No. 21-207

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

REPLY BRIEF OF PETITIONERS

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Respondent's brief in opposition attempts to downplay the clear circuit split created by the court of appeals' decision, characterizing as mere distractions the express (and previously uniform) holdings of four courts of appeals that the derivative jurisdiction doctrine applies where a state court lacked personal jurisdiction before removal. This approach is at odds with the very opinion Respondent seeks to preserve. In its decision, the court of appeals itself acknowledged it was creating a circuit split, noting that "a number of circuits have applied the doctrine of derivative jurisdiction to require dismissal in cases where the state court, prior to removal, lacked personal jurisdiction." Pet. App. 14a. Indeed, the court stated that in light of this precedent (and the decisions of this Court), it could "under-

stand why the district court here applied the doctrine of derivative jurisdiction." *Ibid.* The court of appeals, however, decided to chart its own course, and created a circuit split by "choos[ing] to go in a different direction." *Ibid.*

Not only did the court of appeals recognize it was creating a circuit split, it also acknowledged that it was disregarding nearly a century of this Court's precedent. The court of appeals "beg[an] by acknowledging the obvious"—that this Court "has described the doctrine as encompassing *both* subject-matter *and* personal jurisdiction." Pet. App. 13a. (emphasis added). Respondent nonetheless seeks to disparage this Court's precedent as dicta. This Court's proclamation of the scope of the derivative jurisdiction doctrine is not merely dicta, nor, if it were, could it be so lightly ignored. As the court of appeals acknowledged, even dicta of this Court "is not something to be lightly cast aside." *Ibid.* (citing *F.E.B. Corp.* v. *United States*, 818 F.3d 681, 690 n.10 (11th Cir. 2016) ("[T]here is dicta * * * and then there is Supreme Court dicta.")).

This petition thus represents the paradigm of when this Court should intervene. The court of appeals' decision has created uncertainty where the law was previously uniform, and it ignores nearly a century of this Court's precedent. To make matters worse, it forces defendants in the Eleventh Circuit to choose between exercising their statutory right to removal and preserving their jurisdictional defenses. The need for this Court's review is thus plain and urgent.

I. THIS COURT'S PRECEDENT ESTABLISHES THAT THE DERIVATIVE JURISDICTION DOCTRINE APPLIES TO PERSONAL JURISDICTION

When this Court has defined the derivative jurisdiction doctrine, it has always held that the doctrine applies to *both* subject matter jurisdiction *and* personal jurisdiction. See *Lambert Run Coal Co.* v. *Baltimore & O.R. Co.*, 258 U.S. 377, 382 (1922) ("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."); see also *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). Contrary to Respondent's opposition brief, parties and courts of appeals cannot simply disregard this Court's pronouncement of judicial doctrine. This Court should thus grant certiorari to correct the court of appeals' deviation from this Court's longstanding precedent.

Respondent is incorrect that the presence of the United States as a party in *Lambert Run* means the derivative jurisdiction doctrine applies only to subject matter jurisdiction. Br. in Opp. 5-8. In fact, the United States' sovereign immunity from suit in state courts is more akin to *personal* jurisdiction than to *subject matter* jurisdiction. Unlike subject matter jurisdiction, a party can waive the personal jurisdiction defense. See *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-703 (1982) (noting that "no action of the parties can confer subject-matter jurisdiction upon a federal court" but "the requirement of personal jurisdiction" can "be waived").

Similarly, as this Court has made clear, the United States can waive its sovereign immunity. See *Franconia Assocs.* v. *United States*, 536 U.S. 129, 141 (2002) ("Once the United States waives its immunity and does business with its citizens, it does so much as a party never cloaked with immunity.").

The sovereign immunity underpinnings of *Lambert Run* show that this Court intended what it said when it opined that the derivative jurisdiction doctrine applies to personal jurisdiction. In *Lambert Run*, the Court acknowledged that there were *two* objections to jurisdiction in the state court: first, that a suit to set aside an order of the Interstate Commerce Commission must be brought in federal court (lack of subject matter jurisdiction), and second, that the United States was an indispensable party and "was not joined, and could not be, for it has not consented to be sued in state courts" (lack of personal jurisdiction). *Lambert Run*, 258 U.S. at 382. Thus, in addition to exclusive federal jurisdiction over the subject matter, the fact that the United States did not consent to suit precluded jurisdiction in the state court in *Lambert Run*. This Court's reliance on the absence of consent confirms that the Court was focused on personal jurisdiction, and thus supports the conclusion that the Court's statement that the derivative jurisdiction doctrine applies to personal jurisdiction was very much part of its holding, and not merely dictum. See *Insurance Corp. of Ireland*, 456 U.S. at 702-703.

Even if Respondent were correct that the United States' decision not to waive sovereign immunity creates an absence of subject matter jurisdiction, his argument still falters. The Court in *Lambert Run* de-

fined the derivative jurisdiction doctrine to encompass "jurisdiction of the subject-matter *or* of the parties." 258 U.S. at 382 (emphasis added). If the Court intended the doctrine to apply only where sovereign immunity—not personal jurisdiction—was at issue, and sovereign immunity were a matter of subject matter jurisdiction, the Court would not have referred to both types of jurisdiction in the disjunctive. Instead, the Court referred to the two types of jurisdiction for a simple reason: it adopted the reasoning of *Fidelity Trust Co.* v. *Gill Car Co.*, which expressly included personal jurisdiction within its articulation of the derivative jurisdiction doctrine in a case where sovereign immunity was not at issue. See 25 F. 737, 738-739 (C.C. Ohio 1885) (explaining there can be no "lawfully constituted 'suit'" in federal court upon removal when the state court did not have "jurisdiction over the subject-matter" and "jurisdiction over the parties"). Tellingly, neither *Lambert Run* nor any subsequent decision of this Court casts any doubt on the doctrine articulated for the first time in *Fidelity Trust*.

Following *Lambert Run*, this Court's decisions made it even clearer that subject matter jurisdiction and personal jurisdiction are each *independent* components of the derivative jurisdiction doctrine. In *Freeman*, the Court confirmed that "defects in the jurisdiction of the state court *either* as respects the subject matter *or* the parties were not cured by removal." 319 U.S. at 451 (emphasis added). Again, Respondent's position that the derivative jurisdiction doctrine encompasses subject matter jurisdiction alone cannot be squared with this clear language referring to two distinct types of jurisdiction.

Further, Respondent makes no effort to defend the rationale of the court of appeals' opinion, or to explain why it would make sense to limit the derivative jurisdiction doctrine to subject matter jurisdiction alone. From a policy standpoint, the derivative jurisdiction doctrine makes at least as much sense as applied to personal jurisdiction as subject matter jurisdiction. Pet. 19-20. If removal does not cure a defect in subject matter jurisdiction even where—as in *Lambert Run*—the sole reason the state court lacks jurisdiction is because federal courts have exclusive jurisdiction, then it makes sense that removal likewise would not cure defects in personal jurisdiction either. Indeed, the derivative jurisdiction doctrine makes *more* sense for personal jurisdiction, where the defendant was not even properly subject to the state court's authority. Defendants should not be forced to choose between exercising their statutory right of removal to a federal forum and waiving jurisdictional defenses. Respondent does not substantiate his rigid (and incorrect) insistence that the derivative jurisdiction doctrine only applies to subject matter jurisdiction with any explanation as to why that should be the case. For all of these reasons, this Court should reject Respondent's cramped reading of its precedents and grant certiorari to correct the court of appeals' admitted departure from *Lambert Run* and its progeny.

II. This Court Should Grant Certiorari To Reject The Court Of Appeals' Mischaracterization Of Its Holdings As Dicta

As explained above, the references to personal jurisdiction in the *Lambert Run* line of cases were part of this Court's holdings. It is unremarkable that this

Court might articulate a holding that extends beyond what might be the minimum scope necessary to decide the precise factual circumstances directly before it. See *Thryv, Inc.* v. *Click-To-Call Techs., L.P.*, 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."). This Court's holdings are not narrowly confined to the facts of a given case; rather, they include all portions of an opinion that are "necessary to [the] result." See *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996). Petitioners showed that principles of personal jurisdiction were necessary to the result of *Lambert Run*, and thus, this Court's inclusion of personal jurisdiction within the derivative jurisdiction doctrine was not dicta. Pet. 12-13.

To support his argument that this Court's holdings in four separate cases are merely dicta, Respondent states in conclusory fashion that the Court's articulation of the derivative jurisdiction doctrine as encompassing personal jurisdiction was not necessary to the Court's decision in *Lambert Run*. Br. in Opp. 10. Respondent's citation to the appendix of *Ex parte Watkins*, 32 U.S. 568, 680 (1833), merely reiterates that holdings consist of matters necessary to the outcome of a case—but fails to show why this Court's language regarding consent and personal jurisdiction was itself unnecessary in *Lambert Run*. As it did in *Thryv*, the Court should grant certiorari to reverse the court of appeals' failure to adhere faithfully to this Court's precedent.

III. CONGRESS UNDERSTOOD THAT THE DERIVATIVE JURISDICTION DOCTRINE ENCOMPASSED PERSONAL JURISDICTION WHEN IT ENDORSED THE DOCTRINE FOR ALL REMOVALS EXCEPT THOSE UNDER 28 U.S.C. 1441

In arguing that Congress understood the derivative jurisdiction doctrine to be "limited to issues of subject matter jurisdiction," Br. in Opp. 13, Respondent ignores the fact that Congress has twice addressed the derivative jurisdiction doctrine, yet expressly left it intact with respect to all removals other than those arising under 28 U.S.C. 1441. Congress is "presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-240 (2009) (citation omitted). Respondent's opposition fails to overcome this presumption.

The legislative history supports Petitioners' argument and confirms that Congress understood the doctrine to encompass personal jurisdiction. The statement of the Judicial Conference of the United States to the House Subcommittee on Courts in connection with the 1985 amendment to Section 1441 clarified that the amendment was intended to "address[] only questions of subject matter jurisdiction and not questions of *personal jurisdiction*." *Federal Judicial Improvements Act of 1985: Hearing on H.R. 1472, H.R. 2187, H.R. 2446, H.R. 2561, H.R. 2724, H.R. 3044, H.R. 3049, and H.R. 3081 Before the H. Comm. on the Judiciary*, 99th Cong. 46 (1985) (Statement of the Judicial Conference of the United States) (emphasis added). This statement reflects that Congress (i) was fully aware the doctrine

applied to both subject matter and personal jurisdiction, and (ii) in amending Section 1441, was focused on eliminating the doctrine with respect to cases where the state court lacked subject matter jurisdiction. The court of appeals, then, has effectively abrogated the derivative jurisdiction doctrine as to personal jurisdiction, in direct contravention of congressional intent. This is yet another reason to grant certiorari, as this Court has repeatedly stated that when Congress has addressed an area of established precedent and modified it only in part, it is presumed to have adopted the doctrine to the extent it was not addressed. See *Forest Grove*, 557 U.S. at 239-240.

IV. There Is A Well-Developed Circuit Split On The Question Presented That Is Ripe For This Court's Resolution

Respondent's attempt to minimize the conflict among the circuits by characterizing the First, Second, Seventh, and Ninth Circuits' opinions on this issue as dicta—while consistent with his approach to this Court's own decisions—not only distorts the actual holdings of those cases, but is also contrary to the court of appeals' opinion, which conceded that it was creating a circuit split. Pet. App. 14a. ("[O]ver the years a number of circuits have applied the doctrine of derivative jurisdiction to require dismissal in cases where the state court, prior to removal, lacked personal jurisdiction over the defendants."). Respondent's attempt to contort the other circuits' holdings into dicta only highlights the need for this Court's review to resolve the conflict among the lower courts.

For example, in *Aanestad* v. *Beech Aircraft Corp.*, 521 F.2d 1298, 1299 (1974), the Ninth Circuit stated at

the outset of its opinion that the sole issue on appeal was "whether the district court correctly determined that it had no personal jurisdiction over the defendant." The first sentence of the court's analysis stated that "the district court had personal jurisdiction over the defendant Beech only if the court from which the case was removed had such jurisdiction" and cited to this Court's decision in *Freeman* and the Seventh Circuit's decision in *Block* v. *Block*, 196 F.2d 930, 933 (1952). *Id.* at 1300. The Ninth Circuit concluded that the district court properly dismissed the action under the derivative jurisdiction doctrine, because the state court lacked personal jurisdiction over the defendant and thus, the district court likewise lacked jurisdiction. *Id.* at 1300-1301. That the derivative jurisdiction doctrine applies to cases involving personal jurisdiction was far beyond a "passing reference" in the court's opinion; it was the Ninth Circuit's holding. Br. in Opp. 14.

The First, Second, and Seventh Circuit opinions are also plainly in conflict with the court of appeals' ruling in this case. The courts of appeals in *Meyer*, *Garden Homes*, and *Block* all viewed ineffective service of process as an absence of personal jurisdiction. See *Meyer* v. *Indian Hill Farm, Inc.*, 258 F.2d 287, 290 (2d Cir. 1958) ("[T]he personal jurisdiction of the district court over Indian Hill rests on the validity under New York law of the service of process on the New Jersey Secretary of State."); *Garden Homes, Inc.* v. *Mason*, 238 F.2d 651, 653 (1st Cir. 1956) ("Effective service is, of course, the keystone to a court's personal jurisdiction over the defendant."); *Block* 196 F.2d at 932-933 (7th Cir. 1952) (affirming dismissal for "want of jurisdiction over [the defendant's] person" due to defects in service at the state court). The court of appeals here recog-

nized that these earlier decisions involved a lack of personal jurisdiction over the defendants. Pet. App. 14a.

District courts have also relied on these circuit opinions when concluding that the derivative jurisdiction doctrine applies to personal jurisdiction. See, *e.g.*, *Xyrous Commc'ns, LLC* v. *Bulgarian Telecomms. Co. AD*, No. 1:09-cv-396, 2009 WL 2877084, at *7 (E.D. Va. Sept. 4, 2009) ("In removal cases, a federal court obtains personal jurisdiction over a party if the state court from which that case was removed had personal jurisdiction over that party."); *Bach* v. *McDonnell Douglas, Inc.*, 468 F. Supp. 521, 524 (D. Ariz. 1979) ("Since this case was removed from an Arizona Court, this Court has personal jurisdiction only if the Arizona Court from which it was removed, could properly assert jurisdiction."); accord *McCurtain Cnty. Prod. Corp.* v. *Cowett*, 482 F. Supp. 809, 813 (E.D. Okla. 1978); *Haraburda* v. *U.S. Steel Corp.*, 187 F. Supp. 79, 81 (W.D. Mich. 1960).

Respondent cites to four district court cases which he states "reject[] this type of expansion of the derivative jurisdiction doctrine." Br. in Opp. 9. To the extent these cases opine that the derivative jurisdiction doctrine does not apply to personal jurisdiction, they only highlight the uncertainty among the lower courts. *Ibid.*

The need for review by this Court could not be clearer. The court of appeals recognized that it was creating a circuit split and "therefore underst[ood] why the district court here applied the doctrine of derivative jurisdiction." Pet App. 14a. Nevertheless, the panel decided "to go in a different direction." *Ibid.* It is this "different direction" that represents a division where the law (at least at the circuit level) was previ-

ously uniform. And it is this "different direction"—departing from a century of Supreme Court and lower court precedent—that requires review and resolution by this Court. See *Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995) (granting certiorari to "end the division of authority" among the federal courts).

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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