No. 24-456

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Nothing in Respondents' Opposition alters the fact that this case presents a clear circuit split on an important and recurring question: whether plaintiffs' intent matters in assessing if they have "proposed" a joint trial of the claims of 100 or more persons. Here, Respondents' consolidation motions expressly invoked a Connecticut rule that provides unambiguously and solely for *trial* consolidation. Yet by adopting a test that looks to what plaintiffs purportedly mean and not just what their motions say, the Second Circuit effectively created an extra-textual scienter requirement that allows plaintiffs to evade the important jurisdictional protections for mass actions that Congress created.

This Court should grant review to resolve the conflict in how to assess CAFA jurisdiction, and in doing so, establish a simple, bright-line rule that looks at what plaintiffs actually said—not what they claim to have intended to say—in their pleadings.

I. There Is a Circuit Conflict, As the Decision Below Expressly Recognized

Respondents are wrong that "[t]his case does not implicate a circuit split." Opp. 7. ***First***, Respondents ignore that the Second Circuit itself expressly recognized the existence of a conflict:

> Two other circuits considering whether CAFA requires courts determining if a joint trial has been "proposed" have adopted [the Eleventh Circuit's] reasoning [in *Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013)] that the "natural reading of the provision is that the plaintiffs must actually want … what they are proposing." *Ramirez v. Vintage Pharms., LLC*, 852 F.3d 324, 331-32 (3d Cir. 2017) (quoting

> *Scimone*, 720 F.3d at 884); *see also Parson v. Johnson & Johnson*, 749 F.3d 879, 888 (10th Cir. 2014) (same).
>
> One circuit has held otherwise. *Adams v. 3M Co.*, 65 F.4th 802 (6th Cir. 2023). In *Adams*, the Sixth Circuit … conducted its inquiry into whether a joint trial was "proposed" without considering plaintiffs' intent.

Pet. App. 11a-12a (Opinion). The decision below could not have been clearer in identifying a split between the Sixth Circuit on the one side, and the Third, Tenth, and Eleventh on the other. After doing so, the Second Circuit allied itself with those latter courts. *Id.* at 12a-14a.

What is important in deciding whether to grant review is how the lower courts view the case law. Absent this Court's intervention, courts will continue to "pick a side" and the split will only widen. Respondents' attempt to bridge the division by characterizing the cases differently than the courts themselves perceive them cannot resolve that problem. This Court should take this opportunity to settle this issue.

Second, Respondents' attempt to harmonize the conflicting circuit court opinions fails. Neither *Adams v. 3M Co.*, 65 F.4th 802 (6th Cir. 2023), nor *Lester v. Exxon Mobil Corp.*, 879 F.3d 582 (5th Cir. 2018), adopted or applied an intent-based test. The courts simply parsed the relevant pleadings and found a proposal for a joint trial. Unlike the Second Circuit, both courts then declined invitations to look beyond those pleadings to ascertain plaintiffs' intent. *See Adams*, 65 F.4th at 805; *Lester*, 879 F.3d at 586, 588; Pet. 11-13.

The "brass tacks" of *Adams*'s and *Lester*'s removal analyses were thus completely different from the Second Circuit's. Opp. 8. For example, Respondents claim that the *Adams* court looked at the "language and structure of

the complaint[s]," *id.*, just as the Second Circuit here. But in *Adams*, the complaints were the particular pleadings proposing a joint trial. The court examined them to assess their objective meaning. *Adams*, 65 F.4th at 803-04.

That is different than the Second Circuit's use of the complaints here to ascribe to Respondents a general mindset of avoiding federal jurisdiction, and then using that background motive to conclude that Respondents' later consolidation motions did not mean to propose a joint trial. *See* Pet. App. 10a (Opinion) ("It is clear … Plaintiffs originally sought to keep these actions in state court. *Consistent with that desire*, there is … an obvious reason why Plaintiffs might seek consolidation for pretrial management …." (emphasis added)).

The Fifth and Sixth Circuits, because they focus on what plaintiffs proposed rather than what they intended, also use state law in a qualitatively different manner. Respondents argue that, like the Second Circuit, *Adams* cited to "state procedural rules and to state law." Opp. 8-9. In *Adams*, though, the Sixth Circuit relied on those authorities to identify the objective meaning of the pleading as established by governing state law. 65 F.4th at 804. Similarly, *Lester* reviewed the case law to ensure that its interpretation of state procedural rules correctly reflected the law. 879 F.3d at 587 & n.13. Petitioners are not arguing that such ordinary use of case law is inappropriate or that courts should "ignore state case law when interpreting a state procedural rule." Opp. 17.

That is nothing like the inquiry into Connecticut "local practice" that the Second Circuit engaged in here. Pet. 10; Pet. App. 15a (Opinion); *see infra* p. 7. The Second Circuit reviewed case law not to determine what Connecticut law actually holds, but to divine "*what Plaintiffs meant* in citing Section 9-5" in their consolidation motions. Pet. App. 17a n.6 (Opinion) (emphasis added). The court acknowledged that even if

its analysis of Section 9-5 is "not the best reading of the provision—indeed, even if it is ultimately a mistaken reading," that would be of no moment, because the "ultimate[] question … is what, given these cases, we can understand Plaintiffs' citation to Section 9-5 to mean." *Id.* at 17a.

Had the Second Circuit correctly asked what Section 9-5 means under Connecticut law rather than what Respondents intended, the result here would have been different. That is because the plain language of Section 9-5 unambiguously calls only 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 action *be consolidated for trial*." Conn. Prac. Book § 9-5(a) (emphases added). The Connecticut Supreme Court has commanded that "[w]hen a statute or Practice Book rule is clear and unambiguous, there is no room for construction." *State v. Genotti*, 220 Conn. 796, 807 (1992) (citation and quotation marks omitted). Consistent with its plain language, a legion of Connecticut lower courts have explained that Section 9-5 applies only to trial consolidation, and have used it for that sole purpose.[1]

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[1] *See e.g.*, *Feinstein v. Keenan*, No. FSTCV106007235S, 2012 WL 2548274, at *2 n.3 (Conn. Super. Ct. June 6, 2012) (Section 9-5 "speaks only of consolidation for purposes of trial"); *Chieffalo v. Hoffman-Olson*, No. FSTCV085007415S, 2010 WL 1052270, at *2 (Conn. Super. Ct. Feb. 22, 2010) ("The court's authority under Practice Book § 9-5 … only extends to consolidating cases for the purpose of trial."); *Rhodes v. JMS Restaurants, LLC*, No. DBDCV196031822S, 2021 WL 3722717, at *9 (Conn. Super. Ct. July 22, 2021) ("[Section § 9-5] makes it clear that [the cases] are consolidated only for trial." (citations and quotation marks omitted)); *Ahuja v. Planning Bd. of the City of Stamford*, No. CV91 0117923 S, 1993 WL 58416, at *1 (Conn. Super. Ct. Feb. 24, 1993) (same); *Gottesman v. Kratter*, No. FSTCV176031889S, 2020 WL 8265336, at *1 (Conn. Super. Ct. Dec. 14, 2020) (under Section 9-5,

Against the plain language of this rule and the weight of authority, the Second Circuit relied on a few trial court opinions which, it admitted, did not necessarily show that Section 9-5 authorizes anything other than trial consolidation. Pet. App. 15a-16a (Opinion). Those cases cited courts' inherent authority as an alternative basis to allow pretrial consolidation. *Id.* The Second Circuit thus never concluded that Section 9-5 allows for pretrial consolidation under Connecticut law. Rather, it constructed a rationale to explain why Respondents might have intended something different than what they asked for. *Id.* at 11a-12a.[2] This approach is nothing like how *Adams* or *Lester* analyzed CAFA removal.

Nor did *Lester* endorse use of "intent" to avoid the plain meaning of a pleading that proposes trial consolidation. Respondents argue otherwise, claiming that *Lester* recognized the relevance of a disclaimer against joint trials. Opp. 10. But of course, if a plaintiff "'disclaims any intention' of proceeding jointly" in the pleading at issue, *id.*, the disclaimer is pertinent. Such a disclaimer has nothing to do with intent, but is simply evidence of what the pleading objectively means. There was no such disclaimer in the consolidation motions here.[3]

"consolidation is for purposes of trial"); *Pinto v. Zieba*, No. X05 CV 980163318S, 2000 WL 1056676, at *6 (Conn. Super. Ct. July 10, 2000) (cases "were only consolidated for trial" under Section 9-5).

[2] Respondents mischaracterize the statement in *Adams* that "every Circuit to consider the question agrees" as referring to the test for CAFA mass action removal. Opp. 9. This was not a comment on the relevant test at all. The court merely noted that all circuits had held that the inclusion of 100 or more plaintiffs in one complaint sufficed for removal. *Adams*, 65 F.4th at 804-05.

[3] Respondents cite *Addison v. Louisiana Regional Landfill Co.*, 398 F. Supp. 3d 4 (E.D. La. 2019), as interpreting the Fifth Circuit to endorse an intent-based inquiry. Opp. 10. *Addison* never examined plaintiffs' intent; it relied on plaintiffs' *express* consent to

Third, Respondents cannot erase the difference between the Second Circuit's test and the other circuits' by emphasizing a single line in the decision below referencing a "reasonable observer." Opp. 1-2, 8. Notwithstanding this passing reference, the court unquestionably fashioned a test that searches for plaintiffs' underlying motivations, not for the objective meaning of the consolidation request that they made to the court. Regardless of whether the Second Circuit evaluated plaintiffs' intent based on what a "reasonable observer" would think of that intent, its approach cannot be reconciled with other courts' sole focus on the objective meaning of what the plaintiffs actually proposed.

A prime example of how a focus on intent differs from a focus on objective meaning is the Second Circuit's conclusion that Respondents sought consolidation only to save filing fees. Pet. App. 11a (Opinion) ("Consolidation … would presumably have saved Plaintiffs thousands of dollars in filing fees …. Plaintiffs' actions are thereby *consistent with a desire* to … facilitate … economical transfer of these actions to the CLD." (emphasis added)). Respondents did not mention filing fees in their consolidation motions nor in any other contemporaneous document. Instead, Respondents offered this explanation for the first time in their remand papers before the district court. *Id.* The Second Circuit's after-the-fact assessment of Respondents' motivations is thus precisely the sort of reliance on "unexpressed intentions" that *Adams* condemned. 65 F.4th at 805.

Likewise, the Second Circuit looked at email correspondence between the parties. Pet. App. 11a (Opinion). Putting aside that none of those emails disclaimed trial consolidation, such inter-party emails

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defendants' request to consolidate as the basis for jurisdiction. 398 F. Supp. 3d at 8.

obviously cannot alter the relief objectively requested of the court. The Second Circuit used those emails not to determine what relief Respondents' motions actually asked for, but to piece together a narrative of what Respondents purportedly wanted to achieve when they filed the motions. Neither *Adams* nor *Lester* relied on out-of-court communications between the parties to ascertain intent.

Finally, as explained above, the Second Circuit did not seek to identify what Respondents' citation to Section 9-5 objectively meant under Connecticut law, but instead asked what those citations "tell us … [about] what Plaintiffs meant in citing Section 9-5." Pet. App. 17a n.6; *see supra* pp. 3-5. Whether or not it includes a "reasonable observer" gloss, a focus on why Respondents invoked a rule is fundamentally different than a focus on what the rule actually says.

II. This Court Should Correct the Decision Below

Respondents do not dispute the need for simple, bright-line rules in assessing jurisdiction. Pet. 14-17; Opp. 20-21. Rather, Respondents claim that the Second Circuit's "reasonable observer" test is simple enough for courts to apply. Opp. 20. Not so. Such a test would require courts to engage in fact-intensive inquiries into plaintiffs' motives, necessitating discovery and potentially lengthy evidentiary hearings—all before reaching the merits. Pet. 16. Such a vague and sprawling test would provide little guidance to courts, leading to unpredictable and discordant results. Respondents also fail to explain how such a rule would give defendants any direction on which cases are properly removable. *Id.* How can a defendant, when confronted with a pleading asking on its face for trial consolidation, fairly be required to deduce if its adversary truly "meant it" before invoking its removal rights?

Such an unwieldy and uncertain inquiry would stick out like a sore thumb among tests used in other removal contexts. To assess federal question jurisdiction, for example, courts examine the complaint to see if it raises a federal question—ignoring the "pleader's intent." *See, e.g.*, *Vorhees v. Naper Aero Club Inc.*, 272 F.3d 398, 402 (7th Cir. 2001) ("[T]he pleader's intent is not relevant to the jurisdictional issue."); *Fitzgerald v. Codex Corp.*, 882 F.2d 586, 587-88 (1st Cir. 1989) (rejecting plaintiffs' argument that they "did not intend to state a claim under [federal law]").[4]

In contrast, Respondents' analogy to contract law is inapt. Opp. 20. CAFA removal does not turn on an offer made to the opposing party, but on whether a request is made to the court for a joint trial. If a plaintiff files a pleading expressly making such a request, then jurisdiction exists. Even if contract law were pertinent, the parol evidence rule generally commands courts not to look outside the four corners of the contract unless the contract language is ambiguous. *Restatement (Second) of Contracts* § 213 (1979); 29A Am. Jur. 2d Evid. § 1083 (2024 update); *Omni Quartz, Ltd. v. CVS Corp.*, 287 F.3d 61, 64 (2d Cir. 2002). Here, the consolidation motions are unambiguous and require no extrinsic evidence. By asking to consolidate under Section 9-5, Respondents explicitly proposed a joint trial.

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[4] *See also, e.g.*, *Dreamscape Design Inc. v. Affinity Network, Inc.*, 414 F.3d 665, 673-74 (7th Cir. 2005) (rejecting plaintiffs' "disclaim[er of] any intention of prosecuting a federal claim" (citation and quotation marks omitted)); *Morris v. Ambassador Nursing Home, Inc.*, 845 F. Supp. 1164, 1169-70 (E.D. Mich. 1994) ("[R]egardless of whether or not plaintiff *intended* her claims to involve an interpretation of [federal law], resolution of six of her claims do require such interpretation. Therefore, the removal … must stand." (emphasis in original)).

III. The Question Presented Is Important

This issue—the proper test for assessing CAFA mass action jurisdiction—is important and recurring.

Respondents argue that the question at issue does not often arise. Yet nine circuits have considered the circumstances in which a joint trial has been proposed under the mass action provision. *See e.g.*, Pet. App. 3a (Opinion); *Ramirez v. Vintage Pharms., LLC*, 852 F.3d 324, 329-32 (3d. Cir. 2017); *Lester*, 879 F.3d at 587; *Adams*, 65 F.4th at 804; *In re Abbott Lab'ys, Inc.*, 698 F.3d 568, 572-73 (7th Cir. 2012); *Atwell v. Bos. Sci. Corp.*, 740 F.3d 1160, 1163-66 (8th Cir. 2013); *Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218, 1223-25 (9th Cir. 2014) (en banc), *cert. denied before judgment*, 573 U.S. 946 (2014); *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). So this is hardly a rare question.

Respondents also do not dispute that by their very nature, every one of the cases implicated by the mass action provision is significant. Pet. 18-19. Typically, these cases involve several hundred plaintiffs, each of whom alleges significant individual injuries. *See, e.g.*, Pet. App. 5a (Opinion) (853 plaintiffs); *Lester*, 879 F.3d at 585 (over 500 plaintiffs); *Adams*, 65 F.4th at 803 (700 plaintiffs); *In re Abbott*, 698 F.3d at 570 ("several hundred" plaintiffs); *Parson*, 749 F.3d at 886 (702 plaintiffs). Indeed, the nationwide importance of mass actions is the reason why Congress enacted a special removal and interlocutory appeal provision for them in the first place. Nor do Respondents contest that the forum in which these cases proceed can often be dispositive. Pet. 18.

Finally, Respondents seek to minimize the importance of this case by focusing myopically on its particular facts, the Connecticut rule invoked, the state law at issue, and whether their arguments here were truly

"post hoc excuses." Opp. 14-15. But the question this Petition presents—how courts should approach CAFA mass action removals—is more far-reaching. The Second Circuit's test undoubtedly creates a loophole permitting plaintiffs to back-pedal from an express joint trial proposal and obtain remand based on an inquiry into their inner motives. Such a loophole cannot be cabined to the facts of this particular case. Whether CAFA permits plaintiffs to walk back an express trial proposal in this way is a pure question of statutory interpretation that the Court should resolve now.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[5] Respondents are wrong that "depending on how the state court resolves various pending motions [related to personal jurisdiction]," that the Petition may become moot. Opp. 6-7, 15. Petitioners Boehringer Ingelheim Pharmaceuticals, Inc. and Boehringer Ingelheim USA Corp. (both Connecticut citizens) have not filed any such motion. *See, e.g.*, *Bacher v. Boehringer Ingelheim Pharms. Inc.*, CLD Dkt. No. UWY-CV22-6081298-S (Conn. Super. Ct.). Nor do any of Petitioners' motions seek dismissal of the claims of particular plaintiffs who are Connecticut citizens.

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