No. 01-896

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA) N.A.,

Petitioners,

v.

JOHN B. MCCAULEY, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the cost to the defendant of complying with an injunction sought by a plaintiffs' class may satisfy the amount-in-controversy requirement of the diversity statute, where such compliance would cost the defendant more than the $75,000 minimum whether it covered the entire class or any single member of the class.

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INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers ("NAM") respectfully submits this brief as *amicus curiae* in support of petitioners and urges reversal of the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its member companies, or its counsel, made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), a letter of consent to file this brief from respondents has been filed with the Clerk of the Court; petitioners have filed with the Court a blanket consent for all *amici*.

The NAM is the oldest and largest multi-industry trade association in the United States. The NAM represents 14,000 member companies and subsidiaries (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

The NAM and its member companies are vitally interested in the proper application of the federal diversity statute to a relatively small, but exceedingly important group of lawsuits filed against out-of-state manufacturers seeking broad injunctive relief on behalf of plaintiff classes. At bottom, the NAM believes that a plaintiff's unilateral decision to proceed via class action rather than individually should have no bearing on whether there is federal jurisdiction in such cases. That is especially true in class-action cases which, like this one, involve requests for broad injunctive relief.

Such requests take many forms. One that increasingly arises in state-wide or nationwide toxic tort class actions is a request for medical monitoring. See, *e.g.*, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 603 (1997) (alleging, *inter alia*, medical monitoring claim). Medical monitoring often involves a court-administered fund, which finances not only the costs associated with periodic medical examinations, but also the costs of court-mandated studies on the long-term effects of a toxic substance or product in question, and research regarding related conditions.[2] Such relief thus

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[2] This Court, of course, has been skeptical of medical monitoring and has limited its effect in cases arising under the Federal Employer Liability Act. *Buckley v. Metro-North Commuter R.R.*, 521 U.S. 424, 438-39 (1997) (assuming that "an exposed plaintiff can recover related reasonable medical monitoring costs [as an element of damages] if and when he develops symptoms," but holding that medical monitoring costs do not represent a "separate negligently caused economic 'injury'" for which a defendant may recover even if he has no current "disease or symptoms"). Nevertheless, medical monitoring relief has been sought in a number of different types of mass tort actions. *See, e.g., Petito* v. *A.H. Robins Co.*,

requires not only a court-administered fund, but also the appointment of (and adequate compensation for) a fund administrator and an advisory panel of qualified and knowledgeable individuals that will devise a comprehensive medical monitoring plan. See, *e.g.*, *Petito* v. *A.H. Robins Co.*, 750 So. 2d 103, 106 (Fla. Dist. Ct. App. 1999) (holding that court in equity may create, supervise, and implement medical monitoring plan in action against manufacturer of Fen-Phen). The costs of compliance with such relief, if it is available under state law, undoubtedly would exceed the jurisdictional amount, even if the remedy were limited to the cost of the administration components of the fund. Accordingly, a claim for injunctive medical monitoring relief should satisfy the amount-in-controversy requirement.

Other class-action plaintiffs sometimes seek court-ordered safety programs. See, *e.g.*, *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 139 (3d Cir. 1998); see also *In re Three Mile Island Litig.*, 557 F. Supp. 96, 97 & n.1 (M.D. Pa. 1982); *Ganim* v. *Smith & Wesson Corp.*, 780 A.2d 98, 117 (Conn. 2001) (seeking injunctive relief against gun manufacturer in form of funding for "programs focused on handgun safety and owner responsibility"). In *General Motors*, for example, a plaintiff class brought several actions in both state and federal court against the manufacturer of pick-up trucks alleging that they had a defectively designed fuel system. 134 F.3d at 137. As part of a proposed settlement in state court, plaintiffs sought—and defendant agreed to—defendant-funded "safety programs, researching the safety of general fuel systems and testing proposed retrofits for safety and feasibility." *Id.* at 139. These proposed programs purportedly would cost a total

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750 So. 2d 103 (Fla. Dist. Ct. App. 1999) (pharmaceutical product); *Amchem*, 521 U.S. at 597 (exposure to asbestos); *Ayers* v. *Township of Jackson*, 525 A.2d 287 (N.J. 1987) (groundwater contamination); *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990) (exposure to PCBs).

of $5.1 million. *Id.* (explaining that injunctive relief would result in research and testing for retrofits); see also *In re Three Mile Island Litig.*, 557 F. Supp. at 97 (noting that approved settlement included fund for "evacuation planning for the future").

Another category of lawsuits affected by the decision below are cases seeking an injunction ordering the defendant to remove a toxic substance from a common area enjoyed by multiple plaintiffs or plaintiff class. See, *e.g.*, *Lane* v. *Champion Int'l Corp.*, 844 F. Supp. 724, 727 (S.D. Ala. 1994); *Anderson* v. *W.R. Grace & Co.*, 628 F. Supp. 1219, 1232 (D. Mass. 1986). In *Lane*, for example, the plaintiff class consisted of individuals who owned property adjoining a bay in which the defendant released toxic substances from its paper mill. 844 F.Supp. at 726. Part of the relief sought by the class was an injunction "to force the defendants to clean up and remove from [the bay] all toxins and other pollutants they had released there." *Id.* at 727 (ordering remand for lack of jurisdiction only after plaintiffs amended complaint to exclude request for injunctive relief). Such relief would satisfy the jurisdictional minimum if the costs of cleanup to the defendant exceeded $75,000.[3]

Finally, some class-action plaintiffs have sought damages and injunctive relief in the form of corrective advertising. In *Earnest* v. *General Motors Corp.*, 923 F. Supp. 1469 (N.D. Ala. 1996), for example, the plaintiff class alleged that the defendants designed and installed defective engines and engine control modules in their automobiles, and requested injunctive relief that included an "advertising campaign to notify putative class members of the alleged defect." *Id.* at 1471. There too, if the cost of implementing the advertising

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[3] *See also Anderson* v. *W.R. Grace & Co.*, 628 F. Supp. 1219, 1232-33 (D. Mass. 1986) (request for injunction ordering defendant to remove hazardous substances previously dumped on plaintiffs' property, and all contamination from area groundwater).

campaign exceeded $75,000, the jurisdictional amount would be satisfied.

Given the size and significance of the claims involved, these cases often spawn parallel suits in other states and subject out-of-state manufacturers to multiple lawsuits that must be defended simultaneously across the country. Although the relative number of such cases is small, the cost to defendants of complying with the broad injunctive relief sought can amount to millions and sometimes billions of dollars.

As demonstrated below, such cases are properly resolved in federal court. They are precisely the types of claims that the Constitution contemplated would be the province of federal courts, and for which the diversity statute was intended.

STATEMENT OF THE CASE

As is clear from Petitioners' statement of the case (with which *amicus* agrees), the essential facts are that the respondents in this case brought a class-action suit in state court seeking broad injunctive relief against the petitioners, Ford Motor Company and Citibank. The suit claims that the petitioners acted unlawfully in terminating a particular credit-card rebate program. In addition to seeking compensation for individual plaintiffs, the plaintiffs seek an injunction that, among other things, would require Ford and Citibank to reinstate the program essentially as it existed prior to its termination. Although the total costs of that reinstatement would vary to some extent depending on the number of plaintiffs (and others) choosing to participate, it is undisputed that the reinstatement would impose fixed costs well in excess of the statutory $75,000 minimum for diversity jurisdiction. Those fixed costs would be incurred even if only a single plaintiff ultimately participated in the program.

On appeal, the Ninth Circuit ruled that these fixed costs could not be considered in determining whether the statutory minimum had been met, and therefore ruled that the case

must be remanded to state court. The Ninth Circuit acknowledged that, if the suit had been brought by a single plaintiff, then these costs would be sufficient to satisfy the statutory minimum. J.A. 113. However, relying upon its earlier precedents, the court ruled that—because the suit was brought on behalf of a class of many plaintiffs—the petitioners could satisfy the statutory minimum only by showing, as to each class member, that the fixed costs *divided by the number of class members*, plus the amount sought by that class member individually, exceeded the statutory minimum. J.A. 116-119. Because petitioners had not made this showing, the court held that they had failed to establish a sufficient basis for diversity jurisdiction. *Id.* at 118-119.

SUMMARY OF ARGUMENT

I. This Court's settled precedent makes clear that a claim by a plaintiff class for injunctive relief that would impose on the defendant fixed compliance costs exceeding $75,000, regardless of the number of plaintiffs joining the action in which that claim is raised, satisfies the amount-in-controversy requirement imposed by 28 U.S.C. § 1332(a).

This case is controlled by the principle, reflected in Federal Rule of Civil Procedure 82 ("Rule 82"), that procedural rules can neither "extend" nor "limit" federal jurisdiction. Put another way, the Federal Rules of Civil Procedure, including Rule 23, are jurisdictionally "neutral." Here, there can be no question that, if plaintiffs proceeded through individual lawsuits—rather than through a Rule 23 class action—their individual requests for an injunction reinstating the rebate program would have satisfied the amount-in-controversy requirement.

Under settled law, the amount in controversy in a case involving a claim for injunctive relief is the "sum or value" of that relief, which may be assessed from the perspective of the defendant. As a result, the amount-in-controversy requirement is satisfied if the injunction sought by the

plaintiff would impose on the defendant compliance costs exceeding $75,000. It is undisputed in this case that the injunction sought by the plaintiffs would impose on the defendants fixed compliance costs in excess of the jurisdictional minimum. Under settled law, moreover, where multiple plaintiffs file suit to vindicate a "common and undivided interest," the "sum or value" of each plaintiff's interest may be considered in the aggregate. Each of the plaintiffs in this case has a common and undivided interest in an injunction requiring petitioners to reinstate the rebate program at issue.

That conclusion cannot be altered by plaintiffs' decision to proceed through a class-action mechanism. As Rule 82 makes clear, because Rule 23 of the Federal Rules of Civil Procedure is a procedural provision, it can neither extend nor limit the substantive standards governing the amount-in-controversy requirement. Thus, just as the existence of a plaintiff class cannot extend diversity jurisdiction, by way of aggregation, to encompass a group of jurisdictionally deficient claims by individual defendants, see *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), so also plaintiffs' decision to proceed via a class action cannot limit federal diversity jurisdiction when each plaintiff's claim for injunctive relief independently satisfies the jurisdictional amount.

II. Contrary to the decision below, a fair application of the neutrality principle reflected in Rule 82 to cases involving claims for class-wide injunctive relief has not and will not cause the sky to fall on the federal courts. To the contrary, enforcement of Rule 82 according to its plain terms will affect only a small, but important number of class actions for which the purposes underlying diversity jurisdiction are served. Class actions brought against out-of-state defendants that seek injunctive relief requiring medical monitoring, safety programs, remediation of toxic spills, or corrective advertising campaigns are precisely the types of claims for

which the diversity provision of Article III, and every subsequent diversity statute, were designed.

First, proper application of the diversity statute and Rule 82 would not cause an influx of "state law nuisance" actions in federal court, as the Ninth Circuit suggested. Rather, counsel for plaintiffs who truly wish to remain in state court have the ability and strong incentives to limit their complaints in a way that avoids federal jurisdiction—for example, by omitting claims for broad injunctive relief where money damages would suffice. Indeed, in the context of money damages, this Court has explained that plaintiffs can avoid federal jurisdiction by waiving recovery of damages in excess of the jurisdictional amount. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 294 (1938). As a result, the number of such claims ultimately litigated in federal court would likely be very small.

Moreover, the small number of cases where plaintiffs insist on seeking broad injunctive relief are precisely the types of cases for which diversity jurisdiction was designed. Indeed, the same incentives that cause plaintiffs to file suit in state court—*e.g.*, lax class certification standards applied against out-of-state defendants—are the reasons that the Constitution and Congress provided litigants the option to proceed in federal court to avoid such practices. Further, the federal courts are procedurally and institutionally well equipped to handle large class actions such as these. Not only do federal judges bring a more national perpective to such cases, but they also have the ability to coordinate and consolidate similar or identical actions pending in multiple courts and to utilize unique procedural tools permits federal courts to resolve such cases efficiently, fairly and without undue delay.

ARGUMENT

I. UNDER THE NEUTRALITY PRINCIPLE OF RULE 82, A REQUEST BY A CLASS FOR INJUNCTIVE RELIEF THAT WOULD IMPOSE FIXED COSTS IN EXCESS OF $75,000 SATISFIES THE AMOUNT-IN-CONTROVERSY REQUIREMENT, JUST AS IF THE SAME REQUEST WERE MADE BY A SINGLE PLAINTIFF OR A GROUP OF PLAINTIFFS.

This case is controlled by a single, common-sense principle that is enshrined in Rule 82 of the Federal Rules of Civil Procedure and the decisions of this Court. It is that a procedural rule or device "'shall not be construed to extend or limit the jurisdiction of the United States district courts.'" *Snyder*, 394 U.S. at 337 (quoting Fed. R. Civ. P. 82). In other words, the procedural mechanisms created by the rules of civil procedure should be neutral with respect to the reach of federal jurisdiction.

The decision below both ignores and contravenes this fundamental principle. As shown below, the language of the diversity statute, as well as this Court's decisions construing it, clearly establish that the fixed costs imposed by an injunctive order can satisfy the amount-in-controversy requirement, whether the underlying claim is asserted by an individual plaintiff or a group of individual plaintiffs. What distinguishes this case from those is that this case involves a class action under Rule 23. But, under Rule 82's neutrality principle, the mere use of the class-action device cannot "'limit the jurisdiction'" of the federal courts, any more than the use of that device can "'extend'" federal jurisdiction. *Id.*

A. The Language Of 28 U.S.C. § 1332(a) And This Court's Decisions Make Clear That The Fixed Costs Of Providing Injunctive Relief Can Satisfy the Amount-In-Controversy Requirement, Whether The Claim Is Asserted By An Individual Or A Group Of Individual Plaintiffs.

The amount-in-controversy requirement is a statutory limitation on the scope of federal jurisdiction authorized by Article III of the Constitution, which provides, in pertinent part, that the "judicial Power shall extend to all Cases, in Law and Equity . . . between Citizens of different States." U.S. Const. art. III, § 2. Section 1332 of Title 28 sets forth Congress' grant of federal diversity jurisdiction and provides:

> The 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.

28 U.S.C. § 1332(a). The amount-in-controversy requirement (which was a component of the first diversity statute in the Judiciary Act of 1789[4]) was designed to identify those cases involving diverse parties for which a federal forum for the resolution of interstate conflicts should be available. Unlike the federal question statute, which no longer contains an amount-in-controversy requirement, see 28 U.S.C. § 1331, the federal diversity statute recognizes that federal jurisdiction will not extend to every dispute (however trivial) between diverse plaintiffs and defendants. Rather, where the citizenship of the plaintiffs is diverse from the citizenship of the defendants, the controlling jurisdictional question is

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[4] That Act conferred diversity jurisdiction on the federal courts "where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars." Act of Sept. 24, 1789, § 11, 1 Stat. 78. Apart from periodic *adjustments* to the jurisdictional amount over the past two centuries, the language of this provision has undergone very few changes since 1789.

whether "the matter in controversy exceeds the sum or value of $75,000." *Id.* § 1332(a). Under Rule 82, the application of this limitation cannot depend on whether a group of plaintiffs chooses to proceed through individual lawsuits or through the use of the class-action mechanism.

1. There can be no doubt that the fixed costs of an injunctive remedy can satisfy the amount-in-controversy requirement for federal diversity jurisdiction in a suit brought by an individual plaintiff. Where a single plaintiff brings claims for specified damages, the "sum or value" of the "matter in controversy" is determined by the amount specified in the complaint. *St. Paul Mercury Indem. Co.*, 303 U.S. at 290-92 (involving removal from state court based upon diversity jurisdiction). However, where the complaint does not specify the precise amount sought, the court must assess the "sum or value" of the "matter in controversy" to determine whether it has diversity jurisdiction. See 14B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3702, at 49-52 (3d 1998).

This Court has repeatedly held that the jurisdictional amount-in-controversy requirement may be satisfied based upon claims for injunctive relief. See, *e.g.*, *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977); *Mississippi & Mo. R.R.* v. *Ward*, 67 U.S. (2 Black) 485 (1862). In so doing, the Court has explained that "the amount in controversy is measured by the value of the object of the litigation." *Hunt*, 432 U.S. at 347. In turn, the "value of the object" of any such litigation may fairly be understood as the defendant's cost of complying with an injunction sought by the plaintiffs. See, *e.g.*, *Market Co.* v. *Hoffman*, 101 U.S. 112, 113 (1879) (measuring the amount in controversy by reference to the defendant's cost of complying with an injunction sought by 206 individual plaintiffs, each of whom stood to benefit by an amount less than the jurisdictional minimum); see also *Smith* v. *Adams*, 130 U.S. 167, 175 (1889) ("[T]he pecuniary value of the matter in

dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by . . . the pecuniary result to one of the parties immediately from the judgment.").

Thus, the amount-in-controversy requirement of Section 1332(a) is clearly satisfied if a single plaintiff seeks an injunction that would require the defendant to expend more than the jurisdictional minimum in order to comply with it. See *Market Co.*, 101 U.S. at 113.

2. Moreover, where several plaintiffs join in seeking an injunction, the law is settled that the costs of complying with the injunction can satisfy the amount-in-controversy requirement to the extent those costs are fixed—that is, to the extent those costs do not depend on the presence of any individual plaintiff. As this Court has previously noted, "'when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.'" *Zahn*, 414 U.S. at 294 (quoting *Troy Bank* v. *G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911)); see also *Snyder*, 394 U.S. at 337 (same). Thus, when multiple plaintiffs bring a single claim to vindicate an undivided interest shared by the plaintiffs collectively, the "sum or value" of the entire claim may be used to measure the amount in controversy with respect to each individual plaintiff.

This basic approach is well-established in this Court's precedents. For example, in *Shields* v. *Thomas*, 58 U.S. (17 How.) 3 (1854), the representatives of a decedent's estate brought suit against the husband of the decedent's widow, alleging that the former had converted to his own use a significant portion of the property in the estate. *Id.* at 4. The plaintiffs obtained a decree requiring the defendant "to pay to each [plaintiff] the specific sum to which he was entitled, as his proportion of the property misappropriated by" the defendant. *Id.* When the defendant failed to comply with that decree, the plaintiffs obtained an injunction ordering him to

do so. *Id.* The plaintiffs moved to dismiss the appeal to this Court, arguing that, because no single plaintiff was entitled to more than $2,000.00 under the decree, appellate jurisdiction was lacking. *Id.* But the Court rejected that argument, explaining that

> [T]he matter in controversy . . . was the sum due to the representatives of the deceased collectively; and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a *common and undivided interest* in the claim; and it was perfectly immaterial to the appellant, how it was to be shared among them. He had no controversy with either of them on that point. . . .

Id. at 4-5 (emphasis added). In so holding, the Court distinguished *Oliver* v. *Alexander*, 31 U.S. (6 Pet.) 143 (1832), where multiple plaintiffs were deemed not to satisfy the jurisdictional amount requirement because each plaintiff's "recovery d[id] not depend upon the recovery of others, but rest[ed] altogether on its own evidence and merits." *Shields*, 58 U.S. (17 How.) at 5. The *Shields* Court explained that *Oliver* was inapposite because the plaintiffs in *Shields* had a "common and undivided interest" in the subject of their claims, whereas the interests claimed by the plaintiffs in *Oliver* were "separate and distinct." *Id.* at 5.

Subsequent decisions consistently have focused on whether the plaintiffs have a "common and undivided interest," such that the "sum or value" of their claims may be considered in the aggregate, or "separate and distinct" interests, such that each plaintiff's claim must be considered individually. See, *e.g.*, *Zahn*, 414 U.S. at 294; *Snyder*, 394 U.S. at 338; see also 14B Charles Alan Wright, *supra*, § 3704, at 143-47. Like this case, many (if not most) of the cases falling into the former

category have involved claims for injunctive relief, which by their nature implicate common and undivided interests.[5]

Actions consisting of "separate and distinct" claims, by contrast, typically involve claims for money damages arising out of a single defendant's breach of several related obligations, see, *e.g.*, *Oliver*, 31 U.S. (6 Pet.) at 145-46 (admiralty suit brought by seamen to collect unpaid wages from ship owners); or claims for equitable relief that can scarcely be distinguished from claims for money damages, see, *e.g.*, *Gibson* v. *Shufeldt*, 122 U.S. 27, 39 (1887) (equitable claims that would conclusively determine the amount of money each plaintiff would recover from the defendant).

The claim at issue here—for an injunction requiring the petitioners to re-establish their credit card rebate program—obviously is not "separate and distinct" as to each plaintiff. To the contrary, regardless of other individual claims that the plaintiffs seek to assert, that particular claim vindicates a "common and undivided interest" shared by all of the plaintiffs in this case. As explained previously, every plaintiff in this case seeks precisely the same relief—a single injunction requiring the defendants to reinstate the rebate program. Although some plaintiffs ultimately may benefit from that program to a greater degree than others, the injunction itself would treat all plaintiffs equally. And it is undisputed that the injunction would impose on each defendant fixed compliance costs exceeding $75,000—costs that would not drop below the jurisdictional amount even if this action had been brought by a single plaintiff.

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[5] *See, e.g.*, *Troy Bank* v. *G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911) (bill in equity to enforce vendor's lien); *New Orleans Pac. Ry.* v. *Parker*, 143 U.S. 42, 52 (1892) (bill in equity seeking mortgage foreclosure); *Davies* v. *Corbin*, 112 U.S. 36, 40-41 (1884) (bill to enjoin the collection of certain taxes); *Stinson* v. *Dousman*, 61 U.S. (20 How.) 461, 467 (1857) (injunction requiring specific performance under real estate contract); *Shields* v. *Thomas*, 58 U.S. (17 How.) 3, 4 (1854) (bill in equity to enforce the terms of a prior judgment).

In that sense, therefore, "the matter in controversy" here is "not the particular sum to which each [plaintiff is] entitled," but rather the class's "common and undivided interest" in having the rebate program reinstated. *Shields*, 58 U.S. (17 How.) at 4-5. Thus, the respective interests of the plaintiffs in this case are sufficiently "common and undivided" that the "sum or value" of the relief they seek may be considered in the aggregate, at least to the extent of the *fixed* costs of providing that relief.

B. Because Class-Action Procedures Cannot "Extend or Limit" The Scope Of Diversity Jurisdiction, The Amount-In-Controversy Requirement Is Satisfied By A Class Action Seeking An Injunction Whenever An Individual Suit Seeking The Same Relief Would Satisfy That Requirement.

Accordingly, there can be no serious question that the cost of complying with the respondents' proposed injunction would be considered as part of the amount in controversy if the plaintiffs all were suing the respondents as individuals rather than as part of a class pursuant to Rule 23. The only question, then, is whether the presence of a Rule 23 class action makes any difference. As shown below, it cannot, consistent with Rule 82's neutrality principle.

In the decision below, the Ninth Circuit did not dispute that an individual suit seeking the very injunctive relief sought in this case would satisfy the amount-in-controversy requirement. However, based on its analysis of this Court's decisions in *Zahn* and *Snyder*, the Ninth Circuit concluded that the presence of a class action in this case was sufficient to preclude satisfaction of that requirement. J.A. 116. Far from supporting the Ninth Circuit's conclusion, however, *Zahn* and *Snyder* logically confirm the existence of federal diversity jurisdiction in this case, particularly this Court's analysis of Rule 82.

In *Snyder*, not one of the plaintiffs sought damages in excess of the jurisdictional amount and therefore the amount in controversy for diversity jurisdiction could have been met only by aggregating the damages sought by the entire plaintiff class. 394 U.S. at 333. Similarly, in *Zahn*, although the named plaintiffs each had demonstrated that their claims exceeded the jurisdictional amount, no such showing could be made with respect to the unnamed members of the class. 414 U.S. at 292. In both cases, this Court refused to aggregate the claims of the multiple plaintiffs, and held instead that "[e]ach plaintiff in a . . . class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.'" *Id.* at 301; see *Snyder*, 394 U.S. at 336 (same).

In so doing, however, the Court carefully explained that the procedural rule governing class actions neither expanded nor limited the scope of federal subject matter jurisdiction. See *Zahn*, 414 U.S. at 299-300; *Snyder*, 394 U.S. at 336-37. Outside of the class-action context, the Court reasoned, each and every plaintiff must "individually satisfy the jurisdictional amount," *Zahn*, 414 U.S. at 292, and the class-action mechanism is merely a useful procedural tool that enables large groups of plaintiffs to join together in a single action for purposes of convenience. *Id.* at 299-300; *Snyder*, 394 U.S. at 336-37. The availability of that procedural mechanism therefore could not authorize a group of plaintiffs to maintain collectively a federal diversity suit if each plaintiff could not bring such a claim individually. *Zahn*, 414 U.S. at 299-301; *Snyder*, 394 U.S. at 336-37. To do so, the Court ruled, "would clearly conflict with the command of Rule 82 that '[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts.'" *Snyder*, 394 U.S. at 337 (quoting Fed. R. Civ. P. 82); see *Zahn*, 414 U.S. at 299.

The facts here are the logical flip-side of *Snyder* and *Zahn*. That is, the availability of class-action procedures cannot

"limit" the subject matter jurisdiction of the courts, Fed R. Civ. P. 82, where each plaintiff in the class *could* satisfy the jurisdictional amount based upon the request for injunctive relief. In this case, therefore, in contrast to *Zahn* and *Snyder*, if any of the plaintiffs brought a separate action seeking the same injunctive relief they now seek as a class, they could have proceeded in federal court because the "sum or value" of each such action would exceed $75,000. By the same token, any such action filed in state court could properly have been removed to federal district court. See 28 U.S.C. § 1441(a).

Zahn and *Snyder* thus logically confirm that plaintiffs' decision to proceed as a class action rather than multiple individual actions does not "limit" federal subject matter jurisdiction where the federal courts would have had jurisdiction over each claim for injunctive relief if plaintiffs had sued individually. Any such "limit"—including the limitation imposed by the Ninth Circuit below—would flatly violate Rule 82.

* * * * *

The language of Section 1332 and this Court's decisions interpreting the amount-in-controversy requirement, when considered in light of Rule 82's neutrality principle, make clear that the federal diversity statute encompasses the request for injunctive relief by the plaintiff class in this case. Thus, the Ninth Circuit erred in declining to exercise jurisdiction. As Chief Justice Marshall put it more than 180 years ago:

> We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Accordingly, respondents' efforts to limit the scope of jurisdiction conferred by the diversity statute are properly directed to Congress, not this Court.

II. APPLICATION OF RULE 82'S NEUTRALITY PRINCIPLE TO RECOGNIZE FEDERAL JURISDICTION IN CASES SUCH AS THESE SERVES THE POLICIES UNDERLYING DIVERSITY JURISDICTION WITHOUT UNDULY BURDENING THE FEDERAL COURTS.

The court of appeals refused to adhere to these principles based upon a concern that recognition of diversity jurisdiction here would unduly burden federal courts in future cases. But that concern is misplaced, both because it vastly overstates the real-world impact of Rule 82 in this context, and because it overlooks the key role that federal courts can and should play in the efficient and fair resolution of such class-action suits against out-of-state defendants.

A. Reversal Of The Decision Below Would Likely Affect Only A Relatively Small But Important Set Of Lawsuits Seeking Broad Injunctive Relief In Addition To Monetary Damages.

There is no reason to believe that a fair application of Rule 82 in cases such as these will significantly increase the burden on federal courts—if it has any such effect at all. In the first place, most of the federal courts to address this issue have disagreed with the Ninth Circuit and have found that the fixed costs of complying with an injunction can satisfy the amount-in-controversy requirement.[6] For that and other reasons, many of these suits already are being maintained in federal

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[6] *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997) (explaining that correct standard is "the cost to each defendant of an injunction running in favor of one plaintiff"); *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 719 n.16 (D. Md. 2001) ("Of course, the cost to the defendant of an injunction running in favor of one plaintiff will often be used as the test to determine the amount in controversy in class actions and other multi-plaintiff cases."); *In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 834-35 (E.D. Mich. 1999) (adopting the Seventh Circuit's approach *In re Brand Name*).

court. See, *e.g.*, *Gibbs* v. *E.I. DuPont De Nemours & Co.*, 876 F. Supp. 475, 480 (W.D.N.Y. 1995) (medical monitoring); *General Motors*, 134 F.3d at 139 (safety program); *Lane*, 844 F. Supp. at 727 (clean-up of toxic substance); *Earnest*, 923 F. Supp. at 1471, 1472.

As discussed in the NAM's statement of interest, these cases include class actions seeking injunctive relief in the form of "medical monitoring," "safety programs," "clean-up" programs, and "corrective advertising." There is no evidence that such cases are creating an undue burden in other circuits.

Moreover, a ruling reversing the decision below is unlikely to affect a plaintiff's incentive to choose a federal forum rather than a state forum. Given the enormous benefits to plaintiffs in certain jurisdictions of proceeding in state court, a reversal of the decision below is much more likely to cause most plaintiffs to forgo a claim for injunctive relief rather than proceed in federal court.

Indeed, in all such suits, the plaintiffs and their attorneys ultimately control whether such cases will proceed in a federal forum or in state court. As explained in *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938), if a plaintiff "does not desire to try his case in federal court he may resort to the expedient of suing for less than the jurisdictional amount . . . ." *Id.* at 294.

By the same token, in cases such as those at issue here, there is ample reason to believe that a plaintiff committed to brining such claims in state court would simply omit claims for injunctive relief to avoid federal diversity jurisdiction. Cf. *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 399 (1987) (plaintiffs may, "by eschewing claims based on federal law, choose to have the cause heard in state court"). First, and foremost, plaintiffs may omit such claims because they believe the likelihood of succeeding on the merits is small. Many of the types of class-action equitable relief discussed above have been rejected or criticized by courts across the

country.[7] Moreover, even if the theory underlying the request for relief were viable, the right to equitable relief in such cases arises only if money damages are inadequate. Cf. *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 75-76 (1992) ("[I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief."). For example, the benefits of injunctive relief (such as the discounts on auto purchases under the credit card program in this case) often can be realized in state court through money damages.

Second, plaintiffs may choose to omit such equitable claims if they perceive an advantage in proceeding in state court rather than federal court. In federal court, for example, class actions receive exacting scrutiny. Indeed, in *Amchem Prods.* v. *Windsor*, 521 U.S. 591 (1997), this Court found that a proposed class of "hundreds of thousands, perhaps millions" of individuals who were allegedly harmed by past exposure to asbestos-related products failed to satisfy Rule 23's predominance requirement. *Id.* at 597.[8] This rigor on the part

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[7] *See, e.g., Buckley*, 521 U.S. at 439 (holding that medical monitoring costs do not under FELA represent a "separate negligently caused economic 'injury'" for which a defendant may recover even if he has no current "disease or symptoms"); *McClenathan* v. *Rhone-Poulenc, Inc.*, 926 F. Supp. 1272, 1281 (S.D.W. Va. 1996) (questioning basis of injunctive relief in form of "independent safety audits"); *Bristol Tech., Inc.* v. *Microsoft Corp.*, 114 F. Supp. 2d 59, 98 (D. Conn. 2000) (noting that courts grant requests to order corrective advertising only under certain limited circumstances), *vacated on other grounds*, 250 F.3d 152 (2d Cir. 2001); *cf. Walsh* v. *Ford Motor Co.*, 130 F.R.D. 260, 266-67 (D.D.C. 1990) (declining to certify class under Rule 23(b)(2) where money damages would "be more certain to provide real benefits to affected motorists" than the requested injunction ordering recall and retrofit of defective vehicles).

[8] The federal courts of appeals have employed equally rigorous analyses when determining whether to certify a class action. *See, e.g., Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (reversing district court's grant of class certification to a national class of cigarette

of the federal courts stands in sharp contrast to the more liberal approach toward class certification that class-action lawyers may enjoy in some state courts.

Indeed, profound concern has been expressed that the "*laissez-faire*" approach taken by many state-court judges often results in "entrepreneurial contingency fee attorneys . . . bypass[ing] the rigorous review given by federal judges and obtain[ing] certification of questionable claims and approval of outrageous settlements." Victor E. Schwartz *et al.*, *Federal Courts Should Decide Interstate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483, 499 (2000). For example, one study on class actions documented that over a two-year period, a state court in rural Alabama certified almost as many class actions (35 cases) as all 90 federal district courts did in one year (38 cases). *Id.* In addition, a practice referred to as "'drive-by' class certifications" may occur whereby some state-court judges certify classes at the request of plaintiffs' counsel before defendants have been served with a complaint or given a chance to respond. See *id.* at 501.

Such lax standards may account for the recent explosion in the number of class-action lawsuits being filed in state courts. See Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 Loy. L.A. L. Rev. 1559, 1597 (2000) (noting that the *Amchem* decision accelerated the trend of attorneys seeking "to certify settlement classes in state courts where the rules on certification are perceived to be more liberal"). According to

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smokers); *cf. In re American Med. Sys., Inc.*, 75 F.3d 1069, 1089 (6th Cir. 1996) (noting that "strict adherence to Rule 23 in products liability cases involving drug or medical products which require FDA approval is especially important") (emphasis omitted); *In re A.H. Robins Co.*, 86 F.3d 364, 375-76 (4th Cir. 1996) (refusing to allow plaintiffs' attorneys to receive additional ten percent in fees from unanticipated surplus of settlement funds set aside for class members).

the Federal Judicial Conference's Advisory Committee on Civil Rules, U.S. companies have in recent years experienced a 300-1,000 per cent increase in the number of class actions filed against them, with the vast majority of them having been filed in state courts. 1 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23*, at ix-x (May 1, 1997). This trend is confirmed by a study performed by the RAND Corporation, which concluded in 1997 that the "doubling or tripling . . . of the number of putative class actions" has been concentrated in the state court systems, "because plaintiffs . . . see increased unwillingness among federal judges to certify or sustain certification of class actions." Deborah Hensler et al., *Preliminary Results of the RAND Study of Class Action Litigation* 15 (1997). Another survey conducted in 1999 revealed that while federal court class actions had increased by 340 per cent over the past decade, state-court class-action filings had increased 1,315 per cent. See *Analysis: Class Action Litigation*, Class Action Watch, Spring 1999, at 3, *available at* http://www.fed-soc.org/Publications/classactionwatch/classv1i3.pdf.[9]

For all these reasons, if this Court rules that a claim for broad injunctive relief with fixed costs in excess of $75,000 satisfies the amount-in-controversy requirement, plaintiffs with access to class-action-friendly state courts are not likely to forgo those benefits just to maintain a claim for injunctive relief. They are much more likely to forgo their claims for

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[9] A more recent study published in 2001 ("the Harvard study") examined data from the dockets of three state courts widely viewed as "class action magnets." John H. Beisner & Jessica Davidson Miller, *They're Making A Federal Case Out of It . . . In State Court,* 25 Harv. J.L. & Pub. Pol'y 143, 205 (2001). The results of the Harvard study confirmed that the filing of state-court class actions has increased in numbers wildly disproportionate to their populations. *Id.* at 161-62 & tbl. 1. In addition, the study found that the majority of class actions filed in all three counties were brought on behalf of nationwide classes. *Id.* at 163-64 & tbl. 2.

broad injunctive relief and focus instead on damage claims that fall below the federal threshold.

B. The Ninth Circuit's Approach Ignores The Policies Underlying Diversity Jurisdiction As Well As The Federal Courts' Unique Competence To Address Large Class Actions.

On the other hand, to the extent a plaintiff nevertheless insists on seeking broad, class-wide equitable relief against an out-of-state defendant, that is precisely the type of case that can and should proceed in federal court. In this regard, the decision below simply ignores the purposes underlying diversity jurisdiction and the federal courts' unique competence to address such cases in a fair, efficient and just manner.

1. Federal diversity jurisdiction was envisioned by the Framers and first enacted by the Congress more than 200 years ago to address concerns regarding bias and the appearance of bias in cases involving citizens of different states.

In *Federalist No. 80,* for example, Alexander Hamilton suggested that "the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens" because the federal judiciary "having no local attachments, will likely be impartial between the different States and their citizens." *Federalist No. 80* (Alexander Hamilton). James Madison echoed the view that federal diversity jurisdiction is necessary to avoid local bias. He reasoned that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them" and, as a result, a "citizen of another State might not chance to get justice in a state court, and at all events he might think himself inured." 3 Elliot, *Debates of the Federal Constitution* 486 (1836).

Consistent with these views, this Court has explained that Congress conferred diversity jurisdiction in the Judiciary Act

of 1789 "to prevent apprehended discrimination in state courts against those not citizens of the State." *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 74 (1938).[10]

Federal diversity jurisdiction also serves the purpose of combating the perception of bias by out-of-state defendants. Chief Justice Marshall recognized the constitutional significance of even the perception of bias:

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

Bank of United States v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), *overruled in part on other grounds, Louisville, Cincinnati, & Charleston R.R.* v. *Letson*, 43 U.S. (2 How.) 497 (1844). Thus, federal diversity jurisdiction serves not only to protect out-of-state defendants against actual bias, but also to bolster public confidence in the dual state and federal judicial systems by addressing concerns regarding the mere appearance of discrimination in favor of local residents.

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[10] Federal courts continue to recognize the need to protect out-of-state defendants against state-court hostility through diversity jurisdiction. *See, e.g.*, *Rooney* v. *Tyson*, 127 F.3d 295, 297 n.1 (2d Cir. 1997) (recognizing that asking state court to decide case pending in federal court "would contravene the object of diversity jurisdiction of presenting the actual parties to a litigation with a neutral, federal, playing field"); *J.A. Olson Co.* v. *City of Winona, Miss.*, 818 F.2d 401, 404 (5th Cir. 1987) ("Diversity jurisdiction exists for the purpose of providing a federal forum for out-of-state litigants where they are free from prejudice in favor of a local litigant."); *Wallace* v. *HealthOne*, 79 F. Supp. 2d 1230, 1232 (D. Colo. 2000) ("The history and purpose of diversity jurisdiction is to provide a neutral forum for out-of-state parties who fear that they will be subjected to local prejudice if forced to litigate as strangers in a state court.").

Anecdotal accounts of bias against out-of-state defendants in the context of class-action litigation are, unfortunately, well documented and take a number of forms. For example, commentators report that there may be local hostility toward an out-of-state defendant by the presiding judge, who is elected by a constituency that may have a strong bias against the out-of-state company. See Brittain Shaw McInnis, *The $75,000.01 Question: What Is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013, 1027-28 (1998) (hereinafter *McInnis*) (noting that "[i]n some instances, . . . judges can end up deciding cases that involve attorneys or parties who have made substantial contributions to their campaigns"); see also William A. Braverman, *Janus Is Not A God of Justice: Realignment of Parties in Diversity Jurisdiction*, 68 N.Y.U. L. Rev. 1072, 1083 n.50 (1993) (noting that empirical studies suggest state-judge biases against out-of-state defendants). Indeed, some commentators have underscored that "[i]n states where judges are elected, some judges may feel political pressure to approve large class-action settlements so as to project an image of looking out for consumer interests and bringing large sums of money into their jurisdictions." Schwartz *et al.*, *supra*, at 502. Diversity jurisdiction is the constitutionally prescribed antidote to these problems, whether real or perceptual.

2. To the extent such class-action cases end up in federal rather than state court, moreover, federal courts are well suited to deal with them. Indeed, federal courts offer institutional strengths that enhance their ability to resolve class-action lawsuits seeking broad (*e.g.*, nation-wide) injunctive relief efficiently and effectively—in many cases far more efficiently than their state-court counterparts.

First, the federal judiciary typically has greater resources—including human resources such as a full complement of law clerks, secretaries and satellite court personnel—than most state trial courts for handling complex class-action litigation and for coordinating and disposing of duplicative litigation

efficiently. See Edward F. Sherman, *Class Actions & Duplicative Litigation*, 62 Ind. L.J. 507, 550-51 (1987); see also Stephen Daniel Kaufmann, Comment, *"Federalizing" Class Actions: The Future of the Jurisdictional Requirements For Diversity-Based Class Actions*, 52 Ala. L. Rev. 1029, 1054 (2001) (noting that federal judges, unlike state-court judges, generally have access to several law clerks, magistrate judges and special masters). Among other things, these resources permit federal judges to focus more attention on dispositive legal or evidentiary issues, pre-trial motions for summary judgment, and other developments that may permit the disposition of cases prior to the expenditure of vast resources by both sides.

Second, Congress has empowered the federal courts to coordinate and consolidate cases that raise common factual or legal questions to promote efficient and just dispute resolution. See 28 U.S.C. § 1407(a). Specifically, § 1407(a) provides that "[w]hen civil actions involving one or more common questions of fact are pending in different [federal judicial] districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings" by the judicial panel on multidistrict litigation. *Id.* Such transfers are proper where they "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." *Id.* As the *Manual for Complex Litigation* puts it, "[o]ne of the values of multidistrict proceedings is that they bring before a single judge all of the cases, parties, and counsel comprising the litigation," and "afford a unique opportunity for the negotiation of a global settlement." *Manual For Complex Litigation (Third)* § 31.132, at 254 (1995); see also Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv. L. Rev. 1001, 1001 (1974) (noting that transfer and consolidation under § 1407 aimed to "achieve the objectives of eliminating conflict and duplication and assuring efficient and economical pretrial proceedings"); Carter G. Phillips et

al., *Rescuing Multidistrict Litigation From the Altar of Expediency*, 1997 BYU L. Rev. 821, 833 (1997) (hereinafter *Rescuing Multidistrict Litigation*) ("[I]n enacting § 1407, Congress chose to allow judicial efficiency to outweigh individual convenience . . . .")

The availability of multidistrict litigation (MDL) proceedings in the federal court system offers several advantages to parties in complex class actions. For one thing, this system protects class-action defendants against abusive procedural tactics employed by plaintiffs' counsel to run up the costs of litigation. John A. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 Harv. J.L. & Pub. Pol'y 143, 152-53 (2001).[11]

MDL proceedings also offer numerous procedural and practical benefits. These include eliminating the need to conduct multiple productions of documents in several states and condensing discovery into a national depository in a single location. *Manual For Complex Litigation (Third)* § 31.131, at 251 (noting that the Judicial Panel considers requests for MDL "mindful that the objective of transfer is to eliminate duplication of discovery, avoid conflicting rulings and schedules, [and] reduce litigation cost"); see also *Rescuing Multidistrict Litigation*, at 823 (noting that more efficient use of pretrial judicial resources outweighs the harm to litigants).

Yet another class of benefits associated with moving state-court class actions into MDL includes the advantages that federal courts may provide to defendants generally. For example, one commentator has observed that federal courts

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[11] For example, plaintiffs' counsel often file nearly identical class actions before multiple state courts, which results in the proliferation of duplicative class action litigation in different jurisdictions. *Beisner & Miller*, *supra*, at 152-53. As a result, defendants have found themselves litigating concurrently in multiple venues, and incurring significant transaction costs. *Id.* at 153.

may be more rigorous with respect to dispositive motions and admissibility of evidence, particularly scientific evidence and expert testimony, and that state courts may be more liberal in terms of discovery and less restrictive with protective orders.[12]

* * * * *

For all these reasons, adherence to Rule 82 in this context will not substantially increase the burdens on federal courts because, in the vast majority of cases, plaintiffs and their lawyers will simply forgo broad requests for injunctive relief rather than subject themselves to federal jurisdiction. And any such cases that do wind up in federal court will be the very kinds of cases for which the diversity provisions of Article III, and the subsequent diversity statutes, were designed. From both a procedural and institutional standpoint, federal courts are well suited to handle the complexities of these large class actions, and allowing them to do so will enhance justice for all parties by promoting the efficient and fair resolution of these cases. There simply is no sound policy reason to depart from the neutrality principle of Rule 82 by allowing the class-action device artificially to restrict the scope of federal jurisdiction in cases seeking broad injunctive relief.

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[12] Mark P. Robinson, Ass'n of Trial Lawyers of Am., *MDL, Class Actions, and Competing Interests of State Litigation* 357 (2001) (CLE). Similarly, federal courts are authorized under Rule 42 of the Federal Rules of Civil Procedure to order actions consolidated into a single action "[w]hen actions involving a common question of law or fact are pending before the court." Fed. R. Civ. P. 42(a). Thus, if the class action defendant can have multiple state-court actions successfully removed and transferred to a single federal court, such actions could ultimately be consolidated into a single action before that court under Rule 42. This would bring organization, efficiency and lower litigation costs to all involved parties.

CONCLUSION

For these reasons, and those stated in petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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