No.

In the Supreme Court of the United States

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.; BOEHRINGER INGELHEIM CORPORATION; BOEHRINGER INGELHEIM USA CORPORATION; GLAXOSMITHKLINE LLC; GLAXOSMITHKLINE HOLDINGS (AMERICAS) INC.; PFIZER INC.; SANOFI-AVENTIS U.S. LLC; SANOFI US SERVICES INC., PETITIONERS,

v.

BETH BACHER, REPRESENTATIVE FOR PAUL BACHER (DECEASED), JEROME JAY BERKOWITZ, MARY CASSIDY, JOHN CORWIN, ARMANDO RAMOS, RAFAEL ROLON, RODERICK SULLIVAN, THOMAS VAZZANO, ANNE YOST, PLAINTIFF REPRESENTATIVE FOR RICHARD YOST (DECEASED), ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Class Action Fairness Act of 2005 ("CAFA") vests federal courts with subject matter jurisdiction over mass actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11). After filing nine identical complaints—each consisting of just under 100 plaintiffs, but collectively more than 800 plaintiffs—Plaintiffs moved to consolidate the cases under a Connecticut state court rule that expressly and solely provides for consolidation "for trial." Conn. Prac. Book § 9-5. Defendants thereafter removed the nine cases under CAFA. The Second Circuit nevertheless affirmed the District Court's decision to remand the cases to state court on the basis that Plaintiffs did not "intend" to seek trial consolidation. The question presented is:

Whether plaintiffs' intent matters in assessing if plaintiffs have "proposed" a joint trial of the claims of 100 or more persons pursuant to 28 U.S.C. § 1332(d)(11)?

PARTIES TO THE PROCEEDING

Petitioners Boehringer Ingelheim Pharmaceuticals, Inc., Boehringer Ingelheim Corporation,[1] Boehringer Ingelheim USA Corporation, GlaxoSmithKline LLC,[2] GlaxoSmithKline Holdings (Americas) Inc., Pfizer Inc., Sanofi-Aventis U.S. LLC, and Sanofi US Services Inc. were Appellants-Defendants below.

Respondents, who were Plaintiffs-Appellees below, are the following individuals: Beth Bacher, Plaintiff Representative for Paul Bacher (Deceased); Asha Atkins; Anthony Baldwin; Lashauna Deneise Banks; Niema Baptista; Calanthe Batiste; Jason Behrens; Chasity Bellard; Jesse Blake; William Block; Jeffrey Bolen; Christopher Brophy, Sr.; Kenisha Bundage; Maurice Calhoun; Sonja Chamberlain; Stephen Champine; Lindsey Charles; Douglas Chouinard; Billie Jo Clem; Ron Mazun Collins; Chauncey Conway; Florence Couchie; Trina Dau; Kenneth Davis; Roger Allan Defrang; Rusty Delaney; Randy Dercks; Alvester Does; Chastity Dotson; Horace Doty; Teddy Doucet; Detric Drewery; Connie Dugale; Harris Dugger; Tantasha Dutye; Laura Edwards; Lorie A Eischen; Cindy Eklund; Laura Ellis; Darell Enloe; Lillie Evans; Austin Ferguson; Dollie Fields; William Lynn Fisher; Kevin Herbert; Kay Fivecoait; Paul Fluesmeier; Edward L Forrest; Leah Francis; Viola Francis; Mark Franklin; Tamara Frederick; Celeste Freeman; Robert Frommer;

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[1] Boehringer Ingelheim Corp. was a defendant in the proceedings below, but has merged with Boehringer Ingelheim Pharmaceuticals, Inc. and is no longer a separate entity.

[2] GlaxoSmithKline LLC and GlaxoSmithKline Holdings (Americas) Inc. were defendants in the proceedings below, but have since reached an agreement in principle to resolve the claims alleged in these actions.

Terreance Gaines; Traveon Gaines; Ladoris Galbert; Robert Gardner; Linda Gill; Michael Glidden; John Goings; Jason Golden; Roy Goodman; Justin Gorham; Dale Graham ; Calandra Grey; Mario Gualtieri; Arnoldo Gutierrez; Mildred Haggerty; Bryttny Hall; Della Hamm; Tremian Hampton; Zack Hansana; Bridgette Hardy; Robert Harman; Joann Adams, Plaintiff Representative for Robert Eugene Adams (Deceased); John Bagaco, Plaintiff Representative for Joao Bagaco, (Deceased); Ilene Barajas, Plaintiff Representative for Martin Barajas (Deceased); Ricky Doyle, Plaintiff Representative for Anita Bennete (Deceased); Mark Bleuer, Plaintiff Representative for Karen Bleuer (Deceased); Darla Booker, Plaintiff Representative for Douglas Lydell Booker (Deceased); Joseph Bucceri, Plaintiff Representative for Barbara Bucceri (Deceased); Robbie Cahoon, Plaintiff Representative for Dusty Cahoon (Deceased); Shermecka Dubose, Plaintiff Representative for Patricia Cobb (Deceased); Teresa Ghosio, Plaintiff Representative for Susan Callari (Deceased); Tracie Cato, Plaintiff Representative for Sandra Cato (Deceased); Forestine Clark, Plaintiff Representative for Edward Clark (Deceased); Sonja Contreras, Plaintiff Representative for Enrique Contreras (Deceased); Jaqueline Cortez-Bateman, Plaintiff Representative for William Cortez (Deceased); Nicholas Cristino, Plaintiff Representative for Francis Cristino (Deceased); Aaron Currie, Plaintiff Representative for Bonita Currie (Deceased); Susan Verback, Plaintiff Representative for Virginia Cwiakala (Deceased); Diane Dahl, Plaintiff Representative for Michael A. Dahl Sr. (Deceased); Diana Dasent, Plaintiff Representative for Mary Dasent (Deceased); Joanne Yobak, Plaintiff Representative for Rita Jane Donohue (Deceased); Thomas Eccles, Plaintiff Representative for Patricia Eccles (Deceased); Dana Dugas, Plaintiff Representative for Bonnie Edwards (Deceased); Lillian

Fears, Plaintiff Representative for Wayne Fears (Deceased); Lisa Richie, Plaintiff Representative for Daniel Molz (Deceased), Jerome Jay Berkowitz; Gregory Allen Akervik; Angela Albertson; Michael Allwein; Venetta Anaya; Macdavis Annan; Mohammad Saleem Anwaar; Timothy Archer; Tina Atkinson; Nate Austin; Justin Baggott; Daniel Baker; Carolyn Barnes; Johanna Baumbaugh; Richard Beaver; Barbara Bell; Ellen Berk; Debra Bisset; John Black; Roy Blanton; Deborah Lee Bly; Charles Borden; Timothy Bowens; Linda Brasher; Nikki Broadstone; Clarissa Brown; Debbie Brown; Harry Brown; James Brown; Rosemarie Bull; Charles Bullock; Lesa Burgos; Roy Burke; Edna Burt; Freddie Burton; Lunda Butler; Michael Byrne; Gloria Campbell; Madeleine Campbell; James Carney; Jane Carrillo; Frank Carroll; Jerry Carter; Mary Carufel; Lisa Ann Caselli; Craig Caso; Richard Castro; Willie Chaplin; Peggy Chapman; Janice Chavis; Karen Cheatham; Shirley Chelenyak; Celia A. Clark; Leonard Clayton; Starla Clayton; Betty Jean Clouse; Steven Coates; Sandra Coats; Rita Coleman; Kathy Conway; Willie Conway; Karen Cook; Charles Cooke; Gregory Cooper; Corlinda Cowart; Tenna Cox; Charles Evan Craig; Joseph Crites; Shirley Cummings; Carol Danaher; Kary Darin; Robert Darmos; Rosie David; Jandy Davis; William Davis; Creston Dean; Ricardo Deleon; Susanne Delong; Talitha Deluco; Richard Dill; Francis Ditto, Jr.; Alicia Dominguez; Edelia Dominguez; Teresa Duda; Don Dufner; Charles Dunlap; Don Earles; David Head; Keith William Nann; Sharon Oliver; Larry Simmons; Robert Strasser; Janice Turkasz; Kathy Vandegrift; Lillie Belton, Plaintiff Representative for the Estate of Ronnie Belton (Deceased); Carol Bolton, Plaintiff Representative for the Estate of Eddie Bolton (Deceased); Nancy Harkey, Plaintiff Representative for the Estate of Clyde Harkey, Jr. (Deceased); Mark Miller, Plaintiff Representative for the Estate of Lenora Miller

(Deceased); Angelique Skorich-Pastva, Plaintiff Representative for the Estate of Michael Pastva (Deceased), Mary Cassidy; Charles Allen; Randall Allison; David F. Anderson; Shawn Artson; Michael Augello; Julius L. Baker; Melinda Biersdorfer; Steven Bohler; Randy R. Branson; Senada Bubalo; Pat Chalmers; Roger Choice; David Chojnacki; Regina G. Coble; Daphne E. Collier; Frances Coutts; Jean E. Dingle; Pansy Downs; Phillip Drewery; Robert Norman Eberenz; Michael Eichholtz; Paul L Farmer; Rick Farnes; Valentino Fazi; Mary Ferea Lakisha Flood; Philip L. Franckel; Jack Fulater; Pamela Gant; Tonia Gathings; Juliet Goldstein; Matine Goodreau; Michael Grant; Thomas A. Hall; Matthew L Hayden; Diane Herman; Frederick Hollingsworth; Vernon Hughes; Ronald Huston; Kathryn Jones; Norman Jones Tressa Jones; Scott Joslin; Ronald Kaminski; Brian Kawa; Donald Kay; Lois Juanita Kempf; Eva Kennedie; Deborah Kondelikgillen; Steven Lambert; Harry Lamont; Marc R. Levine; Charles Loayza; David Majerek; Raymond Marrujo; David Martin; Eugene Raymond Massey; Glen McGinness; Michele Mcinchak; Jose Medina; Juan Medina; Mark V. Mile; Loraine Miller; Michelle Mix; Michael Momerak; Debra Moray; Donald E. Myers; Norman Lee Neal; Johnny Norred; Daniel Oneal; Dean Scott Panessa; Mary Petke; George Petrina; Kellie Rhodes; Linda Richmond; Lydia C. Rios; Pedro Rodriguez James Rogers; Moniqua Mitchell Sanders; Sandra A Sanders; Arthur Satriale; Darell Smith; Jeanne L Smith; Mothanez Smith; Robert Smith; Tamara Ann Smith; Joe Sosky; Margie Nell Spivey; Noah Stepro; Minnie Stevens; Sharon Stevens-Kuncl; Melina Suarez; Laurence Walden; Stephen Walker; Mitchell Weatherly; Michael Wheless; Ranae Susan Willoughby; And Lucas Etienne, Plaintiff Representative for James Witt (Deceased), John Corwin; Robert Abrahams; Tonya Acosta; Shamisha Adams; Tejon Marcet Adams; George

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RULE 29.6 STATEMENT

Boehringer Ingelheim Pharmaceuticals, Inc. and Boehringer Ingelheim USA Corporation (collectively "BI")

Boehringer Ingelheim Pharmaceuticals, Inc. is a wholly owned subsidiary, directly or indirectly, of Boehringer Ingelheim USA Corporation and Boehringer Ingelheim Corporation, both privately owned corporations. No publicly held corporation owns 10% or more of the stock of Boehringer Ingelheim Pharmaceuticals, Inc.

Boehringer Ingelheim USA Corporation is a wholly owned subsidiary of Boehringer Ingelheim International GmbH. No publicly held corporation owns 10% or more of the stock of Boehringer Ingelheim USA Corporation.

Pfizer Inc. ("Pfizer")

Pfizer Inc. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Sanofi-Aventis U.S. LLC and Sanofi US Services Inc. (collectively "Sanofi")

Sanofi-Aventis U.S. LLC and Sanofi US Services Inc. are indirect subsidiaries of Sanofi, a *société anonyme* organized under the laws of France and traded on the Paris Stock Exchange and NASDAQ. Sanofi owns 100% of the stock in Sanofi-Aventis U.S. LLC and Sanofi US Services Inc.

RELATED PROCEEDINGS

U.S. District Court for the District of Connecticut:

Bacher v. Boehringer Ingelheim Pharms., Inc., No. 3:22-cv-01432 (JAM) (D. Conn. Jan. 17, 2023) (order granting motion to remand)

Berkowitz v. Boehringer Ingelheim Pharms., Inc., No. 3:22-cv-01438 (JAM) (D. Conn. Jan. 17, 2023) (order granting motion to remand)

Cassidy v. Boehringer Ingelheim Pharms., Inc., No. 3:22-cv-01443 (JAM) (D. Conn. Jan. 17, 2023) (order granting motion to remand)

Corwin v. Boehringer Ingelheim Pharms., Inc., No. 3:22-cv-01436 (JAM) (D. Conn. Jan. 17, 2023) (order granting motion to remand)

Ramos v. Boehringer Ingelheim Pharms., Inc., No. 3:22-cv-01439 (JAM) (D. Conn. Jan. 17, 2023) (order granting motion to remand)

Rolon v. Boehringer Ingelheim Pharms., Inc., No. 3:22-cv-01441 (JAM) (D. Conn. Jan. 17, 2023) (order granting motion to remand)

Sullivan v. Boehringer Ingelheim Pharms., Inc., No. 3:22-cv-01440 (JAM) (D. Conn. Jan. 17, 2023) (order granting motion to remand)

Vazzano v. Boehringer Ingelheim Pharms., Inc., No. 3:22-cv-01435 (JAM) (D. Conn. Jan. 17, 2023) (order granting motion to remand)

Yost v. Boehringer Ingelheim Pharms., Inc., No. 3:22-cv-01442 (JAM) (D. Conn. Jan. 17, 2023) (order granting motion to remand)

United States Court of Appeals for the Second Circuit:

Bacher v. Boehringer Ingelheim Pharms., Inc., 110 F.4th 95 (2d Cir. 2024) (affirming remand)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a–20a) is published at 110 F.4th 95. The decision of the United States District Court for the District of Connecticut (Pet. App. 21a–31a) is not published but is available at 2023 WL 196053.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 23, 2024. *See* Judgment, No. 23-877 (2d Cir. July 23, 2024) (Doc. 272). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions and court rules, 28 U.S.C. § 1332, 28 U.S.C. § 1453, and Connecticut Practice Book § 9-5, are reproduced in the petition appendix, Pet. App. 32a–43a.

INTRODUCTION

This case presents an acknowledged circuit split on a recurring question of federal statutory interpretation: whether CAFA's mass action provision, 28 U.S.C. § 1332(d)(11), permits consideration of plaintiffs' underlying intent in deciding whether plaintiffs have "proposed" a joint trial of the claims of 100 or more persons. The litigation at issue involves 853 Plaintiffs who filed product liability claims in Connecticut state court against the brand-name manufacturers of the heartburn medication Zantac. Although initially filed as nine multi-plaintiff cases, each just shy of 100 plaintiffs, Plaintiffs filed motions asking to consolidate the claims under a Connecticut state court rule that provides ***only*** for consolidation "***for trial***." Conn. Prac. Book § 9-5 ("Section 9-5") (emphasis added). On their face, Plaintiffs' motions

to consolidate constituted an express proposal to try the claims of more than 100 persons jointly, thereby triggering federal jurisdiction under CAFA's mass action provision. 28 U.S.C. § 1332(d)(11). Defendants accordingly removed the cases to federal court.

The District Court nevertheless granted remand, finding that despite Plaintiffs' explicit request to consolidate under Section 9-5, Plaintiffs did not mean to obtain the relief their motions requested. In reaching this conclusion, the District Court looked behind the face of the consolidation motions and credited Plaintiffs' *post hoc* representations as to their intent—that Plaintiffs only meant to consolidate the cases for pretrial management.

After granting Defendants' petition for permission to appeal, the Second Circuit affirmed in a divided opinion, with Judge Kearse dissenting. The panel majority recognized that the federal courts of appeal are split on the question of whether intent matters in assessing if a joint trial of the claims of 100 or more persons has been "proposed." Siding with the Third, Tenth, and Eleventh Circuits, the Second Circuit held that the statutory term "proposed" does not turn on what relief Plaintiffs actually requested, but on whether Plaintiffs ***intended*** to seek a joint trial. Having framed the test as depending on intent, the panel majority sustained remand on the basis that Plaintiffs did not actually want a joint trial, surmising (like the District Court) that Plaintiffs sought consolidation to minimize filing fees in transferring the cases to Connecticut's Complex Litigation Docket ("CLD").

This Court should grant review to address this circuit split. The Fifth and Sixth Circuits have declined to consider the intent underlying plaintiffs' proposals for joint trials. *See Adams v. 3M Co.*, 65 F.4th 802, 805 (6th Cir. 2023); *Lester v. Exxon Mobil Corp.*, 879 F.3d 582, 587 (5th Cir. 2018). By contrast, the Second Circuit expressly held that intent matters in analyzing CAFA's mass action

provision. In doing so, it relied on opinions by the Third, Tenth, and Eleventh Circuits, each of which has endorsed consideration of intent in assessing CAFA jurisdiction. *See Ramirez v. Vintage Pharms., LLC*, 852 F.3d 324, 331–32 (3d Cir. 2017); *Parson v. Johnson & Johnson*, 749 F.3d 879, 888 (10th Cir. 2014); *Scimone v. Carnival Corp.,* 720 F.3d 876, 884 (11th Cir. 2013). Especially given the Second Circuit's crystallization of these differing interpretations of CAFA, this split will continue to lead to discordant results absent guidance from this Court.

Review is also warranted to make clear that jurisdictional rules—here, in the CAFA context—should be simple and straightforward. This Court has repeatedly explained that the threshold issue of jurisdiction should be decided with easy-to-administer rules. *See, e.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77, 94–95 (2010); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 171–73 (2014). Here, there is no basis in CAFA's statutory text—which asks only whether a joint trial has been "proposed"—to effectively require proof of scienter. By grafting onto the statute the element of intent, the Second Circuit's decision establishes an unpredictable, fact-intensive inquiry for CAFA mass action jurisdiction that is not required by the statute itself.

Finally, this is an important issue because the Second Circuit's approach threatens to water down CAFA's core protections. CAFA was meant to assure defendants' right to a federal forum in cases of national importance. If the decision is allowed to stand, it will create a loophole that permits easy evasion of federal jurisdiction: plaintiffs can simply declare, post-removal, that they did not really mean to propose a joint trial despite the plain statements in their pleadings. Making plaintiffs' intent the linchpin of the removal analysis will encourage exactly the kind of gamesmanship and forum abuse that CAFA was meant to avoid. In short, plaintiffs should be held accountable for

what their pleadings actually say, not what a court later divines as the intent behind their actions.

For these reasons, the petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

I. The National Zantac Litigation

In 1983, the U.S. Food and Drug Administration ("FDA") approved Zantac (ranitidine), a medication widely used to treat gastroesophageal conditions. Pet. App. 57a (*Bacher* Compl. ¶ 22). In the decades that followed, the FDA reviewed the safety and efficacy of Zantac many times, approving additional indications, dosages, and formulas. In 1995, Zantac became available over-the-counter. *Id.* at 57a–58a, 59a (*Bacher* Compl. ¶¶ 24, 29). The right to market over-the-counter Zantac transferred between Defendants: first from GlaxoSmithKline to Pfizer (and its predecessor) in 1998, then from Pfizer to BI in 2006, and finally from BI to Sanofi in 2017. *Id.* at 57a–61a (*Bacher* Compl. ¶¶ 24–25, 27–28, 31–32, 34–35, 38).

In September 2019, an online pharmacy, Valisure, filed a citizen petition with the FDA reporting that its testing of ranitidine samples revealed high levels of N-Nitrosodimethylamine ("NDMA"), a chemical that Plaintiffs allege is a human carcinogen. *Id.* at 61a–62a, 70a–73a (*Bacher* Compl. ¶¶ 39, 72–74, 76–78). The FDA subsequently conducted its own product testing, which identified levels of NDMA much lower than Valisure's (and similar to that found in smoked meats) but still above conservative regulatory limits in some ranitidine samples.[1] The companies that sold ranitidine at that time

[1] FDA, *Laboratory Tests: Ranitidine* (Nov. 1, 2019), www.fda.gov/drugs/drug-safety-and-availability/laboratory-tests-ranitidine.

then withdrew the products from the market in an abundance of caution. *See, e.g.*, *id.* at 60a (*Bacher* Compl. ¶¶ 35–36).

Since 2019, tens of thousands of plaintiffs filed lawsuits alleging that ranitidine-containing products caused them to develop cancer. On February 6, 2020, the Judicial Panel on Multidistrict Litigation created a multidistrict litigation ("MDL"). *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 437 F. Supp. 3d 1368, 1370 (J.P.M.L. 2020). In December 2022, the MDL court issued an exhaustive 341-page opinion granting Defendants' *Daubert* and summary judgment motions on general causation as to the five cancer types that plaintiffs pursued. *In re Zantac (Ranitidine) Prod. Liab. Litig.*, 644 F. Supp. 3d 1075, 1286–87 (S.D. Fla. 2022).

II. The Connecticut Litigation

To avoid litigating in the MDL, floods of plaintiffs began filing their Zantac claims in state courts across the country. The particular Plaintiffs at issue here are 853 individuals hailing from 36 states, who filed their cases in the Superior Court of the State of Connecticut, Judicial District of Danbury. *See, e.g.*, Pet. App. 44a–135a (*Bacher* Compl.). Represented by the same law firm, Plaintiffs aggregated their claims into nine identical complaints (the "Actions"), each naming between 80 and 99 individual Plaintiffs. *Id.* (*Bacher* Compl.).

Shortly after filing the Actions, Plaintiffs' counsel requested Defendants' agreement to refer the Actions to Connecticut's CLD. *Id.* at 142a–143a (Ex. B to Mem. of Law in Supp. of Mot. to Remand (Oct. 21, 2022 email)); *id.* at 144a (Ex. A to Opp'n to Remand ("Glasser Aff.") ¶ 6). Connecticut's CLD manages "challenging civil cases" that typically involve "multiple litigants, legally intricate issues or claims for damages that could total millions of dollars," and is available in three locations: Hartford,

Stamford, and Waterbury.[2] While transfer to the CLD places the matters before a single judge, it does not mandate a joint trial. *See* Conn. Prac. Book § 23-13 (permitting designation of a group of cases as complex litigation cases that may be assigned to a single judge "for pretrial, trial, or both"). Defendants agreed to Plaintiffs' request for transfer to the CLD on the condition that the application indicate a preference for assignment to the Hartford or Stamford locations. Pet. App. 142a (Ex. B to Mem. of Law in Supp. of Mot. to Remand (Oct. 26, 2022 email)); *id.* at 144a–145a (Glasser Aff. ¶ 8).

Plaintiffs did not, however, move for transfer to the CLD. Instead, without further consultation with Defendants, Plaintiffs filed motions to consolidate the Actions pursuant to a different Rule, Connecticut Practice Book § 9-5. *Id.* at 136a–138a (Mot. to Consolidate). Section 9-5(a) provides ***solely*** for trial consolidation:

> Whenever there are two or more separate actions which should be ***tried together***, the judicial authority may upon the motion of any party or upon its own motion, order that the actions ***be consolidated for trial***.

Conn. Prac. Book § 9-5 (emphases added). Plaintiffs did not cite any other authority in their motions beyond this Rule. Nor did they include language in their motions seeking to limit their request to consolidation for only pretrial purposes. *See generally* Pet. App. 136a–138a (Mot. to Consolidate).

Because Plaintiffs' motions on their face sought to consolidate the claims of more than 800 persons for trial, Defendants removed the Actions under CAFA's mass action provision. *See* Notice of Removal of Action, No.

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[2] *See* Conn. Judicial Branch, Facts About the Connecticut Judicial Branch: Complex Litigation Docket, www.jud.ct.gov/external/super/FACTS_090216.pdf.

3:22-cv-01432 (JAM) (D. Conn. Nov. 10, 2022) (Docs. 1, 2). That provision defines a removable "mass action" as:

> [A]ny civil action . . . in which monetary relief claims of ***100 or more persons are proposed to be tried jointly*** on the ground that the plaintiffs' claims involve common questions of law or fact.

28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). On November 17, 2022, Plaintiffs moved to remand. *See* Pls.' Mot. for Remand, No. 3:22-cv-01432 (JAM) (D. Conn. Nov. 17, 2022) (Doc. 29).

III. The District Court's Remand Orders

On January 17, 2023, the District Court issued orders remanding the Actions to state court. Pet. App. 21a–31a (Remand Order). Acknowledging that "[a]t first glance" Plaintiffs' citation to Section 9-5 reflected a proposal for a joint trial, the District Court decided that its role was "not to grade or foot-fault the quality of plaintiffs' filings," and looked beyond the face of those motions. *Id.* at 27a, 29a (Remand Order). Upon doing so, the court held that the entire record did "not show that the plaintiffs ***wanted*** or ***intended*** to bring about a joint trial of all their claims when they filed their motion to consolidate." *Id.* at 29a (Remand Order) (emphases added).

The District Court thus accepted Plaintiffs' *post hoc* explanation for citing Section 9-5—that notwithstanding the language of that provision, Plaintiffs were not seeking a joint trial, but only consolidated pretrial management. *Id.* at 26a (Remand Order). To reach this conclusion as to Plaintiffs' motives, the court parsed "the evidence of communications between counsel prior to the plaintiffs' filing of their motion," which consisted of various emails. *Id.* (Remand Order). Based on those emails, the court surmised that, "[a]s best as I can tell, the plaintiffs sought consolidation as no more than an expedient for an easier

and less costly transfer of the cases to the [CLD]." *Id.* (Remand Order).

The District Court also afforded significant weight to what it viewed as Plaintiffs' consistent strategy to avoid federal jurisdiction. Because "plaintiffs [had] structured their state court complaints . . . [each] shy of the 100-plaintiff federal removal threshold," the District Court reasoned, "[i]t would be odd—and unfair as well—to interpret the plaintiffs' motion to consolidate as an effort to invite removal to federal court and to undo their plans to litigate in a state court forum that they carefully chose in the first place." *Id.* at 30a (Remand Order).

After inquiring into the motives underlying Plaintiffs' consolidation motions, the District Court concluded that there was no "intentional act" to propose a joint trial under CAFA and granted remand. *Id.* at 29a, 30a (Remand Order).

IV. The Second Circuit's Decision

On January 27, 2023, Defendants timely petitioned for permission to appeal pursuant to 28 U.S.C. § 1453(c). *See* Pet. for Permission to Appeal Remand Order, No. 23-139 (2d Cir. Jan. 27, 2023) (Doc. 1). Defendants also moved to stay remand, which the District Court granted based on "a reasonable likelihood that a panel of the Second Circuit could view the remand order differently than [it had]." Order Granting Mot. to Stay Remand, No. 3:22-cv-01432 (JAM) (D. Conn. Feb. 3, 2023) (Doc. 70). On June 13, 2023, the Second Circuit granted Defendants' petition for permission to appeal.[3] *See* Order Granting Leave to Appeal, No. 23-139 (2d Cir. June 13, 2023) (Doc. 51).

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[3] On February 8, 2023, per the parties' joint request, the Second Circuit consolidated the nine related Petitions for purposes of the appeal only. *See* Order Granting Mot. for Case Mgmt. Relief, No. 23-139 (2d Cir. Feb. 8, 2023) (Doc. 11).

On July 23, 2024, a divided Second Circuit panel affirmed the District Court's remand order. Pet. App. 1a–18a (Opinion); *id.* at 19a–20a (Dissent). The majority recognized a circuit split on the core question of whether "CAFA permits a consideration of Plaintiffs' 'intent.'" *Id.* at 11a (Opinion). It observed that the Sixth Circuit had recently "refused to consider an intent-based argument and held that requiring district courts to divine counsels' unexpressed intentions would run afoul of the usual maxim that jurisdictional rules be 'simple.'" *Id.* at 12a (Opinion) (quoting *Adams v. 3M Co.*, 65 F.4th 802 (6th Cir. 2023)) (cleaned up).

But the majority pointed to the Third, Tenth, and Eleventh Circuits as espousing the opposite view and as interpreting CAFA's mass action provision to "permit[] a consideration of Plaintiffs' 'intent'" in assessing whether a joint trial of 100 or more parties' claims has been proposed. *Id.* at 11a–12a (Opinion) (citing *Ramirez v. Vintage Pharms., LLC*, 852 F.3d 324, 331–32 (3d Cir. 2017); *Parson v. Johnson & Johnson*, 749 F.3d 879, 888 (10th Cir. 2014); *Scimone v. Carnival Corp.*, 720 F.3d 876, 884 (11th Cir. 2013)). The majority then sided with those circuits endorsing consideration of intent, persuaded that the "common understanding" that the word "propose" means to "intend to make an offer or request." *Id.* at 11a–12a (Opinion).

Applying its intent-based rule, the majority held that Plaintiffs had not intended to seek a joint trial. The Second Circuit recited the "great lengths" that Plaintiffs had taken to avoid federal jurisdiction. *Id.* at 3a, 10a (Opinion). It noted that Plaintiffs structured their complaints to avoid federal jurisdiction by naming fewer than 100 plaintiffs in each action, and had included in their complaints a disclaimer of federal jurisdiction. *Id.* at 5a, 10a (Opinion). With this motive to keep the cases in state court as a backdrop, the court held that there was an

alternative reason why Plaintiffs might have filed their consolidation motions other than to obtain a joint trial: "avoidance of a costly fee." *Id.* at 10a (Opinion); *see id.* at 11a (Opinion) ("Plaintiffs' actions are thereby consistent with a desire to consolidate to facilitate the economical transfer of these actions to the CLD.").

Framing the question as a search for Plaintiffs' intent allowed the majority to sidestep the plain text of Plaintiffs' consolidation motions, which had relied exclusively on Section 9-5 as the basis for relief. *Id.* at 10a–18a (Opinion). Instead, the majority credited Plaintiffs' argument that "local Connecticut practice regarding Section 9-5" is different from what that Rule provides on its face. *Id.* at 15a (Opinion). In support of this "practice," the majority relied on unpublished trial court cases that Plaintiffs had not cited in their consolidation motions. *Id.* at 15a–16a & n.5 (Opinion). The court acknowledged that those cases may not reflect the "best reading" of Section 9-5. *Id.* at 17a (Opinion). In the majority's view, however, "ultimately the question is not what the correct understanding of Connecticut law is. Rather, it is what, given these cases, we can understand Plaintiffs' citation to Section 9-5 to mean." *Id.* (Opinion).

Judge Kearse dissented. To determine whether a "proposal" had been made, she focused on Plaintiffs' statements, not their intentions: "I have seen nothing in the state-court record showing that plaintiffs stated, prior to or in making their motion for consolidation, that they sought consolidation of these cases only for pretrial proceedings." *Id.* at 19a (Dissent). She accordingly relied on the fact that "plaintiffs moved for consolidation under a [Connecticut Practice Book section] that refers only to consolidation 'for trial,'" and that they had invoked that provision "without stating that they sought consolidated proceedings only for the pretrial stage." *Id.* at 20a (Dissent). Finally, Judge Kearse observed that in any

case, Plaintiffs' references to the CLD were not inconsistent with seeking a joint trial because cases transferred to the CLD may still be assigned to a single judge for trial. *Id.* at 19a–20a (Dissent).

On September 26, 2024, the Second Circuit denied Defendants' motion to stay the issuance of the mandate. *See* Order, No. 23-877 (2d Cir. Sept. 26, 2024) (Doc. 281).

REASONS FOR GRANTING THE PETITION

I. There Is a Clear Circuit Conflict on Whether CAFA Permits Consideration of Plaintiffs' Intent When Determining Jurisdiction

This Court should grant review to resolve the conflict recognized by the Second Circuit as to whether intent matters in assessing if plaintiffs proposed a joint trial under CAFA's mass action provision. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

Just last year, the Sixth Circuit refused to consider plaintiffs' intent in deciding whether a joint trial had been proposed under CAFA's mass action provision. In *Adams v. 3M Co.*, 65 F.4th 802, 803 (6th Cir. 2023), the plaintiffs filed two complaints in state court, each with more than 100 plaintiffs. After the defendants removed the cases, the plaintiffs moved to remand. In their remand motions, the plaintiffs disclaimed any intent for a joint trial and argued that their conduct in related suits demonstrated that they never intended to propose to try the cases together. *See* Pls.' Mot. to Remand, *Adams v. 3M Co.*, No. 7:21-CV-00082-REW-CJS (E.D. Ky. Nov. 24, 2021) (Doc. 23). The district court agreed, granted remand, and "reject[ed] the notion that Plaintiffs intended to or

volitionally acted in a way that would propose a joint trial." *Adams v. 3M Co.*, 2022 WL 4482441, at *13.

The Sixth Circuit reversed. After examining the complaints "at face value," the court held that the plaintiffs had proposed a joint trial. *Adams*, 65 F.4th at 804. Writing for a unanimous panel, Judge Sutton expressly rejected the plaintiffs' argument that they did not actually intend to seek a joint trial on the basis that they had "sought individual rather than joint trials in a similar case." *Id.* at 805. The court explained that this "Court has long construed jurisdictional statutes like CAFA to establish 'simple' bright-line rules. . . . Requiring district courts to divine counsels' unexpressed intentions . . . would be anything but." *Id.* at 804–05 (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 94–95 (2010), and *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment)).

The Fifth Circuit similarly rejected the plaintiffs' intent-based argument in *Lester v. Exxon Mobil Corp.*, 879 F.3d 582 (5th Cir. 2018). There, the defendant removed the personal injury actions to federal court after the plaintiffs moved to consolidate their newly-filed claims with a case already pending in state court that included hundreds of plaintiffs. *Id.* at 585. The state trial court had organized those already-pending cases into smaller trial "flights." *Id.* In moving to remand, the plaintiffs argued that their motion "***intended*** to propose a joint trial only with the [smaller trial] flight," and not the entire civil action at issue, which if true, would have resulted in fewer than 100 plaintiffs being tried together. *Id.* at 586 (emphasis added). The Fifth Circuit disagreed, explaining that "[t]he focus of CAFA is the consolidation that is proposed." *Id.* at 587. It held that the plaintiffs had proposed a joint trial of the entire case based on the plain language of the consolidation motion (as the plaintiffs had "moved to consolidate their case with the

[whole] case, not just the flight set for trial") and the statute that the motion cited (which, like Section 9-5, "***only*** permit[ted] consolidation for trial, as opposed to pretrial, purposes"). *Id.* (emphasis added).

In the decision below, by contrast, the Second Circuit expressly adopted an interpretation of CAFA's mass action provision that places plaintiffs' intent at the center of the jurisdictional inquiry. Pet. App. 14a (Opinion). Rejecting Defendants' reliance on *Adams*, the court squarely held that "[w]e disagree and hold that CAFA permits a consideration of Plaintiffs' 'intent.'" *Id.* at 11a (Opinion). The court's entire analysis depended on this framing, which allowed it to sidestep the plain text of Plaintiffs' consolidation motions. Those motions had expressly invoked Connecticut's trial consolidation rule. Rather than the text of the motions and the rule cited therein, the court relied on various extra-textual indicia of intent such as the parties' email communications, Plaintiffs' prior litigation conduct, and even "local Connecticut practice" to conclude that Plaintiffs had no clear intent to seek a joint trial. *Id.* at 10a–11a, 15a–16a, 18a (Opinion).

To support its decision, the court further relied on opinions by the Third, Tenth, and Eleventh Circuits that endorse delving into plaintiffs' intent when deciding whether there has been a proposal for a joint trial under CAFA. *Id.* at 11a–12a (Opinion). As the Second Circuit explained, in *Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013), the Eleventh Circuit held that a proposal for a joint trial means "that the plaintiffs must actually want, or at least intend to bring about, what they are proposing." *Id.* at 881, 884. In *Parson v. Johnson & Johnson*, 749 F.3d 879 (10th Cir. 2014), the Tenth Circuit similarly held that "the common usage of the word 'propose' involves an intentional act." *Id.* at 888. It went on to hold that plaintiffs' litigation conduct evidenced

plaintiffs' "***intention*** to avoid CAFA jurisdiction." *Id.* (emphasis added). Likewise, in *Ramirez v. Vintage Pharms., LLC*, 852 F.3d 324 (3d Cir. 2017), the Third Circuit held that "[i]ntent is certainly pertinent to determining whether Plaintiffs have proposed a joint trial." *Id.* at 331.

This pronounced circuit split over the meaning of the statutory term "proposed"—and, accordingly, the role of intent in deciding CAFA mass action jurisdiction—warrants this Court's review.

II. The Court Should Grant Review to Bring This Case in Line with Existing Supreme Court Precedent Favoring Simple, Bright-Line Jurisdictional Rules

The Court should also grant the petition for a writ of certiorari to bring CAFA jurisprudence in line with the statute's text and this Court's repeated admonition that threshold questions of jurisdiction should be governed by simple, straightforward rules.

This Court has made clear on multiple occasions that "[w]e place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Hertz*, 559 U.S. at 80. It has even done so in construing other aspects of CAFA's mass action provision, adopting a simple reading of the term "plaintiff" that "leads to a straightforward, easy to administer rule" and "comports with the commonsense observation that 'when judges must decide jurisdictional matters, simplicity is a virtue.'" *AU Optronics Corp.*, 571 U.S. at 172–73 (quoting *Std. Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013)).[4]

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[4] *See Axon Enter., Inc. v. FTC*, 598 U.S. 175, 212 (2023) (Gorsuch, J., concurring) ("Jurisdictional rules, this Court has often said, should be 'clear and easy to apply.'" (citations omitted)); *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 11 (2015) (noting "our rule favoring

The simplest rule is the one the statutory text calls for: when an express proposal for a joint trial has been made, the inquiry should stop there—removal is proper irrespective of whether plaintiffs meant (or afterwards claim to have meant) what they proposed. After all, the statute contains no reference to "intent"; it merely provides for removal of "any civil action . . . in which monetary relief claims of 100 or more persons ***are proposed to be tried jointly***." 28 U.S.C. § 1332(d)(11) (emphasis added). This allows for an easy-to-administer analysis that depends upon no more than parsing the relevant pleading containing the "proposal."

Here, for example, the analysis should have started and ended with Plaintiffs' consolidation motions. Those motions unambiguously stated: "Pursuant to Conn. Prac. Book § 9-5, Plaintiffs in this action move to consolidate it with the following actions . . . ." Pet. App. 136a (Mot. to Consolidate). That Rule, in turn, by its unambiguous text allows only for ***trial*** consolidation. Conn. Prac. Book § 9-5 ("Whenever there are two or more separate actions which should be ***tried together***, the judicial authority may . . . order that the actions ***be consolidated for trial***." (emphases added)). Section 9-5 was the sole legal basis for Plaintiffs' motions, and it defined the relief they sought. In fact, it was the only authority Plaintiffs cited in their two-page consolidation motions.

By contrast, the rule the Second Circuit adopted is anything but simple or straightforward. Requiring proof of intent effectively adds a scienter element that nowhere

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clear boundaries in the interpretation of jurisdictional statutes"); *Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 128 (2013) (agreeing that "jurisdictional tests, often applied at the outset of a case, should be 'as simple as possible'"); *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) ("It is of first importance to have a definition . . . [that] will not invite extensive threshold litigation over jurisdiction." (citation omitted)).

appears in the statutory text. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993) ("[W]e may not add terms or provisions where [C]ongress has omitted them."). Rather than look at the face of plaintiffs' pleadings to see what they actually said, it requires courts to engage in a fact-intensive inquiry into plaintiffs' motives, which by nature are subjective and readily disputed.

For instance, here, the Second Circuit relied heavily on a series of email communications between Plaintiffs and Defendants that it believed reflected Plaintiffs' ultimate motives in moving to consolidate (i.e., to save filing fees). Pet. App. 6a, 11a (Opinion). It went so far as to eschew the traditional judicial function of interpreting the law, holding that "the question is not what the correct understanding of Connecticut law is," *id.* at 17a (Opinion), and waded instead into the murky waters of "local Connecticut practice" in search of Plaintiffs' intent, *id.* at 15a–17a (Opinion).

Faced with a rule that erects intent as the governing criterion, one could easily imagine CAFA removals devolving into disputes about discovery into parties' email communications or conversations, engendering battles about privilege over counsel's litigation strategy, and requiring full evidentiary hearings. *See AU Optronics*, 571 U.S. at 171–72. And such an intent-based rule would provide no *ex ante* guidance to defendants, who will be forced to decide whether to remove a case based on guesswork about what plaintiffs or their attorneys believe, rather than what their pleadings say.[5]

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[5] The fact that the Second Circuit (in a single line in its opinion) characterized its test as based on how a "reasonable observer" would view Plaintiffs' intent does not alleviate these problems. Pet. App. 4a (Opinion). The Second Circuit's test still makes subjective intent its ultimate objective, and it established no limits and

This Court should therefore grant review to bring the test for CAFA mass action removal back in line with the statute's text and the Court's expressed preference for simple jurisdictional rules, and should hold that divining plaintiffs' intent has no place in determining CAFA jurisdiction.

III. The Question Presented Is Important To Preserving CAFA's Protections

The question presented is important to maintaining CAFA's vitality. Congress enacted CAFA to vest federal courts with subject matter jurisdiction over "interstate cases of national importance under diversity jurisdiction." Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 5 (2005). The existing laws at the time had "enable[d] plaintiffs' lawyers who prefer to litigate in state court to easily 'game the system' and avoid removal of large, interstate class actions to federal court." S. Rep. No. 109-14, at 10 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 11; 151 Cong. Rec. S1086-02, S1103 (daily ed. Feb. 8, 2005) (statement of Sen. Grassley) ("Crafty lawyers game the system. Crafty lawyers file these large class actions in certain courts. They are shopping for magnet State courts, and they are able to keep them there."). Congress expanded federal jurisdiction to curb these abuses and ensure a federal forum to litigate significant class and mass actions.

Indeed, mass action cases are typically high-stakes matters where the forum in which the claims are litigated can make all the difference. *See Fidelity Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari) ("Th[e] enormous

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provided no clarity as to what sources of evidence might be used to demonstrate intent. For example, the Second Circuit's analysis involved a wholly novel and inherently uncertain inquiry about "local [ ] practice" that in and of itself raises innumerable problems of proof. *Id.* at 15a–17a (Opinion).

potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari."). Removals of mass actions often involve hundreds of plaintiffs, such as the 853 Plaintiffs at issue here. It is no secret that plaintiffs aggregate these lawsuits in state court for strategic reasons. For example, the validity of mass tort cases often turns on whether admissible expert evidence supports medical causation of plaintiffs' injuries. While federal courts apply *Daubert* scrutiny to exclude "junk science," state courts may adhere to more relaxed standards such as the *Frye* test. *See, e.g.*, Andrew W. Jurs & Scott DeVito, *A Tale of Two* Dauberts*: Discriminatory Effects of Scientific Reliability Screening*, 79 Ohio St. L.J. 1107, 1125 (2018) ("[W]hen . . . states [ ] continue to utilize the older *Frye* standard, federal filing rates decrease as plaintiffs file in state courts with perceived lower evidentiary standards."). Whether an action stays in federal court or is remanded to state court is therefore a critical—and often dispositive—issue in major mass tort litigation.

The Second Circuit's interpretation of the statute threatens to undercut the protections Congress afforded to defendants when it expanded federal jurisdiction to encompass mass actions. The decision creates a loose exception to CAFA jurisdiction that can be easily exploited. Even where a request for a joint trial is clear on its face, plaintiffs can avoid the jurisdictional consequences of their actions with *post hoc* excuses that they "didn't really mean it" when they requested trial consolidation. To defeat such back-pedaling once a case is removed, defendants will be forced to shoulder the unenviable burden of disproving the professed motives of their adversaries and their counsel. If such tactics could permit mass action plaintiffs to avoid CAFA, "then Congress's obvious purpose in passing the statute . . . can

be avoided almost at will." *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008).

Having filed motions asking for a joint trial, Plaintiffs should be held responsible for their litigation choices. The Court should grant certiorari to ensure that jurisdiction turns on what Plaintiffs actually said, and not the slippery slope of what they intended.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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