

EXPLORING FEDERAL DIVERSITY JURISDICTION

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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Material submitted by the Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Chairman, Subcommittee on the Constitution and Civil Justice. This material is available at the Subcommittee and can also be accessed at:

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EXPLORING FEDERAL DIVERSITY JURISDICTION

TUESDAY, SEPTEMBER 13, 2016

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 11:06 a.m., in room 2237, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Goodlatte, DeSantis, Gohmert, Jordan, Cohen, and Conyers.

Staff Present: (Majority) Paul Taylor, Chief Counsel; Jake Glancy, Clerk; Perry Apelbaum, Staff Director & Chief Counsel; James J. Park, Minority Counsel; Matthew Morgan, Professional Staff Member; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Committee hearing will come to order. I want to welcome all of you this morning. And I will now make an opening statement.

In Federalist Paper No. 81, Alexander Hamilton described how Article III of the Constitution was designed to establish a system of Federal courts competent to the determination of matters of national jurisdiction. To that end, section 2 of Article III allows Congress to extend the jurisdiction of Federal courts to controversies “between citizens of different states,” cases in which, by their interstate nature, implicated national concerns.

Prior to the ratification of the Constitution, our new Nation was governed by the Articles of Confederation, which allowed States to impose rules that benefited their own commercial interests while hurting consumers nationwide by limiting the free flow of goods and services throughout the country.

The Framers of our Constitution were clear that for America to succeed, the rules had to be changed to allow the development of a vibrant national economy that could sustain the needs of all of its citizens, in whatever States they might live. To that end, the Framers drafted a commerce clause and also a clause allowing Federal courts to hear disputes between citizens of different States so goods and services could cross State lines into new markets without the fear that local State officials would stack the deck against them.

James Madison, in the Virginia ratifying convention, defended Federal court diversity jurisdiction over all cases involving any citizens from different States as follows: “It may happen that a strong prejudice may arise in some States against the citizens of others who may have claims against them. We know that tardy and even defective administration of justice has happened in some States. A citizen of another State might not chance chance to get justice in a State court, and at all levels he might think himself injured.”

Alexander Hamilton also explained in Federalist Paper No. 80 that, “No man ought certainly to be a judge in his own case, or in any case—or any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the Federal courts as the proper tribunals for the determination of controversies between States and their citizens.”

He elaborated that “in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States is essential to the peace of the Union.” He had an opinion, didn’t he?

Yet the Federal courts themselves, through various opinions, have narrowed Federal jurisdiction over cases involving citizens of different States such that the existence of citizens from two different States in a lawsuit, in and of itself, as contemplated by the text of Article III, section 2, does not confer Federal court jurisdiction.

This hearing will examine whether Congress should statutorily expand Federal court diversity jurisdiction to more accurately reflect the expectations of the Framers of the Constitution, and to implement its Federal court diversity jurisdiction clause as originally understood.

So with that, I will now yield to the Ranking Member for an opening statement.

Mr. COHEN. Thank you, Mr. Chair.

Once again, we’re holding a hearing that’s designed to make the case that Congress should tilt the playing field in favor of corporate defendants and against those harmed by their wrongdoing. Not exactly what I live by. Not exactly what I think a law should live by. We all should look to the people that are being hurt and injured and give them the benefit of the doubt whenever you can. In this case, we give the mighty and the powerful every opportunity to oppress, to injure, and to harm without compensation.

The hearing title is seemingly innocuous, but the ultimate goal of this hearing seems to advocate for appealing the more than 200-year-old complete diversity requirement, a requirement that the first Congress created and the Supreme Court has repeatedly upheld since 1806. Doing so would do serious harm to consumers, Federal courts, and the fundamental balance between the national government and State sovereignty.

Diversity jurisdiction is the jurisdiction of Federal courts to hear otherwise purely State law matters when the parties are citizens of different States. It’s rooted in Article III, section 2 of the Con-

stitution, which provides in part that Federal courts have the power to hear controversy of citizens of different States.

The diversity statute defines the scope of diversity jurisdiction more precisely, imposing various requirements, such as a minimum amount in controversial requirement and the requirement that there be complete diversity. That is that every plaintiff is a citizen of a different State than every defendant in order for a Federal court to exercise jurisdiction over a purely State matter.

This hearing seems like old wine—and not old wine that has aged well, but old wine that you should throw out—in a new bottle. Earlier this year, for instance, we considered legislation that would have drastically altered another longstanding and related doctrine, the doctrine of fraudulent joinder in order to make it easier for Federal courts to exercise jurisdiction over State cases.

I would oppose the attempt to repeal the complete diversity requirement for the same reasons I oppose the fraudulent joinder legislation: First, repealing complete diversity and thus making it easier to bring purely State law matters into Federal court would significantly increase the workload of the Federal judiciary. Not a bad thing for people to work hard, but not when there are not enough judges.

This increase would impact all litigants in the Federal courts, not just those bringing diversity suits, or diminish the attention to resources Federal courts could give to every case on their dockets, criminal and civil.

The increased workload would stem from the increased number of cases a Federal court would have to hear, should it become easier to file State law cases in Federal court. The burden, however, would be compounded by the high number of judicial vacancies that resulted from the Senate's failure—absolute disregard for their duties constitutionally imposed—to act in a manner timely on presidential judicial nominations. And the first in line, I should remind, is Edward Stanton, Jr.—or the third, excuse me, who is the U.S. attorney in the Western District of Tennessee and first in line, been waiting 11 months for confirmation.

Secondly, repealing the complete diversity requirement would upset the careful balance between the roles of State and Federal courts under our system of federalism. I find it ironic some conservatives—who invoked phrases like “states’ rights” and “activist Federal judges,” and opposing things like voting rights or civil rights—are now seeking to empower the Federal courts to become substantial arbiters of State law, the power traditionally and rightly belonging to State courts. State courts should interpret and shape State laws in instances where Federal courts shape State laws are and should be the narrowest exceptions.

Finally, the increased cost of potential complexity of litigating State law matters in Federal courts may result in ultimately denying those with meritorious claims their day in court. Plaintiffs have a right to choose the form in which their claims will be heard. Repealing the complete diversity requirement threatens to erode that right and add cost to the litigation State claims, the prospect of which could result in dissuading those with meritorious claims from even filing suit.

I'm deeply disappointed we are wasting our time on our limited time that we have in this Congress, in this Committee on this hearing. We should be focused on restoring voting rights. Right before an election, what are we doing about voting rights? "Nada." Nothing. The courts are acting. Yeah, North Carolina went too far and joined. We're doing nothing to let people vote, because we don't want them to vote on the majority side. They want to impose restrictions to limit people's power to vote and express their will.

Criminal justice reform so important people are being deprived of their liberty and kept for longer periods of time than necessary at \$30,000 a person. Did we deal with criminal justice reform? No. And due process for individuals who might be fleeing from a policeman. Have we dealt with that? No. Are we dealing with—and this wouldn't be in this Committee, but in this Congress—funding to fight Zika? No.

There's so many matters that we have to come forth and could come forth in this Subcommittee, but we're not dealing with them. We're finding 200-year-old statutes to attack. Repealing a well-settled law does not seem to be one of the reasons we should be here and using our precious time.

With that, I sayeth no more and yield back the balance of my time.

Mr. FRANKS. And I thank the gentleman.

And it appears that we don't have any other opening statements, so—oh, I'm sorry, Mr. Conyers, forgive me. You're just such a shrinking wallflower over there in the corner, nobody can see you.

And so I now recognize the full Judiciary Committee Ranking Member, Mr. Conyers of Michigan, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman. I'm honored to be recognized here. I've been around long enough to be known by most of the Members of the House.

I take the position that the hearing focusing on Federal diversity jurisdiction whereby Federal courts may hear otherwise purely State law cases if the plaintiff and the defendant are citizens of different States. For more than two centuries now, the Congress has imposed and the Supreme Court has upheld the requirement of complete diversity, which mandates that every plaintiff must be a citizen of a different State than every defendant for a Federal court to have jurisdiction of the lawsuit.

Unfortunately, based on the majority of witnesses' testimony, it appears that this hearing may be laying the groundwork for the outright repeal of this longstanding requirement, and it represents the latest attempt by corporate interest to deny State court plaintiffs access to justice.

As many of you may recall, I've long opposed any effort to repeal the complete diversity requirement for the following reasons: To begin with, expanding the scope of Federal diversity jurisdiction upends the careful, centuries-long balance between Federal and State sovereignty that current law has achieved.

More than a decade ago, when we were considering the Class Action Fairness Act of 2005, which, among other things, eliminated the complete diversity requirement for certain class actions, I raised the concern then that the measure would undermine State law by substantially divesting State courts of the ability to inter-

pret State law. State courts, after all, should be the final arbiters of State law.

The complete diversity requirement and other limitations on the scope of diversity jurisdiction are designed to serve this important federalism interest. And repealing it beyond the class action context would only heighten my concerns. And in addition, eliminating the complete diversity requirement would increase costs and might make even litigation costs prohibitive for many plaintiffs with meritorious claims.

As it is, the cost of litigation increases whenever Federal courts are called upon to decide State law questions because of the added complexity and time required to resolve such issues. Eliminating complete diversity would only increase these costs on litigants with a disproportionate adverse impact on plaintiffs who generally have fewer resources than the corporate defendants they typically face in court.

Once again, our experience with the Class Action Fairness Act is instructive, as the law made it far more burdensome, expensive, and time consuming for injured persons to vindicate their rights under State law. So we should be wary of spreading this harm even more broadly.

Finally, eliminating complete diversity would increase burdens on an already strained Federal court system. Even by the majority of witnesses' own estimate, eliminating the complete diversity requirement would potentially add more than a half a million additional cases to the Federal court dockets every year.

As it is, the Federal court system is already straining to meet its current caseload in light of significant unmet judicial resource needs. There are numerous judgeship vacancies, as well as an overwhelming need to create new judgeships that require congressional action. Accordingly, we should be especially wary of eliminating the longstanding complete diversity requirement, a requirement whose constitutionality the Supreme Court has repeatedly upheld for more than 200 years.

And so I want to commend the Ranking Member, Mr. Cohen, for his statement, which I support.

And I thank the witnesses for their presence and look forward to their testimony.

Thank you, Mr. Chairman.

Mr. FRANKS. Thank you, sir. I thank the gentleman.

And without objection, other Members' opening statements will be made part of the record.

So I will now introduce our witnesses. Our first witness is Mr. Charles Cooper, a partner at the Cooper & Kirk Law Firm in Washington, D.C. Welcome, Mr. Cooper.

Our second witness is Professor Joanna Shepherd, professor of law at Emory Law School. And welcome, Ms. Shepherd.

Our third and final witness is Dean Ronald Weich, professor of law at the University of Baltimore. Welcome, Professor.

Each of the witnesses' written statements will be entered into the record in its entirety. And I'd ask each witness to summarize his or her testimony in 5 minutes or less. And to help you stay within that time limit, there is a timing light in front of you. The light switches from green to yellow, indicates that you have 1

minute to conclude your testimony. When the light turns red, it indicates that the witnesses' 5 minutes have expired.

And so before I recognize the witnesses, it is the tradition of this Subcommittee that they be sworn. So if you'd please stand.

Do you swear that the testimony you're about to give before this Committee is the truth, the whole truth, and nothing but the truth so help you God?

You may be seated.

And let the record reflect that all of the witnesses responded in the affirmative.

So I would now recognize our first witness, Mr. Charles Cooper. Mr. Cooper, if you make sure that microphone is on.

**TESTIMONY OF CHARLES J. COOPER, PARTNER,
COOPER & KIRK, PLLC**

Mr. COOPER. Good morning, Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee. I want to thank you for inviting me to participate in this morning's hearing on the subject of diversity jurisdiction. And I'm honored to share my thoughts with you on the issues that are raised by this subject matter, particularly the issues raised by complete diversity, the doctrine of complete diversity.

Forum selection is controlled in our system of litigation, both State and Federal, by plaintiffs. It is therefore no surprise and no accident that mass tort suits and other large-scale interstate disputes cluster in certain notoriously plaintiff-friendly State jurisdictions.

The proliferation of complex interstate disputes in State courts has imposed massive, often bankrupting, costs on major American manufacturing corporations and has placed great burdens on the national economy. Large-scale interstate disputes almost always involve adverse parties of diverse citizenship. Yet the out-of-state defendants are often locked in State court, unable to remove those cases to Federal court.

The cases cannot be heard in Federal court because the Supreme Court early on interpreted the diversity jurisdiction statute to require complete diversity of citizenship. Thus, the plaintiffs in many interstate disputes can keep their out-of-state defendants trapped in State court simply by naming at least one in-State defendant.

Now, I want to make four quick points this morning about complete diversity. First, the diversity of citizenship clause of Article III, section 2 provides simply that Federal judicial power—and I'm quoting—Federal judicial power shall extend to controversies between citizens of different States.

The literal scope of that plain language thus clearly embraces cases of minimal diversity, that is cases where any single plaintiff and any single defendant are citizens of different States. And the Supreme Court has held that complete diversity is not a constitutional requirement of the diversity clause. That is, Article III, section 2, is satisfied by minimal diversity case.

Second, the requirement of complete diversity is at war with the animating purpose of the diversity clause of section 2, which was succinctly described by Hamilton in Federalist No. 80, previously noted by the Chairman, but I think it bears repeating. "The na-

tional judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. For it is that tribunal which, having no local attachments, would be likely to be impartial between the different States and their citizens.”

Now, that understanding of the purpose of diversity jurisdiction was echoed by virtually every supporter of the Constitution in the ratifying debates. James Madison put the point a little more bluntly in the Virginia convention. “It may happen that a strong prejudice may arise in some States against the citizens of others who may have claims against them. A citizen of another State might not chance to get justice in a State court, and in all events, he might think himself injured.”

My third point is that the requirement of complete diversity can be traced to a Supreme Court decision in 1806 construing—actually, misconstruing the language of the original diversity provision in the 1789 Judiciary Act, which was materially identical to the language of the diversity clause in Article III, section 2.

The decision called *Strawbridge against Curtiss* was issued by Chief Justice Marshall in a perfunctory six-sentence opinion that offered no reasoning in support of his texturally strained conclusion that a case—and this is quoting from that statute—“between a citizen of a State and a citizen of another State somehow requires complete diversity rather than minimal diversity.”

Marshall and the majority of the Court later came to the view that *Strawbridge* had been wrongly decided. And Marshall is reported to have—and I’m quoting from a Supreme Court case—to have repeatedly expressed regret to his fellow justices that the decision had been made. But the case has never been overruled. Thus, the statutory requirement of complete diversity of citizenship is not one that the first Congress truly intended to impose on the Federal judiciary in the first place, but it has nonetheless governed the Federal judiciary for over 200 years.

My fourth point is a much closer and more controversial one than the others. It is that a very strong case can be made that a requirement of complete diversity cannot constitutionally be imposed by Congress, even if it were inclined to do so. And that strong case was made by a figure no less than Joseph Story in *Martin against Hunter’s Lessee*.

My time has expired, and so, Mr. Chairman, I’ll refer the Subcommittee to my discussion of those constitutional issues in my written testimony. Thank you very much.

[The prepared statement of Mr. Cooper follows:]

Testimony of Charles J. Cooper
on
“Exploring Federal Diversity Jurisdiction”

Before the
Subcommittee on the Constitution and Civil Justice
of
The House Committee on the Judiciary

September 13, 2016
Washington, DC

Good morning Mr. Chairman, and Members of the Subcommittee. Thank you for inviting me to participate in today's hearing entitled "Exploring Federal Diversity Jurisdiction." I am honored to share with you my thoughts on the important issues raised by this subject, especially the issues associated with the rule of complete diversity of citizenship.¹

I. Introduction.

Article III of the Constitution was designed to establish a federal judiciary, in Alexander Hamilton's words, "competent to the determination of matters of national jurisdiction."² The Framers, apprehensive of actual or perceived state court bias in favor of local interests, considered a neutral federal tribunal a necessity – some thought it essential in some cases to the peace and harmony of the union – and they took care to extend federal jurisdiction to "cases in which the State tribunals cannot be supposed to be impartial."³

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

¹ Founding partner, Cooper & Kirk, PLLC. Mr. Cooper served as the Assistant Attorney General for the Office of Legal Counsel from 1985–1988 and was a member of the Standing Committee on Practice and Procedure of the Judicial Conference of the United States for seven years (1998-2005). Much of his litigation practice focuses on cases involving constitutional issues. This testimony is drawn in large part from an article that Mr. Cooper co-authored with Howard C. Nielson. *See* "Complete Diversity and the Closing of the Federal Courts," 37 *Harvard Journal of Law & Public Policy* 319-323 (2014).

² THE FEDERALIST No. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³ THE FEDERALIST No. 80, at 478 (Hamilton).

jurisdiction in federal and state courts over cases in which the impartiality of state courts would be most directly tested: those cases in which the interests of the State itself, or its citizens, were adverse to the interests of other States, foreign countries, or their citizens. Of particular concern to the Framers in establishing federal jurisdiction over such disputes was the crippling effect that judicial bias favoring in-state interests, whether real or perceived, would have on interstate commerce. By ensuring that a neutral federal forum was available in such cases, the Framers were animated by much the same spirit that resulted in the various substantive constitutional protections against state interference with interstate and foreign commerce.⁴

Today, despite the Framers' intention to provide even-handed access to the courts, forum selection is controlled by plaintiffs. It is no accident that large mass tort suits and class actions cluster in certain notoriously plaintiff-friendly state jurisdictions. The proliferation of complex interstate disputes in state courts has imposed massive, often bankrupting, costs on major American manufacturing corporations and has placed great burdens on the national economy. Not surprisingly, the emergence of plaintiff-friendly state courts has become a significant factor in the decision-making of interstate business. According to one

⁴ See U.S. CONST. art. I, § 8, cl. 3; *id.* § 10; art. IV, § 2, cl. 1.

report, Madison County, Illinois, has the largest asbestos docket of any state court in the nation even though only about one in ten asbestos claims filed there has any connection to the area.

Mass tort cases and other large interstate disputes almost always involve adverse parties of diverse citizenship, yet the out-of-state defendants are locked in state court, unable to remove the cases to federal court. The cases cannot be heard in federal court because the Supreme Court early on interpreted the diversity jurisdiction statute⁵ to require “complete” diversity of citizenship – that is, to require that the state citizenship of every plaintiff in a case must be different from that of every defendant. Thus, the plaintiffs in mass tort actions and other interstate disputes arising out of the same or related activity can keep their out-of-state defendants in state court simply by naming at least one in-state defendant.

The complete diversity rule thus gives rise to a jurisdictional paradox. On the one hand, an ordinary slip-and-fall action involving a single plaintiff and single defendant of diverse citizenship can be heard in federal court, although it has no impact on interstate commerce. On the other hand, federal jurisdiction does not extend to mass tort and other interstate actions arising out of the same or a related series of activities, brought by myriad plaintiffs against multiple defendants from

⁵ Now codified at 28 U.S.C. § 1332.

multiple jurisdictions, and seeking massive recoveries that could collectively have a serious adverse effect on interstate commerce. This paradox is compounded by the rule's illegitimate provenance: The complete diversity requirement is inconsistent with the history and purposes of the diversity clause of Article III; it is not required by, and may well contravene, the Constitution; and it rests on a Supreme Court construction of the diversity statute that the Court itself has acknowledged was erroneous.

II. The Central Purpose of Article III's Diversity Provisions Was To Provide a Neutral Federal Tribunal for Resolving Interstate Disputes.

Article III, Section 2 provides that the federal “judicial Power shall extend ... to Controversies ... between a State and Citizens of another State [and] between Citizens of different States.”⁶ The history of the framing and ratification of these diversity clauses makes clear that they were designed to ensure that a case brought by a State or its citizens against a citizen of a different State could be litigated in a presumably neutral federal court rather than in a possibly biased state court.

1. Under the Articles of Confederation, commerce between the States had been shackled by local prejudice and corresponding distrust.⁷ The Framers well understood that if the fledging nation was to succeed, it would have to

⁶ U.S. CONST. art. III, § 2, cl. 1.

⁷ See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979); THE FEDERALIST No. 7 (Hamilton). See U.S. CONST. art. I, §§ 8, 10; art. IV, § 2.

overcome these tendencies. The new national government was thus given ultimate legislative power over the regulation of interstate commerce, the citizens of each State were guaranteed all of the privileges and immunities of citizens in all of the States, and the States were expressly barred from enacting such then-common discriminatory measures as tender laws and laws impairing the obligation of debts and other contracts.⁸ The new federal judiciary was correspondingly designed to provide a neutral tribunal, not beholden to local interests, in which interstate controversies could be adjudicated. By enabling individuals, investors, and commercial enterprises to cross state lines with confidence that their legal disputes would be fairly adjudicated, diversity jurisdiction went hand-in-hand with other constitutional provisions designed to foster development of a truly national economy and identity.

The call for federal diversity jurisdiction first appeared in the Constitutional Convention on May 28, 1787, in the Virginia Plan, designed by James Madison and proposed by Edmund Randolph.⁹ Questions concerning the jurisdiction of the federal judiciary were sent to the Committee of Detail, which proposed that the federal courts be given specific jurisdictional grants over particular types of cases, including “Controversies between ... a State and a Citizen or Citizens of another

⁸ See U.S. CONST. art. I, §§ 8, 10; art. IV, § 2.

⁹ See Alison L. LaCroix, *The Authority for Federalism: Madison’s Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 475, 477 (2010).

State, [and] between Citizens of different States.”¹⁰ These proposed jurisdictional grants over interstate disputes, with only slight stylistic modification, ultimately became the diversity clauses of Article III.

2. When the Convention adjourned and sent the new Constitution to the States for ratification, opposition to Article III from the Antifederalists was fierce. They argued that the proposed federal judiciary would “utterly annihilate . . . state courts.”¹¹ The diversity clauses would result, they argued, in ordinary citizens being forced to endure the expense and inconvenience of litigating their disputes in distant federal courts, especially if appeals had to be taken to the faraway Supreme Court.¹²

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

It may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them. . . . A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.¹³

¹⁰ *Id.* at 173.

¹¹ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot ed., 1901) (“ELLIOT’S DEBATES”) (George Mason); *see also id.* at 527.

¹² *See, e.g., id.* at 526 (Mason); 4 ELLIOT’S DEBATES 138-39 (Samuel Spencer).

¹³ 3 ELLIOT’S DEBATES 533.

John Marshall placed these points in larger context, arguing that a neutral federal forum for resolving interstate disputes was needed to preserve the peace and harmony of the union:

To preserve the peace of the Union only, its jurisdiction in this case ought to be recurred to. Let us consider that, when citizens of one state carry on trade in another state, much must be due to the one from the other, as is the case between North Carolina and Virginia. Would not the refusal of justice to our citizens, from the Courts of North Carolina, produce disputes between the states?¹⁴

James Wilson likewise defended the Constitution's grant of jurisdiction over interstate and international disputes: "[I]f it is not necessary, if we mean to restore either public or private credit," asked Wilson, "that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort?"¹⁵ Indeed, Wilson saw diversity jurisdiction as essential to the "important object [of] extend[ing] our manufactures and our commerce."¹⁶

The most influential defense of the new federal judiciary, however, was provided by Alexander Hamilton in his classic series of essays on Article III in the *Federalist Papers*. In *Federalist No. 80*, Hamilton emphasized the critical importance of a neutral forum for resolving disputes "in which the State tribunals cannot be supposed to be impartial and unbiased."¹⁷ As he explained:

¹⁴ *Id.* at 557.

¹⁵ 2 ELLIOT'S DEBATES 491.

¹⁶ *Id.* at 492.

¹⁷ *Id.* at 475.

No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens.¹⁸

As Hamilton further elaborated, “[T]he national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.”¹⁹ As Hamilton explained, only “that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.”²⁰ Like Marshall and Randolph, Hamilton also emphasized that “[t]he power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is ... essential to the peace of the Union.”²¹

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

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either

¹⁸ *Id.* at 478.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 477; *see also id.* at 475, 480.

entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.²²

II. The Complete Diversity Rule Is Difficult To Reconcile with Article III’s Language Providing that Federal Jurisdiction “Shall Extend” to Controversies Between Citizens of Different States.

Article III, Section 1 provides that “[t]he judicial Power of the United States, *shall be vested* in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”²³ Article III, Section 2 directs, in turn, that “[t]he judicial Power *shall extend*” to various enumerated categories of cases and controversies, including “Controversies . . . between Citizens of different States.”²⁴ Any case involving diverse parties, including minimally diverse parties, falls squarely within the clear language of Article III.

1. In his landmark opinion in *Martin v. Hunter’s Lessee*, Justice Joseph Story forcefully argued that “[t]he language of [Article III] throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to

²² *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), *overruled in part on other grounds*, *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844); *see also, e.g., Martin*, 14 U.S. (1 Wheat.) at 347 (“The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.”); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1685 (1833) (“Nothing can conduce more to general harmony and confidence among all the states, than a consciousness, that controversies are not exclusively to be decided by the state tribunals; but may, at the election of the party, be brought before the national tribunals.”).

²³ U.S. CONST. art. III, § 1 (emphasis added).

²⁴ *Id.* § 2, cl. 1 (emphasis added).

carry it into operation.”²⁵ Just as Section 1 of Article III provides that the federal judicial power “*shall be vested* (not may be vested)” in a supreme court and congressionally established inferior courts, Justice Story noted, it also provides that “[t]he judges, both of the supreme and inferior courts, *shall hold* their offices during good behaviour, and *shall*, at stated times, receive, for their services, a compensation which shall not be diminished during their continuance in office.”²⁶ Justice Story argued that “[t]he language, if imperative as to one part, is imperative as to all.”²⁷ Congress thus may no more refuse to vest the judicial power than it may “create or limit any other tenure of the judicial office” (besides tenure “during good behaviour”) or “refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office.”²⁸

²⁵ 14 U.S. (1 Wheat.) at 328; *see also* 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 612-14 (1953).

²⁶ *Martin*, 14 U.S. (1 Wheat.) at 328.

²⁷ *Id.* at 330.

²⁸ *Id.* at 328-29. Justice Story also noted that the mandatory language of Article III vesting the judicial power mirrors that of Articles I and II:

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

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

Justice Story then turned to the language of Section 2 providing that “the judicial power *shall extend*” to the enumerated cases and controversies,²⁹ including disputes between parties from different states. These words too, said Justice Story, are “used in an imperative sense,” and “import an absolute grant of judicial power.”³⁰ Thus, he urged, the “duty of congress to vest the judicial power of the United States” must be understood as “a duty to vest the *whole judicial power*,” else “congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all.”³¹

In short, the plain language of Article III, Justice Story concluded, makes clear that the federal “judicial power shall extend to all the cases enumerated in the constitution.”³²

2. While Justice Story’s mandatory view of federal jurisdiction has not prevailed,³³ his textual analysis has great force and has never been satisfactorily

²⁹ *Martin*, 14 U.S. (1 Wheat.) at 331.

³⁰ *Id.*

³¹ *Id.* at 330.

³² *Id.* at 333; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) (“The constitution vests the *whole* judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish.” (emphasis added)).

³³ The Supreme Court has held that Congress’s power under Section 1 to “ordain and establish” inferior federal courts includes the plenary power to control the scope of jurisdiction expressly “extend[ed]” to them under Section 2. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (“[H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.”). In other words, Congress has power, according to the Court, to vest inferior Federal courts with original jurisdiction over all, any, or none of the cases and controversies specifically enumerated in Article III, Section 2. And given that Congress can, in Story’s words, “defeat the jurisdiction as to all” cases enumerated in Section 2, including diversity of citizenship cases, it follows that Congress has the lesser power to restrict federal jurisdiction to cases of complete diversity.

answered. Some have argued that the Exceptions Clause, combined with Congress' constitutional power over the establishment of inferior federal courts, authorizes Congress to regulate the jurisdiction of the federal courts, save for the Supreme Court's original jurisdiction. Article III provides that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*"³⁴ Given that Article III commits the creation of inferior federal courts to Congress's discretion, the Exceptions Clause could be understood to permit Congress to eliminate the judicial power over certain cases or controversies simply by excepting them from the Supreme Court's appellate jurisdiction and then declining to create inferior courts with jurisdiction over those matters.

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

³⁴ *Id.* § 2, cl. 2 (emphasis added).

effect to all of its provisions, and any reading of some of its provisions that would render others meaningless should be avoided if reasonably possible.

Such a reading is clearly possible: although the mandatory language of Article III vesting and extending the federal judicial power require that the *entire* judicial power be vested *somewhere* in the federal judiciary, Congress's authority over the inferior Courts and its ability to make exceptions to the Supreme Court's appellate jurisdiction give Congress substantial discretion over *where* in the federal judiciary that power is vested. Thus, Congress may choose not to grant inferior federal courts jurisdiction over certain cases or controversies enumerated in Article III (or may even choose not to create inferior federal courts at all), so long as the Supreme Court retains appellate jurisdiction over any cases or controversies not cognizable in the inferior federal courts. Alternatively, Congress may except certain enumerated cases or controversies from the Supreme Court's appellate jurisdiction, so long as it creates inferior federal courts with jurisdiction over those matters. But Congress may not, consistent with this reading of Article III, remove any of the enumerated cases or controversies from the federal judiciary entirely, *both* by excepting it from the Supreme Court's appellate jurisdiction *and* by declining to create an inferior federal court with jurisdiction to consider it. As summarized by Alexander Hamilton in *Federalist No. 82*, "[t]he evident aim of the plan of the convention is that *all* the causes of the specified classes shall, for

weighty public reasons, receive their *original or final* determination in the courts of the Union.”³⁵

This reading of Article III both respects its mandatory language vesting and extending the federal judicial power and serves its central purposes, including providing a neutral tribunal for resolving “cases in which the State tribunals cannot be supposed to be impartial.”³⁶ And it still accords Congress substantial control over the *allocation* of federal judicial power, consistent with Congress’s control over the existence of inferior federal tribunals and with the express terms of the Exceptions Clause. Further, this reading is completely consistent with the justification for the constitutional provisions regarding inferior federal courts advanced by leading Framers of the Constitution.³⁷ And it is truer to the plain language of the Exceptions Clause—which by its terms grants Congress power to make exceptions only to the “*supreme Court[’s] appellate Jurisdiction,*” not to “[t]he *judicial Power of the United States*”—than is the alternative reading, which

³⁵ THE FEDERALIST No. 82, at 494 (Hamilton) (emphasis added); *see also, e.g., Martin*, 14 U.S. (1 Wheat.) at 333 (“The judicial power shall extend to all the cases enumerated in the constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.”).

³⁶ THE FEDERALIST No. 80, at 478 (Hamilton).

³⁷ *See, e.g.,* THE FEDERALIST No. 81, at 485 (Hamilton) (“The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance.”); 1 FARRAND’S RECORDS 124 (Madison) (“[U]nless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree.”).

would allow Congress to remove broad classes of cases and controversies from the federal judicial power entirely.³⁸

III. The Complete Diversity Rule Rests on an Erroneous Construction of the Judiciary Act of 1789.

The language of Article III, Section 2 consumes but a scant six words in extending federal jurisdiction to “controversies . . . between citizens of different States.” By its terms, the diversity clause is unqualified: any case in which a plaintiff sues a citizen of another state conforms to the literal language of Article III, Section – it is a “Controversy . . . between Citizens of different States” – even if the plaintiff also names a fellow-citizen as a defendant.

In keeping with the text and history of the diversity clause, the Supreme Court has interpreted that clause to require only minimal diversity. That is, federal jurisdiction over interstate disputes is authorized under the Constitution “so long as any two adverse parties are not co citizens.”³⁹ In *State Farm Fire & Casualty Co. v. Tashire*, the Court upheld the federal interpleader statute, which applies in any case in which any two adverse parties have diverse citizenship, even though other parties to the case destroy complete diversity.

³⁸ Justice Story’s conclusion—that the plain text of Article III mandates jurisdiction in federal courts in all enumerated cases or controversies—is also supported by the historical evidence from the Constitutional Convention and the ratification debates. See Charles J. Cooper & Howard C. Nielson, Jr., “Complete Diversity and the Closing of the Federal Courts,” 37 *Harvard Journal of Law & Public Policy* 319-323 (2014).

³⁹ *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531 (1967).

The language of the original diversity statute in the 1789 Judiciary Act does not differ materially from that of the citizenship diversity clause in Article III, Section 2, and like that clause, appears by its literal terms to extend to cases of minimal diversity. Unlike the diversity clause in Article III, however, this statutory language was construed by the Supreme Court in 1806 to require complete diversity of citizenship in the case of *Strawbridge v. Curtiss*.⁴⁰ In a perfunctory six-sentence opinion, Chief Justice John Marshall wrote that the “court understands these expressions to mean, that each distinct interest” in a diversity case must be “represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts,” at least if their interest in the outcome is “joint.”⁴¹

The *Strawbridge* opinion offered no textual analysis, or any other reasoning, in support of the Court’s “understand[ing]” of the meaning of the diversity statute, and Chief Justice Marshall later came to regret the decision as wrongly decided. In *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*,⁴² the Court acknowledged that the *Strawbridge* case was not “maintainable upon the true principles of interpretation of the Constitution and the laws of the United States.”⁴³ In a remarkable passage reflecting upon the Court’s internal deliberations under the

⁴⁰ 7 U.S. (3 Cranch) 267 (1806).

⁴¹ *Id.* at 267-268.

⁴² 43 U.S. (2 How.) 497 (1844).

⁴³ 43 U.S. (2 How.) at 555.

late Chief Justice Marshall, who had passed away nine years earlier, the Court noted:

“By no one was the correctness of [Strawbridge] more questioned than by the late chief justice who gave [it]. It is within the knowledge of several of us, that he repeatedly expressed regret that [that] decision[] had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different. We think we may safely assert, that a majority of the members of this court have at all times partaken of the same regret . . .”⁴⁴

Notwithstanding this remarkable confession of error, *Strawbridge* has never been overruled, and Congress has never amended the diversity statute to eliminate altogether the requirement of complete diversity.

IV. Congress Should Consider Amending the Diversity Statute To Eliminate the Complete Diversity Statute.

A candid survey of the history of the doctrine of complete diversity thus brings one inevitably to the conclusion that both its constitutional and statutory pedigrees are highly questionable:

- The Supreme Court has interpreted Article III’s grant of federal jurisdiction over “controversies . . . between citizens of different states,” consistent with the literal scope of its plain language and with its purpose of providing a neutral judicial forum for interstate litigants, to require only minimal diversity of citizenship. It is therefore quite clear that the requirement of complete diversity is not constitutionally *compelled*.
- It is not at all clear, however, whether the statutory requirement of complete diversity is constitutionally *permissible*. The Supreme

⁴⁴ *Id.* at 555-56.

Court's decisions holding that Congress has discretionary authority to vest inferior federal courts with original jurisdiction over any, or none, of the cases and controversies enumerated in Article III, Section 2, are very difficult to square with the plain language of Article III providing that "[t]he judicial power *shall extend* to" the enumerated cases and controversies and that it "*shall be vested* in" the Supreme Court and congressionally established inferior courts.

- Quite apart from the difficult question whether Congress has constitutional authority, as a matter of original meaning, to require complete diversity, the Supreme Court's decision in *Strawbridge* interpreting the 1789 Judiciary Act to require complete diversity was itself wrong as a matter of statutory interpretation, as the Court has acknowledged.

In sum, then, the statutory requirement of complete diversity of citizenship is not one that the First Congress truly intended to impose on federal jurisdiction in the first place, and it very well may be a requirement that Congress lacked constitutional authority to impose in any event. Yet, the requirement has governed diversity jurisdiction throughout our nation's history, and in recent times it has been used by plaintiffs as an instrument to close the federal courts to the very types of interstate disputes for which the Founders intended to provide a neutral federal forum.

Congress recognized in 2005 that "the Framers established diversity jurisdiction to ensure fairness for all parties in litigation involving persons from multiple jurisdictions, particularly cases in which defendants from one state are

sued in the local courts of another state.”⁴⁵ Finding that the requirement of complete diversity in large interstate class actions had given rise to “the precise concerns that diversity jurisdiction was designed to prevent,”⁴⁶ Congress enacted the Class Action Fairness Act of 2005⁴⁷ (CAFA), which amended the diversity statute to extend original federal jurisdiction over certain large class actions in which “any member of a class of plaintiffs is a citizen of a State different from any defendant.”⁴⁸ Among other things, Congress intended this statute to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.”⁴⁹ The Conference Report on CAFA emphasized that “most class actions are precisely the type of case for which diversity jurisdiction was created” because they “usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy.”⁵⁰ But massive interstate class actions are kept out of federal court, the report noted, by

⁴⁵ S. Rep. No. 109-14, at 6 (2005).

⁴⁶ *Id.*

⁴⁷ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

⁴⁸ 28 U.S.C. § 1332(d)(2) (2006); *see also id.* at § 1453 (permitting removal of qualifying interstate class actions to federal court).

⁴⁹ Class Action Fairness Act of 2005, § 2(b)(2), 118 Stat. at 5.

⁵⁰ S. REP. NO. 109-14, at 10, 27.

plaintiffs’ lawyers “adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity.”⁵¹

The Conference Committee’s complaint about lawyers “gaming” the complete diversity requirement to “avoid removal of large interstate class actions to federal court”⁵² is no less true, as previously noted,⁵³ of mass tort suits involving many plaintiffs seeking large damages awards against multiple out-of-state defendants. Such mass tort suits have equally significant implications for interstate commerce and national policy and are, therefore, also precisely the type of case for which the federal judiciary was created to provide a neutral forum. The doctrine of complete diversity, however, enables plaintiffs to close the doors of federal courts to out-of-state defendants in such interstate disputes and thus is at war with a central purpose of Article III. In the words of Chief Justice Marshall, the federal courts “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.”⁵⁴

⁵¹ *Id.* at 10.

⁵² *Id.*

⁵³ *See supra* Part 1.B.

⁵⁴ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

Mr. FRANKS. Thank you, Mr. Cooper.
I will now recognize Professor Shepherd for 5 minutes.

**TESTIMONY OF JOANNA SHEPHERD, PROFESSOR OF LAW,
EMORY UNIVERSITY SCHOOL OF LAW**

Ms. SHEPHERD. Thank you, Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee for the opportunity to testify today.

My research focuses on empirical analyses of the civil justice system and the judiciary. Today, I will discuss one of my recent studies that examines the impact on Federal court caseloads of an expansion in diversity jurisdiction.

Research suggests that the bias recognized by the original Framers against out-of-state litigants and corporations persist today. Surveys of attorneys indicate that bias based on residency status or corporate status continue to be the primary rationales for seeking a Federal forum over a State forum in diversity cases. The intensifying politicization of State courts and State judicial elections likely account for some of the present judicial bias in State courts.

Approximately 90 percent of State court judges must be reelected by voters, and in the last several decades, these elections have become more competitive and contentious with aggressive campaigning and significant spending.

A substantial body of empirical research, including much of my own work, has shown that State judicial elections lead judges to decide cases in ways that will get them reelected, and this includes favoring in-State litigants who are voters over out-of-State litigants.

Despite this evidence of bias, some commentators have argued that expanding diversity jurisdiction would place an impossible burden on the Federal courts. My study addresses this question by estimating the impact on Federal caseloads of replacing complete diversity with the minimal diversity standard required by the Constitution.

To determine the impact of moving from a complete diversity standard to a minimal diversity standard, the study compiled data from several different sources. First, a team of independent researchers from Emory University collected and coded data from almost 3,600 complaints filed in the State courts in 2013. Additional data were compiled from Federal court caseloads, data on diversity cases in Federal courts, data on removal statistics to Federal courts, and data on State civil court filings.

The results from the 3,600 coded complaints showed that about 7.5 percent of the cases were removable under the current complete diversity standard. An additional 6.3 percent of the complaints would be removable under a minimal diversity standard. However, the majority of cases that satisfy the current complete diversity standard are not filed in Federal court, nor ever removed to Federal court.

There are numerous reasons why diverse litigants that do not fear local bias may prefer to remain in State court. To mention a few: Many State courts have established positions in an area of law and defendants prefer the certainty of State court over the uncertainty of Federal court; some State courts and judges, such as spe-

cialized business courts in the States, have special expertise that may make them more knowledgeable about certain areas of law than the Federal courts; defense counsel may have closer contacts and stronger relationships to both State court judges and attorneys; in cases involving individuals or small businesses, the convenience in lower cost of State court may deter removal to Federal court; and finally, a defendant such as a large local employer might assume that potential local bias in State court, either judicial or political, may actually work in its favor.

Indeed, existing Federal data on removal statistics reveals that of the 7.5 percent of the complaints in our study that were removable under complete diversity, the majority, about 97 percent, would never be removed.

Next, I applied the actual removal rate under complete diversity to the number of potentially removable cases under minimal diversity. My co-panelist questions whether this is a safe assumption to make, to assume that the percentage of removable cases that are actually removed under complete diversity will be the same percentage that is actually removed under minimal diversity.

I agree that this is an assumption. Unfortunately, assuming is all we can do because we don't live in a world with a minimal diversity standard. However, there's no reason to think that the removal rate will be higher under minimal diversity. If anything, it should be lower.

Because some of the new cases will have plaintiffs and defendants that share a domicile, the advantages of keeping the cases in State court that I just detailed will be even more likely to exist. Convenience, lower travel costs, favorable local bias, and close relationships with judges and attorneys, are more likely to convince these defendants that do not fear local bias to stay in State court. Thus, if anything, the percentage of cases that are actually removed should decrease under minimal diversity, not increase.

But, assuming that the removal rate stays the same, the data revealed that approximately 13,900 additional cases would be removed annually to Federal court under a minimal diversity standard. This represents only a 7.7 percent increase in Federal court caseloads.

And while this 7.7 percent increase seems like a small burden, the burden could be further reduced by increasing the amount in controversy requirement to a level above \$75,000. Or alternatively, filling existing judicial vacancies or expanding the number of Federal District Court judgeships—which has happened ten times since 1960—would also alleviate this burden.

Thank you again for the opportunity to speak to you today.

[The prepared statement of Ms. Shepherd follows:]

TESTIMONY OF JOANNA SHEPHERD, PROFESSOR OF LAW AT EMORY UNIVERSITY
BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE, U.S. HOUSE OF
REPRESENTATIVES JUDICIARY COMMITTEE

SEPTEMBER 13, 2016

Chairman Franks, Ranking Member Cohen, and members of the Subcommittee on the Constitution and Civil Justice, thank you for the opportunity to testify about my study examining the impacts on federal court caseloads of an expansion in diversity jurisdiction.

My name is Joanna Shepherd. I am a Professor of Law at Emory University. I hold a Ph.D. in Economics and was formerly an Economics Professor. My research focuses on empirical analyses of legal institutions, the civil justice system, and the judiciary. I have published broadly in law reviews, legal journals and peer-reviewed economics journals, and am the author of two books. My research has been cited by numerous courts, including the U.S. Supreme Court. I have previously testified before the House Judiciary Committee, and before the National Academy of Sciences and several state legislative committees.

I. EXECUTIVE SUMMARY

Diversity jurisdiction is one form of federal subject-matter jurisdiction, under which federal courts may hear lawsuits based on state law so long as the parties satisfy certain prerequisites. To invoke diversity jurisdiction under the traditional diversity statute, the lawsuit must involve "a controversy between citizens of different states or between a citizen of a state and an alien," and the amount in controversy must exceed \$ 75,000.¹ Either a plaintiff or defendant can invoke diversity jurisdiction.

The traditional diversity statute has long been interpreted by the courts to require "complete diversity"; that is, there cannot exist a common citizenship between any plaintiff and any defendant.² However, Article III of the U.S. Constitution only requires a "minimal diversity" standard for federal diversity jurisdiction: at least one plaintiff and one defendant must be diverse in citizenship.³ In recent decades,

¹ 28 U.S.C. § 1332(a).

² *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806).

³ The Constitution merely requires minimal diversity, where at least one plaintiff has a citizenship status different than at least one defendant. *See Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 577 n.6 (2004); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) ("Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.").

Congress has enacted several pieces of legislation that replace the complete diversity requirement with minimal diversity in certain situations, expanding federal diversity jurisdiction to include more cases.⁴ The purpose of these reforms was to streamline the adjudication of multiple suits in a single forum⁵ and reduce plaintiff attorneys' ability to choose sympathetic state forums in which to litigate nationwide class actions.⁶

In a recent report, I explore the consequences of replacing the complete diversity standard with a minimal diversity standard in all civil cases. As the primary criticism of expanding federal diversity jurisdiction is the impact on federal court caseloads, I empirically estimate the impact on caseloads of moving to a minimal diversity standard. I analyzed almost 3,600 complaints filed in state courts to determine the percentage of complaints that do not currently satisfy complete diversity but would satisfy a minimal diversity standard. Then I use existing data on federal district court caseloads, data on diversity cases in federal courts, data on removal statistics to federal district courts, and data on state civil case filings to quantify the impact on federal court caseloads. My empirical analysis predicts that moving to a minimal diversity standard would increase federal district court caseloads by approximately 7.7 percent, a relatively small burden on the federal courts. Moreover, this burden could be further reduced by increasing the amount-in-controversy requirement in diversity cases, filling existing judicial vacancies, or expanding the number of federal district court judgeships.

II. THE JUSTIFICATION FOR FEDERAL DIVERSITY JURISDICTION

The traditional justification for diversity jurisdiction is that it protects out-of-state residents from potentially biased state courts.⁷ In order to promote interstate

⁴The first, in 1990, gave the federal courts supplemental jurisdiction over claims that formed "part of the same case or controversy" even when the joinder of additional parties eliminated complete diversity. 28 U.S.C. § 1367(a) (2012). In 2002, the Multiparty, Multiforum Trial Jurisdiction Act eliminated the complete diversity requirement for litigation arising from a single accident where at least 75 persons die. 28 U.S.C. §1369. In 2005, Congress enacted the Class Action Fairness Act that grants federal jurisdiction over class actions when only a minimal diversity standard is satisfied, there are over 100 plaintiffs, and more than \$ 5 million is in controversy. Codified at 28 U.S.C. §§ 1332(d), 1453, and 1711-1715.

⁵H.R. REP. NO. 107-685, at 199 (2002) (Conf. Rep.).

⁶See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1725 (2008).

⁷See ERWIN CHERMERINSKY, FEDERAL JURISDICTION, § 5.3.2, at 274 (2d ed. 1994); see also *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias."); *Burgess v. Seligman*, 107 U.S. 20, 34 (1883) (stating that diversity jurisdiction was established "to institute independent tribunals, which . . . would be unaffected by local prejudices").

commerce, the Framers sought to ensure that commercial cases would be heard in an impartial forum to protect foreign litigants from local bias.⁸

Supporters of diversity jurisdiction assert that bias against out-of-state litigants and corporations persists today.⁹ Indeed, surveys of attorneys indicate that bias based on residency status¹⁰ or corporate status¹¹ continue to be the primary rationales for seeking a federal forum over a state forum in diversity cases. Moreover, although it is difficult to empirically test whether state judges are more biased than federal judges because of multiple sample selection problems, empirical evidence indicates that, compared to federal judges, many state judges tend to favor in-state plaintiffs over out-of-state defendants.¹²

The intensifying politicization of state courts and state judicial elections likely account for some of the present judicial bias in state courts. Approximately 90 percent of state court judges must be reelected by voters,¹³ and in the last several decades, these elections have become more competitive and contentious, with aggressive campaigning and significant spending.¹⁴ A substantial body of empirical research shows that state judicial elections influence judges to decide cases in ways

⁸ Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 496-97 (1928) (“we may say that the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction . . .”).

⁹ See Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 79 (1993) (“The consensus is that diversity has existed and exists to provide a neutral forum for out-of-staters against perceived local bias by state courts.”)

¹⁰ Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 97-99 (1980) (noting that of 74 attorneys representing out-of-state clients in federal cases, 40 percent reported that fear of local bias was a reason for their choice of federal court over state court); Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S. C. L. REV. 961, 966 (1995) (noting that 60 percent of all respondents consider the resident status of their clients as a relevant factor in choice of forum).

¹¹ Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 409 (1992) (noting that of cases removed from state court to federal court, 18 percent of plaintiff attorneys and 45 percent of defense attorneys reported bias against corporations); Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S. C. L. REV. 961, 967 (1995) (noting that 41 percent of surveyed attorneys removing cases to federal court considered the corporate status of their client as an important consideration in forum choice).

¹² Eric Helland & Alex Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341 (2002).

¹³ Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, app. 2 at 1105 (2007).

¹⁴ JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER & LINDA CASEY, THE BRENNAN CENTER FOR JUSTICE, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE* (Charles Hall ed., 2010); ALICIA BANNON, ERIC VELASCO, LINDA CASEY & LIANNA REGAN, THE BRENNAN CENTER FOR JUSTICE, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2011-2012: HOW NEW WAVES OF SPECIAL INTEREST SPENDING RAISED THE STAKES FOR FAIR COURTS* (Laurie Kinney & Peter Hardin eds., 2013).

that will get them re-elected, by conforming to voter preferences,¹⁵ altering voting patterns,¹⁶ and favoring campaign contributors in their decisions.¹⁷ Retention concerns would similarly influence state judges to favor in-state litigants, who are voters, over out-of-state litigants.

Indeed, countless examples exist of overt bias in state courts, with state judges favoring local litigants and plaintiffs' attorneys over out-of-state corporate defendants. For example, state courts in Madison County, Illinois have been accused of favoring plaintiffs' lawyers over out-of-state corporations in asbestos litigation.¹⁸ The circuit court in Madison County even acknowledged that they apply "kind of a loose" and "liberal" policy that favors plaintiffs.¹⁹ In other state courts, bias has been the direct result of bribery and corruption, evidenced by the convictions of both attorneys and judges.²⁰

Despite the general sentiment among attorneys and empirical evidence that bias persists, some commentators claim that the traditional justification for diversity jurisdiction is no longer relevant in the present day, rendering diversity jurisdiction unnecessary.²¹ More recently, the increased caseload in the federal courts has prompted calls for limiting or abolishing diversity jurisdiction.²² This study will address the relationship between diversity jurisdiction and federal court caseloads by estimating the impact on federal caseloads of replacing complete diversity with the minimal diversity standard required under Article III of the Constitution.

¹⁵ See, e.g., Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169 (2009).

¹⁶ See e.g., Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427 (1992); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004).

¹⁷ See e.g., Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 670-72 & tbls. 7- 8 (2009); Michael Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011); Michael Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239 (2013).

¹⁸ See e.g., Jim Copland, *The Tort Tax*, WALL ST. J., June 11, 2003, at A16; Noam Neusner, *The Judges of Madison County*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 39.

¹⁹ Victor E. Schwartz, Mark A. Behrens & Kimberly D. Sander, *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL'Y 235, 245 (2004) (quoting Transcript of Record at 16, 22, *Union Carbide Corp. v. Hon. Nicholas G. Byron* (Ill. May 6, 2004) (No. 03-L-1294)).

²⁰ See e.g., The Associated Press, *Mississippi: Judge Enters Plea*, N.Y. TIMES, July 31, 2009, at A16; *United States v. Scruggs*, 714 F.3d 258 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 336 (2013).

²¹ Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 314 (1979) (claiming that diversity jurisdiction is "an idea whose time has passed"); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: The Silver Lining*, 66 A.B.A. J. 177, 180 (1980) (arguing that diversity jurisdiction should be abolished);

²² See FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 14 (Apr. 2, 1990) ("Diversity cases are a large part of the trial load of the district courts, and their elimination would therefore markedly lighten the burden on those courts.").

III. EMPIRICAL STUDY OF IMPACTS OF A MINIMAL DIVERSITY STANDARD

A. DESCRIPTION OF CODING PROJECT

To determine the impact of moving from a complete diversity standard to a minimal diversity standard, this study compiled data from several different sources. First, a team of independent researchers from Emory University School of Law collected and coded data from almost 3,600 complaints filed in state courts.²³ The researchers used the Westlaw database of State Trial Court Pleadings that contains complaints filed in 12 states: California, Delaware, Florida, Georgia, Illinois, Maryland, Massachusetts, New York, Oregon, Pennsylvania, Texas, and Washington. The complaints were randomly selected from the 2013 complaints in the database, and the coding went through a two-step quality control process to confirm reliability.²⁴

The researchers coded each complaint for citation, state, date of filing, type of plaintiff and defendant (individual versus corporation), domicile of each plaintiff and each defendant, whether the sum of the claims was alleged to be in excess of \$75,000,²⁵ whether the case was a class action, and whether the case was a shareholder suit. The domicile was coded as the address in the case of individuals,²⁶ and as either the principal place of business or place of incorporation for

²³ This data coding was supported in part by the National Association of Manufacturers. However, the views expressed in this report are those of the author and do not necessarily reflect the position of NAM.

²⁴ Ultimately, over 10 percent of the cases were coded by at least 2 researchers to confirm reliability.

²⁵ The rules concerning the amount in controversy are complex. If a single plaintiff has multiple, unrelated claims against a single defendant, and each individual claim is less than \$75,000, the multiple claims may be aggregated to meet the amount in controversy. When there are multiple defendants, claims generally may not be aggregated to meet the amount in controversy unless the defendants would be held jointly liable against the plaintiff. However, where there is more than one plaintiff against one defendant, and none of the individual claims are greater than \$75,000, the plaintiffs' claims may only be aggregated if the claims share a common and undivided interest.²⁵ In the few cases where it was impossible to tell whether a court would aggregate the claims to exceed \$75,000, the coders erred on the conservative side and assumed the cases were removable. The coders also erred on the conservative side and assumed the amount in controversy requirement was satisfied when the claim involved damages over multiple days that could have aggregated to exceed \$75,000. If these conservative assumptions prove inaccurate, the impact on federal caseloads would be slightly smaller than that reported here.

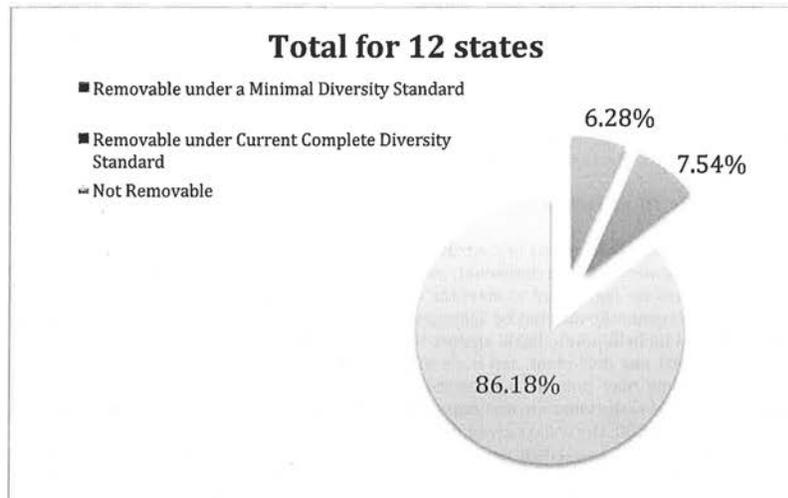
²⁶ The rules for determining state citizenship are complex. In general, an individual is a citizen of the state of domicile, and a corporation is a citizen of any state in which it is incorporated or has its principal place of business. 28 U.S.C. § 1332(c)(1). There were some cases where the plaintiff and/or defendant's domicile was not directly stated but we presumed a particular domicile: in medical injury cases where the injury occurred at a local hospital and in car accident cases given the long arm statutes that generally give the state courts' jurisdiction over motor vehicle accidents occurring in the state. If domicile could not be presumed, the cases were dropped from the analysis.

corporations.²⁷ Additional data were compiled to estimate the impact of a minimal diversity standard on federal courts: data on federal court caseloads, data on diversity cases in federal courts, data on removal statistics to federal courts, and data on state civil case filings.

B. CASES REMOVABLE UNDER COMPLETE AND MINIMAL DIVERSITY

The aggregate results for all states are reported in Figure 1 below. The results show that in the sample of 3,600 complaints, 7.54% of the cases were removable under the current complete diversity standard. That is, in 7.54% of the complaints filed in state court, no plaintiff shared a domicile with any defendant and the sum of the alleged claims exceeded \$75,000. In an additional 6.28% of the complaints, at least one plaintiff and one defendant had different domiciles and the sum of the alleged claims exceeded \$75,000; these additional cases would be removable under a minimal diversity standard.

Figure 1: Cases Removable Under a Complete Diversity Standard and a Minimal Diversity Standard



²⁷ In the few cases where principal place of business and place of incorporation gave conflicting results—that is, one satisfied a minimal diversity standard and one did not—the coders made the conservative assumption that the case could be removed under a minimal diversity standard. If, ultimately, the cases would not be removable, the impact on federal caseloads would be smaller than that estimated here.

As expected, variation in the removability of cases exists across individual states and is approximately normally distributed. Although random sample selection could be partly responsible for the state differences, the variation is likely caused by differences in state laws, industries, and litigation environments. For example, states with no-fault rules for auto accidents have fewer motor vehicle cases; states with significant medical malpractice tort reforms have fewer medical malpractice claims; and states with indulgent consumer protection statutes have more consumer litigation. Moreover, different kinds of claims are made against different industries. For example, insurers face claims that are very different from service businesses. Large manufacturers and drug companies face claims that are markedly different from retail and wholesale distributors. These different kinds of claims in turn impact the volume of filings from state to state. Finally, some states have become hotbeds for certain kinds of claims because of the courts' litigation-friendly reputations. For example, asbestos litigation tends to be concentrated in certain states not only because of the industries located in the state, but also because of the litigation-friendly environment for asbestos victims. These differences in laws, industries, and litigation environments give rise to differences in the claims filed in the states, and different kinds of claims vary in how likely they are to satisfy the diversity standard.

C. ESTIMATED CASES THAT ACTUALLY ARE REMOVED UNDER COMPLETE DIVERSITY

The majority of cases that satisfy the current complete diversity standard are not filed in federal court or removed to federal court by the litigants. There are numerous reasons why diverse litigants may prefer to remain in state courts including:

- Many state courts have established positions in an area of law, and a defendant would prefer the certainty of state court over the uncertainty of federal court.
- A defendant may know *the* state appellate court's position on relevant issues, whereas an appeal to the federal circuit is unpredictable given the random panel assignment of circuit court cases.
- Some state courts and judges have special expertise that make them more knowledgeable about certain areas of law than the federal courts.
- Defendants might predict a better outcome before a jury in state court that is typically larger than federal juries and does not require a unanimous decision.
- Jury behavior is generally more predictable in state court; the jury in state court is usually drawn from a relatively-homogeneous pool over a small geographic area, while in federal court the jury pool is selected from a more diverse population over a larger geographic area.
- In some cases, the rules of procedure may benefit the defendant; federal discovery rules are often thought to be more pro-plaintiff than the discovery rules in several state courts.

- Federal cases tend to move more quickly than cases in state court, and for various reasons, defendants may prefer a delay.
- The “forum defendant rule” may keep many defendants in state court even when diversity jurisdiction exists.
- In commercial cases, defendants may expect to fare better in front of a specialized state “business court” than they would in front of a federal court.
- Defense counsel may have closer contacts and stronger relationships to both state court judges and local attorneys.
- In cases involving individuals or small businesses, the convenience and lower cost of state court may deter removal to federal court.
- And finally, a defendant such as a large local employer might assume that potential local bias in state court, either judicial or political, may work in its favor.

To estimate how many cases would actually be removed, I first estimate the total number of removable cases under the current complete diversity standard. Figure 2 shows these data and estimations. According to state-level court data, 8,882,030 civil cases were filed in the 12 states in our sample in the most recent year of available data (1st column in Figure 2). Our coding of complaints indicated that 7.54 percent of the cases initially filed in the courts of these 12 states were removable under the current complete diversity standard (2nd column in Figure 2). Thus, 669,705 cases are predicted to be removable each year under the current diversity standard (3rd column in Figure 2).

Figure 2: Cases that are Removable to Federal Court under a Complete Diversity Standard

| 2012 STATE INCOMING CIVIL CASES ²⁸ | PERCENT OF CASES THAT ARE REMOVABLE UNDER CURRENT COMPLETE DIVERSITY STANDARD ACCORDING TO CODING PROJECT ¹ | PREDICTED NUMBER OF CASES ARE REMOVABLE UNDER CURRENT COMPLETE DIVERSITY STANDARD |
|-----------------------------------------------|------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|
| 8,882,030 | 7.54% | 669,705 |

However, data show that the vast majority of these cases will remain in state court. Figure 3 reports data and estimates of the number of cases that are *actually* filed in state court and subsequently removed to federal court. According to Federal Court data, 135,214 private civil cases were filed in the district courts of the 12 sample states in 2014 (1st column of Figure 3). Of these, approximately 55,465 were cases where the basis of jurisdiction was diversity of citizenship (2nd column of Figure 3). And of these diversity cases, an estimated 16,639 were originally filed in state court and subsequently removed to federal court (3rd column of Figure 3).

²⁸ For all states other than Delaware, Massachusetts, and Oregon, data on incoming state civil cases in 2012 is from the National Center for State Courts, available at: <http://www.courtstatistics.org/>. Data on Delaware incoming cases is available at: <http://courts.delaware.gov/AOC/AnnualReports/FY12/IPAR2012.pdf> (Justice of the Peace Courts), <http://courts.delaware.gov/AOC/AnnualReports/FY12/CCPAR2012.pdf> (Court of Common Pleas), and <http://courts.delaware.gov/AOC/AnnualReports/FY12/Superior2012rev.pdf> (Superior Courts). Data on Massachusetts incoming cases is available at: <http://www.mass.gov/courts/docs/courts-and-judges/courts/boston-municipal-court/2012caseloadstats.pdf> (Boston municipal court), <http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/civilstats2012.pdf> (Massachusetts District Courts), and <http://www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/2012statscivilload.pdf> (Massachusetts Superior Courts). Data on Oregon incoming cases is available at: http://courts.oregon.gov/OJD/docs/osca/2011_stats_table_1.pdf.

Figure 3: Estimated Number of Cases that are Removed to Federal Court under a Complete Diversity Standard

| TOTAL PRIVATE CIVIL CASES FILED IN FEDERAL COURT IN 2014 ²⁹ | ESTIMATED FEDERAL CASES WHERE THE BASIS OF JURISDICTION IS DIVERSITY OF THE LITIGANTS, 2014 ³⁰ | ESTIMATED FEDERAL DIVERSITY CASES THAT WERE ORIGINALLY FILED IN STATE COURT AND REMOVED TO FEDERAL COURT, 2014 ³¹ |
|------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------|
| 135,214 | 55,465 | 16,639 |

Thus, according to data on federal court caseloads, basis of jurisdiction, and removal statistics, only 2.48% (16,639 of 669,705) of cases that satisfy the complete diversity standard are actually removed to federal court.

D. ESTIMATED CASES THAT WOULD BE REMOVED UNDER MINIMAL DIVERSITY

To estimate the impact on the federal courts of moving from a complete diversity standard to minimal diversity standard, I next estimate how many cases filed in state court would meet the minimal diversity standard and be removed to federal court by the litigants.³² Figure 4 reports these data and estimates. According to the coding project, an additional 6.28% of cases would be removable under a minimal diversity standard (1st column of Figure 4). Thus, of the 8,882,030 civil cases in our 12 state sample (2nd column of Figure 4), 557,791 would be removable (3rd column of Figure 4).

²⁹U.S. Courts, Table C-1. U.S. District Courts—Civil Cases Commenced, Terminated, and Pending (2014) available at: <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/C01Mar14.pdf>.

³⁰ There were 105,471 diversity cases filed in federal court last year. This was 41.02% of the 257,093 private cases. U.S. Courts, Table C-2, U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction (2014), available at: <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/C02Mar14.pdf>. The estimated cases in column 2 are calculated by taking 41.02% of the cases in column 1.

³¹ Data indicates that approximately 30% of diversity cases in federal court were removed from state court. Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. of Empirical Legal Studies 551, 564 (2005); Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S. C. L. REV. 961, 971 (1995). The estimated cases in column 3 are calculated by taking 30% of the cases in column 2.

³² This estimation assumes that cases in state court would be removed to a federal district court in the same state.

Figure 4: Cases that would be Removable to Federal Court under a Minimal Diversity Standard

| PERCENTAGE OF ADDITIONAL CASES THAT WOULD BE REMOVABLE UNDER A MINIMAL DIVERSITY STANDARD | 2012 STATE INCOMING CIVIL CASES ³³ | ESTIMATED NUMBER OF ADDITIONAL CASES THAT WOULD BE REMOVABLE UNDER A MINIMAL DIVERSITY STANDARD |
|-------------------------------------------------------------------------------------------|-----------------------------------------------|-------------------------------------------------------------------------------------------------|
| 6.28% | 8,882,030 | 557,791 |

However, not all of the cases removable under a minimal diversity standard would actually be removed to federal court. The statistics on *actual* removal under the complete diversity standard from Figure 3 show that approximately 2.48 percent of removable cases are actually removed to federal court. Applying these statistics on removal from Figure 3 to the number of removable cases under minimal diversity reveals that, of the 557,791 removable cases, only 13,859 cases would actually be removed to federal court (3rd column in Figure 5). Figure 5 reports these estimates for the 12 sample states.

³³ Source: For all states other than Delaware, Massachusetts, and Oregon, data on incoming state civil cases in 2012 is from the National Center for State Courts, available at: <http://www.courtstatistics.org/>. Data on Delaware incoming cases is available at: <http://courts.delaware.gov/AOC/AnnualReports/FY12/JP2012.pdf> (Justice of the Peace Courts), <http://courts.delaware.gov/AOC/AnnualReports/FY12/CCPAR2012.pdf> (Court of Common Pleas), and <http://courts.delaware.gov/AOC/AnnualReports/FY12/Superior2012rev.pdf> (Superior Courts). Data on Massachusetts incoming cases is available at: <http://www.mass.gov/courts/docs/courts-and-judges/courts/boston-municipal-court/2012caseloadstats.pdf> (Boston municipal court), <http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/civilstats2012.pdf> (Massachusetts District Courts), and <http://www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/2012statscivilload.pdf> (Massachusetts Superior Courts). Data on Oregon incoming cases is available at: http://courts.oregon.gov/OJD/docs/osca/2011_stats_table_1.pdf.

Figure 5: Estimated Cases that would be Removed to Federal Court under a Minimal Diversity Standard

| ESTIMATED NUMBER OF ADDITIONAL CASES THAT WOULD BE REMOVABLE UNDER A MINIMAL DIVERSITY STANDARD | ESTIMATED PERCENTAGE OF DIVERSITY CASES THAT ARE REMOVED TO FEDERAL COURT | ESTIMATED NUMBER OF ADDITIONAL CASES THAT WOULD ACTUALLY BE REMOVED |
|-------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------|---------------------------------------------------------------------|
| 557,791 | 2.48% | 13,859 |

E. IMPACTS ON FEDERAL COURT CASELOADS

The estimated 13,859 additional cases in the 12-state sample translate into only a minimal impact on federal caseloads. Figure 6 reports data on incoming caseloads in federal district courts. Compared to the 179,867 incoming cases in the 12-state sample, an additional 13,859 cases represents only a 7.7 percent increase in federal caseloads. In 2014, 370,013 cases were heard in all federal district courts.³⁴ A 7.7 percent increase in this aggregate caseload represents an additional 28,491 cases.

Figure 6: Impact of Minimal Diversity Standard on Federal Court Caseloads

| | TOTAL INCOMING CASES IN FEDERAL DISTRICT COURT, 2014 ³⁵ | ESTIMATED NUMBER OF ADDITIONAL CASES THAT WOULD ACTUALLY BE REMOVED | ESTIMATED PERCENTAGE INCREASE IN FEDERAL DISTRICT COURT CASELOAD |
|------------------------------------|--------------------------------------------------------------------|---------------------------------------------------------------------|------------------------------------------------------------------|
| 12-State Sample | 179,867 | 13,859 | 7.7% |
| All Federal District Courts | 370,013 | 28,491 | 7.7% |

³⁴ U.S. Courts, *Federal Judicial Caseload Statistics 2014*, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014.aspx>.

³⁵ U.S. Courts, Table C-1. U.S. District Courts—Civil Cases Commenced, Terminated, and Pending (2014), available at: <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/C01Mar14.pdf>; U.S. Courts, Table D. Cases, U.S. District Courts—Criminal Cases Commenced, Terminated, and Pending (2014), available at: <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/D00CMar14.pdf>.

A 7.7 percent increase in federal district court caseloads places a relatively small burden on federal courts. Distributing the case increase over the 667 existing federal district court judgeships results in an additional 43 cases per year for each judgeship.³⁶ Moreover, the burden could be minimized by filling existing judicial vacancies or increasing the number of existing district court judgeships (judgeship increases are fairly common—there were 241 federal district court judgeships in 1960 compared to 667 today³⁷). Finally, increasing the amount in controversy requirement from \$75,000 to some higher amount would mean that even fewer cases would be removable under a minimal diversity standard, further reducing the modest burden on federal courts.

³⁶ U.S. Courts, *Judges and Judgeships* 2014, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx>.

³⁷ U.S. Courts, *U.S. District Courts Additional Authorized Judgeships since 1960 (2014)*, <http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/judgesjudgeships/docs/district-judgeships.pdf>.

Mr. FRANKS. Thank you, Professor.
Mr. Weich.

**TESTIMONY OF RONALD WEICH, DEAN, PROFESSOR OF LAW,
UNIVERSITY OF BALTIMORE SCHOOL OF LAW**

Mr. WEICH. Thank you.

Good morning, Chairman Franks, Ranking Member Cohen, full Committee Ranking Member Conyers, and Members of the Subcommittee. My name is Ronald Weich. I'm the dean at the University of Baltimore School of Law, and I appreciate the opportunity to testify today.

The subject of today's hearing, Federal diversity jurisdiction, is very technical, but as has been noted by the Members of the Committee, it is very important. It implicates core principles in our constitutional system: State sovereignty, the proper functioning of the Federal courts, and questions of federalism.

And the importance of the subject lead me to urge, above all, that the Committee proceed with great caution. This is potentially a powder keg for the Federal courts and for our system of federalism. And if the Committee wants to explore, as the title of the hearing suggests, Federal diversity jurisdiction, that's fine.

But to legislate in this area would require far more consideration. And specifically, I would urge that you consult with key stakeholders and subject matter experts across the spectrum. I am not, myself, a civil procedure professor. I don't teach Federal jurisdiction. As the dean of a law school, I have a certain perspective that I'll share with the Committee today, but I would urge that subject matter experts in this very technical area be consulted before any legislation is advanced.

I want to address several issues, starting with *Strawbridge* against *Curtiss*, which Mr. Cooper referred to, the 1806 decision by Chief Justice Marshall. Mr. Cooper is a legendary litigator. I respect him greatly. But I fear that he has taken on mission impossible here trying to convince Congress to overturn a decision by Chief Justice John Marshall from 210 years ago.

Not only has the Supreme Court not overturned, never seriously questioned the holding in *Strawbridge* that Article III requires complete diversity, but Congress has never come back to that question in a significant way. And I'll describe that in some detail.

You know, I looked—after reviewing Mr. Cooper's testimony, I went back last night, and using my somewhat atrophied legal research skills, I wanted to see whether *Strawbridge* had been questioned in Supreme Court cases in these 210 years, and it really has not in any significant way. There are decisions from the 19th century, the 20th century, and as I cite in my testimony, the *Exxon Mobil* versus *Allapattah* case in 2005, where the Supreme Court says we adhere to the principle of complete diversity.

Meanwhile, Congress, which could have imposed a different diversity standard, hasn't done so. In fact, it's done the opposite. The Congress has repeatedly raised the amount in controversy threshold to make diversity jurisdiction less available, and Congress has taken other steps to limit rather than expand Federal diversity.

One exception to that is, of course, the Class Action Fairness Act of 2005, and that seems to me to be a cautionary tale. I've heard

that there are practitioners and judges who feel that that law allowed too many cases into Federal court. Perhaps there are defendants who fear that it doesn't go far enough. And that might be a fit subject for consideration, but that's far, far from the very dramatic step of changing complete diversity to minimal diversity.

In my testimony, I point out that Congress has, for 210 years, largely restricted diversity jurisdiction for three reasons, which have been highlighted by Members of the Committee already: Number one, State sovereignty; number two, litigation costs; and number three, the proper functioning of the Federal courts.

On State sovereignty, it must be emphasized that these are State law claims arising under State statutes or State common law, and it is quite a dramatic thing from the perspective of federalism to say that a Federal court not accountable to the citizens of a State should adjudicate those claims. And it's really ironic. I know many Members of this Committee have long championed the principle of State sovereignty and States' rights, and it seems odd that now you would move in a different direction in this area.

I speak in my testimony about the Maryland judiciary, which I know well, which is very well equipped to handle these cases. And I know you have on this Committee, a former State court judge, Judge Gohmert, who knows well the State judiciary in Texas.

I point out in my testimony that the exercise of diversity jurisdiction tends to increase complexity and costs. And I highlight, for example, the problems that are created when a Federal court has to certify a question to State courts. It can take years for that to be resolved.

And then finally, the Federal courts, where, as has been pointed out, the caseload is increased, there are fewer judges. My distinguished co-panelist, Professor Shepherd, says it would only be 7.7 percent of an increase in the caseload. That's a dramatic increase for Federal judges. And I fear that if we're simply assuming because the past is present, that that's not going to be a very comforting assumption for Federal judges and administrators who would be looking at really an ocean of new cases coming into the Federal courts.

So for all these reasons, I would urge the Committee to proceed with great caution before expanding Federal diversity jurisdiction.

[The prepared statement of Mr. Weich follows:]

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

“EXPLORING FEDERAL DIVERSITY JURISDICTION”

September 13, 2016

TESTIMONY OF RONALD WEICH

DEAN, UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Weich Testimony 9/13/16

Good morning Chairman Franks, Ranking Member Cohen and members of the Subcommittee. My name is Ronald Weich and I am the dean of the University of Baltimore School of Law. Thank you for the opportunity to testify at this hearing entitled "Exploring Federal Diversity Jurisdiction."

The subject of today's hearing is technical, complex, little-understood by the general public, and yet fundamental to the administration of justice in this country. Federal diversity jurisdiction touches on profound questions of federalism, state sovereignty and the proper functioning of the federal courts.

The importance of federal diversity jurisdiction leads me to urge the subcommittee to proceed with great caution in this field. I appreciate that you have titled this hearing "Exploring Federal Diversity Jurisdiction." It is fine to "explore" issues surrounding diversity jurisdiction, but it would be entirely premature for Congress to legislate on this subject. If Congress were to consider seriously any modification of the status quo in this area, this should be the first of many hearings on the subject. A one panel hearing convened on one-week notice does not permit meaningful input by key stakeholders or experts in the field of civil procedure.

I want to state candidly, and without false modesty, that I am not one of those experts. As a law school dean I maintain a general familiarity with the core subjects taught in my school, including civil procedure. As the dean of a public law school and one of only two law school deans in Maryland, I have an institutional awareness of and concern for the well-being of both the Maryland state judiciary and the federal courts that sit in Maryland. Finally I have long been involved in efforts to ensure access to the courts for all Americans. But none of that qualifies me as an expert on civil procedure, especially not on the relatively arcane subject of federal diversity jurisdiction.

It is my understanding that when the minority members of the subcommittee were given notice of this hearing one week ago, their staff unsuccessfully sought to identify true experts in this specific field who would be available to testify on such short notice. I am very glad to offer my perspective on the issues at hand, but my participation in this hearing does not suffice. I

Weich Testimony 9/13/16

encourage the subcommittee to adopt a longer term approach to any future hearings on this subject so that you will hear from those with greater familiarity of the subject matter, including practitioners on both sides of such lawsuits, state and federal judges, court administrators, and a broad range of law professors who teach and write about civil procedure.¹

Having expressed that concern, I will now address the questions that I understand to be of interest to the subcommittee.

I. The doctrine of complete diversity has been the law of the land since the earliest days of the Republic.

The basic contours of federal diversity jurisdiction have been well-established for more than 200 years. Article III, section 2 of the Constitution provides, in relevant part, that the federal judicial power shall extend to controversies “between Citizens of different States.” Congress gave life to that provision in the Judiciary Act of 1789, but from the outset sought to limit the reach of diversity jurisdiction by imposing a monetary threshold – one mentioned nowhere in the Constitution – that must be met before federal diversity jurisdiction is invoked.

Soon thereafter, in an opinion by Chief Justice John Marshall, the Supreme Court interpreted that statute to require complete diversity. In other words, the Court held that the words “between citizens of different states” means that all plaintiffs in a lawsuit must be citizens of different states than all defendants in the lawsuit to establish this type of federal jurisdiction. That is the holding in the landmark case of Strawbridge v. Curtiss, 7 (3 Cranch) U.S. 267 (1806).

An article co-authored by my distinguished colleague at the witness table today, Charles Cooper, suggests that Chief Justice Marshall came to regret his decision in Strawbridge. That may or may not be so, but it is of no current

¹ In the short time that I was afforded to prepare this testimony, I did have an opportunity to consult with colleagues at my law school and am particularly grateful for the assistance provided by Professor Christopher J. Peters of the University of Baltimore law faculty.

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significance because the Supreme Court itself has never looked back. The holding in Strawbridge has been repeatedly reaffirmed over the last two centuries.²

As recently as 2005 the Court observed that it has always “adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern...” Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 553–54 (2005) (citations omitted).

Few legal doctrines are as venerable and as deeply ingrained in practice as the complete diversity doctrine. At any time over the 210 years since Strawbridge, Congress could have amended the diversity statute to impose only a minimal diversity requirement. But with a few narrow exceptions I will discuss below, Congress has done the opposite – it has systematically restricted access to diversity jurisdiction. For example:

- Congress has regularly raised the minimum amount-in-controversy requirement in order to limit the reach of diversity jurisdiction. The \$500 threshold in the 1789 Act was raised to \$2,000 in 1887, to \$3,000 in 1911, to \$10,000 in 1958, to \$50,000 in 1988 and to the current level of \$75,000 in 1996.
- Congress has amended the diversity statute to provide that corporations are considered citizens of both their state of incorporation and their principal place of business, thus making it more difficult to satisfy the complete diversity requirement.

² Mr. Cooper’s article also raises the novel constitutional argument that the complete diversity doctrine violates Article III. But 210 years of consistent precedent and practice deserves substantial deference. The Supreme Court has *never* questioned the basic principle that Congress is free to restrict the subject-matter jurisdiction of the lower federal courts within the outer boundaries specified by Article III. In addition, the logic of Mr. Cooper’s argument would prohibit Congress from restricting in any way the maximum scope of federal subject-matter jurisdiction allowed by the constitutional text. This would render other long-established statutory provisions unconstitutional, chief among them the minimum-amount-in-controversy requirement which is nowhere mentioned in the constitutional text. The result of such a radical, latter day reinterpretation of Article III would be a catastrophic increase in the caseload of the federal courts.

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- Congress has included in the removal statute the "forum defendant rule," which prohibits removal even of a completely diverse case if any defendant is a citizen of the state in which the case was brought.
- Congress has erected other procedural obstacles to removal based on diversity, such as a 30-day time limit to remove once a case becomes removable and an absolute one-year time limit for removal based on diversity jurisdiction.

There are a handful of contemporary exceptions to this trend of Congress restricting the reach of diversity jurisdiction. A 1990 law gave the federal courts supplemental jurisdiction over claims that formed "part of the same case or controversy" even in the absence of complete diversity over those claims. In 2002, the Multiparty, Multiforum Trial Jurisdiction Act eliminated the complete diversity requirement for litigation arising from a single accident in which at least 75 people died. Finally, in the Class Action Fairness Act of 2005, Congress allowed federal jurisdiction over class action lawsuits involving over 100 plaintiffs and more than \$5 million in controversy when only a minimal diversity standard is satisfied.

But these were surgical adjustments to federal jurisdiction intended to enhance judicial efficiency or provide for federal consideration of cases with national economic implications. In contrast, a shift from the complete diversity rule to a minimal diversity rule would be anything but surgical – it would recklessly allow hundreds of thousands of routine, locally-based disputes to be filed in or removed to federal court.

The 2005 Class Action Fairness Act (CAFA) is a cautionary tale. A number of judges and lawyers believe that the law has proved to be overbroad, resulting in a federal forum for cases that state courts would be perfectly well-equipped to handle. Rather than exploring federal diversity jurisdiction in general, the subcommittee may wish to examine the decade of experience under that 2005 law to see if it should be fine-tuned in one way or another.

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But in any event, CAFA is an exception to a two century-long trend. There are several excellent reasons why Congress has most often limited, rather than expanded, the availability of diversity jurisdiction. I will review these reasons in turn, while noting that any proposal to expand diversity jurisdiction would undermine the policy values that have caused Congress to disfavor an expanded role for the federal courts in state law disputes.

II. An expansion of diversity jurisdiction threatens state sovereignty and principles of federalism.

Every case filed in or removed to federal court based on diversity jurisdiction is a case in which a federal court, not a state court, will interpret, apply and develop state law. Almost as well-established as the complete diversity doctrine is the Erie doctrine, which provides that diversity cases are governed by state statutes and state common law, not federal law. Erie Railroad Co. v. Tompkins, 304 US 64 (1938). But just as federal courts are generally better suited to decide issues of federal law, so state courts are generally better suited to decide issues of state law.

Indeed, in a federal system, our constitutional presumption is that the institutions of a state's government, including its courts, should play the primary role in developing the law of that state. To expand access to diversity jurisdiction would be to undermine this basic federalist presumption by denying state courts the capacity to interpret and apply their own laws. This is an affront to the principle of state sovereignty.

The argument that state courts are inherently biased or somehow incompetent to handle complex civil litigation is anecdotal at best, but really it is unfounded and insulting to the diligent, hard-working professionals who comprise the overwhelming majority of state court judges. In Maryland, the jurisdiction I know best, the state judiciary is highly skilled and well-trained. The Maryland courts promptly resolve a wide array of complex matters arising under Maryland law with wisdom, restraint and respect for precedent. Far from being a "judicial hellhole," our state court system is a respected civic institution.

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Litigants who are unhappy to find themselves in state court have remedies short of removal to federal court. If a judge is perceived to be biased, his or her recusal may be sought. If state law is thought to be unfair, the democratic process provides a means to change it. But seeking a federal forum to bypass state sovereignty is an illegitimate strategy.

It would be ironic indeed if this current congressional majority, which claims as one of its central tenets the power of states to develop their own laws and govern their own citizens without undue interference by the federal government, were to transfer power over state law from state judges to federal judges by amending the diversity statute.

III. The exercise of diversity jurisdiction tends to increase the complexity and cost of civil litigation.

As noted above, Congress has sometimes allowed federal courts to adjudicate state law claims in the interest of judicial efficiency. But the availability of diversity jurisdiction often works against judicial efficiency and increases litigation costs.

First, the potential availability of a federal forum as an alternative to state court naturally breeds litigation over which forum is appropriate. Once federal jurisdiction is established, the parties may well struggle over which state's law is to be applied by the federal court, and the manner in which federal procedural law interacts with state substantive law. Complexity also arises when federal courts must decide if they have supplemental jurisdiction over state law claims.

Finally, complexity and litigation costs mushroom when federal courts are confronted with state law issues that are unresolved or uncertain. In such instances, federal courts may seek to "certify" a question of state law – that is seek an advisory ruling on the question from the highest court in the state whose law is at issue in federal court.

But certification by a state court is not always available. For example, one practitioner brought to my attention the Bleak House-like litigation in Estate of McCall v. United States. In that case, a federal district court was called upon to

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decide “a novel question of state law that the Supreme Court of Florida has not yet addressed.” The court noted that certification of state law questions “avoid[s] the risk of ‘friction-generating error’ when a federal court must construe a novel question of state law that has not been decided by the state’s highest court. But “neither the Florida Constitution nor Florida’s rules of procedure permit the Supreme Court of Florida to accept a question certified for review by a United States district court.” 663 F. Supp. 2d 1276, 1296 (N.D. Fla. 2009).

That federal judge engaged in an “Erie guess,” attempting to surmise what the Florida Supreme Court would do. The case was then appealed to the U.S. Court of Appeals for the Eleventh Circuit. Florida does accept certified questions from federal courts of appeal, so the Eleventh Circuit certified several issues to the Florida Supreme Court. Estate of McCall v. United States, 642 F.3d 944, 952-53 (11th Cir. 2011). After the case was briefed and argued in the Florida Supreme Court, that court came to a different conclusion about Florida law than had the U.S. District Court. Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014). The case was returned to the Eleventh Circuit, which issued a mandate to the District Court, which later that year issued a final judgment. It took five years and substantial expense just to resolve the state law issue.

A less tangible but very real cost of expanded diversity jurisdiction is that it will lead to greater disuniformity in the law. Federal courts sitting in diversity are required to apply state law to state-law claims and defenses, but state courts are not bound to follow federal interpretations of state law. The more opportunities the federal courts have to decide state-law issues, the greater the likelihood of divergence between federal- and state-court decisions on the same state-law issue. The result will be less consistency and more unpredictability in the law, as identical disputes are resolved differently depending on whether they are heard by a state or a federal court.

IV. An expansion of diversity jurisdiction threatens the proper functioning of the federal courts.

Another important reason Congress has generally limited diversity jurisdiction is to avoid imposing too heavy a burden on the already over-burdened

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federal courts. Congress has recognized that the federal courts should not be distracted from their central responsibility: interpreting federal statutes and resolving federal constitutional questions.

Federal court caseloads have increased significantly in recent years. According to the Administrative Office of the Courts, civil filings in U.S. District Courts are 8 percent higher than a decade ago, even after a decline in 2015.

Moreover, the workload of individual federal judges has risen due to unconscionable delays in the Senate's confirmation of judicial nominees. There were an average of 61 judicial vacancies throughout 2014, as compared to 33 in 2006. According to the Congressional Research Service, this is the longest period of historically high vacancy rates in 35 years.

Partly because of increasing caseloads and partly because of increases in judicial vacancies, federal court dockets are already stressed. Counting both full-time active judges and part-time senior judges, the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007.

In 2014, for instance, the number of cases per authorized judgeship was 436, which was 14 percent higher than 10 years ago. But adjusting for judicial vacancies, the true number of cases per sitting judge in 2014 was 479 – almost 20% higher than in 2006.

In response to these unprecedented pressures on the federal courts, the Judicial Conference recommended last March that Congress create 77 more judgeships for district courts and five more for circuit courts to keep up with current workloads. But Congress has disregarded that recommendation, just as it has disregarded the repeated call by Chief Justice Roberts to restore cuts made to the federal judiciary under the budget sequestration process.

The proposal to shift from complete diversity jurisdiction to minimal diversity jurisdiction would bring even more cases into the federal system, exacerbating a dire situation. It is uncertain how many new cases would be filed in or removed to federal court, but the threat is ominous.

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In a study commissioned by the National Association of Manufacturers, my fellow panelist Professor Joanna Shepherd has estimated that a minimal diversity standard would increase federal district court caseloads by “only” 7.7 percent, an average of 43 cases per judge per year. Even assuming the accuracy of this estimate, an increase of 7.7% cases represents a significant additional burden on federal courts across the country.

Moreover, the 7.7% increase in district court cases predicted by the Shepherd study does not take account of the inevitable ripple effects on the Courts of Appeals. Federal litigants have a right to appeal, even on issues solely of state law, and surely many of the additional cases litigated under minimal diversity would be appealed. The caseloads of the Courts of Appeals would increase accordingly.

But in fact, there is reason to fear that Professor Shepherd’s methodology underestimates the number of cases that would be added to federal dockets. She determined that a minimal diversity standard would make 557,791 additional cases eligible to be added to the federal court caseload. That is a huge number – it is about twice the existing caseload of the federal courts.

Shepherd asserts, however, that only 2.5% of those additional cases would actually be removed to federal court because only 2.5 percent of cases currently eligible to be removed are in fact removed. This extrapolation is purely speculative. There are any number of reasons why defense lawyers in the 557,791 additional removable lawsuits might choose a federal forum, even though only a small number do so now. And in multi-defendant cases, any single defendant could seek removal regardless of the other defendants’ preferences.

Therefore I am much less confident that a change in law which doubles the number of cases eligible to be heard in federal court will not overwhelm the federal courts. In Maryland alone, there would be an additional 97,834 cases subject to federal jurisdiction, a 9.9% increase in that district’s potential caseload. Professor Shepherd believes that only a small fraction of these cases would end up in federal court, but that academic assumption would be little comfort to the federal judges in the District of Maryland looking at a potential influx of almost 100,000 new filings each year.

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What is the impact on justice when the federal courts are overburdened? Cases are adjudicated less promptly, and individual cases receive less individualized attention. When judges are overworked, the quality of justice inevitably suffers.

Congress has long sought to protect the federal courts from a flood of routine state law cases so that those courts are available to resolve important federal questions, including crucial constitutional questions, in a timely manner. The importance of maintaining the excellence of the federal courts is a paramount reason to limit rather than expand federal diversity jurisdiction.

V. Conclusion

I hope that today's exploration of federal diversity jurisdiction convinces the subcommittee that this well-settled portion of federal law should not be unsettled. The 210 year old doctrine of complete diversity protects state sovereignty, guards against unnecessary litigation costs and insulates the federal courts from an explosion of their already bulging dockets. It has worked well for 210 years; now is not the time to change course.

Mr. FRANKS. Thank you, Mr. Weich.

I would now thank all of the panel members for their testimony. We'll proceed under the 5-minute rule with questions, and I would begin recognizing myself for 5 minutes.

And Mr. Cooper, I'll direct my first rather basic, sort of the blooming obvious award question to you. What do you think the implications are of your argument for federalism? And I'll put it a little differently. Do you think that a minimum diversity standard is a violation of States' rights and what the—that the Founders or Framers somehow got the wrong ballots?

Mr. COOPER. Chairman Franks, I do not. And, you know, I come to this issue as somebody who, I think, has a reputation, if you will, but certainly a pedigree of being very, very protective of federalism, principles of federalism, State rights, not only in my early time in the Reagan administration Justice Department where some people called me the federalism cop of the Administration, but also in my private practice where I've represented a number of States and attempted in every way to zealously protect those reserved rights under the 10th Amendment. But my research into this subject matter has completely satisfied me that this is one of those provisions of the Constitution that quite carefully and deliberately created a path, if you will, into Federal—neutral Federal tribunals for interstate disputes.

The necessity of a neutral Federal tribunal to take to resolve interstate disputes of national importance was viewed by all of the Founders as a necessary feature of the Federal Government's power to regulate interstate commerce, and of all the other substantive provisions, Chairman Franks, that were designed to ensure a national commercial network.

And so I believe, in fact, that our Federal system depends as much on the Federal courts having diversity jurisdiction over large interstate disputes as it does that this body, Congress, have regulatory power over interstate commerce. They go hand in hand.

Mr. FRANKS. Yes, sir. Thank you, Mr. Cooper.

And I'd now like to ask Professor Shepherd on this issue of local "bias." I know one of your areas of interest is the empirical research concerning bias in general, especially in contemporary State court litigation against out-of-state defendants. And what are the principal findings that you've had in that regard?

Ms. SHEPHERD. Well, I could go on and on. This is a big area of my research and others as well. But the research generally shows that in the majority of States—there's three States where judges have permanent tenure, like in the Federal system, but in the other 47 States, they don't. And they're selected and retained through a variety of methods: Elections, appointed, merit selection.

But in all of these systems, there is a real problem of bias. There is a problem of certain kinds of judges being more likely to be put on the bench and then be retained based on the way that they vote. We find that the campaign money matters a lot for who wins and then who stays on the bench. We find that contributions from certain groups are very correlated with the way those judges vote.

So judges that receive more money from group X are more likely to vote in favor of group X. And, you know, we've seen—in *Caperton v. Massey*, we saw the Supreme Court take this issue up

for the first time and recognize that there is a risk of real bias, but we still have recusal rates, recusal systems that are not really in place to protect the litigants.

And so there's just an overwhelming body of evidence that I could produce, you know, this high for you that would suggest that there's a lot of bias in the State courts today.

Mr. FRANKS. Well, thank you.

I'm going to now turn to our Ranking Member and recognize him for 5 minutes for questions.

Mr. COHEN. Thank you, sir.

Professor Shepherd, you have been in favor of having additional Federal courts created and—that the backlog that we've got in the Senate, you mentioned in your testimony, that could end. Have you written any letters to the Members of the Judiciary Committee urging them to approve the District Court judges who are sitting before them?

Ms. SHEPHERD. No, I have not.

Mr. COHEN. Haven't taken that step.

7.7 percent is a pretty large increase really. I mean, they're behind as is. How can you—that's your figure. It could be greater, it could be lesser. Without the Senate acting and approving the nominees of the President or increasing judges, how could this work?

Ms. SHEPHERD. No, I mean, I agree that given the current situation where we have a lot of vacant judgeships, that that does represent a problem. I mean, hopefully those vacancies will be filled. They have been slowly, little by little.

In terms of expanding the number of judgeships, that has happened ten times since 1960. We were at a number down near 200, and now we're at 667. So it's not that, you know, crazy of an idea that we might increase that, but, of course, you're right, we would have to not only create new judgeships but actually fill the vacancies as well.

You know, I think another idea that might make a lot of sense and certainly has more of a background is increasing the amount in controversy from 75,000 to some higher amount. And then we would be limiting, not just the new cases that would satisfy the minimal diversity standard that would go forward, but also some of the current cases that satisfy complete diversity, there would be some of those that would no longer be removable as well.

Mr. COHEN. Your statements about the State courts and the idea that sometimes they don't take the cases to Federal court because they've got a judge they like or something or—and they can get a favorable—and the money has—and I don't say it doesn't. What's your position on Citizens United?

Ms. SHEPHERD. I think Citizens United has—I think it's very—the way it treats judicial elections should be separated from the way it treats other elections, but I have written very publicly against Citizens United as it applies to judicial elections.

Mr. COHEN. How about nonjudicial elections where people approve judges and might be influenced by the money they receive from certain groups?

Ms. SHEPHERD. You know, that's not—I mean, all my research is really just focused on the issues in State judicial elections, so I don't really feel qualified to answer that.

Mr. COHEN. Just curious, have you been paid anything by the National Association of Manufacturers at any time in the past?

Ms. SHEPHERD. They paid for the coding for the researchers that—it costs a lot to hire a team of researchers to code this. And as with a lot of my work, that—the actual coding projects are funded by some other group. Like a lot of my judicial work is funded by the American Constitution Society, the coding projects are. This coding project was funded by NAM.

Mr. COHEN. And how much did NAM pay you for doing that work?

Ms. SHEPHERD. Pay me or pay the researchers?

Mr. COHEN. Paid you.

Ms. SHEPHERD. I would have to look back through—it was 10 researchers. They make, you know, \$12 to \$15 an hour. I don't recall the exact numbers. I would have to look back through—

Mr. COHEN. So you didn't get paid, just the researchers got paid?

Ms. SHEPHERD. The researchers got paid, and there was a small amount for my time, but the majority of it went to the researchers.

Mr. COHEN. How much was that small amount?

Ms. SHEPHERD. I would have to—I'm sorry, I don't recall.

Mr. COHEN. Was it as much as a \$105,000 consulting fee from the American Tort Reform Association for your work there?

Ms. SHEPHERD. No.

Mr. COHEN. Wasn't that much, okay.

Ms. SHEPHERD. No.

Mr. COHEN. You wrote an article, and I don't know what it is, but the title of it intrigues me, about "Baseball's Accidental Racism: The Draft, African-American Players, and the Law." Would you tell me what that was about? I'm a baseball fan.

Ms. SHEPHERD. Oh, yes. I'm going to probably get it wrong, and I apologize. It's been over a decade. I was actually an econ professor when I wrote that. I was good friends with Nolan Ryan—with the scout, Red Murff, who was the—who drafted, I guess, or whatever the verb at that point was, Nolan Ryan. And he used to talk about how back in his day when he was a scout, things were completely different. And he found Nolan when he was 14, worked with him, had him out to his ranch every summer. I grew up in Texas. And when it came time for Nolan to sign with the team, he went with who Red said should be, you know, the best team.

And then he said the draft just did away with all of that. There was no incentive to invest in a player because they could go—they could sign with any team. You had no say over that. And he said it's really harmed a lot of the lower-income groups, including, at the time, a lot of the, you know, minority groups.

And so it was just an empirical analysis confirming that the draft did have these negative impacts on certain lower-income groups because scouts no longer had the incentive to really work with and invest in the skills of players.

Mr. COHEN. Thank you. There has been a decrease in African-American players in the major leagues, and part of it's because of opportunity costs that football and basketball seem to take. But I think it's been an unfortunate situation, because it's America's sport, and it should be more reflective of our populous and Willie Mays' great talents.

I yield back the balance of my time.

Ms. SHEPHERD. Thank you.

Mr. FRANKS. I will now recognize the Vice-Chairman of the Subcommittee, Mr. DeSantis, for 5 minutes.

Mr. DESANTIS. Well, thank you, Mr. Chairman.

Thanks to the witnesses.

So, Mr. Cooper, is it the case that you think that if Congress were to legislate a minimal diversity, would that be constitutional? I mean, I guess, I know you would argue that it would be in terms of original principles, but we would have to get a favorable Supreme Court decision, they would have to reevaluate this, and the courts too?

Mr. COOPER. No. Congressman DeSantis, I honestly don't think there's anyone who doubts Congress' ability to legislate minimum diversity. The harder question is whether Congress would have authority to legislate complete diversity, if that's what it decided to do. But the burden of my testimony is that it never did decide to do that in the original 1789 Judiciary Act.

The language was very closely similar to Article III, section 2, and the interpretation in *Strawbridge* that that requires complete diversity is something that strains the language itself, and it adds a restriction that the language just doesn't apply in certainly none of the history. And the Court itself, or the author of the Court and the majority of the members, later came to think it was wrongly decided.

But I don't think anyone doubts really that Congress has—because the Constitution itself does not require complete diversity. Congress has the ability to legislate minimal diversity. And it did, as, I think, the Ranking Member mentioned in his opening remarks, or perhaps it was Congressman Conyers, I am sorry, referencing CAFA, the Class Action Fairness Act, where complete diversity was significantly relaxed.

Mr. DESANTIS. Now, a lot has changed since the 1789 Judiciary Act, particularly in the legal profession, particularly when you talk about some of the massive cases that can be brought. And I think you allude to this in your testimony, plaintiffs really can go anywhere in the country, so to speak, and find specific jurisdictions that have a track record of being very friendly to certain cases. I think you cited this one place in Illinois where the asbestos cases all were brought, even though most of the plaintiffs never have any connection to Illinois.

So how would what you're proposing change that dynamic, and would changing that dynamic be better for the economy?

Mr. COOPER. Yes. Well, relaxing the complete diversity requirement would change that dynamic by allowing the removal of cases where there is diversity, minimal diversity, to Federal court. The original—I would submit to the Committee—Subcommittee, the original intent and understanding of the purpose and the operation of the diversity clause in Article III, section 2.

As you mentioned, there are a number of State court jurisdictions where literally hundreds of cases—for example, Madison County and the asbestos cases—fewer than one-tenth of the cases in those State—in those State courts in Madison County have—do the plaintiffs have anything to do—or the defendants, for that mat-

ter—have anything to do with the jurisdiction, by way of citizenship anyway.

And this would permit that kind of clear gaming of—and forum selection for the reasons that Professor Shepherd has outlined to be frustrated by ensuring that those cases, which are, you know, very large interstate disputes among very large concerns, could be removed to a Federal tribunal.

Mr. DESANTIS. And is the, I guess, the implication that there are certain State courts that have developed kind of a reputation of being very conducive for certain types of cases, that if you remove that to an Article III court that it would be, I guess, less friendly for some of the lawyer-driven major litigation?

Mr. COOPER. There is a reason that these cases—usually mass tort cases, but other kinds as well—these interstate disputes concentrate in particular State jurisdiction. There's a reason for that. Plaintiffs' lawyers select those jurisdictions. There's a reason for that. I think we've heard testimony thus far to explain that phenomenon.

And if the Federal jurisdiction in those areas was available on a minimal diversity basis, even if significantly restricted by an increased amount in controversy, for example, then I think those kinds of forum shopping abuses, really, would disappear.

Mr. DESANTIS. Thank you.

My time's expired. I yield back.

Mr. FRANKS. I thank the gentleman.

I now recognize the Ranking Member of the full Committee, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

I thank the witnesses for their discussion here.

I'm going to—since Professor Weich has not been asked a single question yet, I'll break this void and ask him about the estimate made by his co-panelist, Ms. Shepherd, who estimates that 557,000 cases would become removable, which is twice the current civil Federal caseload. She's hoping that only 2.5 percent of them will actually get removed. But what would happen if more were removed? What, in your view, would be the impact on Federal courts, sir?

Mr. WEICH. Right. Thank you, Congressman Conyers, for that question. First of all, as to the estimate by Professor Shepherd, she says assuming is all we can do, and I understand that it's an assumption based on social science principles that she has applied here, but it is a very scary prospect that, based on that assumption, a change would be made to law that might increase the Federal caseload so dramatically.

As you say, there are over half a million additional cases that she has found that could end up in Federal court. And one point to make here is that because these are multidefendant cases, if Congress were to move to a minimal diversity standard, any defendant could make that choice, even if other defendants didn't want to see the case removed to Federal court. There would be more decisionmakers, and so you would see, I think, the reason to fear that there would be more than only 7.7 percent.

But even if it were that, that is a very large increase for an already overstressed Federal court system. And, again, these are

State law cases. It's not just the number. It's the kind of cases. Federal judges aren't principally responsible for knowing State law. They have to master it in particular cases here. Sometimes State law is unclear and they have to seek certification from the highest State court in which they sit. There's tremendous complexity about which State law is to apply, whether supplemental jurisdiction attaches.

For all these reasons—there are costs that are associated with increasing and expanding Federal diversity jurisdiction. And for these reasons, at the very least, Congress should move slowly, but in the end, I think it would be unwise to expand this category of Federal jurisdiction.

Mr. CONYERS. Thank you so much.

Does eliminating the complete diversity requirement raise any federalism concerns given that its elimination may allow Federal courts to play an even larger role in deciding purely State law claims?

Mr. WEICH. It does. I assume that question was directed to me, Congressman Conyers, and I feel that it does raise State sovereignty concerns in a very significant way. And in part, there is not just, you know, the abstract balance between Federal and State. It's how State courts are viewed, and the talk of bias and judicial hellholes, I think, really is a disservice to the hardworking, highly professional State court judges.

You know, in 1789, you know, at the framing of the Constitution, the first Judiciary Act, and in 1806 when Chief Justice Marshall decided *Strawbridge*, the country was more factionalized. One had reason to question whether State courts had loyalty to the Federal Government.

There is no question. We have fought wars to ensure allegiance to the Federal Constitution. And there is no doubt—and I tell you, every day I deal with Maryland State court judges who are deeply committed to doing their jobs and adhering to and enforcing the Federal Constitution and Federal rights. And there's just no reason to think that the State judiciary, in general, is incompetent or biased or incapable of handling their responsibility to apply State law.

Mr. CONYERS. Thank you.

Related to that in a way is the consideration of the impact that might occur with the elimination of complete—of the complete diversity rule would have on the cost for litigants seeking to file claims in State courts. Wouldn't that—could that be significant?

Mr. WEICH. Yes. I mean, I'm interested to hear Professor Shepherd say that she thinks not all cases—not many cases would be removed, because many parties in State court appreciate the convenience and lower cost of litigating in the jurisdiction in which they sit. If all that is true, then expanding Federal jurisdiction and allowing defendants to remove cases to Federal court will, I think, increase costs and limit convenience and take disputes out of the local fora in which they belong.

Mr. CONYERS. Thank you, sir.

And I thank Chairman Franks.

Mr. FRANKS. I thank you, sir.

And I would now recognize the gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman. And we appreciate the witnesses being here, and I do find it interesting too, the discussion about bias.

I was wondering, Professor Shepherd, do you have empirical studies and data about bias in Federal court?

Ms. SHEPHERD. No. I mean, there—I haven't done any of that work, but there are some studies that mainly just looked at the relationship between ideology and the way Federal court judges rule, and as you can imagine, there is a linkage there. Judges appointed by Republicans tend to vote differently than judges that are appointed by Democratic Presidents. But importantly, it's not because they don't have to be retained or run for reelection or reappointment, it's different, and it's based more on this kind of fundamental predictable ideology than it is who's giving money to the campaign.

Mr. GOHMERT. It is interesting to observe, though. I can't recall anyone ever appointed to Federal court, and especially the Supreme Court, that was touted as a liberal who took to the court and became immensely conservative, but certainly it's happened the other way.

But I—I do want to reiterate something Mr. Weich has said about having worked as a prosecutor but for much longer period as a civil litigator in both State and Federal courts, from MDL litigation, all kinds of litigation, and having appeared in front of different Federal courts and State judges. Having been a State district judge and a State appellate court judge, I found a tremendous amount of bias in Federal courts, and that is obviously why you have people who have learned how to game the Federal court system by filing multiple suits and hoping the case comes up in the Federal court judge they want and then dismissing others. I mean, it's become quite a game.

I also saw great disservice to people who had complaints about benefits from their employment that got removed to Federal court and there became an end of their righteous claim. There has—I've seen a great deal of injustice that was not occurring at the State court level that did occur at the Federal level. So I think that's worth keeping in mind.

And when people talk in terms of, gee, it's terrible for States like Texas that elect their judges, much better if you have judges appointed, it seems like to me there is equal pros and cons. I have seen massive abuses from people who sought their appointment, played the political game, got their appointments, and then became far more political than somebody who had to stand for election and appear to be fair to all sides.

So anyway, it's interesting, the studies, the empirical data you refer to from State courts that doesn't appear to be done for Federal courts, and yet experience shows there's an awful lot of bias in Federal courts that is not being talked about.

Well, I appreciate your testimony today. You've provided data that I'm going to have to look in and do some cross-referencing myself, but it's an interesting issue, and I appreciate all of you bringing it to our attention.

Thank you. I yield back.

Mr. FRANKS. And I thank the gentleman.

And I now recognize the Chairman of the Judiciary Committee, Mr. Goodlatte, for 5 minutes.

Mr. GOODLATTE. Well, thank you, Mr. Chairman. I appreciate your holding this hearing. I appreciate the testimony of the witnesses, particularly from my good friend, Chuck Cooper. It is great to see you here with us. And I'm going to just briefly share some of my thoughts about this issue.

Federal court diversity jurisdiction might seem dry and technical at first blush, but it's actually near the heart of the Founders' vision of the body politic; namely, their understanding that Federal courts should hear cases between citizens of different States, especially when those lawsuits involve commercial or other subjects integral to the national economy.

Currently, when a citizen from one State sues a defendant from another State, the interstate nature of that lawsuit gives Federal courts jurisdiction over the case. While the Constitution provides that Congress can grant Federal courts jurisdiction over all such cases, cases involving what lawyers refer to as minimal diversity, a glitch in current statutory law, allows trial lawyers to forum shop and keep their cases in the State courts they prefer if they sue a defendant from another State and simply also sue an additional local defendant in the State in which they're filing the case.

Not surprisingly, these rules have been abused by trial lawyers who sue local defendants, even though the plaintiffs' claims against those defendants have little or no support in fact or law, because suing those local defendants allows trial lawyers to keep their case in a preferred State court forum.

This Committee reported out and the House passed earlier this year the Fraudulent Joinder Prevention Act, which would limit this abuse. And just over a decade ago, I was the chief sponsor of the Class Action Fairness Act, which was enacted into law in 2005. As many people have noted, including current 7th Circuit Court of Appeals Judge Diane Wood, that legislation addressed the same problem in the context of class action lawsuits.

In the conference report on that law, Congress was explicit about its view of the purpose of diversity jurisdiction and the need in multi-State class actions to close another aspect of this jurisdictional loophole. The conference report commented, for example, that one of the primary historical reasons for diversity jurisdiction is the reassurance of fairness and competence that a Federal court can supply to an out-of-State defendant facing suit in State court.

The report went on to describe the many reasons the Constitution extends Federal court jurisdiction to lawsuits involving citizens of different States, even when questions of State law are at issue. Among these reasons are that citizens in one State might experience injustice if they were forced to litigate in out-of-State courts, that the availability of Federal courts would shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents, and that the option of going to Federal court would guard against the possibility that the State courts might discriminate against interstate business and commercial activities because diversity jurisdiction is itself a means of ensuring the protection of interstate commerce.

The conference report section entitled “National Class Actions Belong in Federal Court Under Traditional Notions of Federalism” makes clear that it’s unfair to have one State court dictating to 49 others what their laws should be, that it’s unfair to maintain a system that allows State court judges to dictate national policy, and that the existing system often allowed one State court to issue rulings that flatly contradicted the law of another implicated State.

The Committee report on the Class Action Fairness Act concluded as follows: “The Federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy. By enabling Federal courts to hear more class actions, this bill will help minimize the class action abuses taking place in State courts and ensure that these cases can be litigated in a proper forum.”

Today, this hearing is about whether those same principles should apply more broadly to provide for justice and fairness in even more context and situations involving multiple States and national interests. So I thank the witnesses again for their contribution today.

I yield back.

Mr. FRANKS. And I thank the gentleman, and couldn’t have said it better myself. And this concludes today’s hearing. And I want to thank all of our witnesses. I want to thank the audience and certainly the Members. And without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And with that, this hearing is adjourned.

[Whereupon, at 12:09 p.m., the Subcommittee was adjourned.]

