).

¹⁵⁷ But see *Ava Acupuncture P.C. v. State Farm Mut. Auto. Ins. Co.*, No. 08 Civ. 5650, 2008 WL 5170186, at *5 (S.D.N.Y. Dec. 9, 2008) (“Because the proposed class consists only of those who purchased insurance policies under New York’s No-Fault law (which is virtually only New York residents), two-thirds of the class members are very likely citizens of New York.”); *Kitson v. Bank of Edwardsville*, No. 06-528, 2006 WL 3392752, at *6–7 (S.D. Ill. Nov. 22, 2006) (“All that [the lead plaintiff] must show is that it is more likely than not that over two-thirds of the members of the class are Illinois citizens, and the Court believes he has met this burden [based on the class members’ mailing addresses].”).

Perhaps the most noteworthy cases in this respect are two Hurricane Katrina cases recently decided by the Fifth Circuit, which I will call *Touro* and *Tenet*.¹⁵⁸ Both cases, filed in Louisiana state courts against New Orleans hospitals, involved class actions by hospital patients alleging inadequate care when Katrina made landfall. The defendants subsequently removed the cases to federal court under CAFA, and the plaintiffs moved to remand, citing the local controversy exception. The issue was whether the evidence presented by the plaintiffs was sufficient to demonstrate that two-thirds of the class members were citizens of Louisiana at the time the action was filed.

In *Touro*, the plaintiffs attempted to rely solely on an affidavit from the defendant stating that 242 of the 299 patients in the hospital at the time of the hurricane had a “primary residence” in Louisiana.¹⁵⁹ The court dismissed the plaintiffs’ remand motion by emphasizing that domicile requires intent to remain in the state—refusing to eliminate this facet of the citizenship inquiry.¹⁶⁰ The court also rejected statistics suggesting that many Hurricane Katrina victims intended to return to New Orleans, viewing this evidence as lacking the specificity needed to demonstrate intent for the putative class.¹⁶¹

So what could the plaintiffs in *Touro* possibly have done to fulfill the intent requirement?¹⁶² In *Tenet*, the prescient plaintiffs submitted similar hospital data to that provided in *Touro*, but added eight affidavits of potential class members expressing their desire to eventually return to New Orleans.¹⁶³ Finding that this demonstrated the requisite intent, the court then applied the presumption of continuing dom-

¹⁵⁸ The Fifth Circuit consolidated the appeals in these two cases under the same caption. However, the court issued two separate opinions in the two cases. In order to distinguish the opinions, I will refer to each one by the first named hospital defendant. Thus, I will refer to one case as *Touro* (*Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc.*, 485 F.3d 793 (5th Cir. 2007)) and the other as *Tenet* (*Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc.*, 485 F.3d 804 (5th Cir. 2007)). It is worth noting that subsequent district court opinions have referred to the cases as *Preston I* and *Preston II*, although the courts have disagreed as to which case is which. Compare *Joseph v. Unitrin, Inc.*, No. 1:08-CV-077, 2008 WL 3822938, at *4 (E.D. Tex. Aug. 12, 2008) (referring to 485 F.3d 793 as *Preston I*), with *Bennett v. Bd. of Comm’rs for E. Jefferson Levee Dist.*, Nos. 07-3130, 07-3131, 2007 WL 2571942, at *3 (E.D. La. Aug. 31, 2007) (referring to 485 F.3d 804 as *Preston I*).

¹⁵⁹ See *Touro*, 485 F.3d at 798 (relying on mailing addresses).

¹⁶⁰ *Id.* at 801 (“In this case, with no evidence of intent provided by the movants, the district court could not make the requisite credible estimate necessary to remand under the local controversy exception.”).

¹⁶¹ *Id.* at 802.

¹⁶² Neither the *Touro* nor *Tenet* opinions mentioned the possibility of tracking down each class member, but doing so might have been feasible in a situation like this, where the class was relatively small and each plaintiff had a potentially significant claim. In large, negative-value class actions, however, this approach quickly becomes impossible.

¹⁶³ *Tenet*, 485 F.3d at 815.

icile and presumed that these plaintiffs were still Louisiana citizens at the time the suit was filed. The court then held that the defendants did not adequately rebut this presumption.¹⁶⁴

In these two cases, the Fifth Circuit tried to forge an approach based on “practicality and reasonableness”¹⁶⁵—presumably attempting to ensure that district judges have enough information to do more than speculate that the citizenship requirement is met. But such an open-ended standard provides little guidance to judges who need to make the crucial decision of whether to remand a class action. For example, a recent opinion, explicitly invoking a “common sense approach,” remanded another Hurricane Katrina-related case—distinguishing *Touro* and *Tenet* solely because the plaintiffs in question had resided in suburban Jefferson Parish and not in the harder-hit city of New Orleans.¹⁶⁶

The Eleventh Circuit also has not endorsed a residence-to-citizenship presumption for class members. In *Evans v. Walter Industries, Inc.*, the plaintiffs proposed a class consisting of property owners or lessees on whose land the defendants allegedly deposited various waste substances.¹⁶⁷ An attorney for the plaintiffs interviewed more than ten thousand potential class members and determined that, of the interviewees that met the class description, nearly ninety-five percent were Alabama residents. She then asked the court to presume that, given this percentage of residents, more than two-thirds of the class must have been Alabama citizens.¹⁶⁸

The court criticized the attorney’s sampling methods as unclear on several fronts.¹⁶⁹ Perhaps anticipating the rejoinder that the court

¹⁶⁴ *Id.* at 818–19.

¹⁶⁵ *Id.* at 816.

¹⁶⁶ See *Bennett v. Bd. of Comm’rs for E. Jefferson Levee Dist.*, Nos. 07-3130, 07-3131, 2007 WL 2571942, at *4–5 (E.D. La. Aug. 31, 2007) (inferring that “greater than two-thirds of the putative class members are citizens of Louisiana based on a common sense reading of the definition of the class in the complaint, the evidence offered by Plaintiffs, and the Court’s conclusion that no substantial diaspora from Jefferson Parish took place after Hurricane Katrina”). District courts outside of the Fifth Circuit have followed an approach similar to that in the Katrina cases. See, e.g., *Smalls v. Advance Am.*, No. 2:07-3240, 2008 WL 4177297, at *7 (D.S.C. Sept. 5, 2008) (“It is Plaintiff’s burden to show *citizenship* of the purported class members and he has failed to do so.”); *McMorris v. TJX Cos.*, 493 F. Supp. 2d 158, 163 (D. Mass. 2007) (citing *Touro* with approval); *Schwartz v. Comcast Corp.*, No. 05-2340, 2006 WL 487915, at *6 (E.D. Pa. Feb. 28, 2006) (“Absent evidence of any factor that bears on the class members’ intent to remain in Pennsylvania, I am unable to determine the domicile of plaintiff’s residential class members.”).

¹⁶⁷ 449 F.3d 1159, 1165–66 (11th Cir. 2006).

¹⁶⁸ *Id.* at 1166.

¹⁶⁹ See *id.* (noting that plaintiffs’ attorney’s affidavit failed to distinguish between property damage and personal injury classes and did not specify percentage of total class represented by sample).

was conceptualizing an infeasible approach in the class action setting, it stated: “We understand that evidence of class citizenship might be difficult to produce in this case. That difficulty, however, is to a considerable degree a function of the composition of the class designed by plaintiffs.”¹⁷⁰ However, the court gave no hint of how the plaintiffs could have designed their class in order to have had a chance to receive compensation for their alleged injuries. Ultimately, both the Katrina cases and *Evans* provide unsatisfying alternatives to a rebuttable presumption that residence equates to citizenship.

Notably, the residence-to-citizenship presumption had precedential support even prior to CAFA,¹⁷¹ and courts should turn to this line of precedent in order to effectuate the federalism ideals underlying CAFA. As the Katrina cases and *Evans* suggest, a more daunting standard for plaintiffs will leave just about any class action with minimal diversity and an amount in controversy exceeding \$5 million in federal court. Such an interpretation contravenes the intent of the Act¹⁷² and is in tension with the longstanding background norm, as articulated by Chief Justice Warren, that we must “assign[] to each system those cases most appropriate in the light of the basic principles of federalism.”¹⁷³ A rebuttable presumption gives plaintiffs a realistic opportunity to utilize these exceptions while still giving defendants a chance to demonstrate the inapplicability of the presumption in a particular situation. If the defendant could introduce evidence to the contrary, the presumption would “burst.” The plaintiffs would then bear the burden of producing evidence to demonstrate that one of the exceptions applied.¹⁷⁴

The effectiveness of the rebuttable presumption approach is apparent when examining both the Katrina cases and *Evans* under this framework. In both of the Katrina cases, even without interviewing individual class members, the defendants could have used census data to demonstrate that the population of Orleans Parish

¹⁷⁰ *Id.*

¹⁷¹ See *supra* note 144.

¹⁷² See S. REP. NO. 109-14, at 27 (2005), reprinted in 2005 U.S.C.A.N. 3, 27 (“[CAFA] includes a narrowly-tailored expansion of federal diversity jurisdiction to ensure that class actions that are truly interstate in character can be heard in federal court.”).

¹⁷³ ALL, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 1 (1969).

¹⁷⁴ The “bursting bubble” view of a presumption, which interprets Federal Rule of Evidence 301, is analyzed in *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 287–88 (3d Cir. 2006). It appears to be the majority rule. See *id.* at 288 (“This view of Rule 301 is widely accepted.”). But some scholars claim that the correct interpretation of the rule is that a presumption is still relevant even after evidence to the contrary is introduced. *E.g.*, 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5122.2 (2d ed. 2005).

plunged after Hurricane Katrina.¹⁷⁵ The judge would then have had to evaluate the probative value of this evidence. Given that 200 of the 299 class members in *Touro* resided in Orleans Parish prior to Hurricane Katrina,¹⁷⁶ this evidence would strongly suggest the inaccuracy of the normal presumption that a person's known residence at the time of the hurricane signals the state where, at the time of filing suit, she intends to remain.¹⁷⁷

As a result, the burden would then revert back to the plaintiffs, who could present affidavits from class members or other nongeneralized evidence demonstrating that two-thirds of the plaintiffs were still domiciled in Louisiana. This methodology better allows for large classes—where the cost of interviewing a significant percentage of class members would be prohibitively expensive—to take advantage of the exceptions' underlying purpose of allowing state tribunals to adjudicate class actions in which intrastate interests predominate.

Evans is also an appropriate example of the need for the residence-to-citizenship presumption. Given the fact that the class spanned nearly a century of aggrieved property owners, interviewing a representative sample of plaintiffs to determine their citizenship would be impractical.¹⁷⁸ Residence, on the other hand, could be extracted from sampling techniques. Although the plaintiffs' attorney's actual sample in *Evans* might not have included members comprising all subsets of the class,¹⁷⁹ if the sample had in fact been representative, the defendants should have had to rebut the presumption that residence was an effective proxy for domicile. Both the Katrina cases and *Evans* are situations where potentially strong local interests were at stake—the health and property interests of Louisiana and Alabama citizens, respectively. Although CAFA's federalism exceptions are narrow, they can allow cases like these to stay in state court. The judiciary has the responsibility to forge a reasonable stan-

¹⁷⁵ See *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc. (Touro)*, 485 F.3d 793, 802 (5th Cir. 2007).

¹⁷⁶ *Id.* at 798.

¹⁷⁷ Alternatively, this data might not rebut the residence-to-citizenship presumption but instead might rebut the presumption of continuing domicile. In *Tenet*, the court rejected the defendant's attempt to rebut this presumption, analogizing the hurricane to a forcible change in residence like imprisonment. See *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc. (Tenet)*, 485 F.3d 804, 818–19 (5th Cir. 2007) (“Since domicile is a voluntary status, a forcible change in a person's state of residence does not alter his domicile . . .” (quoting *Denlinger v. Brennan*, 87 F.3d 214, 216 (7th Cir. 1996))).

¹⁷⁸ See *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1165–66 (11th Cir. 2006).

¹⁷⁹ At oral argument, the plaintiffs' attorney who interviewed potential class members admitted that most of the interviewees had heard of the case through word of mouth. The court noted that “[p]otential plaintiffs outside of Anniston[, Alabama,] would seem to be under-represented in such a pool.” *Id.* at 1166 n.6.

dard so as to prevent the exceptions from being nonexistent, just as it has the responsibility to make it feasible for defendants to remove class actions to federal court if the amount in controversy is uncertain.

CONCLUSION

Federal judges must devise standards to allocate class actions between federal and state courts within the parameters of CAFA; doing so will effectuate Congress's goal of creating "balanced diversity" for class actions between state and federal courts. The standard that best addresses the legitimate concern of manipulative pleading is forcing defendants to prove that the amount in controversy exceeds \$5 million by a preponderance of the evidence. And with respect to the federalism exceptions, a residence-to-domicile presumption can help ensure that plaintiffs have a legitimate chance to remand locally centered class actions to state court.

Alternative formulations of these standards could create dramatic inefficiencies. Requiring defendants to prove the jurisdictional amount to a higher standard (such as a "legal certainty") would keep significant, national-market cases in state courts—potentially resulting in high verdicts (or, more likely, high settlements) that over-deter corporations for their wrongs and ultimately pass these unnecessary costs on to consumers. Furthermore, making the federalism exceptions nearly impossible to utilize would all but prevent state courts from adjudicating localized disputes—potentially stultifying the development of state law and preventing local values from influencing local cases.¹⁸⁰

My proposed standard also would lessen the need to amend CAFA. Without a doubt, the statute, like many legislative compromises, was not drafted devoid of ambiguity, and it could be clarified with amendments to several sections of the Act. However, given that it took eight painful years to pass a muddled class action bill,¹⁸¹ the judiciary would be better served if Congress stayed clear of the fray. If federal judges act within their permissible discretion and interpret CAFA's provisions sensibly, perhaps politicians on both sides of the aisle can live with the result.

¹⁸⁰ Cf. Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1682 (1992) ("Furthermore, a federal judge will necessarily approach a decision filling in the interstices in the state decisional law through the prism of the eyes of someone steeped in federal law.").

¹⁸¹ The first version of CAFA was introduced in 1997. S. 254, 105th Cong. (1997).