No. 21-

In the Supreme Court of the United States

JOHN C. KITCHIN, JR., NORTH WEST AUTO BODY CO., AND MARY MENKE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

V.

BRIDGETON LANDFILL, LLC, REPUBLIC SERVICES, INC., ALLIED SERVICES, LLC, AND ROCK ROAD INDUSTRIES, INC.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Class Action Fairness Act's "local controversy" exception, a federal district court must decline jurisdiction over a class action in which, among other requirements, there is a local defendant "whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class." 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb).

The question presented is whether this requirement can be satisfied where the local and non-local defendants engaged in the same alleged conduct (as the Sixth, Ninth, and Tenth Circuits hold), or whether the alleged conduct of the local defendant must be different from that of the non-local defendants (as the Fifth and Eighth Circuits hold).

CORPORATE DISCLOSURE STATEMENT

Petitioner North West Auto Body Co. has no parent corporation. No company owns 10% or more of its stock.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Eighth Circuit: *Kitchin v. Bridgeton Landfill, LLC*, No. 19-2072 (July 8, 2021)

U.S. District Court, Eastern District of Missouri: *Kitchin v. Bridgeton Landfill, LLC*, No. 4:18-CV-672-CDP (May 8, 2019)

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John C. Kitchin, Jr., North West Auto Body Co., and Mary Menke respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 3 F.4th 1089 (8th Cir. 2021). The opinion of the district court is published at 389 F. Supp. 3d 600 (E.D. Mo. 2019).

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2021. The court of appeals denied panel rehearing and rehearing en banc on August 12, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1332(d)(2) provides:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

28 U.S.C. § 1332(d)(4) provides:

A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

STATEMENT

This case raises an important question that often arises when defendants seek to remove class actions to federal court under the Class Action Fairness Act of 2005. The statute directs federal district courts to "decline to exercise jurisdiction" where, among other requirements, there is at least one defendant who is a citizen of the state in which the suit was originally filed, and this local defendant's "alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class." 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb). These cases often involve multiple defendants, including one local defendant and one or more non-local defendants. The local defendant is often a corporate subsidiary or an agent of a non-local defendant, which is typically an out-of-state corporation.

The lower courts have struggled to apply this statute to the recurring fact pattern in which the alleged conduct of the local defendant is the same as the alleged conduct of the non-local defendant. For example, where the local defendant is a wholly-owned subsidiary of the non-local defendant, the complaint often alleges that both entities engaged in the same misconduct and that both are liable. In such a complaint, does the local defendant's "alleged conduct form[ ] a significant basis" for the plaintiffs' claims? Or, in order to satisfy this requirement, must the complaint distinguish between the conduct of the local defendant and that of the non-local defendant?

As the court of appeals recognized below, there is a circuit split on this question. This case provides an excellent opportunity to resolve it.

1. CAFA's local controversy exception

Under the Class Action Fairness Act of 2005 ("CAFA"), the federal district courts have jurisdiction over certain class actions in which any member of the plaintiff class is a citizen of a state different from any defendant. 28 U.S.C. § 1332(d)(2)(A). But CAFA includes a "local controversy" exception, under which district courts must decline to exercise jurisdiction over class actions that satisfy several requirements. § 1332(d)(4). (The name of the exception does not appear in the statute but is nevertheless widely used. It comes from the Senate Report explaining the exception's scope and purpose. *See* S. Rep. No. 14, 109th Cong., 1st Sess. 39 (2005).)

To fall within the local controversy exception, a class action must satisfy each of these requirements:

- More than two thirds of the proposed plaintiff class are citizens of the state in which the suit was filed. 28 U.S.C. § 1332(d)(4)(A)(i)(I).
- There is at least one defendant from whom significant relief is sought, whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class, and who is a citizen of the state in which the suit was filed. § 1332(d)(4)(A)(i)(II).
- The plaintiffs' principal injuries occurred in the state in which the suit was filed. § 1332(d)(4)(A)(i)(III).
- No other class action has been filed in the past three years asserting the same factual allegations against the same defendants. § 1332(d)(4)(A)(ii).

If a class action satisfies these requirements, the district court "shall decline to exercise jurisdiction." § 1332(d)(4).

The local controversy exception implements the intent of Congress "that class actions with a truly local focus should not be moved to federal court under this legislation because state courts have a strong interest in adjudicating such disputes." S. Rep. No. 14, at 39. The purpose of CAFA was to correct the anomaly that allowed plaintiffs to defeat federal jurisdiction over truly nationwide class actions by naming a single non-diverse defendant. *Id.* at 10; *see Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1752 (2019) (Alito, J., dissenting). Without an exception for local controversies, however, CAFA would have created a mirror-image anomaly, by allowing defendants to remove essentially local suits to federal court based on the presence of a single diverse defendant. Congress therefore included in CAFA a list of criteria to distinguish local from nationwide controversies. As the Senate Report explained, "the purpose of each of these criteria is to identify a truly local controversy—a controversy that uniquely affects a particular locality to the exclusion of all others." S. Rep. No. 14, at 39.

The Senate Report explained that one of the criteria is that "there must be at least one real local defendant." *Id.* at 40. That is, there must be a local defendant "whose alleged conduct forms a significant basis for the claims asserted by the class." *Id.* Plaintiffs may not turn national controversies into local ones merely by naming a nominal or peripheral local defendant. Rather, "the Committee intends that the

local defendant must be a primary focus of the plaintiffs' claims—not just a peripheral defendant." *Id.*

The Senate Report provided two hypothetical examples of class actions, one that falls within the local controversy exception and one that does not.

The first hypothetical case was a class action against a Florida cemetery for improper burial practices, in which 90% of the plaintiffs live in Florida, and the defendants are the local cemetery and its out-of-state parent corporation. "This is precisely the type of case for which the Local Controversy Exception was developed," the Senate Report explained. "Although there is one out-of-state defendant (the parent company), the controversy is at its core a local one, and the Florida state court where it was brought has a strong interest in resolving the dispute. Thus, this case would remain in state court." *Id.* at 41.

The second hypothetical case was a class action brought in Florida by local residents against an out-of-state automobile manufacturer and a few in-state dealers, alleging that a certain model of vehicle was defective. "This case would not fall within the Local Controversy Exception for two reasons," the Report explained. "First, the automobile dealers are not defendants whose alleged conduct forms a significant basis of the claims or from whom significant relief is sought by the class," because the manufacturer, not the dealers, was principally at fault. *Id.* Second, the injuries caused by the alleged misconduct "were incurred in all fifty states. The fact that the suit was brought as a single-state class action does not mean that the principal injuries were local." *Id.* This case would therefore be removable to federal court. *Id.*

CAFA's local controversy exception thus reflects the judgment of Congress that minimal diversity alone is not enough for federal courts to exercise jurisdiction over class actions. Rather, CAFA shifted "a larger number of class actions into federal courts, while continuing to preserve primary state court jurisdiction over primarily local matters." *Id.* at 6. The local controversy exception was "intended to ensure that state courts can continue to adjudicate truly local controversies in which some of the defendants are out-of-state corporations." *Id.* at 28.

2. The facts of this case

For nearly half a century, two landfills near St. Louis have stored thousands of tons of highly toxic radioactive waste that was produced in the 1940s and 1950s.[1] The waste contains dangerous radioactive isotopes of radium, uranium, thorium, and other elements. Exposure to the waste causes cancer and other fatal illnesses. It also causes genetic mutations that can be passed down for generations. The waste will remain radioactive for a very long time to come. One of its principal components, radium-226, has a half-life of 1,600 years. Other isotopes present in the waste have half-lives that are even longer.

At first, the waste was stored at other sites. In 1973, the waste was dumped in two privately-owned landfills, the Bridgeton and West Lake Landfills, both of which are in Bridgeton, Missouri. These landfills were not designed or licensed to store radioactive waste. They are simply large holes in the ground, with no liners preventing the waste from

[1] The facts are taken from petitioners' complaint. At this stage they must be accepted as true.

seeping into the soil and the water. As a result, the soil now has a concentration of radium-226 that is ten thousand times higher than normal. Beneath the landfills, meanwhile, there is a smoldering subsurface fire that is getting close to the radioactive waste. The fire has the potential to cause the expulsion of toxic radioactive gases.

Over the years, radioactivity has spread from the landfills to the surrounding properties. Radioactive contamination has been found in the neighboring community in the soil, in the surface water, in the trees, and in the air.

Petitioners are residents of Bridgeton who live and work near the landfills. John Kitchin, Jr., purchased his property in 1995. App. 23a. It is the location of his family's auto body business, the North West Auto Body Company. *Id.* Kitchin discovered in 2017 that his property is contaminated with radioactive material. *Id.* His business has lost significant revenue because of the contamination. *Id.* He expects to continue to lose revenue and to incur costs for relocating the business. *Id.* Mary Menke owns a home in Bridgeton. *Id.* at 24a. She learned in 2018 that her property is also contaminated with radioactive material.

Kitchin and Menke often experience offensive odors coming from the landfills. *Id.* Samples taken on and around their properties confirm that there is a highly elevated level of radioactivity with the same characteristics as the radioactive waste in the landfills. *Id.*

Respondents are a set of four nested corporations and LLCs that owned and operated the two landfills when the complaint was filed and for many years be-

fore. The parent entity is Republic Services. The other three respondents—Rock Road Industries, Bridgeton Landfill, and Allied Services—were wholly-owned subsidiaries of Republic Services. Rock Road Industries and Bridgeton Landfill owned the landfills. Republic Services and Allied Services operated the landfills. Rock Road Industries was a citizen of Missouri; it was a Missouri corporation whose principal place of business was the two landfills in Bridgeton. The other three entities were citizens of Delaware.

Petitioners filed this suit as a class action in Missouri state court. The proposed class includes two subclasses. The "property damage subclass" comprises all owners of real property within an 11-square-mile region surrounding the landfills. The "medical monitoring subclass" comprises all the residents of the same region. The region is entirely located within Missouri. All members of both proposed classes are Missouri citizens. This is because the radioactive contamination caused by the landfills has not crossed state lines and is not likely to do so in the future.

The suit is based entirely on Missouri law. The complaint includes counts for trespass (because the radioactive material has migrated onto the plaintiffs' property), nuisance (because the landfills unreasonably interfere with the plaintiffs' use and enjoyment of their property), negligence (because of respondents' negligent operation of the landfills), and strict liability in tort (because storing radioactive waste is an abnormally dangerous activity). The complaint seeks damages and an injunction requiring respond-

ents to clean up the landfills and to provide medical and environmental monitoring.

Under Missouri law, the respondents are jointly and severally liable for the harms they have caused. Moreover, the respondents are not independent firms; one respondent owns the other three. For these reasons, the complaint does not try to apportion blame among the respondents. Rather, the complaint alleges that they all engaged in the same conduct, that they were all responsible for the operation of the landfills, and that they are all liable for the injuries to health and property that resulted. *Id.* at 8a-9a, 48a.

Respondents removed the case to federal district court on three grounds. Two of these grounds—the Price-Anderson Act and CERCLA—are no longer present in this case, because the district court rejected them and respondents did not appeal these portions of the district court's decision. *Id.* at 28a-43a. Respondents' third basis for removal was the Class Action Fairness Act.

3. The district court decision

The district court remanded the case to the state court. App. 20a-50a. The district court held that it was required to decline jurisdiction because the case falls within the local controversy exception to the Class Action Fairness Act. *Id.* at 43a-49a.

The district court found that when the complaint was filed, one of the defendants, Rock Road Industries, satisfied the requirement that there be one local significant defendant. *Id.* at 46a-48a. (After the complaint was filed but before seeking removal, respondents hastily merged Rock Road Industries into

Bridgeton Landfill, in an apparent effort to get this case into federal court by eliminating the local defendant. The district court rebuffed this stratagem on the ground that the citizenship of the defendants is determined at the time the complaint is filed. *Id.* at 46a.)

The district court found that the plaintiffs seek "significant relief" from Rock Road Industries and that the conduct of Rock Road Industries forms a "significant basis" for the plaintiffs' claims. *Id.* at 46a-48a. The district court observed that "[t]here is nothing in the amended petition to indicate that Rock Road Industries is a nominal defendant or that its subsidiary status undercuts the substantial monetary relief sought by plaintiffs." *Id.* at 47a.

The district court held:

> Here, plaintiffs' amended petition alleges the same claims against all defendants. It claims that the defendants all engaged in the same conduct, including knowingly and improperly accepting radioactive wastes; improperly dumping and spreading such wastes over several acres of the Landfill; and causing radioactive contaminants to be dispersed, resulting in damage to neighboring properties and communities. Plaintiffs also claim that all defendants maintained daily control over the management, operation, and environmental decisions of the Landfill, thereby making them all responsible for the damages alleged. The conduct of Rock Road Industries is the same conduct alleged against the other defendants. There is no need or requirement for me to conduct a "mini-trial" to adduce evidence as to the specific conduct of

> each of the defendants. Rock Road Industries' status as a subsidiary is irrelevant since the conduct alleged is the same for all defendants. The amended petition's allegations indicate that Rock Road Industries' conduct forms a significant basis of all claims asserted.

Id. at 48a (citations omitted).

The district court accordingly granted petitioners' motion to remand the case to the state court. *Id.* at 50a.

4. The court of appeals decision

The Court of Appeals for the Eighth Circuit reversed. *Id.* at 1a-19a. The court held that the complaint did not adequately allege that the conduct of Rock Road Industries, the local defendant, formed "a significant basis" for the claims asserted by the plaintiffs. *Id.* at 8a-12a.

The court of appeals began by noting that "CAFA itself does not describe the type or character of conduct that would form a 'significant basis' of plaintiffs' claims." *Id.* at 9a (citation omitted). The court observed that all courts agree that the statute calls for a comparison of the local defendant's alleged conduct with that of the other defendants. *Id.* at 9a-10a. But the court of appeals acknowledged that "courts applying this approach have split regarding what it requires." *Id.* at 10a.

On one side of the split, "[s]ome courts, like the district court here, have adopted the view that allegations that the local and nonlocal defendants 'all engaged in the same conduct' suffice to show that the local defendant's conduct meets the significant-basis requirement." *Id.* (citing *Coleman v. Estes Ex-*

press Lines, Inc., 631 F.3d 1010, 1020 (9th Cir. 2011)).

On the other side of the split, the court continued, was the Eighth Circuit itself, in *Atwood v. Peterson*, 936 F.3d 835 (8th Cir. 2019) (per curiam). App. 10a. "In *Atwood*," the court explained,

> we joined a number of courts taking the opposite view and found that a complaint that did "not allege any substantive distinctions between the conduct" of the local and nonlocal defendants failed to "indicate whether the local defendants' alleged conduct is an *important* ground for the asserted claims in view of the alleged conduct of all the Defendants."

Id. (quoting *Atwood*, 936 F.3d at 840) (citation and internal quotation marks omitted). The court noted that the Fifth Circuit had taken the same view. App. 10a (citing *Opelousas Gen. Hosp. Auth. v. FairPay Sols., Inc.*, 655 F.3d 358, 359, 362-63 (5th Cir. 2011) (per curiam)).

The court of appeals thus held that the district court erred in finding "that Plaintiffs' allegations of how Defendants 'all engaged in the same conduct' suffice to satisfy the significant-basis requirement." App. 11a. "If nothing in the complaint distinguishes the conduct of Rock Road Industries from the conduct of the other defendants," the court concluded, "then the allegations in the complaint do not satisfy the significant-basis requirement." *Id.* (citation, brackets, and internal quotation marks omitted). "Such collective allegations leave doubt about the comparative significance of Rock Road Industries' conduct, preventing remand under the local-

controversy exception." *Id.* at 11a-12a (citation and internal quotation marks omitted).

Judge Stras concurred in the judgment. *Id.* at 18a-19a. He would have decided the case on the ground that the citizenship of the defendants should be assessed at the time of removal, not at the time the complaint was filed. *Id.* (The panel majority did not reach this question. *Id.* at 8a n.2.) Judge Stras concluded that because respondents merged Rock Road Industries into Bridgeton Landfill before removing the case to federal court, the case lacks a local defendant. *Id.* at 19a.

The court of appeals denied panel rehearing and rehearing en banc. *Id.* at 51a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari for all the conventional reasons. The circuits are split three to two on the question presented. The decision below is incorrect. The issue recurs frequently. And this case is an ideal vehicle for resolving the split.

I. There is a 3-2 circuit split on whether a local defendant's alleged conduct can be a "significant basis" for the plaintiffs' claims where it is the same conduct as that of the non-local defendants.

The decision below further entrenches a 3-2 circuit split as to whether the statute's "significant basis" requirement can be satisfied where the local and non-local defendants engaged in the same alleged conduct. On one side of the split, the Sixth, Ninth, and Tenth Circuits hold that it can. On the other

side of the split, the Fifth and Eighth Circuits hold that it cannot.

A. The majority view is that it can.

Three circuits—the Sixth, Ninth, and Tenth—take the view that a local defendant's alleged conduct can be "a significant basis for the claims asserted by the proposed plaintiff class" even if it is the same conduct as that of the non-local defendants.

In *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383 (6th Cir. 2016), cert. denied, 137 S. Ct. 2242 (2017), the defendants were alleged to have been negligent in designing the water system in Flint, Michigan. The complaint alleged "a single claim of professional negligence" against local and non-local corporate defendants. *Id.* at 396. The claim was that the local corporation had been created by the non-local corporation to conduct its work in Michigan and that both corporations were negligent. *Id.* The Sixth Circuit concluded that the alleged conduct of the local corporation satisfied the statutory requirement, because it was an "important and integral part of plaintiffs' professional negligence claim," even though the complaint did not distinguish between the conduct of the local and non-local corporations. *Id.* (internal quotation marks omitted).

Judge Kethledge dissented in *Mason*. He preferred to follow the other side of the circuit split and require plaintiffs to allege different conduct on the part of the local and non-local defendants. *Id.* at 400 (Kethledge, J., dissenting) (citing *Opelousas Gen. Hosp. Auth. v. FairPay Sols., Inc.*, 655 F.3d 358, 362 (5th Cir. 2011) (per curiam)). As Judge Kethledge put it, "nothing in the complaint distinguishes the

conduct of [the local defendant] from the conduct of the other defendants." *Id.* (citation and internal quotation marks omitted). "The complaint therefore contains no information about the conduct of [the local defendant] relative to the conduct of the other defendants, and thus does not establish that [the local defendant's] conduct forms a significant basis of the plaintiffs' claims." *Id.* (citation, brackets, and internal quotation marks omitted).

The Ninth Circuit likewise holds that a local defendant's conduct can be a significant basis for the plaintiffs' claims even if it is the same conduct as that of a non-local defendant. In *Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010 (9th Cir. 2011), the plaintiffs alleged the same conduct on the part of a local subsidiary corporation, Estes West, and its non-local parent corporation, Estes Express. The Ninth Circuit held that the complaint "sufficiently alleges conduct of Estes West that forms a significant basis for the claims asserted on behalf of the class under subsection (bb)." *Id.* at 1020. The plaintiffs made identical allegations against Estes Express and Estes West, "but the allegations against Estes Express in no way make the allegations against Estes West, the actual employer, insignificant." *Id. See also Allen v. Boeing Co.*, 821 F.3d 1111, 1121 (9th Cir. 2016) (rejecting the argument that "Plaintiffs have not alleged that Landau's conduct forms a 'significant basis' for their claims, as required by subsection (bb), because they have not distinguished Landau's acts from Boeing's acts"); *Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1119 (9th Cir. 2015) ("significant basis" requirement satisfied where local defendant alleged to be responsible for 15-20% of

wrongdoing); *Christmas v. Union Pac. R. Co.*, 698 F. Appx. 887, 889 (9th Cir. 2017).

The Tenth Circuit has reached the same conclusion. In *Woods v. Standard Ins. Co.*, 771 F.3d 1257, 1266 (10th Cir. 2014), the Tenth Circuit found that a local defendant did not satisfy the "significant basis" requirement where she was merely "an isolated role player in the alleged scheme implemented by" the non-local defendants. But the Tenth Circuit contrasted these facts with those of one of its prior cases, in which it noted that the local defendant *would* satisfy the requirement. *Id.* at 1267-68 (citing *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1242-45 (10th Cir. 2009)). As the court described the prior case, the defendants were a local company and its non-local corporate parent, and "all class members were seeking to hold the [local] company jointly and severally liable for all of plaintiffs' damages." *Woods*, 771 F.3d at 1267. In these circumstances, the Tenth Circuit explained, the local company "*was* a significant local defendant for the purposes of the local controversy exception of CAFA." *Id.* at 1267 (emphasis added).

If our case had arisen in the Sixth, Ninth, or Tenth Circuits, the outcome would have been different. In each of these circuits, the same conduct on the part of local and non-local defendants can be enough to satisfy the "significant basis" requirement of CAFA.

B. The minority view is that it cannot.

The Fifth and Eighth Circuits take the opposite view. In these circuits, a local defendant's conduct cannot be a "significant basis" for the plaintiffs'

claims if it is the same as the conduct of a non-local defendant.

In *Opelousas Gen. Hosp. Auth. v. FairPay Sols., Inc.*, 655 F.3d 358, 359-60 (5th Cir. 2011) (per curiam), the plaintiffs alleged that the local defendant engaged in a racketeering enterprise with two non-local defendants to misappropriate funds from the plaintiff hospitals and that all the defendants were jointly and severally liable. The Fifth Circuit held that the plaintiffs failed to establish that the conduct of the local defendant formed a significant basis for their claims, because the "complaint contains no information about the conduct of [the local defendant] relative to the conduct of the other defendants." *Id.* at 361. The court further explained: "The complaint makes no effort to quantify or even estimate the alleged illegal underpayments made by [the local defendant] versus those made by" the other defendants. *Id.* at 362. "The complaint therefore does not allege facts describing [the local defendant's] conduct so as to establish that [the local defendant's] conduct forms a significant basis of the plaintiff's claims." *Id.* This was the decision Judge Kethledge urged the Sixth Circuit to follow in his dissent in *Mason*.

The Eighth Circuit has now reached the same holding twice. In *Atwood v. Peterson*, 936 F.3d 835, 837 (8th Cir. 2019) (per curiam), the non-local defendant was Walgreens, while the local defendants were the managers of the many Walgreens stores in Arkansas. The complaint alleged that the defendants collectively implemented a price discrimination scheme that violated Arkansas law. *Id.* The Eighth Circuit held that the plaintiffs had not satisfied the "substantial basis" requirement, because "the com-

plaint does not allege any substantive distinctions between the conduct of the district managers and the conduct of Walgreens." *Id.* at 840. The Eighth Circuit recognized that its decision created a conflict with the Ninth Circuit, but the court concluded that "we respectfully disagree with the rulings to the contrary in *Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010 (9th Cir. 2011)." *Atwood*, 936 F.3d at 841.

In the decision below, the Eight Circuit relied on *Atwood* to hold once again that the "substantial basis" requirement cannot be satisfied where the local and non-local defendants engaged in the same conduct. App. 10a-12a. The Eighth Circuit recognized that "[s]ome courts, like the district court here, have adopted the view that allegations that the local and nonlocal defendants 'all engaged in the same conduct' suffice to show that the local defendant's conduct meets the significant-basis requirement." *Id.* at 10a. But the Eighth Circuit concluded: "In *Atwood*, however, we joined a number of courts taking the opposite view." *Id.*

Respondents acknowledged this split in their briefing in the Eighth Circuit. Resp. 8th Cir. Br. 21. They observed that the Eighth Circuit "in *Atwood* expressly disagreed with the broad interpretation followed by other circuits." *Id.* at 22.

We urged the Eighth Circuit to bring the courts of appeals into closer alignment by rehearing this case en banc, but the court declined. App. 51a. As a result, the split cannot be resolved without this Court's intervention.

II. The decision below is wrong.

The majority view is the correct one. A local defendant's alleged conduct can be "a significant basis for the claims asserted by the proposed plaintiff class," 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb), even if it is the same alleged conduct as that engaged in by a non-local defendant.

The text of the statute commands this result. If two people engage in the same conduct, the conduct of both can be a significant basis for a claim. The word "significant" does not mean "different from than that of anyone else." It simply means "important." If John and Paul together steal Ringo's drums by engaging in identical conduct, John's conduct and Paul's conduct would both be significant bases for Ringo's claim of theft. The statute requires the local defendant's conduct to be "a significant basis" for the plaintiffs' claim, not "a more significant basis" or "a different basis" than the conduct of other defendants. There is nothing in the statutory text to support an additional requirement that the local defendant's conduct must somehow be different from the non-local defendant's conduct.

The purpose of this statutory provision points in the same direction. The provision is meant to distinguish real defendants, the ones who actually harmed the plaintiffs, from nominal or peripheral defendants added for the purpose of blocking removal. In our case, Rock Road Industries owned the landfills that leaked radioactive waste onto plaintiffs' properties. Rock Road Industries is a real defendant, regardless of whether its conduct was the same as or different from the conduct of the other defendants.

The purpose of CAFA as a whole also points in the same direction. The objective of CAFA was to ensure that federal courts hear "interstate cases of national importance." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013) (citation and internal quotation marks omitted). But some class actions are of local, not national, importance, even if they happen to involve a defendant incorporated in another state. This is why Congress crafted the local controversy exception—"to ensure that state courts can continue to adjudicate truly local controversies in which some of the defendants are out-of-state corporations." S. Rep. No. 14, 109th Cong., 1st Sess. 28 (2005).

In this case, a group of neighbors seeks to abate a noxious land use in the neighborhood. This case is a paradigmatic local controversy. *See FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("regulation of land use is perhaps the quintessential state activity"). Indeed, this case closely resembles the hypothetical case discussed in the Senate Report, involving improper burial practices at a Florida cemetery owned by an out-of-state corporation. S. Rep. No. 14, at 41. As the Report explains, "[a]lthough there is one out-of-state defendant (the parent company), the controversy is at its core a local one, and the Florida state court where it was brought has a strong interest in resolving the dispute. Thus, the case would remain in state court." *Id.* The result should be the same here.

The majority view is also more consistent with the practicalities of litigation. A district court typically decides whether a removed case should be remanded to state court before there has been any discovery. The plaintiffs may not yet know precisely which de-

fendants committed which wrongful acts. This uncertainty is even more likely where, as here, the defendants are a set of nested corporate entities rather than a group of individuals. At this very early stage of litigation, it would make no sense to require plaintiffs to make fine distinctions between the conduct committed by various defendants.

Nor would it make sense, at this preliminary stage, for the parties to conduct discovery and introduce evidence regarding differences among the conduct of the defendants, just to figure out which court system should host the litigation. As Justice Scalia once observed, "[n]othing is more wasteful than litigation about where to litigate." *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting). The district court below was right to say that "[t]here is no need or requirement for me to conduct a 'mini-trial' to adduce evidence as to the specific conduct of each of the defendants." App. 48a. For this reason, the statute requires that the local defendant be one "whose *alleged* conduct"—not whose *proven* conduct—"forms a significant basis for the claims asserted by the proposed plaintiff class." 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb) (emphasis added).

The Fifth and Eighth Circuits appear to have been led astray by the worry that the majority view might allow plaintiffs to use a pleading trick to get cases remanded to state court. The supposed trick would work like this: In a case where all the real defendants are non-local, the plaintiffs' complaint would include a nominal local defendant and allege in a conclusory way that the local defendant engaged in the same conduct as the real defendants, without providing any more detail. The Fifth and Eighth Cir-

cuits seem to have worried that if such a conclusory allegation constitutes a significant basis for the plaintiffs' claims, plaintiffs will be able to evade the "significant basis" requirement in virtually every case. *See Opelousas*, 655 F.3d at 363; *Atwood*, 936 F.3d at 840-41. Judge Kethledge expressed the same concern in dissent in the Sixth Circuit. *Mason*, 842 F.3d at 400 (Kethledge, J., dissenting).

This worry is unfounded. District courts routinely distinguish between plausible and conclusory allegations in every conceivable kind of case. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). There is no reason to think they cannot do the same here.

In this case, for example, it is crystal-clear that Rock Road Industries is not a nominal defendant plucked from thin air to satisfy the local controversy exception. Rather, Rock Road Industries owned the landfills that have leaked radioactive waste throughout the neighborhood for decades. The conduct of Rock Road Industries forms at least as significant a basis for this lawsuit as the conduct of any other defendant.

The district courts in the circuits that take the majority view have had no trouble distinguishing plausible allegations like the one in this case from conclusory allegations. They routinely deny motions to remand where the allegations regarding the local defendant's conduct are merely conclusory. *See, e.g.*, *Adame v. Comprehensive Health Mgmt., Inc.*, 2019 WL 1276192, *4 (C.D. Cal. 2019) (holding that because the complaint includes only "bare and conclusory allegations … [p]laintiff has not met her burden of proving that Easy Choice's or WHPOC's specific

conduct forms a significant basis for her asserted claim."); *Clark v. WorldMark*, 2019 WL 1023887, *5 (E.D. Cal. 2019) ("Without more detail, the Court is unable to determine whether the in-state Defendant's conduct is a significant basis for the claims in this case."); *Bradford v. Bank of America Corp.*, 2015 WL 5311089, *4 (C.D. Cal. 2015) ("These bare allegations are insufficient to prove the elements of the local controversy exception.").

The Eighth Circuit thus erred in holding that a local defendant's conduct cannot satisfy the "significant basis" requirement where the complaint does not differentiate between the local defendant's conduct and the conduct of the other defendants. The court's error provides another reason to grant certiorari.

III. This case is a perfect vehicle for deciding this important question.

There could be no better vehicle than this case for resolving the circuit split. In the court of appeals, respondents abandoned all grounds for removal other than CAFA. There are no factual disputes or threshold issues standing in the way of a decision. If this case falls within the local controversy exception, it must be remanded to state court. If the case doesn't fall within the local controversy exception, it belongs in federal district court.

This issue is important because disputes over the local controversy exception often arise in class actions, especially cases involving environmental contamination, where the harm is typically local but the defendants who caused the harm often include out-of-state corporations. *See, e.g.*, *Aarstad v. BNSF Ry.*

Co., 2020 WL 1673100 (D. Mont. 2020) (asbestos); *Ictech-Bendeck v. Progressive Waste Sols. of La., Inc.*, 367 F. Supp. 3d 555 (E.D. La. 2019) (air pollution); *Thompson v. Louisiana Regional Landfill Co.*, 365 F. Supp. 3d 725 (E.D. La. 2019) (air pollution); *Romano v. Northrop Grumman Corp.*, 2017 WL 6459458 (E.D.N.Y. 2017) (hazardous chemicals); *MD Haynes, Inc. v. Valero Marketing and Supply Co.*, 2017 WL 1397744 (S.D. Tex. 2017) (contaminated water); *Millman v. United Technologies Corp.*, 2017 WL 1165081 (N.D. Ind. 2017) (contaminated soil and groundwater); *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383 (6th Cir. 2016) (contaminated water); *Allen v. Boeing Co.*, 821 F.3d 1111 (9th Cir. 2016) (contaminated groundwater); *Reece v. AES Corp.*, 638 F. Appx. 755 (10th Cir. 2016) (fluid waste); *Brown v. Saint-Gobain Performance Plastics Corp.*, 2016 WL 6996136 (D.N.H. 2016) (contaminated water); *Hostetler v. Johnson Controls, Inc.*, 2016 WL 3662263 (N.D. Ind. 2016) (contaminated groundwater); *Davis v. Omega Refining, LLC*, 2015 WL 3650832 (E.D. La. 2015) (air and water pollution); *Keltner v. SunCoke Energy, Inc.*, 2015 WL 3400234 (S.D. Ill. 2015) (air pollution); *Rowell v. Shell Chemical LP*, 2015 WL 3505118 (E.D. La. 2015) (air pollution); *Cedar Lodge Plantation, L.L.C. v. CSHV Fairway View I, L.L.C.*, 768 F.3d 425 (5th Cir. 2014) (underground sewage leaks); *Smith v. Honeywell Int'l, Inc.*, 2013 WL 2181277 (D.N.J. 2013) (contaminated soil); *Brown v. Paducah & Louisville Ry., Inc.*, 2013 WL 5273773 (W.D. Ky. 2013) (hazardous chemicals).

Five circuits have already weighed in on this issue. Every conceivable argument on both sides has

been thoroughly aired. There is no wisdom to be gained by waiting for the circuit split to grow larger.

Meanwhile, the split is undermining the national uniformity that was the goal of the Class Action Fairness Act. The radioactive waste leaking from respondents' landfills is approximately twenty miles west of downtown St. Louis, where it was produced. Had the waste been trucked just a mile or two in the opposite direction, it would have landed in Illinois, in the Seventh Circuit, where the outcome of this case might well have been different. And had the waste been driven three hours to the southeast, it would have reached Kentucky, in the Sixth Circuit, where the outcome definitely would have been different. This divergence in results, based on the fortuity of where the case happens to be litigated, is what Congress was trying to avoid by enacting the Class Action Fairness Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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