No. 99-391

IN THE SUPREME COURT OF THE UNITED STATES

ROBIN FREE AND RENEE FREE,
Petitioners,

v.

ABBOTT LABORATORIES, et al.,
Respondents.

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Filed February 14, 2000

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is filed on behalf of the Product Liability Advisory Council as *amicus curiae* in support of respondents, with the written consent of the parties.[1]

[1] No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council ("PLAC") is a nonprofit corporation with over 100 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to pharmaceutical products. PLAC has filed numerous *amicus* briefs in federal and state court proceedings raising issues with significant consequences for products liability law. In particular, PLAC's members have a significant interest in the rules governing removal to federal court of putative class actions filed in state courts. PLAC's members have observed the marked increase in state-court class actions in recent years, and many have first-hand experience with the current practices in many state courts with respect to certification of classes. For these reasons, PLAC and its members have a significant interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

Petitioners Robin and Renee Free are the named plaintiffs in a lawsuit originally filed in Louisiana state court against the respondents, alleging violations of a state antitrust statute, on behalf of themselves and a class of additional unnamed plaintiffs. Petitioners are both residents of Louisiana. Respondents are all out-of-state corporations.

It is an open secret in the class action bar that that even though officially adopted class action standards are relatively uniform among federal and state courts, certain local state courts in some jurisdictions are significantly more likely to certify large-scale, multi-state class actions than are federal and other state courts. In recent years, a number of Louisiana state courts have fallen in that category. *See* Exec. Summary, RAND Institute for Civil Justice, *Class Action Dilemmas* 7 (1999). And, of course, Louisiana residents would prefer to litigate against large out-of-state corporations in their own state courts, rather than the courts of the nation. Like most class action defendants, respondents in this case therefore sought to remove this purported class action from the state court and to seek the security of a federal forum – and the federal rules of procedure – under the federal diversity jurisdiction statute, 28 U.S.C. § 1332.

1. Because the petitioners' claims satisfied both the citizenship and amount-in-controversy predicates for federal diversity jurisdiction, *see* 28 U.S.C. § 1332, the federal district court properly asserted original jurisdiction over their claims under the diversity statute. And under the plain terms of the supplemental jurisdiction statute, 28 U.S.C. § 1367, if the court has "original jurisdiction" over any claim in a civil action, the court has "supplemental jurisdiction" over "all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case and controversy under Article III of the United States Constitution," including "claims that involve the joinder or intervention of additional parties." 28 U.S.C. § 1367(a). There is no dispute here that the claims of the unnamed class members are sufficiently related to the claims of petitioners such they form part of the same case and controversy within the meaning of Article III; joinder of the unnamed plaintiffs claims under Rule 23 is therefore proper under the plain terms of § 1367(a).

Petitioners urge a different interpretation of § 1367. They argue that a federal court does not have "original jurisdiction" under § 1367 over a claim that satisfies the amount-in-controversy minimum if that claim is accompanied by claims that do *not* satisfy that minimum. For this reading of the requirements of "original jurisdiction," petitioners rely on this Court's opinion in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). But *Zahn* did *not* hold that a court lacks "original jurisdiction" over civil actions that include monetarily insufficient claims. *Zahn*, like its predecessor

cases, made perfectly clear that the court must dismiss any insufficient claims, but that the court maintains its original jurisdiction over the action and any sufficient claims that are asserted. Section 1367 simply alters the requirement that insufficient claims be dismissed: where *Zahn* implicitly rejected the argument that a court ought to assert ancillary jurisdiction over insufficient claims so long as it has original jurisdiction over any sufficient claims, § 1367 by statute confers such "ancillary" – now "supplemental" – jurisdiction over those same claims.

This plain textual reading is not inconsistent with the legislative history, as petitioners assert. Even assuming that legislative history can in some instances subvert a statute's clear language, this is not such a case. The history does not even come close to demonstrating that every member of Congress who voted for the statute that became § 1367 intended to preserve the *Zahn* rule; to the contrary, that history does not reveal even a single member of Congress who proclaimed a belief that § 1367 would preserve *Zahn*. In fact, the only clear statement in the legislative record about the fate of *Zahn* appears in a report that expressly urges overruling that case, and recommends language substantively identical to what became § 1367 to accomplish that result.

2. The statute is also hardly "absurd" as a matter of expected congressional policy. Far from it: the importance of providing a federal forum for state-law claims against out-of-state defendants – especially out-of-state corporations – cannot be oversold. While it cannot be said that every local court in every state fails to apply basic class action requirements appropriately, or is susceptible to biased treatment of foreign corporations, there is an obvious reason why radically disproportionate numbers of class actions are being filed in selected county courts in certain states. The evidence, and the consistent experience of *amicus* PLAC's members, demonstrates that certain state courts do not take

seriously the fundamental due process norms underlying the standard class action requirements of issue commonality and predominance. Section 1367 provides a sensible solution, eliminating the formalistic barrier to removal presented by the requirement that even the unnamed members in a class action allege an injury in excess of the diversity minimum, even where the claims of the entire class range in the millions of dollars.

ARGUMENT

This is a case of statutory interpretation. The question presented is whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, requires a court that has original jurisdiction over the claims of a named class action plaintiff that satisfy both the diverse citizenship and the amount-in-controversy predicates of the diversity jurisdiction statute, 28 U.S.C. § 1332, to assume supplemental jurisdiction over the related claims of unnamed class members joined with that plaintiff pursuant to Federal Rule of Civil Procedure 23. Although this Court in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), operating under the old nonstatutory rules of ancillary and pendent jurisdiction, had implicitly rejected joinder of monetarily insufficient claims as ancillary to sufficient claims, Congress obviously had the power to change that rule by statute. *See Finley v. United States*, 490 U.S. 545, 556 (1989). That is what Congress did. This reading of the statute is not "absurd" or inconsistent with the legislative history, as petitioners suggest. It is what the plain text requires. And there are very good reasons for giving out-of-state defendants faced with a massive overall potential class-action liability the opportunity to repair to a federal forum, even where the individual claims of unnamed class members could not be asserted on their own in a federal diversity action.

I. THE PLAIN LANGUAGE OF § 1367 CONFERS SUPPLEMENTAL FEDERAL JURISDICTION OVER THE CLAIMS OF UNNAMED CLASS MEMBERS

A

1. *Section 1367(a).* The answer to the question whether there is federal jurisdiction over the claims in petitioners' state-law class action begins with the first paragraph of the supplemental jurisdiction statute, 28 U.S.C. § 1367. That paragraph provides:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

It should be clear from this language, read in its entirety, that the phrase "a civil action" within the court's "original jurisdiction" does not refer to the overall action itself, but only to those individual claims within an action that are themselves within the court's original jurisdiction. So long as there is a *claim* that falls within a district court's "original jurisdiction," in other words, the court has supplemental jurisdiction over "all *other* claims" in the action that are transactionally related to that claim. 28 U.S.C. § 1367(a) (emphasis added). This Court's opinion in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), makes this point perfectly clear and, in doing so, sets forth the basic structure for applying § 1367(a).

In *City of Chicago*, a plaintiff had asserted in a complaint in state court a number of state-law claims for review of a state administrative agency action, as well as federal constitutional claims that state law allowed to be joined in a complaint for administrative review. *See id.* at 164. The defendant removed the action to federal court, and the plaintiffs objected, contending that because federal courts traditionally did not have "original jurisdiction" over the state-law administrative-review claims, the case could not be heard in federal court. *Id.* at 166. According to this Court, that argument was founded on a "an erroneous premise": the court's "original jurisdiction derives from [plaintiff's] federal claims, not its state law claims." *Id.* And once federal jurisdiction is established, "the relevant inquiry respecting the accompanying state claims is whether they fall within a district court's *supplemental* jurisdiction, *not* its original jurisdiction." *Id.* at 167. The notion proposed by the *City of Chicago* plaintiffs that a court must determine whether the state-law claims themselves fit within the court's "original jurisdiction," the Court explained,

> would effectively read the supplemental jurisdiction statute out of the books: The whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking.

Id.

For purposes of establishing supplemental jurisdiction over claims in a removed action, *City of Chicago* thus confirms that the first task is to determine whether there are any claims within the overall action over which the federal court has original jurisdiction. That is plainly so here. The district court has original jurisdiction over the claims of petitioners, the named plaintiffs in the state-law cause below: the citizenship of each petitioner is completely diverse from that of

each respondent, and each of petitioners' claims against the respondents exceeds the amount-in-controversy requirement of the diversity statute.

Having established original federal jurisdiction over the claims of the named plaintiffs in this action, the next task is simply to determine whether the accompanying claims – here, the monetarily insufficient claims of the unnamed class members – "fall within [the court's] supplemental jurisdiction." *City of Chicago*, 522 U.S. at 167. Under the terms of the statute, that inquiry turns on whether the unnamed plaintiffs' claims "are so related" to claims over which the court has original jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a); *see City of Chicago*, 522 U.S. at 165, 167. This point is not contested by petitioners: the "nucleus of operative fact" common to every plaintiff's claim, *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966), is whether or not the respondents conspired to fix the prices of infant formula. And because supplemental jurisdiction as defined § 1367(a) expressly includes "claims that involves the joinder or intervention of additional parties," it is clear that joinder of the unnamed class members' claims under Rule 23 is proper.

2. *Section 1367(b).* Because the federal court's "original jurisdiction" is invoked in this case under the diversity statute, 28 U.S.C. § 1332, the supplemental jurisdiction statute requires one additional inquiry. Where the diversity statute is the source of the court's original jurisdiction under paragraph (a) of § 1367, paragraph (b) provides certain specific exceptions to the joinder of parties and claims otherwise authorized under paragraph (a):

> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

As petitioners observe, § 1367(b) "sets forth a number of limitations on the exercise of supplemental jurisdiction in a diversity action." Pet. Br. at 19. But while paragraph (b) expressly prohibits a court from taking supplemental jurisdiction over the claims of plaintiffs joined under Rule 19, or who seek to intervene under Rule 24, the paragraph does *not* speak to a court's supplemental jurisdiction over the claims of plaintiffs joined under Rule 23. Paragraph *(b)* of § 1367, in other words, simply has nothing to say about whether paragraph *(a)* of the statute authorizes a court that has original jurisdiction over the claims of named plaintiffs in a class action to assert supplemental jurisdiction over unnamed members joined pursuant to Rule 23. Indeed, the absence of a prohibition in paragraph (b) on the use of Rule 23 in that fashion – despite the list of other specified prohibitions – suggests that Congress actually contemplated that the rule *would* be used to join class claims under paragraph (a). *See TVA v. Hill*, 437 U.S. 153, 188 (1978); *National Passenger R.R. Corp. v. National Assoc. of R.R. Passengers*, 414 U.S. 453, 458 (1974).

B

Petitioners understandably do not, in fact, argue for the existence of an exception in § 1367(b) that simply is not there. The true focus of their alternative textual reading of

the statute is not on § 1367(b) at all, but, rather, on the phrase "original jurisdiction" in § 1367(a).

1. Relying upon this Court's opinion in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and its forebears, *e.g.*, *Snyder v. Harris*, 394 U.S. 332 (1969); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589 (1939), petitioners assert that it was a fundamental requirement of "original jurisdiction" predating § 1367 that "in a multi-plaintiff diversity action . . . the claims of each plaintiff must satisfy the jurisdictional minimum [amount-in-controversy]." Pet. Br. at 13. Because it was, as petitioners say, a "requirement of original jurisdiction that each and every plaintiff in the action has claims exceeding the jurisdictional minimum," *id.* at 16, a court may not assume "original jurisdiction" *ab initio* under § 1367(a) over a "civil action" that includes claims beneath the jurisdictional minimum.

The precise nature of petitioners' argument is not clear, but they could not plausibly be arguing that a court may not assert "supplemental jurisdiction" over a "civil action" if the court does not have "original jurisdiction" over any nonfederal claims within the overall action. That view, of course, would be directly contrary to the supplemental jurisdiction statute, "the whole point" of which "is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking." *City of Chicago*, 522 U.S. at 167.

Properly understood, petitioners' argument instead seems to be that a court does not have "original jurisdiction" even over a claim that otherwise appears to meet the requirements of diversity jurisdiction, if that claim is accompanied by claims that do not meet those requirements. The presence of any claim that does not meet both requirements of diversity jurisdiction, petitioners imply, essentially "destroys" the court's "original" diversity jurisdiction over even those

claims in the action that do meet those requirements. Section 1367(a)'s requirement of "original jurisdiction," in other words, must be understood as prohibiting a court from taking jurisdiction over a diversity-based claim that is accompanied by claims that do not meet the requirements of diversity.

The problem for petitioners is that they are, at best, only half right about the jurisdictional effect in multi-plaintiff actions of the two requirements of diversity, and the requirement they get wrong is the one that governs this case. The requirement of complete citizenship diversity, *see Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), may well be the sort of "rule of original diversity jurisdiction" that "destroys" the jurisdiction of a court over even the claims of diverse parties to an action that also includes nondiverse parties, *cf. Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 388 (1998), but this Court has never held – or even suggested – that the minimum amount-in-controversy rule that is at issue in this case is the same kind of rule.

(a) Citing a series of cases leading up to and including *Zahn*, petitioners assert that the amount-in-controversy rule "was understood" in this Court's decisions "as a declaration by Congress that that the federal courts shall not have jurisdiction, based only on diversity, where the claims of any plaintiff in a multi-plaintiff diversity action do not meet the amount-in-controversy threshold." Pet. Br. at 15. But neither *Zahn* nor any of its antecedents *ever* said that a federal court lacks jurisdiction over a civil action in diversity case "where the claims of any plaintiff in a multi-plaintiff diversity action do not meet the amount-in-controversy threshold."

To the precise contrary, the rule enunciated and applied in *Zahn*, according to *Zahn* itself, held that "district courts *were to entertain* the claims of only those class action plaintiffs whose individual cases satisfied the jurisdictional

amount requirement." 414 U.S. at 297-98 (emphasis added). Thus,

> *Zahn* does not require that an entire class action be dismissed for lack of subject matter jurisdiction over some of the class members. Rather, the court is required only to dismiss only those class members whose claims appear to a "legal certainty" to be less than the jurisdictional amount.

In re School Asbestos Litig., 921 F.2d 1310, 1315 (3d Cir. 1990). The same was true of the earlier cases. *Snyder v. Harris*, 394 U.S. 32 (1969), for example, had already held "that class actions involving plaintiffs with separate and distinct claims were subject to the usual rule that a federal district court *can assume jurisdiction* only over those plaintiffs presenting claims exceeding the $10,000 minimum specified in § 1332." *Zahn*, 414 U.S. at 299 (describing *Snyder*; emphasis added). *See also Clark v. Paul Gray, Inc.*, 306 U.S. 583, 590 (1939). Contrary to petitioners' characterization of the amount-in-controversy rule as a sword that pierces the jurisdiction of the court over the entire action, that rule in fact required *only* the "dismissal of *those litigants whose claims do not satisfy the jurisdictional amount*, even though other litigants assert claims sufficient to invoke the jurisdiction of the federal court." *Zahn*, 414 U.S. at 295 (emphasis added); *see also* Thomas D. Rowe, Jr., *1367 and All That: Recodifying Federal Supplemental Jurisdiction*, 74 Ind. L.J. 53, 63 (1998) (under *Zahn*, "unnamed class members with jurisdictionally insufficient claims could not tag along in federal court; only unnamed class members with jurisdictionally sufficient claims could be part of the class").

It is therefore incorrect to argue, as petitioners do, that the amount-in-controversy rule prohibits a court from asserting its "original jurisdiction," within the meaning of § 1367(a), over a claim that satisfies the jurisdictional minimum amount, if that claim is accompanied by jurisdictionally insufficient claims. The amount-in-controversy rule is not, and never was, that kind of rule of original diversity jurisdiction.

(b) The case may be different when the diversity predicate in question is the requirement of completely diverse citizenship, first enunciated by this Court in *Strawbridge*. A recent opinion of this Court suggests that the rule of "complete diversity" *is* a rule of original diversity jurisdiction: "A case falls within the federal district court's 'original' diversity 'jurisdiction' only if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same State." *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 388 (1998). And "[w]here original jurisdiction rests upon Congress' statutory grant of 'diversity jurisdiction,' this Court has held that one claim against one nondiverse defendant destroys that original jurisdiction." *Id.* at 389.

The rule of complete diversity thus appears to have fundamentally different jurisdictional consequences in a multi-plaintiff action than the amount-in-controversy rule. With respect to the complete diversity rule, petitioners' view of "original jurisdiction" in § 1367 may well be right: a court may not be able to assert "original" *diversity* jurisdiction under the statute over the claim of a diverse plaintiff in a civil action that includes claims of other, nondiverse plaintiffs, because "[t]he presence of the nondiverse party automatically destroys *original* jurisdiction." *Id.* at 389. As explained above, however, that has never been true of the amount-in-controversy rule. To the contrary, *Zahn* and its antecedents explicitly state that the court *retains* its original jurisdiction over those claims that satisfy the statutory minimum. *See supra* at 11-12. It follows that nothing in the amount-in-controversy rule prohibits a court from asserting original jurisdiction over jurisdictionally sufficient claims

under § 1367, and then asserting supplemental jurisdiction over the insufficient claims in accordance with the plain terms of § 1367.

The Court's analysis in *Schacht* provides useful guidance for the instant case. *Schacht* involved a civil action initially filed in state court that included federal claims against state officers in their individual capacities, as well as claims that were, for purposes of the Eleventh Amendment, constructively against the state itself. *See* 524 U.S. at 383-84. Because the Eleventh Amendment would have barred the claims against the state from being brought in federal court, *id.* at 385, the question presented in *Schacht* was whether "the presence of even one such [barred] claim in an otherwise removable case deprived the federal courts of removal jurisdiction over the entire case." *Id.*

This Court held that removal of the action was not improper, because the presence of a claim barred by the Eleventh Amendment "does not automatically destroy original jurisdiction" over the entire action. *Id.* at 389. En route to that holding, the Court compared the presence of an Eleventh Amendment-barred claim in a federal question case with the presence of a nondiverse party in a diversity case, suggesting that in the latter situation, removal of the overall action is improper because the "presence of the nondiverse party automatically destroys original jurisdiction." *Id.* By contrast, the Court explained, because the Eleventh Amendment only provides a sovereign-immunity defense in federal court against certain claims, the presence of an Eleventh Amendment-barred claim does not present an obstacle to removal of the overall action, but requires only that the barred claims be dismissed. *Id.* at 392-93.

The presence of an insufficient monetary claim in a diversity case under *Zahn* is much like the presence of an Eleventh Amendment-barred claim in a federal question case

under *Schacht*: neither prohibits the assertion of "original jurisdiction" over an action that includes such claims. All that is required in either case is dismissal of the jurisdictionally improper claims.[2] And all that § 1367(a) did was to alter the *Zahn* rule, authorizing the court to take supplemental jurisdiction over insufficient claims, where previously it could not.

2. Petitioners further argue that interpreting § 1367 according to its plain meaning would necessarily lead to the "absurd" result of eliminating the complete diversity rule, because, they say, diverse plaintiffs could simply join nondiverse plaintiffs under Rule 20. Pet. Br. at 23. That argument rests on the same erroneous assumption that the amount-in-controversy rule has the same the jurisdictional effects in a diversity action as the complete diversity rule. As we have

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[2] The Court's opinion in *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), cited in *Schacht*, 524 U.S. at 388, 389, also suggests that the rule of complete diversity is a rule of original jurisdiction: "When a plaintiff sues more than one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for *each* defendant or face dismissal." 490 U.S. at 829 (emphasis in original). The *Newman-Green* Court did approve dismissal of a dispensable nondiverse party (as opposed to dismissal of the entire action) when the party's nondiverse status is discovered late in the litigation, but the opinion still describes the presence of such a party as creating a "jurisdictional defect[]," for which dismissal is a "remedy." *Id.* at 833 n.7; *see also id.* at 836 (dismissal "correct[s] jurisdictional defects"); *id.* at 839 (Kennedy, J., dissenting) (effect of dismissal is to confer jurisdiction "retroactively"). The dismissal of nondiverse claims *Newman-Green* authorizes in the complete diversity context is thus very different from dismissal of monetarily insufficient claims *Zahn* authorizes in the amount-in-controversy context. Unlike *Newman-Green*'s treatment of the presence of a nondiverse party as an actual "jurisdictional defect" in the overall action (for which dismissal of the individual nondiverse parties is a "remedy"), *Zahn* and its antecedents make clear that the presence of a monetarily insufficient claim in a diversity case has no effect at all on the court's jurisdiction over the overall action. *See supra* at 11-12.

shown, it may well be the case that a court may *not* assume "original jurisdiction" in diversity within the meaning of § 1367(a) over a "civil action" when the claims of nondiverse parties are joined with those of diverse parties.[3] Because the complete diversity rule may be the kind of rule of original jurisdiction the amount-in-controversy rule clearly is not, it is not necessary to read the end of the complete diversity rule into the plain textual reading of § 1367.

But the ultimate effect of § 1367 on the rule of complete diversity is, in any event, beside the point here. Regardless of its meaning for complete diversity, the text of the statute is unambiguous with respect to the joinder of monetarily insufficient claims of unnamed plaintiffs in a class action with the sufficient claims of the named plaintiffs. "The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical." *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998). And even if the plain meaning of the statute led to less-than-complete diversity in some cases, that would raise no constitutional difficulty warranting a departure from the straightforward textual reading: the requirement of complete diversity is purely statutory, and there is "no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as *any* two adverse parties are not co-citizens." *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (emphasis added); *see Caterpillar, Inc. v. Lewis*, 519 U.S.

[3] This is the interpretation of § 1367 and complete diversity urged by James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. Pa. L. Rev. 109, 146 (1999). The petitioners cite this article in support of their view of the amount-in-controversy rule, Pet. Br. at 11 n.4, but, like petitioners, Pfander errs in assuming that the amount-in-controversy rule is the jurisdictional equivalent of the complete diversity rule in a class action diversity proceeding, *see* Pfander, *supra*, at 148.

61, 68 & n.3 (1996). But whatever may be its consequences for the rule of complete diversity – and those consequences, as we have seen, are not foreordained – all that is relevant here is that the text of § 1367 plainly confers supplemental jurisdiction on the monetarily insufficient claims of unnamed plaintiffs in a putative class action.

C

The previous sections have demonstrated that the plain text of the statute compels a clear and straightforward result here. Petitioners nevertheless resort to the legislative history in the hopes of discerning an intent of Congress that would trump the text of the statute. But that is not the function of legislative history; while this Court on occasion adverts to legislative history to clarify an ambiguous statute, the use of such history to redraft one that is unambiguous has never been countenanced. *See, e.g., Shannon v. United States*, 512 U.S. 573, 583 (1994). And even assuming legislative history might control over the statutory text where that history leaves an objective observer "fully convinced that every Member of the enacting Congress, as well as the President who signed the Act, intended a different result," *Conroy v. Aniskoff*, 507 U.S. 511, 518 n.12 (1993), this is hardly such a case.

Petitioners principally rely on a single footnote, attached to a single sentence, in a single committee report accompanying the 1990 Act. The footnote is simply a citation to *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921) (which held that the rule of complete diversity applies only to named plaintiffs in a class action) and to *Zahn*. And the sentence to which that footnote is attached states: "The section [§ 1367] is not intended to affect the *jurisdictional requirements* of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley* [*v. United States*, 490 U.S. 545 (1989)]." H.R. Rep. 101-

734, at 29 (1990) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875.

Though critical to petitioners' claim that the legislative history is "unmistakably clear," Pet. Br. at 25, this passage in fact does not admit of obvious interpretation. Petitioners read the passage, together with its footnote, as plainly saying that the statute was not intended to "overrule" *Zahn*, but that reading is not at all obvious from the words, nor is it even necessarily the best reading. What the sentence actually says is that the statute was not intended to set aside the "jurisdictional requirements" of § 1332, which in *both* the cited cases – *Zahn* and *Ben Hur* – had been understood as meaning that at least *some* of the plaintiffs must satisfy both predicates of the statute. And insofar as the phrase "jurisdictional requirements of . . . § 1332" may be taken as a reference to preservation of a court's *original* diversity jurisdiction, we have already explained why the *Zahn* rule is not about original jurisdiction at all. Thus, the legislative history snippet so key to petitioners' analysis can be read as simply confirming what the statutory text actually says: the statute preserves the rule, reaffirmed in *Ben Hur* and *Zahn*, that in a diversity case there must be some claim within the court's original diversity jurisdiction, before a court may exercise supplemental jurisdiction authority over transactionally related claims.

Thus, the passage on which petitioners primarily rely fails to establish for certain that even the author of that passage – not to mention a single member of Congress – clearly intended that § 1367 would not alter the result in a case like *Zahn*. There is, in fact, only one snippet from the legislative history that says anything precise about the result in *Zahn*: the initial report of the Federal Courts Study subcommittee, authored by subcommittee chairman Judge Posner, which explicitly proposed *rejecting* the rule in *Zahn*, and recommended statutory language that would accomplish that result.

See Report to the Federal Courts Study Committee of the Subcommittee on the Federal Courts and Their Relation to the States (Mar. 12, 1990), *reprinted in* Federal Courts Study Committee, 1 *Working Papers and Subcommittee Reports* 1, 561 n.33 (1990).[4] And that language, it turns out, was in all relevant ways identical to the statutory language ultimately enacted by Congress. *Compare id. with* 28 U.S.C. § 1367. Several law professors involved in the drafting process, on the other hand, apparently favored maintaining the *Zahn* rule. *See* Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 19 Seton Hall Legis. J. 157, 160 (1994). Notably, it does not appear that a single member of Congress was among those who engaged in the debate over the future of *Zahn*.

At the end of the day, about the only thing that is "clear" from the record of commentary, proposals, amendments, and counterproposals concerning § 1367 is that *Zahn* had its supporters and detractors among the judges and law professors who saw § 1367 through its various iterations. That says nothing at all, of course, about what *Congress* intended in enacting the statute. For that we must rely on the statute's language. And as to the meaning of that language, the one lesson we *can* learn from the legislative history is that Judge Posner's subcommittee believed that language essentially identical to what would become § 1367 would reverse the *Zahn* rule.

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[4] Petitioners incorrectly state that the full Committee "rejected" that proposal, Pet. Br. at 28; in fact, the full Committee's report did not say a word about *Zahn* or the effect of the recommended statutory language on the *Zahn* rule.

II. ALLOWING THE REMOVAL OF STATE COURT CLASS ACTIONS INVOLVING PARTIES WITH DIVERSE CITIZENSHIP IS A SENSIBLE POLICY RESULT

In addition to asserting that the plain textual reading of § 1367 leads to the "absurd" result of eliminating the complete diversity rule, *see supra* at 15-17, petitioners defend their construction of the statute on the ground that Congress could not possibly have intended to "expand" federal diversity jurisdiction over class actions such as the case at bar. In reality, the absurdity lies with petitioners' argument. Congress has been manifesting an increasingly heightened concern about state courts' handling of class actions. Indeed, that concern has now grown so acute that only several months ago, the House of Representatives passed legislation that would allow parties much broader latitude to remove state court class actions to federal court.[5] Recognizing that interstate class actions "deserve Federal court access because they typically affect more citizens, involve more money, and implicate more interstate commerce issues than any other type of lawsuit,"[6] that legislation expands federal jurisdiction over certain purported class actions if there is minimal diversity among the parties (including the unnamed putative class members), regardless of each claimant's amount in controversy.[7] If Congress is now passing laws granting even broader federal jurisdiction over class actions than what would be permitted by the plain meaning of § 1367, there is hardly a sound basis for nullifying that plain meaning on the

[5] H.R. 1875, 106th Cong. (1999). *See also* 145 Cong. Rec. H8594-95 (daily ed. Sept. 23, 1999) (floor vote).

[6] H.R. Rep. 106-320, at 4 (1999).

[7] Comparable legislation is pending in the Senate. *See* S. 353, 106th Cong. (1999).

ground that it is "absurd" to suggest that Congress could have intended such a result.

The powerful logic supporting the expansion of federal diversity jurisdiction over purported class actions is amply demonstrated by the records from multiple recent House and Senate Judiciary Committee hearings exploring the abuses of state court class actions and from the debates of this issue on the House floor. Those hearings and debates have focused on several long-standing problems:

First, there is concern that some state courts have become magnets for class actions, effectively declaring themselves the national tribunals for such cases. Even though state legislatures and courts have generally adopted the same principles for the certification of classes as have our federal courts,[8] some local county courts in some states have manifested a "laissez faire" attitude toward the question whether matters may be litigated on an aggregated basis. A report recently released by the RAND Institute for Civil Justice ("RAND/ICJ") confirmed what PLAC's corporate members already knew from their own experience: certain state courts have become fertile grounds for consumer and mass tort class actions because they are more likely to certify nationwide classes than are the federal courts or other state courts. Exec. Summary, RAND/ICJ, *Class Action Dilemmas* 7 (1999). Since nationwide class actions can, by definition, be filed in virtually any court of general jurisdiction in any of the 50 states, certain state courts have become the favorites of the plaintiffs' bar. *See Class Action Dilemmas, supra*, at

[8] Forty states have adopted the current Fed. R. Civ. P. 23 virtually verbatim. *See* H.R. Rep. 106-320, at 5 (1999). Two states do not permit class actions, *id.*, and the courts of the other eight states typically look to federal precedents for guidance on class certification issues, *see, e.g., Vasquez v. Superior Court*, 484 P.2d 964, 976 (Cal. 1971) (in bank); *Testa v. City of Providence*, 572 A.2d 1336, 1338 n.2 (R.I 1990); *Gardner v. Newsome Chevrolet-Buick, Inc.*, 404 S.E.2d 200, 201 (S.C. 1991).

7; *Hearing Before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary on H.R. 3789* ["*H.R. 3789 Subcommittee Hearing*"], 105th Cong. 8 (June 18, 1998) (testimony of Sheila Birnbaum, Esq.) ("Plaintiff class action lawyers will typically seek out 'select' state court judges who quickly certify class actions with seemingly little or no consideration to the appropriateness of class certification under the rules or the due process rights of the defendant and absent class members."). As the RAND/ICJ report concluded, "class action attorneys 'shop' for judges who are favorable to class actions," and such attorneys "find them most often in state courts." *Class Action Dilemmas*, *supra*, at 7.[9]

Second, there is concern that the state courts that are class action magnets are "speed traps" for defendants. The expanded use of class actions in certain state courts would be little cause for concern if those courts generally treated certification of classes in accordance with the minimal criteria specified in Rule 23 of the Federal Rule of Civil Procedure. The federal rule enables plaintiffs to litigate and dispose of multitudinous claims simultaneously, but it also requires observance of specific additional protections to ensure that simultaneous litigation of multiple claims does not impair the defendant's due process right to present an adequate defense

[9] In many states, county courts can take this approach without substantial fear of reversal either (a) because class certification determinations are not subject to interlocutory appellate review, *see, e.g.*, *Eaton v. Unified Sch. Dist. No. 1*, 595 P.2d 183, 186 (Ariz. 1979); *Knowles v. Standard Sav. & Loan Ass'n*, 261 S.E.2d 49 (S.C. 1979); or (b) because the state's appellate courts afford the trial courts broad discretion in making class certification determinations, *see, e.g.*, *Tuley v. Kansas City Power & Light Co.*, 843 P.2d 248, 256 (Kan. 1992) (trial court's class certification determination may be reversed only where it was "arbitrary, fanciful, or unreasonable"); *Carson v. Weiss*, 972 S.W.2d 933, 934 (Ark. 1998) (interlocutory appeal of class action determination subject to review only for "abuse of discretion").

against each individual claim. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) ("[The] Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged."). For example, Rule 23 requires that claims of the representative parties be "typical" of the claims of every member of the class, Fed. R. Civ. P. 23(a), and that common issues of law "predominate" over the any legal questions affecting only individual class members, *id.* 23(b)(3). Those requirements ensure that a defendant forced to deal with hundreds or thousands of plaintiffs at once is in fact only defending against a single, narrowly presented legal situation. Under those circumstances, there is less risk of prejudicing the defendant's right to fully defend against claims brought by numerous plaintiffs.

The state courts that manifest a "laissez-faire" attitude toward class certification typically do not take seriously the due process foundations of the requirement that class actions present legal and factual issues that are truly common to the entire class. *See H.R. 3789 Subcommittee Hearing*, *supra*, at 22 (attached March 5, 1998 testimony of John W. Martin, Jr.) ("many local courts are willing to certify for class action treatment cases that do not comport with the basic class action requirements. . . . Indeed, some state courts actually have certified proposed classes identical to ones rejected outright by federal courts [on due process grounds]."). For example, the congressional hearings revealed a pattern among some state courts for certifying classes on the same day the complaint was filed before the defendant was even served and allowed to oppose. *Id.* The record also indentifies one state court judge who certified almost as many cases for class treatment during 1996-1997 as were certified during 1997 by all approximately 900 sitting federal district judges.[10] This abuse of the class action device has serious

[10] *See Mass Torts and Class Actions: Hearing before the Subcomm. on Intellectual Property and the Courts of the House Comm. on the Judi-*

consequences. The inappropriate certification of a class is hardly a minor pretrial ruling error. The issuance of a class certification order immeasurably alters the nature of the litigation, most particularly by dramatically increasing the risks to which the defendant is exposed, and, consequently, the incentives for settling even the most nonmeritorious actions. As was observed in recent House floor debates,

> Today, an attorney can devise a theoretical case, write it as a class action, and argue that he is pursuing the claim on behalf of millions of people, none of [whom] solicited that attorney's assistance. Using this practice, hundreds of frivolous lawsuits are filed in favorable State courts and used as high-stakes, court-endorsed blackmail devices against companies that usually settle rather than face a long and arduous court battle.[11]

Third, there is concern that this "laissez-faire" environment in certain state courts has spawned a "flood of class-action litigation."[12] As former Attorney General Griffin Bell has testified,

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ciary, 105th Cong. (March 5, 1998) (statement of Dr. John Hendricks) (available at http://www.house.gov/judiciary/41164.htm).

[11] 145 Cong. Rec. H8564 (daily ed. Sept. 23, 1999) (statement of Rep. Goodlatte). As Judge Posner has observed, a class certification order "often, perhaps typically, inflict[s] irreparable injury on the defendants." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995).

[12] *H.R. 1875, The Interstate Class Action Jurisdiction Act of 1999, Hearing before the House Comm. on the Judiciary* (July 21, 1999) (statement of Prof. E. Donald Elliott (Yale Law School)) (available at http://www.house.gov/judiciary/elli0721.htm) (citing D. Hensler, *Preliminary Report of the RAND Study of Class Action Litigation* 15 (May 1, 1997) (observing a "doubling or tripling of the number of putative class actions" heavily "concentrated in the state courts")).

> class actions are now being used by attorneys to build lawsuits where none would otherwise exist. Please do not take seriously any suggestion that class actions normally originate when an injured party seeks out an attorney and asks for assistance in obtaining a remedy. Attorneys usually "develop" the concept for a claim and then search for a plaintiff to fit the mold.[13]

Fourth, concern has been expressed that in many state court class actions, consumer class members are merely pawns in what are really business ventures masquerading as lawsuits. In recent congressional hearings, witnesses have urged that state court class actions primarily benefit class counsel, not the class members.[14] For example, former Attorney General Richard Thornburgh observed that "[t]he most alarming aspect of recent class-action law is the utter disproportion between the[] vast fortunes reaped by the individual trial lawyers, and the injury claimed and the remedial actions achieved on behalf of individual plaintiffs."[15] Those

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[13] *H.R. 1875, The Interstate Class Action Jurisdiction Act of 1999, Hearing before the House Comm. on the Judiciary* (July 21, 1999) (statement of Hon. Griffin Bell) (available at http://www.house.gov/judiciary/bell0721.htm).

[14] *Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees, Hearing before the Subcomm. on Administrative Oversight and the Court of the Senate Judiciary Comm.*, 104th Cong. (Oct. 30, 1997) (statement of Sen. Herb Kohl); *S. 353: "The Class Action Fairness Act of 1999," Hearing before the Subcomm. on Administrative Oversight and the Courts of the Senate Judiciary Comm.*, 106th Cong. (May 4, 1999) (statement of Sen. Herb Kohl); *S. 353: "The Class Action Fairness Act of 1999," Hearing before the Subcomm. on Administrative Oversight and the Courts of the Senate Judiciary Comm.*, 106th Cong. (May 4, 1999) (statement of John P. Frank).

[15] *Mass Torts and Class Actions: Hearing before the Subcomm. on Intellectual Property and the Courts of the House Comm. on the Judiciary*, 105th Cong. (March 9, 1998) (statement of Hon. Richard Thornburgh) (available at http://www.house.gov/judiciary/41156.htm).

charges are bolstered by case reviews in the RAND study revealing that in non-personal injury class actions filed in state courts, class counsel often (if not typically) receive more dollars from settlements or verdicts than the thousands of persons in the class *combined*. *See Class Action Dilemmas, supra,* at 23.

Fifth, there is concern that state court class actions have created a serious "false federalism" problem. As former Acting Solicitor General Walter E. Dellinger testified before the House Judiciary Committee,

> many state courts faced with interstate class actions . . . have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, which results essentially in a breach of federalism principles. . . . And because the state court decision has binding effect everywhere . . . the other states . . . have no way of revisiting the interpretation of their own laws.[16]

For example, in a nationwide class action, the Williamson County (Illinois) Circuit Court recently applied Illinois law to the question whether it is fraudulent for an auto insurer to use aftermarket parts (instead of original manufacturer's parts) in repairing accident-damaged vehicles. The attorneys general and insurance commissioners of other states protested that choice-of-law determination vigorously, noting that their respective states' laws (which should have been applied instead of Illinois law) *encouraged* the use of aftermarket parts to reduce repair costs.[17] Nevertheless, finding

[16] *H.R. 1875, The Interstate Class Action Jurisdiction Act of 1999, Hearing before the House Comm. on the Judiciary* (July 21, 1999) (statement of Hon. Walter E. Dellinger) ("Dellinger Testimony") (available at http://www.house.gov/judiciary/dell0721.htm).

[17] *See* Matthew L. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. Times, Sept. 27, 1998, at 29.

the practice fraudulent under Illinois law, the jury and court awarded $1.2 billion to the nationwide class.[18] Unsurprisingly, insurers nationwide immediately stopped using aftermarket parts.[19] Thus, a county court judge elected by the approximately 60,000 residents of a single Illinois community effectively countermanded the policies adopted by the elected officials of other jurisdictions.[20]

Finally, many witnesses at the recent congressional hearings have expressed the view that the pending class action crisis is attributable to the fact that the federal courts' doors are closed to most class actions not involving federal questions. As a leading civil procedure treatise has noted, the "traditional principles" regarding federal diversity jurisdiction over class actions "have evolved haphazardly and with little reasoning" and "serve no apparent policy."[21] Indeed, as noted during a recent House floor debate, the diversity jurisdiction statutes

> were originally enacted years ago, well before the modern class action arose, and they now lead to perverse results. For example, under current law, a citizen of one State may bring in Federal court a simple $75,001 slip-and-fall claim against a party from another State. However, if a class of 25 million product owners, each having a claim of $10,000 living in all 50 states, brings claims collectively worth $250 bil-

[18] Roger Manor, *State Farm Liability Jumps to $1.1 Billion*, Chicago Sun-Times, Oct. 9, 1999, at 1; Davan Majaraj, *Judge Hits State Farm in Parts Case*, L.A. Times, Oct. 9, 1999, at C-1.

[19] *See, e.g., Insurance Company to Halt Use of Cheaper Auto Parts*, Fort Worth Star-Telegram, Nov. 7, 1999, at 13.

[20] Other examples are cited in the Dellinger Testimony, *supra* note 16.

[21] 14B Charles A. Wright *et al.*, Federal Practice and Procedure § 3704, at 127 (3d ed. 1998).

> lion against the manufacturer, the lawsuit cannot be heard in Federal court.[22]

Echoing that view in recently concluding that a large class action must be remanded to an Alabama state court, the United States Court of Appeals for the Eleventh Circuit *apologized* to the defendant, noting that the state court to which the case was being remanded "has on occasion produced gigantic awards against corporate out-of-state defendants." *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797 (11th Cir. 1999). As the court observed, "one would think that this case is exactly what those who espouse the historical justification for [federal diversity jurisdiction] would have had in mind," *id.*, but the current federal jurisdiction rules "do[] not accommodate the reality of modern class litigation," *id.* at 799 (Nangle, D.J., concurring).[23]

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In sum, contrary to petitioners' contentions, the result that the text of § 1367 commands is in no way an "absurd" policy that could not have been intended by the members of Congress. As noted above, the House of Representatives recently passed legislation that would expand federal jurisdiction over purported class actions well beyond what is permitted by the plain meaning of § 1367.[24] And as long in-

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[22] 145 Cong. Rec. H8569 (daily ed. Sept. 23, 1999) (statement of Rep. Goodlatte).

[23] Similarly, in *In re Prudential Ins. Co. of America Sales Practices Litig.*, 148 F.3d 283, 305 (3d Cir. 1998) (Scirica, J.), the Third Circuit observed that "national (interstate) class actions are the paradigm for federal diversity jurisdiction," yet most such "class actions may be beyond the reach of the federal courts" under the current jurisdictional statutes.

[24] H.R. 1875, 106th Cong. (1999). *See* 145 Cong Rec. H8594-95 (daily ed. Sept. 23, 1999) (floor vote). Comparable legislation is pending in the Senate. S. 353, 106th Cong. (1999).

terpreted by this Court, the diversity jurisdiction statute already allows an out-of-state defendant to remove a putative class action filed by diverse named plaintiffs even if the complete diversity requirement is not satisfied with respect to the unnamed class members. *See Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921). Section 1367 merely equalizes that rule for the amount-in-controversy requirement, sensibly allowing defendants to remove to federal court the kinds of putative multistate class actions now filed so frequently in certain state courts – actions that, while alleging individual claims of less than the diversity statute minimum, on aggregate expose the defendant to millions of dollars in potential liability.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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