No. 18-1578

In the
Supreme Court of the United States

PFIZER, INC.,
Petitioner,

v.

ALIDA ADAMYAN, *et al.*,
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RELATED PROCEEDINGS

Subsequent to the filing of this Petition, Pfizer filed a second petition for certiorari in these cases, *Pfizer Inc. v. Superior Court of California, County of Los Angeles*, No. 19-278, arising from the California state courts. In that petition, Pfizer petitions for review of the California state courts' determination under federal law that, by litigating the federal subject matter issues presented in this Petition, Pfizer forfeited the personal jurisdiction defenses that this Court recognized in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

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INTRODUCTION

Respondents' brief in opposition only underscores why this Court should grant review to decide whether judicial proposals for joint trial can trigger mass action removal under the Class Action Fairness Act ("CAFA"). Respondents do not dispute the importance of this question, the lower courts' conflicting views on the topic, or its likely recurrence. Instead, they urge the Court to sit this one out. But the circumstances of this case only highlight the need to answer the question. Based on an atextual reading of CAFA's text and a fundamental misunderstanding of its purpose, Pfizer was deprived of its federal statutory right to remove an action in which *thousands* of plaintiffs' claims have been joined in a prototypical mass action. This Court should grant review and reverse the lower courts' unlawful remand.

The straight-forward arguments on this question have already been ventilated in the lower courts' conflicting opinions. Respondents do not dispute that the Circuits have reached inconsistent conclusions on the question presented. And that disagreement is not academic. In particular, although Respondents now downplay as *dicta* the Seventh Circuit's reasoning in *Koral v. Boeing Co.*, 628 F.3d 945, 947 (7th Cir. 2011), district courts around the country have repeatedly followed its reasoning to deny mass action removal based on judicial proposals for joint trial. That is precisely what happened here, at Respondents' express urging. Without this Court's review, *Koral*'s flimsy logic will continue to influence courts nationwide to remand cases that were properly removed.

Respondents' brief in opposition also confirms that this Court can and should review the question presented. Critically, Respondents do not dispute that the Ninth Circuit denied review based on its agreement with the district court's remand order and thus do not dispute that the merits of the order are reviewable by this Court under *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014). Instead, they suggest the Ninth Circuit might have relied on the district court's fallback argument that the California courts had not actually proposed trying all claims together. But that is implausible because it would have required the Ninth Circuit to defy its own *en banc* decision in *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1224 n.5 (9th Cir. 2014) (en banc). And even if that were the basis of the Ninth Circuit's ruling, it would only further support this Court's review because it is inconsistent with other Circuits' precedents.

I. This Court Should Grant Review To Resolve Division In The Lower Courts And Enforce CAFA's Plain Text, Structure, And Purpose.

The Court should grant certiorari and reverse in order to vindicate defendants' statutory right to remove mass actions to federal court. On its face, CAFA's language provides for removal based on judicial proposals, both in its use of the passive voice to confer jurisdiction over "any civil action" in which claims are "proposed to be tried jointly" and also in its specific exclusion of removal based on proposals from defendants. Pet.II. That conclusion is not only the natural reading of the statute's plain text, it is also consonant with CAFA's statutory objective of

furthering federal jurisdiction over "interstate cases of national importance." *Standard Fire Insurance Co. v. Knowles*, 568 U.S. 588, 595 (2013); *accord Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 165 (2014); *Dart*, 135 S. Ct. at 554.

The lower courts' decisions here flout that clear statutory command. *See* Pet.II; ATRA.Br.3-4. Without grappling with the statute's plain language, the district court held that courts are incapable of proposing anything, and thus categorically barred from triggering mass action removal. App.10-12. But that atextual reading of the statute glosses over the fact that removal here was based on the supervising state-court judge explicitly issuing a "Request" that was specifically authorized by state law. Pet.26-27. And the district court's reasoning that CAFA applies where joint trial is requested, but not where it is compelled *sua sponte*, gives short shrift to CAFA's pro-removal objectives. Pet.26.

Respondents barely contest Pfizer's arguments in favor of review, which they address only in the last four pages of their brief. They acknowledge that there is a "'division' among the courts of appeals" on whether a judicial proposal for joint trial can trigger mass action removal. Resp.Br.29; *compare Scimone v. Carnival Corp.*, 720 F.3d 876, 881 (11th Cir. 2013) (stating that CAFA's "passive syntax" could "be referring to a proposal … by the state court acting *sua sponte*."), *Parson v. Johnson & Johnson*, 749 F.3d 879, 887 (10th Cir. 2014) (stating that CAFA "does not specify who can make such a proposal—the plaintiffs only, or the district court through an order of consolidation or

coordination."), *with Koral*, 628 F.3d at 947. They do not dispute that this question has recurred in the district courts, and they agree it will likely recur again. Resp.Br.29n.17. They do not dispute the importance of the question to "interstate cases of national importance'" over which CAFA confers jurisdiction. *Knowles*, 568 U.S. at 595. They do not dispute the problems with the Ninth Circuit's use of the same two-judge screening panel to dispose of Pfizer's invocation of a favored procedure under 28 U.S.C. § 1453(c) *and* its petition for rehearing *en banc*. 9th Cir. Gen. Ords. 6.3(g)(2), 6.11. And they do not dispute that, under the rulings below, large, interstate coordinated proceedings like this one are removable if 100 plaintiffs ask to join them, but not if a court asks 100 to be joined to them. *See* Pet.17.

Nor do Respondents have anything to say about the loophole created by this atextual result. Under the lower courts' reasoning, plaintiffs can escape federal jurisdiction if only they leave the task of coordination to the state courts rather than requesting it themselves. Pet.18. Because of this misreading of the statute "[d]efendants throughout the United States continue to be embroiled in sprawling multi-plaintiff lawsuits in state courts, where procedural protections essential to the fair conduct of aggregate proceedings are oftentimes less well developed or robust than federal law." ATRA.Br.4; *see also* WLF.Br.12-13. Review is warranted to enforce CAFA's text and prevent circumvention of its purposes.

While Respondents suggest that the question presented is "best left to percolate" in the lower courts, Resp.Br.29, the lower courts' recent treatment of this question only underscores that review is needed now. Respondents' convenient attempt to minimize Judge Posner's reasoning in *Koral* as *dicta*, Resp.Br.28-29, is inconsistent with their briefing below, which argued that *Koral* "resolved the question definitively against CAFA mass action jurisdiction." 19a-20a. Indeed, on its face, *Koral* expressly purported to "*answer*[] a question left open" by prior decisions. 628 F.3d at 946-47 (7th Cir. 2011) (emphasis added) (citing *Anderson v. Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009)). Having rendered that "answer," *Koral* has repeatedly and consistently been invoked to reject mass action removal based on judicial proposals, both within and beyond the Seventh Circuit's boundaries. *See Ferrar v. Johnson & Johnson Consumer Cos., Inc.*, 2015 WL 5996357, at *2-3 (E.D. Mo. Oct. 14, 2015) (citing and following *Koral*); *J.B. ex rel. Benjamin v. Abbott Labs., Inc.*, 2012 WL 1655980, at *5 (N.D. Ill. May 9, 2012) (citing and following *Koral*); *Alexander v. Bayer Corp.*, 2016 WL 6678917, at *2 (C.D. Cal. Nov. 14, 2016) (citing and following *Koral*). Indeed, in this very case, the district court cited and followed *Koral*, *see* App.11, and the Ninth Circuit, by denying review, endorsed that view. *See* Pet.16-17.

Instead of defending the reasoning of *Koral* and the courts below, Respondents simply restate it. They claim that within the meaning of "ordinary, everyday English," courts "don't propose—they order." Resp.Br.30; *see also* App.11. Not only is that flippant

response inconsistent with the judicial actions at issue here, to the extent there is any material difference between a *proposal* for joint trial and an *order* for joint trial, it cuts in favor of jurisdiction, not against it. *See* Pet.26. In light of this Court's direction that CAFA's "provisions should be read broadly" consistent with its pro-removal purposes, *Dart*, 135 S. Ct. at 554 (citation and quotation marks omitted), the federal interest in a massive interstate lawsuit is even greater "where joint trial is compelled by a state court than where it is merely requested." Pet.26. And, in all events, it is simply untrue that courts are only capable of issuing "orders." They also issue requests, invitations, and tentative rulings. *Id.* That was particularly true in this case, where removal was first triggered by a "Request" issued by the supervising judge as specifically authorized by California law. App.216, 259-62; Cal. Civ. Proc. Code § 404.4. And it was true as well for the order of the coordination judge that suggested the joinder of additional cases and requested the parties' views. App.268-71.

In short, Respondents offer no persuasive justification for allowing this important issue to go unresolved in this important case. As amici explain, absent review, "the right of defendants to remove mass actions will be largely extinguished in the Ninth Circuit." WLF.Br.11; *see also* ATRA.Br.12. Rather than permitting the lower courts' atextual reading of CAFA to take hold throughout the country's largest Circuit, this Court should uproot it now and ensure that CAFA's plain text and purpose are enforced.

II. This Court Can And Should Review The Merits Of The Remand Order.

Dart provides a clear basis for this Court to review the question presented. As in *Dart*, Respondents have not "suggested in [their] written submissions to this Court that anything other than" the merits of the district court's remand order led to the Ninth Circuit's denial of review. 135 S. Ct. at 557. They do not suggest that any of the non-merits criteria for CAFA review were possible grounds for the Ninth Circuit's denial of review. For instance, they do not dispute that the question is "important, unsettled, and recurrent" and would "in all probability escape meaningful appellate review." *Id.* at 555 (citation and quotation marks omitted). As a result, the summary denial of review by a two-judge panel of the Ninth Circuit "strongly suggests that the panel thought the District Court got it right" in denying remand. *Id.* And so, under *Dart*, this Court can and should determine whether the lower courts got it wrong.

Instead, Respondents suggest that the Ninth Circuit's decision might have been based on the district court's fallback argument that, even if a state court could propose a joint trial, that is not what happened here. In particular, the district court suggested that the coordination judge's "prior orders and statements describing how the coordinated cases would proceed"—that is, through pretrial coordination and bellwether trials—indicated that the court "was not contemplating a joint trial." App.13; Resp.Br.14. But that fallback argument falls flat.

As an initial matter, it could not have been the Ninth Circuit's grounds for summary denial because it is squarely foreclosed by a binding *en banc* decision from that very court. In *Corber*, the Ninth Circuit affirmed the existence of mass action jurisdiction over a plenary California coordinated proceeding indistinguishable from the one at issue here. 771 F.3d at 1224-25. The *en banc* court made clear that mass action removal is determined by whether joint trial is *proposed*, "not whether one will occur at some future date." *Id.* at 1224 n.5. Because the statutory scope of coordination "for all purposes" under California law "must include the purposes of trial," the Ninth Circuit held that a request to join a California coordinated proceeding is necessarily "seeking a joint trial." *Id.* at 1223; WLF.Br.22. Since mass action removal is triggered by a *proposal*, the fact that "a judge has discretion to limit coordination to pretrial matters" is irrelevant to determining jurisdiction. *Corber*, 771 F.3d at 1224 n.5. Here, also, the manner in which the coordination judge (Kuhl, J.) suggested she intended to conduct the litigation is irrelevant because the supervising judge (Weintraub, J.) requested the case be added to the joint-trial proceeding.

Indeed, the proceedings contemplated by the state court fit squarely within *Corber*'s core holding. That decision rejected the district court's notion that joint trial contemplates that "the coordinated cases will be tried together, either at the same time or before one jury." App.13-14. Rather, as *Corber* explained, a request for coordination to avoid "inconsistent judgments and conflicting determinations of liability" seeks relief that could "be addressed only through *some*

form of joint trial." 771 F.3d at 1223-24 (emphasis added). Rather than avoiding "joint trial," the proceedings contemplated by the coordination judge embrace it. Pretrial proceedings to issue litigation-wide dispositive rulings and avoid "inconsistent judgments and conflicting determinations of liability" is "joint trial" relief, as are bellwether trials with potential issue-preclusive effect on other cases. *See Ford Motor Warranty Cases*, 11 Cal. App. 5th 626, 644-45 (2017) (noting that California law authorizes "trial of one or more test cases, with appropriate provision being made concerning the res judicata or collateral estoppel effects of a judgment") (citation and quotation marks omitted).

Moreover, even if the Ninth Circuit did inexplicably rest its denial on this fallback point, that would only further warrant this Court's review. In addition to conflicting with a binding Ninth Circuit decision, the district court's view conflicts with the holdings of other Circuits as well. As the Seventh Circuit has explained, it is irrelevant whether joint trial "actually ensues" because "the statutory question [is] whether one has been proposed." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008). Thus, "[w]hether CAFA applies does not and cannot depend on how a state trial court actually manages various claims within a larger action," since CAFA's focus is "the consolidation that is proposed." *Lester v. Exxon Mobil Corp.*, 879 F.3d 582, 587 (5th Cir. 2018). The issue for joint trial under CAFA "is not whether 100 or more plaintiffs answer a roll call in court, but whether the 'claims' advanced by 100 or more persons are proposed to be tried jointly." *Bullard*, 535 F.3d at 762.

Thus, a request for coordination to avoid inconsistent judgments seeks joint trial, *see Atwell v. Bos. Scientific Corp.,* 740 F.3d 1160, 1165-66 (8th Cir. 2013); *In re Abbott Labs., Inc.*, 698 F.3d 568, 573 (7th Cir. 2012), as does "[a] trial of 10 exemplary plaintiffs, followed by application of issue or claim preclusion to … more plaintiffs without another trial." *Bullard*, 535 F.3d at 762.

While Respondents emphasize the Ninth Circuit's prior grant of leave to appeal in *Alexander v. Bayer*, No. 17-55828, that case actually *supports* review here. The fact that the Ninth Circuit acknowledged this question in *Tanoh*, 561 F.3d at 956, and *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1047-48 (9th Cir. 2015), and previously granted review in *Alexander* confirms that the Ninth Circuit's agreement with the district court is the only plausible explanation for its denial of review. Pet.16-17; WLF.Br.18. Had it disagreed, then its own previous grant of review should have warranted the same action here. And, as in *Dart*, the Ninth Circuit's summary denial of review and rehearing *en banc* risks raising the possibility—within a Circuit covering nearly a quarter of the Nation's population—that the question will not be presented again because defendants will not wish to risk the rejection of further removals on this theory. *See* 135 S. Ct. at 557; WLF.Br.10-11.

* * *

Finally, Pfizer submits that review is especially warranted in light of the post-remand events that gave rise to Pfizer's pending petition in *Pfizer Inc. v. Superior Court*, No. 19-278. Following remand, the

coordination judge held that, under federal law, Pfizer forfeited the personal jurisdiction defense that this Court recognized in *Bristol-Myers*, 137 S. Ct. 1773, because it litigated the removal question presented here without first litigating personal jurisdiction. As set forth in that petition, California's novel rule squarely conflicts with the decisions of this Court, all the courts of appeals, and the structural relationship between personal and subject matter jurisdiction. Together, the two petitions illustrate the collective jurisdictional abuses of the California state and federal courts in this litigation. In the same set of cases, Pfizer was denied the federal subject matter jurisdiction that CAFA promises for mass actions and then, following remand, denied its constitutional due process rights to assert a personal jurisdiction defense, solely because it had asserted its CAFA rights in federal court. Granting both petitions would enable the Court to rectify that unlawful whipsaw. At the very least, considering the two petitions together could simplify disposition of both petitions. For example, review and reversal here would result in the vacatur of the remand and all subsequent proceedings in state court, including the state courts' aberrant personal jurisdiction rulings.

CONCLUSION

For the foregoing reasons and those set forth in Pfizer's Petition, certiorari should be granted.

Respectfully submitted,

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