No. ____

In the Supreme Court of the United States

BEHRMAN CAPITAL IV, L.P., BEHRMAN BROTHERS IV L.L.C. AND MIDCAP FINANCIAL INVESTMENT, L.P., PETITIONERS

v.

THOMAS E. REYNOLDS, TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The derivative jurisdiction doctrine precludes federal courts from exercising jurisdiction in removed cases where the state court lacked jurisdiction. As this Court explained nearly a century ago, "[t]he jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run Coal Co.* v. *Baltimore & O.R. Co.*, 258 U.S. 377, 382 (1922). The court of appeals held, in conflict with *Lambert Run* and its progeny and decisions of four other circuits, that the derivative jurisdiction doctrine *only* applies to issues of subject matter jurisdiction, and does not mandate dismissal following removal from a state court that lacked personal jurisdiction over the defendants.

The question presented is:

Whether the derivative jurisdiction doctrine precludes federal courts from exercising personal jurisdiction following removal from state courts that lacked personal jurisdiction "of the parties." *Ibid.*

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioner Behrman Capital IV L.P. was an appellee in the court of appeals. No parent corporation owns Behrman Capital IV L.P., and no publicly held corporation owns 10% or more of the stock of Behrman Capital IV L.P.

Petitioner Behrman Brothers IV L.L.C. was an appellee in the court of appeals. No parent corporation owns Behrman Brothers IV L.L.C., and no publicly held corporation owns 10% or more of the stock of Behrman Brothers IV L.L.C.

Petitioner MidCap Financial Investment, L.P. was named as an appellee in the court of appeals by the Trustee.[1] No parent corporation owns MidCap Financial Investment, L.P., and no publicly held corporation owns 10% or more of the stock of MidCap Financial Investment, L.P.

Respondent Thomas E. Reynolds, in his capacity as Chapter 7 Trustee of the estates of Atherotech Holdings, Inc. and Atherotech, Inc., was the appellant in the court of appeals.

ASF III Blue Note Limited was named as an appellee in the court of appeals by the Trustee.

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[1] Petitioners submit that by filing an Amended Complaint dated April 19, 2019 in which he dropped all persons and entities from the underlying action other than Petitioners Behrman Capital IV L.P. and Behrman Brothers IV L.L.C., the Trustee waived his appellate rights as to those persons and entities. The court of appeals held that the Trustee did not waive his appellate rights as to MidCap Financial Investment, L.P. App., *infra*, 7a-9a.

AXA Primary Fund America IV, L.P. was named as an appellee in the court of appeals by the Trustee.

AXA Private Capital I, L.P. was named as an appellee in the court of appeals by the Trustee.

Greg M. Behrman was named as an appellee in the court of appeals by the Trustee.

Brighthouse Life Insurance Company was named as an appellee in the court of appeals by the Trustee.

Gregory J. Chaite was named as an appellee in the court of appeals by the Trustee.

Core Americas/Global Holdings, L.P. was named as an appellee in the court of appeals by the Trustee.

Gary Dieber was named as an appellee in the court of appeals by the Trustee.

Douglas E. Behrman Trust was named as an appellee in the court of appeals by the Trustee.

Global Fund Partners II, L.P. was named as an appellee in the court of appeals by the Trustee.

The Governor and Company of the Bank of Ireland was named as an appellee in the court of appeals by the Trustee.

Mark V. Grimes was named as an appellee in the court of appeals by the Trustee.

Kimberly B. Behrman Trust was named as an appellee in the court of appeals by the Trustee.

Simon Lonergan was named as an appellee in the court of appeals by the Trustee.

William M. Matthes was named as an appellee in the court of appeals by the Trustee.

Partners Group Direct Investments 2006, L.P. was named as an appellee in the court of appeals by the Trustee.

Partners Group Global Opportunities Subholding Limited was named as an appellee in the court of appeals by the Trustee.

PE Holding USD Gmbh was named as an appellee in the court of appeals by the Trustee.

Portfolio Advisors Secondary Fund L.P. was named as an appellee in the court of appeals by the Trustee.

Michael Rapport was named as an appellee in the court of appeals by the Trustee.

Pradyut Shah was named as an appellee in the court of appeals by the Trustee.

Stepstone Private Equity Partners III Cayman Holdings, L.P. was named as an appellee in the court of appeals by the Trustee.

Stepstone Private Equity Partners III, L.P. was named as an appellee in the court of appeals by the Trustee.

Strategic Partners IV Investments L.P. was named as an appellee in the court of appeals by the Trustee.

Jeffrey S. Wu was named as an appellee in the court of appeals by the Trustee.

V

Varma Mutual Pension Insurance Company was named as an appellee in the court of appeals by the Trustee.

Amanda Zeitlin was named as an appellee in the court of appeals by the Trustee.

RELATED CASES

- *Reynolds* v. *Behrman Capital IV L.P.*, No. 19-13537, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered February 23, 2021.
- *Reynolds* v. *Behrman Capital IV L.P., et al.*, No. 18-cv-1453, U.S. District Court for the Northern District of Alabama. Judgment entered July 28, 2020.
- *Reynolds* v. *Behrman Brothers Management Corporation*, No. 19-cv-5842, U.S. District Court for the Southern District of New York. Judgment entered May 7, 2020.
- *Reynolds* v. *Behrman Capital IV L.P., et al.*, No. 18-cv-514, U.S. District Court for the Northern District of Alabama. Judgment entered Sept. 3, 2019.
- *Reynolds* v. *Behrman Capital IV L.P.*, No. 01-CV-2018-900889, Alabama Circuit Court of Jefferson County. Judgment entered June 5, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Behrman Capital IV, L.P., Behrman Brothers IV L.L.C, and MidCap Financial Investment, L.P. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 988 F.3d 1314. The opinions of the district court (App., *infra*, 21a-50a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2021. The court of appeals' order denying a timely petition for rehearing en banc was entered

on May 14, 2021. App., *infra*, 53a-54a. On June 3, 2021, the court of appeals entered a stay of its mandate to allow Petitioners to file the present petition for a writ of certiorari. App, *infra*, 51a-52a. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1334, 1441, and 1452 of Title 28 of the United States Code are reproduced in full in an appendix hereto. App., *infra*, 55a-61a.

INTRODUCTION

This case presents the Court with an opportunity to resolve a conflict among the lower courts over a significant jurisdictional question: whether the derivative jurisdiction doctrine precludes federal courts from exercising personal jurisdiction following removal from state courts lacking personal jurisdiction over the defendants. The court of appeals broke with a century of precedent in this Court and in four sister circuits when it held that the derivative jurisdiction doctrine applies *only* where the state court lacked subject matter jurisdiction.

The court of appeals' holding departed from an area of the law that this Court first announced in 1922, and that lower courts have followed ever since. Indeed, this Court alone has stated on four separate occasions that the derivative jurisdiction doctrine applies to ***both*** subject matter ***and*** personal jurisdiction. Relying on that well-established precedent, the Courts of Appeals for the First, Second, Seventh, and Ninth Circuits have each applied the derivative jurisdiction doctrine to cases removed from a state court that lacked personal jurisdiction over the defendant.

This judicial precedent also aligns with Congressional intent. In 1985 and again in 2002, Congress amended the general removal statute, 28 U.S.C. 1441, to abrogate the derivative jurisdiction doctrine in part (only as to removals under that section (Section 1441)) while otherwise leaving the doctrine intact. This endorsement of the established view of the derivative jurisdiction doctrine made the Eleventh Circuit's departure from it all the more inexplicable. Indeed, the panel itself recognized its decision was an outlier, noting, "***we choose to go in a different direction***." App., *infra*, 14a (emphasis added).

The question whether the derivative jurisdiction doctrine applies to cases involving personal jurisdiction is an important one for this Court to resolve. The court of appeals' ruling will force defendants in the Eleventh Circuit to choose between exercising their statutory right to removal and preserving their jurisdictional defenses. This case provides the Court with the opportunity to restore national uniformity on this significant issue of federal jurisdiction.

STATEMENT OF THE CASE

A. The Derivative Jurisdiction Doctrine

The derivative jurisdiction doctrine has its roots in nineteenth century jurisprudence, when the Circuit Court of Ohio established that there can be no "lawfully constituted 'suit'" in federal court when the state court from which the case was removed did not have both "jurisdiction over the subject-matter" *and* "jurisdiction over the parties." *Fidelity Tr. Co.* v. *Gill Car Co.*, 25 F. 737, 738-739 (C.C. Ohio 1885). This Court adopted the doctrine in 1922, when it held, citing *Fidelity Trust*, that in cases removed from state court, "[i]f the state

court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run Coal Co.* v. *Baltimore & O.R. Co.*, 258 U.S. 377, 382 (1922). Since *Lambert Run*, the Court has faced this issue on three occasions, and each time has reaffirmed that the derivative jurisdiction doctrine applies where the state court lacked jurisdiction over ***either*** the subject matter ***or*** the parties. See *Arizona* v. *Manypenny*, 451 U.S. 232, 242 n.17 (1981); *Freeman* v. *Bee Mach. Co.*, 319 U.S. 448, 451 (1943); *Minnesota* v. *United States*, 305 U.S. 382, 389 (1939).

Relying on this Court's clear articulation of the doctrine in *Lambert Run* and its progeny, lower courts for decades have applied the derivative jurisdiction doctrine to issues of *both* subject matter jurisdiction *and* personal jurisdiction. Until now, four courts of appeals had addressed this issue, and they uniformly held that the derivative jurisdiction doctrine applied to bar a district court from exercising jurisdiction over a controversy following removal of the suit from a state court that lacked personal jurisdiction over the defendants. See *Aanestad* v. *Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974); *Meyer* v. *Indian Hill Farm, Inc.*, 258 F.2d 287, 290 (2d Cir. 1958); *Garden Homes, Inc.* v. *Mason*, 238 F.2d 651, 653 (1st Cir. 1956); *Block* v. *Block*, 196 F.2d 930, 933 (7th Cir. 1952).

In 1985, against the backdrop of this uniform judicial precedent, Congress reviewed the scope of the derivative jurisdiction doctrine and limited its application in certain respects. Specifically, Congress amended the general removal statute, 28 U.S.C. 1441, to add a new

subsection (e) stating that in removed civil actions, the federal court "to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." Judicial Improvements Act, Pub. L. No. 99-336, § 3(e), 100 Stat. 633 (1985) (the 1985 Amendment).

Following the 1985 amendment, there was some confusion among the lower courts whether it applied to all removals or just those under Section 1441. In 2002, Congress resolved that confusion. It clarified that it had abrogated the derivative jurisdiction doctrine only as to removals under Section 1441. Congress again amended Section 1441(e) (now codified at 28 U.S.C. 1441(f)) to read, "The court to which a civil action is removed ***under this section*** is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11,020(b)(3)(A), 116 Stat. 1758 (2002) (the 2002 Amendment) (emphasis added). Courts have recognized "that § 1441(f) is more clear than former § 1441(e) in abrogating derivative jurisdiction only with respect to removals effectuated under § 1441." *Palmer* v. *City Nat'l Bank of W. Va.*, 498 F.3d 236, 246 (4th Cir. 2007), cert. denied 128 S. Ct. 2495 (2008).

With any ambiguity as to congressional intent thus resolved as a result of the 2002 Amendment, lower courts have consistently applied the derivative jurisdiction doctrine to cases removed pursuant to statutes

other than Section 1441, including applying the doctrine to cases in which the state court from which the case was removed lacked personal jurisdiction. See *Amtrust N. Am.* v. *Sennebogen Maschinenfabrik GmbH*, No. 3:19-CV-1004, 2020 WL 5441407, at *10 (M.D. Fla. Aug. 25, 2020), report and recommendation adopted 2020 WL 5423203 (M.D. Fla. Sept. 10, 2020); *Bramblett* v. *El Paso Cnty.*, No. EP-11-CV-167, 2011 WL 11741275, at *2 (W.D. Tex. June 13, 2011).

B. Proceedings Below

Atherotech, Inc. (Atherotech) was a Delaware corporation based in Alabama that manufactured a blood test that measured risks related to cardiovascular disease, including cholesterol levels. Petitioner Behrman Capital IV, L.P. (Fund IV) owned approximately 94% of the equity interests in Atherotech's direct parent company, Atherotech Holdings, Inc. (Holdings). Petitioners Behrman Brothers IV L.L.C. (Behrman Brothers) and MidCap Financial Investment, L.P. (MidCap) owned the remaining shares of Holdings. Atherotech began to experience financial difficulties in late 2014 and, along with Holdings, filed for Chapter 7 bankruptcy protection on March 4, 2016, in the United States Bankruptcy Court for the Northern District of Alabama. The bankruptcy court appointed Respondent Thomas E. Reynolds Chapter 7 bankruptcy trustee, and he filed over 100 fraudulent transfer actions in that court before instituting this action.

On March 3, 2018, on the eve of the expiration of the statute of limitations, the Trustee departed from his prior practice and chose to file this case (and only this case) in Alabama state court, asserting fraudulent transfer claims against Fund IV and its general partner

Behrman Brothers, both New-York based entities; Fund IV's limited partners; Behrman Brothers Management Corporation (BBMC), the financial advisor to Fund IV; MidCap, an investment firm organized under the laws of Delaware that always has maintained its principal place of business outside of Alabama; and 12 other defendants. The complaint also asserted negligence and breach of contract claims against Atherotech's former outside counsel, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo (Mintz Levin). The defendants removed the case to the United States District Court for the Northern District of Alabama under 28 U.S.C. 1452(a),[2] and the court severed the claims against Mintz Levin and BBMC, and remanded the BBMC claims to the Alabama state court.[3]

Petitioners and the other defendants moved to dismiss for lack of personal jurisdiction under the de-

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[2] The notice of removal asserted Section 1441 as an alternative ground for removal, but the district court disagreed that the complaint's state law claims raised a substantial federal question and rejected Section 1441 as a basis for removal. The court instead held that removal was proper solely under Section 1452(a) because the court had subject matter jurisdiction under 28 U.S.C. 1334(b) due to the relationship with the bankruptcy proceedings. See Reynolds C.A. R.E. 77.

[3] The state court subsequently dismissed the claims against BBMC, which the Trustee refiled in the United States District Court for the Southern District of New York, which also dismissed them. See Op., *Reynolds* v. *Behrman Brothers Mgmt. Corp.*, No. 19-cv-5842 (S.D.N.Y. Apr. 23, 2020), ECF No. 45. The Northern District of Alabama entered summary judgment for Mintz Levin on the claims against it. See Mem. Op. & Order, *Reynolds* v. *Behrman Capital IV L.P.*, No. 18-cv-1453 (N.D. Ala. July 28, 2020), ECF No. 49.

rivative jurisdiction doctrine. The district court granted the motion, finding that the Trustee had not pled sufficient facts to establish personal jurisdiction over the defendants in Alabama state court and, further, that the district court could not acquire personal jurisdiction upon removal pursuant to Bankruptcy Rule 7004(f), which would contravene the derivative jurisdiction doctrine. App., *infra*, 39a-50a. The district court gave the Trustee an opportunity to amend the complaint to establish personal jurisdiction over the defendants pursuant to Alabama's long-arm statute. *Id.* at 6a. In his amended complaint, the Trustee made the tactical decision to drop all defendants other than Petitioners Fund IV and Behrman Brothers, and raised additional allegations in an attempt to meet his jurisdictional burden.[4] The district court found that the amended complaint was insufficient to establish personal jurisdiction over Fund IV and Behrman Brothers in Alabama and again granted their motion to dismiss. *Id.* at 25a-31a.

The Trustee appealed, and the court of appeals reversed, holding that the derivative jurisdiction doctrine only applies to cases removed from a state court that lacked subject matter jurisdiction. In so ruling, the court of appeals acknowledged that this Court has repeatedly "described the [derivative jurisdiction] doctrine as encompassing both subject-matter and personal jurisdiction," App, *infra*, 13a, and that four circuit

[4] Petitioner MidCap was among the defendants that the Trustee dropped. The Trustee therefore has never contested the district court's initial finding that MidCap lacked minimum contacts with Alabama.

courts had "applied the doctrine of derivative jurisdiction to require dismissal in cases where the state court, prior to removal, lacked personal jurisdiction over defendants." *Id.* at 14a. Notwithstanding this well-settled law, the panel characterized this Court's prior holdings as dicta and declared that "we choose to go in a different direction." *Ibid.*

Petitioners filed a petition for rehearing en banc, which the court of appeals denied. App., *infra*, 53a-54a. Petitioners then moved to stay the mandate, which the court of appeals allowed. *Id.* at 51a-52a.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DEPARTED FROM THIS COURT'S ESTABLISHED PRECEDENT AND SPLIT WITH PREVIOUSLY UNIFORM CIRCUIT DECISIONS

A. This Court Has Repeatedly Held that the Derivative Jurisdiction Doctrine Applies When State Courts Lack Personal Jurisdiction

This Court first recognized the derivative jurisdiction doctrine nearly one hundred years ago, when it held that the "jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction." *Lambert Run Coal Co.* v. *Baltimore & O.R. Co.*, 258 U.S. 377, 382 (1922). Thus, when a case is removed from state court to federal court, the removal cannot cure any jurisdictional defects. See *General Inv. Co.* v. *Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 288 (1922). In *Lambert Run*, this Court made clear that the derivative jurisdiction doctrine encompasses ***both*** subject matter ***and*** personal jurisdiction: "If the state court

lacks jurisdiction of the subject-matter ***or of the parties***, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." 258 U.S. at 382 (emphasis added). The doctrine therefore preserves a defendant's statutory right to remove a case to federal court without waiving jurisdictional defenses.

In reaffirming the doctrine post-*Lambert Run*, this Court has consistently made clear that derivative jurisdiction extends to personal jurisdiction:

- "Where the state court lacks jurisdiction of the subject matter ***or of the parties***, the federal court acquires none, although in a like suit originally brought in a federal court it would have had jurisdiction." *Minnesota* v. *United States*, 305 U.S. 382, 389 (1939) (emphasis added).
- "[D]efects in the jurisdiction of the state court ***either*** as respects the subject matter ***or the parties*** were not cured by removal." *Freeman* v. *Bee Mach. Co.*, 319 U.S. 448, 451 (1943) (emphasis added).
- "In the area of general civil removals, ***it is well settled*** that if the state court lacks jurisdiction over the subject matter ***or the parties***, the federal court acquires none upon removal, even though the federal court would have had jurisdiction if the suit had originated there." *Arizona* v. *Manypenny*, 451 U.S. 232, 242 n.17 (1981) (emphasis added).

Accordingly, the court of appeals' decision to "go in a different direction" contravenes four opinions of this

Court stating that the doctrine applies to jurisdiction "of the parties."

Jurisdiction "of the parties" undeniably refers to personal jurisdiction. This Court made this point clear when in *Lambert Run* it adopted the Ohio Circuit Court's opinion in *Fidelity Trust* v. *Gill Car Co.*, which expressly defined the doctrine as encompassing *both* types of jurisdiction. See 25 F. 737, 738-739 (C.C. Ohio 1885). Significantly, the court of appeals did not disagree, stating that it was "acknowledging the obvious" in noting that this Court "has described the doctrine as encompassing ***both subject-matter and personal jurisdiction***." App., *infra*, 13a (emphasis added).

Given the duty of a lower court to apply this Court's precedent, that acknowledgement should have ended this case. Yet the court of appeals rationalized its decision "to go in a different direction" by mischaracterizing each of this Court's discussions of the derivative jurisdiction doctrine as dicta. App., *infra*, 13a-14a. That contention misreads past precedent and, in any event, is insufficient grounds to cast aside this Court's articulation of the doctrine even if it were properly characterized as dicta (which it is not).

First, this Court's repeated references to jurisdiction "of the parties" are not dicta. While it is true that subject matter jurisdiction was at issue in *Lambert Run*, *Minnesota*, *Freeman*, and *Manypenny*, that does not change the fact that the Court held in each of those cases that the doctrine encompasses both forms of jurisdiction. These were not stray remarks unmoored from the key issue before the Court, but rather were part and parcel of the Court's analysis and holding. See, *e.g.*, *Lambert Run*, 258 U.S. at 382. This Court can

and does frequently articulate a principle as the basis for its ruling that goes beyond the narrow factual circumstances before it. The Court does not generally grant review in cases simply to correct error as applied to specific facts, and a case that is overly fact-dependent is generally a poor candidate for review, because it would prevent the Court from articulating a general rule for future cases. Thus, it is a consistent feature of this Court's rulings that they have application beyond the facts presented, and apply to other circumstances that fall within its reasoning. See *Thryv, Inc.* v. *Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1376 n.8 (2020) ("*Cuozzo*'s recognition that § 314(d) can bar challenges rooted in provisions other than § 314(a) was hardly 'dicta,' post, at 1386—it was the Court's holding."). Lower courts are therefore bound not only by the particular results in a given case, but also by "those portions of the opinion necessary to that result." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996). A lower court cannot excise portions from a holding of this Court merely because it extends beyond the precise facts at issue. See *Thryv*, 140 S. Ct. at 1376 n.8. As one court of appeals aptly put it, "[i]f lower courts felt free to limit Supreme Court opinions precisely to the facts of each case, then our system of jurisprudence would be in shambles." *McCoy* v. *Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991), cert. denied 112 S. Ct. 1939 (1992).

In this regard, the underlying dispute in *Lambert Run* is instructive. In that case, after noting that the state court lacked subject matter jurisdiction over a suit to set aside an order of the Interstate Commerce Commission, the Court further noted that there was a *second* objection to the exercise of jurisdiction. That

objection (which the court of appeals did not recognize) turned on the fact that the United States was a necessary party, but had not been joined in state court *and could not be joined*, because it had not consented to suit there. See *Lambert Run*, 258 U.S. at 382. Thus, while *Lambert Run* did not involve an actual defendant over whom personal jurisdiction was lacking, the consequences of a state court's lack of personal jurisdiction, and the fact that it could not be cured by removal to federal court, was before the Court. The Court's articulation of the principle underlying its ruling was thus necessary to the result in that case that the federal court could not exercise jurisdiction following removal. It was not the kind of "stray comment" on a matter "not even at issue" that can be brushed aside as mere dicta. *National Collegiate Athletic Ass'n* v. *Alston*, 141 S. Ct. 2141, 2157-2158 (2021). The full scope of the holding in *Lambert Run* is further confirmed by the Court's reiteration of the rule as applying to state court defects in personal jurisdiction in three subsequent opinions over six decades.

Second, even if the Court's repeated inclusion of personal jurisdiction within the derivative jurisdiction doctrine were dicta—which it is not—the court of appeals was not free to disregard it so lightly. Dicta that is "an important part of the Court's rationale for the result it reached * * * is entitled to greater weight." *Local 28 of Sheet Metal Workers' Int'l Ass'n* v. *E.E.O.C.*, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring in part and dissenting in part). It is unsurprising that this Court might include in its announcement of a new legal principle "some explanatory language that is intended to provide guidance to lawyers and judges in future cases," and it is wrong to invite lower

courts "to discount the importance of such guidance." *Carey* v. *Musladin*, 549 U.S. 70, 79 (2009) (Stevens, J., concurring). Here, the court of appeals erred in disregarding the Court's consistent articulation of the derivative jurisdiction doctrine's scope, whether dicta or not.

B. The Court of Appeals' Opinion Breaks with a Century of Nationwide Uniformity and Creates a Circuit Split

The court of appeals' opinion in this case is in direct conflict with the holdings of the four circuits that had previously addressed the scope of the derivative jurisdiction doctrine. In the decades since *Lambert Run*, the Courts of Appeals for the First, Second, Seventh, and Ninth Circuits have all held that the derivative jurisdiction doctrine bars a federal court from exercising jurisdiction over a defendant following removal from a state court lacking personal jurisdiction. See *Aanestad* v. *Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974); *Meyer* v. *Indian Hill Farm, Inc.*, 258 F.2d 287, 290 (2d Cir. 1958); *Garden Homes, Inc.* v. *Mason*, 238 F.2d 651, 653 (1st Cir. 1956); *Block* v. *Block*, 196 F.2d 930, 933 (7th Cir. 1952). As such, the court of appeals' opinion here creates a circuit split where the law was previously uniform. This Court's guidance is now necessary to resolve this important conflict.

In *Aanestad*—the most recent court of appeals decision to address this issue prior to this case—the defendant removed a wrongful death action from California state court to federal court. 521 F.2d at 1299-1300. Thereafter, the district court dismissed the complaint for lack of personal jurisdiction. *Id.* at 1300. The Ninth Circuit affirmed, holding that because the state court lacked jurisdiction over the defendant, the federal court

likewise lacked personal jurisdiction. *Id.* at 1300-1301. Citing this Court's decision in *Freeman*, the Ninth Circuit reasoned that "since the case was removed from a California court, the district court had personal jurisdiction over the defendant Beech only if the court from which the case was removed had such jurisdiction." *Id.* at 1300.

Similarly, in *Block*, the defendant removed the case from state court and subsequently moved to dismiss the complaint in federal court "for want of jurisdiction over his person." 196 F.2d at 932. The district court concluded that because of defects in service, the state court lacked jurisdiction over the defendant. *Id.* at 932-933. Consequently, the district court held that pursuant to the derivative jurisdiction doctrine, it, too, lacked jurisdiction. *Id.* at 933. Notably, the Seventh Circuit wrote that "the District Court had no alternative but to dismiss the case" under the derivative jurisdiction doctrine even though "the state court undoubtedly did have jurisdiction over the subject matter" of the case. *Ibid.* The same result obtained in cases testing the scope of the derivative jurisdiction doctrine in the First and Second Circuits. See *Garden Homes*, 238 F.2d at 653; *Meyer*, 258 F.2d at 290.

The panel here acknowledged these decisions and went so far as to say that it could "understand why the district court here applied the doctrine of derivative jurisdiction" in light of this uniform precedent. App. *infra*, 14a. Yet, rather than recognize, as the Seventh Circuit did, that it had "no alternative" but to follow this precedent, the court split with its sister circuits and instead went in a "different direction," relying upon dicta from two decisions in which the derivative juris-

diction doctrine was not even directly at issue. *Id.* at 16a-17a (citing *Aguacate Consol. Mines, Inc., of Costa Rica* v. *Deeprock, Inc.*, 566 F.2d 523 (5th Cir. 1978) (upholding transfer after removal where personal jurisdiction was lacking in the state court from which the action was removed, but without addressing whether the derivative jurisdiction doctrine would preclude the transferee court from exercising jurisdiction); *Witherow* v. *Firestone Tire & Rubber Co.*, 530 F.2d 160, 168-169 (3d Cir. 1976) (finding that the federal court lacked jurisdiction in a removed case where the claim was time-barred at the time of removal, and remarking in passing that the derivative jurisdiction doctrine applies only to subject matter jurisdiction)).

II. Limiting The Derivative Jurisdiction Doctrine To Issues Of Subject Matter Jurisdiction Is Inconsistent With Congressional Intent

Congress implicitly adopted this Court's articulation of the derivative jurisdiction doctrine as encompassing personal jurisdiction when it enacted the 1985 Act and 2002 Act and left the doctrine largely intact. In the 1985 Act, Congress amended 28 U.S.C. 1441 to abolish the derivative jurisdiction doctrine as to removals under that section, but courts subsequently expressed confusion over whether Congress had abrogated the doctrine as to removals under other statutes. Judicial Improvements Act, Pub. L. No. 99-336, § 3(e), 100 Stat. 633 (1985). In the 2002 Act, Congress resolved this confusion by again amending Section 1441 to state expressly that the derivative jurisdiction doctrine did not apply to removals "under this section" only. 21st Century Department of Justice Appropriations Authorization

Act, Pub. L. No. 107-273, § 11,020(b)(3)(A), 116 Stat. 1758 (2002). Congress otherwise did not change the doctrine as the courts, and especially this Court, had expressed it.

Congress's amendments to Section 1441 endorsed the Court's inclusion of both subject matter and personal jurisdiction within the scope of the derivative jurisdiction doctrine. Congress is "presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change" in relevant regard. *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-240 (2009) (citation omitted); see also *Ankenbrandt* v. *Richards*, 504 U.S. 689, 700-701 (1992) ("With respect to such a longstanding and well-known construction of the diversity statute, and where Congress made substantive changes to the statute in other respects * * * we presume * * * that Congress adopted that interpretation when it reenacted the diversity statute." (cleaned up)). Significantly, as this Court has intoned, where, as here, Congress "has relied upon conditions that the courts have created," the courts "are not as free as [they] would otherwise be to change them," because any such change "would effectively alter the statute." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 273 (1979).

Congress is, of course, presumed to be aware of this Court's articulation of the derivative jurisdiction doctrine as encompassing both subject matter and personal jurisdiction at the time it enacted the 1985 Act and 2002 Act. See *Forest Grove*, 557 U.S. at 239-240. Following review on two different occasions, Congress left the scope of the doctrine largely unchanged and

thus endorsed those cases. Cf. *Rodas* v. *Seidlin*, 656 F.3d 610, 619 (7th Cir. 2011) ("Given that Congress explicitly abrogated the doctrine of derivative jurisdiction only with respect to removals under Section 1441, it supports the notion that—for whatever reasons—Congress intended to keep the doctrine in place with regard to other removal provisions."). Thus, the court of appeals contravened binding precedent of this Court, the holdings of its sister circuits, *and* the intent of Congress when it substantially narrowed the scope of the derivative jurisdiction doctrine.

III. The Panel's Decision To Significantly Narrow The Scope Of The Derivative Jurisdiction Doctrine Raises An Important Question, And This Case Presents An Appropriate Vehicle To Resolve The Circuit Split

A. This Case Presents an Important Question for This Court's review

This case presents an important question for this Court's review. Uniformity is critical here, as a circuit split will encourage plaintiffs to avoid filing in circuits that continue to apply the derivative jurisdiction doctrine as this Court defined it. See *Mason* v. *Cont'l Grp., Inc.*, 474 U.S. 1087, 1087 (1986) (White, J., dissenting from denial of certiorari where lower court division would "have the troubling effect of encouraging forum shopping by plaintiffs"). The question presented is all the more important because it implicates the due process rights of defendants to avoid being haled into a court where they have insufficient contacts. See *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("The personal

jurisdiction requirement recognizes and protects an individual liberty interest.").

This case illustrates the significance of this point, and the important role of the derivative jurisdiction doctrine as a bulwark against forum shopping. Here, rather than bring this case in the bankruptcy court as he did with over 100 other fraudulent transfer cases, the Trustee chose to attempt to hale dozens of out-of-state and foreign defendants into Alabama state court, where personal jurisdiction was clearly lacking. The derivative jurisdiction doctrine, until now, prevented such forum shopping. Under the court of appeals' ruling, though, plaintiffs in the Eleventh Circuit will face no adverse consequences when they file a case in a state court where the defendant had no ties and the defendant removes. In so doing, the court of appeals' ruling strips defendants from exercising their statutory right to removal without waiving jurisdictional objections. This is no mere hiccup in a case's procedural history, but goes to a fundamental right. If federal courts lacked the power to rule on validity of threshold defects following removal, a state court could compel a defendant to submit to "a jurisdiction not of his residence, or give up his right to take the case to what, in contemplation of law, may be a more impartial tribunal for the determination of the action instituted against him, and which it is the purpose of the removal proceedings to secure to him." *Cain* v. *Commercial Publ'g Co.*, 232 U.S. 124, 133 (1914).

In addition to promoting uniformity and preventing forum shopping, review is important to acknowledge that the derivative jurisdiction doctrine holds at least as much force in the personal jurisdiction context as in

the subject matter jurisdiction context. After all, *Lambert Run* applied the doctrine in the context of a claim over which there was exclusive federal court jurisdiction, illustrating that removal of a complaint from a state court that lacks jurisdiction precisely because Congress has expressly provided exclusive jurisdiction to federal courts does not cure jurisdictional defects. See also *General Inv. Co.* v. *Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 287-288 (1922) (applying derivative jurisdiction doctrine to case filed in state court under Sherman Antitrust Act and Clayton Act, which provide for exclusive federal subject matter jurisdiction). Thus, there is little reason to think that removal would cure a state court's lack of personal jurisdiction, where the state and federal courts are far more likely to be applying the same test. In each case, the doctrine stems from the principle that it is "essential * * * to the right of removal" that the federal court have the power to pass upon the threshold question of the state court's jurisdiction, including "the validity of the service of process; that is, upon the question of jurisdiction over the person of the defendant." *Cain*, 232 U.S. at 133. The derivative jurisdiction doctrine, therefore, makes as much sense, if not more, in the personal jurisdiction context as it does in the subject matter jurisdiction context.

Moreover, the derivative jurisdiction doctrine has particular significance in the context of bankruptcy-related removals under Section 1452. The purpose of Section 1452 is to "centraliz[e] bankruptcy litigation in a federal forum." *California Pub. Emps.' Ret. Sys.* v. *WorldCom, Inc.*, 368 F.3d 86, 103 (2d Cir. 2004), cert. denied 543 U.S. 1080 (2005). Parties, including debtors, frequently avail themselves of Section 1452 to remove a

state court action pending at the time a debtor files for bankruptcy. Under the court of appeals' decision, debtors will be forced to choose between removing a case to federal court or preserving their jurisdictional defenses, which undermines the purpose of removal under Section 1452, in violation of the principle articulated in *Cain*.

B. This Court Should Reaffirm the Scope of the Derivative Jurisdiction Doctrine in This Case

This case presents an ideal vehicle for the Court to resolve the circuit split over the scope of the derivative jurisdiction doctrine. The derivative jurisdiction doctrine was the sole basis for the court of appeals' decision. Cf. *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 182-184 (1959) (dismissing the writ of certiorari as improvidently granted despite a circuit split because alternative grounds for relief existed). There are no other issues that could complicate the Court's ability to resolve this important question in the present case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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