No. 21-683

In the Supreme Court of the United States

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

Petitioners,

V.

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

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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Respondents offer three grounds for denying certiorari, but respondents are mistaken as to each. First, the Question Presented is indeed presented by the facts of this case. Second, the circuit split is real. Finally, there is no substance to any of respondents' "additional reasons" for denying certiorari.

I. The Question Presented is squarely presented in this case.

Respondents err in suggesting that the Question Presented is not, in fact, presented. BIO 9-10. Respondents make this mistake because they begin with the faulty factual premise that "the Complaint does not allege 'the same' conduct for all defendants." *Id.* at 10. In fact, the complaint *does* allege the same conduct on the part of all the defendants. 8th Cir. App. 339-85.

The complaint names four defendants—one parent company (Republic Services) and three wholly-owned subsidiaries (Rock Road Industries, Bridgeton Landfill, and Allied Services). The complaint alleges that all four defendants committed the same state-law torts by mismanaging their landfills so egregiously that radioactive waste has migrated onto the plaintiffs' properties. The complaint does not try to assign particular misdeeds to particular defendants, because the defendants are not independent firms, and, in any event, they are jointly and severally liable under state law, so it makes no difference precisely which nominal entity committed which misconduct.

Both courts below recognized that the complaint alleges the same conduct on the part of all four de-

fendants. The Court of Appeals explained that "with rare exception, … Plaintiffs simply alleged that 'Defendants' engaged in conduct causing Plaintiffs' injuries without identifying specific acts of each defendant or otherwise parsing out in any meaningful way Rock Road Industries' particular, injury-causing conduct." Pet. App. 9a. The District Court likewise observed that "plaintiffs' amended petition alleges the same claims against all defendants. It claims that the defendants all engaged in the same conduct, including knowingly and improperly accepting radioactive wastes; improperly dumping and spreading such wastes over several acres of the Landfill; and causing radioactive contaminants to be dispersed." *Id.* at 48a.

Both courts below based their decisions on the fact that the complaint alleges the same conduct on the part of all the defendants. The District Court held that although "the conduct of Rock Road Industries is the same conduct alleged against the other defendants," the plaintiffs had no need "to adduce evidence as to the specific conduct of each of the defendants," because the complaint adequately alleged "that Rock Road Industries' conduct forms a significant basis of all claims asserted." *Id.* The Court of Appeals held that since "nothing in the complaint distinguishes the conduct of Rock Road Industries from the conduct of the other defendants, … the allegations in the complaint do not satisfy the significant-basis requirement." *Id.* at 11a (citation, brackets, and internal quotation marks omitted).

Respondents are thus mistaken in asserting that the Question Presented is not presented by the facts of this case. Respondents did not make this mistake

in the Court of Appeals below, where they argued that the complaint does not satisfy the local controversy exception precisely *because* it does not distinguish between the conduct of Rock Road Industries and the conduct of the other defendants. Resp. 8th Cir. Br. 26 ("Because nothing in the complaint distinguishes the conduct of the purported local defendant Rock Road from the conduct of the other defendants, no comparison of the Defendants' conduct can be made, and the exception does not apply.").

II. The circuit split is real.

Respondents also err in suggesting that the circuits are not divided. BIO 10-23. In fact, they are.

Respondents note, correctly, that all circuits agree that to determine whether the local defendant's alleged conduct is a "significant basis" for the plaintiffs' claims, the local defendant's alleged conduct must be compared with the alleged conduct of the non-local defendants. BIO 14-16. What respondents don't say is that the circuits are divided on how to undertake this comparison. In the Fifth and Eighth Circuits, the complaint must distinguish between the conduct of the local defendant and that of the non-local defendants. In the Sixth, Ninth, and Tenth Circuits, the complaint need not make this distinction. This division has determined the outcome of several cases in recent years, including this one.

The Courts of Appeals have forthrightly acknowledged that the split is real. Below, the Eighth Circuit noted that "[s]ome courts, like the district court here, have adopted the view that allegations that the local and nonlocal defendants 'all engaged in the same conduct' suffice to show that the local defendant's

conduct meets the significant-basis requirement." Pet. App. 10a. The Eighth Circuit cited a Ninth Circuit case as an example of a court that has taken this view. *Id.* (citing *Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010, 1020 (9th Cir. 2011)). But the Eighth Circuit explained that in *Atwood v. Peterson*, 936 F.3d 835, 840 (8th Cir. 2019) (per curiam), "we joined a number of courts taking the opposite view and found that a complaint that did not allege any substantive distinctions between the conduct of the local and nonlocal defendants failed to indicate whether the local defendants' alleged conduct is an *important* ground for the asserted claims." Pet App. 10a (citation and internal quotation marks omitted). The Eighth Circuit cited a Fifth Circuit case as an example of a court that has adopted this "opposite view." *Id.* (citing *Opelousas Gen. Hosp. Auth. v. FairPay Sols., Inc.*, 655 F.3d 358, 359, 362-63 (5th Cir. 2011) (per curiam)).

In *Atwood*, the Eighth Circuit also recognized that it was splitting with the Ninth Circuit. "In concluding that CAFA removal is not foreclosed by the complaint's conclusory allegations that the local defendants engaged in the same conduct as the diverse defendant," the Eighth Circuit explained, "we respectfully disagree with the rulings to the contrary in *Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010 (9th Cir. 2011)." *Atwood*, 936 F.3d at 840-41.

In the Sixth Circuit, Judge Kethledge likewise alluded to the split in his dissenting opinion. In *Mason v. Lockwood, Andrews & Newman, P.C.*, 842 F.3d 383, 396 (6th Cir. 2016), cert. denied, 137 S. Ct. 2242 (2017), the majority held that a complaint satisfied the significant-basis requirement by alleging identi-

cal conduct on the part of the local and non-local defendants. Judge Kethledge urged the court to follow the Fifth Circuit's *Opelousas* decision instead. *Id.* at 400 (Kethledge, J., dissenting) (citing *Opelousas*, 655 F.3d at 362).

These courts have correctly identified the conflict among the circuits. Respondents' summaries of these cases, by contrast, omit or misconstrue the important parts.

• Respondents' discussion of *Coleman* (BIO 18-19) omits the passages in which the Ninth Circuit held that a complaint referring to Estes West (the local defendant) and Estes Express (the non-local defendant) merely as "Defendants," and making identical allegations against both, satisfied the significant-basis requirement because "the allegations against Estes Express in no way make the allegations against Estes West, the actual employer, insignificant." *Coleman*, 631 F.3d at 1013, 1020.

• Respondents' discussion of *Mason* (BIO 19-20) omits the part of the decision from which Judge Kethledge dissented, the passage in which the Sixth Circuit held that a complaint stating "a single claim of professional negligence against three defendants," one local and two non-local, satisfied the significant-basis requirement even though it referred to the defendants collectively throughout, without distinguishing between the conduct of the local and non-local defendants. *Mason*, 842 F.3d at 396.

• Respondents' discussion (BIO 20-21) of *Woods v. Standard Ins. Co.*, 771 F.3d 1257 (10th Cir. 2014), misconstrues the relevant part of the opinion. In this passage, the Tenth Circuit explained that the significant-basis requirement is satisfied where a com-

plaint against a local operating company and its non-local corporate parent alleges that both firms are "jointly and severally liable for all of plaintiffs' damages," without distinguishing between the conduct of the two firms. *Id.* at 1267-68. The Tenth Circuit referred to a prior case, *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240 (10th Cir. 2009), but not, as respondents seem to think, because *Coffey* involved the significant-basis requirement. Rather, the Tenth Circuit referred to the facts of *Coffey* as an example of facts that would satisfy the requirement.[1]

Respondents provided a more accurate account of these cases in the Court of Appeals below. There, respondents correctly observed:

> Courts interpreting this provision have charted divergent paths: one narrow, and one broad. Under the broad approach followed in the Ninth Circuit, a complaint is deemed to satisfy the "significant basis" prong where the alleged conduct of the local defendant is the same as (and indistinguishable from) the alleged conduct of the out-of-state defendants. *Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010, 1020 (9th Cir. 2011). In other words, under the broad view, if the complaint refers to the "defendants" collectively in each claim, this element of the exception will be met.

Resp. 8th Cir. Br. 21. Below, respondents accurately contrasted the Ninth Circuit's "broad approach" with the "narrow approach" taken by the Eighth Circuit,

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[1] The Brief in Opposition also includes an erroneous description of the petition for rehearing en banc we filed below. BIO 16-17. In fact, the petition for rehearing delineated the same circuit split we delineate here and in our certiorari petition.

under which, "if 'the complaint does not allege any substantive distinctions' between the conduct of the local defendant and the conduct of the out-of-state defendants, the required comparative analysis cannot be made." *Id.* at 22 (quoting *Atwood*, 936 F.3d at 840).

The circuits are split. This case would have come out differently in the Sixth, Ninth, or Tenth Circuits.

III. There is no substance to respondents' "additional reasons" for denying certiorari.

Respondents finish up (BIO 24-26) with several scattershot arguments against certiorari. None has any merit.

First (BIO 24), no barrier to review is posed by the existence of the other two elements in subsection (II) of the local controversy exception. 28 U.S.C. § 1332(d)(4)(A)(i)(II). The Court of Appeals had no need to address these elements below. Pet. App. 8a n.2. If this Court grants certiorari and reverses, the Court of Appeals will address them on remand. That often happens in the wake of this Court's decisions, so it is hardly a reason to deny certiorari. In any event, petitioners will easily satisfy the other two elements, for the reasons given by the District Court. *See id.* at 46a-47a.

Second (BIO 25 n.8), a recent Eighth Circuit decision involving the Price-Anderson Act can have no effect on this case. Respondents abandoned their arguments under the Price-Anderson Act by failing to brief them in the Court of Appeals below.

Third (BIO 25), a grant of certiorari will not disrupt any proceedings in the District Court. Nothing

of significance has happened in the District Court since the Court of Appeals issued its mandate just a few months ago.

Fourth (BIO 25), respondents offer an argument on the merits that ignores the text of the statute. The statute says that the local defendant's alleged conduct must be "a *significant* basis for the claims asserted by the proposed plaintiff class." 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb) (emphasis added). The statute does not require the local defendant's alleged conduct to be *different* from the conduct of other defendants. Where two people engage in the same conduct, the conduct of both can be significant. The decision below is wrong for this reason.

Finally (BIO 26), respondents err in suggesting that the issue is unimportant because it arises infrequently. It arises often enough to have been decided by five Courts of Appeals. Indeed, the issue can arise in any case in which a local defendant is the subsidiary of an out-of-state parent corporation, a fact pattern that seems to recur quite often in suits alleging environmental contamination, like this one.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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