LOOSENING THE UNIFORM APPLICATION OF REMOVAL JURISDICTION

I. INTRODUCTION

> It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.[1]

In February 2005, the 109th Congress succeeded where several predecessors had failed—it enacted the Class Action Fairness Act.[2] Congress began considering enacting a class action fairness act almost eight years earlier.[3] From that point, Congress continued to consider different forms of the act in each session until the 109th session; in each instance, however, despite favorable reports from the Senate Judiciary Committee, the bills either failed to obtain cloture or Congress took no further action.[4] Nonetheless, on February 3, 2005, the Senate Judiciary Committee reported favorably on the Class Action Fairness Act of 2005 ("CAFA"),[5] and CAFA took effect on February 18, 2005.[6]

Congress enacted CAFA to ensure fairer outcomes for class action litigants and to enable federal court adjudication of matters of national importance.[7] Furthermore, the Senate Judiciary Committee observed that plaintiffs' lawyers were manipulating the federal jurisdiction system to ensure that their clients' cases remained in favorable state venues.[8] To resolve the abuses of the class

1. Blanchard v. Bergeron, 489 U.S. 87, 99 (1989) (Scalia, J., concurring).

2. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 4, 14 (codified in scattered sections of 28 U.S.C.); *see also* S. REP. NO. 109-14, at 1-2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 3-4 (recounting history of failures of past sessions of Congress to enact a class action fairness act).

3. *See* S. REP. NO. 109-14, at 1-2, *reprinted in* 2005 U.S.C.C.A.N. at 3-4 (noting that, in 1997, 105th Congress was first Congress to consider a class action fairness act).

4. *Id.* at 2-3. "Cloture" is defined as "[t]he procedure of ending debate in a legislative body and calling for an immediate vote." BLACK'S LAW DICTIONARY 105 (2d pocket ed. 2001). When a vote for cloture fails, a filibuster on the issue may continue. Eric A. Posner & Adrian Vermeule, Essay, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1694 (2002). If a filibuster continues uninhibited by cloture, a minority of senators can effectively preclude adoption of legislation that a majority of the Senate and the House of Representatives favors. Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN L. REV. 181, 182 (1997).

5. S. REP. NO. 109-14, at 3, *reprinted in* 2005 U.S.C.C.A.N. at 4-5.

6. Class Action Fairness Act § 9.

7. Class Action Fairness Act of 2005, S. 5, 109th Cong. § 2(b)(1)-(2) (2005).

8. S. REP. NO. 109-14, at 10-11, *reprinted in* 2005 U.S.C.C.A.N. at 11-12; *see also* S. 5, § 2(a)(2) (observing that "[o]ver the past decade, there have been abuses of the class action device").

action system and prevent plaintiffs' lawyers from influencing federal jurisdiction, CAFA substantially altered federal diversity jurisdiction[9] as it pertains to interstate class actions.[10] For example, Congress was concerned that plaintiffs' lawyers could avoid federal court jurisdiction by violating the "complete diversity" rule.[11] In response, CAFA explicitly permits a federal court to exercise jurisdiction over an interstate class action in which any member of the class of at least 100 is a citizen of a different state from any defendant.[12] Additionally, Congress was concerned with plaintiffs' lawyers' efforts to avoid a federal forum by exploiting common-law developments pertaining to the amount in controversy.[13] Congress responded to this concern by explicitly permitting federal courts to aggregate each class member's claim to satisfy the five million dollar minimum requirement.[14]

Congress also adopted and revised provisions of existing removal statutes to establish a class action removal scheme.[15] Despite explicitly revising existing jurisdictional and removal statutes, Congress failed to address the issue of which party to the litigation bears the burden of proving that federal jurisdiction exists.[16] Under the common law of removal, the party asserting federal jurisdiction bears this burden;[17] nevertheless, several federal district courts determined that CAFA's legislative history abrogated the common-law rule.[18] The district courts relied, in part, on the Committee's declaration that CAFA

9. See *infra* Parts II.A.1 and II.B.3 for a review of how CAFA has explicitly and implicitly altered federal jurisdiction.

10. See *infra* notes 70-78 and accompanying text for a brief synopsis of the nature of federal removal jurisdiction.

11. S. REP. NO. 109-14, at 10*, reprinted in* 2005 U.S.C.C.A.N. at 11. See also *infra* notes 37-40 and accompanying text for a discussion of the complete-diversity requirement.

12. 28 U.S.C. § 1332(d)(2) (2006).

13. S. REP. NO. 109-14, at 10-11, *reprinted in* 2005 U.S.C.C.A.N. at 11-12. See also *infra* notes 41-44 and accompanying text for a discussion of common-law treatment of the amount-in-controversy requirement.

14. 28 U.S.C. § 1332(d)(6).

15. *Id.* § 1453. See also *infra* notes 52-57 and accompanying text for a review of how CAFA alters the traditional removal process.

16. *See, e.g.*, Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (noting that CAFA's text does not address shifting burden of proof to party seeking remand); Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1122-23 (C.D. Cal. 2005) (noting that pre-CAFA diversity jurisdiction statute is void of language regarding allocation of burden of proof on remand).

17. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921); Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 403 (9th Cir. 1996); Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 359 (3d Cir. 1995) ("[T]he burden of establishing removal jurisdiction rests with the defendant." (citing Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 29 (3d Cir. 1985))). *Contra* S. REP. NO. 109-14, at 43, *reprinted in* 2005 U.S.C.C.A.N. at 40-41 (averring that Senate Judiciary Committee intended named plaintiffs to bear burden of proving inexistence of federal jurisdiction).

18. *See, e.g.*, Natale v. Pfizer, Inc., 379 F. Supp. 2d 161, 168 (D. Mass. 2005) (maintaining that, under CAFA, party seeking remand bears burden of proof that federal jurisdiction does not exist); Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005) (determining that CAFA's legislative history effectively shifted responsibility to prove impropriety of removal to party seeking remand); *Berry*, 381 F. Supp. 2d at 1123 (determining that party opposing removal bears burden of proof under CAFA).

intended to transfer the burden to plaintiffs to demonstrate remand is appropriate.[19] As such, these district courts imposed the burden of disproving federal jurisdiction on the complaining class.[20]

Thereafter, several circuit courts of appeals and district judges sitting in later sessions admonished reliance on ambiguous legislative history in the face of established removal principles.[21] The criticizing courts subsequently determined that CAFA's legislative history fails to alter the traditional burden of proof on remand and, therefore, required the removing party to establish that federal jurisdiction exists.[22]

The courts that retain the traditional burden, however, did not address why federal courts should unquestioningly apply traditional removal principles to newly enacted removal statutes.[23] Federal courts proclaim that traditional removal principles apply unless revised through valid and explicit legislation.[24] The established principles, however, were developed under § 1441 (the "General Removal Statute") to give effect to that statute's intended purposes.[25] Since the development of the principles, Congress has enacted several other removal processes and federal courts have abandoned traditional removal principles, despite the absence of express statutory language, to give effect to the policies

19. *See, e.g.*, *Waitt*, 2005 WL 1799740, at *2 (relying on Committee's expressed intention to shift burden of proof to party seeking remand); *Berry*, 381 F. Supp. 2d at 1122 (acknowledging Committee's clear intention to require party opposing federal jurisdiction to bear burden of proof); *see also* S. REP. NO. 109-14, at 43, *reprinted in* 2005 U.S.C.C.A.N. at 40-41 ("[I]t is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court . . . .").

20. *Natale*, 379 F. Supp. 2d at 168 ("Under the [CAFA], the burden of removal is on the party opposing removal to prove that remand is appropriate." (citing *Berry*, 381 F. Supp. 2d at 1122)); *Waitt*, 2005 WL 1799740, at *2 (requiring proponent of remand to demonstrate impropriety of federal jurisdiction); *Berry*, 381 F. Supp. 2d at 1122-23 (concluding that CAFA shifted burden of proof on remand to opponent of federal forum).

21. *See, e.g.*, DiTolla v. Doral Dental IPA, LLC, 469 F.3d 271, 275 (2d Cir. 2006) (concluding that Congress's silence regarding burden of proof failed to alter traditional rule); Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 685 (9th Cir. 2006) (holding that removing party continues to bear burden of establishing federal jurisdiction on remand motion and implicitly overruling district court decisions in *Waitt* and *Berry*). *Compare, e.g.*, *Natale*, 379 F. Supp. 2d at 168 (declaring that, under CAFA, burden is on "party opposing removal to prove that remand is appropriate" (citing *Berry*, 381 F. Supp. 2d at 1122-23), *and* Harvey v. Blockbuster, Inc., 384 F. Supp. 2d 749, 752 (D.N.J. 2005) (determining that CAFA's legislative history implies that party seeking remand bears burden of proving impropriety of removal), *with, e.g.*, Moniz v. Bayer A.G., 447 F. Supp. 2d 31, 34 (D. Mass. 2006) (rejecting proffered argument to shift burden of proof because *Abrego* implicitly overruled *Natale*), *and* Morgan v. Gay, No. 06-1371(GEB), 2006 WL 2265302, at *3 (D.N.J. Aug. 7, 2006) (mem.) (determining that party asserting removal bears burden), *aff'd*, 471 F.3d 469 (3d Cir. 2006).

22. *E.g.*, Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (refusing to shift burden because "when the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more force than an opinion poll of legislators").

23. See *infra* Part II.B.2 for a discussion that highlights the lack of consistency with which federal courts apply removal principles to other removal statutes.

24. *See, e.g.*, *Brill*, 427 F.3d at 448.

25. See *infra* Part II.B.1 for a synopsis of the current state of the common law of removal.

underlying the new removal statutes.[26]

Federal courts have disregarded their duty to interpret statutory language for subsequently enacted congressional removal statutes. In several instances, the nuanced language of new removal statutes varies in small, but significant, manners from the language of the General Removal Statute.[27] Nevertheless, federal courts have presumed that the common law of removal continues to apply even though Congress, and not the judiciary, has the privilege of determining the jurisdictional framework of the inferior federal courts.[28] The recent ambiguity encountered in resolving the issue of CAFA's burden of proof on remand highlights the flaw in the foundations of removal common law—the traditional principles should not presumptively apply to the various removal schemes.

Continued ambiguity regarding the applicability of traditional removal principles will hinder Congress's ability to legislate effectively. Congress and the federal judiciary will be unable to develop efficient removal jurisdiction, and the federal judiciary may continue to misinterpret statutes that Congress intends to depart from long-standing removal principles. In addition, as exemplified in the divergent treatment of CAFA, circuit splits might develop that would create favorable venues; in certain circuits, plaintiffs will be forced into federal court, whereas in other circuits, defendants will be trapped in state court.[29]

Therefore, when Congress enacts a new removal statute, federal courts should determine whether the policies that traditional removal principles serve are commensurate with the policies Congress intends the new process to serve. If the policies are congruent, then courts may appropriately apply established removal principles; if the policies are incompatible, however, then the courts should consider whether the application of each principle corresponds to Congress's intended policies. In no instance should federal courts slavishly adhere to traditional removal principles—consistency and uniformity are not guiding principles of removal. Nonetheless, as this Comment argues, CAFA does not alter the traditional principle that requires the removing party to establish federal jurisdiction, and, therefore, it is appropriate for federal courts to continue to impose the burden of proof on the party asserting jurisdiction under CAFA.

This Comment first identifies in Part II.A how the enactment of CAFA altered the frameworks of federal diversity and removal jurisdiction. Part II.B.1 reviews the development of traditional removal principles and how these principles have affected federal judiciary treatment of the burden of proof on remand under CAFA. Part II.B.2 explores how the courts have applied long-

26. See *infra* Part II.B.2 for a review of several removal processes and how courts have treated these additional processes in the context of traditional removal principles.

27. See *infra* notes 113-17 and accompanying text for a comparison of the language of several removal statutes.

28. See *infra* note 45 for a discussion of Congress's power over lower federal court jurisdiction.

29. See *infra* Part III.B.3 for a discussion of the potential implications of an ambiguous removal framework.

standing removal principles to other removal statutes. Part II.B.3 considers how courts have treated other provisions of CAFA in light of existing removal principles.

Thereafter, Part III.A concludes that CAFA did not shift the burden of proof on remand because CAFA's text selectively altered removal principles, because policies of limited federal jurisdiction and deference to state courts warrant removing parties continuing to bear the burden, and because CAFA's legislative history is insufficient authority to alter the traditional burden. Part III.B then contends that unquestioning application of traditional removal principles to removal statutes is inappropriate where statutory language differs across removal statutes, where courts have failed to consistently apply the principles universally, and where policy implications reveal the importance of deliberate consideration of continued adherence to removal common law.

II. OVERVIEW OF EXISTING LAW

A. CAFA and Its Implications for the Burden of Proof on Remand Motions

1. Practical Effects of CAFA on Federal Jurisdiction and the Removal Process

CAFA,[30] effective February 18, 2005, substantially altered the landscape of interstate class actions. Subject to limited explicit exceptions,[31] CAFA permits any defendant to a class action of at least 100 plaintiffs to remove the case to federal court,[32] regardless of complete diversity of citizenship, so long as the claims in aggregate exceed five million dollars.[33] Congress announced that its purpose in enacting CAFA was to ensure fairer outcomes for class members and defendants and to enable federal courts to consider cases of national importance.[34] The Senate Judiciary Committee noted in its report on CAFA that plaintiffs' lawyers may be "playing" the judiciary system to avoid federal jurisdiction and actively pursue favorable state venues.[35]

The committee identified two common-law developments that enable

30. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 4, 14 (codified in scattered sections of 28 U.S.C.).

31. *See, e.g.*, 28 U.S.C. § 1332(d)(4)(A) (2006) (instructing district courts to decline to exercise jurisdiction if matter concerns local controversy); *id.* § 1332(d)(4)(B) (directing district courts to decline exercise of jurisdiction when class action is filed in home state of controversy).

32. *Id.* §§ 1332(d)(5)(B), 1453(b).

33. *Id.* § 1332(d)(2), (6).

34. Class Action Fairness Act of 2005, S. 5, 109th Cong. § 2(b)(1)-(2) (2005).

35. S. REP. NO. 109-14, at 10-11 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 11-12; *see also* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 603-04 (2006) (reporting that half of surveyed plaintiffs' attorneys thought state judges were more favorable than federal judges and seventy-five percent of defense attorneys thought federal judges were more favorable to their clients' interests).

plaintiffs' lawyers to abuse the class action system.[36] First, the committee focused on the complete-diversity requirement[37] originally promulgated in *Strawbridge v. Curtiss*[38] and extended to class actions in *Supreme Tribe of Ben-Hur v. Cauble*.[39] The committee noted that plaintiffs' lawyers name plaintiffs or defendants that will defeat complete diversity, thereby precluding the exercise of diversity jurisdiction.[40] Second, the committee expressed concerns that conventional principles for determining the amount in controversy also create a shelter from federal jurisdiction.[41] In addition to the complete-diversity requirement, federal law requires that matters removed to federal court on the basis of diversity jurisdiction involve an amount in controversy exceeding $75,000.[42] Prior to CAFA, federal courts would decline removal because they would not exercise diversity jurisdiction over class actions unless each class member's claim satisfied the requisite amount in controversy.[43] The committee was specifically concerned about this practice's anomalous results: a defendant in a suit with one plaintiff seeking an amount in excess of $75,000 could avail itself of federal jurisdiction, but the same defendant facing multiple plaintiffs seeking a larger aggregate sum of money is precluded from a federal forum if each individual plaintiff sought less than $75,000.[44]

36. *See* S. REP. NO. 109-14, at 10, *reprinted in* 2005 U.S.C.C.A.N. at 11 (noting that complete-diversity requirement and nonaggregation principle enable manipulation of system); *see also* S. 5, § 2(a)(2) (finding that there have been abuses of class action system in recent decade, which undermine national judicial system).

37. S. REP. NO. 109-14, at 10, *reprinted in* 2005 U.S.C.C.A.N. at 11.

38. 7 U.S. (3 Cranch) 267, 267 (1806) (holding that diversity jurisdiction requires that each individual plaintiff be citizen of different state from defendant). The complete-diversity requirement precludes federal courts from exercising jurisdiction over a purported diversity-of-citizenship case if any plaintiff is a citizen of the same state of any defendant, regardless of the number of litigants. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 250 (9th ed. 2005).

39. 255 U.S. 356, 366-67 (1921) (holding that joinder of coclaimants to class action properly before federal court does not defeat diversity of citizenship when all named plaintiffs are completely diverse from all defendants); *see also* Snyder v. Harris, 394 U.S. 332, 340 (1969) (dictum) ("[I]f . . . no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant . . . .").

40. S. REP. NO. 109-14, at 10, *reprinted in* 2005 U.S.C.C.A.N. at 11; *see also* 28 U.S.C. § 1332(a) (2006) (conferring federal district courts with jurisdiction over matters that involve both an amount in controversy in excess of $75,000 and citizens of different states); Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of* Phillips Petroleum Co. v. Shutts, 74 UMKC L. REV. 543, 549 (2006) (suggesting that plaintiffs in class action could easily avoid diversity jurisdiction pre-CAFA by naming representative from defendant's home state).

41. S. REP. NO. 109-14, at 10-11, *reprinted in* 2005 U.S.C.C.A.N. at 11-12.

42. 28 U.S.C. § 1332(a).

43. *See* Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973) (holding that each member of purported class action must satisfy requisite amount in controversy for court to exercise diversity jurisdiction); *Snyder*, 394 U.S. at 336-37 (confirming continuing vitality of settled doctrine that class member claims could not be aggregated to satisfy amount-in-controversy requirement). *But cf.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549 (2005) (holding that federal courts may exercise supplemental jurisdiction over claims that otherwise satisfy jurisdictional requirements if named plaintiff is only party that satisfies amount-in-controversy requirement for diversity).

44. S. REP. NO. 109-14, at 11, *reprinted in* 2005 U.S.C.C.A.N. at 12.

CAFA explicitly resolves these issues by granting federal district courts original jurisdiction[45] over a class action in which any member of the class of at least 100 plaintiffs is a citizen of a different state from any defendant and "the matter in controversy exceeds the sum or value of" five million dollars.[46] In addition to explicitly revising the legal principles of diversity jurisdiction, Congress also altered the removal process.[47] Defendants in actions initially filed in state courts have the right to remove such matters to federal court if the plaintiff could originally have filed in federal court.[48] Before Congress enacted CAFA, a defendant could not remove a case to federal court if the defendant was a citizen of the state wherein the matter was originally filed.[49] In addition, when the matter named several defendants, each defendant was required to consent to the removal to federal court.[50] Further, Congress expressly limited the time frame in which a defendant could remove a matter and prohibited removal after one year had passed following the original filing date.[51]

CAFA adopted and revised certain provisions of existing removal statutes to create a removal process particular to class actions.[52] For example, a defendant in CAFA litigation may remove a matter to federal court even though the defendant is a citizen of the state in which the matter is pending.[53] Further,

45. It is a well-settled principle that federal courts are courts of limited jurisdiction and are authorized to exercise only the power that is granted to them by the Constitution and statutes. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986)). For a general discussion of the scope of Congress's power to confer jurisdiction on federal district courts, see Rory Ryan, *No Welcome Mat, No Problem?: Federal-Question Jurisdiction After* Grable, 80 ST. JOHN'S L. REV. 621, 623-26 (2006); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22-30 (1981); J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 913-14 (1983).

46. 28 U.S.C. § 1332(d)(2), (5)(B).

47. *See* S. REP. NO. 109-14, at 29, *reprinted in* 2005 U.S.C.C.A.N. at 28-29 (asserting that CAFA promulgates three new rules regarding removal of class actions to federal court).

48. 28 U.S.C. § 1441(a) (2006); FRIEDENTHAL ET AL., *supra* note 38, at 313 (citing LARRY W. YACKLE, FEDERAL COURTS 138 (2d ed. 2003)). *See generally* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 717-56 (1986) (discussing development and history of general removal process).

49. 28 U.S.C. § 1441(b) (2000) (prohibiting removal under traditional removal scheme where any party of interest served as defendant is citizen of state in which action was brought).

50. *E.g.*, Chi., Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 248 (1900) (averring that all defendants to matter must join in petition for removal); Hewitt v. City of Stanton, 798 F.2d 1230, 1232-33 (9th Cir. 1986) (conforming to established precedent requiring each real party in interest to join petition for removal); P.P. Farmers' Elevator Co. v. Farmers Elevator Mut. Ins. Co., 395 F.2d 546, 547 (7th Cir. 1968) (holding that each real party in interest must join petition for removal).

51. *See* 28 U.S.C. § 1446(b) ("[A] case may not be removed on the basis of [diversity] jurisdiction . . . more than 1 year after commencement of the action.").

52. *See, e.g.*, 28 U.S.C. § 1441 (2006) (establishing which actions are generally removable); *id.* § 1442(a)(1) (permitting removal of actions brought against certain federal officers); *id.* § 1443 (providing for removal of civil rights cases); *id.* §§ 1446-1447 (establishing procedure to remove actions to federal court and procedure following removal). The CAFA removal framework is codified at 28 U.S.C. § 1453.

53. *See* 28 U.S.C.A. § 1453(b) (permitting removal under CAFA of class actions without regard

any defendant may remove the matter without need for consent of the remaining defendants.[54] A third change Congress effected eliminated the ban on removal after one year passes following the original filing date.[55] Regardless of these substantive changes to the process, plaintiffs in a removed class action retain the right to seek remand of the case to state court.[56] Notably, Congress did not explicitly address which party bears the burden of proof of federal jurisdiction on a remand motion in either CAFA or any other relevant preceding jurisdictional statute.[57]

2. CAFA's Legislative History Causing Conflict

Although CAFA does not explicitly address which party bears the burden of proof of federal jurisdiction on a remand motion, a small number of federal district courts has determined that the burden shifts to the party opposing removal.[58] These courts are in the clear minority, and those that have not been overruled[59] have been challenged in a later session of the same court.[60] In *Berry v. American Express Publishing Corp.*,[61] the United States District Court for the

to whether any defendant is citizen of state in which class action was commenced).

54. *Id.*

55. *Id.* (stating that class action removal process shall follow § 1446 except that one-year limitation under § 1446(b) does not apply).

56. *See id.* § 1453(c)(1) (providing that § 1447, including its provision for opportunity for plaintiff to seek remand within thirty days of filing of notice of removal, applies to removal under § 1453).

57. *See, e.g.*, Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (maintaining that none of CAFA's text is relevant for shifting burden of proof to party opposing removal); Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1123 (C.D. Cal. 2005) (noting that original diversity jurisdiction statute does not contain language regarding the appropriate burden of proof on remand).

58. Traditional removal principles require that the removing party bear the burden of establishing that federal jurisdiction exists and removal is appropriate. *See* Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921) ("[T]he petitioning defendant must take and carry the burden of proof, he being the actor in the removal proceeding . . . ." (citing Carson v. Dunham, 121 U.S. 421, 425-26 (1887))); Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 359 (3d Cir. 1995) ("[T]he burden of establishing removal jurisdiction rests with the defendant." (citing Abel v. State Farm Fire & Cas. Co., 770 F.2d 26, 29 (3d Cir. 1985))).

59. *See, e.g.*, *Abrego*, 443 F.3d at 685 (holding that burden of proving federal jurisdiction on remand motion has not shifted, thereby implicitly overruling district court decisions in *Waitt v. Merck & Co.*, No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005), *Yeroushalmi v. Blockbuster, Inc.*, No. CV 05-225-AHM(RCX), 2005 WL 2083008, at *3 (C.D. Cal. July 11, 2005), and *Berry*, 381 F. Supp. 2d at 1123).

60. *Compare, e.g.*, Natale v. Pfizer, Inc., 379 F. Supp. 2d 161, 168 (D. Mass. 2005) (declaring that under CAFA, burden is "on the party opposing removal to prove that remand is appropriate" (citing *Berry*, 381 F. Supp. 2d at 122-23)), *and* Harvey v. Blockbuster, Inc., 384 F. Supp. 2d 749, 752 (D.N.J. 2005) (stating that it appears that party seeking remand bears initial burden of establishing that action should be remanded), *with, e.g.*, Moniz v. Bayer A.G., 447 F. Supp. 2d 31, 34 (D. Mass. 2006) (declining to accept argument that burden of proof has shifted because *Natale* was effectively overruled in *Abrego*), *and* Morgan v. Gay, No. 06-1371(GEB), 2006 WL 2265302, at *3 (D.N.J. Aug. 7, 2006) (mem.) (determining that party invoking removal continues to bear burden), *aff'd*, 471 F.3d 469 (3d Cir. 2006).

61. 381 F. Supp. 2d 1118 (C.D. Cal. 2005).

Central District of California determined that the legislative history and the purposes underlying CAFA justified reallocating the burden of proof on a remand motion to the party opposing removal.[62] The district court noted that the enactment of CAFA exposed several issues, including burden of proof of federal jurisdiction, that need to be reconciled with existing legal principles.[63] Because the text of CAFA did not resolve this issue, the district court turned to the committee report as "'the authoritative source for finding the Legislature's intent.'"[64] In line with several other district courts,[65] the Central District of California relied on the committee report's statement that "'[i]t is the Committee's intention'" that "'the named plaintiffs should bear the burden of demonstrating that a case should be remanded to state court.'"[66]

62. *Berry*, 381 F. Supp. 2d at 1121-23 (relying on statements in committee report on CAFA that impose on party seeking remand burden of proving exemption from jurisdiction and that express intention to expand federal court jurisdiction over interstate class actions).

63. *Id.* at 1121.

64. *Id.* (quoting Garcia v. United States, 469 U.S. 70, 76 (1984)); *see also* Kenna v. U.S. Dist. Court Cent. Dist. Cal., 435 F.3d 1011, 1015 (9th Cir. 2006) (stating that committee reports are considered with greater weight than floor statements when interpreting ambiguous statute). Although it is appropriate for a court to look to legislative history to determine the meaning of an ambiguous statute, Rabin v. Wilson-Coker, 362 F.3d 190, 199 (2d Cir. 2004), resort to legislative history is unnecessary when the statute is clear and unambiguous on its face, United States v. Oregon, 366 U.S. 643, 648 (1961); *see also* Blum v. Stenson, 465 U.S. 886, 896 (1984) (stating that where question of federal law depends on statute and Congress's intent, courts look first to statute and then to legislative history if statute is unclear). Further, an ambiguous statute cannot be understood through equally ambiguous legislative history. Stowell v. Sec'y of Health & Human Servs., 3 F.3d 539, 542-43 (1st Cir. 1993). *But see* Train v. Colo. Pub. Interest Research Group, Inc., 426 U.S. 1, 10 (1976) ("'When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use . . . .'" (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543-44 (1940))). For a thorough discussion on the use of legislative history to interpret ambiguous statutes, see generally Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161 (1996); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 551-56 (1992); R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 PEPP. L. REV. 37 (1997); Abner J. Mikva, *The Role of Legislative History in Judicial Interpretation: A Discussion Between Judge Kenneth W. Starr and Judge Abner J. Mikva: A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380. For a more focused review of how CAFA's legislative history should be interpreted in accordance with existing principles of statutory interpretation, see Jeffrey L. Roether, Note, *Interpreting Congressional Silence: CAFA's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings*, 75 FORDHAM L. REV. 2745, 2765-73 (2007).

65. *See, e.g.*, Waitt v. Merck & Co., No. C05-07591, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005) (holding that party opposing removal bears burden of proof based on legislative history of CAFA); *Natale*, 379 F. Supp. 2d at 168 (accepting argument in *Berry* that committee report expresses Congress's intent with regard to shifting burden of proof). *But see* Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) ("[W]hen the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more force than an opinion poll of legislators . . . .").

66. Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1122 (C.D. Cal. 2005) (quoting S. REP. NO. 109-14, at 43-44 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 43-44); *see also* H. Hunter Twiford, III et al., *CAFA's New "Minimal Diversity" Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing*

The district court, however, failed to consider the timing of the committee report.[67] The court opined that Congress did not explicitly address the burden of proof because the committee report provides sufficient evidence of the intent to shift the burden.[68] Despite the weight the court gave the committee report, "[t]he circulation and filing of th[e] report occurred after passage of the legislation . . . . and on the same day the President signed the measure into law."[69] Because the committee report advocates federal jurisdiction over interstate class actions and recommends a shift of the burden of disproving federal jurisdiction to plaintiffs, it has spawned conflicting judicial interpretations.

B. Judicial Treatment of CAFA and Its Provisions

1. Treatment of Removal and the Burden of Proof on Remand

The federal judiciary has developed substantial common law to deal with the removal of civil actions to federal court.[70] Underlying this expansive category of case law is the premise that defendants' right of removal is a statutory privilege subject to congressional adjustment.[71]

All federal jurisdictional conditions must be satisfied before federal courts will permit removal.[72] In particular, a long-standing common-law principle requires that the removing defendant, as the party invoking federal jurisdiction, bears the burden of satisfying the district court that the jurisdictional requirements have been met and removal is appropriate.[73] Several courts have

Jurisdiction, 25 MISS. C. L. REV. 7, 10 (2005) (concluding that CAFA's "text, purpose, and legislative history" support shifting burden of proof to party seeking remand).

67. *See Berry*, 381 F. Supp. 2d at 1121-23 (failing to mention date committee rendered report on CAFA despite analysis of report's content and its implications for burden of proof issue). See *infra* notes 250-53 and accompanying text for a discussion of the significance of the timing of the committee report.

68. *Berry*, 381 F. Supp. 2d at 1122. The district court did not, however, consider long-standing principles stating that Congress acts with knowledge of the state of the law. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives . . . know the law . . . ."); United States v. Male Juvenile, 280 F.3d 1008, 1016 (9th Cir. 2002) ("In construing statutes, we presume Congress legislated with awareness of relevant judicial decisions." (citing *Cannon*, 441 U.S. at 696-704)).

69. S. REP. NO. 109-14, at 79, *reprinted in* 2005 U.S.C.C.A.N. at 73.

70. 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721 (3d ed. 1998).

71. *Id.*; *see also* 28 U.S.C. § 1441(a) (2000) (granting defendant right to remove to federal district court matter initially filed in state court but within district court's original jurisdiction).

72. 14B WRIGHT ET AL., *supra* note 70, § 3721.

73. *Id.*; 14C WRIGHT ET AL., *supra* note 70, § 3739 (3d ed. 1998); *see also* Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921) (declaring that "the petitioning defendant must take and carry the burden of proof, he being the actor in the removal proceeding" (citing Carson v. Dunham, 121 U.S. 421, 425-26 (1887))); Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 403 (9th Cir. 1996) (relying on precedent to require defendant to prove facts supporting federal jurisdiction on remand motion); Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 359 (3d Cir. 1993) ("[T]he burden of establishing removal

established that all doubts should be resolved in favor of remand to state court,[74] consistent with the judicial policy of limiting the removal jurisdiction of federal courts.[75] These established principles are consistent with several underlying values of the federal judiciary: limited jurisdiction,[76] judicial efficiency,[77] and preservation of comity and deference to the states.[78]

Since the enactment of CAFA[79] in February 2005, federal courts have had ample opportunities to incorporate the traditional principles of removal with CAFA's interstate class action framework; however, courts have infrequently addressed these issues directly.[80] In one noteworthy case, *Abrego Abrego v. Dow Chemical Co.*,[81] the United States Court of Appeals for the Ninth Circuit explored the applicability of general removal principles to CAFA.[82] In its April

jurisdiction rests with the defendant." (citing Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 29 (3d Cir. 1995))); Rodgers v. Cent. Locating Serv., Ltd., 412 F. Supp. 2d 1171, 1176 (W.D. Wash. 2006) (arguing that "§ 1332 has always been silent on the applicable presumptions and burdens, both before and after CAFA, [and thus] the presumption against removal must be considered a judicial gloss" on text of statute). *Contra* S. REP. NO. 109-14, at 43, *reprinted in* 2005 U.S.C.C.A.N. at 41 (declaring intent of Senate Judiciary Committee that named plaintiffs should bear burden of lack of federal jurisdiction).

74. Diaz v. Sheppard, 85 F.3d 1502, 1505 (11th Cir. 1996); *see also* Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993) (acknowledging that "[a]ny doubt regarding jurisdiction should be resolved in favor of the states" (citing Jones v. Gen. Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976))). In contrast, the Senate Judiciary Committee stated that CAFA's provisions should be read with a "strong preference" for the federal forum to resolve properly removed interstate class actions. S. REP. NO. 109-14, at 43, *reprinted in* 2005 U.S.C.C.A.N. at 41.

75. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941) (determining that language of Judiciary Act of 1887 and successive congressional actions indicate that removal statutes are to be construed strictly to limit federal jurisdiction); Mulcahey v. Columbia Organic Chem. Co., 29 F.3d 148, 151 (4th Cir. 1994) (construing removal jurisdiction narrowly because of concerns for federalism); *see also* 14B WRIGHT ET AL., *supra* note 70, § 3721 (acknowledging that federal courts historically interpret removal statutes narrowly to limit scope of federal jurisdiction).

76. 14B WRIGHT ET AL., *supra* note 70, § 3721. See *supra* note 45 for an explanation of the scope of federal court jurisdiction.

77. 14B WRIGHT ET AL., *supra* note 70, § 3721; *see also* Collins v. Am. Red Cross, 724 F. Supp. 353, 358 (E.D. Pa. 1989) (finding prudence in doubting removal jurisdiction where contrary action may result in futile federal legislation); Bally v. NCAA, 707 F. Supp. 57, 58 (D. Mass. 1988) (recognizing inefficiency of determining improper removal jurisdiction after full trial on merits).

78. *See* 14C WRIGHT ET AL., *supra* note 70, § 3739 (indicating that federal judiciary strives to conduct itself in manner deferential to state courts); *see also* Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 685 (9th Cir. 2006) (noting that traditional rationale of burden allocation to determine removal jurisdiction was, inter alia, to avoid offending state sensitivities (citing Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76 (1941))).

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

80. *See, e.g.*, Miedema v. Maytag Corp., 450 F.3d 1322, 1328-30 (11th Cir. 2006) (acquiescing to traditional removal principles rather than integrating CAFA with removal jurisprudence).

81. 443 F.3d 676 (9th Cir. 2006).

82. *Abrego*, 443 F.3d at 685-86 (exploring effect of CAFA on traditional allocation of burden of proof). This decision implicitly overruled three previous district court decisions, *Waitt v. Merck & Co.*, No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005), *Yeroushalmi v. Blockbuster, Inc.*, No. CV 05-225-AHM(RCX), 2005 WL 2083008, at *3 (C.D. Cal. July 11, 2005), and *Berry v. Am. Express Publ'g Corp.*, 381 F. Supp. 2d 1118, 1123 (C.D. Cal. 2005), each of which relied on the

2006 opinion, the Ninth Circuit refused to shift the burden of proof on a remand motion to the party opposing removal[83] because CAFA is silent regarding the burden of proof[84] and explicitly alters only certain established removal principles.[85]

In *Brill v. Countrywide Home Loans, Inc.*,[86] the United States Court of Appeals for the Seventh Circuit reached the same conclusion.[87] The Seventh Circuit stated that the traditional rule burdening the removing party makes practical sense, because it induces the party with vital and applicable knowledge, the removing party, to come forward.[88] The court of appeals noted that "[t]he rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around for a long time" and stated that only valid and explicit legislation can change the rule.[89]

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legislative history of CAFA to shift the burden of proof on a remand motion to the party opposing federal jurisdiction. See *supra* notes 61-69 and accompanying text for a discussion of an earlier district court decision interpreting CAFA to shift the burden of proof on remand.

83. *Abrego*, 443 F.3d at 686.

84. *Id.* at 683. The court of appeals noted that the statute is not ambiguous because it is silent regarding the issue of burden of proof. *Id.* at 683; *see also* Judy v. Pfizer, Inc., No. 4:05CV1208RWS, 2005 WL 2240088, at *2 (E.D. Mo. Sept. 14, 2005) ("The omission of a burden of proof standard in the CAFA does not create an ambiguity inviting courts to scour its legislative history to decide the point."); Gregory P. Joseph, *Federal Class Action Jurisdiction After CAFA,* Exxon Mobil *and* Grable, 8 DEL. L. REV. 157, 159-60 (2006) (arguing that traditional burden of proof continues to apply, because CAFA does not explicitly alter legal context of removal); Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1664-65 (2006) (advocating adherence to traditional burden of proof because CAFA text does not explicitly change burden). The court of appeals also acknowledged Congress's selective and deliberate alteration of particular common-law principles to broaden federal jurisdiction and argued for a more forceful application of the principle that Congress acts knowing the existing law where Congress has chosen to revise some, but not all, existing principles. *Abrego*, 443 F.3d at 684-85.

85. *Abrego*, 443 F.3d at 684. The court of appeals acknowledged that traditional removal principles require a strict construction of removal statutes. *Id.* at 685 (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941), and Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992), for proposition that Congress enacted original removal statutes under Judiciary Act of 1887 to restrict federal removal jurisdiction and, thus, strong presumption against removal exists). The court of appeals concluded that because CAFA did not explicitly controvert this strong presumption, the removing party continues to bear the burden. *Id.*; *see also Miedema*, 450 F.3d at 1328-29 (rejecting argument that legislative history of CAFA compels courts to shift burden of proof on remand to petitioning party, because CAFA's explicit language failed to address principle of strictly construing removal statutes).

86. 427 F.3d 446 (7th Cir. 2005).

87. *Brill*, 427 F.3d at 448 (determining that absent explicit legislation altering well-established legal principle, removing party continues to bear burden of proving federal jurisdiction); *see also* Werner v. KPMG LLP, 415 F. Supp. 2d 688, 695 (S.D. Tex. 2006) (finding that burden of proof has not shifted because CAFA's silence on this issue contrasts with explicit language modifying other traditional principles); Ongstad v. Piper Jaffray & Co., 407 F. Supp. 2d 1085, 1088 (D.N.D. 2006) (deciding that "express language of CAFA does nothing to disrupt" requirement for removing party to prove federal jurisdiction).

88. *Brill*, 427 F.3d at 447-48.

89. *Id.* at 448; *see also* DiTolla v. Doral Dental IPA, LLC, 469 F.3d 271, 275 (2d Cir. 2006) (concluding that Congress is presumed to know that existing law placed burden on removing party and, therefore, its silence in CAFA manifests its choice to not change burden); Moniz v. Bayer A.G.,

2. Application of Traditional Removal Principles to Other Removal Statutes

Federal courts that refuse to shift the burden of proof continue to require the removing party to establish federal jurisdiction because it is the traditional removal principle.[90] In some other contexts, however, courts have strayed from traditional removal principles despite the absence of explicit statutory language overriding the common law of removal;[91] instead, courts have relied on the underlying policy of the subject removal statute.[92]

In construing the predecessor to § 1441, the United States Supreme Court stated that "[t]he *removal statute* which is nationwide in its operation, was intended to be uniform in its application."[93] The Court was concerned that the judiciary would inconsistently apply the removal statute based on differences in local law or the subject matter of a case.[94] Accordingly, the Court determined that the removal statute itself establishes the criteria for removal.[95] More than thirty years later, in *Grubbs v. General Electric Credit Corp.*,[96] the Court expanded on the *Shamrock Oil & Gas Corp. v. Sheets*[97] proposition in the face of conflicting local law and declared that "the *removal statutes and decisions of this Court* are intended to have uniform nationwide application."[98] The *Grubbs* opinion, however, ruled on the narrow issue of whether a federal court should consider the propriety of a removal following a trial on the merits in federal court,[99] and, therefore, some question the reliability of the Court's statement

447 F. Supp. 2d 31, 34 (D. Mass. 2006) (acknowledging that "clear majority of courts" have held that burden remains with removing party because language of CAFA is silent regarding established rule); Morgan v. Gay, No. 06-1371(GEB), 2006 WL 2265302, at *3 (D.N.J. Aug. 7, 2006) (mem.) (noting that all courts of appeals that have considered issue have refused to change burden where Congress failed to change burden through statutory language in CAFA), *aff'd*, 471 F.3d 469 (3d Cir. 2006).

90. *See, e.g.*, Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58 (2d Cir. 2006) (determining that Congress should have been especially aware of preexisting law regarding burden because venerable line of cases places burden on removing party); *Abrego*, 443 F.3d at 684-85 (holding that burden of proof remains subject to "near-canonical rule," which requires removing party to establish federal jurisdiction); *Brill*, 427 F.3d at 447-48 (relying on longevity of rule requiring proponent of federal jurisdiction to bear burden of proving jurisdiction).

91. *See, e.g.*, Bradford v. Harding, 284 F.2d 307, 310 (2d Cir. 1960) (determining that if case were removed under 28 U.S.C. § 1442, traditional removal requirement that all defendants join in removal would not apply).

92. *E.g.*, City of Greenwood v. Peacock, 384 U.S. 808, 834 (1966) (holding notice of removals under § 1443 to higher level of specificity to preserve state sovereignty and state court role in state criminal proceedings); *Bradford*, 284 F.2d at 310 (determining that protection of federal authority justifies departure from traditional removal principle that requires all defendants to join in notice of removal).

93. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104 (1941) (emphasis added) (citing 28 U.S.C. § 71 (1940) (current version at 28 U.S.C. § 1441 (2006))).

94. *Id.* at 104.

95. *Id.*

96. 405 U.S. 699 (1972).

97. 313 U.S. 100 (1941).

98. *Grubbs*, 405 U.S. at 705 (emphasis added).

99. *Id.* at 700 (holding that substance of appeal may not be validity of removal procedure after

regarding uniform application of removal statutes and removal common law.[100]

Despite the Court's statements in *Shamrock Oil* and *Grubbs*, several federal court decisions indicate that removal statutes are treated distinctly and that principles are not applied uniformly.[101] For example, removal jurisdiction conferred on federal courts pursuant to § 1442 is not subject to the same restrictions, statutorily or judicially imposed, that apply to cases removed under § 1441.[102] In *Bradford v. Harding*,[103] the United States Court of Appeals for the Second Circuit discarded the traditional requirement for removal under § 1442 that all defendants join in a petition for removal.[104] The court of appeals determined that for parties granted the power of removal under § 1442, the statute's language entitles removing parties to invoke the privilege irrespective of other defendants,[105] because § 1442 provides for removal "by them"[106] as opposed to § 1441's provision for removal "by the *defendant* or the *defendants*."[107] In addition, the court of appeals noted that the policy underlying § 1442—that the federal government is entitled to vindicate its own interests and preserve its own existence—warrants construction of the statute's language in favor of removal.[108]

trial on merits, regardless of propriety of removal).

100. *See, e.g.*, E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J.L. & PUB. POL'Y 569, 599 n.157 (2006) (arguing that *Grubbs* should be construed as establishing limited proposition that after improperly removed case is tried on merits, issue is whether federal court would have had jurisdiction).

101. *See, e.g.*, Davis v. Glanton, 107 F.3d 1044, 1050 (3d Cir. 1997) (requiring notice of removal under § 1443 to clearly support predictability of denial of civil rights in state proceeding); Bradford v. Harding, 284 F.2d 307, 310 (2d Cir. 1960) (allowing individual parties to remove case pursuant to § 1442 regardless of whether all defendants join in notice of removal).

102. 14C WRIGHT ET AL., *supra* note 70, § 3727.

103. 284 F.2d 307 (2d Cir. 1960).

104. *Bradford*, 284 F.2d at 310. In addition to overriding the principle that all defendants must consent to removal, federal courts do not enforce the well-pleaded complaint rule in § 1442 removals. *See, e.g.*, Poss v. Lieberman, 299 F.2d 358, 359 (2d Cir. 1962) (determining that defendant's ability to assert federal right as defense justifies exempting § 1442 removal from requirement that facts supporting removal exist on face of plaintiff's complaint). Courts do, however, hold § 1442 removals to higher standards under other circumstances. For example, derivative jurisdiction must exist to remove a case under § 1442 whereas no such requirement exists for a removal under § 1441. 14C WRIGHT ET AL., *supra* note 70, § 3727; *see, e.g.*, Edwards v. U.S. Dep't of Justice, 43 F.3d 312, 315 (7th Cir. 1994) (averring that district court jurisdiction under § 1442 is derivative of state court jurisdiction and, therefore, state court initially must have had subject matter jurisdiction). Further, for removal under § 1442, parties must demonstrate, through specific averments, that the complaint alleges actions that justify application of § 1442. *E.g.*, Mesa v. California, 489 U.S. 121, 129 (1989) ("[F]ederal officer removal must be predicated on the allegation of a colorable federal defense."); *see also* 14C WRIGHT ET AL., *supra* note 70, § 3727 (reporting that courts require § 1442 removals to satisfy higher level of specificity in removal notice than § 1441 removals).

105. *Bradford*, 284 F.2d at 309-10.

106. 28 U.S.C. § 1442(a) (2006).

107. *Id.* § 1441(a) (emphasis added).

108. *Bradford*, 284 F.2d at 310; *see also* Am. Policyholders Ins. Co. v. Nyacol Prods., Inc., 989 F.2d 1256, 1265 (1st Cir. 1993) (noting that cases against federal officers should be tried in federal court to protect federal authority).

The federal judiciary also holds cases removed under § 1443 to higher standards than the standard to which it holds § 1441 removals.[109] For example, a defendant attempting to remove a case from state court pursuant to § 1443 must show, inter alia, by specific allegations, that he has been denied or cannot enforce in state court a right created by the civil rights law under which the defendant seeks protection.[110] This higher standard preserves the policy of allowing state courts to try state criminal trials with the United States Supreme Court conducting ultimate review of federal rights.[111]

Not only do the federal courts treat the removal statutes in a nonuniform manner but Congress also has enacted several removal statutes that confer the right to remove on different parties.[112] Such statutes may further complicate the application of a uniform standard. For example, § 1441 entitles "the defendant or the defendants" to remove a case to federal district court if the case concerns a matter over which the district court has original jurisdiction.[113] In *Shamrock Oil*, the United States Supreme Court determined that this statutory phrase entitled only the original defendant or defendants to the right of removal, even if the plaintiff became a defendant to a counterclaim.[114]

In the face of this established removal principle, Congress has enacted several removal statutes that do not mirror the language in § 1441(a) that identifies the party granted the right of removal.[115] For example, § 1452, which is related to bankruptcy proceedings, allows "[a] party" to remove the matter to federal court.[116] Moreover, CAFA's language as enacted significantly departs from the language of the General Removal Statute and proclaims that a class action "may be removed *by any defendant* without the consent of all

109. *See, e.g.*, Davis v. Glanton, 107 F.3d 1044, 1050 (3d Cir. 1997) (relying on Georgia v. Rachel, 384 U.S. 780, 803 (1966), to require that removing defendant's allegations be supported by clearly predictable denial of civil rights in state proceeding). The court of appeals also acknowledged that § 1443 creates a narrow exception to the traditional, well-pleaded complaint rule. *Id.* at 1047.

110. City of Greenwood v. Peacock, 384 U.S. 808, 827-28 (1966); 14C WRIGHT ET AL., *supra* note 70, § 3727.

111. *See Peacock*, 384 U.S. at 834 (acknowledging importance of historical practice of having state courts try state criminal matters subject to Court's review of federal rights issues). Moreover, federal courts have the power to correct any wrongs committed against a defendant's federal civil rights that occurred in state court proceedings. *Id.* at 828.

112. *See* 28 U.S.C. § 1441(a) (2006) (enabling "the defendant or the defendants" to remove case); *id.* § 1442(a) (identifying particular federal officials and granting right of removal "by them"); *id.* § 1443 (permitting removal "by the defendant"); *id.* § 1452(a) (acknowledging that "[a] party" may remove action filed pursuant to federal bankruptcy jurisdiction); *id.* § 1453(b) (empowering "any defendant" in class action to remove matter to federal court without consent of all defendants).

113. 28 U.S.C. § 1441(a).

114. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 107-08 (1941); *see also* Haden P. Gerrish, *Third Party Removal Under Section 1441(c)*, 52 FORDHAM L. REV. 133, 138-39 (1983) (noting federal court practice of confining rights of removal under § 1441(a) and (c) to original defendant or defendants).

115. *See, e.g.*, 28 U.S.C. § 1452(a) (conferring right of removal to "[a] party" under federal bankruptcy jurisdictional statute); *id.* § 1453(b) (entitling "any defendant" right to remove class action to federal district court).

116. *Id.* § 1452(a).

defendants."[117]

3. Treatment of Other CAFA Provisions Affecting Established Principles

CAFA does not directly address which party bears the burden of establishing federal jurisdiction on a motion for remand; nevertheless, it does contain several other provisions that courts have either interpreted according to traditional legal principles or applied as exceptions to established judicial doctrine because of explicit statutory language to the contrary.[118] How courts analyze these provisions illustrates the adherence to,[119] or departure from,[120] traditional legal principles for all CAFA provisions. From courts' actions in these instances emerges consistent judicial reasoning that courts can apply to cases raising the burden-of-proof-on-remand issue.[121] Such reasoning emerges in the federal court treatment of four CAFA provisions: (a) post-CAFA amendments to complaints filed pre-CAFA and the principles of relation-back,[122] (b) burden of proof of jurisdictional exceptions,[123] (c) appellate review of remand orders,[124] and (d) determination of the requisite amount in controversy.[125]

117. *Id.* § 1453(b) (emphasis added).

118. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 571-72 (2005) (dictum) (stating that CAFA explicitly abandons traditional rule prohibiting aggregation of claims to satisfy amount-in-controversy requirement); Evans v. Walter Indus., Inc., 449 F.3d 1159, 1164-65 (11th Cir. 2006) (confronting issue of whether parties asserting exception to federal jurisdiction continue to bear burden under CAFA); Prime Care of Ne. Kan., LLC v. Humana Ins. Co., 447 F.3d 1284, 1289 (10th Cir. 2006) (considering whether amendments to pre-CAFA complaints filed after CAFA's commencement date are subject to CAFA's provisions); Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 435 F.3d 1140, 1142 (9th Cir. 2006) (deciding issue regarding express language in CAFA that permits appeal of adverse remand decisions).

119. *See, e.g.*, *Evans*, 449 F.3d at 1164-65 (adhering to existing removal principles and requiring party asserting jurisdictional exception to prove its existence).

120. *See, e.g.*, *Amalgamated Transit Union Local 1309*, 435 F.3d at 1142 (determining that explicit CAFA provision permitting interlocutory appeal of remand orders controverts existing precedent).

121. *See, e.g.*, *Exxon Mobil Corp.*, 545 U.S. at 571-72 (dictum) (confirming that CAFA explicitly controverts traditional principle barring aggregation of plaintiffs' claims when courts calculate amount in controversy); Hart v. FedEx Ground Package Sys., Inc., 457 F.3d 675, 680 (7th Cir. 2006) (averring that language of CAFA does not alter traditional principle that party seeking jurisdictional exception bears burden of proof); Braud v. Transp. Serv. Co. of Ill., 445 F.3d 801, 804-05 (5th Cir. 2006) (determining that because CAFA fails to define when action commences, it resigns federal courts to apply traditional removal principle that state law governs commencement); *Amalgamated Transit Union Local 1309*, 435 F.3d at 1142 (deciding that express CAFA language overrides existing removal principle limiting review of remand orders).

122. See *infra* Part II.B.3.a for an analysis of federal courts' treatment of amendments and CAFA's effective date.

123. See *infra* Part II.B.3.b for a discussion of cases addressing plaintiffs' burden of proving the existence of an exception to federal jurisdiction.

124. See *infra* Part II.B.3.c for a review of cases considering CAFA's effect on existing removal principles regarding appellate review of remand orders.

125. See *infra* Part II.B.3.d for an assessment of federal courts' treatment of CAFA's effect on establishing the amount-in-controversy requirement for federal diversity jurisdiction.

a. Relation-Back Principles and CAFA's Applicability to Post-Enactment Amendments

Courts considering whether amendments following the enactment of CAFA apply to a complaint filed before CAFA's enactment have articulated three positions.[126] Depending on where the original complaint was filed, courts may either welcome defendants into the federal forum or relegate defendants to state court.[127] Federal judiciary treatment of post-CAFA amendments to complaints filed pre-CAFA reveals a significant deficiency in applying federal jurisdictional principles to CAFA—several variations of judicial treatment are possible that create favorable venues.[128] First, some courts have determined that amendments have no effect on the pre-CAFA commencement date of the case and, therefore, a complaint filed before the effective date of CAFA is not subject to removal under CAFA's provisions.[129]

In *Weekley v. Guidant Corp.*,[130] the United States District Court for the Eastern District of Arkansas refused to exercise jurisdiction under CAFA over a civil action originally filed in July 2004 and amended in July 2005.[131] The plaintiff attempted to amend her individual complaint to move for class certification, and the defendants sought removal under CAFA because the class action commenced after CAFA's effective date.[132] The district court focused on the explicit language in CAFA, which states, "[t]he amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act."[133] Because Congress used the term "civil action" rather than "claim or cause of action" as it previously had in other removal statutes, the district court relied on the meaning of "civil action" to determine the outcome.[134] Under the principle that (for removal proceedings) state law governs when a civil action is commenced,[135] the district court applied Arkansas law to determine that the civil

126. Prime Care of Ne. Kan., LLC v. Humana Ins. Co., 447 F.3d 1284, 1285 (10th Cir. 2006).

127. *Compare, e.g.*, Comes v. Microsoft Corp., 403 F. Supp. 2d 897, 904 (S.D. Iowa 2005) (prohibiting removal of complaint originally filed pre-CAFA, thereby precluding definitively defendant's ability to remove pre-CAFA complaints under CAFA), *with, e.g.*, *Prime Care*, 447 F.3d at 1288 (determining that relation-back principles apply to post-CAFA amendment of pre-CAFA complaint, thereby preserving opportunity to remove complaint filed pre-CAFA).

128. See *infra* Part III.B.3 for a discussion of the dangers of allowing unresolved federal jurisdiction issues to languish.

129. *See, e.g.*, *Comes*, 403 F. Supp. 2d at 903-04 (relying on Congress's use of "civil action" in CAFA to prohibit removal of class action filed five years before CAFA's enactment because civil action can only commence once); Weekley v. Guidant Corp., 392 F. Supp. 2d 1066, 1067 (E.D. Ark. 2005) (holding that post-CAFA amendment to complaint originally filed pre-CAFA cannot affect date "civil action" commenced).

130. 392 F. Supp. 2d 1066 (E.D. Ark. 2005).

131. *Weekley*, 392 F. Supp. 2d at 1067.

132. *Id.*

133. *Id.* (quoting Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 4, 14 (codified in scattered sections of 28 U.S.C.)).

134. *Weekley*, 392 F. Supp. 2d at 1067.

135. *Id.* at 1067 n.1 (citing Winkels v. George A. Hormel & Co., 874 F.2d 567, 570 (8th Cir.

action commenced when the complaint was filed.[136] Thus, the court held that Weekley's action commenced, for purposes of removal consideration, before the effective date of CAFA and thus was not subject to removal under CAFA.[137] Notably, the district court considered irrelevant the defendants' argument that the amended complaint did not relate back to the original complaint.[138] The court stated that relation-back principles are irrelevant because CAFA applies only to civil actions commenced after CAFA's enactment, not to complaints amended after that date.[139]

Similarly, in *Comes v. Microsoft Corp.*,[140] the United States District Court for the Southern District of Iowa reached the same conclusion regarding an amendment to a complaint originally filed in 2000.[141] The court averred that, under Iowa law, a "civil action" commences when a petition is filed in a court.[142] The court relied on the *Weekley* decision to conclude that, had Congress intended CAFA to apply to actions pending at the time of its enactment, it would have done so explicitly.[143] Therefore, a post-CAFA amendment to a complaint filed prior to CAFA's enactment does not initiate a civil action subject to removal under CAFA.[144]

The second position focuses on whether an amendment relates back to the original pre-CAFA complaint and is applied in the Eighth and Tenth Circuits, as well as in one district court in the Eleventh Circuit.[145] In *Eufaula Drugs, Inc. v. Scripsolutions*,[146] the United States District Court for the Middle District of Alabama decided that application of CAFA to a post-CAFA amendment depends on whether the amendment relates back to the original complaint filed pre-CAFA.[147] Reviewing applicable Alabama law, the district court held that the amended complaint in question related back to the original complaint because the defendant received notice of the matter within 120 days of the filing of the original complaint and that, but for a mistake in the name, the defendant would have been properly named.[148] The district court further concluded that the action

1989)).

136. *Id.* at 1067 (citing ARK. R. CIV. P. 3).

137. *Id.*

138. *Id.* at 1068.

139. *Weekley*, 392 F. Supp. 2d at 1068.

140. 403 F. Supp. 2d 897 (S.D. Iowa 2005).

141. *Comes*, 403 F. Supp. 2d at 904.

142. *Id.* at 903 (citing IOWA R. CIV. P. 1.301(1)).

143. *Id.*

144. *Id.* at 904.

145. *See, e.g.*, Prime Care of Ne. Kan., LLC v. Humana Ins. Co., 447 F.3d 1284, 1288 (10th Cir. 2006) (determining that relation-back principles govern issues of commencement and amendment); Plubell v. Merck & Co., 434 F.3d 1070, 1071 (8th Cir. 2006) (identifying issue as whether amendment relates back to original complaint); Eufaula Drugs, Inc. v. ScripSolutions, No. 2:05CV370-A, 2005 WL 2465746, at *3 (M.D. Ala. Oct. 6, 2005) (acknowledging that evaluating when amended action commenced requires application of relation-back principles).

146. No. 2:05CV370-A, 2005 WL 2465746 (M.D. Ala. Oct. 6, 2005).

147. *Eufaula Drugs*, 2005 WL 2465746, at *3.

148. *Id.* at *3-4 (applying ALA. R. CIV. P. 15(c)(3)).

commenced against the defendant prior to the enactment of CAFA because the class intended to serve the defendant with process in "due course."[149] Accordingly, the district court did not exercise CAFA jurisdiction because the original complaint commenced the suit prior to the enactment of CAFA and the amendment related back to the original complaint.[150]

The United States Court of Appeals for the Eighth Circuit reached a similar decision regarding an amendment to modify a class representative in *Plubell v. Merck & Co.*[151] Although the defendant articulated reasons different from those in *Eufaula* for why the action was commenced after the enactment of CAFA, focusing on the differences in the factual allegations of the original class representative and the successor representative, the court of appeals used reasoning comparable to the *Eufaula* decision. The court of appeals determined that the defendant knew or should have known it would be called on to defend the action against the new plaintiff because the substance of the class action did not change.[152] The defendant had to defend the same claims regardless of which class member was named as the representative.[153] Further, amending the class representative would not unfairly prejudice the defendant in maintaining a defense because the nature of the case did not change; the defendant was facing the same case as before the amendment.[154] Because the amendment filed post-CAFA did not change the claims in the original complaint filed pre-CAFA and the defendant would not be unfairly prejudiced, the court of appeals affirmed the refusal to exercise federal jurisdiction.[155]

The United States Court of Appeals for the Tenth Circuit also used relation-back principles to determine whether CAFA applied to an amended complaint.[156] In *Prime Care of Northeast Kansas, LLC v. Humana Insurance Co.*,[157] the court of appeals relied on legal principles existing at the time Congress enacted CAFA.[158] Consequently, the court of appeals decided that the relation-back principle governs the concepts of commencement and amendment.[159] Accordingly, the court of appeals held that a post-CAFA amendment triggers a substantive right of removal under CAFA when the amended pleading does not relate back to the original complaint.[160] Thus courts

149. *Id.* at *4 (determining that commencement begins under CAFA as it does for statute-of-limitation purposes and thus, under Alabama law, begins when plaintiff intends to serve process on defendant in due course).

150. *Id.*

151. 434 F.3d 1070, 1071 (8th Cir. 2006).

152. *Plubell*, 434 F.3d at 1073.

153. *Id.*

154. *Id.*

155. *Id.* at 1074.

156. Prime Care of Ne. Kan., LLC v. Humana Ins. Co., 447 F.3d 1284, 1289 (10th Cir. 2006).

157. 447 F.3d 1284 (10th Cir. 2006).

158. *See Prime Care*, 447 F.3d at 1288 (noting that legal concepts of commencement and amendment had been governed by relation-back principle prior to CAFA enactment).

159. *Id.*

160. *Id.* at 1289.

in the Eighth, Tenth, and Eleventh Circuits use principles of relation-back to determine whether an amendment falls under CAFA: if it relates back, CAFA does not apply, but if it does not relate back, CAFA does apply.[161]

The third position, adopted in the Fifth and Seventh Circuits, as well as in one district court in the Sixth Circuit, also applies the relation-back principle to determine the applicability of CAFA, unless the amended pleading names a new defendant.[162] In *Braud v. Transport Service Co. of Illinois*,[163] the United States Court of Appeals for the Fifth Circuit acknowledged CAFA's failure to define when an action commences and opined that CAFA was not intended to replace existing precedent for determining when an action commences against a new defendant.[164] Accordingly, the court of appeals confirmed that, under applicable state law, an action commences against a new defendant when the defendant has its first opportunity to defend itself.[165] The court of appeals also noted that because CAFA strikes the one-year limitation generally applicable to removal proceedings, CAFA suggests that a new defendant added to an action post-CAFA does not face any time restrictions for removal other than the thirty-day deadline after receiving notice.[166] The court of appeals concluded that so long as the defendant is indeed new to the action, the addition commences the action against the new defendant and permits removal regardless of relation-back principles.[167]

In *Adams v. Federal Materials Co.*,[168] the United States District Court for the Western District of Kentucky held that CAFA applies because the addition of a new defendant after CAFA's enactment commences a new action as to that defendant.[169] The district court based its decision on existing removal principles

161. *See, e.g.*, Eufaula Drugs, Inc. v. ScripSolutions, No. 2:05CV370-A, 2005 WL 2465746, at *3 (M.D. Ala. Oct. 6, 2005) (stating that CAFA does not apply if amended complaint relates back to original but does apply if relation does not exist).

162. *See, e.g.*, Braud v. Transp. Serv. Co. of Ill., 445 F.3d 801, 804 (5th Cir. 2006) (deciding that amended complaint that adds new defendant commences action as to new defendant); Knudsen v. Liberty Mut. Ins. Co., 435 F.3d 755, 758 (7th Cir. 2006) (determining that amended class definition commenced new action against previously unnamed defendants); Adams v. Fed. Materials Co., No. Civ.A. 5:05CV-90-R, 2005 WL 1862378, at *4 (W.D. Ky. July 28, 2005) (finding that it is appropriate to define "commenced" for each defendant). A related, but separate, set of cases also considers the issue of adding a named plaintiff. *Compare* Phillips v. Ford Motor Co., 435 F.3d 785, 788 (7th Cir. 2006) (holding that addition of named plaintiffs to class action is amendment that relates back to original complaint when the claims arise out of same transaction or occurrence set forth in original complaint), *with* Plummer v. Farmers Group, Inc., 388 F. Supp. 2d 1310, 1315-16 (E.D. Okla. 2005) (establishing four principles for court to consider when determining whether new plaintiff's claims relate back to original complaint).

163. 445 F.3d 801 (5th Cir. 2006).

164. *Braud*, 445 F.3d at 804-05.

165. *Id.* at 805.

166. *Id.* at 805-06; *see also* 28 U.S.C. § 1453(b) (2006) (adopting § 1446 class action removal framework, which includes thirty-day removal deadline, but stating that one-year limitation does not apply).

167. *Braud*, 445 F.3d at 806.

168. No. Civ.A. 5:05CV-90-R, 2005 WL 1862378 (W.D. Ky. July 28, 2005).

169. *Adams*, 2005 WL 1862378, at *4.

and the general intent of Congress in enacting CAFA.[170]

In *Knudsen v. Liberty Mutual Insurance Co.*,[171] the United States Court of Appeals for the Seventh Circuit reversed a district court's remand to state court because the redefined class in the amended complaint included claims that the defendant had no notice of under the original complaint.[172] The expanded class definition included claims against additional entities, who were not previously part of the matter, for their actions prior to the original defendant's acquisition of those entities.[173] Thus, the actions for which the class was seeking relief were subject to the acquired entities' separate policies—not the original defendant's.[174] Therefore, the court of appeals determined that federal jurisdiction existed because the amended complaint presented novel claims after CAFA's effective date.[175]

b. The Untouched Burden of Proving a Jurisdictional Exception

CAFA contains two notable exceptions to the exercise of original federal jurisdiction: the local-controversy[176] and home-state exceptions.[177] Existing case law requires the party seeking an exception to the exercise of federal jurisdiction to find an express exception.[178] Federal courts rely on this principle when considering the home-state and local-controversy exceptions under CAFA.[179]

170. *See id.* at *3-4 (acknowledging that removal principles recognize that addition of new defendant opens new window of removal and that Congress intended to extend removal to defendants in large class actions on basis of minimal diversity).

171. 435 F.3d 755 (7th Cir. 2006).

172. *Knudsen*, 435 F.3d at 756-57.

173. *Id.* at 757-58.

174. *Id.*

175. *Id.* at 758.

176. 28 U.S.C. § 1332(d)(4)(A) (2006). Federal courts must decline to exercise jurisdiction where (1) more than two-thirds of the proposed class are citizens of the state wherein the plaintiffs originally filed the complaint, (2) at least one defendant is a citizen of the original filing state and is a defendant from which the class seeks significant relief and whose alleged conduct forms a significant basis of the pending claims, (3) the principal alleged injuries occurred in the original filing state, and (4) no other class action based on the same or similar factual allegations has been filed against any of the defendants within the three years preceding the filing of the complaint at bar. *See* Hart v. FedEx Ground Package Sys. Inc., 457 F.3d 675, 679 (7th Cir. 2006) (setting forth four required circumstances under which local-controversy exception removes class action from scope of CAFA).

177. 28 U.S.C. § 1332(d)(4)(B).

178. *See* Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 697-98 (2003) (relying on explicit statutory language of § 1441(a) to confirm that plaintiff bears burden of establishing jurisdictional exception after justified removal).

179. *See, e.g.*, Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc., 485 F.3d 804, 812 (5th Cir. 2007) ("Under CAFA, the moving party on the remand motion, not the defendant seeking federal jurisdiction, bears burden to establish [an exception to CAFA jurisdiction]."); Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1021-22 (9th Cir. 2007) (concluding that party seeking remand bears burden of proving exception to CAFA jurisdiction); *Hart*, 457 F.3d at 680 (determining that party claiming jurisdictional exception under CAFA bears burden of proof); Evans v. Walter Indus., Inc., 449 F.3d 1159, 1164-65 (11th Cir. 2006) (adhering to traditional removal principles and requiring party seeking remand to prove asserted jurisdictional exception under CAFA).

For example, in *Evans v. Walter Industries, Inc.*,[180] a matter of first impression, the United States Court of Appeals for the Eleventh Circuit required the party opposing removal to establish that CAFA's local-controversy exception constituted an explicit exception.[181]

The United States Court of Appeals for the Seventh Circuit addressed each exception in *Hart v. FedEx Ground Package System, Inc.*[182] The court of appeals determined that the party opposing jurisdiction bears the burden of establishing the jurisdictional exception[183] but went on to compare the home-state and local-controversy exceptions with the General Removal Statute.[184] The court of appeals opined that although the phrases "[e]xcept as otherwise expressly provided"[185] and "shall decline to exercise jurisdiction"[186] are not identical, their underlying concepts are analogous.[187] The court of appeals considered the phrase "shall decline to exercise jurisdiction"[188] in CAFA to be a congressional mandate to federal courts that created two express exceptions and noted that its ruling was compatible with CAFA's legislative history.[189] Accordingly, federal courts unwaveringly interpret the jurisdictional exceptions under CAFA pursuant to the explicit language of the statute and traditional legal principles.[190]

c. The Explicit Statutory Language Abrogating the Principle that Parties Cannot Appeal Remand Decisions

The explicit language of CAFA changed existing legal principles regarding a litigant's opportunity to appeal an unfavorable remand order. Generally,

180. 449 F.3d 1159 (11th Cir. 2006).

181. *Evans*, 449 F.3d at 1164 ("[W]hen a party seeks to avail itself of an express statutory exception to federal jurisdiction granted under CAFA . . . we hold that the party seeking remand bears the burden of proof with regard to that exception."); *accord* Frazier v. Pioneer Ams. LLC, 455 F.3d 542, 546 (5th Cir. 2006) (holding that long-standing removal doctrine supports placing burden of proving jurisdictional exception on plaintiff because plaintiffs are better positioned than defendants to support this burden).

182. 457 F.3d 675, 679 (7th Cir. 2006) (focusing on issue of which party bears burden to prove either home-state or local-controversy exception).

183. *Hart*, 457 F.3d at 680.

184. *Id.* at 680-81 (acknowledging that *Frazier* and *Evans* reached appropriate conclusions, but noting that each court missed important step of examining language of statute in question).

185. 28 U.S.C. § 1441(a) (2006).

186. *Id.* § 1332(d)(4).

187. *Hart*, 457 F.3d at 680-81.

188. 28 U.S.C. § 1332(d)(4).

189. *Hart*, 457 F.3d at 681; *see also* S. REP. NO. 109-14, at 44 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 41 ("It is the Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption.").

190. *See, e.g.*, Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc., 485 F.3d 804, 813 (5th Cir. 2007) (concluding that traditional removal principles and congressional intent in enacting CAFA support holding that party seeking remand, whether plaintiff or nonconsenting defendant, bears burden of establishing exception to CAFA jurisdiction); Evans v. Walter Indus., Inc., 449 F.3d 1159, 1164-65 (11th Cir. 2006) (holding that party seeking to avail itself of jurisdictional exception bears burden of proof pursuant to CAFA's text and removal principles).

remand orders are not appealable;[191] however, CAFA allows a party to apply to a court of appeals for an interlocutory appeal of a remand decision.[192] For example, in *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc.*,[193] the United States Court of Appeals for the Ninth Circuit relied on the explicit language of CAFA and its legislative history to determine that courts of appeals have discretionary authority to review remand orders, unlike most other situations in which parties cannot appeal remand orders.[194] Consequently, federal courts have recognized and heeded Congress's explicitly expressed intent to revise statutorily this particular legal principle.[195]

d. CAFA's Revision to Traditional Principles for Determining the Requisite Amount in Controversy

In no uncertain terms, CAFA provides that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000."[196] Although CAFA explicitly disposes of the rule against aggregation, the statute does not identify which party to the action bears the burden of establishing the amount in controversy. Under existing common law, when the defendant seeks removal to federal court, that party bears the burden of establishing satisfaction of the amount-in-controversy requirement by a preponderance of the evidence.[197] In certain circumstances, however, the party seeking removal may be subject to the higher standard of establishing the amount in controversy to a legal certainty.[198]

No clarity exists concerning whether courts will continue the traditional principle that the removing defendant must prove that the amount in

191. Patterson v. Dean Morris, L.L.P., 444 F.3d 365, 367 (5th Cir. 2006).

192. Braud v. Transp. Serv. Co. of Ill., 445 F.3d 801, 803 n.1 (5th Cir. 2006); 28 U.S.C. § 1453(c)(1) (2006).

193. 435 F.3d 1140 (9th Cir. 2006).

194. *Amalgamated Transit Union Local 1309*, 435 F.3d at 1142; *see also* Wallace v. La. Citizens Prop. Ins. Corp., 444 F.3d 697, 699-700 (5th Cir. 2006) (dictum) (recognizing that provision in CAFA governing review of remand decisions provision was intended to ensure expeditious review of remand orders in class action).

195. *See, e.g.*, *Amalgamated Transit Union Local 1309*, 435 F.3d at 1142 (acknowledging clear intent of class action removal statute to permit appeals of remanded class actions); 28 U.S.C. § 1453(c)(1) ("[A] court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed . . . .").

196. 28 U.S.C. § 1332(d)(6); *see also* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 571-72 (2005) (dictum) (averring that CAFA abrogates long-established rule against aggregating claims to satisfy amount-in-controversy requirement). See *supra* note 43 and accompanying text for a summary of the state of the law regarding aggregation of claims prior to the enactment of CAFA.

197. *See, e.g.*, Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1356-57 (11th Cir. 1996) (stating that, where plaintiff seeks unspecified amount of damages, removing party must establish requisite amount in controversy by preponderance of evidence).

198. *See, e.g.*, Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 402-03 (9th Cir. 1996) (explaining that "legal certainty" standard applies to removing party when plaintiff filed complaint in state court alleging damages in excess of required amount (internal quotation marks omitted)).

controversy satisfies the statutory requirement for CAFA removals[199] because of the recent conflict regarding which party bears the burden of establishing federal jurisdiction on a motion for remand following removal pursuant to CAFA.[200] Unlike the resolution of the aggregation principle, CAFA does not explicitly address the amount-in-controversy burden.[201]

III. DISCUSSION

CAFA[202] does not explicitly transfer the burden of proof of federal jurisdiction from the removing party to the party seeking remand.[203] Notwithstanding the absence of such language, several federal district courts have imposed the burden of proof on the party seeking remand.[204] Some courts of appeals for the respective federal circuits have implicitly overruled these decisions[205] and fellow district court judges in subsequent cases have challenged

199. *See, e.g.*, Hooks v. Am. Med. Sec. Life Ins. Co., No. 3:06-CV-00071, 2006 WL 2504903, at *4 (W.D.N.C. Aug. 29, 2006) (requesting additional evidence to assist court in determining whether CAFA amount in controversy is satisfied, but failing to indicate which party should provide evidence). *But see, e.g.*, Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 682-83 (9th Cir. 2006) (interpreting CAFA subject to traditional rule that removing party bears burden of establishing federal jurisdiction, including amount-in-controversy requirement). In addition to the lack of clarity regarding which party bears this burden, it also appears that courts of appeals may be in conflict regarding the appropriate standard by which to measure the amount in controversy. *Compare, e.g.*, Lowery v. Ala. Power Co., 483 F.3d 1184, 1210-11 (11th Cir. 2007) (asserting that proponent of federal jurisdiction under CAFA bears burden of satisfying amount-in-controversy requirement by preponderance of evidence even where pleadings provide no evidence of damages), *and* Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58 (2d Cir. 2006) (averring that removing party must show by "reasonable probability" that aggregate amount in controversy exceeds minimum requirement (internal quotation marks omitted)), *with, e.g.*, Morgan v. Gay, 471 F.3d 469, 474-75 (3d Cir. 2006) (concluding that removing party bears burden of proving to legal certainty that claim satisfies amount-in-controversy requirement). For a further discussion of this issue and the implications of misallocating the burden, see Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 110-13 (2007).

200. See *supra* Part II.B.1 for a review of the unresolved dispute among federal courts regarding which party bears the burden of establishing federal jurisdiction under CAFA on a motion for remand.

201. *See* 28 U.S.C. § 1332(d)(6) (2006) (establishing aggregation of class member claims, but failing to identify party responsible for proving aggregate amount).

202. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

203. *See, e.g.*, Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (noting that CAFA's text fails to address burden of proof on remand and none of its text is relevant for determining whether burden was shifted).

204. *E.g.*, Natale v. Pfizer Inc., 379 F. Supp. 2d 161, 168 (D. Mass. 2005) (stating that, under CAFA, party making remand motion bears burden of proof); Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005) (concluding that based on CAFA's legislative history, party seeking remand bears responsibility to prove removal is improper); Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1122-23 (C.D. Cal. 2005) (determining that burden of proof has shifted to party opposing removal).

205. *See, e.g.*, *Abrego*, 443 F.3d at 685 (holding that CAFA did not alter burden-of-proof doctrine requiring removing party to establish federal jurisdiction, thereby implicitly overruling district court decisions in *Waitt*, *Berry*, and *Yeroushalmi v. Blockbuster, Inc.*, No. CV 05-225-AHM(RCX), 2005 WL 2083008, at *3 (C.D. Cal. July 11, 2005)).

the remaining decisions.[206] In the limited number of opinions regarding the issue, courts that have refused to shift the burden have done so on one consistent basis: traditional removal principles dictate that the removing party establish federal jurisdiction if it is challenged and CAFA's provisions do not alter this long-standing principle.[207]

In applying this general removal principle to the CAFA removal statute,[208] courts and some scholars inadvertently overlook one important step—that general removal principles are uniformly and presumptively applicable to all removal statutes.[209] Although federal courts that refuse to shift the burden of proof correctly interpret CAFA,[210] the inconsistent decisions on the issue expose the weakness of automatically applying traditional removal common law.[211] Because adapting CAFA to the existing removal framework creates ambiguity,[212] the United States Supreme Court should reexamine the viability of removal principles, not only for CAFA, but also for future removal statutes.[213] The Court should solidify removal jurisprudence by defining the applicability of removal principles to new statutes beginning with the burden of establishing

206. *Compare, e.g.*, *Natale*, 379 F. Supp. 2d at 168 (declaring that principle in which party opposing removal under CAFA bears burden of proving remand is appropriate), *and* Harvey v. Blockbuster, Inc., 384 F. Supp. 2d 749, 752 (D.N.J. 2005) (stating that rule that party seeking remand bears burden of establishing remand is prudent), *with, e.g.*, Moniz v. Bayer A.G., 447 F. Supp. 2d 31, 34 (D. Mass. 2006) (noting that *Natale* was effectively overruled in *Abrego* and, therefore, refusing to accept argument that CAFA shifted burden), *and* Morgan v. Gay, No. 06-1371(GEB), 2006 WL 2265302, at *3 (D.N.J. Aug. 7, 2006) (mem.) (determining that removing party continues to bear burden), *aff'd*, 471 F.3d 469 (3d Cir. 2006).

207. *See, e.g.*, Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58 (2d Cir. 2006) (deciding that CAFA did not affect traditional rule that removing party bears burden of proving federal jurisdiction); Miedema v. Maytag Corp., 450 F.3d 1322, 1329-30 (11th Cir. 2006) (concluding that CAFA did not alter well-established rules that govern placement of burden of proof and, therefore, removing party continues to bear burden); *Abrego*, 443 F.3d at 685 (holding that burden of proof remains, under traditional rule of burden allocation, on proponent of federal forum); *Brill*, 427 F.3d at 447-48 (stating that rule requiring proponent of federal jurisdiction to bear burden of proof is well established and Congress must explicitly override such rule).

208. 28 U.S.C. § 1453 (2006) (establishing federal removal jurisdiction and procedure for removal of class actions).

209. See *supra* Part II.B.2 for a discussion of the lack of uniformity with which removal principles are applied to other removal statutes. *See also* Joseph, *supra* note 84, at 160 (arguing that removing party should continue to bear burden of proof simply because CAFA does not explicitly alter legal context of removal); Kanner, *supra* note 84, at 1664-65 (advocating view that CAFA has not shifted burden because CAFA text does not expressly address traditional burden); Roether, *supra* note 64, at 2784-89 (positing that proponent of federal jurisdiction should continue to bear burden of proving that subject matter jurisdiction exists because CAFA's legislative history should not be sufficient to alter long-standing principle).

210. See *infra* Part III.A for an analysis of the burden of proof under CAFA on a remand motion.

211. See *infra* Part III.B for an analysis of the weaknesses of uniformly applying removal jurisprudence to all removal statutes.

212. See *supra* Part II.A.1 for a discussion of CAFA's impact on the preexisting removal framework.

213. See *infra* Part III.B.3 for a review of how failure to determine universal application of removal statutes may affect important policy considerations.

federal jurisdiction for removal under CAFA. When considering whether traditional removal principles apply, the Court should not advocate slavish adherence to existing principles. Instead, in each instance in which Congress enacts a new removal statute, the federal judiciary should examine the policy influencing Congress's action and determine whether those policies conform to those of the common law of removal. If in the particular instance the policies are consistent, then federal courts should adhere to long-standing principles; however, consistency and uniformity are not principles that should guide these decisions.

A. CAFA Does Not Shift the Burden of Proof on Remand

1. CAFA Altered Several Removal Principles but Failed to Address Burden of Proof

Congress explicitly altered several traditional removal principles when it enacted CAFA[214] but failed to address the burden of proof on remand.[215] Because of Congress's overt revision of certain common-law principles and subsequent failure to address the burden of proof, CAFA does not alter the traditional principle requiring the removing party to prove federal jurisdiction.[216] For example, CAFA permits courts of appeals to accept applications for review of remand decisions.[217] In general, prior to CAFA's enactment, removal principles dictated that neither the removing party nor the party seeking remand could appeal a remand decision.[218] Following CAFA's enactment, however, federal courts have acknowledged Congress's directive and have overridden the principle that remand decisions are not appealable.[219]

Furthermore, CAFA explicitly abrogated the traditional removal principle prohibiting aggregation of plaintiff claims to satisfy the requisite amount in

214. See *supra* Part II.A.1 for a review of the effects of CAFA on federal jurisdiction and the removal process.

215. *See, e.g.*, Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (stating that CAFA's text does not contain any language regarding shifting burden of proof to party opposing removal).

216. *See* Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58 (2d Cir. 2006) (stating that "CAFA's detailed modifications of existing law show that Congress appreciated the legal backdrop at the time it enacted this legislation" and declining to modify long-standing rule absent "clear textual directive"); Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 684-85 (9th Cir. 2006) (noting that Congress carefully inserted particular provisions to broaden federal jurisdiction and absence of such provision regarding burden of proof indicates reluctance to change jurisdictional principle).

217. 28 U.S.C. § 1453(c)(1) (2006); Braud v. Transp. Serv. Co. of Ill., 445 F.3d 801, 803 n.1 (5th Cir. 2006).

218. *See* Patterson v. Dean Morris, L.L.P., 444 F.3d 365, 367 (5th Cir. 2006) (noting that, generally, appellate review of orders of remand is not permitted).

219. *See, e.g.*, Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs. Inc., 435 F.3d 1140, 1142 (9th Cir. 2006) (interpreting CAFA's purpose of making orders concerning motions to remand class action be appealable); *see also* Wallace v. La. Citizens Prop. Ins. Corp., 444 F.3d 697, 699-700 (5th Cir. 2006) (dictum) (acknowledging that CAFA permits review of remand decisions to ensure prompt review of remand orders in class actions).

controversy.[220] Before Congress enacted CAFA, the United States Supreme Court determined that class action members' claims could not be aggregated to determine the amount in controversy.[221] Congress sought to close this loophole for plaintiffs' lawyers[222] and accordingly dismissed the common-law principle by explicitly permitting aggregation.[223] Congress also included a provision in CAFA that dismisses the common-law requirement of complete diversity.[224] Congress noted that complete diversity provides an additional means for plaintiffs' lawyers to avoid federal jurisdiction.[225] Therefore, Congress included a provision in CAFA that grants federal courts jurisdiction over interstate class actions in which any class member of at least 100 is a citizen of a different state from any defendant.[226] The statutory text and legislative history of CAFA indicate that Congress intended to resolve certain jurisdictional issues that plaintiffs' lawyers exploited to escape a federal forum.[227]

Several other traditional principles remain unaffected by CAFA[228] and have caused, in one instance, significant debate and different results in several federal circuits.[229] CAFA presents an interesting situation for federal court

220. 28 U.S.C. § 1332(d)(6) (2006) ("[T]he claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000 . . . .").

221. *See, e.g.*, Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973) (holding that class action members must individually meet jurisdictional amount requirement before court can exercise diversity jurisdiction) , *superseded by statute*, 28 U.S.C. § 1367; Snyder v. Harris, 394 U.S. 332, 336-37 (1969) (confirming that class member claims cannot be aggregated to satisfy requisite amount in controversy). *But cf.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549 (2005) (permitting federal courts to exercise supplemental jurisdiction over claims that fail amount-in-controversy requirement so long as one named plaintiff satisfies amount-in-controversy requirement for diversity).

222. *See* S. REP. NO. 109-14, at 10-11 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 11-12 (expressing concern about plaintiffs' lawyers ability to avoid federal forum by seeking damages less than $75,000 for each class member).

223. 28 U.S.C. § 1332(d)(6).

224. *See* 28 U.S.C. § 1332(d)(2), (5)(B) (granting federal courts original jurisdiction over class actions in which any member of class of at least 100 members is citizen of different state from any defendant). See *supra* notes 37-39 and accompanying text for a discussion of the common-law principle of complete diversity.

225. S. REP. NO. 109-14, at 10, *reprinted in* 2005 U.S.C.C.A.N. at 11 (acknowledging that plaintiffs' lawyers name plaintiffs or defendants to defeat complete diversity, thereby precluding federal diversity jurisdiction).

226. 28 U.S.C. § 1332(d)(2), (5)(B). This provision closes the complete-diversity loophole, because it permits a defendant to remove a matter to federal court despite sharing common citizenship with a plaintiff. Thus, Congress preempted the plaintiffs' lawyers' tactic of including one class member who shares state citizenship with one defendant to avoid diversity jurisdiction.

227. *See* Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 684-85 (9th Cir. 2006) (acknowledging that Congress explicitly altered particular jurisdictional principles when it enacted CAFA); S. REP. NO. 109-14, at 10-11, *reprinted in* 2005 U.S.C.C.A.N. at 11 (discussing abuses of federal judicial system in class actions due to current rules of federal jurisdiction).

228. See *supra* Part II.B.3 for a review of how CAFA's provisions have affected other removal principles, including when an amended action commences, which party bears the burden of proving a jurisdictional exception, whether remand decisions are appealable, and how the amount in controversy should be determined.

229. *See, e.g.*, Prime Care of Ne. Kan., LLC v. Humana Ins. Co., 447 F.3d 1284, 1285 (10th Cir.

interpretation because it is clear that Congress wanted interstate class actions to have a federal forum if CAFA's requirements are satisfied;[230] nevertheless, Congress exercised its intention through selective revisions to existing common-law principles and otherwise left untouched other principles.[231] Because courts presume that Congress acts with knowledge of the existing law, and because Congress left certain removal principles untouched when it enacted CAFA,[232] several courts have concluded that any principle not addressed in CAFA should continue to have full effect until superseded by explicit and valid legislation or otherwise overruled.[233] These courts thus conclude that the party seeking removal should continue to bear the traditional burden of establishing federal jurisdiction on a remand motion.[234] These courts fail, however, to consider whether the policies underlying the traditional removal principles correspond to the policies underlying CAFA.[235] As such, courts that continue to enforce the traditional burden have assumed uniformity is a worthy ideal without considering whether CAFA conforms to the fundamental policies of the removal policies CAFA left untouched.

2006) (stating that courts adopt three distinct positions regarding whether CAFA applies to actions commenced prior to CAFA's effective date but amended after its effective date). See also *supra* Part II.B.3.a for a review of how CAFA has impacted the determination of when an amended complaint commences.

230. *See* Class Action Fairness Act of 2005, S. 5, 109th Cong. § 2(b)(2) (2005) (declaring that purpose of CAFA is, inter alia, to establish federal court jurisdiction over interstate class actions of national importance).

231. *See Abrego*, 443 F.3d at 684-85 ("Congress carefully inserted into the legislation the changes it intended and did not mean otherwise to alter the jurisdictional terrain."). *But see* Twiford et al., *supra* note 66, at 67 (opining that Congress's purpose in adopting CAFA to remedy interstate class action abuses supports shifting burden of proof to party opposing jurisdiction).

232. *See, e.g.*, *Abrego*, 443 F.3d at 684 (acknowledging that CAFA reverses only certain established legal principles of federal subject matter jurisdiction); *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 696-97 (1979) (noting judicial assumption that legislators are aware of existing state of law); United States v. Male Juvenile, 280 F.3d 1008, 1016 (9th Cir. 2002) (recognizing that Court presumes Congress is cognizant of pertinent judicial decisions when it drafts legislation).

233. *See* Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (concluding that to change long-standing removal principle requiring removing party to establish federal jurisdiction, Congress must enact valid and explicit language contradicting that principle). *But see* Shapiro, *supra* note 199, at 97-98 (opining that judicial reliance on presumption that Congress acted with knowledge of existing law when enacting CAFA and, therefore, failure to change burden was intentional, is "probably a useful fiction").

234. *E.g.*, *Abrego*, 443 F.3d at 685 (holding that, under CAFA, burden remains on party seeking removal to establish removal jurisdiction). See *supra* notes 82-89 and accompanying text for a discussion of cases refusing to alter the traditional rule requiring the removing party to establish federal jurisdiction.

235. *See, e.g.*, Miedema v. Maytag Corp., 450 F.3d 1322, 1328-30 (11th Cir. 2006) (concluding that CAFA does not alter traditional burden on remand motion because removal statutes should be construed strictly and Congress acts with knowledge of existing law); *Abrego*, 443 F.3d at 683-84 (adhering to traditional burden on remand because federal courts have limited jurisdiction and presumption exists against removal); *Brill*, 427 F.3d at 447-48 (finding that traditional burden was not shifted to party seeking remand because CAFA's legislative history is insufficient to alter long-standing removal principle). See also *supra* Parts II.B.1-2 for a discussion of traditional removal principles and the policies justifying their application.

2. Policy Justifications for Continuing to Impose Burden on Removing Party

The party asserting federal jurisdiction should bear the burden of proving federal jurisdiction rather than requiring the party opposing federal jurisdiction to establish that it does not exist under any circumstances. Federal courts are courts of limited jurisdiction[236] and removal statutes are strictly construed to preserve limited jurisdiction.[237] Furthermore, all doubts regarding jurisdiction should be resolved in favor of remand to state court.[238] Accordingly, if federal jurisdiction is not established, the reviewing court should remand the matter to state court.[239]

Although Congress enacted CAFA to ensure fairer outcomes for class action litigants and enable federal courts to consider cases of national importance,[240] requiring the removing party to establish federal jurisdiction does not preclude compliance with these intentions. Because federal courts, Congress, and litigants expect the strict construction of removal statutes,[241] courts should preserve strict construction by requiring the removing party to establish federal jurisdiction. Permitting a change in the traditional principles absent an explicit revision would constitute an unfair burden on the affected party. Under CAFA, class members would be unfairly burdened by having to prove that remand is appropriate,[242] even though nothing in common law[243] nor CAFA[244] would have informed them of a new burden. Preserving the traditional burden presumes that federal jurisdiction does not exist,[245] thereby limiting federal courts' exercise of

236. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (averring that federal courts are authorized to exercise only that power granted to them by Constitution and statute).

237. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941) (determining that successive and consistent congressional actions indicate that removal statutes are to be strictly construed to limit federal jurisdiction).

238. *See* Diaz v. Sheppard, 85 F.3d 1502, 1505 (11th Cir. 1996) (construing removal jurisdiction narrowly, with doubts of federal jurisdiction favoring remand); *see also* Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993) (presuming plaintiff has choice of forum so that "[a]ny doubt regarding jurisdiction should be resolved in favor of the states" (citing Jones v. Gen. Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976))). In contrast, the Senate Judiciary Committee stated that courts should interpret CAFA's provisions with a strong preference for federal jurisdiction over properly removed interstate class actions. S. REP. NO. 109-14, at 43 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 40-41.

239. *See* 14B WRIGHT ET AL., *supra* note 70, § 3721 (reporting that federal courts require each element of federal jurisdiction to exist prior to accepting removal).

240. Class Action Fairness Act of 2005, S. 5, 109th Cong. § 2(a)(1), (b)(2) (2005).

241. See *supra* note 237 and accompanying text for a discussion of the federal court practice of strictly construing removal statutes.

242. *See* Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005) (characterizing alternative to traditional burden of proof as requirement that proponent of remand prove removal is improvident).

243. *See* Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447-48 (7th Cir. 2005) (confirming that traditional removal principle requires removing party to establish federal jurisdiction on remand motion).

244. *See id.* at 448 (opining that CAFA text does not address burden of proof on remand).

245. *See* Werner v. KPMG LLP, 415 F. Supp. 2d 688, 694 (S.D. Tex. 2006) (stating that proponent of federal jurisdiction must rebut presumption against federal subject matter jurisdiction).

jurisdiction and maintaining a policy of deference to state courts.[246]

Furthermore, conforming CAFA to traditional removal principles absent explicit contravention preserves judicial efficiency.[247] A significant case overflow for the federal judiciary would result from allowing class action defendants to remove the actions from state court and then requiring the class members to disprove federal jurisdiction.[248] Imposing the burden on the defendants preserves judicial efficiency because defendants would be unable to transfer the burden of demonstrating the propriety of remand to the class. Thus, the defendants would not have an incentive to remove all class actions to federal court. Also, defendants likely have knowledge of certain facts that would establish federal jurisdiction; therefore, the party with appropriate knowledge should be required to come forward and divulge such information to the court.[249]

3. CAFA's Legislative History Is Insufficient to Shift Burden of Proof

Advocates of shifting the burden of proof rely on a statement in the Senate Judiciary Committee report[250] on CAFA to justify their position;[251] nevertheless, the report has little significance because the committee delivered it after Congress approved the statute in question.[252] Thus, courts that have refused to defer to the committee report have appropriately considered only the language of CAFA to determine the statute's effect on existing legal principles.[253]

246. *See* 14C WRIGHT ET AL., *supra* note 70, § 3739 (reporting that federal courts act in manner deferential to state authority); *see also* Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 685 (9th Cir. 2006) (averring that requiring party seeking removal to establish federal jurisdiction comports with federal policy to avoid offending state sensitivities).

247. *See, e.g.*, Rodgers v. Cent. Locating Serv., Ltd., 412 F. Supp. 2d 1171, 1175 (W.D. Wash. 2006) (confirming that principles of fairness and judicial efficiency support presumption against propriety of removal).

248. *See* Roether, *supra* note 64, at 2788-89 (asserting that shifting burden to party seeking remand would lead to waste of judicial resources in event courts discover lack of subject matter jurisdiction after commencement of litigation).

249. *Brill*, 427 F.3d at 447-48.

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

251. *See, e.g.*, Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005) (explaining that, even though CAFA lacks burden-shifting language, legislative history clearly shows intent to shift burden to plaintiffs); Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1122-23 (C.D. Cal. 2005) (relying on CAFA's legislative history to determine that burden of proof has shifted to party seeking remand); *see also* S. REP. NO. 109-14, at 43, *reprinted in* 2005 U.S.C.C.A.N. at 41 ("[I]t is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court . . . .").

252. *See* S. REP. NO. 109-14, at 79, *reprinted in* 2005 U.S.C.C.A.N. at 73 (noting views of Senator Leahy that "[t]he circulation and filing of th[e] report occurred after passage of the legislation . . . . and on the same day that the President signed the measure into law"). See also *supra* note 64 and accompanying text for a review of the weight of legislative history for judicial interpretation of statutes.

253. *See* Morgan v. Gay, 471 F.3d 469, 472-73 (3d Cir. 2006) (stating that reliance on CAFA's legislative history is misplaced because actual text of CAFA does not reference burden shifting and is unambiguous, thus counseling against reference to legislative history); Miedema v. Maytag Corp., 450 F.3d 1322, 1328 (11th Cir. 2006) (dismissing defendant's reliance on legislative history and enforcing

In *Berry v. American Express Publishing Corp.*,[254] the United States District Court for the Central District of California opined that Congress did not include an explicit provision regarding the burden of proof on remand in CAFA because the committee report was sufficiently clear to shift the burden to the party seeking remand.[255] The district court's opinion, however, did not acknowledge that the report was issued after both houses of Congress had already passed the statute.[256] Clearly, Congress could not have relied on the language of a report that had not even been issued when it voted to pass CAFA.[257] Thus, courts cannot attribute such statements to the entire body of Congress.[258]

Furthermore, courts should defer to a statute's legislative history only when the statute is ambiguous on its face[259] and the legislative history is not equally ambiguous.[260] CAFA does not contain any language concerning the burden of proof on remand whatsoever, and the absence of such language should not be interpreted as ambiguity.[261] When a statute is silent, there is no ambiguity, because courts presume that Congress enacts with knowledge of the existing legal landscape.[262] Even if a court determined that CAFA's failure to address the burden of proof constituted ambiguity, the committee report is itself ambiguous and would not assist in resolving the issue.[263] Although the report clearly states

traditional rule, which requires defendant to establish federal jurisdiction); *Brill*, 427 F.3d at 448 (rejecting argument that legislative history suffices to shift burden of proof, because declaration in committee report does not carry weight of explicit statutory directive from Congress).

254. 381 F. Supp. 2d 1118 (C.D. Cal. 2005).

255. *Berry*, 381 F. Supp. 2d at 1122.

256. See *supra* note 252 and accompanying text for a review of the dissemination of the committee report after congressional approval of CAFA.

257. *See* S. REP. NO. 109-14, at 79 (2005), *reprinted in* 2005 U.S.C.C.A.N. at 73 (indicating that committee report was circulated after Congress had already enacted CAFA).

258. *See Brill*, 427 F.3d at 448 ("[W]hen the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more force than an opinion poll of legislators . . . .").

259. *See* United States v. Oregon, 366 U.S. 643, 648 (1961) (stating that it is unnecessary to consider legislative history when statute is clear and unambiguous); Rabin v. Wilson-Coker, 362 F.3d 190, 199 (2d Cir. 2004) (acknowledging that it is appropriate to consult legislative history to understand ambiguous statute).

260. *See* Stowell v. Sec'y of Health & Human Servs., 3 F.3d 539, 542-43 (1st Cir. 1993) ("[A]n ambiguous statute cannot be demystified by resort to equally ambiguous legislative history."). See also *supra* note 64 and accompanying text for a discussion of when federal courts use legislative history to understand an ambiguous statute.

261. Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 683 (9th Cir. 2006); *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 696-98 (1979) ("It is always appropriate to assume that our elected representatives . . . know the law . . . ."); United States v. Male Juvenile, 280 F.3d 1008, 1016 (9th Cir. 2002) ("In construing statutes, we presume Congress legislated with awareness of relevant judicial decisions." (citing *Cannon*, 441 U.S. at 696-704)).

262. *Abrego*, 443 F.3d at 683-84; *see also* Roether, *supra* note 64, at 2772-73 (discussing judicial treatment of statutory silence as evidence that Congress did not intend to legislate on issue).

263. Despite the clear statement in the committee report expressing the intent to shift burden of proof on remand to the party opposing federal jurisdiction, the committee report was filed after each house of Congress passed the proposed legislation. See *supra* note 252 and accompanying text for a discussion of Senator Leahy's testimony. Further, the committee statements do not relate to any

that "it is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court,"[264] the committee did not unanimously approve the report,[265] and the report was distributed after Congress enacted CAFA.[266] These facts alone disqualify the committee report as dispositive of the burden of proof issue.

Accordingly, courts should not rely on CAFA's legislative history to determine which party bears the burden of proving that federal jurisdiction exists on a remand motion. Discounting the clear statement in the Senate Judiciary Committee's report on CAFA, the statute is barren of any language to justify shifting the burden to the party seeking remand. Several federal courts have recognized these facts and have appropriately disregarded CAFA's legislative history and continued to impose the burden of proof on the removing party.[267] In *Abrego Abrego v. Dow Chemical Co.*,[268] the United States Court of Appeals for the Ninth Circuit determined that the lack of ambiguous statutory language regarding the burden issue warranted continued adherence to the traditional principle of burdening the proponent of federal jurisdiction.[269] The court of appeals relied on principles of limited federal jurisdiction and the presumption that Congress is aware of existing law to conclude that federal jurisdiction does not exist unless its proponent establishes its existence and, in the context of removal jurisdiction, that burden lies with the removing party.[270]

Because of CAFA's silence on the burden of proof issue and the questionable authority of the committee report, federal courts should continue to impose the traditional principle that requires the removing party to bear the burden of proving that the federal forum is appropriate. Courts, however, should not acquiesce to traditional removal principles simply because they exist.[271] The

particular provision of CAFA and, therefore, do not help clarify any portion of CAFA. *Brill*, 427 F.3d at 448. Congress defined the purposes of CAFA when it passed the legislation; however, the purposes neither presumed federal jurisdiction exists nor imposed the burden of disproving federal jurisdiction on class members. *See* Class Action Fairness Act of 2005, S. 5, 109th Cong. § 2(b) (2005) (enumerating purposes of CAFA, which did not refer to presumption of federal jurisdiction or intended allocation of burden of proof under CAFA).

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

265. *Id.* at 3 (reporting that thirteen members against five members of Senate Judiciary Committee voted in favor of passing CAFA in its proposed form).

266. *See id.* at 79 (stating that committee report was filed after Senate considered CAFA and after House of Representatives had already passed CAFA).

267. See *supra* notes 82-89 and accompanying text for a discussion of decisions that disregard CAFA's legislative history.

268. 443 F.3d 676 (9th Cir. 2006).

269. Miedema v. Maytag Corp., 450 F.3d 1322, 1329-30 (11th Cir. 2006); *Abrego*, 443 F.3d at 683-84; *see also* Brill v. Countrywide Home Loans, 427 F.3d 446, 447-48 (7th Cir. 2005) (asserting that CAFA's legislative history does not relate to any statutory language addressing sensible rule that party seeking removal must prove federal jurisdiction).

270. *Abrego*, 443 F.3d at 684; *see also* DiTolla v. Doral Dental IPA, LLC, 469 F.3d 271, 275 (2d Cir. 2006) (presuming that, when Congress enacted CAFA, it was aware that burden of proof traditionally rests with party invoking federal jurisdiction and that CAFA's silence on burden evidences decision not to change rule).

271. *Contra* Rodgers v. Cent. Locating Serv., Ltd., 412 F. Supp. 2d 1171, 1177-78 (W.D. Wash.

absence of any evidence of an explicit legislative change in CAFA to the burden of proof on remand does not warrant adherence to the traditional removal burden. Reviewing CAFA in the larger context of all removal statutes provides further guidance.

B. CAFA Is Sufficiently Different from Other Removal Statutes to Justify Consideration of the Impact of Removal Principles

1. Uniform Application of Removal Principles to CAFA Is Inappropriate

The recent dispute regarding which party bears the burden of proving federal jurisdiction under CAFA exposes a weakness in the foundation of removal principles. Resolution of this issue would be simpler if removal principles were universally applied or removal statute text were identical across statutes.[272] Nonetheless, courts that require the removing party continue to bear the burden of establishing federal jurisdiction under CAFA rely on the traditional removal principle that the proponent of federal jurisdiction must establish that jurisdiction exists.[273] None of these courts, however, address whether all traditional removal principles should be applied to each removal statute.[274]

It is inappropriate for courts to strictly apply removal principles from other removal statutes to CAFA because the language of CAFA differs significantly from the language of the other removal statutes and because CAFA's purpose justifies individual analysis.[275] For example, traditional removal principles extend the right of removal only to the original defendant or defendants.[276] CAFA,

2006) (opining that legislative history is unnecessary resource when courts have consistently applied traditional principle to statute in question). Although the district court stated that legislative history is unnecessary in the face of long-standing principles, the district court failed to acknowledge that CAFA added new provisions to § 1332 and created a new removal statute. *Id.* Thus courts have not had the opportunity to consistently apply long-standing principles to the new provisions.

272. See *supra* Part II.B.2 for a review of the federal judiciary's lack of uniformity in applying removal principles and the inconsistency of removal statute text.

273. See *supra* Part II.B.1 for a discussion of federal court treatment of the burden of proof on remand following a removal under CAFA.

274. *See, e.g.*, Miedema v. Maytag Corp., 450 F.3d 1322, 1329-30 (11th Cir. 2006) (finding that CAFA does not address long-standing principle of burden of proving federal jurisdiction, but failing to consider whether it is appropriate to apply preexisting removal principle to novel removal frameworks); Morgan v. Gay, Civ. No. 06-1371 (GEB), 2006 WL 2265302, at *3 (D.N.J. Aug. 7, 2006) (mem.) (concluding that CAFA's silence and committee report are inadequate to alter years of precedent, but failing to argue that precedent should be applied uniformly across multiple removal jurisdictions), *aff'd*, 471 F.3d 469 (3d Cir. 2006); Werner v. KPMG LLP, 415 F. Supp. 2d 688, 694-95 (S.D. Tex. 2006) (indicating that traditional rule requires that proponent of federal jurisdiction overcome presumption against federal jurisdiction, but failing to aver that removal principles apply universally to all removal statutes.)

275. See *supra* notes 113-17 and accompanying text for a comparison of relevant removal statute text.

276. *See* Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100, 107-08 (1941) (determining that § 1441 restricts right of removal to original defendant or defendants such that plaintiff cannot remove if made

however, permits removal by "any defendant."[277] This distinction has important implications as additional parties are added to a case as either additional defendants or if defendants file counterclaims against plaintiffs. Previously, the United States Supreme Court relied on the language in § 1441 that only "the defendant or the defendants" are entitled to remove a case to federal court.[278] Accordingly, the Court limited this right to the original defendant or defendants at the time the matter was filed and did not include plaintiffs subject to a counterclaim.[279] CAFA upsets this traditional rule, however, because it permits "any defendant" to remove a class action and does not otherwise limit this distinction.[280]

In addition, CAFA contains several provisions that explicitly contravene traditional removal principles.[281] In conjunction with the different language CAFA uses to grant the right of removal, CAFA's provisions have created many substantive changes to the common law of removal, including allowing a defendant to remove a matter even though the defendant is a citizen of the state wherein the complaint was originally filed, permitting a defendant to remove a matter without obtaining the consent of other defendants, and enabling removal even after one year has elapsed since the complaint's original filing date.[282] Because CAFA is substantially and sufficiently different in both form and substance from existing removal statutes under which the uniform principles were constructed, CAFA does not lend itself to uniform application of traditional removal principles. Therefore, courts cannot continue to apply all uncontroverted removal principles until federal courts determine that uniform application of removal principles is an important policy justification that warrants universal consideration.

Federal courts have considered, on several occasions, the underlying policy of removal statutes and have construed the statutes in a manner that adheres to

a defendant to counterclaims); *see also* Gerrish, *supra* note 114, at 139 (noting that federal courts confine privilege of removal under § 1441(a) and (c) to the original defendant or defendants).

277. 28 U.S.C. § 1453(b) (2006).

278. *Shamrock Oil*, 313 U.S. at 106-07 (analyzing revision of General Removal Statute that changed right of removal from "either party" to "defendant or defendants" as indicative of Congress's intent to narrow federal removal jurisdiction).

279. *Id.* at 108 (deciding that revised removal statute does not preserve right of removal for any plaintiffs).

280. *See* 28 U.S.C. § 1453(b) (extending right of removal to "any defendant without the consent of all defendants" without restricting privilege to certain class of defendants). Although courts presume that Congress acts with knowledge of existing law, Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 684 (9th Cir. 2006), courts will abandon existing law if Congress creates valid and explicit legislation that abrogates the existing law, Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005). CAFA creates ambiguity regarding which defendants may properly remove a matter because CAFA abandons "the defendant or the defendants" standard in favor of "any defendant." 28 U.S.C. § 1453(b). Therefore, CAFA is sufficiently different from existing removal statutes to warrant deliberate consideration of whether universal removal principles apply to CAFA.

281. See *supra* Parts II.A.1 and II.B.3 for a review of CAFA's explicit revisions of traditional removal jurisprudence.

282. See *supra* Part II.A.1 for a summary of how CAFA has substantively altered certain traditional removal principles.

the applicable policy.[283] The courts have acknowledged CAFA's purposes but have disregarded them in favor of traditional removal principles.[284] Congress enacted CAFA to ensure fairer outcomes for class litigants and to enable federal courts to resolve matters of national importance.[285] Congress intended for CAFA to provide a federal forum for interstate class actions; unquestioning application of traditional removal principles may ignore this intended purpose by denying defendants access to federal courts if they are unable to sufficiently demonstrate CAFA jurisdiction.[286] Further, the traditional removal principles were developed in the context of the General Removal Statute, which was intended to protect out-of-state defendants from potentially prejudicial local venues,[287] and are not uniformly applied.[288]

Because CAFA's intended purpose, like those of the other specific removal statutes,[289] is distinct from the intended purpose of the General Removal Statute, federal courts should treat it differently and should not apply uniform standards unless the Supreme Court first determines that it is appropriate to apply the general principles to CAFA. The Court should develop a policy-based decision-making process that considers which policies Congress intends to promote with each removal statute.[290] When the policies and substance of the statutes are consistent, uniform application of removal principles may be appropriate. The federal judiciary should not strive to adopt uniformity as a removal value, because individual removal statutes warrant special

283. See *supra* notes 101-11 and accompanying text for a review of how federal courts have deviated from traditional removal principles to conform to a removal statute's underlying policy.

284. *See, e.g.*, Morgan v. Gay, 471 F.3d 469, 473 (3d Cir. 2006) (opining that courts should not consider CAFA's findings and purposes as evidence of Congress's intent to alter traditional rule because there is no statement regarding burden shifting); Miedema v. Maytag Corp., 450 F.3d 1322, 1329-30 (11th Cir. 2006) (acknowledging defendant's argument advocating consideration of CAFA's purpose, but determining that statute's purpose fails to overcome well-established rule regarding burden of proof on remand).

285. Class Action Fairness Act of 2005, S. 5, 109th Cong. § 2(b) (2005) (establishing that CAFA is intended to, inter alia, ensure fair recoveries for legitimate class action claims and provide for federal jurisdiction over interstate class actions of national importance).

286. *See Miedema*, 450 F.3d at 1329 (concluding that appeals to CAFA's overriding purpose to provide federal forum "are unavailing in the face of CAFA's silence on the traditional, well-established rules that govern the placement of the burden of proof"). See also *supra* notes 45-57 and accompanying text for a review of how CAFA has altered federal diversity jurisdiction.

287. *See* FRIEDENTHAL ET AL., *supra* note 38, at 313 (characterizing right of removal as protection of defendant's interest from local bias and preservation of defendant's right to veto plaintiffs' choice of forum).

288. See *supra* Part II.B.2 for a review of the lack of uniformity in applying traditional removal principles.

289. *See, e.g.*, City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 834 (1966) (characterizing underlying policy of § 1443 as preserving state court role in trying state criminal matters); Bradford v. Harding, 284 F.2d 307, 310 (2d Cir. 1960) (construing § 1442, which addresses removal of cases against federal officers, as favoring removal because statute's underlying policy enables federal government to protect its rights and existence in federal forum).

290. *Cf.* Stowell v. Sec'y of Health & Human Servs., 3 F.3d 539, 542 (1st Cir. 1993) ("Courts should go very slowly in assigning talismanic importance to particular [statutory] words or phrases absent some cogent evidence of legislative intent.").

consideration.[291] The burden of proof issue that arose under CAFA[292] illustrates the need for nuanced explanations of why particular removal principles apply—uniformity may not always be ideal.[293]

2. Removal of Uniform Application from Universal Removal Principles

Although the United States Supreme Court stated that "the removal statutes and decisions of this Court are intended to have uniform nationwide application,"[294] federal courts have treated particular removal statutes separately from traditional removal principles.[295] In some instances, even though the removal statute at bar did not contain any explicit language contrary to the traditional principles,[296] the courts relied on the underlying policy of the statute to abrogate traditional removal jurisprudence.[297]

For example, for a removal under § 1442, courts do not require the consent of all defendants.[298] Traditionally, all defendants must join a notice of removal;[299] in *Bradford v. Harding*,[300] however, the United States Court of Appeals for the Second Circuit discarded this traditional principle.[301] Instead, the court of appeals focused on § 1442's underlying policy of allowing the federal government to vindicate its own interests and preserve its own existence.[302] Because of this underlying policy, the court of appeals deemed it necessary to interpret the removal statute in favor of removal.[303] Courts have further relaxed traditional principles as they apply to § 1442 by eliminating the well-pleaded complaint rule even though the statute does not explicitly permit that rule's

291. *See, e.g.*, *Peacock*, 384 U.S. at 834-35 (relying on underlying policy of § 1443 to deviate from removal principles); *Bradford*, 284 F.2d at 310 (foregoing removal uniformity to comply with Congress's motives behind § 1442).

292. See *supra* Part II.B.1 for a discussion of which party bears the burden of establishing federal jurisdiction for a CAFA removal.

293. See *supra* Part II.B.2 for a review of removal statutes that are not subject to uniform application of removal principles.

294. Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 705 (1972).

295. See *supra* Part II.B.2 for a review and discussion of instances where federal courts have declined to apply traditional removal principles to §§ 1442 and 1443.

296. *Compare, e.g.*, *Bradford*, 284 F.2d at 309-10 (disregarding traditional principle requiring consent of all defendants to remove matter to federal court), *with, e.g.*, 28 U.S.C. § 1442 (2006) (failing to explicitly contravene long-standing removal principle that all defendants must consent to removal).

297. *See, e.g.*, *Bradford*, 284 F.2d at 310 (determining that federal government's interest in vindicating its own rights justifies broad construction of § 1442 to entitle federal officers to federal forum). This broad construction of § 1442 disregards the traditional principle requiring consent of all defendants to remove a matter to federal court.

298. *Id.*

299. Chi., Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 248 (1900); Hewitt v. City of Stanton, 798 F.2d 1230, 1232-33 (9th Cir. 1986) (applying precedent and requiring each real party in interest to join notice of removal); P.P. Farmers' Elevator Co. v. Farmers Elevator Mut. Ins. Co., 395 F.2d 546, 548 (7th Cir. 1968) (concluding that each real party in interest must consent to removal).

300. 284 F.2d 307 (2d Cir. 1960).

301. *Bradford*, 284 F.2d at 310.

302. *Id.*

303. *Id.*

abrogation.[304] Although Congress did not address explicitly the well-pleaded complaint rule, the Second Circuit noted in *Poss v. Lieberman*[305] that § 1442 does not require that federal courts have original jurisdiction over a complaint in the same manner as § 1441.[306] Further, in *Davis v. Glanton*,[307] the United States Court of Appeals for the Third Circuit deviated from traditional removal principles when it required a party removing an action under § 1443 to show, by specific allegations, an inability to enforce in state court the civil rights law under which the defendant sought protection.[308] Federal courts apply this higher pleading standard to preserve the underlying federal judiciary policy of allowing state courts to try state criminal matters with the United States Supreme Court ensuring protection of federal rights.[309] Thus, where the language of subsequent removal statutes differs from the language of the General Removal Statute or policy reasons provide justification, courts have disregarded traditional removal principles even without explicit contravening statutory language.

These deviations illustrate that traditional removal principles are ideals and are clearly not rules commanding outcomes. Courts are not required to apply all removal principles unless expressly abrogated; the common law of removal consists of principles that are necessary tools for courts to render their decisions. Because federal courts do not always apply traditional removal principles, the courts considering the burden of proof on remand under CAFA should not automatically rely on removal jurisprudence when resolving the issue. Because courts have relied on the underlying policies of removal statutes to deviate from removal principles in the past, the federal judiciary should consider CAFA's stated purpose of enabling resolution of matters of national importance in a federal forum.[310] Requiring that the party seeking removal establish federal jurisdiction under CAFA is appropriate;[311] nevertheless, federal courts should be aware that continued uniform application of removal principles to new removal statutes could lead to conflicting policy issues.[312] Because uniform application

304. *Compare* Poss v. Lieberman, 299 F.2d 358, 359 (2d Cir. 1962) (concluding that defendant's ability to assert federal right as defense justifies exempting removal under § 1442 from well-pleaded complaint rule), *with* 28 U.S.C. § 1442 (2006) (containing no provisions regarding well-pleaded complaint rule).

305. 299 F.2d 358 (2d Cir. 1962).

306. *Poss*, 299 F.2d at 359; *see also* 28 U.S.C. § 1441(a) ("[A]ny civil action brought in a State court of which the district courts of the United States *have original jurisdiction*, may be removed . . . ." (emphasis added)).

307. 107 F.3d 1044 (3d Cir. 1997).

308. *Davis*, 107 F.3d at 1050 (requiring removing defendant to satisfy higher level of specificity in notice of removal to support removal under § 1443).

309. *See, e.g.*, City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 834 (1966) (recognizing that federal courts should allow state courts to try state criminal matters and intervene only when federal rights are compromised during trial).

310. Class Action Fairness Act of 2005, S. 5, 109th Cong. § 2(b)(2) (2005).

311. See *supra* Part III.A.2 for an analysis of the viability of applying the traditional burden of proof to CAFA removals.

312. See *infra* Part III.B.3 for a discussion of the possible policy implications of failing to address uniform application of removal principles.

evinces such issues, courts should consider anew whether traditional principles apply to removal statutes as they are enacted and should not unquestioningly defer to the traditional principles.

3. Important Policy Considerations Warrant Definitive Resolution of Removal Jurisprudence

The United States Supreme Court should develop a process that the federal judiciary can use to determine the appropriateness of applying traditional removal principles when Congress enacts new removal statutes with language that differs significantly from the General Removal Statute. This process should instruct subordinate courts that when evaluating application of traditional removal principles, the courts should consider the important policies underlying the new removal legislation. Such a stance would enable Congress to enact removal legislation that would operate within its intentions. This issue has emerged under CAFA removals[313] because separate courts,[314] and sometimes the same court,[315] have interpreted inconsistently which party bears the burden of proving federal jurisdiction on a remand motion. The legislature and federal judiciary both suffer in this situation because neither knows how the other will treat removal statutes. Regardless of whether either group gives deference to the other's treatment of removal statutes, without a general rule regarding whether uniform standards apply or whether each statute will be handled individually, neither Congress nor the federal court system can function efficiently in developing removal jurisdiction. Ambiguity may also lead to misinterpretation of statutes, exemplified in the small number of courts erroneously determining that CAFA shifted the burden of proof to the party seeking remand,[316] because it is unclear what legislative measures are necessary to avoid judicially created removal principles.[317]

Further, a lack of uniformity may lead to different federal circuits developing different approaches, not only to removal statutes in general, but to CAFA in particular. Only five circuits have definitively determined that the removing party continues to bear the burden of proof under CAFA on a remand

313. See *supra* Part III.B.1 for a discussion of how CAFA has exposed the potential weakness of removal jurisprudence.

314. *Compare, e.g.*, Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1122 (C.D. Cal. 2005) (finding that CAFA was enacted to expand federal jurisdiction over class actions and thus shifting burden to party opposing federal jurisdiction is appropriate), *with, e.g.*, *Abrego*, 443 F.3d at 684-85 (determining that CAFA's silence regarding traditional burden and limited legislative history addressing burden fail to overcome presumption against removal).

315. *Compare, e.g.*, Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005) (holding that CAFA's legislative history shifts burden of proof on remand to party opposing removal), *with, e.g.*, Rodgers v. Cent. Locating Serv., Ltd., 412 F. Supp. 2d 1171, 1178 (W.D. Wash. 2006) (concluding that CAFA's silence and legislative history are insufficient to create new presumption in favor of federal jurisdiction).

316. See *supra* Part II.A.2 for a discussion of cases that shifted the burden of proof to the opponent of federal jurisdiction.

317. See *supra* Part II.B.2 for a discussion of removal statutes that altered the applicable removal principles despite the absence of explicit statutory language to the contrary.

motion.[318] Thus, there remains the possibility that the circuits could develop a split.[319] The interesting situation that CAFA would spawn in a circuit split would be the development of favorable venues. Because CAFA concerns the removal of class actions, which can include residents of various states and thus various circuits, plaintiffs' lawyers will be aware of which circuits are favorable to the class and which courts will impose the burden of proof on the removing defendants.[320] Therefore, it is important to resolve uniformly not only the existing issue under CAFA but also the applicability of removal jurisprudence in general to prevent the development of favorable venues—an evil Congress sought to remedy directly with CAFA.[321]

These policy concerns are immediately applicable to resolving the current issue of the burden of proof under CAFA. Because it is unclear whether general removal principles are appropriately applied to CAFA[322] and because of the potential for establishing favorable federal forums, the United States Supreme Court should resolve the CAFA issues. Because CAFA is sufficiently distinct from existing removal statutes, general removal principles should not automatically apply.[323] Further, important policy considerations underlying CAFA, like those underlying §§ 1442 and 1443,[324] justify reconsidering whether traditional removal rules apply to CAFA. CAFA's distinctive framework, including removal requirements and policy considerations, requires separate consideration from existing removal statutes and, therefore, warrants Supreme Court consideration of CAFA to clarify how Congress can draft removal legislation that engenders Congress's intentions and avoids the development of

318. *See* Morgan v. Gay, 471 F.3d 469, 473 (3d Cir. 2006) (determining that party invoking CAFA jurisdiction bears burden of establishing federal jurisdiction); DiTolla v. Doral Dental IPA, LLC, 469 F.3d 271, 275 (2d Cir. 2006) (concluding that CAFA has not changed traditional rule requiring party seeking federal forum to prove federal jurisdiction is appropriate); Miedema v. Maytag Corp., 450 F.3d 1322, 1329-30 (11th Cir. 2006) (resolving burden of proof issue in favor of retaining traditional burden placed on proponent of federal jurisdiction); *Abrego*, 443 F.3d at 685 (holding that, under CAFA, burden of establishing federal jurisdiction remains on party seeking removal); Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (determining that Congress's failure to alter existing burden of proof explicitly results in application of traditional burden against party seeking removal under CAFA).

319. For a general discussion of the benefits and consequences of fostering a circuit split, see Wallace, *supra* note 45, at 928-32.

320. *Cf.* S. REP. NO. 109-14, at 10-11 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 11-12 (discussing plaintiffs' lawyers' abuse of judicial system to avoid federal jurisdiction for presumably favorable state venues); Cabraser, *supra* note 40, at 549 (implying that, prior to CAFA's enactment, class action plaintiffs could avoid diversity jurisdiction by naming class representative from defendant's home state).

321. S. REP. NO. 109-14, at 10-11, *reprinted in* 2005 U.S.C.C.A.N. at 11-12.

322. See *supra* Part III.B.1 for a discussion of why uniform application of removal principles to CAFA is inappropriate.

323. See *supra* Part III.B.2 for a discussion of CAFA's distinctive characteristics that preclude automatic application of general removal principles.

324. See *supra* Parts II.B.2 and III.B.2 for a discussion of the purposes and policies underlying §§ 1442 and 1443 and their impact on traditional removal principles.

favorable venues.[325] More generally, the Supreme Court should establish a means by which lower federal courts may appropriately determine whether traditional removal principles apply to novel removal frameworks.

IV. CONCLUSION

Congress enacted CAFA[326] to ensure fairer outcomes for class action litigants and to provide a federal forum for interstate class actions of national importance.[327] To preserve the opportunity to litigate matters in federal courts, the Senate Judiciary Committee declared its "intent . . . that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court."[328] This expression caused several federal district courts to alter the long-standing removal principle that required a removing party prove the propriety of a federal forum. Consequently, those district courts determined that the party seeking remand now bears the burden of disproving federal jurisdiction.[329]

Shortly thereafter, several circuit courts of appeals and other district courts disagreed and determined that CAFA's legislative history was insufficient to change the traditional burden of proof.[330] When applying previous removal statutes, however, federal courts have deferred to articulated legislative policy rather than the common law of removal.[331] Nevertheless, federal courts currently require that the proponent of removal bear the burden of establishing that removal is appropriate.[332] In so ruling, these courts failed to address the reason

325. See *supra* Part II.A.1 for a review of how CAFA altered the traditional removal framework and Congress's purposes in enacting CAFA.

326. Pub. L. No. 109-2, § 1, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

327. Class Action Fairness Act of 2005, S. 5, 109th Cong., § 2(b)(1)-(2) (2005).

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

329. *See* Natale v. Pfizer Inc., 379 F. Supp. 2d 161, 168 (D. Mass. 2005) ("Under [CAFA], the burden of removal is on the party opposing removal to prove that remand is appropriate."); Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740, at *2 (W.D. Wash. July 27, 2005) (determining that CAFA shifted burden of proof to party opposing federal jurisdiction); Berry v. Am. Express Publ'g Corp., 381 F. Supp. 2d 1118, 1122-23 (C.D. Cal. 2005) (finding that burden of proof on remand shifted to party seeking remand).

330. *See, e.g.*, *Abrego*, 443 F.3d at 685 (overruling district court decisions in *Waitt* and *Berry* and refusing to shift burden of proof on remand to party seeking remand); Moniz v. Bayer A.G., 447 F. Supp. 2d 31, 34 (D. Mass. 2006) (refusing to require party seeking remand to bear burden of disproving federal jurisdiction because *Abrego* implicitly overruled *Natale*).

331. *See, e.g.*, Davis v. Glanton, 107 F.3d 1044, 1047-48 (3d Cir. 1997) (acknowledging that parties removing action pursuant to civil rights removal statute must satisfy higher pleading burden although not expressed in statute); Bradford v. Harding, 284 F.2d 307, 310 (2d Cir. 1960) (foregoing traditional removal principle to construe removal statutes strictly to give deference to federal officer removal statute's underlying policy).

332. *See, e.g.*, DiTolla v. Doral Dental IPA, LLC, 469 F.3d 271, 275 (2d Cir. 2006) (applying long-standing rule of removal, and concluding that CAFA has not shifted burden of proving federal jurisdiction to party seeking remand); Miedema v. Maytag Corp., 450 F.3d 1322, 1328-30 (11th Cir. 2006) (adhering to traditional removal principles despite passage of CAFA, and, therefore, requiring proponent of federal jurisdiction to prove it is appropriate); *Abrego*, 443 F.3d at 685 (continuing to require removing party under CAFA to establish propriety of federal forum).

for presumptively and unquestioningly applying traditional removal principles to CAFA or, for that matter, the reason for applying traditional removal principles universally to diverse removal statutes.

Because applying existing removal principles to CAFA creates ambiguity, the federal judiciary should reconsider the vitality and validity of slavish adherence to long-standing removal principles.[333] Instead, federal courts should inquire as to whether the policies underlying the traditional removal principles conform to the policies of newly enacted removal statutes.[334] In instances in which the policies are compatible, federal courts should adhere to the common law of removal. Where the policies are incompatible, courts should consider whether Congress's intended policies displace traditional removal principles and justify departure from those principles.

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333. See *supra* Parts II.A.2 and II.B.1 for a review of how CAFA has created ambiguity in the federal judiciary regarding the burden of proof on remand.

334. See *supra* Part III.B.2 for a discussion of how federal courts have relied on the underlying policies of other removal statutes to depart from traditional removal principles.

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