NO. 19-802

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

This case presents an important and unsettled issue that is fundamental to pleading federal jurisdiction based on diversity of citizenship. Is an assertion regarding an individual's "state citizenship" a fact that must be accepted as true, or a conclusion that must be supported by well-pleaded facts?

In both the district court and the court of appeals, the parties accepted that an individual's "state citizenship" is a conclusion that must be supported by well-pleaded facts. Cox argued that Ehrman's allegations that he resided in California and he and class members made purchases in California gave it a sufficient factual basis to assert they were all "citizens" of California. App.18a-19a. Ehrman argued that, even accepting the residency and purchase allegations as true, those facts would not establish his or at least one class member's domicile in California and United States citizenship. App.15a-18a.[1] The district court agreed with Ehrman. App.22a-23a.

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[1] Ehrman emphasized that if residency alone was a sufficient basis to infer domicile and United States citizenship, the result would be a pyrrhic victory for defendants because "indeterminate" complaints and other papers that showed residency would trigger removal obligations and either force rushed removals or prompt motions to remand based on untimeliness. App.18a; 28 U.S.C. § 1446(b)(3) (requiring removal "within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable"); *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (observing "[s]imple jurisdictional rules also promote greater predictability.").

But the Ninth Circuit sidestepped the issue and treated Cox's factual basis for asserting that Ehrman and class members were all citizens of California as "immaterial." App.6a. It held a bare assertion regarding an individual's state citizenship is a fact that must be accepted as true. App.6a-8a. It said "Cox did not have to explain why it believed Ehrman or the putative class members were citizens of California." App.6a. And it did not explain why Cox had a right or need to plead state citizenship "based solely on information and belief." *Id.*

The Ninth Circuit's decision sanctions guessing. If left undisturbed, the decision will erode the fact-pleading requirements of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and lead other courts to misinterpret and misapply *Dart Cherokee Basin Operating Co., L.L.C. v. Owens*, 574 U.S. 81 (2014).[2] This Court should grant the writ and reaffirm the principle that a short and plain statement of the grounds for removal requires well-pleaded facts, not legal conclusions couched as facts.

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[2] It is abundantly clear that a removing defendant does not have a burden to submit evidence with a notice of removal. *Dart Cherokee*, 574 U.S. at 84. But the Ninth Circuit's decision misinterprets the liberal "short and plain statement" pleading standard as requiring that a conclusory assertion of state citizenship be accepted as true without regard for the factual basis for the assertion. App.5a-8a.

A. The Ninth Circuit's Treatment of State Citizenship as a Fact Is Contrary to Well-Established Pleading Principles.

The diversity statute and the Class Action Fairness Act ("CAFA") each treat a party's state citizenship as one of several required elements of federal diversity jurisdiction. 28 U.S.C. § 1332(a), (d). Like each element of a cause of action, each element of diversity jurisdiction "does not require 'detailed factual allegations,' but it demands more than an unadorned" assertion that the element is satisfied. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

To withstand a facial challenge, a complaint or notice of removal must contain "sufficient factual matter" or plausible "factual content" that would let a court infer that each required element is satisfied. *Id.* A defendant cannot simply recite each required element, or make an unadorned assertion that is merely consistent with the element, and then insist the assertion is a fact that must be accepted as true. *Id.* A conclusion "couched as a factual allegation" is still a conclusion. *Twombly*, 550 U.S. at 555.

For all of the other required elements of CAFA jurisdiction, Cox did not simply recite the element and insist it was satisfied. It pleaded specific factual content showing: (1) the action was a "class" action (as Ehrman admitted in his complaint); (2) there were over 832,000 class members; (3) the aggregate amount in controversy exceeded $27 million; and (4) the state citizenship of each relevant defendant was Delaware and Georgia based on their respective states of incorporation, locations of their principal places of business, and their membership. App.51a-55a. Ehrman accepted this specific factual content as true and did

not challenge Cox's assertions that those elements of CAFA jurisdiction were satisfied. App.15a.

But even the liberal "short and plain statement" pleading standard does not sanction naked assertions of the grounds for removal. 28 U.S.C. § 1446(a). "Short" does not mean without factual content, and "plain" does not mean conclusory. Without pleading facts that suggest both domicile in California and United States citizenship, there is nothing plausible about Cox's assertion that Ehrman and all class members are "citizens" of California.[3] Just as unspecified "information" and unsupported "belief" will not let a cause of action survive a motion to dismiss, they also will not let a bare assertion of state citizenship survive a facial challenge to a notice of removal.[4] The necessary

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[3] Domicile is itself a legal conclusion, although it is treated as a fact in some circumstances. *Galva Foundry Co. v. Heiden*, 924 F.2d 729, 730 (7th Cir. 1991) ("Domicile is not a thing, like a rabbit or a carrot, but a legal conclusion, though treated as a factual determination for purposes of demarcating the scope of appellate review."); *Homes v. Sopuch*, 639 F.2d 431, 434 (8th Cir. 1981) (holding domicile is determined by a "legal test" and is a "mixed question of law and fact"). United States citizenship also depends on the existence of certain facts. *See, e.g.*, U.S. CONST. Amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 ("'Domicile' is not necessarily synonymous with 'residence.'") (quoting *Perri v. Kisselbach*, 34 N.J. 84, 87 (1961)). A bare assertion of an individual's state citizenship forces a court to infer the existence and plausibility of unpleaded facts and forces the non-removing party to disprove the truth of unpleaded facts.

[4] Cox continues to point to Ehrman's residence (*i.e.*, "home") in California and his and class members' purchases made in California as a factual basis for its assertion that Ehrman and class members are all "citizens of California." Opp. at 3-4, 14-15. But

factual content does not need to be lengthy and tedious, but it does need to be expressly and positively pleaded.

Plausible facts showing domicile and United States citizenship are essential to reach a conclusion regarding an individual's state citizenship. This Court should confirm that a "short and plain statement" of the grounds for jurisdiction requires more than conclusions couched as facts.

B. Admitting One's Own State Citizenship Is Different Than Asserting Another Individual's State Citizenship Based Solely on Information and Belief.

Admitting one's own state citizenship is different than asserting another party's state citizenship based solely on information and belief.

"Allegations in a complaint are considered judicial admissions." *Hakopian v. Mukasey*, 551 F.3d 843, 846 (9th Cir. 2008); 9 J. Wigmore, *Evidence* § 2590, p. 822 (J. Chadbourn rev. 1981) (the "vital feature" of a judicial admission is "universally conceded to be its conclusiveness upon the party making it"). Of course, a court is not required to accept an admission or stipulation that a jurisdictional element is or is not satisfied. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592 (2013) (rejecting stipulation that class would not seek damages over $5 million as non-binding).

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that is the precise issue the Ninth Circuit sidestepped. App.8a. This Court can, but need not, use this case to decide whether a mere allegation of residency provides a factual basis to plausibly assert or infer domicile in that state and United States citizenship.

Most individuals are aware of their "physical presence in a place" and "state of mind concerning [their] intent to remain there." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) (citing *Texas v. Florida*, 306 U.S. 398, 424 (1939)) (explaining the federal common law requirements of domicile and observing that domicile and residence are not "synonymous"). Most individuals are also aware of their country of citizenship based on their place of birth or naturalization status. *See* U.S. CONST. Amend. XIV, § 1.

The fact that an individual can judicially admit his own state citizenship does not mean other parties are free to make bare assertions of another individual's state citizenship. In *Cameron v. Hodges*, the Court accepted as true an individual's admission of his own state citizenship but rejected and unsupported assertion of another party's diverse state citizenship. 127 U.S. 322, 324 (1888); *see also Brown v. Keene*, 33 U.S. 112, 115 (1834) (accepting plaintiff's own assertion he is a "citizen of the state of Maryland" but rejecting assertion that the individual defendant was a "citizen or resident" of Louisiana because, even though there was an assertion of domicile, there was no assertion of United States citizenship); *Dancel v. Groupon, Inc.*, 940 F.3d 381, 385 (7th Cir. Oct. 9, 2019) (holding "speculation" that a class member is a "citizen of a state other than Illinois or Delaware" was "nothing but a guess of diversity, educated and sensible though it may be").

Ehrman judicially admitted and conclusively established the "class action" element of CAFA jurisdiction by pleading class allegations in his state court complaint. App.12a. Ehrman could have judicially

admitted and conclusively established his own state citizenship as well, and, in doing so, he would have relieved Cox of its burden to plead factual content showing his domicile and United States citizenship. But he had no reason to do so. *Harris v. Bankers Life & Casualty Ins. Co.*, 425 F.3d 689, 693 (2005) (observing "it is not uncommon for a state court pleading to omit the necessary facts needed to determine diversity" because "diversity of citizenship is a federal, not a state, concern").

This Court has observed that "humans and corporations can assert their own citizenship." *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 1014 (2016)). But even the right to assert one's own state citizenship has limits.[5] Unless an individual asserts his own state citizenship in a pleading or other paper, a removing defendant has the burden to plead facts that are essential to establishing an individual's domicile and United States citizenship. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989).

The Ninth Circuit's treatment of the factual basis for state citizenship as "immaterial" created a new, relaxed pleading burden that relieves removing defendants of their burden to plead plausible facts.[6]

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[5] Even judicial admissions sometimes require specific factual content. A corporation, for example, cannot simply admit it is a "citizen" of Delaware and Georgia; it must admit facts showing its state of incorporation and principal place of business. *See* App.51-52a; *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010).

[6] Cox says asserting an individual's state citizenship is "functionally identical" to asserting that an individual is domiciled in that state and a United States citizen. Opp. at 9 n.8. But the facts on which diversity depends cannot be "inferred argument-

C. The Existence of Jurisdiction Does Not Relieve a Party of Its Burden to Plead the Factual Basis for Jurisdiction.

If a plaintiff fails to plead plausible facts which, taken as true, would establish that the defendant violated the law, the complaint must be dismissed even if the defendant did in fact violate the law. *Twombly*, 550 U.S. at 570. And if a removing defendant fails to plead plausible facts which, taken as true, would establish each required element of federal jurisdiction, the case must be remanded to state court even if federal jurisdiction actually exists.

Ehrman did not waive the pleading defect in this case. *In re Continental Casualty Co.*, 29 F.3d 292, 294 (7th Cir. 1994) (observing a plaintiff "has a right to remand if the defendant did not take the right steps when removing"). Instead, he exercised his statutory right to insist that Cox plead a sufficient factual basis for the existence of federal jurisdiction based on diversity of citizenship.

Cox could have filed a motion seeking leave to amend or supplement its notice of removal with additional facts showing that minimal diversity exists. *See* 28 U.S.C. § 1653 (allowing jurisdictional allegations to be amended on terms); Fed. R. App. P. 27 (establishing procedure for filing motions in courts of appeal); *Newman-Green*, 490 U.S. at 828 (observing the court of appeals invited and granted a motion for leave to amend the complaint). Indeed, jurisdictional discovery

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atively" from other assertions. *Brown*, 33 U.S. at 115. A court can infer that a jurisdictional element is satisfied based on well-pleaded facts, but a court cannot infer the existence of facts that have not been pleaded.

and an independent investigation revealed facts showing Ehrman's and several other class members' states of domicile and United States citizenship long before the Ninth Circuit heard argument and issued its decision. *See* Ninth Circuit Docket No. 11-2. But Cox chose not to seek leave to amend.

If the Court confirms that Cox's bare assertion of Ehrman's and class members' state citizenship did not satisfy its removal pleading burden, it should reverse and remand. Giving Cox another chance to seek leave to amend would eliminate the consequences of invoking federal jurisdiction based on guesses instead of facts and incentivize more premature and inadequate removals.

CONCLUSION

A removing defendant cannot deny a plaintiff his choice of forum based on conclusory assertions of an individual's state citizenship, and it cannot burden a federal court based on a guess (even a sensible one) that minimal diversity probably exists. Yet that is precisely what the Ninth Circuit's decision in this case allows.

This case is the perfect vehicle to decide whether an individual's state citizenship is a fact that must be accepted as true, or a conclusion that must be supported by well-pleaded facts. The Court should grant the writ and resolve this important and unsettled question.

Respectfully submitted,

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