No. 24-_____

IN THE

Supreme Court of the United States

THE ESTATE OF ISABELLA HERNDON,
JOHN HERNDON, J.H., a minor, AND T.H., a minor,

Petitioners,

v.

NETFLIX, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether diversity jurisdiction in the context of the Class Action Fairness Act may be established without ever identifying a diverse person or their state or country of citizenship.

2. Whether diversity jurisdiction under Article III may be exercised without ever establishing personal jurisdiction over a diverse person.

3. Whether, under TransUnion LLC v. Ramirez, 594 U.S. 413 (2021), jurisdiction may be predicated on injury-at-law under wrongful-death or survivorship statutes without showing Article III injury-in-fact.

4. Whether this Court should grant, vacate, and remand—depending upon this Court's forthcoming decision in a case submitted for decision this term, Royal Canin U.S.A. v. Wullschleger, No. 23-677.

CORPORATE DISCLOSURE STATEMENT & RELATED PROCEEDINGS

Corporate Disclosure Statement:

No Petitioner is a non-governmental corporation.

Directly Related Proceedings

- The Estate of Isabella Herndon v. Netflix, Inc., No. 4:21-cv-06561-YGR (N.D. Cal. Jan. 19, 2022).
- The Estate of Isabella Herndon v. Netflix, Inc., No. 22-15260 (9th Cir. Feb. 27, 2024).

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Petitioners the Estate of Isabella Herndon, John Herndon, J.H, a minor, and T.H, a minor, hereby respectfully petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit (Pet.App.1) is reproduced in the Appendix and is also available at 2024 U.S. App. LEXIS 5712.

The jurisdictional order of the U.S. District Court for the Northern District of California (Pet.App.8) is reproduced in the Appendix.

The order denying rehearing (Pet.App.32) is reproduced in the Appendix and is also available at 2024 U.S. App. LEXIS 12015.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals issued February 27, 2024. A timely filed petition for rehearing was denied May 17, 2024. JUSTICE KAGAN, Circuit Justice for the Ninth Circuit, graciously granted an extension of the time to file a petition for a writ of certiorari until October 14, 2024. This Petition is timely. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY & CONSTITUTIONAL PROVISIONS

Section 1332(d)(2), a provision of the Class Action Fairness Act ("CAFA"), reads in pertinent part as follows:

§ 1332. Diversity of citizenship; amount in controversy; costs

[…]

(d)

[…]

> **(2)** 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.

Section 2 of Article III, a provision of the U.S. Constitution, reads in pertinent part as follows:

> The judicial Power shall extend […] to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

I. COURTS HAVE CONSISTENTLY REFUSED TO PERMIT PROBABILITIES AND STATISTICS TO SUPPLANT FACTS AND EVIDENCE.

Our legal system is a system of facts and evidence—not mere probabilities and statistic. The misuse of statistical and probabilistic reasoning in legal proceedings has been well-documented. E.g., Laurence H. Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329 (1971).

Examples of statistical misuse and mathematical sleight of hand abound in the annals of law. E.g., People v. Collins, 69 Cal. 2d 319 (1968); see also Tribe at 1334-1338 (discussing Collins). For example, Collins infamously involved the use of general population statistics and probabilistic reasoning to convict a citizen of robbery. Rather than specifically *identify* the man through fact and evidence, the conviction relied on "overwhelming probability" and statistical inference drawn from population data. See Collins, 68 Cal. 2d 319, 325 (1968) ("assuming the robbery was committed by a Caucasian woman with a blond ponytail who left the scene accompanied by a Negro with a beard and mustache, there was an overwhelming probability that the crime was committed by any couple answering such distinctive characteristics.").

The California Supreme Court rightfully reversed the conviction, and chastised such misuse of statistic and probabilistic sleight of hand. It cautioned against the pernicious misuse of "[m]athematics, a veritable sorcerer in our computerized society[.]" Id. at 320. Statistical inference "while assisting the trier of fact in the search for truth, must not be allowed to case a spell over him." Id. Collins is but a famous example. Many courts have expressed healthy skepticism over such "use of mathematical odds as evidence to identify" particular persons. See State v. Sneed, 76 N.M. 349, 353 (1966). After all, ours is a system of facts and evidence—not mere probabilities and statistics.

Courts have likewise resisted misuse of statistics and bare probabilities when determining the citizenship of class members. See, e.g., Smith v. Marcus & Millichap, Inc., 991 F.3d 1145, 1159 (11th Cir. 2021) ("[N]one of the generalized data submitted was sufficient to establish the class members' intent to remain in the state. At best, the submitted data speak only to **population** moving patterns[.]"); id. ("requiring something more than general data sources is not impractical or unreasonable"); In re Spint Nextel Corp., 593 F.3d 669, 674 (7th Cir. 2010) ("But that's all guesswork. Sensible guesswork […] but guesswork nonetheless.").

Fundamentally, the raw use of statistics and probabilistic guesswork is an attempt to shortcut the judicial role of applying law to evidence. It's problematic generally—and especially problematic in certain contexts like, as here, jurisdiction. Probabilistic guess work (even sensible guesswork) can't supplant facts and evidence when it comes to identifying specific persons—or their citizenship. After all, at its core, our system of law is one of facts and evidence—not mere inferences and guesswork based upon probabilities and statistic.

II. RATHER THAN JURISDICTION BY STATISTIC, THIS COURT REQUIRES IDENTIFICATION OF A DIVERSE PARTY AND A DIVERSE STATE.

This basic tenant of our legal system—insisting upon facts and evidences rather than probabilistic inference and supposition—is important. Indeed, our judicial system rightfully treats cases and person as individuals—not as tokens or placeholders for a broader group. Indeed, no court would—or should—ever accept a probabilistic or statistical likelihood about any population group (race, religion, *etc.*) to *infer* facts about a specific person in lieu of actually examining the *facts* and *evidence* about that specific person. Not only is such an inference in the absence of facts unfair to the person, it's a basic misuse of statistics predicated upon a basic fallacy—what statisticians call an "ecological fallacy" or "population fallacy."

And, this general principle holds true when it comes to jurisdiction as well. Federal courts don't do jurisdiction by statistic or probabilistic guesswork. They insist that jurisdiction be *established—i.e.*, shown. And, the federal courts have done so for centuries.

For centuries, the federal courts, including this Court, have demanded specific facts, allegations, and evidence to identify the diversity of citizenship and, therefore, to establish jurisdiction and adjudicatory authority. E.g., Bingham v. Cabot, 3 U.S. 382, 838 (1798) ("necessary to *set forth* the citizenship"); Brown v. Keene, 33 U.S. 112, 115 (1834) (Marshall, C.J.) ("the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends."); Cameron v. Hodges, 127 U.S. 322, 325 (1888) ("requiring a distinct statement of the citizenship of the parties, and of the particular State").

Likewise, courts have eschewed diversity by negative inference. A party can't just come to federal court by reasoning that the other party is from *somewhere* else, anywhere else (we just don't know where). E.g., Cameron, 127 U.S. at 324-235; D.B. Zwirn Special Opportunities Fund, L.P. v. Methrota, 661 F.3d 124, 127 (1st Cir. 2011).

Rather, facts and evidence are cornerstone of a jurisdictional showing.

Parties seeking to invoke federal jurisdiction based upon diversity must identify *where* the diverse party is from. Cameron, 127 U.S. 322 at 324-235 ("must be a citizen of some other ***named*** State"). Simply put, one can't "establish diversity in the negative" or negative inference. Id.; Mehrotra, 661 F.3d at 125-126 (2011). After all, to do so often reduces to just probabilistic guess work—and it's always likely based upon raw population statistics that a citizen of *one state* is diverse from the other *forty-nine states* and the *rest of the world*. Nonetheless, a probabilistic hunch that there's likely *some* class member from *somewhere* who is diverse doesn't pass muster because a hunch doesn't *establish* a federal court's jurisdiction. See, e.g., Darcel v. Groupon, Inc., 940 F.3d 381, 385 (7th Cir. 2019) ("negative citizenship fails to satisfy the minimal diversity requirement.").

Instead, diversity jurisdiction demands that specific identification, through facts and evidence. There must be some affirmative, positive showing in the record that there is "a citizen of some other ***named*** State" that creates diversity. E.g., Cameron, 127 U.S. at 324-235; Toulon v. Cont'l Cas. Co., 877 F.3d 725, 733 (7th Cir. 2017) ("***identify*** the ***name*** and ***state of citizenship*** of at least one plaintiff whose citizenship is diverse[.]").

It is upon these foundational principles—that courts require facts and evidence rather than statistics and guesswork—that this Petition arises.

Ultimately, courts don't do jurisdiction by statistic. Diversity doesn't turn on probabilities. Instead, courts have long required that the diversity be specifically identified.

III. THE LOWER COURTS CONTRAVENED THIS PRINCIPLE—DECIDING THIS CASE WITHOUT IDENTIFYING A DIVERSE PARTY OR DIVERSE STATE.

1. This case arose from Respondent's decision to target a specific child, Isabella "Bella" Herndon, with content it was aware would likely lead to her death, by suicide, and then to incessantly pressure her to watch it until she did—and died. Respondent did this to other children as well, so the Herndon family wanted this case pleaded as a class action.[1]

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[1] Space does not allow, so the merits of the case are not summarized in this Petition. Yet, notably, the Ninth Circuit's rulings on state-law procedural grounds, though not at issue in this Petition, are manifestly wrong—as would be readily demonstrated by a *full* reading of the very California Supreme Court cited by the Ninth Circuit. Pet.App.5a (Shalabi v. City of Fontana, 489 P.3d 714, 717 (Cal. 2021)).

The Herndon family sued in California state court seeking redress for the loss of their daughter and sister.

2. Respondent removed to federal court. Yet, its notice of removal nowhere identified any diverse person or any diverse person's place of citizenship, but merely insisted that it was likely. Pet.App.46a.

3. Petitioners moved to remand and disputed that there was any identification of a diverse person or any identification of their diverse place of citizenship. Respondent never identified one, but rather resorted to inferences upon inferences, ultimately based upon broad-level statistics and no facts or evidence establishing a diversity of citizenship. For example, Respondent relied upon World Health Organization ("WHO") statistics on suicide, rather than any facts or evidence particular to the citizenship of any person shown to be in the case or part of the class. E.g., Pet.App.47a-52a.

4. The District Court denied the motion to remand. Pet.App.8a-31a. Pertinent to the first question presented, the District Court acknowledged that Petitioners and Respondent were *not* diverse as to citizenship, Pet.App.22a, but then it nowhere identified any diverse person with respect to any diverse place of citizenship, Pet.App.22a-23a.

Rather than *establishing* its jurisdiction over this case about the death of a young girl, the District Court simply proceeded on hunch that jurisdiction was probabilistically likely, Pet.App.29a ("non-citizens of California"). At no later point in time, either in the District Court or in the Court of Appeals, has any diverse person of diverse citizenship been identified.

Along similar lines, and pertinent to the second question presented, no diverse person was ever brought into the civil action. No diverse person was *in the case*, such that the case could be said to be a "Controvers[y] […] between Citizens of different States" under Article III or under CAFA—*i.e.*, because no diverse citizen was in the civil action. No diverse person had received process—either by service or by notice—or joined the case.

Pertinent to the third question presented, the District Court simply assumed that based upon the injury-at-law for wrongful death and for survivorship, there was Article III injury-in-fact. See Pet.App.8a-10a. It assumed from the nature of the statutory rights an injury in fact.

Pertinent to the fourth question presented, the District Court refused to credit an amended complaint for determining jurisdiction. Pet.App.12a-16a.

5. Later, the District Court granted an anti-SLAPP motion against the grieving family that Respondent said would amount to well over $1 million for petitioning a court for redress of grievances—the death of their daughter.

6. Likewise, the District Court dismissed the case on a Rule 12(b)(6) motion—and refused to reconsider its jurisdictional finding. Likewise, the Ninth Circuit refused a CAFA petition to review the District Court's jurisdictional findings. See Estate of Isabella Herndon v. Netflix, No. 21-80118 (9th Cir.) (petition for permission to appeal).

7. Petitioners appealed. They challenged the subject-matter jurisdiction in their jurisdictional statement. Pet.App.34a-35a. The Ninth Circuit ignored the questions of original jurisdiction and simply stated that it had appellate jurisdiction, presumably agreeing with the District Court in full. Pet.App.1a-7a; see Pet.App.3a (noting appellate "jurisdiction under 28 U.S.C. § 1291," but ignoring Petitioners on the District Court's jurisdiction).

8. Petitioners sought rehearing to, *inter alia*, correct the jurisdictional error. Pet.App.36a-45a. The Ninth Circuit denied rehearing. Pet.App.32a-33a.

9. JUSTICE KAGAN graciously extended the time to petition, and Petitioners now seek relief from the opinions below that buried their claims for relief as to their dead daughter—done over their repeated objections regarding jurisdiction.

IV. UNDER THE RATIONALES BELOW, DIVERSITY JURISDICTION DOES NOT REQUIRE DIVERSITY, JUST SOME PROBABILITY OF IT.

Several problems plague the jurisdiction-by-statistic approach adopted below.

First, courts don't just guess at jurisdiction, they *establish* their jurisdiction. They establish that their jurisdiction in fact exists based on actual diversity of citizenship. Courts don't just determine that jurisdiction is likely or probable to exist—and then proceed to the merits and risk an advisory opinion. Before turning to the merits, courts *determine* that they in fact have jurisdiction—not merely that jurisdiction is likely.

For example, most Fortune 500 corporations are domiciled in Delaware (approximately 67%). But a New Jersey plaintiff couldn't just file suit in federal court against any Fortune 500 corporation on the theory that it's *likely* to be diverse. Even though it might be *probable* that the corporation is a citizen of Delaware, that wouldn't tell us anything about whether *that* particular corporation was in fact a citizen of Delaware or whether there's in fact diversity between the parties. The court would require the diversity to be established—not guessed at.

Courts don't do jurisdiction by statistic or probability, but by evidence and fact.

Second, that's for good reason. There's wisdom in this approach.

Demanding that jurisdiction and diversity be established (not just likely) upfront is far more administrable, saves significant time for courts, and avoids advisory decisions where diversity jurisdiction, though seemingly likely, ultimately proves lacking. See, e.g., Sprint, 593 F.3d at 674 (7th Cir. 2010) ("There are any number of ways in which our assumptions about the citizenship of this vast class might differ from reality.").

That's *why* we don't just guess at jurisdiction. That's why the law has long required diversity jurisdiction be demonstrated and established, up front, and with regards to actual citizenship of at the time of removal. Cf. Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) ("courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.").

Third, it might seem easier to guess. Admittedly, there's an understandable temptation to just infer jurisdiction where diversity seems probable, perhaps even almost certain. But, there's another problem with jurisdiction by statistics: there will *always* be a very high probability of diversity as to persons of unknown citizenship.

Suppose a plaintiff sues a defendant of unknown citizenship. *Probability, based on general population statistics, will always indicate that there is an over 99% chance that a defendant of unknown citizenship is a citizen of another state or country.*[2] Pet.App.47a-52a. And, in class-actions involving over 100 people, the probability of diversity is even higher where citizens of the class members are unknown. See 28 U.S.C. §1332(d)(5)(B).

Bare probability of diversity proves too much.

The point is simple. Whenever a person's citizenship is unknown, there is always a high likelihood that such a person is a citizen of a diverse state or country. But that doesn't tell us anything about the *actual* citizenship of any *particular* person in the class. See Pet.App.29a ("many non-citizens of California"); Pet.App.47a-52a. That's *why* Courts determine diversity jurisdiction by looking at *actual* not *probable* citizenship.

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[2] The world population is approximately 8,000,000,000 persons. California (the most populous state) has a population of approximately 39,000,000 persons. Wyoming (the least populous state) is approximately 581,000 persons.
See https://www.census.gov/popclock/.

And, of course, the more likely it is that there is in fact a diverse person, the easier it should be for the party invoking federal jurisdiction to simply identify that diverse person and their citizenship through facts and evidence.

*****

Jurisdiction by probability (rather than jurisdiction in fact) presents an administrative nightmare, provides no discernable limiting principles, would dramatically alter federalism's delicate and sacred balance between federal and state courts, and would inundate the federal dockets with easily avoidable post-removal fights about jurisdiction. The alternative is simple: do what the courts have done for centuries and require the removing party to specifically identify the person and citizenship of a diverse party.

Below, the lower courts were wrong to do jurisdiction by statistic—and thereby depart from and conflict with those courts that have demanded that diversity must be specifically identified. Respectfully, the Petition should be granted.

REASONS FOR GRANTING THE WRIT

I. THE ISSUES PRESENTED RAISE PROFOUNDLY IMPORTANT QUESTIONS THAT GO TO THE FUNDAMENTALS OF FEDERAL JURISDICTION.

The issues presented for review are important questions that go to the fundamentals of Article III jurisdiction—questions that if left unaddressed complicate disputes over jurisdiction to the detriment of the courts and litigants alike.

As to the first question presented, it's important to resolve the present dispute between jurisdiction by fact and evidence, on the one hand, and jurisdiction by statistic on the other. The question is only more important because it arises in the CAFA context.

First, jurisdiction by statistic marks a stark departure from this Court's time-tested approach to diversity jurisdiction. Jurisdiction based on diversity has always required that the diverse person and their diverse citizenship be specifically identified, based on facts and evidence. E.g., Bingham, 3 U.S. at 838 (1798) ("necessary to *set forth* the citizenship"); Brown, 33 U.S. at 115 (1834) ("the averment of jurisdiction *shall be positive*, that the declaration shall state *expressly the fact on which jurisdiction depends*"); Cameron, 127 U.S. at 324-325 ("requiring a distinct statement of the citizenship").

That's been true from the 18th Century to the 21st. It's been true in the individual case as well as the CAFA class-action context. See Toulon, 877 F.3d 725, 733 (7th Cir. 2017) ("***identify*** the ***name*** and ***state of citizenship*** of at least one plaintiff whose citizenship is diverse") (CAFA case); Dancel, 940 F.3d at 386 ("identify a specific, diverse class member") (CAFA case).

From alpha to omega, jurisdiction has required an express statement of diversity, identifying a specific person and specific place of citizenship, based on fact or evidence. See Brown, 33 U.S. 112, 115 (1834) ("the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments."); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 547 (1986) ("not sufficient that jurisdiction may be inferred").

So, the exercise of jurisdiction by statistic taken below marks a stark departure from established jurisprudence. It's aberrant to exercise jurisdiction based on the mere probabilistic hunch that there must be some unidentified someone from some unidentified State who is diverse. See Pet.App.29a ("many non-citizens of California").

It's aberrant to *infer* probable diversity from general population statistics, rather than simply

identifying a specific person of specific citizenship who is diverse. Pet.App.47a-52a. As such, it's important to clarify if this aberrant approach to diversity jurisdiction is somehow sanctioned by CAFA.

Indeed, it's important that this Court clarify whether the lower courts, below, were correct to read CAFA as Congress' ushering in a new age of jurisdiction by statistic. Or, whether CAFA requires what's always been required: to concretely "***identify*** the ***name*** and ***state of citizenship***" that establish diversity with facts and evidence. See Toulon, 877 F.3d at 733.

Second, there's administrability. Jurisdiction by statistic is an administrative nightmare for courts– courts tasked with the independent and *sua sponte* obligation to evaluate their own jurisdiction. Indeed, this Court has stressed that "administrative simplicity is a major virtue" when determining jurisdiction. See Hertz, 559 U.S. at 94. For the parties, "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims but which court is the right court to decide those claims." Id.

More importantly, as to judicial resources, "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." Id. Under this rubric of administrative

simplicity, there's no contest. Jurisdiction by facts and evidence to affirmatively specify a diverse party's *citizenship* is exceedingly more administrable than jurisdiction by statistical inference as to the *probable* diversity of unnamed parties from unspecified states—where parties will be endlessly disputing both the probability and the courts will be endlessly asked to divine a line that cannot be drawn.

Indeed, jurisdiction by statistic invites readily avoidable post-removal fights over statistical inferences and probabilities of diversity as to unknown and unidentified persons of unknown and unidentified citizenship. Statistic and probability invites endless line-drawing exercises about how probable is probable enough to just assume diversity exists—disputes that facts and evidence avoid entirely by ***establishing*** jurisdiction. That's why courts outside the Ninth Circuit have wisely eschewed such an approach for a far simpler one: to just require the removing party to concretely "***identify*** the ***name*** and ***state of citizenship*** of at least one plaintiff whose citizenship is diverse[.]." See, e.g., Toulon, 877 F.3d at 733.

These administrative difficulties are particularly acute given courts' *sua sponte* obligations to assess their own jurisdiction. After all, courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." Hertz, 559 U.S. at 94. If diversity

jurisdiction turned on statistical inferences and mere probabilities of diversity as to unknown and unidentified persons of unknown and unidentified citizenship, then courts would be tasked with the *sua sponte* obligation to play armchair statistician, assessing probabilities and populations statistics. And, given that it's *always* probable in a statistical sense that *someone* might be diverse, courts would have no line drawn to help them.

The alternative is to decide diversity as it's always been decided—*i.e.*, by having courts review allegations, facts, and evidence in the record for a "distinct statement of the citizenship of the parties" that creates diversity. See Cameron, 127 U.S. at 324. Indeed, it's far simpler and administrable to require the removing party or the record to concretely "***identify*** the ***name*** and ***state of citizenship*** of at least one plaintiff whose citizenship is diverse" than it is to have courts trying to determine jurisdiction by statistic. See Toulon, 877 F.3d at 733.

Third, exercising diversity jurisdiction in the complete absence of any allegations, facts, or evidence of evidence is risky.

It risks federal courts issuing advisory opinions or, worse, acting *ultra vires*. See, e.g., J.A. Masters Invs. v. Beltramini, __ F.4th ___, 2024 U.S. App. LEXIS 22872, *5 (5th Cir. Sept. 9, 2024) ("We decline to risk

transgressing our Article III power absent a sound basis in the record supporting the exercise of federal jurisdiction."); id. ("a nonbinding advisory opinion at best and an *ultra vires* act at worst."). As such, it's important to clarify whether jurisdiction by statistic is legitimate in the CAFA context. Whether the mere *probability* of diversity, rather than *specifically-identified* diversity, is somehow a legitimate exercise of federal judicial power.

Simply put, the probabilistic approach to diversity adopted below would mark a stark departure from how diversity jurisdiction's been done for centuries. And, that aberrant approach to jurisdiction raises profound concerns of administrability and legitimacy. As such, it's important to clarify that jurisdiction by fact and evidence, not jurisdiction by statistic, is how diversity in CAFA is established. And, it is important to resolve the split over whether probable diversity is enough or whether diversity must be specifically identified.

As to the second question presented, fundamental notions of fairness and bedrock principles of due process make it important to address the lower courts' exercise of Article III jurisdiction without ever establishing jurisdiction over any diverse party. Indeed, it is unclear how any diverse party is even in this case—and if they aren't, there is no Article III jurisdiction.

In Shutts this Court explained that a court *can* bring plaintiffs into a case and exercise jurisdiction over those persons, but they first "must receive notice plus an opportunity to be heard" to be part of the civil action. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-812 (1985) (citing Mullane, 339 U.S., at 314-315; cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174-175 (1974). Indeed, notice is an "elementary and fundamental requirement of due process"—so even if there were diverse persons involved, they were never brought into the civil action, either by service or by notice. E.g., Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In short, the most elementary and bare minimums of due process were not taken as to any diverse party—and as such they were not brought into the case.

Notably, below not only was no diverse party ever notified, no diverse party was even identified. As such, it remains entirely unclear who the diverse party is and, furthermore, how that party is even in the case.

Accordingly, the lower courts' purported exercise of diversity jurisdiction under Article III without ever establishing its jurisdiction over any diverse party, contravenes bedrock principles of due process: notice and opportunity (to be heard *or* to opt out).

As to the third question presented, Article III's injury-in-fact requirement goes to the core of the Constitution's separation of powers. Accordingly, it is

important to correct the lower courts' exercise of Article III jurisdiction absent any showing of injury-in fact.

TransUnion explained that Article III's "concrete-harm requirement is essential to the Constitution's separation of powers." TransUnion, 594 U.S. at 429. Accordingly, TransUnion articulated a clear rule: Article III standing requires injury-in-fact. See TransUnion, 594 U.S. at 417 ("[n]o concrete harm, no standing.").

Yet, wrongful-death and survivorship claims are creatures of modern statute because death was not recognized historically as an injury at common-law. E.g., Clark v. Goodwin, 170 Cal. 527, 529 (1915) ("It is only by virtue of some such statute as this that an action for the death of a person can be maintained in this state, no such right of action existing under the common law.").

The theory was that the decedent was not the plaintiff and the plaintiff had not suffered a harm. Under TransUnion, that's not to say that surviving family members *cannot* have standing, but rather that the removing defendant, Respondent here, must *demonstrate* Article III injury in fact, rather than merely assume it because the causes of action involved death.

Below, the exercise of Article III jurisdiction absent any showing of injury-in-fact transgresses the

Constitution's separation of powers. Accordingly, it is important to correct the exercise of Article III jurisdiction absent any showing of injury-in-fact and over claims and harms not recognized historically at common-law.

As to the fourth question, it's presently pending before this Court as a merits action in Royal Canin U.S.A. v. Wullschleger, No. 23-677.

II. THE ISSUES PRESENTED ARISE ON CIRCUIT SPLITS AND ON DEVIATIONS FROM THIS COURT'S PRECEDENTS ABOUT JURISDICTION.

The first question presents a Circuit split and also deviation below from this Court's precedents. The second and third questions presented are important questions where the opinions below deviate from this Court's precedents. The fourth question will be controlled by this Court's forthcoming merits decision in Royal Canin.

As to the first question, there is a split between the Ninth Circuit below and at the First, Seventh, and Eleventh Circuits.

The Ninth Circuit purported to exercise diversity jurisdiction by negative probabilistic inference about the raw statistical likelihood of diversity, *without* identifying a diverse person and the place of their diverse citizenship. Pet.App.3a ("We have jurisdiction"); Pet.App.22a-23a (District Court's rationale). The Ninth Circuit's view, predicated upon the District Court's, is there are likely to be "many non-citizens of California." Pet.App.29a.

The other Courts of Appeals have rejected this mere assumption of negative citizenship based upon a felt likelihood, rather than facts and evidence:

> Groupon instead posited that some "undetermined number" of class members are "non-Illinois and non-Delaware citizens." This allegation of negative citizenship fails to satisfy the minimal diversity requirement.

Dancel v. Groupon, Inc., 940 F.3d 381, 385 (7th Cir. 2019); accord Toulon, 877 F.3d 725, 733 (7th Cir. 2017) (holding that statement to the effect of "'a member of a class of plaintiffs is a citizen of a state different from defendant'" is "insufficient to establish minimal diversity" and ordering the parties to "identify the name and state of citizenship of at least one plaintiff whose citizenship is diverse"); D.B. Zwirn, 661 F.3d 124, 125-126 (1st Cir. 2011) ("[T]hese allegations are insufficient to invoke diversity jurisdiction under 28 U.S.C. § 1332. That Mr. Mehrotra is a citizen of Rhode Island and that Zwirn is not considered a citizen of Rhode Island 'is not sufficient to give jurisdiction in a . . . Court of the United States.'"); Smith v. Marcus & Millichap, Inc., 991 F.3d 1145, 1159 (11th Cir. 2021) ("With only generalized data and no specific facts to support the citizenship of any member of the putative class, doubts abound in this case."); Sprint, 593 F.3d at 674 (7th Cir. 2010) ("But that's all guesswork. Sensible guesswork, based on a sense of how the world works, but guesswork nonetheless.").

Ultimately, the Seventh Circuit succinctly stated why the Ninth Circuit's reliance on "guesswork" to

establish jurisdiction isn't a reliable way to establish adjudicatory power over parties: "There are any number of ways in which our assumptions about the citizenship of this vast class might differ from reality." Sprint, 593 F.3d at 674 (7th Cir. 2010).

It's not just a Circuit split. This Court too, especially Cameron v. Hodges, 127 U.S. 322, 325 (1888), has rejected the Ninth Circuit's approach to simply assuming diversity without establishing the states of citizenship:

> While this petition sets forth the citizenship of Hodges to be in the State of Arkansas, both at the commencement of the suit and at the time of the application for removal, it does not state that of any of the complainants, but merely says "that none of the complainants are or were at that time citizens of said State of Arkansas," nor have we been able to find in the record any evidence, allegation or statement as to the citizenship of any of them. That the defendant, Hodges, was a citizen of Arkansas, in connection with the fact that none of the complainants were citizens of that State, is not sufficient to give jurisdiction in a Circuit Court of the United States.

Cameron v. Hodges, 127 U.S. 322, 324 (1888); see also Bingham v. Cabot, 3 U.S. 382, 838 (1798) ("it

was necessary to *set forth* the citizenship"); Brown v. Keene, 33 U.S. 112, 115 (1834) (Marshall, C.J.) ("The decisions of this court require, that *the averment of jurisdiction shall be positive*, that the declaration shall state expressly the fact on which jurisdiction depends."); Cameron v. Hodges, 127 U.S. 322, 323-324 (1888) ("requiring a *distinct statement of the citizenship of the parties*, and of the particular State in which it is claimed, in order to sustain the jurisdiction").

Thus, as to the first question presented there is both a Circuit split and this Court has rejected that strategy of setting forth diversity by negative inference, at least in the context of ordinary diversity jurisdiction.

As to the second question, the Ninth Circuit deviated from the approach this Court ordained for bringing class-members into a case, see Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-812 (1985), insofar as the Ninth Circuit purported to exercise diversity jurisdiction when any of the supposed diverse class members, even if they do exist, were not part of the civil action.

As to the third question, this Court has recently reaffirmed Article III injury-in-fact in TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021).

Yet, the Ninth Circuit has an approach of simply determining jurisdiction based upon the type of certain causes of action—from injury at law—that there is injury in fact. E.g., Robins v. Spokeo, Inc., 867 F.3d 1108, 1113-1114 (9th Cir. 2017) (focusing upon the nature of the *law*, not the nature of the *injury*); Wit v. United Behavioral Health, 79 F.4th 1068, 1082 (9th Cir. 2023) (continuing post-TransUnion to focus on the nature of the *law* and on the mere "risk of harm" not cabined to prospective relief). But TransUnion, 594 U.S. at 436 ("TransUnion advances a persuasive argument that in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a separate concrete harm.").

Suffice it to say, the Ninth Circuit is not following this Court's approach to Article III jurisdiction reaffirmed in TransUnion and, under that approach, there's no Article III injury-in-fact on this record.

As to the fourth question, this Court's decision in Royal Canin U.S.A. v. Wullschleger, No. 23-677, would control.

III. THE LOWER COURTS ERRED WHEN ALLOWING JURISDICTIONAL GUESSWORK AND ASSUMPTION TO SUPPLANT FACT AND EVIDENCE.

The lower courts' purported exercise of jurisdiction was based upon a series of errors and splits with the authority of the other Circuits and the decisions of this Court.

As to the first question presented, the error was deeming *diversity* jurisdiction established without ever identifying any *diverse* person or their *diverse* state or country of citizenship.

1. Longstanding precedents of this Court make clear that diversity must be specifically and affirmatively shown. E.g., Bingham, 3 U.S. at 838 (1798) ("it was necessary to *set forth* the citizenship"); Brown, 33 U.S. at 115 (1834) (Marshall, C.J.) ("The decisions of this court require, that *the averment of jurisdiction shall be positive*, that the declaration shall state expressly the fact on which jurisdiction depends."); Cameron, 127 U.S. at 324 (1888) ("requiring a *distinct statement of the citizenship of the parties*, and of the particular State in which it is claimed, in order to sustain the jurisdiction").

Along similar lines, other Courts of Appeals "have admonished parties that they cannot merely allege diversity of citizenship without identifying the parties' states of citizenship[.]" E.g., Dancel, 940 F.3d at 385

(7th Cir. 2019); D.B. Zwirn Special Opportunities Fund, L.P. v. Methrota, 661 F.3d 124, 127 (1st Cir. 2011) ("the complaint was insufficient to support diversity jurisdiction because, among other reasons, the complaint contained no allegations about the defendants' citizenship.").

CAFA did not disrupt such long standing principles. Accordingly, CAFA's minimum diversity requirement demands that the party asserting jurisdiction "***identify*** the ***name*** and ***state of citizenship*** of at least one plaintiff whose citizenship is diverse[.]" Toulon v. Cont'l Cas. Co., 877 F.3d at 733; Dancel, 940 F.3d at 386 ("identify a specific, diverse class member.").

Thus, the Ninth Circuit erred because no diverse person of diverse citizenship was ever identified.

2. Moreover, courts have rejected attempts "to establish diversity in the negative." E.g., D.B. Zwirn, 661 F.3d at 125 (1st Cir. 2011). For example, to say that one party "is a citizen of Rhode Island and that [another party] is not considered a citizen of Rhode Island 'is not sufficient to give jurisdiction in a . . . Court of the United States.'" Id. at 126 (quoting Cameron, 127 U.S. at 324).

In the CAFA context as well, establishing jurisdiction by so-called "negative citizenship" is insufficient as well.

Dancel, 940 F.3d at 385 (7th Cir. 2019) ("This allegation of *negative citizenship fails to satisfy the minimal diversity requirement*."). That's because demonstrating diversity requires an affirmative, positive showing that there is "a citizen of some other ***named*** State[.]" Cameron, 127 U.S. at 324-235; Toulon, 877 F.3d at 733 (7th Cir. 2017) ("***identify*** the ***name*** and ***state of citizenship*** of at least one plaintiff whose citizenship is diverse").

As such, the mistakes in the lower courts' approach to diversity jurisdiction are manifest when they relied upon a hunch about "non-citizens of California" without every identifying the *citizenship* of *any* diverse person. Pet.App.29a. It's not enough to say that the diverse party is from some unidentified state other than California. Rather, diversity requires identifying a "citizen of some other ***named*** State[.]" Cameron, 127 U.S. at 324-235.

Indeed, permitting the negative approach to diversity jurisdiction flips the burden of proof on its head. Any party invoking federal jurisdiction could simply point to a naked statistic probability of diversity and shift the burden of proof to the other party to disprove a diversity that's never been established or shown. That's why court reject this approach to diversity jurisdiction by negative inference. See, e.g., Dancel, 940 F.3d at 385 (7th Cir. 2019) ("Groupon, as the removing party, bears the burden of showing the existence of federal jurisdiction. It has rested on

its speculation that 'undoubtedly' a class member is a citizen of a state other than [California]").

3. The record contains no evidence or allegation whatsoever as to *citizenship*. Indeed, the closest the record comes is an aside about a place of *harm* four years before the complaint was filed–not place of *citizenship*. Pet.App.23a ("*harms* in Florida and Canada").

Yet, place of *harm* does no work for establishing diversity jurisdiction. That's because place of harm doesn't identify citizenship (or even residency). And, diversity jurisdiction requires diversity of *citizenship*. See, e.g., J.A. Masters Invs. v. Beltramini, __ F.4th__, 2024 U.S. App. LEXIS 22872, *5 (5th Cir. Sept. 9, 2024) (per curiam) ("While the underlying pleadings mentioned the *residence* of each party, they did not specifically identify the *citizenship* of each party—a common yet unfortunate mistake when invoking a federal court's diversity jurisdiction.").

Moreover, allegations about *harms* occurring *four years before* filing says nothing about *citizenship* at the *time of filing*. And, the time-of-filing rule is "hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure." Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 570-571 (2004) (Scalia, J.). These basic conflations obscured the jurisdictional gravamen from ever being asked below: what is "the *name* and *state of citizenship* of

at least one plaintiff whose citizenship is diverse[?]" See Toulon, 877 F.3d at 733 (7th Cir. 2017).

Rather than identifying a specific person and their specific citizenship to establish diversity, the lower courts just accepted the view that the lack of any class definition or geographical limit to the class entailed diversity jurisdiction. Pet.App.23a ("sprawling global class").

Yet, functionally, this probabilistic approach to jurisdiction would eviscerate jurisdictional limits in any case involving persons of unknown citizenship. Indeed, one could do this mathematical parlor trick in nearly any case involving persons of unknown citizenship. After all, the probability of diversity is always high based on general population statistics. Suppose a Nevadan sues a defendant of unknown citizenship. Probabilistically, there's an over 99% chance the defendant is not a Nevadan.[3]

Yet that 99% probability wouldn't tell us anything where that specific defendant is from.

Showing diversity jurisdiction has always required the diverse person's citizenship be specifically

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[3] Nevada has a population of 3 million. The U.S. has a population of 336.3 million. The world has a population of 8.04 billion. See Census Population Clock, https://www.census.gov/popclock/.

identified. Jurisdiction is not, as the Ninth Circuit believed, based on the mere probability or likelihood of diversity as to persons of unknown citizenship. It was error to exercise diversity jurisdiction, under CAFA, without ever identifying any diverse person or specifically identifying their state of citizenship. Indeed, the record is entirely devoid of any showing of any *citizenship* of any party other than California.

As to the second question presented, the lower courts also erred because the, *even if* there is a diverse person, they were never brought into the civil action as Article III and CAFA require.

Indeed, this Court's case law has addressed what's necessary to bring an absent plaintiff into a civil action. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-812 (1985). In *Shutts*, this Court explained the bare minimums of due process required in order to exercise jurisdiction over an unnamed class members. Id.

Specifically, Shutts explained:

> The [non-party] plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. […] The notice should describe the action and the plaintiffs' rights in it.

Id. at 811-812.

Thus, Shutts made clear that in order to bring an unnamed class members, notice and an opportunity to be heard must be provided. Shutts didn't require formal service, but it did require bare minimums of due process. Under Shutts, the Ninth Circuit erred: no one other than Californians has been brought into the case, so there is no diversity in the civil action. Not only was no diverse party ever identified, no diverse party was even notified. Accordingly, the Ninth Circuit erred by exercising diversity jurisdiction under Article III and CAFA without ever establishing jurisdiction over a diverse party.

As to the third question presented, the lower courts further erred. Specifically, the lower courts exercised jurisdiction absent any showing of Article III injury-in-fact.

Indeed, the wrongful-death and survivorship claims here are creatures of modern statute, not recognized historically at common-law. In TransUnion, this Court reaffirmed a clear rule: "To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they have suffered a concrete harm." TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021). Simply put, "[n]o concrete harm, no standing." Id.

That injury-in-fact inquiry turns on whether there's a "close historical or common-law analogue[.]"

Id. at 424. That's because the "judicial power of common-law courts was historically limited depending on the nature of the plaintiff's suit." Spokeo, Inc. v. Robins, 578 U.S. 330, 343 (2016) (Thomas, J., concurring). And, such "limitations persist" in modern Article III standing doctrine. Id.

As such, a mere statutory violation (or the right to sue under a statute) is not enough. Indeed, this Court has plainly "rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" TransUnion, 594 U.S. at 426 (quoting Spokeo, 578 U.S. at 341).

Critically, the common law did not recognize death as a harm to the non-decedent persons who might later sue for the death of another.

At common law, wrongful death and survival claims did not exist. And, both this Court and the California Supreme Court have recognized that no such injury or cause of action was recognized at common law. E.g., Henshaw v. Miller, 58 U.S. 212, 219 (1855) ("The maxim of the common law is 'actio personalis moritur cum persona[.]'"); Hunt v. Authier, 28 Cal. 2d 288, 290 (1946) ("At common law the maxim, *Actio personalis moritur cum persona*, persisted to effect the abatement of all actions[.]").

Simply put, at common law, it was well-settled that a personal right of action dies with the person.

Indeed, "[n]othing was more firmly settled at common law[.]" Clark v. Goodwin, 170 Cal. 527, 529-530 (1915). The common-law simply did not recognize such injury-in-fact; at common law, a personal interest died with the person.

True, modern statutory innovations have departed from that common law approach. See Moyer v. Phillips, 462 Pa. 395, 399 (1974) ("In the early nineteenth century survival statutes were enacted, along with wrongful death acts, to modify what was considered the harsh and unjust rule of common law."); Clark, 170 Cal. at 529 ("It is only by virtue of some such statute as this that an action for the death of a person can be maintained in this state, no such right of action existing under the common law.").

And, such modern statutory innovations might well explain the modern sensibilities causing the lower courts to simply assume injury-in-fact here. Yet this Court's been clear, the mere violation of statutorily created rights don't give rise to Article III standing where those harms were not recognized at common law. TransUnion, 594 U.S. at 426; Spokeo, 578 U.S. at 341.

TransUnion made clear: "[n]o concrete harm, no standing." 594 U.S. at 417. The common-law was equally clear: no person, no standing. At common law, the deceased had no "personal stake" and no injury-in-fact and the non-decedent plaintiffs were merely non-harmed persons established by statute. Cf. TransUnion, 594 U.S. 413, 423 (2021). This is not to say that injury-in-fact could never shown, but rather that it cannot simply be assumed for purposes of Article III jurisdiction.

At common law, a personal stake died with the person—*actio personalis moritur cum persona*. The wrongful-death and survivorship claims here are creatures of modern statute, unrecognized historically at common-law.

Accordingly, under the rule stated in TransUnion, such violations of modern statutes are not enough and it was error to exercise jurisdiction in the absence of such showing.

As to the fourth question presented, the error, if there is one, will be determined by this Court's forthcoming merits decision in Royal Canin.

Here, the lower courts refused to consider the amended complaint for jurisdictional purposes. Pet.App.12a-16a. If this Court affirmed in Royal Canin, that would be error such that this Court should grant, vacate, and remand the petition. See generally Royal Canin U.S.A. v. Wullschleger, No. 23-677; see also Wollschläger v. Royal Canon U.S.A., Inc., 75 F.4th 918, 923 (8th Cir. 2023) ("an amended

complaint supersedes an original complaint, these changes can create or destroy federal jurisdiction").

IV. THIS CASE IS A GOOD VEHICLE THAT CONTRASTS JURISDICTION BY FACT AND EVIDENCE AGAINST JURISDICTION BY STATISTIC.

This case presents a good vehicle for the questions presented.

As to the first question, there's simply "no dispute" about diversity between the Parties, *i.e.*, no diversity here between Petitioners and Respondent. Pet.App.22 ("There is no dispute here that [Respondent] and the [Petitioners] are not diverse."); Pet.App.36 ("Here, a grieving *California* family sued a *California* corporation in *California* state court on *California* claims.").

Furthermore, there's no allegation or evidence on this record identifying a diverse person of diverse citizenship. The closest the record comes is an aside about a place of *harm* four years before the complaint was filed—*not* a place of diverse *citizenship*. Thus, if diversity jurisdiction requires *identifying* a diverse person of diverse citizenship, then a straightforward reversal follows. By contrast, if a probabilistic hunch or statistical *guesswork* suffices, then this Court would affirm.

To the extent Respondent might emphasize what it sees as the strength of its statistical suppositions, such arguments would only serve to reinforce that this case is a good vehicle.

The likelier the probability, the more teed up the question is. After all, gut-level hunches that there's a strong probability of diversity would simply show that the arguments for jurisdiction by statistic aren't getting short shrift. Such arguments would be cleanly presented by able counsel.

Ultimately, there are two different approaches to jurisdiction here—jurisdiction by facts and evidence versus jurisdiction by statistic—that are cleanly and squarely presented and lead to opposite results. Though these approaches aren't equally *supported* (insofar as the latter contravenes centuries of practice and case law), this instant case presents a clear picture of how the two approaches operate and how they fundamentally differ.

* * *

As to the second, third, and fourth questions presented, they raise legal issues readily resolved by straightforward applications of existing precedent. Cf. Dupree v. Younger, 598 U.S. 729, 735 (2023) ("purely legal issues—that is, issues that can be resolved without reference to any disputed facts").

The second question is readily resolved by applying Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 813-814 (1985), because no diverse person was given the bare minimums of process in order for the District Court to exercise personal jurisdiction over them.

The third question is readily resolved by applying TransUnion LLC v. Ramirez, 594 U.S. 413, 434 (2023), because there was "no historical or common-law analog" for wrongful death or survivorship statutes. Rather, at common law, death abated the claim. Wrongful-death and survivorship *statutes* are just that—*statutory* bases for injury-at-law to statutory beneficiaries and statutory survivors.

Finally, the fourth question presented is readily resolved by applying this Court's forthcoming decision in Royal Canin U.S.A. v. Wullschleger, No. 23-677. If this Court affirms there, then it would vacate and reverse here.

V. THE HERNDON FAMILY DESERVES TO KNOW THAT DIVERSITY JURISDICTION WAS PROPERLY EXERCISED.

Below, jurisdiction was exercised on a probabilistic hunch—a hunch that surely there's someone, somewhere, in this case, who's diverse. Pet.App.23a ("sprawling"); Pet.App.29a ("many non-citizens of California"); Pet.App.46a (Respondent's overt use statistical guesswork *without* identifying a diverse person of diverse citizenship). Yet, no diverse person and no diverse citizenship has ever been identified—not by Respondent, not by the District Court, and not by the Court of Appeals.

That approach departs from centuries of jurisprudence—jurisprudence under which the diverse person's citizenship be expressly *identified*. See, e.g., Bingham v. Cabot, 3 U.S. 382, 838 (1798) ("necessary to *set forth* the citizenship"); Brown v. Keene, 33 U.S. 112, 115 (1834) (Marshall, C.J.) ("The decisions of this [C]ourt require, that the averment of jurisdiction shall be *positive*, that the declaration shall state expressly the fact on which jurisdiction depends."); Cameron, 127 U.S. at 323-324 (1888) ("must be a citizen of some other *named* State"); Bender, 475 U.S. at 546-547 (1985) ("***not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings***").

Again and again, in both the CAFA context and outside of it, courts have insisted that diversity jurisdiction requires a positive, concrete showing of a *specific* person, of *specific* citizenship, in order to establish diversity. See Dancel, 940 F.3d at 385 (7th Cir. 2019) ("identify a *specific class member* who is a citizen of a state other than [California]"); D.B. Zwirn, 661 F.3d at 125-126 (1st Cir. 2011) ("This court has always been very particular in requiring a distinct statement of the citizenship of the parties, and of *the particular State in which [diversity] is claimed*[.]") (citing Cameron, 127 U.S. at 324-325).

Diversity jurisdiction has always demanded more than the mere possibility. Century after century, court after court, diversity jurisdiction has required the identification of a diverse person of a specifically identified diverse citizenship. See Cameron, 127 U.S. at 324 (rejecting jurisdiction where the Court has been unable "to find in the record any evidence, allegation or statement as to the *citizenship* of any of them").

This case is a stark contrast.

Against the grain of time-honored jurisprudence, jurisdiction in the present case was exercised despite no diverse person and no diverse citizenship ever being identified.

Instead, the exercise of jurisdiction "rested on [the] speculation that 'undoubtedly' a class member is a citizen of a state other than [California]" here. See Dancel, 940 F.3d at 385 (7th Cir. 2019). But see Pet.App.29a ("many non-citizens of California")

Doctrinally, such probabilistic speculation has never been enough. Pragmatically, the stronger one thinks the probability of diversity of citizenship across a class, the easier it should be to simply *identify* a specific person. Yet, simply insisting that there must be someone, from somewhere, other than California, has never been enough. See, e.g., Cameron, 127 U.S. at 324-325 ("must be a citizen of some other ***named*** State"). But see Pet.App.29a ("many non-citizens of California").

Here, jurisdiction has been predicated upon the gut-hunch that surely someone from somewhere is diverse in this case—we just don't know who they are and we don't know their citizenship. Indeed, the lower courts simply *ipse dixit* fiated that this case involved "many non-citizens of California." E.g., Pet.App.29a. Yet, the record reveals nothing about the citizenship of the unnamed and unidentified class members (from unidentified states) who purportedly give rise to diversity. No one has ever specifically identified a diverse person of diverse citizenship who is in this case, years into this litigation.

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Law in the age of the Internet is different. Ordinary citizens with Internet access can readily discern for themselves the basics of any doctrine. The Herndon family, like most Americans, is able use search engines, to Google. As such, they are abundantly aware that diversity jurisdiction requires a showing, not a hunch, as to minimal diversity. See "Diversity jurisdiction," Wikipedia (last accessed Oct. 14, 2024) ("Under the Class Action Fairness Act of 2005, a class action can usually be brought in a federal court when there is just *minimal diversity*, such that *any* plaintiff is a citizen of a different state from *any* defendant." (italics in original)).

For years, the Herndon family's been asking: who is the diverse party here? What diverse state (or country) is the diverse party from? The Herndons have repeatedly asked Respondent, the removing party, and the lower courts to please identify the diverse party and diverse citizenship that creates jurisdiction here. No one's ever answered those questions. No minimally diverse person has ever been identified.

The Herndon family believes that this failure (and refusal) to answer such basic jurisdictional questions strikes at the heart of the legitimacy of the federal courts' treatment of their dead daughter's claims.

Indeed, the Fifth Circuit put eloquent judicial pen to such ordinary citizens' concerns about legitimacy:

> [W]ithout full assurance that this case falls within the strictures of our limited

> jurisdiction, any resolution we would purport to provide would be a nonbinding advisory opinion at best and an *ultra vires* act at worst. We decline to risk transgressing our Article III power absent a sound basis in the record supporting the exercise of federal jurisdiction.

J.A. Masters, __ F.4th__, 2024 U.S. App. LEXIS 22872, *5 (5th Cir. Sept. 9, 2024).

The Herndon family is aware that this Honorable Court is the court of final appeal. This grieving family of the deceased, a family who lost a daughter, has repeatedly asked the federal courts purporting to exercise jurisdiction to simply identify the diverse person of diverse citizenship who establishes jurisdiction in this case. That has not happened.

It should have. After all, "according to the uniform decisions of this court, the jurisdiction of the [District] Court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record." Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382 (1884).

The Herndon's, like many ordinary citizens, hold this Honorable Court in the highest regard because it is the ultimate vanguard of rights. Respectfully, this Court should ensure that there's diversity in this case if the federal courts are purporting to exercise diversity jurisdiction. This Court could do so by either

calling for a response. Or, this Court could simply vacate and instruct the Ninth Circuit to address the jurisdictional basis for diversity.

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Here, there's no dispute that all named and identified parties are California citizens. Pet.App.22a ("There is no dispute here that Netflix and the named plaintiffs are not diverse."). Respondent removed on the basis of diversity. Yet to date, despite the grieving family asking for years, no citizen has ever been identified by name or state of citizenship who is not from California. That silence speaks volumes.

Out of respect for the dead, and respect for the faithful departed's grieving family, *someone* should identify the diversity.

CONCLUSION

For the foregoing reasons, the Herndon family respectfully requests that this Honorable Court grant this Petition.

In the alternative, this Court could remand and instruct the Court of Appeals to address diversity jurisdiction. Or, this Court could call for response to permit Respondent to identify the diversity on this record—something Respondent has repeatedly refused to do.

Out of the respect for the dead, *someone* should identify the diversity.

Respectfully submitted,

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