No. 01-651

In the Supreme Court of the United States

CHASE MANHATTAN BANK, PETITIONER

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

MICHAEL JAY SINGER
WENDY M. KEATS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

WILLIAM HOWARD TAFT, IV
Legal Adviser

JAMES G. HERGEN
Assistant Legal Adviser

JOHN P. SCHNITKER
Attorney-Adviser
Department of State
Washington, D.C. 20520

QUESTION PRESENTED

Whether corporations organized under the laws of United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of alienage diversity jurisdiction under 28 U.S.C. 1332(a)(2).

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INTEREST OF THE UNITED STATES

Article III of the Constitution extends the judicial power of the United States to controversies "between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." U.S. Const. Art. III, § 2, Cl. 1. Congress, in turn, has enacted the alienage diversity statute, which grants federal district courts jurisdiction over civil actions in which the matter in controversy exceeds $75,000, exclusive of interest and costs, and the action "is between * * * citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. 1332(a)(2). Congress enacted that statute to ensure, consistent with Article III, that private international disputes between United States citizens and foreign citizens or

subjects, involving substantial amounts in controversy, may be resolved in a federal judicial forum.

The United States has a substantial interest in the correct interpretation of the alienage diversity statute because that grant of jurisdiction facilitates international commerce and because misapplication of that statute can have significant foreign policy ramifications. The alienage diversity statute gives foreign nations assurance that civil actions between United States citizens and their citizens or subjects will be resolved in a neutral national forum. The construction of that statute by the Court of Appeals for the Second Circuit has led, however, to repeated and well-founded objections from an important ally and trading partner, the United Kingdom, that that court has improperly denied citizens and subjects of the United Kingdom access to an important federal forum for resolving international commercial disputes. The United States is keenly interested in ensuring that the alienage diversity statute is interpreted in a manner consistent with congressional intent. That interpretation also encourages foreign nations to afford United States citizens reciprocal access to foreign courts.

STATEMENT

Petitioner Chase Manhattan Bank sued respondent in the United States District Court for the Southern District of New York for breach of an indenture agreement providing for the issuance of secured debt to finance respondent's business ventures. See Pet. App. 15a-16a. The district court granted summary judgment in favor of petitioner, allowed foreclosure on collateral valued at more than $49 million, and entered a deficiency judgment in the amount of more than $98 million. See *id.* at 8a, 13a, 15a-16a, 54a. The court of appeals

reversed that decision and ordered the district court to dismiss the action for lack of subject matter jurisdiction in light of the court of appeals' prior decision in *Matimak Trading Co.* v. *Khalily*, 118 F.3d 76 (2d Cir. 1997), cert. denied, 522 U.S. 1091 (1998). Pet. App. 1a-7a. The court of appeals concluded that the district court improperly exercised jurisdiction under the alienage diversity statute, 28 U.S.C. 1332(a)(2), because respondent, which is a corporation organized under the laws of a United Kingdom Overseas Territory, is not, in the court's view, a "citizen[] or subject[] of a foreign state." Pet. App. 7a.[1]

1. Petitioner is a United States bank, incorporated under the laws of the State of New York, that engages in domestic and international financing. Respondent is a foreign corporation organized under the laws of the British Virgin Islands. Petitioner and respondent entered into an indenture under which respondent issued notes, secured by collateral, in the aggregate amount of $119,000,000. The notes were issued to finance the activities of respondent's four Hong Kong subsidiaries, which engage in joint ventures for road construction projects in China. Respondent agreed to make regular repayments on the notes to petitioner. It also agreed

[1] The United Kingdom Overseas Territories consist of Anguilla, Bermuda, British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, the Pitcairn Islands, Saint Helena and dependencies, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands. Pet. 6 n.2; British Nationality Act 1981, 31 Halsbury's Statutes 127, Sched. 6. Prior to 1998, the United Kingdom referred to the Overseas Territories as "Dependent Territories," but there is "no practical difference" between those terms. Pet. App. 6a n.1. Until its July 1, 1997, reversion to China, Hong Kong was a Dependent Territory.

that the indenture was governed by the laws of New York and that it would submit "to the jurisdiction of any court of the State of New York or any United States federal court sitting in the Borough of Manhattan, New York City, New York." Pet. App. 2a-3a, 15a-18a; see Pet. 3.

When respondent defaulted on its payments, petitioner brought this action in the United States District Court for the Southern District of New York to obtain immediate repayment of respondent's indebtedness, including both principal and interest. The district court granted petitioner's motion for summary judgment in its entirety. Pet. App. 15a-54a. That court determined at the outset, and without objection from respondent, that it possessed subject matter jurisdiction by virtue of the alienage diversity statute, 28 U.S.C. 1332(a)(2), "because [petitioner] is a corporate citizen of New York, [respondent] is a corporate citizen of the British Virgin Islands and the matter in controversy exceeds $75,000." Pet. App. 17a. The court then rejected respondent's "impossibility" defense, *id.* at 36a-52a, and authorized petitioner to foreclose on collateral accounts totaling $49,054,290.84, *id.* at 8a-9a, 54a. The court later issued an order directing entry of a deficiency judgment in the amount of $98,388,352.74. *Id.* 8a-14a.

2. On respondent's appeal, the court of appeals sua sponte raised the question whether the district court possessed subject matter jurisdiction under the alienage diversity statute. Following supplemental briefing, the court of appeals ruled that the district court lacked jurisdiction because corporations organized under the laws of United Kingdom Overseas Territories do not qualify as "citizens or subjects of a foreign state" (28 U.S.C. 1332(a)(2)). Pet. App. 1a-7a. The court observed that it had addressed the application of

the alienage diversity statute to United Kingdom Overseas Territories (which were then called Dependent Territories, see note 1, *supra*) in *Matimak Trading Co.*, *supra*.

In *Matimak*, a corporation incorporated in Hong Kong, which was then a Dependent Territory, invoked a federal district court's alienage diversity jurisdiction prior to Hong Kong's 1997 reversion to China. The court of appeals ruled that, because "the United States does not regard Hong Kong as an independent, sovereign political entity," the corporation did not qualify as a "citizen[] or subject[] of a foreign state." Pet. App. 5a; *Matimak*, 118 F. 3d at 82. Furthermore, the court ruled that, because the corporation was not a citizen or subject of the United Kingdom under British law, the corporation was "stateless" and "c[ould not] sue a United States citizen under alienage jurisdiction." Pet. App. 5a; *Matimak*, 118 F.3d at 85, 86. The court of appeals adhered to the reasoning of *Matimak* in *Koehler* v. *Bank of Bermuda (New York) Ltd.*, 209 F.3d 130, amended, 229 F.3d 424, rehearing en banc denied, 229 F.3d 187 (2d Cir. 2000) (Bermuda corporation and citizen), and *Universal Reinsurance Co.* v. *St. Paul Fire & Marine Ins. Co.*, 224 F.3d 139 (2d Cir. 2000) (Bermuda corporation).

In this case, the court of appeals noted, respondent is a corporation created under the laws of the British Virgin Islands, and "[t]he British Virgin Islands is a British Dependent Territory, as Hong Kong was at the time of *Matimak* and Bermuda was at the time of *Koehler* and *Universal Reinsurance*." Pet. App. 6a. Finding that "[n]othing relevant to the alienage jurisdiction inquiry has changed since we decided those appeals," the court of appeals concluded that "[w]e are bound to hold that [respondent] is not a citizen or subject of a foreign

state and that the district court therefore had no alienage jurisdiction over this action under § 1332(a)(2)." *Id.* at 6a-7a. Finding no other basis for jurisdiction, the court of appeals reversed the judgment and remanded the case to the district court with instructions to dismiss the complaint. *Id.* at 7a. The court of appeals later denied a petition for rehearing en banc. *Id.* at 55a-56a.

ARGUMENT

The decision of the court of appeals in this case plainly warrants this Court's review. The question of how the alienage diversity statute applies to companies incorporated in a foreign nation's territories presents an issue of substantial and recurring commercial importance as well as a matter of foreign relations significance. That question has produced a square conflict among the courts of appeals. Furthermore, the court of appeals that decided this case—which alone holds the view that those companies are "stateless" and which is a forum for a substantial amount of important commercial litigation—has made clear that it intends to adhere to its broadly criticized ruling. Additionally, the court of appeals' decision is wrong. That decision rejects the traditional and plain meaning of the term "citizens or subjects of a foreign state" and thwarts Congress's purpose by imposing an arbitrary and unwarranted limitation on the scope of its jurisdictional grant. The decision is not only contrary to the views of other courts of appeals, but also to the position of the United States, the United Kingdom, and numerous academic commentators regarding the relationship of the United Kingdom to its Overseas Territories and the application of the alienage diversity statute to companies incorporated in those territories.

1. The Constitution provides that the the "judicial Power" of the United States shall extend to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. Art. III, § 2, Cl. 1. The Framers included that provision to enable Congress to provide a neutral federal forum for lawsuits involving foreign citizens and subjects, in addition to the judicial fora provided by the individual States. See *The Federalist No. 80*, at 406-407 (Alexander Hamilton) (Beloff ed., 1987).[2]

Congress effectuated Article III's establishment of alienage diversity jurisdiction through the Judiciary Act of 1789, under which the federal courts were first organized. The Judiciary Act stated that the federal courts "shall have original cognizance, * * * of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * * an alien is a party." Ch. 20, 1 Stat. 78. In 1875, Congress amended that provision to conform the language of the statute to the language of the Constitution. See Act of Mar. 3, 1875, ch. 137, 18 Stat. (Pt. 3) 470 (federal jurisdiction over suits "between citizens of a State and foreign states, citizens, or subjects"). Congress amended that language to its present form in the 1948 recodification of the Judicial Code, ch. 646, 62 Stat. 930 (§ 1332(a)(2)), as amended by the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 1330, 90 Stat. 2891.

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[2] See generally 15 J. Moore, *Moore's Federal Practice* § 102.73 (1999); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations And Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 10-16, 30-52 (1996); see also Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1927-1928).

Since its introduction in 1789, the alienage diversity statute has assumed international importance. The United States is now the focus of a tremendous volume of international commerce, and the alienage diversity statute is regularly invoked, as it was in this case, to provide for resolution of commercial disputes involving many millions of dollars. See Pet. App. 15a-17a. Indeed, sophisticated commercial parties regularly include forum selection clauses in their international contracts in reliance on the alienage diversity statute's provision of a neutral federal forum for resolution of their disputes. See Pet. 3-4; C.A. App. 58; see generally *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991) (discussing the enforcability of forum selection clauses); *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (same).

The particular issue here—whether corporations incorporated in the United Kingdom's Overseas Territories are "citizens or subjects of a foreign state"—is, in itself, a question of substantial commercial importance. The United Kingdom has represented to the United States and its courts that there are many thousands of banking, insurance, and business companies within its Overseas Territories, see Pet. 17-18 n.10, and those companies regularly transact business with citizens of the United States. As this case illustrates, those transactions can involve many millions of dollars. Pet. App. 15a-16a. Petitioner notes that questions respecting the jurisdictional status of those entities have arisen no less than nine times within the Second Circuit alone since that court's *Matimak* decision. See Pet. 22-23 n.11. There is accordingly a strong commercial need for a definitive determination whether corporations created within such territories are subject to the alienage diversity statute.

The issue is also important in light of its foreign relations ramifications. The United Kingdom has repeatedly expressed its position to the United States, through diplomatic channels and through briefs amicus curiae, that citizens and corporations of its Overseas Territories are citizens or subjects of the United Kingdom for purposes of the alienage diversity statute. See Pet. 14-16. The United States has joined the United Kingdom in objecting to the court of appeals' reasoning through its own amicus filings in the courts of appeals. *Ibid.* Thus, the two nations with the most direct interest in the outcome of this case—the United States and the United Kingdom—agree that the court of appeals' decision presents an issue of substantial practical importance warranting this Court's review.[3]

2. The court of appeals' decision also warrants review because the court's interpretation of the alienage diversity statute has generated a square conflict among the courts of appeals. As noted above, the Second Circuit has ruled on four occasions that residents of and companies incorporated in the United Kingdom Overseas Territories are not "citizens or subjects" of the United Kingdom. See Pet. App. 1a-7a (British Virgin Islands); *Universal Reinsurance Co.*, 224 F.3d at 140-

[3] Other countries, besides the United Kingdom, have overseas territories that are potentially subject to the court of appeals' ruling, including France, the Netherlands, Australia, New Zealand, Denmark, and Norway. The federal district courts within the Second Circuit have indicated that they will apply the court of appeals' reasoning in *Matimak* to at least some of those territories. See *Inarco Int'l Bank, N.V.* v. *Lazard Freres & Co.*, No. 97 Civ. 0378 (DAB), 1998 WL 427618 (S.D.N.Y. July 29, 1998) (suggesting in dicta that a bank incorporated in Aruba, a Netherlands dependency, may not be allowed to invoke alienage diversity jurisdiction, citing *Matimak*).

141 (Bermuda corporation); *Koehler*, 209 F.3d at 139 (Bermuda corporation and citizen); *Matimak*, 118 F.3d at 85-88 (pre-reversion Hong Kong corporation). The Third, Fourth, and Seventh Circuits have ruled that residents and companies incorporated in those territories are citizens or subjects of the United Kingdom for purposes of the alienage diversity statute. See *Southern Cross Overseas Agencies, Inc.* v. *Wah Kwong Shipping Group Ltd.*, 181 F.3d 410 412-413 (3d Cir. 1999) (pre-reversion Hong Kong corporation); *Koehler* v. *Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998) (Bermuda resident); *Wilson* v. *Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-1243 (7th Cir. 1990), cert. denied, 499 U.S. 947 (1991) (Cayman Island corporation).

The division among the courts of appeals is express and irreconcilable. The Third Circuit specifically considered and explicitly "disagree[d]" with the Second Circuit's analysis in *Matimak*. See *Southern Cross*, 181 F.3d at 413, 415-419. The Third Circuit noted that historically, there was no such thing as a "stateless" person or corporation, and the Framers of the Constitution "apparently considered the class of 'subjects or citizens of a foreign state' as identical with the class of 'aliens.'" *Id.* at 415-416 (citation omitted). The court evaluated and rejected the *Matimak* court's presumption that a person or entity that is not a British "citizen" could not be a British "subject" for purposes of the alienage diversity statute. *Id.* at 417-418. The court ultimately deferred to the position of the United States and concluded that pre-reversion Hong Kong corporations were "subjects of the United Kingdom for alienage diversity purposes." *Ibid.*

Faced with the Third Circuit's conflicting decision, the Second Circuit, over a strong dissent, has adhered

to its holding in *Matimak*. See *Koehler*, 229 F.3d at 187 (denying petition for rehearing en banc). In her dissenting opinion, Judge Sotomayor, joined by Judge Leval, observed:

> Because [the Second Circuit] panel decisions have caused a clear split in authority with the other circuit courts, and in light of the potential damage to relations between the United States and the United Kingdom and other nations, it can only be hoped that the Supreme Court chooses to address the resolution of this issue expeditiously.

Id. at 193-194 (Sotomayor, J. dissenting from denial of rehearing en banc). See also *id.* at 194 (Calabresi, J., dissenting separately); 229 F.3d at 424-425 (amending the panel decision to reflect that Judges Cardamone and Newman "feel constrained by the precedential force of *Matimak*" and that "[w]ere the question open in this Circuit, both would rule that citizens of Bermuda and other British Dependent Territories are sufficiently subject to the sovereignty of the United Kingdom to satisfy the alienage clause of the diversity statute"); Pet. App. 6a-7a & n.2 (noting the denial of rehearing en banc in *Koehler*).

In short, the courts of appeals are squarely divided on the issue, and that disagreement on a fundamental question of federal court jurisdiction will persist until this Court grants review.

3. The court of appeals' decision additionally warrants review because it is wrong. Judge Sotomayor's dissent from the denial of rehearing en banc in *Koehler* summarizes the defects in the court of appeals' reasoning. See 229 F.3d at 190-193.

The question whether persons or corporations fall within the scope of the alienage diversity statute is, of

course, an issue of federal law. It depends on "whether United States law deems such persons or entities to be 'citizens or subjects' under our Constitution and statutes for the purpose of alienage jurisdiction." *Koehler*, 229 F.3d at 190 (Sotomayor, J., dissenting). "As an historical matter, the drafters of the Constitution chose the words 'citizens' or 'subjects' to refer to the broad category of those under the authority of a foreign power." *Id.* at 191.[4] Consistent with the traditional and common meaning of those terms, the alienage diversity statute extends federal court jurisdiction to all persons and corporations who are under the authority of a foreign state. See *id.* at 191-192.[5] The Constitution of the

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[4] The dissent noted that in *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), Chief Justice Marshall equated Article III's reference to "Citizens or Subjects" of a foreign state with "aliens." Likewise, the drafters of the Judiciary Act of 1789 treated the Article III terms as synonymous with "aliens" and "foreigners." See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78; 1 Annals of Cong. 810, 814, 825 (Joseph Gales ed., 1789) (House debates); see also Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 60 (1932).

[5] See *Steamship Co.* v. *Tugman*, 106 U.S. 118, 121 (1882) ("a corporation created by the laws of a foreign State may, for the purposes of suing and being sued in the courts of the Union, be treated as a 'citizen' or 'subject' of such foreign State' "); see also *The Pizarro*, 15 U.S. (2 Wheat.) 227, 245-246 (1817); *Inglis* v. *Trustees of Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting); see generally *Oxford English Dictionary* (1977)(defining a "subject" as "[o]ne who is under the dominion of a monarch or reigning prince; one who owes allegiance to a government or ruling power, is subject to its laws, and enjoys its protection"); Noah Webster, *American Dictionary of the English Language* (1828) (defining a "subject" as "[o]ne that owes allegiance to a sovereign and is governed by his laws"); Samuel

British Virgin Islands expressly recognizes the United Kingdom's continuing sovereignty and dominion over that Overseas Territory. See, *e.g.*, Virgin Islands (Constitution) Order 1976, §§ 3-6, 13, 25, 34, 42-43, 71.[6] Because the citizens and corporations of the British Virgin Islands, like citizens and corporations of Bermuda, "live under the sovereignty of the United Kingdom," they "are 'citizens or subjects' of the United Kingdom for purposes of alienage jurisdiction." *Koehler*, 229 F.3d at 193 (Sotomayor, J., dissenting).

The United States and the United Kingdom, as well as numerous academic commentators, have argued that the Second Circuit's construction of the alienage diversity statute is fundamentally unsound.[7] That important jurisdictional issue is now squarely before this Court.

Johnson, *A Dictionary of the English Language* (1755) (defining a "subject" as "[o]ne who lives under the dominion of another").

[6] The British Virgin Islands (Constitution) Order 1976 is reprinted in Constitutions of Dependencies And Special Sovereignties (Blaustein ed., 1997), and at the following websites: *http://www.gis.gov.vg/GenInfoC/TheLaw/Constitution.htm* and *http://www.viparty.com/constitution/constitution.htm*.

[7] *See*, *e.g.*, Jonathan Schafter, *Original Intentions and International Reality: States, Sovereignty, and the Misinterpretation of Alienage Jurisdiction in* Matimak *v.* Khalily, 39 Colum. J. Transnat'l L. 729 (2001); Frank Eric Marchetti, *Alienage Jurisdiction Over Stateless Corporations: Revealing the Folly of* Matimak Trading Company *v.* Khalily, 36 San Diego L. Rev. 249 (1999); Jennifer L. Coviello, *Access Denied: A Case Comment on* Matimak Trading Co. *v.* Khalily, 18 N.Y.L. Sch. J. Int'l & Comp. L. 435 (1999); Mark Baker, *Lost in the Judicial Wilderness: The Stateless Corporation after Matimak Trading*, 19 Nw. J. Int'l L. & Bus. 130 (1998); Teresa M. Mozina, *Why Is There Any Question? Hong Kong and Alienage Jurisdiction: A Critical Analysis of* Matimak Trading Co. *v.* Khalily and D.A.Y., 10 Pace Int'l L. Rev. 575 (1998).

The Court should resolve the conflict among the courts of appeals and restore the opportunity that Congress has provided for the full range of "citizens or subjects" of foreign states to adjudicate their claims and defenses in a federal forum.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

MICHAEL JAY SINGER
WENDY M. KEATS
Attorneys

WILLIAM HOWARD TAFT, IV
Legal Adviser

JAMES G. HERGEN
Assistant Legal Adviser

JOHN P. SCHNITKER
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