No. 24-456

IN THE

Supreme Court of the United States

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC. ET AL.,

Petitioners,

v.

BETH BACHER, REPRESENTATIVE FOR PAUL BACHER (DECEASED) ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents filed nine separate state-law actions in Connecticut state court, each with fewer than 100 plaintiffs. They then moved, in a manner customary under local practice, for pretrial consolidation "to manage all of them in an orderly and efficient manner." Pet. App. 137a. Petitioners subsequently removed each of the actions to federal court, invoking 28 U.S.C. § 1332(d)(11), a provision of the Class Action Fairness Act that provides for removal of any civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly," *id.* § 1332(d)(11)(B)(i).

The question presented is: Whether a federal court can consider state case law and relevant record evidence when assessing if plaintiffs have "proposed" their claims "be tried jointly," or must instead limit itself to doing "no more than parsing the relevant pleading," *see* Pet. 15.

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INTRODUCTION

The mass action provision of the Class Action Fairness Act (CAFA) confers federal subject-matter jurisdiction over civil actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). Below, the Second Circuit conducted that inquiry by asking whether "a reasonable observer would conclude that Plaintiffs acted with the intention of bringing about a joint trial." Pet. App. 4a. To answer that question, the court looked to respondents' motion to consolidate, the record as a whole, and state decisional law. Every circuit conducts that inquiry the same way.

Petitioners nonetheless attempt to manufacture a split out of the fact that some circuits use the word "intent" in describing their analysis while others do not. Petitioners claim that courts like the Second Circuit that use the word "intent" ask judges to become mind readers, divining plaintiffs' unspoken intentions. And they claim that the circuits that do not use the word "intent" ignore state decisional law and the rest of the record, limiting themselves to "parsing the relevant pleading containing the 'proposal.'" *See* Pet. 15.

Petitioners are wrong as to both claims. No circuit—including the Second—requires judges to read minds. The Second Circuit asks whether "*a reasonable observer* would conclude that Plaintiffs acted with the intention of bringing about a joint trial," not whether a psychic would. *See* Pet. App. 4a (emphasis added). And no circuit ignores state decisional law or the record, either. Ignoring state decisional law would raise serious federalism concerns, and ignoring context from the record would

be at odds with how courts interpret every other kind of text, from statutory provisions to contract terms.

In any event, there is no need for this Court to take up the question presented. Removals under CAFA's mass action provision occur infrequently. In the majority of cases where they do occur, there will be little debate over whether plaintiffs have proposed a joint trial or consolidation for some other purpose. Plus, a victory for petitioners on the merits in this case would not affect the volume of cases removed to federal court in any way whatsoever. All that would happen is that future plaintiffs will include a pro forma "solely for pretrial proceedings" recitation in any motion to consolidate.

This Court should deny the petition.

STATEMENT OF THE CASE

1. Petitioners—various drug company defendants—manufacture and sell Zantac, an over-the-counter heartburn medication. Pet. App. 50a. In 2019, independent researchers found that the active ingredient in Zantac transforms over time into a carcinogen called NDMA. *Id.* 51a. The FDA subsequently recalled Zantac. *Id.*

In 2022, nine separate lawsuits alleging state-law personal injury claims were filed in Connecticut Superior Court on behalf of respondents, hundreds of Zantac users who developed cancer as a result of using the drug. Pet. App. 4a-5a, 51a. Each complaint named fewer than 100 plaintiffs. *Id.* 5a. Each complaint contained a clause stating that every plaintiff sought an individual judgment. *Id.* And each complaint contained a provision expressly disclaiming federal jurisdiction. *Id.* 5a n.1.

2. Plaintiffs' and defendants' counsel agreed to transfer these nine actions to the Connecticut Superior Court's Complex Litigation Docket (CLD). Pet. App. 6a. The CLD handles matters involving particularly complicated legal issues and multiple litigants. Conn. Prac. Book § 23-13. Cases placed on the CLD will go before the same judge if they involve the same underlying facts. *Id.* Cases may be assigned to the CLD "for pretrial, trial, or both." *Id.*

Plaintiffs also proposed to defendants that they consolidate the cases prior to transfer to avoid paying nine filing fees. Pet. App. 23a, 26a. Consolidation in Connecticut is governed by Connecticut Practice Book Section 9-5. That rule describes the procedure for the consolidation of "two or more separate actions." Conn. Prac. Book § 9-5. It provides that "the judicial authority may, upon the motion of any party or upon its own motion, order that the actions be consolidated for trial." *Id.* Because Connecticut has no procedural rule that explicitly mentions consolidation for pretrial proceedings, Connecticut courts also use Section 9-5 to consolidate cases solely for pretrial purposes.[1] To disambiguate, litigants who seek to consolidate for both pretrial proceedings and trial

[1] *DiBella v. Town of Greenwich*, 2012 WL 2899242 (Conn. Super. Ct. May 22, 2012). *See also Caprio v. Gorawara*, 2019 WL 13222943, at *2 n.1 (D. Conn. Nov. 14, 2019) (citing *Post v. Brennan*, 2008 WL 2967094, at *1 (Conn. Super. Ct. July 16, 2008); *Groth v. Redmond*, 194 A.2d 531, 532 (Conn. Super. Ct. 1962)).

will often specify that their proposal is made "for all purposes," for "trial," or for "discovery and trial."[2]

Accordingly, when plaintiffs filed their consolidation motion, citing Connecticut Practice Book Section 9-5, they did *not* say that the consolidation was "for all purposes," for "trial," or for "discovery and trial." Instead, their six-sentence motion explained that "[c]onsolidating these actions will allow for the court to manage all of them in an orderly and efficient manner." Pet. App. 137a.

3. Before the state court could act on the motion to consolidate, defendants removed the cases to federal court, invoking the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(11). As relevant here, CAFA defines "mass actions" as civil 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)(B)(i). And as in other removal contexts, defendants have the burden of proof to establish removability. Pet. App. 9a (citing

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[2] *See, e.g.*, Mot. to Consolidate at 3, *Eisele v. Stamford Bd. of Educ.*, 2016 WL 11534572 (Conn. Super. Ct. Jan. 22, 2016) (moving to "consolidate the seven actions for purposes of trial"); Mot. to Consolidate at 4, *Boppers Ent. DJS v. Rosenay*, 2015 WL 13901735 (Conn. Super. Ct. June 25, 2015) ("[c]onsolidating the two actions for discovery and trial"); Plaintiff's Consent Mot. to Consolidate at 1, *Yale New Haven Health Servs., Corp. v. Prospect Med. Holdings, Inc.*, No. HHD-CV24-6184328-S (Conn. Super. Ct. June 11, 2024) (BL-29) (requesting consolidation "for all purposes"); Mot. to Consolidate at 1, *Conestoga Tr. v. PHL Variable Ins. Co.*, No. HHD-X03-CV 21-6145336-S (Conn. Super. Ct. July 15, 2022) (BL-54) (requesting cases be "consolidated for all purposes, including discovery and trial").

McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936)). CAFA does not confer removal jurisdiction over civil actions in which "the claims have been consolidated or coordinated solely for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV).

Defendants argued that plaintiffs' naked citation to Section 9-5 amounted to a proposal for a joint trial within the mass action provision of the Act. Pet. App. 7a.

4. Plaintiffs moved to remand and argued that their motion had proposed consolidation solely for pretrial proceedings. Pet. App. 7a. The district court found that Connecticut courts sometimes treat a Section 9-5 motion "as grounds to consolidate for pre-trial purposes only and not necessarily for purpose of trial." *Id.* 27a. It also found that "there is no other provision of the Connecticut Practice Book that expressly references and authorizes a motion to consolidate for pre-trial discovery and case management." *Id.* Accordingly, the district court concluded that defendants had not carried their burden to show that plaintiffs had proposed to try the nine cases jointly and remanded the cases to state court. *Id.* 30a.

5. The Second Circuit upheld the district court's remand order. The panel majority explained that the mass action provision of CAFA requires "a determination of whether the Plaintiffs *intended* to seek a joint trial—that is, whether a reasonable observer would conclude that Plaintiffs acted with the intention of bringing about a joint trial." Pet. App. 4a. The Second Circuit then concluded that

plaintiffs' consolidation motion proposed consolidation "for pretrial purposes only." *Id.* 14a.

In making this determination, the Second Circuit considered plaintiffs' consolidation motion itself, particularly the language about consolidation to "*manage*" the claims "in an orderly and efficient manner." Pet. App. 18a (emphasis added). It also considered Section 9-5 and the fact that Connecticut courts use that provision both for trial and for pretrial consolidation. *Id.* 15a-17a. Finally, the Second Circuit considered "the structure of [plaintiffs'] complaints," including the fact that each contained fewer than 100 plaintiffs and expressly indicated that the individual plaintiffs' claims remained separate. *Id.* 10a. The panel majority thus agreed with the district court that defendants had not met their burden of proving that plaintiffs' motion proposed a joint trial. *Id.* 17a.

Judge Kearse dissented. She agreed with the majority on the proper test, but she disagreed with the majority's interpretation of the record in this case. Pet. App. 19a-20a.

6. Following the Second Circuit's decision, defendants moved to stay the mandate. Petrs. Mot. to Stay Mandate, Dkt. No. 23-00877, ECF No. 273 (Aug. 18, 2024). The Second Circuit denied the stay motion, and the nine cases were accordingly returned to Connecticut state court. Order Denying Mot. to Stay Mandate, Dkt. No. 23-00877, ECF No. 281 (Sept. 26, 2024). These cases have now been transferred to the CLD, where one of the defendants, GlaxoSmithKline, has settled the claims against it. One other defendants have filed motions to dismiss for lack of personal jurisdiction, and one of the other

defendants has acquiesced to personal jurisdiction in the trial court but preserved the issue for appeal. *See* Supp. Mem. of Law in Further Support of Pfizer Inc., Sanofi-Aventis U.S. LLC, & Sanofi US Services Inc.'s Mot. to Dismiss for Lack of Personal Jurisdiction, Dkt. No. UWY-CV-22-6081298, Entry No. 121.00 (Nov. 8, 2024); Pfizer Inc. & Pls.' Joint Mot. Re: Jurisdictional Disc. & Mot. to Dismiss for Lack of Personal Jurisdiction, Dkt. No. UWY-CV-22-6081298, Entry No. 138.00 (Dec. 19, 2024).

REASONS FOR DENYING THE WRIT

I. This case does not implicate any circuit split.

Though the circuits may use different language, they all ask the same question as the Second Circuit: whether a "reasonable observer" would think plaintiffs sought a joint trial. And every circuit looks beyond the face of the relevant pleading to the whole record and state decisional law in answering that question.[3]

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[3] *See Ramirez v. Vintage Pharms., LLC*, 852 F.3d 324, 329-32 (3d. Cir. 2017); *Lester v. Exxon Mobil Corp.*, 879 F.3d 582, 587 (5th Cir. 2018); *Adams v. 3M Co.*, 65 F.4th 802, 804 (6th Cir. 2023); *Parson v. Johnson & Johnson*, 749 F.3d 879, 888 (10th Cir. 2014); *Scimone v. Carnival Corp.*, 720 F.3d 876, 882-84 (11th Cir. 2013). Indeed, several cases petitioners inexplicably ignore do the same. *See In re Abbott Lab'ys, Inc.*, 698 F.3d 568, 572-73 (7th Cir. 2012) (looking to face of motion, other documents in record, and state case law); *Atwell v. Bos. Sci. Corp.*, 740 F.3d 1160, 1163-66 (8th Cir. 2013) (same); *Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218, 1223-25 (9th Cir. 2014), *cert denied*, 573 U.S. 946 (2014) (same).

1. Petitioners first claim a split between the Second Circuit and the Sixth. Pet. 11-12. The Sixth Circuit defines "proposal" for CAFA mass-action purposes as "[s]omething offered for consideration or acceptance." *Adams v. 3M Co.*, 65 F.4th 802, 804 (6th Cir. 2023). But no meaningful daylight exists between that definition and the Second Circuit's test, under which a "proposal for a joint trial" has been made if "a reasonable observer would conclude that Plaintiffs acted with the intention of bringing about a joint trial." Pet. App. 4a. To identify what is being "offered for acceptance" *is* to ask how a reasonable observer would interpret the offeror's intent. That's Contract Law 101: An offer is, generally speaking, a "manifestation of intention." Restatement (Second) of Contracts §§ 2 (definition of "promise"), 24 cmt. a (an offer is generally a promise) (1981). As the Second Circuit put the point, "something offered for consideration or acceptance" necessarily "contemplate[s] an action with an intended result." Pet. App. 13a (emphasis omitted).

That the two circuits agree is clear when they get down to brass tacks. There is no indication that the Sixth Circuit would ignore intent manifested elsewhere in favor of doing "no more than parsing the relevant pleading containing the 'proposal.'" Pet. 15. For example, in *Adams*, the Sixth Circuit looked at the language and structure of the complaint, just like what the Second Circuit did here. *Compare Adams*, 65 F.4th at 803-04 (complaints each named over 300 plaintiffs and sought "*a*" trial and "*a*" judgment, singular, "on all issues so triable") *with* Pet. App. 5a, 18a. Also like the Second Circuit, the Sixth Circuit looked both to the language of the relevant state procedural rules and to state law interpreting those

rules. *Compare Adams*, 65 F.4th at 804 (looking to Kentucky Rule of Civil Procedure 20.02 and *Island Creek Coal Co. v. Rodgers*, 644 S.W.2d 339 (Ky. Ct. App. 1982)), *with* Pet. App. 14a-18a.

Lest there be any doubt, the Sixth Circuit doesn't think there is a split over the test for mass action removal. It cited with approval the very cases petitioners claim are on the opposite side of the purported split, concluding that "[e]very circuit to consider the question agrees." *Adams*, 65 F.4th at 804-05 (citing *Ramirez v. Vintage Pharms., LLC*, 852 F.3d 324, 329 (3d Cir. 2017); *Parson v. Johnson & Johnson*, 749 F.3d 879, 888 & n.4 (10th Cir. 2014); *Scimone v. Carnival Corp.*, 720 F.3d 876, 881–82 (11th Cir. 2013)).

Petitioners seize on a stray line in the opinion below suggesting the Second Circuit might disagree with the Sixth Circuit's refusal to consider "counsels' *unexpressed* intentions." *See Adams*, 65 F.4th at 805 (emphasis added); Pet. App. 12a. But that "disagreement" was purely academic: "*Unexpressed* intentions" were not at issue in this case—the evidence was all about how the respondents expressed their intent (in their complaint, consolidation motion, state-law citations, and so on). *See supra* at 5-6; Pet. App. 10a, 15a-18a. Regardless, consideration of "unexpressed intentions" would run contrary to the Second Circuit's objective "reasonable observer" test. Pet. App. 4a.

2. Nor is there any tension between the Second Circuit and the Fifth Circuit. *Contra* Pet. 12-13. The Second Circuit made no mention of the Fifth Circuit in the decision below. Pet. App. 11a-12a. And the Fifth Circuit has recognized that plaintiffs' expressed

intent is key. For instance, it has declared that a plaintiff who "disclaim[s] any intention" of proceeding jointly has not "proposed to be tried jointly" within the meaning of CAFA. *Lester v. Exxon Mobil Corp.*, 879 F.3d 582, 588 (5th Cir. 2018). That is why lower courts in the Fifth Circuit characterize the Fifth Circuit's rule as one about whether plaintiffs' conduct "expressed Plaintiffs' *intent* to try the cases jointly"—in other words, about whether a reasonable observer would think plaintiffs wanted to do so. *See, e.g.*, *Addison v. La. Reg'l Landfill Co.*, 398 F. Supp. 3d 4, 13-14 (E.D. La. 2019) (emphasis added).

Nor does the Fifth Circuit confine itself to the four corners of the consolidation motion, as petitioners exhort, Pet. 15. In *Lester*, the Fifth Circuit, like the Second, looked at the complaints at issue. *Compare Lester*, 879 F.3d at 588 (over 600 plaintiffs on one complaint) *with* Pet. App. 5a, 18a, *and supra* at 5-6 (no complaint with over 99 plaintiffs).

And like the Second Circuit, the Fifth Circuit looks both to the language of the relevant state procedural rules and to state law interpreting those rules. Indeed, state case law was dispositive in *Lester*. Plaintiffs first argued that they intended to move for pretrial consolidation only. *Lester*, 879 F.3d at 587. But Louisiana case law made clear that the relevant procedural rules "only permit[ted] consolidation for trial, as opposed to pretrial purposes." *Id.* Plaintiffs then argued that they intended a joint trial with only a subset of the plaintiffs (fewer than 100). *Id.* But Louisiana case law, again, foreclosed that argument: It was "impossible" to join fewer than 100 plaintiffs using

plaintiffs' desired maneuver. *Id.* The Fifth Circuit thus rejected plaintiffs' arguments because of the particulars of Louisiana case law, not because the Fifth Circuit declined to look at evidence the Second Circuit would consider.

And while the Fifth Circuit declined to consider plaintiffs' assertion that they did not intend a joint trial, that assertion was subjective, post hoc, and based on nothing in the record to date. There's no reason to believe the Second Circuit would have credited a similarly baseless assertion in this case. Indeed, relying on plaintiffs' say-so in post-removal filings would be impermissible under a test that asks "whether a reasonable observer would conclude that Plaintiffs *acted*"—that is, at the time of the purported proposal—"with the intention of bringing about a joint trial." Pet. App. 4a (emphasis added).

In other words, while some courts may use slightly different language in analyzing this issue, the result in this case would have been the same in any circuit.

II. The question presented does not merit the Court's review, and this case is a poor vehicle to address it.

The Court has denied certiorari in the past when parties have asked it to consider CAFA's application to mass actions. *See, e.g.*, *Teva Pharms. USA, Inc. v. Romo*, 573 U.S. 946 (2014) (No. 13-1015); *Xanodyne Pharms., Inc. v. Corber*, 573 U.S. 946 (2014) (No. 13-1016). It should do so again here.

1. This Court has recognized that "Congress' overriding concern in enacting CAFA was with *class* actions," while the mass action provision "functions

largely as a backstop." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 173 (2014) (emphasis added). Accordingly, CAFA makes it easier to remove class actions than mass actions. *See, e.g.*, 28 U.S.C. § 1332(d)(11)(B)(i) (additional requirements to remove mass action).

It is not surprising, then, that the mass action provision has been subject to much less litigation: Removals thereunder simply "do not arise that frequently." Newberg & Rubenstein on Class Actions § 6:24 (2024). "Rarely in mass tort aggregations have large numbers of cases been brought together for trial by means of joinder or consolidation." Litigating Mass Tort Cases § 2:4 (2024).

And even in those rare instances where CAFA's mass action provision is in play, petitioners' question presented will virtually never come up. In most cases, it is generally clear when a joint trial has been proposed. In every circuit that has considered the issue, a single complaint that names more than 100 plaintiffs is, as a general rule, removable under CAFA. *Adams v. 3M Co.*, 65 F.4th 802, 805 (6th Cir. 2023) (citing *Scimone v. Carnival Corp.*, 720 F.3d 876, 884 (11th Cir. 2013)). And a complaint that names fewer than 100 plaintiffs falls outside the definition of removeable "mass action," and cannot be removed. 28 U.S.C. § 1332(d)(11)(B)(i); *Adams*, 65 F4th at 805 (citing *Scimone*, 720 F.3d at 884). In the mine run of cases, then, simply counting the number of plaintiffs in the relevant complaint will answer the CAFA removal question.

That leaves only the question of what happens when plaintiffs seek to consolidate multiple complaints, each listing fewer than 100 claimants.

And even there, a citation to a state rule will usually indicate the object of consolidation, so the question presented will still rarely arise. Many states have analogs to Federal Rule of Civil Procedure 42, with specific provisions that litigants cite when they seek to consolidate for pretrial purposes only and maintain separate trials.[4] In other states, the same rule explicitly covers consolidation for both pretrial and trial purposes.[5] Connecticut is unique in that litigants cite Section 9-5 for pretrial only, trial, and all-purpose consolidation, even though its text only explicitly mentions consolidation for trial. But even in Connecticut, consolidation motions often specify that they are "for all purposes" or "for trial," obviating any need to answer the question presented. *See supra* at 4 n.2.

2. Petitioners claim that the Second Circuit's rule allows "[c]rafty lawyers" to "game the system." Pet. 17 (citation omitted). But there is no suggestion that respondents here are secretly trying to obtain a joint trial in state court. If respondents later ask the court for a joint trial, everyone agrees the case may be removed. *See Scimone*, 720 F.3d at 881-82.

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[4] *See, e.g.*, Ala. R. Civ. P. 42(b) (allows for separate trials of cases consolidated for pretrial purposes under Ala. R. Civ. P. 42(a)); Alaska R. Civ. P. 42(b) (same, with regard to Alaska R. Civ. P. 42(a)); Mass. R. Civ. P. 42(b), (d) (same, with regard to Mass. R. Civ. P. 42(a), (c)); Ohio R. Civ. P. 42(B) (same, with regard to Ohio R. Civ. P 42(A)).

[5] *See, e.g.*, Ill. Sup. Ct. R. 384 (permitting consolidation for "discovery, pretrial, trial, or post-trial proceedings"); Kan. Stat. Ann. § 60-242(c)(1) (permitting consolidation "for discovery, pretrial proceedings and possible trial").

Petitioners' concern about "crafty lawyering" is really a concern about plaintiffs' ability to remain in state court, their chosen forum. But that's a gripe with Congress: CAFA explicitly carves out cases "consolidated or coordinated solely for pretrial proceedings" from removal. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(IV). So there's nothing this Court could say that would prevent plaintiffs' lawyers from keeping cases in state court—they'll limit each complaint to under 100 plaintiffs, and when they move to consolidate, they'll simply insert the phrase "solely for pretrial proceedings." Indeed, in this case, everyone agrees that, had respondents used that phrase or simply omitted the citation to Section 9-5, removal would be off the table. The question whether plaintiffs ought to include a handful of additional words in their motion is not worth review by this Court.

3. Petitioners maintain their question presented is about what happens when a "clear" request for a joint trial is overridden by "*post hoc* excuses" that plaintiffs' counsel "didn't really mean it." Pet. 18. But this case doesn't tee up that question—the request was not "clear," and the court below didn't consider any "*post hoc* excuses."

Whether respondents' request was "clear" turns largely on state law. The Second Circuit held it wasn't clear, Pet. App. 17a, and this Court gives "great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986). Granting certiorari to wade into the minutiae of Connecticut practice would be unwise. *See Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996) ("[W]e do not

normally grant petitions for certiorari solely to review what purports to be an application of state law.").

And the court below didn't consider "*post hoc* excuses" or assertions that respondents "didn't really mean it." Indeed, no court considers "*post hoc* excuses" made after the purported proposal, and no court considers claims about plaintiffs' counsel's secret intentions. *See supra* at 7-10; *Scimone,* 720 F.3d at 882 ("[W]e assess jurisdictional facts at the time of removal.").

4. Finally, recall that this case is proceeding apace in Connecticut state court. As petitioners themselves argued in seeking a stay from the Second Circuit, a grant of certiorari at this point would result in a "'ping pong' game of jurisdiction that would be highly disruptive to court systems and the litigants alike." Petrs. Mot. to Stay Mandate 7. And it is entirely possible that the question presented will become moot, depending on how the state court resolves various pending motions. *See supra* at 6.

III. The Second Circuit's decision is correct.

The Second Circuit correctly held that respondents did not "propose" to try their nine separate lawsuits jointly.

1. Recall that CAFA defines "mass actions" as civil actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). To determine if such a proposal was made, the Second Circuit asks "whether a reasonable observer would conclude that Plaintiffs acted with the intention of bringing about a joint trial." Pet. App. 4a.

This inquiry follows directly from the text: "To propose" is "to make known as one's intention." American Heritage Dictionary 674 (4th ed. 2000). *See also* Concise Oxford English Dictionary 1151 (11th ed. 2006) (defining "propose" as to "intend to do something"); Webster's New World College Dictionary 1151 (4th ed. 1999) (defining "propose" as "to purpose, plan, or intend"). The definition of "proposal" cited in *Adams v. 3M Co.*, 65 F4th 802 (6th Cir. 2023)—"something offered for consideration or acceptance"—is consistent with that understanding. *See id.* at 804; *supra* at 8.

Confirming that interpretation of the term "proposed," the Senate Judiciary Committee report paraphrased the mass action provision of CAFA in terms of plaintiffs' intent, explaining that plaintiffs have proposed a joint trial where they "*seek* to try their claims for monetary relief together." Senate Rep. 109-14 at 46 (emphasis added).

A test that ignored manifestations of plaintiffs' intent would disrupt the careful balance Congress sought to strike between allowing pretrial consolidation in state court while ensuring that cases consolidated for trial could be removed. Allowing consolidation for pretrial management in state court was so important to Congress that it wrote that concern into the statute twice, once by specifying that a mass action must involve a proposal that the claims "be *tried* jointly" and once by creating an exception for cases where claims "are consolidated solely for pretrial proceedings." 29 U.S.C. §§ 1332(d)(11)(B)(i) (emphasis added), (B)(ii)(IV). Dissuading consolidation for pretrial management would result in tremendous inefficiencies—imagine nine different

Daubert hearings or nine separate fights about discovery minutiae.

2. Petitioners suggest that the Second Circuit's removal analysis instead "should have started and ended with Plaintiffs' consolidation motions." Pet. 15. That approach—which, again, is the rule in zero circuits—makes no sense. The Second Circuit was correct to look not only at the four corners of respondents' motion, but also to case law interpreting Section 9-5 and other pleading documents in the record. Pet. App. 10a, 14a-18a.

a. Petitioners argue that courts should not "wade[]" into the "murky waters of 'local Connecticut practice.'" Pet. 16. By that, they apparently mean federal courts should ignore state case law when interpreting a state procedural rule. Really? As this Court has explained, looking at the "text" of a state procedural rule is "the right place to start, but not to end." *Smith v. Bayer Corp.*, 564 U.S. 299, 309 (2011). In *Smith* this Court determined the meaning of West Virginia Rule 23 by looking to how West Virginia courts interpreted the text of that rule. *Id.* at 310-12. Likewise, in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), this Court looked to "New York state-court opinions" to interpret New York's codified standard for judicial review of the size of jury awards. *Id.* at 424-25.

Indeed, it would raise significant federalism concerns if federal courts ignored state-court decisions on the meaning of a state procedural rule. *See, e.g.*, *Comm'r v. Est. of Bosch*, 387 U.S. 456, 465 (1967) (federal courts must give "proper regard" to decisions of lower state courts).

Moreover, petitioners are wrong to assert that the state procedural rule at issue here is "unambiguous." *See* Pet. 15. The "ambiguity [] of certain words or phrases may only become evident when placed in context." *King v. Burwell*, 576 U.S. 473, 486 (2015) (citation omitted). For instance, the phrase "second or successive" in the federal habeas statute would seem—unambiguously—to cover, well, the second habeas petition a prisoner files. *See* 28 U.S.C. § 2244(b). But this Court has held that "second or successive" is a term of art: Sometimes, the second habeas petition a prisoner files is not, in fact, "second or successive." *See Magwood v. Patterson*, 561 U.S. 320, 331-32 (2010). So, too, with federal statutes that refer to a "final" judgment or decision: This Court has routinely held that a judgment or decision might be "final" even where further steps indisputably remain. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477-479 (1975); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374-75 (1981).

In federal court, then, procedural provisions that, at first blush, might appear "unambiguous" still must be interpreted with relation to decisional law. State provisions are no different, and federal courts must defer to how state courts interpret those state provisions when conducting CAFA removal analysis.

b. Petitioners also claim that the Second Circuit should have ignored other documents in the record, such as the complaint, as "extra-textual indicia." Pet. 13. That can't be right. "Meaning is inevitably dependent on context." Restatement (Second) of Contracts § 202 cmt. d, (1981). And just as "[a] word changes meaning when it becomes part of a

sentence," "other related writings affect the particular writing." *Id.*

This principle has been repeatedly affirmed by this Court: "Language, of course, cannot be interpreted apart from context." *See, e.g.*, *Smith v. United States*, 508 U.S. 223, 229 (1993). And "[c]ontext is not found exclusively 'within the four corners'" of a text. *Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (citation omitted).

The complaint provides context that invariably informs the meaning of a subsequent motion. That's just common sense: If you want to understand what's happening in Book Three of the *Harry Potter* series, it may well be a good idea to go back to Book One.

c. Finally, petitioners take particular offense to the fact that the Second Circuit "relied heavily on a series of email communications between Plaintiffs and Defendants." Pet. 16. But surely petitioners would admit that email communication *can* be probative evidence about the meaning of a proposal. Let's say rather than emailing about consent to pretrial consolidation, respondents in this case had emailed petitioners before filing the motion here to ask for their consent to an 800-person trial. Presumably, petitioners would want a court to consider that email in assessing what a subsequent motion proposed.

In any event, petitioners' characterization—that the Second Circuit "relied heavily" on those emails—is a stretch. The Second Circuit never once mentioned those emails in the portion of its opinion applying its "reasonable observer" test. *See* Pet. App. 14a-18a. Though the Second Circuit noted the emails in one

sentence in an introductory paragraph, it did so only to confirm the other parts of its analysis. *Id.* 11a.

3. Rather than offer any textual defense of its novel four-corners rule, petitioners urge the Court to adopt their interpretation due to the "need for judicial administration of a jurisdictional statute to remain as simple as possible." Pet. 14 (citation omitted). But in the vast majority of cases, the analysis will be simple under any interpretation of the statute: There will be no need to look beyond the face of the relevant pleading. The inquiry will start and end with counting the number of plaintiffs in a complaint or reading the plain text of a consolidation motion. *See supra* at 12-13. And in the few cases where debate remains, there is no reason to think that "a test that is restricted to the text of a document itself is 'simpler' than one that reads that text in context." Pet. App. 12a.

Moreover, the Second Circuit's "reasonable observer" test is simple for courts to conduct. They're used to using similar tests in other areas of the law. In contract law, for instance, courts determine what a party has "promise[d]" by looking to that party's outward "manifestation of intention to act or refrain from acting in a specified way." Restatement (Second) of Contracts § 2 (1981). *See also Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370-71 (1984) (noting the importance of considering the "intention of the parties" when construing a collective-bargaining agreement); *CITGO Asphalt Ref. Co. v. Frescati Shipping Co., Ltd.*, 589 U.S. 348, 355 (2020) (maritime contracts "must be construed like any other contracts: by their terms and consistent with the intent of the parties") (citation omitted).

To be sure, the Second Circuit's test, like any other, might produce some edge cases. But even the precedent petitioners cite for their "jurisdictional rules must be simple" proposition acknowledges as much: "[T]here may be no perfect test," and "hard cases" will inevitably arise. *Hertz Corp. v. Friend*, 559 U.S. 77, 95 (2010).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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