NO. 19-____

In the Supreme Court of the United States

DAVID EHRMAN, Individually and on Behalf of All Others Similarly Situated,

Petitioner,

–v–

COX COMMUNICATIONS, INC.; COXCOM, LLC; and COX COMMUNICATIONS CALIFORNIA, LLC,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner filed a complaint in California state court. Without taking discovery, Respondents filed a notice of removal and alleged federal jurisdiction based on diversity of citizenship. Respondents alleged Petitioner's state citizenship based solely on "information and belief." Respondents did not allege facts which, taken as true, would establish Petitioner's state of domicile or United States citizenship.

THE QUESTION PRESENTED IS:

To plead diversity of citizenship, is an allegation of an individual's state citizenship made solely on "information and belief" sufficient, or must a party allege facts which, taken as true, would establish an individual's domicile in a state and United States citizenship?

LIST OF RELATED PROCEEDINGS

PROCEEDINGS DIRECTLY RELATED TO THIS PETITION

David Ehrman v. Cox Communications, Inc., CoxCom, LLC, and Cox Communications California, LLC; Case No. 8:18-cv-1125-JVS-DFM; United States District Court for the Central District of California. This case was removed to federal court on June 22, 2018. There has been no entry of judgment in this case.

David Ehrman v. Cox Communications, Inc., CoxCom, LLC, and Cox Communications California, LLC; Case No. 19-55658; United States Court of Appeals for the Ninth Circuit. The Ninth Circuit granted leave to appeal the district court's remand order, issued its opinion on August 8, 2019 reversing the remand order, and issued an order denying panel rehearing or rehearing en banc on September 17, 2019.

PRIOR STATE PROCEEDING REMOVED TO FEDERAL COURT

David Ehrman v. Cox Communications, Inc.; Case No. 30-2018-00992300-CU-MC-CXC; Superior Court of the State of California for the County of Orange. This case was filed on May 9, 2018, removed to federal court on June 22, 2018, remanded to state court on December 17, 2018 pursuant to the district court's December 13, 2018 remand order, and removed again to federal court on May 7, 2019. There has been no entry of judgment in this case.

RELATED FEDERAL CASE

Following remand, Respondents filed a second notice of removal on May 7, 2019, which created a second case between Petitioner and Respondents involving the same claims: *David Ehrman v. Cox Communications, Inc., CoxCom, LLC, and Cox Communications California, LLC*; Case No. 8:19-cv-00857-JVS-DFM; United States District Court for the Central District of California. Respondents' second notice of removal alleged specific facts related to diversity of citizenship. *See* Ninth Circuit Docket ("Circuit Dkt.") 11-1 Ex. A. Petitioner filed a second motion to remand asserting the second removal was untimely. *See* Circuit Dkt. 11-1 Ex. B. The district court has not ruled on Petitioner's second motion to remand and the second case has been stayed since June 11, 2019. *See* Circuit Dkt. 11-1 Ex. C.

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OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion reversing the remand order is reported at 932 F.3d 1223 and is reproduced at App.1a-8a. The Ninth Circuit's order denying panel rehearing or rehearing en banc is unreported and is reproduced at App.24a-25a. The Ninth Circuit's order granting Respondent's petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is unreported and is reproduced at App.9a-10a. The district court's order in *David Ehrman v. Cox Communications, Inc., CoxCom, LLC, and Cox Communications California, LLC*, Case No. 8:18-cv-1125-JVS-DFM granting remand is reported at 2018 WL 6571228 and is reproduced at App.11a-23a.

JURISDICTION

The Ninth Circuit exercised discretion and accepted an appeal from the district court's remand order under 28 U.S.C. § 1453(c)(1). App.9a-10a. The Ninth Circuit issued its opinion on August 8, 2019 and reversed the district court's remand order, holding that Respondents' notice of removal sufficiently pleaded federal jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) ("CAFA"). App.1a-8a. Ehrman timely sought panel rehearing or rehearing en banc, which petition was denied on September 17, 2019. App.24a-25a. Ehrman filed this Petition timely. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND RULES

The relevant statutes and rules include Federal Rule of Civil Procedure 8 ("Rule 8"), Federal Rule of Civil Procedure 11 ("Rule 11"), 28 U.S.C. § 1332, 28 U.S.C. § 1446, and 28 U.S.C. § 1453, each of which is reproduced in the Appendix at App.26a-46a.

INTRODUCTION

For two centuries, the party seeking to invoke federal jurisdiction based on diversity of citizenship has been required to distinctly and positively plead the facts essential to jurisdiction. For individuals, this has meant pleading facts showing both domicile in a state and United states citizenship.

The modern standard is that a "short and plain statement" must include plausible facts and cannot simply recite the required jurisdictional elements or allege legal conclusions couched as facts.

The Ninth Circuit's decision below disregards these historic and modern pleading requirements and adopts a relaxed pleading rule that opens the federal courthouse doors to any party who makes a conclusory allegation of an individual's state citizenship "based solely on information and belief." App.6a. The party seeking to invoke federal diversity jurisdiction no longer needs to allege facts that are already known or that are discovered after a reasonable inquiry; simply stating a belief of an individual's state citizenship is

sufficient. Any facts that caused the party to form such a belief—such as an individual's residency in a state—are considered "immaterial." *Id.*

The Ninth Circuit adopted this relaxed pleading rule in the context of a notice of removal seeking to invoke federal jurisdiction under CAFA. But the court's reliance on *Carolina Casualty Insurance Co. v. Team Equipment, Inc.*, 741 F.3d 1082, 1087 (9th Cir. 2014), a case that adopted relaxed pleading requirements for plaintiffs in non-CAFA cases, shows the new rule is not limited to removing defendants in CAFA cases. App.5a-6a. Even in the CAFA context, the new rule creates a circuit split on how to treat a notice of removal that alleges CAFA jurisdiction but does not allege specific facts to establish each of CAFA's elements.

The Ninth Circuit's relaxed pleading rule overlooks the core principles that federal courts are courts of limited jurisdiction, and that even when federal jurisdiction probably exists it still must be properly invoked. It also overlooks the fact that removing defendants have no need to allege an individual's state citizenship based solely on information and belief because they can ascertain facts that are not already within their knowledge simply by taking jurisdictional discovery in state court.

The Ninth Circuit's relaxed pleading rule presents compelling reasons for review. The new rule conflicts with this Court's historic and modern precedents and is a significant departure from the accepted and usual fact-pleading requirements. The new rule will also burden federal courts with cases that invoke federal

jurisdiction based on conclusory allegations and guesswork instead of knowledge and facts.

This Court should grant review and reaffirm the requirement that the party seeking to invoke federal diversity jurisdiction must plead plausible facts which, taken as true, would show domicile in a state and United States citizenship.

STATEMENT OF THE CASE

A. Cox's Notice of Removal Alleged Ehrman's State Citizenship Based on "Information and Belief."

Petitioner David Ehrman filed a class action complaint in California state court on May 9, 2018. The case was docketed as *David Ehrman v. Cox Communications, Inc.*; Case No. 30-2018-00992300-CU-MC-CXC; Superior Court of the State of California for the County of Orange. *See* Circuit Dkt. 10-2 at ER 104–122. Ehrman alleged that he was a resident of California and that he and class members purchased internet services in California in reliance on false advertisements. He did not allege any facts concerning his or class members' states of domicile or countries of citizenship.

Respondents Cox Communications, Inc., CoxCom, LLC, and Cox Communications California, LLC (collectively, "Cox") filed a notice of removal on June 22, 2018 and sought to invoke federal jurisdiction under the general diversity statute, 28 U.S.C. § 1332(a), and under CAFA. App.47a-55a (also available at Circuit Dkt. 10-2 at ER 95–102). The case was docketed as

David Ehrman v. Cox Communications, Inc., CoxCom, LLC, and Cox Communications California, LLC; Case No. 8:18-cv-1125-JVS-DFM; United States District Court for the Central District of California.

Cox attached to its notice of removal the state court complaint and a short declaration. *See* Circuit Dkt. 10-2 at ER 104–126. Cox alleged the class had over 832,000 members according to its business records and the amount in controversy exceeded $27 million based on the number of class members, the cost of relevant services, and the relief sought. App.51a, 53a-55a.

Cox also alleged specific facts showing each Cox entity's states of citizenship:

> 14. At the time this action was filed, and at the time of the filing of this Notice, Defendant Cox Communications, Inc. was and still is a corporation organized and existing under the laws of the State of Delaware, and its principal place of business was and still is Atlanta, Georgia. (Hayes Decl. ¶ 2.) Accordingly, pursuant to 28 U.S.C. § 1332(c)(1), Cox Communications Inc. is a citizen of Delaware and Georgia.
>
> 15. At the time this action was filed, and at the time of the filing of this Notice, Cox Communications California, LLC was and still is a limited liability company organized and existing under the laws of the State of Delaware, and its principal place of business was and still is Atlanta, Georgia. (Hayes Decl. ¶ 2.) For purposes of diversity jurisdiction, the citizenship of a limited liability company

> is that of each of its members. *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2000). The sole member of Cox Communications California, LLC is CoxCom, LLC, which, at the time the action was filed, and at the time of the filing of this Notice, was and is a limited liability company organized and existing under the laws of Delaware with its principal place of business in Atlanta Georgia. (Hayes Decl. ¶ 2.) The sole member of CoxCom, LLC is Defendant Cox Communications, Inc. (*Id.*) Accordingly, Cox Communications California, LLC is a citizen of Delaware and Georgia.

App.51a-52a (footnote omitted).

With respect to Ehrman and class members, Cox alleged:

> 12. As admitted in the Complaint, Plaintiff is a resident of California. (Exhibit A, ¶ 3.) Defendant is informed and believes, and on that basis alleges, that Plaintiff is a citizen of the state in which he resides, as alleged in the Complaint.
>
> 13. Defendant is informed and believes, and on that basis alleges, that all purported class members are citizens of California, as alleged in the Complaint. (Exhibit A, ¶ 16.)

App.51a. Cox did not allege any facts related to Ehrman's or class members' states of domicile or countries of citizenship.

Cox concluded that, "[b]ased on the foregoing, there is complete, and also minimal, diversity between the parties." App.52a.

B. Ehrman Raised a Facial Challenge to the Sufficiency of Cox's Notice of Removal and the District Court Granted Remand.

Ehrman raised a facial challenge to the sufficiency of Cox's notice of removal. He argued that, because Cox simply incorporated by reference the residency allegations from his state court complaint, and because those allegations, even taken as true, would not establish his or at least one class members' state of domicile and country of citizenship, the notice was insufficient on its face and remand was required. App.15a. He objected to Cox's attempt to "guess its way into federal court" through a "remove first, inquire later" approach to diversity of citizenship. App.16a.

The district court granted remand. It observed that residency allegations alone do not make a case removable based on diversity of citizenship. App.17a-18a, 22a (citing *Harris v. Bankers Life & Casualty Ins. Co.*, 425 F.3d 689, 693 (9th Cir. 2005)). It further observed that the Ninth Circuit has never held that residency in a state is prima facie evidence of domicile in that state and citizenship of the United States, and that at least one other circuit had declined to adopt such a presumption. App.19a-21a (citing *Mondragon v. Capital One Auto Finance*, 736 F.3d 880, 886 (9th Cir. 2013); *King v. Great American Chicken Corp., Inc.*, 903 F.3d 875, 879 (9th Cir. 2018); *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383, 392–93 (6th Cir. 2016)).

The district court held that "Cox's reliance on the residency allegation in the complaint still amounted to mere sensible guesswork such that it is insufficient for establishing minimal diversity." App.23a.

C. The Ninth Circuit Reversed and Held That an Individual's State Citizenship Can Be Pleaded "Based Solely on Information and Belief."

The Ninth Circuit granted Cox's petition for leave to appeal under 28 U.S.C. § 1453. App.9a-10a. It then reversed the district court's remand order. App.1a-8a.

The Ninth Circuit held Cox's statement that it was informed and believes that Ehrman and all class members are "citizens of California" was sufficient to establish minimal diversity absent a factual challenge. App.5a-6a. It further held that a removing defendant can allege an individual's state citizenship "based solely on information and belief." *Id.* (citing *Carolina Casualty*, 741 F.3d at 1087). It did not explain why the relaxed pleading exception for plaintiffs adopted in *Carolina Casualty* also applied to removing defendants. *Id.*

The Ninth Circuit treated Cox's reliance on Ehrman's residency allegation as "immaterial" to the question of whether Cox had adequately pleaded diversity of citizenship. App.6a. It accepted as true Cox's statement that Ehrman "is a citizen of [California]" and "all purported class members are citizens of California," and it said "Cox should not have been required to present evidence in support of its allegation of minimal diversity." App.7a (marks in original).

Ehrman timely filed a petition for panel rehearing or rehearing en banc which was denied. App.24a-25a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's relaxed pleading rule eliminates historic and modern requirements that the party seeking to invoke federal diversity jurisdiction must plead the facts essential to jurisdiction affirmatively based on knowledge. It also disregards the fact that an individual's state citizenship is comprised of two components: domicile in a state and United States citizenship. It treats a conclusory allegation concerning an individual's state citizenship as a well-pleaded fact instead of a legal conclusion that must be supported by well-pleaded facts.

If left undisturbed, the Ninth Circuit's relaxed pleading rule will erode the fact-pleading requirements this Court has repeatedly articulated and relieve defendants from the burden to undertake a reasonable jurisdictional inquiry before filing a notice of removal.

This Court's review is needed to reorient the Ninth Circuit in line with historic and modern fact-pleading precedents and with the plain text of the removal statute.

A. The Ninth Circuit's Relaxed Pleading Rule Disregards the Historic Requirement That the Facts Essential to Federal Diversity Jurisdiction Must Be Distinctly and Positively Pleaded.

It is axiomatic that federal courts are courts of limited jurisdiction. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019) (citing *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)).

For nearly two hundred years, this Court has guarded this limited jurisdiction and required the party seeking to invoke federal jurisdiction based on diversity of citizenship to distinctly and positively plead the facts on which jurisdiction depends. *Brown v. Keene*, 33 U.S. 112, 115 (1834) (Marshall, C.J.) ("The decisions of this court require, that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments."); *Anderson v. Watts*, 138 U.S. 694, 702 (1891) ("[I]t is essential that, in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctively and positively averred in the pleadings, or should appear affirmatively with equal distinctness in other parts of the record."); *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936) ("[The party who seeks the exercise of jurisdiction in his favor] must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of

jurisdiction is obviously for the purpose of determining whether the facts support his allegations.").

A conclusory allegation of an individual's state citizenship has never been sufficient, by itself, to open the federal courthouse doors based on diversity jurisdiction. To the contrary, "[i]n order to be a citizen of a State within the meaning of the diversity statute, a natural person must both be a citizen of the United States and be domiciled within the State." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989) (emphasis in original).

The Ninth Circuit's relaxed pleading rule eliminates the historic requirement that the facts essential to federal diversity jurisdiction must be distinctly and positively pleaded. Under the new rule, as long as the party seeking to invoke federal diversity jurisdiction states a belief that an individual is a citizen of a diverse state, the party does not have to allege any supporting facts in its pleading.

The new rule also disregards the twin components of an individual's state citizenship: domicile in a state and United States citizenship. *Newman-Green*, 490 U.S. at 828; *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983). This Court has long required that the party seeking to invoke federal diversity jurisdiction plead facts showing both domicile in a diverse state and United States citizenship. *Brown*, 33 U.S. at 114 ("A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; but the petitioner does not aver that the plaintiff is a citizen of the United States."). If the relaxed pleading rule stands, courts in the Ninth Circuit will be required to infer from a

bare and conclusory allegation of state citizenship that an individual is both domiciled in a diverse state and a United States citizen.[1]

The Ninth Circuit's new rule cannot be squared with this Court's historic precedents. This Court should reaffirm the requirement that the facts essential to federal diversity jurisdiction must be distinctly and positively pleaded.

B. The Ninth Circuit's Relaxed Pleading Rule Disregards the Modern Requirement That a "Short and Plain Statement" Must Do More than Recite the Jurisdictional Elements and State Legal Conclusions Couched as Facts.

Rule 8 of the Federal Rules of Civil Procedure and the removal statute, 28 U.S.C. § 1446, require plaintiffs and removing defendants to plead a "short and plain statement" showing the grounds for federal jurisdiction. Fed. R. Civ. P. 8(a)(1) (requiring "a short and plain statement of the grounds for the court's

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[1] A party seeking to invoke federal diversity jurisdiction involving a corporation has the burden to plead specific facts showing both components of corporate state citizenship: state of incorporation and principal place of business. 28 U.S.C. § 1332(c)(1); *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010). The opposing party can raise a facial or factual challenge. *Leite v. Crane Co.*, 749 F.3d 1117, 1121–22 (9th Cir. 2014) (holding the existence of removal jurisdiction should be resolved within the same framework as facial and factual attacks to jurisdictional allegations in a complaint). Understanding its fact-pleading burden, Cox alleged specific facts with respect to its own states of citizenship. App.51a-52a. But the Ninth Circuit excused Cox from its burden to allege specific facts concerning both components of Ehrman's or at least one class member's state citizenship.

jurisdiction"); 28 U.S.C. § 1446(a) (requiring "a short and plain statement of the grounds for removal").

Short and plain statements containing jurisdictional allegations that "are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "While legal conclusions can provide the framework of a complaint [or a notice of removal], they must be supported by factual allegations." *Id.* Courts only assume the veracity of "well-pleaded factual allegations." *Id.* A "naked assertion" of a jurisdictional element devoid of "further factual enhancement" is insufficient. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). A party "armed with nothing more than conclusions" cannot "unlock the doors of discovery" in federal court based on the possibility that diversity of citizenship exists. *Iqbal*, 556 U.S. at 678–79

A party seeking to invoke federal jurisdiction cannot plead a legal conclusion drawn from facts which, even taken as true, would not support the conclusion. *Grace v. American Central Ins. Co.*, 109 U.S. 278, 284 (1883) ("It is true that the petition for removal, after stating the residence of the plaintiffs, alleges 'that there is, and was at the time when this action was brought, a controversy therein between citizens of different states.' But that is to be deemed the unauthorized conclusion of law which the petitioner draws from the facts previously averred.") (emphasis added); *see also Twombly*, 550 U.S. at 557 (refusing to accept as true "a legal conclusion couched as a factual allegation").

Cox's conclusion that Ehrman and all class members were citizens of California was drawn directly

and exclusively from the residency allegation in Ehrman's state court complaint. App.51a. But a bare allegation of residence in California, even taken as true, does not authorize a conclusion of law that they are all domiciled in California and United States citizens.

Equally important is the principle that the legal sufficiency of jurisdictional allegations "cannot be decided in isolation from the facts pleaded." *Iqbal*, 556 U.S. at 673. Yet the Ninth Circuit's relaxed pleading rule treats Cox's direct and exclusive reliance on Ehrman's residency allegation as "immaterial" to the question of whether Cox's diversity of citizenship allegation was legally sufficient. App.6a. Without Ehrman's residency allegation, there are no facts left in Cox's notice of removal which, even taken as true, would "allo[w] the court to draw the reasonable inference that" Ehrman or class members were domiciled in California and United States citizens on the dates relevant to removal. *Iqbal*, 556 U.S. at 678.

The Ninth Circuit cited *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 86–87 (2014), but that case lends no support to its relaxed pleading rule. App.5a-8a. The removing defendant in *Dart Cherokee* alleged that, based on the relevant time period and the total number of wells and royalty owners at issue, its calculations showed "the amount of additional royalty sought is in excess of $8.2 million." *Owens v. Dart Cherokee Basin Operating Co., LLC et al*; Case No. 5:12-cv-04157-JAR-JPO; Dkt. 1 (Notice of Removal). This Court held that the defendant's plausible allegation that the amount in controversy totaled more than $8.2 million was sufficient to

satisfy CAFA's $5 million threshold. *Dart Cherokee*, 574 U.S. at 85. This Court did not relax the removing defendant's burden to plead plausible facts; it simply confirmed the notice of removal did not need to contain evidentiary submissions to support plausible factual allegations. *Id.*

If the Ninth Circuit's relaxed pleading rule was correct, then a plaintiff or removing defendant seeking to invoke CAFA jurisdiction could simply allege a "belief" that: there are more than 100 class members; the amount in controversy exceeds $5 million; and the parties are diverse because at least one class member is a "citizen of" a state different from any defendant. 28 U.S.C. § 1332(d)(2). The same would be true under the general diversity statute. 28 U.S.C. § 1332(a). Such conclusory allegations would not comport with the fact-pleading requirements articulated in *Twombly* and *Iqbal*. And nothing in *Dart Cherokee* supports a relaxed standard for pleading specific facts which, taken as true, would establish the elements of CAFA jurisdiction.

This Court should confirm that a "short and plain statement" requires pleading plausible facts which, taken as true, would show domicile in a state and United States citizenship.

C. The Ninth Circuit's Relaxed Pleading Rule Creates a Circuit Split on How to Treat a Notice of Removal Under CAFA That Fails to Plead Specific Facts.

The Ninth Circuit's relaxed pleading rule creates a circuit split on how to treat a notice of removal under CAFA that fails to plead specific facts.

The Seventh and Eleventh Circuits agree that a removing defendant has the burden to plead specific facts which, taken as true, would establish each of CAFA's requirements. *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1217 (11th Cir. 2007) (holding "the defendant is not excused from the duty to show by fact, and not merely conclusory allegation, that federal jurisdiction exists"); *Dancel v. Groupon, Inc.*, 940 F.3d 381, 385 (7th Cir. Oct. 9, 2019) (finding the removing defendant's allegations "do not have the necessary factual content . . . to permit an inference of jurisdiction"). Those circuits simply disagree on the availability of post-removal discovery to establish CAFA jurisdiction. *Lowery*, 483 F.3d at 1215 (holding "[p]ost-removal discovery for the purpose of establishing jurisdiction in diversity cases cannot be squared with the delicate balance struck by Federal Rules of Civil Procedure 8(a) and 11 and the policy and assumptions that flow from and underlie them" where the removing defendant "has asserted no factual basis to support federal jurisdiction and now faces a motion to remand"); *Dancel*, 940 F.3d at 383, 385 (ordering a limited remand to "patch this hole" in a notice of removal that pleaded minimal diversity based on "speculation"); *but see Iqbal*, 556 U.S. at 678–79 (holding allegations that are insufficient on their face cannot "unlock the doors of discovery").

The Seventh and Eleventh Circuits also agree that a facial attack will fail if a removing defendant pleads "specific factual allegations establishing jurisdiction" which, if challenged, can be supported by "evidence combined with reasonable deductions, reasonable inferences, or other reasonable extrapolations." *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d

744, 752 (11th Cir. 2010) (distinguishing the notice of removal in *Lowery* because it "offered no specific facts" and only "contained a conclusory allegation that CAFA's amount-in-controversy requirement had been satisfied"); *Dancel*, 940 F.3d at 384 (indicating it would have remanded to state court based on facially deficient diversity allegations if the plaintiff had not waived or forfeited the argument).[2]

In contrast, the Ninth Circuit's relaxed pleading rule relieves removing defendants of the burden to plead any specific facts and places the burden on plaintiffs to raise a factual dispute when no facts have been pleaded. By eliminating the fact-pleading requirement and shifting the burden to plaintiffs to dispute the factual basis of a legal conclusion that is not supported by any well-pleaded facts, the Ninth Circuit has split from its sister circuits.

The Ninth Circuit's new rule also insulates removing defendants from any facial attack on the sufficiency of their jurisdictional allegations. If a conclusory allegation of an individual's state citizenship must be accepted as true unless the plaintiff raises a

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[2] The *Dancel* court suggested it "may have" accepted an allegation of an individual's "particular state of citizenship" that was based only "on information and belief," but it did not reach or decide the issue. 940 F.3d at 385 (quoting *Med. Assur. Co. v. Hellman*, 610 F.3d 371, 376 (7th Cir. 2010)); *but see America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072, 1074 (7th Cir. 1992) (per curiam) (finding an affidavit of citizenship made "to the best of [the plaintiff's] knowledge and belief" was insufficient to establish diversity jurisdiction); *Carolina Casualty*, 741 F.3d at 1087 (applying an "unusual circumstances" exception to the "general requirement that [a party] must plead diversity affirmatively and on knowledge").

factual challenge, a removing defendant will be incentivized to guess. App.6a-7a. If the removing defendant guesses wrong, remand will only be required if the defendant cannot use after-the-fact jurisdictional discovery to establish an alternative basis for diversity (such as a previously unidentified class member's diverse state citizenship, which is what the Seventh Circuit ordered discovery on in *Dancel*).

The Ninth Circuit's new rule reveals a fundamental misunderstanding of the CAFA statute. App.8a. It conflates Congress's intent to adopt a relaxed minimal diversity requirement "to facilitate adjudication of certain class actions in federal court" with an intent to adopt a relaxed pleading requirement for all CAFA cases. *Dart Cherokee*, 574 U.S. at 89. But "CAFA does not shift the burden of proof in removal actions." *Lowery*, 483 F.3d at 1208. For CAFA and non-CAFA cases alike, a "short and plain statement" must include plausible jurisdictional facts which, taken as true, would establish each jurisdictional element. CAFA broadened the scope of cases that can be brought in or removed to federal court, but it did not excuse plaintiffs or removing defendants from pleading specific jurisdictional facts.

If the Ninth Circuit's relaxed pleading rule stands, a removing defendant's legal conclusions must be accepted as true unless the plaintiff challenges the veracity of unpleaded facts. A removing defendant can immunize its pleading from a facial attack by the simple expedient of not pleading facts. No other circuit has adopted such a rule.

Relaxed jurisdictional pleading requirements nullify *Twombly* and *Iqbal* in the removal context

and turn the well-pleaded complaint rule on its head. This Court should resolve the circuit split created by the Ninth Circuit by reaffirming that a party seeking to invoke CAFA jurisdiction has the burden to plead plausible facts, and the opposing party only needs to raise a factual challenge if the complaint or notice of removal includes well-pleaded facts and not simply conclusions.

D. The Ninth Circuit's Relaxed Pleading Rule Does Not Take into Account the Discovery Tools at a Removing Defendant's Disposal.

A defendant has minimal time pressure to file a notice of removal in cases where federal diversity jurisdiction is not apparent on the face of the state court complaint. *See* 28 U.S.C. § 1446(b); *Harris*, 425 F.3d at 693 (holding an "indeterminate" state court complaint does not trigger the 30-day removal period based on diversity of citizenship).

Jurisdictional discovery in state court or an independent investigation into relevant jurisdictional facts are both reasonable inquiries that a defendant should undertake before filing a notice of removal. 28 U.S.C. § 1446(a) (providing that a notice of removal must be "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure"); Fed. R. Civ. P. 11(b) (requiring a removing defendant to certify "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery").

The Ninth Circuit's relaxed pleading rule eliminates Rule 11's "knowledge" and "inquiry reasonable under the circumstances" requirements and lets a removing defendant invoke federal jurisdiction based solely on "belief" without identifying any of the factual contentions that caused it to form such a belief. App.6a. But a removing defendant "is not excused from the duty to show by fact, and not mere conclusory allegation, that federal jurisdiction exists." *Lowery*, 483 F.3d at 1217. And a removing defendant "is no less subject to Rule 11 than a plaintiff who files a claim originally." *Id.*

Unlike a plaintiff who wants to affirmatively invoke federal jurisdiction but cannot conduct discovery before filing a complaint, a defendant who does not have knowledge of the necessary jurisdictional facts can simply seek discovery in state court before filing a notice of removal. That is exactly what Cox did after the district court granted remand. *See* Circuit Dkt. 11-1 Ex. A at 3-10; Circuit Dkt. 11-1 Ex. B at 20-28.

The Ninth Circuit's relaxed pleading rule is a product of the narrow "unusual circumstances" exception approved in *Carolina Casualty*, where a plaintiff insurance company attested that "facts supporting jurisdiction [were] not reasonably ascertainable" to it before it filed the complaint. 741 F.3d at 1087. But the exception makes little sense in the removal context because there is no "practical necessity" that a removing defendant plead diversity of citizenship based solely on information and belief.[3] *Id.* (quoting

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[3] The "unusual circumstances" exception applied in *Carolina Casualty* may itself be contrary to historic and modern jurisdictional pleading requirements. But that exception is beyond

5 Charles Alan Wright et al., *Federal Practice and Procedure: Federal Rules of Civil Procedure* § 1224 (3d ed., updated 2013)).

Moreover, a removing defendant can seek leave to amend its jurisdictional allegations if it knows relevant jurisdictional facts that it neglected to plead in its notice of removal, or if it discovers relevant jurisdictional facts before remand is granted. 28 U.S.C. § 1653 ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."); *Newman-Green*, 490 U.S. at 831 (holding defective jurisdictional allegations can be amended where jurisdiction exists but a statement about jurisdiction was incorrect). Cox never sought leave from the district court or the court of appeals to amend the jurisdictional allegations in its notice of removal.

Particularly in the context of removal under CAFA, the Ninth Circuit's relaxed pleading rule conflicts with the requirements of the removal statute and Rule 11 and incentivizes defendants to rely on guesswork and to adopt a "remove first, inquire later" approach to federal jurisdiction.

CONCLUSION

Neither plaintiffs nor defendants have an unqualified right to litigate in federal court. Federal courts are courts of limited jurisdiction, and even when

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the scope of this Petition, and this Court would not need to decide the exception's validity if review is granted.

federal jurisdiction probably exists it still must be properly invoked by alleging well-pleaded facts.

A complaint that fails to plead the facts that are essential to federal diversity jurisdiction should be dismissed. And a notice of removal that fails to plead the facts that are essential to federal diversity jurisdiction should result in remand. The plaintiff or defendant will not be denied a forum, it will simply be required to litigate in a state court.

The Ninth Circuit's relaxed pleading rule throws open the federal courthouse doors to any plaintiff or removing defendant who states a belief that an individual is a citizen of a diverse state. The new rule conflicts with two centuries of jurisprudence and prioritizes expedience over the text of the pleading statutes. And it insulates jurisdictional pleadings from facial attacks by requiring courts to accept as true legal conclusions that are drawn from unpleaded facts.

For each of the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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