Statement of

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House Committee on the Judiciary
Subcommittee on Courts, the Internet,
and Intellectual Property

HEARING ON
FEDERAL JUDICIAL CODE REVISION

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Mr. Chairman, Ranking Member Berman, and Members of the Subcommittee:

Thank you for the opportunity to express my views at this hearing on the Federal Courts Jurisdiction Clarification Act of 2005, proposed legislation to clarify and improve statutes governing the subject matter jurisdiction of the federal courts. The Judicial Conference of the United States is to be commended for having put together an excellent set of proposed revisions that address many of the jurisdictional issues that have caused difficulties for the federal courts in recent years. I strongly support virtually all of the proposed changes. My testimony raises for the Subcommittee's consideration several minor revisions to the Judicial Conference's proposed approach, but I can say unhesitatingly that the proposed legislation as written represents a significant improvement over current law.

My Background

Since 1989, I have served as Chief Counsel of the Washington Legal Foundation, a non-profit public interest law firm located in Washington, D.C. I am a graduate of Harvard College and the University of Michigan Law School. My interest in issues concerning federal court jurisdiction was piqued by the two years I spent as a clerk for a federal judge and has continued during my 25 years as a litigating attorney. Most of my practice focuses on federal court litigation, so I am very familiar with current statutes governing federal court jurisdiction and many of the issues that typically arise regarding the proper scope of that jurisdiction.

The Washington Legal Foundation regularly participates in appellate cases that address the circumstances under which parties sued in State court should be permitted to remove the case to federal court. *See, e.g.*, *Lincoln Property Co. v. Roche*, No. 04-712 (U.S., dec.

pending); *Collins v. American Home Products Corp.*, 343 F.3d 765 (5th Cir. 2003), *cert. denied*, 125 S. Ct. 1823 (2005). WLF strongly believes that when residents of a State are engaged in litigation with nonresidents of the State, the right of the nonresidents to have their claims heard in a federal court needs to be protected, in order to protect them from the home-team biases sometimes displayed by State courts.

Major Objectives That Should Drive Any Revisions

When one evaluates current statutes governing federal court jurisdiction, three principal goals ought to be borne in mind. First, the statutes ought to be clear. When clearly defined jurisdictional limits are established, courts and litigants devote far less of their resources to disputes over whether a case belongs in federal court. When the federal circuit courts are divided over the meaning of a jurisdictional statute, that is *prima facie* evidence that the statute is not sufficiently clear, and that Congress should step in to clear up the confusion -- given that the Supreme Court lacks the docket space to address more than a small fraction of circuit splits. When Congress does step in, it is important that the new rule be both easy to understand and easy to enforce; otherwise, parties inevitably will devote considerable resources to contests over the meaning of any new potential ambiguities.

Second, the statutes ought to honor the Founders' commitment to diversity jurisdiction as an essential feature of the federal court system. Both James Madison and Alexander Hamilton viewed diversity jurisdiction as an important safeguard against local prejudices directed at nonresident litigants. The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts; indeed, until the creation of federal question jurisdiction a century later, diversity jurisdiction cases were the prime staple of federal court dockets. The rationale underlying

diversity jurisdiction -- protection against local prejudice -- also caused the drafters of the Judiciary Act of 1789 to grant nonresident defendants the right to remove diversity cases from State court to federal court. While limitations on resources necessitate placing reasonable limits on federal court jurisdiction, those limitations should not be invoked as justification for ignoring the important role that diversity jurisdiction and removal jurisdiction have played for the past 216 years in protecting nonresident litigants from local prejudice.

Third, the statutes ought not to be written so as to allow one party to litigation to manipulate the system to prevent the other party from exercising his or her right to invoke the federal court's diversity jurisdiction. When complete diversity of citizenship exists among plaintiffs and defendants and the amount in controversy is sufficiently large, plaintiffs are entitled to file their lawsuit in federal court. If they choose instead to file their suit in a State's court and the defendants are not citizens of that State, the Defendants are entitled to remove the case to federal court, even if the suit does not raise any issues of federal law. As Justice Story explained nearly 200 years ago, a plaintiff does not enjoy any preference when it comes to choosing whether his suit is to be heard in a federal court or a State court; rather, federal law traditionally has afforded a defendant the same rights as a plaintiff to decide to litigate their case in the federal courts. *Martin v. Hunter's Lessee*, 1 Wheat (14 U.S.) 304, 348 (1816). Nonetheless, plaintiffs that wish to litigate their clams in State court (as many do) often take steps designed to thwart defendants' exercise of their removal rights. Accordingly, if those rights are to be protected, Congress needs to adopt statutes designed to prevent plaintiffs from inappropriately interfering with removal rights.

I address the provisions of the proposed legislation with each of those three goals in

mind.

Section 2. Resident Alien Provision

Section 2 of the proposed legislation addresses ambiguities regarding alienage jurisdiction created in 1988 when Congress amended 28 U.S.C. § 1332(a) to provide that permanent resident aliens should be deemed, for purposes of determining federal court jurisdiction, to be citizens of the State in which they permanently reside. Section 2 eliminates those ambiguities while retaining the purpose of the 1988 amendment: to preclude jurisdiction under § 1332(a)(2) over suits between a citizen of a State and a permanent resident alien residing in the same State. I fully support the proposed change.

Section 3. Citizenship of Corporations and Insurance Companies With Foreign Contacts

Section 3 addresses the issue of which States' citizenship(s) ought to be attributed to a corporation that either: (1) is incorporated in the United States but has a principal place of business overseas; or (2) is incorporated abroad but has a principal place of business in the United States. Federal courts have been badly split on this issue, in light of ambiguities in the current version of 8 U.S.C. § 1332(c)(1). I support the proposed change because it provides a clear rule of decision and because it does not deny federal court access to corporations in situations in which they have reason to fear local prejudice.

Section 4(a). Joinder of Federal Law Claims with Claims that Would Not Be Removable if Filed Separately

The current version of 28 U.S.C. § 1441(c) authorizes a State-court defendant to remove the entire suit to federal court if at least one of the claims raises a federal question, even if the suit also contains other claims that are "separate and independent" from the federal claim

and could not otherwise be removed. This provision has led to enormous difficulties, with some courts going so far as to declare the provision unconstitutional -- because it purports to grant federal courts jurisdiction over matters outside their constitutionally delegated original jurisdiction (*e.g.*, State-law claims involving citizens of a single State). Section 4(a) provides an admirable solution: it would continue to permit removal of the entire case but then *require* remand of the claims that are "separate and independent" of the federal claim(s). This solution eliminates all the difficulties in the current law identified by federal courts but still retains a federal forum for federal claims.

I have one minor editorial suggestion. Section 4(a) refers (in a proposed 28 U.S.C. § 1441(c)(i)(B)) to "a non-removable claim that is not part of the same case or controversy (within the meaning of Article III of the Constitution) as the [federal] claim." I would change the first part of that clause to read, "a claim that could not be removed if filed as a separate action and that is not part . . ." I fear that the word "non-removable" might be subject to misinterpretation because it has a acquired a generally accepted meaning in other contexts; it refers to causes of action that could never be removed under *any* circumstances. *See, e.g.*, 28 U.S.C. § 1445 (listing "nonremovable actions" that may never be removed to federal court). I assume that the intent of Section 4(a) is to operate more broadly than that. For example, if the "separate and independent claim" is a State-law cause of action between citizens of different States but seeks damages of less than $75,000, I assume that Section 4(a) was intended to be applicable. But some courts might not view such a claim as a "non-removable claim," and thus might deem proposed § 1441(c)(i)(B) to be inapplicable. The alternative language I have suggested might eliminate the potential confusion.

Sections 4(b)(1), (b)(2)(A), & (e). Separating the Removal Statute Into Civil and Criminal Statutes

Sections 4(b) and 4(e) of the proposed legislation would divide the rules governing removal of civil and criminal cases into separate sections. Currently, both sets of rules are included in 28 U.S.C. § 1446. The proposed legislation would move the rules governing removal of criminal cases into a new section, to be designated § 1446a. The Judicial Conference explains that its proposal is designed to make the provisions more readily understandable. I have not noticed that the current inclusion of both sets of rules in § 1446 has led to any confusion, but I am certainly not opposed to the proposal (which includes no changes in the substance of the rules).

Section 4(b)(3). Removal in Multiple-Defendant Cases

Most of the procedures for removing a civil case from State court to federal court are set forth in 28 U.S.C. § 1446(b). A major deficiency in § 1446(b) is that it speaks of removal by "the defendant" and does not explicitly address what procedures should be followed when (as often is true) there is more than one defendant in the case. That deficiency has led to enormous confusion in the federal courts when removal is sought in a multiple-defendant case. Section 4(b)(3) does an excellent job of clearing up that confusion. In particular, it addresses when the 30-day removal period begins to run when defendants are not served on the same day. The proposed rule prevents plaintiffs from using scattered service dates to obstruct removal, by providing: (1) each defendant is provided 30 days after it has been served, to file or join in a removal petition; and (2) an earlier-served defendant may consent to a subsequent removal during the 30-day period following service on a later-served defendant, even though

the earlier served defendant failed to file a timely removal petition of its own. These provisions, which have already been adopted by case law in a number of circuits, greatly facilitate coordination among defendants and prevent a later-served defendant from being denied access to a federal forum simply because an earlier-served defendant may not have been sophisticated enough to have been aware of removal rights.

I have one suggested edit. The first sentence in proposed § 1446(b)(2) reads, "In actions involving two or more defendants, all defendants must join in or consent to the removal of the action." I would add, following the words "all defendants," the following clause: "who have been properly joined and served." The proposed language is borrowed from 28 U.S.C. § 1441(b) (which addresses which defendants should be taken into account in determining whether any of the defendants is a citizen of the forum state). Not infrequently, a plaintiff will *never* serve one or more of the plaintiffs. Without the proposed language, a plaintiff could argue that the failure of unserved defendants (whose location may be unknown to the other defendants) to join in or consent to the removal petition defeats removal. Defendants should not be placed in the position of having to track down unserved defendants to obtain their consent to removal and to complete the search within a 30-day period, or else forfeit their right to a federal forum. By adding the "properly joined" language, Congress would make clear that, as federal courts have made clear for more than a century, a fraudulently joined defendant need not be considered for purposes of determining diversity of citizenship, nor consent to removal.

Section 4(b)(4). Authorizing Removal After One Year.

It has long been true that a defendant seeking to remove a case to federal court must do

so within 30 days of service; or, if the case stated by the initial pleading was not removable, within 30 days of the date on which "it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b). In 1988, Congress imposed a significant new limitation on the timing of removal petitions: they may never be removed more than one year "after commencement of the action." That limitation applies even if the defendant seeking removal was not served until well after the action was commenced, and even if the case did not become removable until after the one-year limitation period has expired.

The Judicial Conference correctly recognizes that the one-year limitation period causes considerable hardship for defendants, and that plaintiffs often seek to manipulate the rule to their advantage -- by waiting until after the period has expired either to: (1) dismiss a defendant whose citizenship destroyed diversity and thereby prevented removal, even though the plaintiff never had any intention of proceeding to trial with that defendant; or (2) reveal for the first time that he seeks damages in excess of the minimum jurisdictional amount. The Judicial Conference proposes to address that concern by amending § 1446(b) to provide that the one-year limitation period is inapplicable when "equitable considerations warrant removal."

I agree with the Judicial Conference that the one-year limitation period has become a major problem, but I respectfully disagree with its solution. I agree with Professor Heller that a better solution would be to do away with the one-year limitation period altogether. In 1988 when it adopted the provision, Congress was apparently concerned that late removals would disrupt on-going proceedings in which a State court judge had already invested substantial resources. But even without the one-year limitation period, there are still substantial restraints on a defendant who seeks to remove a case that has been pending for a considerable period of

time. In particular, the defendant may only remove within 30 days of the date on which the case's removability was first ascertainable. Proposed § 1446(b)(5) does a good job of spelling out when removability should be deemed first ascertainable ("Information in the record of the state proceeding, or in response to discovery, shall be treated as an "'other paper'"); that provision makes clear that a removal petition would be untimely if a defendant failed to ascertain that a suit was removable because he was delinquent in undertaking discovery. I note that before the one-year limitation period was adopted in 1988, the federal courts were not flooded with late-filed removal petitions, so deletion of the limitation period is unlikely to have any significant impact on federal court case loads.

Moreover, the only way that it can ever take more than a year for removability to become ascertainable is for a plaintiff to delay in providing the pertinent information. It may be that the plaintiff delayed in providing the information to gain a tactical advantage, or it may simply be that the plaintiff only discovered the information (or made a decision to switch litigation tactics) well after the suit was filed. Either way, the plaintiff can rightly be held accountable for any adverse consequences (caused by removal) brought about by his inaction or change in tactics. Doing away with the one-year rule will eliminate any incentive plaintiffs may have to employ strategies to stall the case in hopes of delaying the ascertainment of facts that would render the case removable.

A principal flaw in the proposed legislation is that it would encourage endless litigation over what is meant by the phrase, “unless equitable considerations warrant removal.” The proposed legislation is virtually silent on that point. It should be a principal aim of Congress when "clarifying" jurisdictional statutes to adopt provisions that provide clarity, not ones that

invite new litigation.

If the Committee decides to follow the basic approach of the proposed legislation, I would amend proposed § 1446(b)(3) to provide as much detail as possible regarding what sort of "equitable considerations" warrant removal after expiration of the one-year limitation period. I would begin by moving the following language from proposed § 1446(b)(4) to proposed § 1446(b)(3):

> If the notice has been filed more than 1 year after commencement of the action, such a finding [that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal] shall be deemed to satisfy the equitable considerations. . .[1]

I would also include the language that the Judicial Conference included in its Section-by-Section analysis of the proposed legislation:

> In determining the equities, the district court will . . . consider such factors as whether the plaintiff had engaged in manipulative behavior, whether the defendant had acted diligently in seeking to remove the action, and whether the case had progressed in state court to a point where removal would be disruptive.

Another possible equitable consideration: whether the defendants first contemplated seeking removal only after the State judge gave an indication that he was likely to rule for the plaintiff. The more such equitable considerations that are spelled out explicitly in § 1446(b)(3), the less likely it is that courts will reach conflicting results regarding the relevant equitable factors and regarding what quantum of equitable factors would "warrant" removal.

Section 4(b)(4). Amount in Controversy.

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[1] This language seems out of place in proposed § 1446(b)(4) (which deals with jurisdictional amount issues) and much more naturally fits within proposed § 1446(b)(3) (which deals with timing issues).

Current law bars the removal of diversity cases unless the amount in controversy is at least $75,000. As the Judicial Conference notes, the amount-in-controversy requirement can complicate removal issues because frequently the complaint will not list damages sought, or the plaintiff will purposely "low ball" the damage figure, knowing that State courts will not deem him bound by that removal-defeating figure.

The proposed legislation would allow removal of virtually any diversity case, regardless of the amount listed in the complaint.[2] At that point, the propriety of removal will depend on whether "the district court finds by the preponderance of the evidence that the amount in controversy exceeds" the jurisdictional amount. The proposed change would unquestionably help to counteract the efforts of some plaintiffs to obstruct removal by specifying a low-ball damage figure or no damage figure at all. I have two concerns, however. First, if Congress adopts this proposal, it will need to provide additional guidance regarding when removability should first be deemed ascertainable by defendants. This proposed provision suggests that a defendant should be permitted to remove a case based on his independent knowledge of the plaintiff's injuries, without regard to what the plaintiff may have claimed. If that is so, one can

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[2] Proposed § 1446(b)(5) allows the defendant to remove and assert his own amount in controversy if:

> [T]he initial pleading seeks (i) non-monetary relief; or (ii) a money judgment but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded.

My understanding of State court practices is that virtually all States permit recovery of damages in excess of the amount demanded. Thus, the proposed rule would permit removal of *any* diversity case, so long as the defendant believes in good faith that the jurisdictional amount exceeds $75,000.

expect that numerous plaintiffs will challenge removal on the basis that the defendant fail to meet the 30-day removal deadline; they will argue that the defendant should have known immediately, based (for example) on the availability of pain-and-suffering and punitive damages, that the case was removable, and should not have waited to obtain the plaintiff's corroborating statement before filing the removal petition. Second, federal judges may be asked to conduct time-consuming mini-trials soon after the removal petitions have been filed, in order to determine whether the jurisdictional amount has been met; and, of course, the parties' roles will be reversed at any such mini-trial, with the plaintiff bad-mouthing his or her own claim.

I ask the Committee to consider an alternative: doing away with jurisdictional amount requirements in those diversity cases in which the amount of damages is inherently unquantifiable. Most tort cases fit into that category, particularly if the plaintiff claims to have suffered personal injury. In such cases, the plaintiff can claim -- in addition to any medical expenses, lost income, and loss of bodily function -- both pain-and-suffering damages and punitive damages. Such damages are taken into account in determining whether the minimum jurisdictional amount has been reached. *See, e.g.*, *Bell v. Preferred Life Assurance Society*, 320 U.S. 238 (1943). I find it hard to believe that any district court judge, after conducting a mini-trial in connection with a motion to remand a personal injury case, could honestly determine by a preponderance of the evidence that no reasonable jury could award the plaintiff at least $75,000 in pain-and-suffering and punitive damages. Accordingly, I recommend that the Committee consider amending 28 U.S.C. § 1332 by eliminating the minimum jurisdictional amount in all tort cases, or at least in some significant subset of tort cases -- such as personal

injury claims. I note that H.R. 420, recently adopted by the House of Representatives, provides a definition of "personal injury claims" (for purposes of defining the types of claims subject to an anti-"forum shopping" provision). The Committee may want to adopt that same definition of "personal injury claim" here.

Because virtually all plaintiffs bringing personal injury claims seek damages in excess of $75,000, the elimination of the minimum jurisdictional amount for such claims is unlikely to have any measurable effect on federal court case loads. Probably the only cases that will be added to federal court dockets that are not there now will be cases in which the defendant filed in state court with every intention of recovering in excess of $75,000 and then successively defeated removal by hiding for more than a year the full extent of damages sought.

Indeed, there is little evidence that the minimum jurisdictional amount requirement has *any* appreciable effect on federal court case loads. It serves primarily as an additional weapon for parties seeking to defeat federal court jurisdiction, with the result that federal judges need to devote resources to refereeing such disputes. When I was clerking for a federal judge in 1980-1982, the jurisdictional amount for both diversity and federal question cases was $10,000. The subsequent elimination of the jurisdictional amount in federal question cases did not result in significant increases in the number of cases filed in federal court, nor did the more-than-seven-fold increase in the jurisdictional amount in diversity cases lead to a significant decrease.

Section 5. Indexing the Amount in Controversy.

The proposed legislation would amend 28 U.S.C. § 1332(a) to require the indexing of the minimum jurisdictional amount requirement in diversity cases, so that the amount would keep pace with inflation. In general, Congress over the past century has been increasing the

jurisdictional amount in diversity cases far faster than the rate of inflation. The Judicial Conference's rationale is that an indexing provision would save Congress the trouble of having to tinker periodically with the jurisdictional amount.

I do not feel strongly one way or the other about this proposal, but in general I oppose it. Changing the jurisdictional amount every eight to ten years has not proven particularly burdensome to Congress. To the contrary, I think it is a good thing to provide Congress on a periodic basis with a good rationale to revisit jurisdictional amount issues. Indeed, over the years Congress has regularly engaged in major revisions of its philosophy on minimum jurisdictional amount requirements. They did not exist at all for most of the 19th century, a time when federal question jurisdiction did not exist and most of the federal court docket consisted of cases based on diversity jurisdiction. Over the next 100 years, jurisdictional amounts were gradually increased in lock-step for both diversity and federal question cases. Later, the jurisdictional amount was eliminated entirely in federal question cases, while Congress continued the gradual increase in the jurisdictional amount for diversity cases. The attitude of future Congresses may change as the size of federal court dockets change and as preserving diversity jurisdiction in federal court is deemed either more or less important by Congress. I see little reason to lock in today the size of future increases in the jurisdictional amount.

Sept. 2005 Proposal -- Facilitating Use of Declarations to Specify Damages

In September 2005, the Judicial Conference proposed an additional amendment to 28 U.S.C. § 1441(a) and 1447, to "facilitate use of declarations to specify damages." The idea behind the legislation is to allow plaintiffs to keep their cases out of federal court if they agree

to be bound by a declaration that they will forgo any damages in excess of the jurisdictional amount in diversity cases (currently $75,000). In general, I support the use of such declarations, as a way to minimize fights over the amount in controversy. A defendant has little basis for complaint if there is no possibility that they could be held liable in State court for more than $75,000. Federal court is not intended to serve as a small claims court; and while out-of-state defendants may face prejudice in State courts even in small cases, at least their potential exposure is much smaller.

My only reservation is that any legislation needs to have numerous protections to ensure that a plaintiff will remain bound by any declaration of intent to forgo damages in excess of $75,000. Those protections should include a provision that will allow the defendant to return to federal court (or go there for the first time) if the defendant reneges on his promise. Federal courts would likely be much more willing to enforce this federal provision than would State courts. The provision should also be made explicitly inapplicable to class actions.