

Notes

VALUING INJUNCTIVE RELIEF UNDER THE CLASS ACTION FAIRNESS ACT

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ABSTRACT

Injunctive relief class actions afford victims of mass harms a chance to sue collectively and enjoin an actor’s conduct. While the moral value of these suits may be monumental for litigants, one procedural question remains murky: how should courts value the amount in controversy to determine whether the suit qualifies for federal diversity jurisdiction?

Historically, federal courts adopted one of two approaches. The “Plaintiff’s Viewpoint approach” values the amount in controversy strictly from any monetary benefit to the plaintiff(s). The “Either Viewpoint approach” values the amount in controversy as the higher of any monetary benefit to the plaintiff or the cost to the defendant of implementing the injunction. Naturally, the more inclusive Either Viewpoint approach tends to result in successful removal more often than the Plaintiff’s Viewpoint approach. For defendants, removal to federal court can be an incredible asset to a class action litigation.

In 2005, the Class Action Fairness Act (“CAFA”) effectively opened federal courts’ doors to a broader array of class action suits than federal diversity jurisdiction previously allowed. Despite this expansion, some federal district courts have continued to apply the more restrictive Plaintiff’s Viewpoint approach even in cases removed under CAFA. This Note argues that CAFA’s text, legislative history, and underlying policy concerns require using the Either Viewpoint approach uniformly in CAFA class actions and suggests a congressional amendment to require this approach.

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INTRODUCTION

Litigants in the United States wield a unique procedural technique for bringing suit on behalf of hundreds, thousands, and even millions of plaintiffs: the class action.¹ In injunctive relief class actions, injured plaintiffs can collectively sue to enjoin an actor's conduct. For example, in *Anderson v. SeaWorld Parks & Entertainment, Inc.*,² the plaintiffs sued on behalf of themselves and all other similarly situated SeaWorld patrons harmed by the park's "deceptive" assertion that it "cares for sea creatures, including Orcas."³ The plaintiffs did not seek any monetary damages for the class.⁴ Instead, they demanded that SeaWorld publish information on its website about the negative effects of captivity on orca health.⁵ Even though plaintiffs did not seek monetary damages, SeaWorld contended that implementing these measures would cost over \$5 million in lost ticket sales, retracted sponsorships, and tarnished reputation.⁶ In calculating the amount in controversy, a necessary condition to accessing federal diversity jurisdiction,⁷ should the court look to the plaintiffs' negligible monetary benefit from the injunction or the massive losses an injunction would impose on SeaWorld?⁸

1. See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 809 (1985) (describing the class action as unique to United States jurisprudence as allowing "litigation of a suit involving common questions when there are too many plaintiffs for proper joinder").

2. *Anderson v. SeaWorld Parks & Ent., Inc.*, 132 F. Supp. 3d 1156 (N.D. Cal. 2015).

3. *Id.* at 1159, 1167.

4. *Id.* at 1159. However, the named plaintiffs did seek monetary damages in their individual capacity. *Id.*

5. *Id.*

6. *Id.* at 1164; see also *SeaWorld's Opposition to Motion to Remand* at 12–14, *Anderson v. SeaWorld Parks & Ent., Inc.*, 132 F. Supp. 3d 1156 (N.D. Cal. 2015) (No. 3:15-CV-02172 SC) (arguing that implementing the proposed remedy on behalf of unnamed class members would cost SeaWorld an amount exceeding the \$5 million threshold).

7. While there may be other routes to federal jurisdiction in class actions, this Note will focus on CAFA and general diversity jurisdiction. The vast majority of class actions involve questions of state tort or contract law, leaving few opportunities to remove for questions of federal law. See FED. JUD. CTR., *IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS* 3 (2008), <https://www.fjc.gov/sites/default/files/2012/CAFA1108.pdf> [<https://perma.cc/8Z3F-34BJ>] (reporting that in cases removed under CAFA in its first three years, 65 percent were contract or consumer protection cases, 32 percent were torts cases, and 3 percent did not fall into either of those categories).

8. To qualify for federal jurisdiction under the Class Action Fairness Act of 2005, the amount in controversy must exceed \$5 million. 28 U.S.C. § 1332(d)(2). In cases like *SeaWorld* where the parties have drastically different monetary values attached to the outcome, this means

The distinction matters a great deal in class actions removed to federal court under the Class Action Fairness Act of 2005 (“CAFA”).⁹ CAFA encapsulates Congress’s response to state courts’ “abuse” of the class action mechanism exhibited in bias against out-of-state defendants and disposition of national-scale class actions in an individual state’s court.¹⁰ Specifically, the Senate Committee on the Judiciary noted that pre-CAFA class action rules allowed attorneys to “game the system” by organizing a putative class to avoid federal jurisdiction.¹¹ Plaintiffs (and perhaps more importantly, their attorneys) could thereby take advantage of state court judges known for certifying questionable classes and approving massive settlements.¹² This was perceived as “one of the most flagrant abuses” of the previous class action system, wherein attorneys could “invent an injured class and then file a national class action in a ‘magnet jurisdiction’ where the judges are more likely to lend a sympathetic ear.”¹³ Concern over state courts’ abuse of the class action mechanism figures prominently in CAFA’s text.¹⁴

If state courts were the problem, federal courts were the answer. Writ large, CAFA embodies congressional intent to expand federal jurisdiction over class actions by eliminating major obstacles to removal.¹⁵ Namely, CAFA grants federal jurisdiction over class actions with over one hundred class members,¹⁶ with at least one class member

that the method for valuing that amount in controversy can either permit or preclude federal jurisdiction.

9. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the U.S. Code).

10. *Id.* § 2(a)(4).

11. S. REP. NO. 109-14, at 10 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 5.

12. *Id.* at 20–21.

13. 150 CONG. REC. 14,512 (2004) (statement of Sen. Christopher J. Dodd).

14. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the U.S. Code). The Act explicitly names “State and local courts” as abusers of the system by keeping national cases out of federal court, demonstrating bias against out-of-state defendants, and wrongfully imposing their binding judgments upon residents of other states. *Id.* § 2(a)(4).

15. See Gregory P. Joseph, *Federal Class Action Jurisdiction After CAFA*, Exxon Mobil and Grable, 8 DEL. L. REV. 157, 158 (2006) (“The heart of CAFA is its expansion of federal diversity jurisdiction.”). Unsurprisingly, this change was not viewed as a universal good. CAFA’s opponents who favored plaintiffs disliked the expansion because federal judges were so much less likely than state court judges to certify a class. S. REP. NO. 108-123, at 75 (2003).

16. 28 U.S.C. § 1332(d)(5)(B).

of diverse citizenship from any defendant,¹⁷ and an aggregated amount in controversy exceeding \$5 million.¹⁸ This final provision signified a distinct departure from pre-CAFA amount-in-controversy requirements, which required at least one plaintiff to claim an amount exceeding \$75,000.¹⁹ Furthermore, U.S. Supreme Court precedent had previously barred aggregation of plaintiffs' claims to meet the amount in controversy in any class action.²⁰ On one hand, CAFA's claim aggregation expands federal jurisdiction over small claims class actions, which are classes having many members with such small claims that bringing suit individually would prove infeasible. Conversely, it creates a puzzling question of how courts should determine the aggregated amount in controversy in class actions demanding injunctive relief.

Before CAFA, federal courts split on their techniques for valuing the amount in controversy in class actions seeking injunctive relief.²¹ One group adopted the "Plaintiff's Viewpoint approach," which measures the amount in controversy strictly by the monetary benefit the plaintiffs would receive from the injunction.²² The other group adopted the "Either Viewpoint approach."²³ The Either Viewpoint

17. *Id.* § 1332(d)(2)(A). This provision is subject to further provisions allowing for discretionary or mandatory remand to state court if over one-third of class members are citizens of the forum state. *Id.* § 1332(d)(3). Judicial discretion depends on whether the number of in-state class members exceeds two-thirds of the total class. *Id.* § 1332(d)(4).

18. *Id.* § 1332(d)(2).

19. *See id.* § 1332(a) (requiring amount in controversy of \$75,000); *see also* *Snyder v. Harris*, 394 U.S. 332, 338 (1969) (granting supplemental jurisdiction over class actions but requiring at least one class member to meet the \$75,000 threshold).

20. *Snyder*, 394 U.S. at 338 (holding that Rule 23 does not permit class member plaintiffs to aggregate claims in meeting the amount-in-controversy threshold).

21. Technically, a third category values the injunctive relief from the viewpoint of the party invoking federal jurisdiction. Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1628 (2006). However, this group remains relatively obsolete and has been largely absorbed into the Plaintiff's Viewpoint approach. *See* *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 392–93 (7th Cir. 1979) (considering the merits of applying the viewpoint of the party invoking federal jurisdiction).

22. *See, e.g.,* *Ericsson GE Mobile Commc'ns, Inc. v. Motorola Commc'ns & Elecs., Inc.*, 120 F.3d 216, 219 (11th Cir. 1997) ("[W]e conclude that this court's predecessor purposefully and conspicuously adopted the plaintiff-viewpoint rule."); *Mass. State Pharm. Ass'n v. Fed. Prescription Serv., Inc.*, 431 F.2d 130, 132 (8th Cir. 1970) ("The amount in controversy is tested by the value of the suit's intended benefit to the plaintiff.").

23. *See, e.g.,* *Ullman v. Safeway Ins. Co.*, 995 F. Supp. 2d 1196, 1217 (D.N.M. 2013) ("The Tenth Circuit follows the 'either viewpoint rule,' which considers either the value to the plaintiff, or the cost to the defendant of injunctive and declaratory relief, as the measure of the amount in controversy.").

approach measures the amount in controversy as the greater of the monetary benefit the plaintiffs would receive from the injunction *or* the cost to the defendant of implementing the injunction.²⁴ District courts have consistently applied their pre-CAFA viewpoint precedent to injunctive relief cases under CAFA, despite CAFA's distinct departure from prior class action rules.²⁵

A court's choice of viewpoint matters quite a bit in a case like *SeaWorld*. There, the putative class met every other requirement under CAFA (i.e., the class had over one hundred members and at least one member was of diverse citizenship from SeaWorld).²⁶ The plaintiffs filed in state court,²⁷ then SeaWorld sought removal to federal court under CAFA.²⁸ While the plaintiffs received no monetary benefit from the putative class's demand that SeaWorld publish information about orcas in captivity,²⁹ to SeaWorld the change "would more likely than not reduce future sales by at least 16.7% . . . [plus] the value of developing a new, viable marketing campaign."³⁰ Based on SeaWorld's \$160 million in ticket revenues over the previous four years, SeaWorld's costs would far exceed \$5 million.³¹ Now imagine compounding this substantial financial exposure with a hostile state court that is ready to certify a class and impose a costly injunction against SeaWorld.³²

Under the Plaintiff's Viewpoint approach, SeaWorld could not remove to federal court. Traditional class action diversity jurisdiction requires at least one member of the class to meet the \$75,000 amount-in-controversy requirement,³³ but CAFA bridged this gap by allowing aggregation of plaintiffs' claims.³⁴ However, SeaWorld still could not remove to federal court under the Plaintiff's Viewpoint approach because there is no monetary benefit to the plaintiffs, and the court

24. *Id.*

25. *Valdez v. Metro. Prop. & Cas. Ins. Co.*, 867 F. Supp. 2d 1143, 1164–65 (D.N.M. 2012); *Hall v. Triad Fin. Servs., Inc.*, No. 07-cv-0184-MJR, 2007 WL 2948405, at *3 (S.D. Ill. Oct. 10, 2007).

26. *Anderson v. SeaWorld Parks & Ent., Inc.*, 132 F. Supp. 3d 1156, 1163 (N.D. Cal. 2015).

27. *Id.* at 1159.

28. *Id.*

29. *Id.* at 1163.

30. *Id.* at 1164 (emphasis omitted).

31. *Id.* at 1164–65.

32. *See supra* notes 10–13 and accompanying text.

33. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558–59 (2005).

34. Joseph, *supra* note 15.

would not consider the cost to SeaWorld. SeaWorld would thus face a significant injunctive liability that may be further exacerbated by a state court hostile to its interests.

The Either Viewpoint approach would allow SeaWorld to remove to federal court. Considering both the negligible benefit to the plaintiffs and the potential costs imposed on SeaWorld, the potential cost to the defendant exceeds the amount-in-controversy requirement of \$5 million. This outcome aligns with Congress's intent to expand federal jurisdiction over class actions and allows defendants to avoid state courts' hostility.³⁵

However, Congress's failure to specify the proper viewpoint for evaluating the amount in controversy in injunctive relief class actions has resulted in a muddled collection of district court opinions delivering unpredictable CAFA interpretations.³⁶ Defendants removing injunctive relief CAFA cases to jurisdictions that have adopted the Plaintiff's Viewpoint approach are unable to take full advantage of the broad federal jurisdiction CAFA confers. Although earlier scholarship acknowledges the discrepancy in federal courts' application of these approaches,³⁷ no author has defended a unified approach in CAFA cases. This Note argues that the Either Viewpoint approach best aligns with CAFA's text, legislative history, and underlying policy concerns, and that the Either Viewpoint approach should be uniformly implemented by amending CAFA's text.

Part I summarizes jurisprudence valuing amounts in controversy in injunctive relief class actions prior to CAFA's enactment,

35. In *SeaWorld*, the Court ultimately applied the Either Viewpoint approach and determined that the cost to SeaWorld exceeded \$5 million and allowed its case to remain in federal court. *SeaWorld*, 132 F. Supp. 3d at 1164–65.

36. District courts within the same circuit have issued conflicting opinions on the proper Viewpoint in CAFA cases. See *Campos v. Metabolic Rsch., Inc.*, No. CV 09-9445-VBF(DTBx), 2010 WL 11597627, at *3 (C.D. Cal. Aug. 4, 2010) (“The ‘defendant’s-viewpoint approach’ cannot be used in class actions without undermining the rule that class action plaintiffs cannot aggregate the amounts of separate claims.”). *But see* *Pagel v. Dairy Farmers of Am., Inc.*, 986 F. Supp. 2d 1151, 1159 (C.D. Cal. 2013) (ruling that the circuit’s pre-CAFA precedent did not require “that the ‘either viewpoint’ rule is prohibited in CAFA cases”). For more in-depth discussion of district court decisions, see *infra* Part II.B.

37. See, e.g., Christopher A. Pinahs, Note, *Diversity Jurisdiction and Injunctive Relief: Using a “Moving-Party Approach” To Value the Amount in Controversy*, 95 MINN. L. REV. 1930, 1943 (2011) (explaining that the lack of congressional intent or Supreme Court guidance caused the “lower courts [to] struggle to fashion a uniform valuation procedure.”); Steven M. Puiszis, *Developing Trends with the Class Action Fairness Act of 2005*, 40 J. MARSHALL L. REV. 115, 124–26 (2006) (noting that while CAFA eliminated the anti-aggregation principle, “[n]ot all federal circuits follow the either viewpoint rule”).

demonstrating the problems Congress believed warranted changing the requirements for federal jurisdiction over class actions under CAFA. Part II explores CAFA's provisions that expand federal jurisdiction to protect defendants in class actions. This Part illustrates the necessity of implementing the Either Viewpoint approach to ensure that defendants' interests are fairly considered in small claims class actions as CAFA intended, comparing this to federal courts' inconsistent interpretation of CAFA in injunctive relief cases. Part III demonstrates the Either Viewpoint approach's consistency with CAFA's text, legislative history, and underlying policy concerns and advocates for congressional amendment of CAFA to ensure that federal courts use the Either Viewpoint approach uniformly.

I. PRE-CAFA CLASS ACTIONS

This Part explains class action precedent leading up to CAFA's enactment, including the problems Congress perceived in pre-CAFA class actions' frequent confinement to state court. Section A details Supreme Court precedent barring aggregation of plaintiffs' claims and requiring complete diversity. Section B explores the consequences of state court jurisdiction pre-CAFA, namely, state courts' hostility toward out-of-state defendants and the states' effective creation of national policy through their disposition of national-scale class actions.

A. *Supreme Court Precedent on Claim Aggregation and Minimal Diversity*

Long before the class action entered the main stage in American jurisprudence, the U.S. Supreme Court addressed claim aggregation in the landmark case *Oliver v. Alexander*.³⁸ In *Oliver*, the Court held that the calculation of each plaintiff's amount in controversy "is confined solely to his own claim . . . without any reference to the claims of others."³⁹ This anti-aggregation precedent prevented plaintiffs from aggregating their claims leading up to the adoption of Federal Rule of Civil Procedure 23 in 1966.⁴⁰ The Court then addressed putative class

38. *Oliver v. Alexander*, 31 U.S. 143 (1832).

39. *Id.* at 147.

40. Rule 23 provides the basis and prerequisites for bringing a suit as a class action in federal court by certifying a class of plaintiffs. FED. R. CIV. P. 23. For more on the Rule's history and developments, see generally Deborah R. Hensler, *Happy 50th Anniversary Rule 23! Shouldn't We Know You Better By Now?*, 165 U. PA. L. REV. 1599 (2017).

members' claim aggregation under Rule 23 in *Snyder v. Harris*.⁴¹ The Court intervened to determine whether "separate and distinct claims presented by and for various claimants in a class action may be added together to provide the \$10,000 jurisdictional amount in controversy."⁴² The Court answered no, ruling that plaintiffs could not aggregate individual claims to satisfy the amount-in-controversy requirement for diversity jurisdiction.⁴³

Twenty-one years later, 28 U.S.C. § 1367 provided that whenever a district court properly exercised original jurisdiction over an action, the court would have "supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case or controversy."⁴⁴ In *Exxon Mobil Corp. v. Allapattah Services, Inc.*,⁴⁵ the Supreme Court decided that § 1367's supplemental jurisdiction grants federal jurisdiction over an entire class whenever a single class member met the amount in controversy,⁴⁶ even over the members who did not themselves meet the amount in controversy.⁴⁷ Reasoning that § 1367(a)'s broad grant of jurisdiction applied whenever a district court had original jurisdiction, "[t]he natural, indeed the necessary, inference is that § 1367 confers supplemental jurisdiction over claims by . . . Rule 23 plaintiffs."⁴⁸ Although Congress enacted CAFA a few months before *Allapattah*, it did not apply retroactively and the Court explicitly refused to analyze CAFA's potential impacts.⁴⁹

Even after *Allapattah*, significant impediments remained to securing removal. First, *Allapattah* held that federal courts could exercise supplemental jurisdiction over class members only if the district court had original jurisdiction.⁵⁰ Small claims class actions that did not have at least one member meeting the amount in controversy could not avail themselves of supplemental jurisdiction. Per the most

41. *Snyder v. Harris*, 394 U.S. 332 (1969).

42. *Id.* at 333.

43. *Id.* at 336.

44. 28 U.S.C. § 1367(a).

45. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

46. *Id.* at 559.

47. *Id.*

48. *Id.* at 560.

49. *Id.* at 571–72.

50. *Id.* at 559.

recently amended federal amount-in-controversy requirement,⁵¹ *Allapattah* effectively held that at least one class member must have a big enough stake in the suit to meet the \$75,000 amount-in-controversy requirement to access federal court.

The longstanding rules of complete diversity were still in play as well.⁵² Since 1806, the Supreme Court has required that every plaintiff be a citizen of a different state from every defendant to qualify for federal diversity jurisdiction.⁵³ Within the class action context, this meant that if any member of the putative class shared state citizenship with the defendant, the class would be disqualified from federal diversity jurisdiction. In effect, this limitation precluded any chance of diversity jurisdiction when plaintiffs' class definition included individuals from all fifty states.⁵⁴

To summarize, pre-CAFA, parties still had to demonstrate complete diversity in order to qualify for federal jurisdiction.⁵⁵ Additionally, class action plaintiffs could not aggregate their claims to satisfy the amount in controversy necessary for federal jurisdiction per *Snyder*.⁵⁶ However, plaintiffs with smaller claims could still join a class action under § 1367 so long as one member met the amount-in-controversy requirement.⁵⁷ Functionally, this required at least one class member to have a stake greater than \$75,000 in the suit.

Let us apply this pre-CAFA precedent to *SeaWorld*. Even assuming that *SeaWorld* had complete diversity from every class member (a lofty assumption considering the class representatives and *SeaWorld* were both California citizens),⁵⁸ the case would still not qualify for federal jurisdiction. The court found a negligible monetary benefit to the class from the injunction, meaning that no individual

51. See 28 U.S.C. § 1332 (requiring that the amount in controversy exceed the sum or value of \$75,000).

52. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

53. *Id.*

54. See *infra* note 79, at 24 and accompanying text (explaining an Alabama case in which 20 million class members from all fifty states filed in state court).

55. *Strawbridge*, 7 U.S. (3 Cranch) at 267.

56. *Snyder v. Harris*, 394 U.S. 332, 336 (1969).

57. 28 U.S.C. § 1367(a); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005).

58. *Anderson v. SeaWorld Parks & Ent., Inc.*, 132 F. Supp. 3d 1156, 1163 (N.D. Cal. 2015).

class member had a claim exceeding the required \$75,000 amount in controversy.⁵⁹ Therefore, *SeaWorld* would be confined to state court.

B. Pre-CAFA Class Actions in State Courts

CAFA was predicated by a decade-long effort by Congress to curb what it perceived as unfair state court class action judgments against defendants.⁶⁰ As explored further below, Congress had two primary critiques of state courts' management of class actions. First, it feared that state courts were hostile to out-of-state class action defendants and therefore rendered unfair judgments against them. Second, Congress emphasized the national, rather than local, scope of large class action suits, meaning they deserved consideration in a more neutral federal tribunal.

CAFA's legislative history is fraught with concern for state courts' bias against out-of-state class action defendants.⁶¹ Advocates for CAFA's unsuccessful predecessor bills highly regarded federal diversity jurisdiction's protection for out-of-state defendants from hostile state courts.⁶² Legislators described the condition of states' class action litigation in the early 2000s as "inconsistent with the constitutional theory of providing Federal diversity jurisdiction where there is the potential for discrimination against an out-of-state defendant."⁶³ Representatives discussed the financial burden of state courts' treatment of defendants in class actions. Senator Orrin Hatch described how "sympathetic local juries trying out-of-state corporations bestow unjustified and sometimes outrageous awards."⁶⁴

59. *See id.* (finding that "Plaintiffs accrue no cognizable monetary benefit from this injunction").

60. *See* Puiszis, *supra* note 37, at 115 (describing congressional acknowledgment of abusive class action claims within securities regulation starting in 1995).

61. CAFA's legislative history primarily refers to non-federal courts oversimply as "state courts" rather than explicitly encompassing all local and municipal courts. In the Committee Report immediately following CAFA's passage, the phrase "state court" appears 212 times, while any variation of the word "municipal" appears only twice, neither of which refers to municipal courts. *See* S. REP. NO. 109-14, 25, 83 n.4 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 22, 76 n.4 (using "municipalities" and "municipal" only in describing case facts or in the proper name of an organization). Accordingly, this Note uses the nomenclature "state courts" to describe state, local, and municipal courts that fall outside of the federal court umbrella.

62. *See* S. REP. NO. 108-123, at 10 (2003) ("[A]n out-of-state defendant in a state court proceeding should have access to an even-handed federal forum.").

63. H.R. REP. NO. 107-370, at 19 (2002).

64. 150 CONG. REC. 14,515 (2004) (statement of Sen. Orrin Hatch).

Legislators were also concerned with cases that never even reached the courtroom. They found that plaintiffs' attorneys used "judicial blackmail" to threaten huge losses to defendants, which incentivized settlement even for frivolous claims.⁶⁵ Congress viewed attorneys' "ability to exercise unbounded leverage" over corporate defendants as an unfair burden in large-scale class actions.⁶⁶

Another concern stemmed from state courts' allegedly lax procedures and willingness to certify class actions. One Senate Report noted that class actions filed within state courts increased by 1,000 percent between 1988 and 1998.⁶⁷ The Report cited studies demonstrating that certain counties were "hotbeds" for class actions with filings disproportionate to their respective populations.⁶⁸ One such hotbed was Madison County, Wisconsin, where class action filings increased by 3,650 percent between 1998 and 2000.⁶⁹ Arguing in favor of reform, the Report echoed concerns that "state court judges are less careful than their federal court counterparts when applying the procedural requirements that govern class actions."⁷⁰

These claims of state court bias were met with resistance. Opposing legislators feared that federal judges were far less likely than state court judges to certify a class.⁷¹ Others declared that allegations of state court bias were "bereft of evidence."⁷² Still, these arguments against CAFA failed to present any evidence that state courts were not biased against out-of-state defendants. Instead, CAFA's opposition rested baldly on the claim that Supreme Court precedent already required due process for class action defendants.⁷³

Perhaps the more compelling argument for increasing federal jurisdiction over large class actions rested in their national scope. Legislators expressed concern that federal courts "cannot assert jurisdiction over claims encompassing large-scale, interstate class actions involving thousands of plaintiffs from multiple states . . . and hundreds of millions of dollars—cases that have obvious and significant

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

66. *Id.* at 21.

67. S. REP. NO. 108-123, at 14 (2003).

68. *Id.*

69. *Id.*

70. *Id.* at 14–15.

71. *Id.* at 76.

72. *Id.* at 78.

73. *Id.* at 77–78, 127–28.

implications for the national economy.”⁷⁴ Stated more bluntly by Senator Chuck Grassley, “[s]omething of national implication should not be decided in one Podunk county in one State but should be decided by our Federal courts.”⁷⁵ This sentiment was raised repeatedly by CAFA advocates.⁷⁶ One speaker at a Senate Judiciary Committee hearing noted that national class actions warranted federal jurisdiction, even if there were no abuses against defendants in state courts.⁷⁷

CAFA’s supporters argued that the national scope of some class actions warranted federal jurisdiction under the values of federalism.⁷⁸ The primary concern was state courts creating national policy: “[A] system that allows state court judges to dictate national policy on these . . . issues from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism.”⁷⁹ One Senate Judiciary Committee Report highlighted a class action filed in an Alabama county court against General Motors Company.⁸⁰ There, the plaintiffs claimed that class membership included over 20 million car owners across the nation hurt by the “faulty” design of federally regulated airbags.⁸¹ This suit begged the question: “Why should an Alabama state court tell 20 million people in all 50 states what kind of airbags they can have in their cars?”⁸²

But what if a class action in Alabama truly only involved Alabama citizens and questions of Alabama law? The above is not to say that legislators did not consider the benefits of keeping some class actions in state court. CAFA’s broad removal provisions are backstopped to prevent removing cases that are “truly local,” such as when enough plaintiffs are from the original filing state.⁸³ Congress did not intend to

74. S. REP. NO. 109-14, at 11 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 14.

75. 150 CONG. REC. 14,369 (2004) (statement of Sen. Charles Grassley).

76. See, e.g., 150 CONG. REC. 14,512 (2004) (statement of Sen. Christopher J. Dodd) (“[A]ttorneys bringing class actions can manage to avoid Federal court all together . . . even though the total amount at stake might exceed hundreds of millions of dollars and have true multi-State national implications.”).

77. *Class Action Litigation: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 10 (2002) (statement of Walter Dellinger).

78. S. REP. NO. 108-123, at 9 n.12.

79. S. REP. NO. 109-14, at 24 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 24.

80. *Id.*

81. *Id.*

82. *Id.*

83. See *infra* Part II.B for discussion of CAFA’s exceptions for removal in cases where enough plaintiffs are from the state court.

strip state courts of all of their jurisdiction over class actions; rather, Congress merely granted federal jurisdiction over cases with national implications, leaving the remainder in state court.⁸⁴ Senators who opposed the bill in its earliest forms later approved CAFA once the amount in controversy was raised to include only more nationally oriented suits, the idea being that only cases of significant magnitude warranted federal over state jurisdiction.⁸⁵

Both the state court bias and national importance rationales made it into CAFA's text.⁸⁶ In injunctive relief class actions, these arguments are particularly relevant to ascertaining the protection Congress sought to offer defendants by expanding federal court jurisdiction. CAFA specifically envisioned increasing defendants' opportunity to remove to federal court by applying an inclusive framework. This type of framework requires valuing injunctive relief class actions under the Either Viewpoint approach.

II. CAFA EXPANDS FEDERAL JURISDICTION: CONSEQUENCES AND INTERPRETATIONS

CAFA turned traditional federal diversity jurisdiction on its head for certain class action suits. As explained in this Part, CAFA expands jurisdiction over class actions by eliminating the complete diversity requirement and allowing plaintiffs' claims to be aggregated to reach the amount in controversy. Section A reviews these provisions and explains their significant departure from previous requirements. Section B analyzes federal courts' interpretations of CAFA for class actions seeking injunctive relief, demonstrating how courts have continued applying their pre-CAFA precedent in the face of significant evidence that CAFA is a distinct departure from prior class action precedent. Section C addresses how claim aggregation affects small

84. 150 CONG. REC. 14,515 (2004) (statement of Sen. Orrin Hatch) ("Our concern is to remove truly national actions to Federal court and not local controversies . . .").

85. For example, in supporting the amended bill, Senator Dianne Feinstein remarked:
The amended Class Action Fairness Act . . . allow[s] Federal courts to hear national class action lawsuits . . . which involve more than 5 million in claims. I think the original bill was 2 million. We amended it in committee to make it even bigger so we could be sure as to the kinds of cases that would be affected.

150 CONG. REC. 14,523–24 (2004) (statement of Sen. Dianne Feinstein).

86. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 4 ("Abuses in class actions undermine the national judicial system . . . in that State and local courts are . . . keeping cases of national importance out of Federal court [and] sometimes acting in ways that demonstrate bias against out-of-State defendants . . .").

claims class actions and why these suits specifically support the Either Viewpoint approach.

A. *CAFA's Minimal Diversity and Claim Aggregation Provisions*

CAFA's purpose is to "provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction."⁸⁷ CAFA primarily expands federal jurisdiction through two mechanisms: minimal diversity and claim aggregation.

Requiring only minimal diversity departed from the traditional complete diversity requirement established in *Strawbridge v. Curtiss*.⁸⁸ To access federal jurisdiction, every plaintiff had to be of diverse citizenship from every defendant.⁸⁹ This doctrine became particularly cumbersome for class actions, whose membership could span all fifty states and thereby preclude diversity jurisdiction.⁹⁰ In response, CAFA provides that federal courts shall have jurisdiction where "*any* member of a class of plaintiffs is a citizen of a State different from *any* defendant."⁹¹

CAFA's permissive claim aggregation also constitutes a significant departure from prior class action precedent—in fact, it flies directly in the face of *Snyder's* anti-aggregation doctrine. Still, Congress was explicit in its command: "In any class action, the *claims of the individual class members shall be aggregated* to determine whether the matter in controversy exceeds the sum or value of \$5,000,000."⁹² The Supreme Court acknowledged this departure in *Allapattah*, writing in its brief section on CAFA that "[i]t abrogates the rule against aggregating claims."⁹³

Claim aggregation essentially opens the federal courts' doors to small claims class actions in which a multitude of plaintiffs have de

87. *Id.* § 2(b)(2).

88. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

89. *Id.*; *see also* *Danks v. Gordon*, 272 F. 821, 824 (2d Cir. 1921) ("A controversy is not between citizens of different states so as to give jurisdiction to the federal courts unless all the persons on one side of it are citizens of different states from all the persons on the other side.").

90. *See supra* notes 80–82 and accompanying text for one such example of a national class action confined to state court.

91. 28 U.S.C. § 1332(d)(2)(A) (emphasis added).

92. *Id.* § 1332(d)(6) (emphasis added).

93. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 571 (2005).

minimis claims against the same defendant.⁹⁴ Instead of requiring that at least one plaintiff's claim exceed \$75,000, CAFA allows plaintiffs to aggregate their de minimis claims to meet the amount in controversy.⁹⁵ Make no mistake—while claim aggregation opens up federal jurisdiction previously unavailable to small claims class action plaintiffs, it also benefits defendants. Rather than being limited to state court, defendants retain the option to remove to federal court if the class's aggregated claims exceed \$5 million.⁹⁶

In juxtaposition to these broad jurisdiction-granting provisions, Congress also included a backstop in CAFA to keep truly local cases within state courts. Federal district courts exercise discretion in declining federal jurisdiction over cases where one- to two-thirds of class members and the primary defendants are citizens of the state where the suit was filed.⁹⁷ Furthermore, federal district courts are required to decline jurisdiction in cases where at least two-thirds of the putative class members and the primary defendants are all citizens of the state where the suit was filed.⁹⁸ This reflects congressional intent to only “remove truly national actions to Federal court and not local controversies.”⁹⁹ Apart from these uniquely “local controversies,” minimal diversity is effectively defendant-friendly. Instead of limiting a defendant to state court whenever a class member shares its state citizenship, CAFA leaves the door open to federal jurisdiction so long as the defendant has diverse citizenship from at least one class member.

CAFA's provisions undoubtedly expand federal jurisdiction in theory by requiring only minimal diversity¹⁰⁰ and permitting claim

94. “De minimis” or “small claims” class actions are the stereotypical justifications for the class action mechanism, because they allow plaintiffs with claims too small, logistically and practically, to sue to band together to recover from a defendant. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

95. 28 U.S.C. § 1332(d)(6).

96. *Id.*

97. *Id.* § 1332(d)(3). In exercising its discretion, the district court is instructed to consider the factors listed in § 1332(d)(3)(A)–(F). These considerations include the national scope of the interests at issue and the defendant's connection with the forum. *Id.* § 1332(d)(3)(A)–(F).

98. *Id.* § 1332(d)(4)(B).

99. 150 CONG. REC. 14,515 (2004) (statement of Sen. Orrin Hatch).

100. *See* 28 U.S.C. § 1332(d)(2)(A) (granting original jurisdiction in class actions meeting the amount in controversy when “any member of a class of plaintiffs is a citizen of a State different from any defendant”).

aggregation.¹⁰¹ These expectations were reflected in reality: a study of three federal district courts in the four months following CAFA's enactment showed a significant increase in class action filings.¹⁰² Despite this clear intent and practical effect to expand federal jurisdiction, some defendants remain unable to access federal diversity jurisdiction because of federal courts' continued use of the Plaintiff's Viewpoint approach.

B. CAFA in Action: Federal Courts' Interpretations in Injunctive Relief Cases

Even before CAFA, federal courts split over the question of injunctive relief valuation. One set—courts using the Plaintiff's Viewpoint approach—maintains that only the value of the suit's benefit to plaintiffs should be considered. The other set—courts using the Either Viewpoint approach—contends that the value of the suit's benefit to plaintiffs *or* the cost to the defendant of implementing that benefit should be considered.¹⁰³

The Second, Third, Fifth, Eighth, Ninth, and Eleventh Circuits follow the Plaintiff's Viewpoint approach.¹⁰⁴ These circuits narrowly define the “object of the litigation” as the potential value of relief to the plaintiff.¹⁰⁵ These circuits have carried the Plaintiff's Viewpoint approach into the class action sphere.¹⁰⁶ They cite *Snyder* as barring the

101. *Id.* § 1332(d)(6).

102. Memorandum from Tom Willging & Emery Lee, Fed. Jud. Ctr. Rsch. Div., to the Advisory Comm. on Civil Rules 3 (May 22, 2006), <https://www.fjc.gov/sites/default/files/2012/CAFA0506.pdf> [<https://perma.cc/UCN9-ACJ7>]. Naturally, this increase puts a strain on federal courts' dockets. Many federal judges have been hostile to CAFA removals, which some academics believe stems from their opposition to lengthy class action proceedings in their courtrooms. *See infra* Part III.B.

103. While technically some district courts have applied a third test, which values the amount in controversy based on the value to the party invoking jurisdiction, no federal circuit court has adopted this approach. Brittain Shaw McInnis, *The \$75,000.01 Question: What Is the Value of Injunctive Relief?*, 6 GEO. MASON L. REV. 1013, 1020–23, 1021 n.52 (1998). Therefore, this Note only considers the Plaintiff's Viewpoint and Either Viewpoint approaches.

104. *Id.* at 1021–22, 1021 n.52, 1022 n.53.

105. McInnis, *supra* note 103, at 1022.

106. *E.g.*, *DiTolla v. Doral Dental IPA of N.Y., LLC*, 469 F.3d 271, 276 (2d Cir. 2006) (“Generally . . . the amount in controversy is calculated from the plaintiff's standpoint . . .” (quoting *Kheel v. Port of N.Y. Auth.*, 457 F.2d 46, 49 (2d Cir. 1972))); *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1268 (11th Cir. 2000) (“For amount in controversy purposes, the value of injunctive or declaratory relief is the ‘value of the object of litigation’ measured from the plaintiff's perspective.” (quoting *Ericsson GE Mobile Commc'ns, Inc. v. Motorola Commc'ns & Elecs., Inc.*, 120 F.3d 216, 218–20 (11th Cir. 1997))); *see Packard v. Provident Nat'l Bank*, 994 F.2d

Either Viewpoint approach because it would impermissibly aggregate plaintiffs' claims against a defendant.¹⁰⁷ In the era of anti-aggregation and complete diversity, this functionally meant that at least one plaintiff had to claim a remedy valued above \$75,000.¹⁰⁸

The First, Fourth, Seventh, Tenth, and D.C. Circuits follow the Either Viewpoint approach in valuing the amount in controversy for claims demanding injunctive relief.¹⁰⁹ These circuits define the "object of the litigation" more broadly as the potential value of relief to the plaintiff *or* the defendant's cost of implementing that relief.¹¹⁰ These circuits also adopted this approach to injunctive relief class action.¹¹¹ While non-CAFA class actions do not share all of the rationales behind the Either Viewpoint approach, this Viewpoint still appears correct in these cases because of state courts' bias against out-of-state defendants and the national scope of large class actions.¹¹² If federal courts offer a safe haven to defendants fearing bias from state courts, it logically follows that this jurisdiction should especially be granted broadly when a defendant is faced with owing a sizeable judgment to many plaintiffs. Additionally, if the defendant's costs are sufficiently high, then the case should be sufficiently national in scope to warrant federal jurisdiction. Regardless, the existing circuit split serves as a backdrop to the continued split in CAFA cases.

CAFA's framework applies only to a limited number of class actions meeting its specific requirements. CAFA grants federal jurisdiction over class actions having over one hundred class members,¹¹³ at least one class member of diverse citizenship from any defendant,¹¹⁴ and an aggregated amount in controversy exceeding \$5

1039, 1050 (3d. Cir. 1993) (declining to measure the amount in controversy by the costs to the defendants).

107. See, e.g., *Packard*, 994 F.2d at 1050 ("In a diversity-based class action seeking primarily money damages, allowing the amount in controversy to be measured by the defendant's cost would eviscerate *Snyder's* holding We will not permit plaintiffs to do indirectly that which they cannot do directly.").

108. See *supra* Part I.A for an in-depth explanation of pre-CAFA class action amount-in-controversy jurisprudence.

109. *McInnis*, *supra* note 103, at 1022 n.55.

110. *Id.* at 1022.

111. *E.g.*, *Comm. for GI Rts. v. Callaway*, 518 F.2d 466, 472–73 (D.C. Cir. 1975).

112. See *supra* Part I.B.

113. 28 U.S.C. § 1332(d)(5)(B).

114. *Id.* § 1332(d)(2)(A).

million.¹¹⁵ In these few cases, district courts have fairly consistently followed their circuit's pre-CAFA viewpoint precedent.¹¹⁶ For example, a string of district courts in the Tenth Circuit applied the Either Viewpoint approach to CAFA suits, each using the same language citing the Circuit's existing precedent.¹¹⁷ In the Seventh Circuit, a district court applying the Either Viewpoint approach reasoned, "In class actions, the Seventh Circuit has determined [the amount in controversy] 'by looking separately at each named plaintiff's claim and the cost to the defendant of complying with an injunction directed to that plaintiff.'"¹¹⁸ Other circuits that have used the Either Viewpoint approach have not yet addressed the issue in CAFA cases.¹¹⁹

District courts in circuits that had used the Plaintiff's Viewpoint approach have reached varying results on valuations under CAFA. The discrepancy within the Eighth and Ninth Circuits is particularly notable. For example, one district court recently opined that "Eighth Circuit case law was well settled on the viewpoint issue when CAFA was passed Thus, in line with longstanding Eighth Circuit

115. *Id.* § 1332(d)(2).

116. *See, e.g.,* Parker v. Riggio, No. 10 Civ. 9504(LLS), 2012 WL 3240837, at *7 (S.D.N.Y. Aug. 6, 2012) ("[T]he prevailing method of calculating value in this Circuit is the 'plaintiff's viewpoint' approach, where one calculates the value to the plaintiff, not the cost to the defendant." (quoting Dimich v. Med-Pro, Inc., 304 F. Supp. 2d 517, 519 (S.D.N.Y. 2004))).

117. *See, e.g.,* Bailey v. Markham, No. CIV 19-0519 JB\GBW, 2020 WL 1324477, at *14 (D.N.M. Mar. 20, 2020) ("The United States Court of Appeals for the Tenth Circuit follows the 'either viewpoint rule,' which considers either the value to the plaintiff, or the cost to the defendant of injunctive and declaratory relief, as the measure of the amount in controversy."); Ullman v. Safeway Ins. Co., 995 F. Supp. 2d 1196, 1217 (D.N.M. 2013) ("The Tenth Circuit follows the 'either viewpoint rule,' which considers either the value to the plaintiff, or the cost to the defendant of injunctive and declaratory relief, as the measure of the amount in controversy."); Valdez v. Metro. Prop. & Cas. Ins. Co., 867 F. Supp. 2d 1143, 1163–64 (D.N.M. 2012) ("The Tenth Circuit follows the 'either viewpoint rule,' which considers either the value to the plaintiff, or the cost to the defendant of injunctive and declaratory relief, as the measure of the amount in controversy.").

118. Hall v. Triad Fin. Servs., Inc., No. 07-cv-0184-MJR, 2007 WL 2948405, at *3 (S.D. Ill. Oct. 10, 2007) (quoting Uhl v. Thoroughbred Tech. & Telecomms., Inc., 309 F.3d 978, 983 (7th Cir. 2002)).

119. CAFA injunctive relief valuation has not been substantively addressed in the First, Fourth, or D.C. Circuits. A Westlaw search, WESTLAW (advanced search for: "class action fairness act" AND "either viewpoint" AND "amount in controversy" AND injunct!), returned no search results interpreting CAFA's valuation of injunctive relief for district courts from the First, Fourth, or D.C. Circuits. Additionally, Wright & Miller's Federal Practice and Procedure does not list any First, Fourth, or D.C. Circuit cases valuing the amount in controversy in injunctive relief under CAFA as of October 2020. 14AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3703, at n.25 (4th ed. 2021).

tradition, the Court will apply the plaintiff's-viewpoint test."¹²⁰ Similarly, a district court in the Ninth Circuit held that the Either Viewpoint approach cannot be applied to CAFA cases because the circuit's pre-CAFA precedent used the Plaintiff's Viewpoint approach.¹²¹

However, a different district court in the Eighth Circuit held that the cost to the defendant of an injunction could be considered in calculating the amount in controversy under CAFA.¹²² District courts in the Ninth Circuit appear similarly conflicted. *SeaWorld* represented one of these controversies. In *SeaWorld*, the court ultimately applied the Either Viewpoint approach, holding that "the value of the injunction-only case may be measured by the value of the injunction to the Defendant."¹²³ The court found that although the putative class's benefit would be negligible, the cost to SeaWorld of complying with plaintiffs' demanded relief sufficiently satisfied the amount in controversy to allow for federal jurisdiction under CAFA.¹²⁴

District court confusion on the proper viewpoint in CAFA cases is not limited to these two circuits. District courts in the Fifth and Eleventh Circuits have departed from their appellate precedent entirely, opting instead to apply the Either Viewpoint approach to CAFA class actions.¹²⁵ Conversely, a district court in the Sixth Circuit

120. *Waters v. Ferrara Candy Co.*, No. 17-cv-00197-NCC, 2017 WL 2618271, at *6 (E.D. Mo. June 16, 2017), *aff'd*, 873 F.3d 633 (8th Cir. 2017). Although the court did aggregate the plaintiff's claims as required by CAFA, it decided that the suit did not warrant CAFA federal diversity jurisdiction because the defendants did not demonstrate that the value to the plaintiffs was more than nominal. *Id.*

121. *See, e.g., Campos v. Metabolic Rsch., Inc.*, No. CV 09-9445-VBF(DTBx), 2010 WL 11597627, at *3 (C.D. Cal. Aug. 4, 2010) ("The 'defendant's-viewpoint approach' cannot be used in class actions without undermining the rule that class action plaintiffs cannot aggregate the amounts of separate claims.").

122. *Adams v. Am. Fam. Mut. Ins. Co.*, 981 F. Supp. 2d 837, 848–49 (S.D. Iowa 2013).

123. *Anderson v. SeaWorld Parks & Ent., Inc.*, 132 F. Supp. 3d 1156, 1162 (N.D. Cal. 2015); *see also Pagel v. Dairy Farmers of Am., Inc.*, 986 F. Supp. 2d 1151, 1159 (C.D. Cal. 2013) (ruling that the circuit's pre-CAFA precedent did not require "that the 'either viewpoint' rule is prohibited in CAFA cases").

124. *SeaWorld*, 132 F. Supp. at 1163–65.

125. *See Bernstein v. JP Morgan Chase & Co.*, No. 09-80533-CIV-RYSKAMP/VITUNAC, 2009 WL 10699864, at *4 (S.D. Fla. Aug. 4, 2009) ("Under CAFA, courts are also able to determine the amount in controversy by looking at defendant's potential losses, including those sustained from an injunction."); *Thompson v. La. Reg'l Landfill Co.*, 365 F. Supp. 3d 725, 730 (E.D. La. 2019) ("The legislative history of CAFA makes clear that the amount-controversy requirement is satisfied 'if the value of the matter in litigation exceeds \$5,000,000 either from the

that had not previously stated its preferred viewpoint decided in a CAFA case that it should “determine the amount in controversy from the perspective of the Plaintiffs.”¹²⁶

Few federal courts of appeals have had occasion to address CAFA, much less in the context of injunctive relief. The courts that have addressed CAFA injunctive relief more substantively declined to decide on a viewpoint based on case-bound facts.¹²⁷ The Second Circuit came the closest to a resolution in *DiTolla v. Doral Dental IPA of New York, LLC*.¹²⁸ There, the court merely alluded to a method of interpretation rather than adopting one of the viewpoints. A quote in dicta vaguely demonstrates preferring the Plaintiff’s Viewpoint approach: “Generally . . . the amount in controversy is calculated from the plaintiff’s standpoint; the value of the suit’s intended benefit or the value of the right being protected or the injury being averted constitutes the amount in controversy when damages are not requested.”¹²⁹ Still, this passage only decided whether the plaintiff had alleged claimable damages, not whether this approach should be generally applied in CAFA cases.¹³⁰

Confused? Based on the hodgepodge of precedent listed above, you are in good company. These confusing interpretations are compounded by the national scope of CAFA class actions—depending on where the initial suit is filed, defendants could be subject to unpredictable CAFA applications. If the court decides to apply the Plaintiff’s Viewpoint approach, defendants may be needlessly denied a federal forum when they might have been granted removal in a

viewpoint of the plaintiff or the viewpoint of the defendant, and regardless of the type of relief sought.” (quoting S. REP. NO. 109-14, at 42 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 40)).

126. *Houchens v. Gov’t Emps. Ins. Co.*, No. 13-CV-00214-CRS, 2013 WL 5740131, at *3 (W.D. Ky. Oct. 22, 2013), *rev’d*, NO. 2014-CA-002017-MR, 2016 WL 4709168 (Ky. Ct. App. Sept. 9, 2016), *aff’d on other grounds*, 569 S.W.3d 923 (Ky. 2018).

127. See *Waters v. Ferrara Candy Co.*, 873 F.3d 633, 636 (8th Cir. 2017) (“We need not resolve the issue of whether courts should apply the plaintiffs’ viewpoint rule or the either viewpoint rule when determining the amount in controversy under CAFA because [defendant] did not meet its burden under either rule.”); *Everett v. Verizon Wireless, Inc.*, 460 F.3d 818, 829 (6th Cir. 2006) (“[W]e need not resolve the question today. Even if we were to apply the ‘either viewpoint’ approach, the more generous of the two from defendant’s perspective, [defendant] has not satisfied a precondition for invoking the theory here.”).

128. *DiTolla v. Doral Dental IPA of N.Y., LLC*, 469 F.3d 271 (2d Cir. 2006).

129. *Id.* at 276–77 (alteration in original) (quoting *Kheel v. Port of N.Y. Auth.*, 457 F.2d 46, 49 (2d Cir. 1972)).

130. See *id.* (determining that the plaintiff “failed to demonstrate that the claim . . . satisfies CAFA’s jurisdictional amount in controversy”).

neighboring jurisdiction. These disjointed opinions confound CAFA's ultimate purpose of providing out-of-state defendants with an "even-handed federal forum" to resolve disputes.¹³¹

C. *CAFA's Claim Aggregation Promotes the Social Value of Small Claims Class Actions under the Either Viewpoint Approach*

CAFA's claim aggregation changed the landscape for one variety of class actions in particular: small claims class actions. These are class actions in which plaintiffs' individual claims would be too small to pursue costly litigation, but in aggregate, there is enough value to bring suit on behalf of all injured plaintiffs.¹³² Within the context of these suits, however, attorneys are incentivized to engage in entrepreneurial litigation that is driven by the desire to recover fees from massive settlements or judgments that inadequately represent plaintiffs' interests.¹³³ Congress recognized that these abuses were occurring primarily in state courts and that defendants were bearing the burden of attorneys' entrepreneurial litigation by paying out massive settlements and judgments rendered by state courts.¹³⁴ CAFA's claim aggregation provision implies the Either Viewpoint approach because it considers defendants' stake in the litigation in deciding whether to grant federal jurisdiction. This sentiment rings particularly true for injunctive relief small claims class actions because the approach balances the interests of plaintiffs in aggregating their small claims against defendants' interest in not being overly penalized.

CAFA's claim aggregation encourages small claims class actions in federal court by allowing plaintiffs to aggregate their individually

131. S. REP. NO. 108-123, at 10 (2003).

132. Then-Associate Justice Williams Rehnquist summarized the premise concisely: "Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually." *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 809 (1985).

133. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882-83 (1987). Coffee offers three main issues that plague small claims class actions: (1) "High agency costs characterize class action litigation and permit opportunistic behavior by attorneys," (2) "Class actions necessarily involve asymmetric stakes," and (3) "An initial cost differential tends to favor plaintiffs in many forms of class action litigation." *Id.*

134. See S. REP. NO. 109-14, at 4 (2005), as reprinted in 2005 U.S.C.A.N. 3, 5 ("One key reason for these problems is that most class actions are currently adjudicated in state courts . . . where there is often inadequate supervision over litigation procedures and proposed settlements.").

small claims.¹³⁵ The societal benefit of small claims class actions has long been recognized in courts.¹³⁶ The literature presents two theories explaining the societal benefit of small claims class actions: compensationalism and optimal deterrence. Compensationalism focuses on balancing the negative costs of entrepreneurial litigation with the benefit of allowing plaintiffs to aggregate their otherwise infeasible legal claims.¹³⁷ Optimal deterrence theory is most relevant in the context of CAFA injunctive relief cases because it emphasizes imposing the maximal amount of penalty on defendants without over penalizing them.¹³⁸ As illustrated above, one of Congress's primary concerns in passing CAFA was state courts' imposition of exorbitant judgments.¹³⁹ Under the optimal deterrence approach, CAFA's claim aggregation provision necessitates using the Either Viewpoint approach to avoid over penalizing defendants.

1. *Aggregation of Small Claims and the Optimal Deterrence Theory.* The optimal deterrence approach focuses on the optimal deterrence of the defendant, the primary party CAFA sought to protect. Preeminent optimal deterrence scholars Gary Friedman and Professor Myriam Gilles propose that in determining whether small claims class actions benefit society, “[a]ll that matters is whether the practice causes the defendant-wrongdoer to internalize the social costs

135. This Note focuses on the value of small claims class actions due to CAFA's permissive aggregation of claims. Specifically, CAFA permits jurisdiction over all plaintiffs if their aggregated claim exceeds \$5 million. 28 U.S.C. § 1332(d)(2). Thus, small claims class actions differ most significantly under CAFA than other forms of diversity jurisdiction because no single plaintiff has to meet the amount-in-controversy threshold. *See supra* Part I.A.

136. *See, e.g., Shuttz*, 472 U.S. at 809 (“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.”); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (“In most class actions—and those the ones in which the rationale for the procedure is most compelling—individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation.”).

137. Coffee, *supra* note 133, at 886–88.

138. *Infra* note 140.

139. *See supra* notes 10–14 and accompanying text.

of its actions.”¹⁴⁰ Gilles and Friedman focus primarily on how underdeterrence can incentivize firms to continue harmful practices.¹⁴¹

Analyzing the social utility of class actions through a CAFA lens naturally requires the perspective that granting broader federal jurisdiction purports to protect defendants rather than punish them.¹⁴² However, the optimal deterrence framework is consistent with CAFA’s aims because it considers plaintiffs’ interest in sufficiently deterring defendants’ wrongful conduct, while also acknowledging that overly punitive judgments against these defendants are socially detrimental.¹⁴³ This theory depends on finding the socially optimal level of deterrence by encouraging class actions that deter undesirable conduct while avoiding over deterring defendants through unfair state court decisions. In Gilles and Friedman’s words, “to deter optimally is not to deter maximally.”¹⁴⁴ A socially optimal class action framework therefore promotes deterrence only insofar as it disincentivizes defendants from harming plaintiffs.

2. The Either Viewpoint Approach Best Balances Parties’ Interests in CAFA Injunctive Relief Small Claims Class Actions under Optimal Deterrence. CAFA’s claim aggregation effectively opens the door to federal jurisdiction for small claims class actions. While the \$5 million amount-in-controversy requirement guarantees that only larger cases will be removable to federal court, CAFA’s claim aggregation provision still enables plaintiffs with small claims to threaten massive judgments on defendants. However, this value must be balanced with

140. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006). While Gilles and Friedman do not attribute any value to plaintiffs being compensated for defendants’ wrongs, *id.* at 107, compensationalism places plaintiffs’ recovery at the center, Coffee, *supra* note 133, at 886–88.

141. See Gilles & Friedman, *supra* note 140, at 160–61 (“[P]laintiffs may sue for injunctive relief and damages and then collude with the defendant to settle the case for damages only [D]efendants will pay dearly for this privilege because the injunction is what concerns them most (since it will end their ability to continue the lucrative but unlawful practice).”).

142. S. REP. NO. 109-14, at 14 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 14 (“[S]tate court judges are lax about following the strict requirements of Rule 23 . . . , which are intended to protect the due process rights of . . . defendants. In contrast, federal courts generally scrutinize proposed settlements much more carefully and pay closer attention to the procedural requirements . . .”).

143. See Gilles & Friedman, *supra* note 140, at 157 (indicating that a corporate wrongdoer should not “internalize more than 100% of the social costs of its actions”).

144. *Id.* at 155.

the interests of the defendants; courts must still be cautious to avoid over deterring defendants through exorbitant judgments. CAFA's history and grant of broad federal jurisdiction over these cases imply that federal courts are best positioned to balance interests and avoid over penalizing defendants.¹⁴⁵ Effectively, CAFA implies that allowing actions to proceed against defendants in state court constitutes over deterring defendants.¹⁴⁶

This reasoning applies to *SeaWorld*. Although plaintiffs' claims against SeaWorld are relatively small, together they form a significant enough threat to the park such that SeaWorld would be motivated to make its practices safer for Orcas. Without this threat, SeaWorld might be underdeterred and fail to improve its practices. Conversely, over deterring SeaWorld by imposing exorbitantly expensive injunctions in state court may negatively impact consumers and stockholders.¹⁴⁷ Optimal deterrence lies somewhere in between these extremes. CAFA envisions a federal forum as best suited to weigh these interests, so it guarantees federal jurisdiction to defendants in certain cases such that they avoid facing an overly punitive judgment from a state court. However, if the value of the injunctive relief sought is viewed only from the Plaintiff's Viewpoint approach, SeaWorld would be denied this avenue to federal jurisdiction.

CAFA balances the interests of plaintiffs and defendants in optimal deterrence through its twofold grant of jurisdiction: plaintiffs can aggregate claims to meet the amount in controversy, but defendants can pursue the protection of federal court. If a district court can refuse defendants' removal by valuing the amount in controversy from the Plaintiff's Viewpoint approach, however, defendants remain

145. *See supra* Part I.B.

146. This assertion presupposes that state courts are in fact biased against out-of-state defendants, and therefore that judgments in state courts against class action defendants will be overly punitive. While this Note supports that conclusion, some scholars argue that such bias is a myth. *See supra* Part I.B for a more in-depth analysis of these competing arguments relating to CAFA's legislative history.

147. Notably, this characterization of optimal deterrence does imply some necessary penalty to defendants who have incurred harm. If SeaWorld were found to have inflicted some harm on plaintiffs, some monetary penalty would be necessary under the theory to deter them from inflicting further harm. Accordingly, this Note does not argue against any penalization of defendants; rather, it argues that penalties must not be so large as to over deter. CAFA's legislative history indicates that this overdeterrence has a net negative impact on consumers by depressing interstate commerce. *See, e.g.*, S. REP. NO. 109-14, at 29-30 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 29 (“[T]he Committee believes that such abuses hurt consumers by resulting in higher prices and less innovation, and that they undermine the principles of diversity jurisdiction, which were established by the Framers to promote interstate commerce.”).

exposed to overly punitive judgments facilitated by state courts. The valuation of these cases thus presents a crucial area of interpretation in the realm of injunctive relief class actions, as explored in the next Part.

III. THE EITHER VIEWPOINT APPROACH'S SUPERIORITY

This Part demonstrates that the Either Viewpoint approach best aligns with CAFA's intent to broaden federal jurisdiction over class actions. Section A explains how CAFA's text, legislative history, and underlying policy concerns favor the Either Viewpoint approach. Section B addresses potential reasons why federal courts have continued to use the Plaintiff's Viewpoint approach in CAFA cases, despite CAFA's significant departure from prior class action precedent. Section C advocates for a congressional amendment enacting the Either Viewpoint approach to ensure uniform national application.

A. *CAFA's Text, Legislative History, and Underlying Policy Concerns Support the Either Viewpoint Approach*

CAFA constituted a significant change from previous standards for federal jurisdiction over class actions. Because CAFA explicitly permits aggregating plaintiffs' claims, at least one rationale against the Either Viewpoint approach has been eliminated. Additionally, CAFA broadly expands defendants' options for removal to federal court by removing the primary pre-CAFA obstacles to federal diversity jurisdiction.¹⁴⁸ The *SeaWorld* case is instructive in this context. If interpreting the amount in controversy in *SeaWorld* with the Plaintiff's Viewpoint approach "would frustrate Congress' manifest purpose"¹⁴⁹ by keeping this large-scale class action out of federal court, the Plaintiff's Viewpoint approach should be rejected.

CAFA's legislative history offers insight into Congress's intention for courts' interpretation of the amount in controversy in injunctive relief CAFA cases. A Senate Committee on the Judiciary Report explicitly advocates for the Either Viewpoint approach:

The Committee is aware that some courts, especially in the class action context, have declined to exercise federal jurisdiction over cases on the ground that the amount in controversy in those cases

148. *Supra* Part II.A.

149. *United States v. Hayes*, 555 U.S. 415, 427 (2009).

exceeded the jurisdictional threshold only when assessed from the viewpoint of the defendant. . . . Because [§ 1332(d)(6)] explicitly allows aggregation for purposes of determining the amount in controversy in class actions, that concern is no longer relevant.¹⁵⁰

Courts that have applied the Either Viewpoint approach to CAFA cases frequently cite this section to support their interpretation.¹⁵¹ While the Report seems to explicitly resolve any doubt about Congress's intention, courts clinging to the Plaintiff's Viewpoint approach either ignore the Report entirely¹⁵² or deny its persuasiveness.¹⁵³ The Report was not issued until ten days after CAFA was signed into law, which one court used to discredit its validity as a post hoc statement entitled to little persuasive weight.¹⁵⁴

However, these arguments ignore the supporting text in CAFA itself: "In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000."¹⁵⁵ Pre-CAFA circuit decisions endorsing the Plaintiff's Viewpoint rely on *Snyder's* prohibition on claim aggregation as precluding the Either Viewpoint approach.¹⁵⁶ The

150. S. REP. NO. 109-14, at 42–43 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 40–41.

151. *E.g.*, *Rippee v. Bos. Mkt. Corp.*, 408 F. Supp. 2d 982, 984 (S.D. Cal. 2005); *Otay Hydraulics, Inc. v. Safety-Kleen Sys., Inc.*, No. 2:12-cv-073570DW(VBKx), 2013 WL 1898573, at *2 (C.D. Cal. May 6, 2013); *Valdez v. Metro. Prop. & Cas. Ins. Co.*, 867 F. Supp. 2d 1143, 1163–64 (D.N.M. 2012); *Yeroushalmi v. Blockbuster Inc.*, No. CV-05-225-AHM(RCX), 2005 WL 2083008, at *5 (C.D. Cal. July 11, 2005).

152. *See, e.g.*, *Campos v. Metabolic Rsch., Inc.*, No. CV 09-9445-VBF(DTBx), 2010 WL 11597627, at *3 (C.D. Cal. Aug. 4, 2010) (failing to mention the Report when dismissing the use of the "defendant's-viewpoint approach").

153. *See, e.g.*, *Waters v. Ferrara Candy Co.*, No. 4:17-cv-00197-NCC, 2017 WL 2618271, at *5 (E.D. Mo. June 16, 2017) (arguing against the persuasive value of the Judiciary Committee CAFA report in enforcing the Plaintiff's Viewpoint approach), *aff'd*, 873 F.3d 633 (8th Cir. 2017).

154. *Id.*

155. 28 U.S.C. § 1332(d)(6).

156. For example, the Ninth Circuit explained,

[The] defendant's-viewpoint approach could not be applied to class actions without undermining *Snyder* . . . , in which the Supreme Court had held that class action plaintiffs cannot aggregate the amounts of their "separate and distinct" claims in order to meet the amount-in-controversy requirement. We explained that in class actions, use of the defendant's-viewpoint approach was "basically the same as aggregation."

Kanter v. Warner-Lambert Co., 265 F.3d 853, 859 (9th Cir. 2001) (citation omitted); *see* *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977) ("[I]n cases which involve 'separate and distinct claims that cannot be aggregated, it would be improper to look to total detriment. The doctrine of [*Snyder*] cannot be so easily evaded." (quoting *Lonnquist v. J.C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970))); *Mass. State Pharm. Ass'n v. Fed. Prescription Serv., Inc.*, 431 F.2d 130, 132 n.1 (8th Cir. 1970) ("In light of [*Snyder*] . . . , we are of the view that the 'plaintiff's viewpoint' rule is

Third Circuit states, “[A]llowing the amount in controversy to be measured by the defendant’s cost would eviscerate *Snyder*’s holding that the claims of class members may not be aggregated in order to meet the jurisdictional threshold.”¹⁵⁷ All of these cases were decided before CAFA did in fact eviscerate *Snyder*’s holding by declaring that “claims of the individual class members shall be aggregated” to reach the amount in controversy.¹⁵⁸ With claim aggregation explicitly required in CAFA’s text, these courts have effectively lost their single rationale in support of the Plaintiff’s Viewpoint. As noted in the Committee Report, *Snyder*’s limitations are simply “no longer relevant” in CAFA cases.¹⁵⁹

The same outcome proves true in *SeaWorld*. The plaintiffs did not seek any monetary damages on behalf of the class members; in fact, “Plaintiffs clearly sought to plead in a way they thought would ensure their case would continue in state court.”¹⁶⁰ However, CAFA expressly provides that the plaintiffs’ claims against SeaWorld must be aggregated to reach the amount in controversy.¹⁶¹ While *Snyder* would have prevented such aggregation,¹⁶² under CAFA, SeaWorld can aggregate all of the plaintiffs’ claims against it to calculate the value of the demanded injunctive relief. The plaintiffs’ proposed remedy would impose substantial costs in lost ticket sales and tarnished reputation, the value of which exceeds the \$5 million threshold.¹⁶³ Accordingly, “Plaintiffs do allege a case worth at least \$5 million, giving the Court original jurisdiction under CAFA.”¹⁶⁴

Perhaps even more convincingly than CAFA’s text and legislative history, CAFA’s underlying policy concerns support adopting the Either Viewpoint approach. First, the Either Viewpoint approach

the only valid rule The holding can only be interpreted as precluding the valuation of the amount in controversy from the defendant’s viewpoint.” (citation omitted)).

157. *Packard v. Provident Nat’l Bank*, 994 F.2d 1039, 1050 (3d Cir. 1993) (applying the Plaintiff’s Viewpoint approach and denying federal diversity jurisdiction).

158. 28 U.S.C. § 1332(d)(6).

159. S. REP. NO. 109-14, at 43 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 41.

160. *Anderson v. SeaWorld Parks & Ent., Inc.*, 132 F. Supp. 3d 1156, 1169 (N.D. Cal. 2015).

161. 28 U.S.C. § 1332(d)(6). If the court were to apply the Plaintiff’s Viewpoint approach to *SeaWorld*, aggregation would provide little benefit—even aggregated, the plaintiffs still claimed they would derive no monetary benefit from the injunction. *Supra* note 4 and accompanying text.

162. *See Snyder v. Harris*, 394 U.S. 332, 339 (1969) (holding that the claims of class members may not be aggregated in order to meet the jurisdictional threshold).

163. *SeaWorld*, 132 F. Supp. 3d at 1164–65.

164. *Id.* at 1165.

protects more defendants from the bias of state courts. If CAFA truly meant to protect out-of-state defendants from hostile state courts, applying the Plaintiff's Viewpoint approach controverts this purpose—more defendants would be confined to state courts, even when they face injunctions costing far greater than \$5 million, so long as the plaintiffs claim nominal monetary benefit from the injunction. This is the exact sort of “gam[ing] the system” that Congress sought to curb.¹⁶⁵ Under the Either Viewpoint approach, defendants facing sufficiently expensive judgments (to the tune of \$5 million) can avail themselves of federal jurisdiction to avoid hostile state courts. Similarly, the Either Viewpoint approach better embodies Congress's desire to give federal courts jurisdiction over class actions with a national footprint.¹⁶⁶ If district courts have the option to deny access to federal court under the Plaintiff's Viewpoint approach, CAFA will still not grant federal jurisdiction to those claims having a large impact on defendants. In effect, its purpose to expand federal diversity jurisdiction¹⁶⁷ over national class actions would be defeated.

Finally, the Either Viewpoint approach takes into account the value of small claims class actions. Under the Either Viewpoint approach, plaintiffs can still aggregate their claims to meet the amount in controversy. At the same time, guaranteeing federal jurisdiction to qualifying defendants under the Either Viewpoint approach ensures that defendants are not over deterred by harsh state court judgments. By implementing the Either Viewpoint approach, federal courts embody the policy implications inherent in CAFA's structure and promote the fairness and equity rationales undergirding CAFA.

B. Counterarguments to the Either Viewpoint Approach in CAFA Cases

The question from Part II.B remains—why have some courts continued to apply the Plaintiff's Viewpoint approach in the face of evidence that CAFA cases should be treated differently from other class actions? While there is no one answer, three factors may help explain these judges' decisions: CAFA's textual ambiguity, continued incorrect application of pre-CAFA class action precedent, and federal judges' hostility toward CAFA.

165. *Supra* note 11 and accompanying text.

166. *Supra* notes 74–77 and accompanying text.

167. *See supra* note 10 and accompanying text.

CAFA's text is frequently critiqued as too ambiguous, and this may lead courts to continue to apply the Plaintiff's Viewpoint approach absent explicit congressional instruction. Ambiguous may be too rosy a characterization—scholars deem the drafting “sloppy.”¹⁶⁸ In fact, substantial litigation has been dedicated to interpreting an unrelated provision of CAFA that reads as entirely nonsensical.¹⁶⁹ This slip is emblematic of CAFA's sloppy drafting. Although Congress did not sloppily describe the aggregation principle, its failure to specify the proper viewpoint for analysis permits judicial discretion in applying the Plaintiff's Viewpoint approach.¹⁷⁰ Judges hostile to CAFA can thereby interpret the statute to apply the Plaintiff's Viewpoint approach absent explicit congressional direction.

CAFA's ambiguity also plays into the rationale that courts have simply (or perhaps stubbornly) stuck with their pre-CAFA class action precedent. However, few circuit courts have had occasion to rule on the issue—instead, district courts have issued the majority of decisions. Notably, the only district courts that have applied the Plaintiff's Viewpoint approach sit in circuits that applied that approach in pre-CAFA cases.¹⁷¹ The trend of following pre-CAFA precedent seems to follow in other areas of CAFA interpretation as well.

For example, in the context of removal, CAFA remains silent on the burden of proof required to show that plaintiffs did or did not meet the amount-in-controversy requirement. Absent congressional guidance on which standard to use, courts almost uniformly applied

168. *E.g.*, Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1565 (2008); Jacob R. Karabell, *The Implementation of “Balanced Diversity” Through the Class Action Fairness Act*, 84 N.Y.U. L. REV. 300, 305 n.27 (2009).

169. Adam N. Steinman, “Less” Is “More”? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle*, 92 IOWA L. REV. 1183, 1183 (2007). In this provision, CAFA gives courts of appeals discretionary jurisdiction over district court decisions on whether removal under CAFA is appropriate, but only in cases where “application is made to the court of appeals not less than 7 days after entry of the order.” 28 U.S.C. § 1453(c)(1). If the statute is supposed to grant appeals only where a timely appeal is filed, legislative history and common sense indicate that Congress intended to write “not more than 7 days.” Steinman, *supra*, at 1187.

170. *See, e.g.*, *Waters v. Ferrara Candy Co.*, No. 4:17-cv-00197-NCC, 2017 WL 2618271, at *6 (E.D. Mo. June 16, 2017) (applying the Plaintiff's Viewpoint approach despite acknowledging CAFA's disposal of the anti-aggregation principle and the Senate Report's explicit instruction to use the Either Viewpoint approach), *aff'd*, 873 F.3d 633 (8th Cir. 2017).

171. *Supra* Part II.C.

their pre-CAFA class action precedent.¹⁷² As in *SeaWorld*, courts in the Ninth Circuit have demonstrated willingness to treat CAFA cases differently from class actions not brought under CAFA.¹⁷³ However, the remaining courts' unwillingness to apply a different standard from pre-CAFA class actions may explain why some courts continue to apply the Plaintiff's Viewpoint approach absent additional congressional direction.

Finally, some scholars have suggested that federal judges are generally hostile to CAFA.¹⁷⁴ This would explain why judges continue to apply the Plaintiff's Viewpoint approach—as the narrower standard, it inherently favors state court jurisdiction and limits defendants' options to remove to federal court. The suggestion that federal judges are hostile to CAFA may have some bite, perhaps most notably in the face of evidence that judges were reluctant to accept an increase to their already heavy dockets.¹⁷⁵ The day before CAFA was passed, Congressman William Delahunt urged his fellow Representatives to consider that “[t]he practical effect of [the bill] could be that many cases will never be heard given how overburdened Federal judges are.”¹⁷⁶ Studies from the Federal Judicial Center suggest that these concerns were well-founded: in the four months following CAFA's passage, the number of class action suits in the three federal district courts the Center observed increased significantly.¹⁷⁷

Professors Kevin Clermont and Theodore Eisenberg's research proves particularly illuminating. In an empirical analysis of federal CAFA decisions from 2005 through 2008, Clermont and Eisenberg conclude that “[t]he set of all published opinions to date allows us to

172. Compare *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1208–11 (11th Cir. 2007) (applying the precedent of the preponderance standard); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404–05 (6th Cir. 2007) (same); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (same); *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804, 813–14 (5th Cir. 2007) (same), with *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006) (applying the pre-CAFA precedent of the legal certainty standard).

173. See, e.g., *Pagel v. Dairy Farmers of Am., Inc.*, 986 F. Supp. 2d 1151, 1159 (C.D. Cal. 2013) (ruling that the circuit's pre-CAFA precedent did not require “that the ‘either viewpoint’ rule is prohibited in CAFA cases”).

174. Clermont & Eisenberg, *supra* note 168, at 1591.

175. See 149 CONG. REC. 25,209 (2003) (statement of the Judicial Conference of the United States) (expressing its “concerns that the provisions would add substantially to the workload of the Federal courts”).

176. 151 CONG. REC. 2643 (2005) (statement of Rep. William Delahunt).

177. Memorandum from Tom Willging & Emery Lee, *supra* note 102.

conclude that most federal judges have resisted CAFA.”¹⁷⁸ Specifically, they find that federal courts had noticeably high rulings in favor of plaintiffs’ motions to remand in both the district courts¹⁷⁹ and courts of appeals.¹⁸⁰ They also find that when defendants acted as appellants in CAFA cases, judges had a significantly higher reversal rate of 37 percent.¹⁸¹ Clermont and Eisenberg find that this statistic “tends to show that it is opposition to extension of CAFA, rather than any aberrational pro-plaintiff attitude, that is driving the appellate judges.”¹⁸² Though this Note does not attempt to recreate that data with more modern cases, more recent legislative history suggesting CAFA amendments show that this concern is ongoing.¹⁸³ This noticeable hostility to extending CAFA jurisdiction to defendants provides a compelling backdrop to courts’ unwillingness to apply the Either Viewpoint approach in CAFA cases.

In short, CAFA’s textual ambiguity regarding which Viewpoint judges should use to value the amount in controversy leaves the door open for them to continue using the Plaintiff’s Viewpoint approach. Some judges may be motivated by precedent, simply applying the Plaintiff’s Viewpoint approach if precedent so dictates. Other judges might be driven by less innocent motives. If a federal judge is already hostile to CAFA, its textual ambiguity allows them to remand cases back to state court. These rationales provide further ammunition to an argument in favor of more federal intervention in the form of a congressional amendment.

178. Clermont & Eisenberg, *supra* note 168, at 1591.

179. Clermont and Eisenberg found a two-to-one plaintiff win rate in federal district courts. *Id.* at 1579.

180. A slightly lower, but still noticeably high, plaintiff win rate of 57 percent was found in courts of appeals. *Id.* at 1582.

181. *Id.* at 1583.

182. *Id.* at 1584.

183. See *Class Actions Seven Years After the Class Action Fairness Act: Hearing Before the H. Subcomm. on the Const.*, 112th Cong. 38 (2012) (statement of Rep. Jerrold Nadler) (“[W]e expressed the concern that [CAFA] would increase the workload of our already overburdened courts And growing caseloads leave Federal judges even less time.”); *State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the H. Subcomm. on the Const. & Civ. Just.*, 114th Cong. 35 (2015) (statement of Rep. John Conyers) (“[T]he Act will increase the workload of our already overburdened Federal courts”). Despite this concern, no official amendments to CAFA have been proposed or drafted.

C. *Necessity of a Congressional Amendment to Enforce the Either Viewpoint Approach*

The prior Sections have focused on the whys: why CAFA necessitates the use of the Either Viewpoint approach and why some courts have continued to apply the Plaintiff's Viewpoint approach in the face of that evidence. This Section will focus on the how. More specifically, this Section will demonstrate the need for a congressional amendment of CAFA to enforce the Either Viewpoint approach. This need stems from the three explanations described above for judges' continued use of the Plaintiff's Viewpoint approach: CAFA's textual ambiguity, misapplied pre-CAFA precedent, and hostility to CAFA cases generally.¹⁸⁴

The amendment would be best situated within 28 U.S.C. § 1332(d)(6), the provision that presently authorizes claim aggregation.¹⁸⁵ Claim aggregation is one of the necessary conditions for the Either Viewpoint approach, and the provision already states the \$5 million amount-in-controversy requirement. Therefore, the amendment could be appended to the existing text. An adapted version of the Tenth Circuit's explanation of the Either Viewpoint approach provides a useful structure.¹⁸⁶ Additionally, adapting the language of existing precedent on the Either Viewpoint approach directs federal courts that have previously used the Plaintiff's Viewpoint approach to look toward circuits that have already applied the Either Viewpoint approach for guidance. As combined with the existing text, the amended text of § 1332(d)(6) would read,

In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs. *The courts shall consider the greater of either the aggregated value to the plaintiff or the cost to the defendant of injunctive relief as the measure of the amount in controversy.*¹⁸⁷

This amendment would effectively address each of the three rationales for continuing to apply the Plaintiff's Viewpoint approach. First, amending the statute's language would give explicit guidance to

184. See *supra* Part III.B.

185. See 28 U.S.C. § 1332(d)(6) ("In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.").

186. *Supra* note 117 and accompanying text.

187. The added portion is italicized.

courts on how to value the amount in controversy in these cases. Second, statutory language describing how CAFA cases should be treated differently from non-CAFA class actions would demonstrate why prior precedent should not be followed. Finally, and perhaps most importantly, explicitly requiring the Either Viewpoint approach in these cases would deny judges the discretion to oppose extending CAFA jurisdiction to defendants.

The existing pool of precedent interpreting CAFA demonstrates a muddled and confusing application of CAFA to injunctive relief cases.¹⁸⁸ While some courts have looked to CAFA's legislative history in applying the Either Viewpoint approach, others have disregarded this history as unpersuasive or ignored it altogether.¹⁸⁹ Providing concrete guidance on the proper interpretation within the text of the statute itself could help avoid this confusion. Because CAFA's text, legislative history, and underlying policy concerns demand that courts use the Either Viewpoint approach, the most efficient and binding way to implement it nationwide is to include the Either Viewpoint in the text of CAFA itself.

CONCLUSION

CAFA demonstrates a significant departure from prior procedural requirements for removing class actions to federal court. Whether based on concerns for state courts' bias against out-of-state defendants or the national impacts of such litigation, the underlying principle of expansive federal jurisdiction remains clear. CAFA's text, legislative history, and underlying policy concerns all show that Congress intended to increase opportunities for defendants to remove to federal court. The Either Viewpoint approach acknowledges the value of the suit to the same party Congress sought to protect in enacting CAFA: the defendant. However, district courts have perpetuated an obstacle to federal jurisdiction by continuing to apply the Plaintiff's Viewpoint approach in CAFA cases. Courts may be motivated by CAFA's ambiguity, a desire to comport with their

188. *Supra* Part II.C.

189. *See, e.g.*, *Waters v. Ferrara Candy Co.*, No. 4:17-cv-00197-NCC, 2017 WL 2618271, at *5 (E.D. Mo. June 16, 2017) (arguing against persuasive value of the Judiciary Committee's CAFA report in enforcing the Plaintiff's Viewpoint approach), *aff'd*, 873 F.3d 633 (8th Cir. 2017); *Parker v. Riggio*, No. 10 Civ. 9504(LLS), 2012 WL 3240837, at *7-9 (S.D.N.Y. Aug. 6, 2012) (following the Plaintiff's Viewpoint approach based on Second Circuit precedent without considering CAFA's legislative history).

previous non-CAFA precedent, or even outright hostility to CAFA. Regardless of the motivation, the result remains the same—courts have created a hodgepodge application of CAFA to amount-in-controversy valuation that leaves defendants with unpredictable expectations in injunctive relief cases.

The most effective resolution of this confusion would be achieved through a congressional amendment to ensure uniform nationwide application. In the meantime, defendants in injunctive relief cases remain subject to the will of district court judges in deciding which viewpoint will be used to value their claims. As in the *SeaWorld* case, these determinations may make or break a defendant's opportunity for federal removal. The current doctrine leaves too much discretion to federal judges to answer one of the most important questions to a defendant in an injunctive relief class action.