No. 19-887

IN THE

Supreme Court of the United States

ARYEH SIMON AND SASSYA SIMON,
Petitioners,

v.

MARRIOTT INTERNATIONAL INC,
ET AL.,
Respondents.

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

REPLY BRIEF OF PETITIONER

TILLMAN J. BRECKENRIDGE*
ANDREW J. PECORARO
PIERCE BAINBRIDGE
BECK PRICE & HECHT LLP
601 Pennsylvania Ave., NW
South Tower, Suite 700
Washington, DC 20004
Telephone: 202-759-6925
tjb@piercebainbridge.com

Counsel for Petitioner

*Counsel of Record

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INTRODUCTION

The question presented here is of critical importance because "[d]ue regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits" defined by the Constitution and Congress. *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934). And the minimal diversity requirement is expressly enshrined in both Article III of the U.S. Constitution and the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). As the petition demonstrated, the district court here flouted those clear limitations and assumed a power it did not have because it did not like the result of applying the law as written. Such a consequentialist approach, adopted by the district court and impliedly sanctioned by the Fourth Circuit, upends Madison's design and demands this Court's attention and intervention.

Respondents do not address this issue head-on; instead they claim that the courts can ignore this constitutional requirement because this case presents issues similar to those raised in *other* cases filed by *different* plaintiffs in which the Simons were not parties. But there is no authority supporting a theory that district courts have jurisdiction over cases that raise similar claims to other cases in federal court. Adopting such a position would risk dramatically expanding federal jurisdiction beyond the bounds of Article III. Respondents rely on the district court's phrasing of the issue as one in which the Simons "skirt" minimal diversity. Resp. Br. at 1. The record, however, easily belies their position—throughout the proceedings below and before this Court it is the Simons that *invoke* this basic constitutional requirement.

Respondents also argue that the question presented in the petition is not properly before the Court. However, this Court in *Dart Cherokee* held that it has the authority to review the merits of a question that a court of appeals declined to review. Especially when a lower court exercises jurisdiction where it has none, the Court has the power—indeed, the duty—to exercise its supervisory authority and uphold the limits of federal jurisdiction.

I. THE EXCEPTIONALLY IMPORTANT QUESTION PRESENTED WARRANTS REVIEW

The district court's failure to abide by the basic principles governing subject-matter jurisdiction is a crucial issue that requires this Court's intervention, because it (i) implicates core constitutional and statutory limits, Pet. at 8-13; and (ii) threatens the sovereignty of state courts inherent in our federalist system, Pet. at 15-18. The Simons are U.S. citizens domiciled in Israel. Pet. App. at 4a. The class they seek to represent is limited to only "U.S. citizens who are domiciled abroad." Pet. App. at 4a-5a. Under well-settled precedent, and as even the Respondents concede, Petitioners and the entire universe of proposed class members in this case are considered "stateless" individuals and their residency status cannot provide the basis for diversity jurisdiction. Resp. Br. at 5; Pet. at 9-10. Nonetheless, the district court ignored these precepts and decided that it could assert such jurisdiction because of policy justifications underlying CAFA. Pet. App. at 12a-13a. As such, the question for the Court is whether it was proper for the district court to ignore the threshold constitutional and statutory requirement of minimal diversity in favor of a district judge's policy concerns.

The answer is clearly no. A federal court cannot assert diversity jurisdiction over a class action which plainly lacks minimal diversity. Cf. *State Farm Fire & Cas. Co.* v. *Tashire,* 386 U.S. 523, 530-31 (1967). This fundamental precept is sacrosanct and must be respected. See *Steel Co.* v. *Citizens for a Better Environ.*, 523 U.S. 83, 94 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." (internal quotation marks and citation omitted)).

The purported congressional intent in CAFA to expand federal jurisdiction over nationwide class actions cannot override the plain language of the Constitution's and CAFA's minimal diversity requirement. To the contrary, courts must abide by the plain language of the Constitution and governing statutes when deciding such a jurisdictional question. *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 564 F.3d 75, 80 (1st Cir. 2009) ("The analysis will turn on the precise language of that section of CAFA. Our job is to effectuate the intent expressed in the plain language Congress has chosen, not to effectuate purported policy choices regardless of language."); *Palisades Collections LLC* v. *Shorts*, 552 F.3d 327, 336 (4th Cir. 2008) (same).

Respondents are correct that there is no circuit split on this issue. Resp. Br. at 7, 14. Presumably this question has not arisen before only because courts have uniformly respected the limits of their jurisdiction. Indeed, every court to consider a class action plaintiff's choice to geographically circumscribe the class to avoid federal jurisdiction has held that such a

choice is permissible.[1] The district court's decision to depart from these well-reasoned decisions marks an unprecedented infringement upon the authority of state courts. The Fourth Circuit's implicit sanction of that departure requires an exercise of this Court's supervisory authority. Sup. Ct. R. 10(a).

Respondents argue that the district court's exercise of jurisdiction over the Simons' case was proper because the district court already had jurisdiction over two cases in the Marriott MDL, which Respondents claim "raise[] the same claims and cover[] the same putative class members." Resp. Br. at 16. But their position is incorrect.

Respondents cite no authority for the proposition that jurisdiction in one case can be based on jurisdiction having already attached in a *different* case with *different* parties. To the contrary, this Court has recognized that a federal court cannot tie a state court case over which it did not have original jurisdiction to similar cases over which it did have

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[1] See *Roberts v. Mars Petcare US, Inc.*, 874 F.3d953, 958 (6th Cir. 2017) ("But even after CAFA, plaintiffs remain the masters of their claims and can choose whom they want to sue."); *In re Sprint Nextel Corp.*, 593 F.3d 669, 673 (7th Cir. 2010) ("[P]laintiffs are free to circumscribe their class definitions so that they can . . . avoid federal jurisdiction."); *Anderson* v. *Bayer Corp.*, 610 F.3d 390, 393 (7th Cir. 2010) ("[T]he general rule in a diversity case is that plaintiffs as masters of the complaint may include (or omit) claims or parties in order to determine the forum." (internal quotation marks and citation omitted)); *In re Hannaford Bros. Co.*, 564 F.3d at 76 (rejecting argument that plaintiff had improperly defined the class by requiring all class members to be citizens of a certain state); *Johnson* v. *Advance Am.*, 549 F.3d 932, 937-38 (4th Cir. 2008) (plaintiff may "limit[] the class to citizens" of one state "so as to avoid federal jurisdiction under CAFA.").

jurisdiction in order to make a case removable. *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 33-34 (2002); see also *Ahearn* v. *Charter Twp. of Bloomfield*, 100 F.3d 451, 456 (6th Cir. 1996) (recognizing that a removing defendant must show that a federal court can exercise jurisdiction over a removed action considered on its own).

Further, Respondents' assertion that the Simons are attempting to "peel[] off" plaintiffs from the MDL mischaracterizes the record. Resp. Br. at 16. No class has been certified from which to carve out the Simons' proposed class. And "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." *Standard Fire Ins. Co.* v. *Knowles*, 568 U.S. 588, 593 (2013) (citing *Smith* v. *Bayer Corp.*, 564 U.S. 299, 315 (2011)). Moreover, the existence of the MDL—whatever its contours may eventually be—provide no basis for finding that the Simons' case, as pleaded, contains minimal diversity. Certification allows unnamed class members to be considered a party only "for the particular purpose of appealing an adverse ruling." *Smith*, 564 U.S. at 313. It does not somehow bind those class members into federal court for their own claims.

Equally unavailing is Respondents' preoccupation with arguing that jurisdiction is proper here based on the dismissed *Frank* case. Resp. Br. at 19-20. Melissa Frank voluntarily dismissed her case after Marriott filed its notice of removal. Resp. Br. at 3; Pet. App. at 4a. The Simons were not named plaintiffs in the *Frank* action and therefore were not parties to that litigation. *Quicken Loans Inc.* v. *Alig*, 737 F.3d 960, 966 (4th Cir. 2013) ("[A]n unnamed member of proposed but uncertified class is not party to that

litigation."). That both Frank and the Simons were represented by the same counsel does not change this analysis. *S. Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 168 (1999) (the fact that the same lawyers represented two sets of plaintiffs "created no special relationship between the earlier and later plaintiffs").

Respondents' cited authorities do not suggest otherwise—they all involve the same plaintiffs attempting to amend their pleadings post-removal. See, *e.g.*, *Broadway Grill, Inc.* v. *Visa Inc.*, 856 F.3d 1274, 1276 (9th Cir. 2017); *Hargett* v. *RevClaims, LLC*, 854 F.3d 962, 964-65 (8th Cir. 2017); *Cedar Lodge Plantation, L.L.C.* v. *CSHV Fairway View I, L.L.C.*, 768 F.3d 425, 425-26 (5th Cir. 2014). Respondents do not identify any authority holding that a different plaintiff's case should be considered an amendment of a case previously dismissed. A case filed by a different plaintiff after the dismissal of a previous case is not the "functional equivalent" of an amendment to the first suit. Resp. Br. at 20.

Respondents further attempt to defend the decisions below by fabricating the concept of "fraudulent dis-joinder" to argue that the Simon's proposed class is somehow improper. Resp Br. at 17. But, even assuming that this concept exists, it is plainly inapposite here. To establish a charge of fraudulent joinder, "[t]he removing party must show either 'outright fraud in the plaintiff's pleading of jurisdictional facts' or that 'there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.'" *Johnson* v. *Am. Towers, LLC*, 781 F.3d 693, 704 (4th Cir. 2015) (quoting *Hartley* v. *CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999)).

There is no fraud in the Simons' pleadings. Respondents agree that the Simons are domiciled in Israel, and acknowledge that they and their proposed class members are stateless. Resp. Br. at 4-5; Pet. App. at 4a. And each of the Simons' proposed class members has a colorable claim against each of the named defendants. See *Johnson*, 781 F.3d at 704 (plaintiffs need only show a "glimmer of hope" of their claim succeeding to defeat a claim of fraudulent joinder). The Marriott data breach exposed to malicious actors the private, personal information of nearly 383 million individuals, including the Simons and the members of the class they seek to represent. Pet. App. at 3a. To apply Respondents' "fraudulent dis-joinder" doctrine would produce the absurdity that, before filing a state court claim, a plaintiff must scour the country to identify any individuals with similar claims against the same defendants and whose inclusion on the plaintiffs' side would give rise to diversity jurisdiction. This is not the purpose of the "narrow" fraudulent joinder doctrine. *Smallwood* v. *Ill. Cent. R.R. Co.*, 352 F.3d 220, 222 (5th Cir. 2003).

Respondents attempts to downplay the importance of this case are inapposite. This Court has been crystal clear about the importance of the limits of federal jurisdiction. It should grant review to resolve this critically important CAFA-related question.

II. THE QUESTION PRESENTED IS PROPERLY BEFORE THE COURT

In *Dart Cherokee Basin Operating Co., LLC* v. *Owens*, this Court held that it has authority to review the merits of a question raised in a petition for leave to appeal under section 1453, because that question is "in" the respective appellate court through such a petition. 574 U.S. 81, 90 (2014). Respondents'

attempts to distinguish this case from *Dart Cherkoee* are off the mark.

The Court explained in *Dart Cherokee* that the Courts of Appeals' "discretion to review a remand order is not rudderless." *Id.* When an appellate court allows a district court to exercise jurisdiction where it has none, it has plainly committed an abuse of discretion. Particularly with respect to matters of jurisdiction, this Court has emphasized its role in maintaining the constitutional and statutory limits on federal jurisdiction. *Bender* v. *Williamsport Area School Dist.,* 475 U.S. 534, 541 (1986) ("When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit.").

Here, the Fourth Circuit's decision to decline review sanctioned the district court's improper exercise of diversity jurisdiction over the Simons' case. That the decisions below in this case implicate a fundamental tenet of constitutional law rather than a decisional rule of one circuit makes this Court's intervention *more* necessary than it was in *Dart Cherokee.*

Respondents make much of the fact that the Tenth Circuit's order denying review of the petitioner's appeal in *Dart Cherkoee* stated that the court had considered both "the parties' submissions, as well as the applicable law," whereas the Fourth Circuit's decision here stated that it was only "upon consideration of submissions relative to the petition for leave to appeal." Resp. Br. at 10, 12; compare *Dart Cherokee*, 574 U.S.at 93, with, Pet. App. at 1. But of

course the Fourth Circuit relied on applicable law, siding with the Respondents.

In the briefing below, as the parties did in *Dart Cherokee*, the parties submitted "conflicting views" on the applicable law. The Simons urged a responsible adherence to the limits of U.S. Constitution and 28 U.S.C. § 1332(d)'s minimal diversity requirement. Conversely, the Respondents maintained their argument, adopted by the district court, that the court can assert jurisdiction by relying on the court's jurisdiction in different cases already pending in the federal court. By rejecting the Simons' petition, the Fourth Circuit at least implicitly agreed with the district court's analysis and sanctioned the rationale that it used.

Indeed, there are many signals that the Fourth Circuit relied on the legally erroneous premise that the district court's decision was correct to deny review of the Simons' petition. The district court and Respondents rely primarily on *Freeman* v. *Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008), and *In re Kitec Plumbing System Products Liability Litigation* ("*Kitec*"), No. 09-md-2098-F, 2010 WL 11618052 (N.D. Tex. Aug. 23, 2010). But the rationale of those cases is questionable at best. *Kitec* has never been cited by *any* other court. And *Freeman* had been expressly disapproved of by at least three circuits. See *Marple* v. *T-Mobile Cent. LLC*, 639 F.3d 1109, 1110 (8th Cir. 2011) (declining to follow *Freeman* and establish a rule permitting the amounts in controversy from separate but largely identical class action lawsuits to be aggregated for purposes of the jurisdictional threshold because "Congress would have ... outlined how courts should aggregate between class actions had it intended for courts to do so."));

Anderson, 610 F.3d at 392-94 (7th Cir. 2010) (same); *Tanoh* v. *Dow Chem. Co.*, 561 F.3d 945, 955-56 (9th Cir. 2009) (same).

More importantly, the district court did not only apply these questionable decisions, but expanded their reach. Neither *Freeman* nor *Kitec* discuss CAFA's minimal diversity requirement. Both holdings are limited to addressing only CAFA's amount-in-controversy requirement. See *Freeman*, 551 F.3d at 407; *Kitec*, 2010 WL 11618052, at *2. Cases addressing the amount-in-controversy requirement are not applicable to questions concerning other CAFA requirements. See *Parson* v. *Johnson & Johnson*, 749 F.3d 879 (10th Cir. 2014) (recognizing that cases addressing the amount-in-controversy requirement are not applicable to questions concerning other aspects of the CAFA); *Scimone* v. *Carnival Corp.*, 720 F.3d 876, 886 (11th Cir. 2013) (same). The Fourth Circuit's decision to reject the Simons' appeal "strongly suggests that the panel thought the District Court got it right." *Dart Cherokee*, 573 U.S. at 92. And because there can be "no doubt" that the Court has "authority to review . . . the [Fourth] Circuit's denial of [the Simons'] appeal" it also has the right to "correct the erroneous view of the law the [Fourth] Circuit's decision fastened on district courts within the Circuit's domain." *Id.* at 95-96.

There will be no other opportunity to review these decisions. The time and expense required by the Simons to prosecute their case through the MDL, to then appeal this jurisdictional question, and finally, if successful, to then potentially relitigate the entire case in state court (because any judgment as to the Simons would be invalid for lack of subject-matter

jurisdiction) is a heavy burden. Further, most MDL cases result in a global settlement in the transferee district. See Leonard A. Davis & Philip A. Garrett, *Case Time & Cost Management for Plaintiffs in Multidistrict Litigation*, 74 La. L. Rev. 483, 487 (2014). By attempting to preserve this jurisdictional issue for appeal, the Simons may jeopardize such a settlement in its entirety if the Respondents refuse to agree to a partial settlement. That result is counterproductive to any notion of efficiency and judicial economy, when the issue can be immediately resolved.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded with instructions to return the case to the Connecticut Superior Court for further proceedings.

Respectfully submitted,

TILLMAN J. BRECKENRIDGE*
ANDREW J. PECORARO
PIERCE BAINBRIDGE BECK
PRICE & HECHT LLP
601 Pennsylvania Ave., NW,
South Tower, Suite 700
Washington, DC 20004
Tel: 202-759-6925
tjb@piercebainbridge.com

*Counsel of Record

Counsel for Petitioners