No. 99-391

IN THE SUPREME COURT OF THE UNITED STATES

ROBIN FREE AND RENEE FREE,
Petitioners,

v.

ABBOTT LABORATORIES, et al.,
Respondents.

BRIEF FOR RESPONDENTS

Filed February 14, 2000

QUESTION PRESENTED

Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes federal courts to exercise supplemental jurisdiction over the claims of absent class members where, as here, those courts have original jurisdiction over the claims of the named plaintiffs.

RULE 29.6 STATEMENT

Respondents Abbott Laboratories and Bristol-Myers Squibb Company have no corporate parents, and no publicly traded company owns 10% or more of their stock. Respondent Mead Johnson & Company is a wholly-owned subsidiary of Bristol-Myers Squibb Company.

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Respondents.

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

BRIEF FOR RESPONDENTS

INTRODUCTION

This case presents a straightforward issue of statutory interpretation. The plain language of the supplemental jurisdiction statute authorizes federal courts to exercise supplemental jurisdiction over non-federal claims to the full extent allowed by Article III, except for particular categories of claims specified in the statute. Conspicuously absent from the list of statutory exceptions are claims brought on behalf of a class under Rule 23 of the Federal Rules of Civil Procedure. That is the beginning and the end of this case. The statute unambiguously authorizes courts to exercise supplemental jurisdiction over the claims of absent class members where, as here, the court has original jurisdiction over the claims of the named plaintiffs.

Petitioners, however, contend that the statute's legislative history reveals a contrary congressional "intent" that is controlling here. For them, "the central question presented by this case is whether the language of Section 1367 requires this Court to disregard Congress's unmistakable intent." Pet. Br. 6. But that approach gets matters precisely backwards. Statutory interpretation begins with the language of the statute, and, at least where that language is unambiguous, ends there. Because the relevant statutory text here is clear, it is neither necessary nor appropriate to consult the legislative history. Indeed, petitioners' contrary approach "give[s] point to the quip that only when legislative history is doubtful do you go to the statute." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543 (1947).

In any event, petitioners' legislative history argument fails on its own terms. The passage of legislative history on which they rely does not purport to explain or interpret any particular statutory provision, but simply declares a free-floating intent bereft of any textual anchor. That is not an interpretive aid, but an alternative (and illegitimate) source of law. As this Court has emphasized, "courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point." *Shannon v. United States*, 512 U.S. 573, 584 (1994) (internal quotation and brackets omitted).

In the final analysis, there is great irony in petitioners' position that the supplemental jurisdiction statute essentially does nothing more than codify the common law of "ancillary" and "pendent" jurisdiction. For years, this Court struggled to reconcile that common law with the bedrock principle that the jurisdiction of the federal courts is governed by statute. Congress enacted the supplemental jurisdiction statute in 1990 to replace the thicket of confusing and contradictory common-law rules. Any common law rules inconsistent with the statute, accordingly, are no longer valid. If Congress did not "intend" to authorize supplemental jurisdiction over the claims at issue here, then Congress can always amend the statute. But that, of course, is a matter for Congress, not this Court.

STATEMENT OF THE CASE

Petitioners Robin and Renee Free filed this class action in Louisiana state court in October 1993, alleging that respondents Abbott Laboratories, Bristol-Myers Squibb Company, and Mead Johnson & Company conspired to raise the price of infant formula in Louisiana in violation of state law. J.A. 39a-51a. Petitioners purported to represent a class consisting of "[a]ll consumers who reside in the State of Louisiana and who, at any time during the period of January 1, 1980 through December 31, 1992, purchased one or more of the [respondents'] brands of infant formula in the State of Louisiana." J.A. 41a. They sought treble damages, attorney's fees, costs, and interest, but purported to disclaim any damages in excess of $20,000 per class member. J.A. 40a-41a.

Respondents timely removed the action to federal court, and petitioners moved to remand. *See* Pet. App. 100a. The district court (Parker, C.J., M.D. La.) held that the case was within the scope of federal jurisdiction, but declined to exercise that jurisdiction on discretionary grounds. Pet. App. 92a-97a, 103a-05a.

The district court first concluded that it could exercise diversity jurisdiction over the named plaintiffs' claims under 28 U.S.C. § 1332 because (1) there was complete diversity of citizenship between the named plaintiffs and the defendants, Pet. App. 99a, 103a, and (2) "the named plaintiffs have claims in excess of $50,000 because under Louisiana law the attorney's fees allowed by statute are attributed to the class representatives," Pet. App. 104a (citing La. Code Civ. Proc. Ann. art 595). The court then concluded that it could exercise supplemental jurisdiction over the absent class members' claims under 28 U.S.C. § 1367 because those claims were "so related to [the named plaintiffs' claims] that they form part of the same case or controversy under Article III of the United States Constitution." Pet. App. 104a (quoting 28 U.S.C.

§ 1367(a)). But the court ultimately abstained from exercising jurisdiction over any of the claims on the ground that they "present novel issues of state law," including the issue whether indirect purchasers have a cause of action under Louisiana antitrust law, and whether any such cause of action is preempted by federal law. Pet. App. 104a; *see also id.* at 95a-97a. Accordingly, the district court granted petitioners' remand motion.

On appeal, the Fifth Circuit vacated the remand order. Pet. App. 76a-91a. The court began by affirming the district court's conclusion that it had diversity jurisdiction over the named plaintiffs' claims. Pet. App. 79a-82a. Like the district court, the court of appeals held that the named plaintiffs' claims satisfied both the complete diversity and matter-in-controversy requirements of the diversity statute. In particular, the court of appeals agreed with the district court that the matter-in-controversy requirement was satisfied because Louisiana law awards all attorneys' fees in a class action to "'the representative parties,'" rather than to the class as a whole. Pet. App. 81a (quoting La. Code Civ. Proc. Ann. art. 595).

The Fifth Circuit next affirmed the district court's conclusion that it had supplemental jurisdiction over the absent class members' claims. Pet. App. 82a-89a. The court of appeals explained that the supplemental jurisdiction statute's "first section vests federal courts with the power to hear supplemental claims generally, subject to limited exceptions set forth in the statute's second section." Pet. App. 87a. Because "[c]lass actions are not among the enumerated exceptions," supplemental jurisdiction here was proper. *Id.* That conclusion, the Fifth Circuit recognized, had the effect of superseding the result in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), an effect specifically disclaimed by a passage in the legislative history. "But the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result." Pet. App. 87a-88a. Because "abolishing the strictures of *Zahn* is not an absurd result," the

Fifth Circuit held, the plain language of the statute was controlling. Pet. App. 88a.

Finally, the court of appeals reversed the district court's decision to abstain from exercising its jurisdiction over this case. Pet. App. 89a-91a. There was no basis for declining jurisdiction over the named plaintiffs' claims, the Fifth Circuit held, because "[s]tanding alone . . . the novelty or complexity of state law issues is not enough to compel abstention." Pet. App. 90a. Accordingly, "[t]his is not one of those truly rare and exceptional cases in which *Colorado River* abstention is proper." *Id.* It followed, the appellate court held, that there was no basis to abstain from exercising supplemental jurisdiction over the absent class members' claims. "The court must now adjudicate claims of the class representatives—including the same novel and complex state law issues the district court preferred to leave to Louisiana." *Id.* "In short," the Fifth Circuit concluded, "the entire case should remain in federal court." Pet. App. 91a.

The case thus returned to the district court, which ultimately dismissed all claims with prejudice on the ground that petitioners, as indirect purchasers, lacked antitrust standing under Louisiana law. Pet. App. 26a-41a. Petitioners appealed that ruling to the Fifth Circuit, which certified the dispositive state-law questions to the Louisiana Supreme Court. Pet. App. 10a-25a. A divided Louisiana Supreme Court, however, denied the certification order. Pet. App. 9a. Accordingly, the Fifth Circuit proceeded "to fathom Louisiana's unsettled antitrust law as Louisiana courts would do it," Pet. App. 2a, and affirmed the district court's conclusion that Louisiana would follow federal law in holding that indirect purchasers like petitioners lack antitrust standing, *see id.* (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1978)).

Petitioners then sought this Court's review, limited to the sole question whether the supplemental jurisdiction statute authorizes federal courts to exercise jurisdiction over the claims of absent class members "as long as diversity

jurisdiction exists over the claims of one named plaintiff." Pet. i. This Court granted *certiorari* on November 29, 1999.

SUMMARY OF ARGUMENT

This case is governed by two provisions of the supplemental jurisdiction statute, 28 U.S.C. § 1367. The first, subsection (a), broadly authorizes federal courts to exercise supplemental jurisdiction over nonfederal claims that form part of the same Article III case or controversy as claims within the courts' original jurisdiction. The second, subsection (b), carves out certain specific exceptions to supplemental jurisdiction where the courts' original jurisdiction is based on diversity of citizenship. The claims of the absent class members here fall within the scope of subsection (a), and are not carved out by subsection (b).

The absent class members' claims fall within the scope of subsection (a) because they form part of the same Article III case or controversy as the named plaintiffs' claims, which are within the federal courts' original jurisdiction. (Petitioners do not dispute that the named plaintiffs satisfy both the complete diversity and matter-in-controversy requirements of the diversity statute.) The absent class members' claims are not carved out by subsection (b) because that subsection does not include claims brought under Rule 23 of the Federal Rules of Civil Procedure. Accordingly, as the Fifth Circuit concluded, the absent class members' claims are properly within the federal courts' supplemental jurisdiction.

Petitioners' two arguments against this straightforward application of the supplemental jurisdiction statute are manifestly incorrect. *First*, petitioners argue that the statute requires original jurisdiction over *all* claims in a particular "civil action" as a predicate for exercising supplemental jurisdiction. That argument, however, makes no sense, because the whole point of supplemental jurisdiction is to allow courts to exercise jurisdiction over claims that are *not* otherwise within their original jurisdiction. Indeed, this Court rejected

precisely this argument just two Terms ago in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997).

Second, petitioners argue that the failure of any plaintiff to satisfy the matter-in-controversy requirement destroys "original jurisdiction" over the entire action. That is not true. Under long-settled law, the failure of one of multiple plaintiffs to satisfy the statutory matter-in-controversy requirement requires dismissal of *that* plaintiff, but does not require dismissal of *other* plaintiffs who satisfy that requirement. *See, e.g., Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588-90 (1939); *Grosjean v. American Press Co.*, 297 U.S. 233, 241-42 (1936); *Rich v. Lambert*, 53 U.S. (12 How.) 347, 352-53 (1851).

A textual interpretation of the supplemental jurisdiction statute, to be sure, has the result of superseding the implicit holding in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that courts cannot exercise common-law ancillary jurisdiction over absent class members' claims even when they have original jurisdiction over the named plaintiffs' claims. But that result is by no means absurd; to the contrary, it is eminently sensible. *Zahn* drew a strong dissent, and has since been widely criticized, in part because it encouraged wasteful duplicative litigation: those members of a class who could satisfy the amount-in-controversy requirement could proceed in federal court, but those members of that very same class who could not were forced to litigate the identical issues in state court.

Because the text of the statute is plain and does not lead to an absurd result, there is no basis for consulting the legislative history. Petitioners rely on an isolated passage from a committee report that they interpret as expressing congressional "intent" to retain the implicit holding in *Zahn*. But that passage does not have the force of law, and thus cannot override the statute's plain text. Legislative history cannot be used to *create*, but only to *resolve*, doubts about the meaning of a statute.

Petitioners' legislative history argument, moreover, fails on its own terms. The snippet of legislative history on which they rely does not purport to explain or interpret any particular provision of the statute, but simply expresses a free-floating intention divorced from the statutory text. As this Court explained in *Shannon v. United States*, 512 U.S. 573, 583 (1994), such legislative history serves no legitimate purpose.

In any event, the legislative history as a whole in this case confirms the textual conclusion that the supplemental jurisdiction statute supersedes the implicit holding in *Zahn*. The language and structure of the statute as ultimately enacted are in all material respects identical to a draft statute that was expressly intended to supersede *Zahn*. Petitioners' argument that the legislative history here is "entirely one-sided," Pet. Br. 31, is thus inaccurate, and the legislative history actually supports respondents at least as much as petitioners.

ARGUMENT

I. THE PLAIN TEXT OF SECTION 1367 AUTHORIZES COURTS TO EXERCISE SUPPLEMENTAL JURISDICTION OVER THE CLAIMS OF ABSENT CLASS MEMBERS.

As this Court has emphasized time and again, an analysis of any statute must begin with the statutory text itself, not with external sources. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Caminetti v. United States*, 242 U.S. 470, 485 (1917). In this case, the Court need proceed no further than this indispensable initial step in the analysis.

The first subsection of the supplemental jurisdiction statute, 28 U.S.C. § 1367(a), broadly authorizes federal courts to exercise supplemental jurisdiction to the limits of Article III. The second subsection of that statute, § 1376(b), then carves out specific exceptions to that authority in diversity cases. Because the claims of the absent class members in this case fall within the first subsection, but are not carved out by the second subsection, the Fifth Circuit properly concluded that those

claims fell within the statutory scope of supplemental jurisdiction.[1]

A. The Plain Text of Subsection 1367(a) Encompasses the Claims of Absent Class Members Where the Claims of the Named Plaintiffs Are Within the Federal Courts' Original Jurisdiction.

This case is governed by subsection (a) of the supplemental jurisdiction statute, which provides in its entirety:

> (a) Except as provided in subsection (b) or (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 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.

This provision extends federal jurisdiction over claims otherwise outside that jurisdiction when two conditions are met (1) the district court in "any civil action" must have "original jurisdiction" over some claim or claims, and (2) the claim or claims for which supplemental jurisdiction is sought must form part of the same "case or controversy under Article III of the United States Constitution" as the claim or claims within the district court's original jurisdiction. Both of these conditions are met here.

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[1] The third subsection of the statute, § 1367(c), authorizes courts to decline to exercise their supplemental jurisdiction under exceptional circumstances. The Fifth Circuit, however, held that the district court abused its discretion by declining jurisdiction over the absent class members' claims under that provision, *see* Pet. App. 89a-91a, and petitioners have not challenged that holding in this Court.

First, the district court had "original jurisdiction" over the named plaintiffs' claims under the diversity statute, 28 U.S.C. § 1332.[2] As the courts below recognized, the named plaintiffs here are citizens of different States than the defendants, and their claims satisfy the statutory matter-in-controversy requirement because they alone are entitled to collect all attorneys' fees under Louisiana law. Pet. App. 79a-82a (Fifth Circuit); 103a-04a (district court). Petitioners do not contest either of these points.[3]

Second, the absent class members' claims are part of the same constitutional "case or controversy" as the named plaintiffs' claims. All of these claims "derive from a common nucleus of operative fact." *Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Indeed, the named plaintiffs and the absent class members challenge precisely the same conduct, which is why petitioners purport to represent the absent class members in the first place. *See, e.g.*, J.A. 44a ("[T]he claims of the representative parties are typical of the claims applicable to the entire class."); *id.* ("[Q]uestions of law and fact common to the

[2] The "original jurisdiction" inquiry is the same in cases removed from state court as in cases filed in federal court in the first instance. As this Court recently explained, "a removed case is necessarily one 'of which the district courts have original jurisdiction.'" *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 165 (1997) (citing 28 U.S.C. § 1441(a)); *see also id.* at 176 n.1 (Ginsburg, J., dissenting).

[3] Petitioners' *amicus*, the State of Louisiana, asserts that the fee-shifting statute on which the lower courts relied is *procedural*, not *substantive*, in nature, and hence inapplicable in federal court under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *See* La. Br. 4, 8-9. That is incorrect. To the contrary, it is well-settled that such fee-shifting statutes are substantive, not procedural, in nature, and hence apply in federal court. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975). That is true regardless of whether the State characterizes the statute as substantive or procedural for its own purposes. *See, e.g., Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945). Petitioners, it is worth noting, do not challenge this point; to the contrary, it is the very premise of the Question Presented in their petition for *certiorari* that "diversity jurisdiction exists over the claims of one named plaintiff." Pet. i.

class predominate over any questions affecting only individual members of the class."). Whatever the outer limits of a single "case or controversy" under Article III, it is clear that all of the claims in this case fall well within them. *See, e.g., City of Chicago v. International College of Surgeons*, 522 U.S. 156, 165-66 (1997); *Gibbs*, 383 U.S. at 725. Again, petitioners do not contest this point.

Petitioners, however, insist that the statutory predicate for supplemental jurisdiction is lacking here because this case is not a "civil action of which the district courts have original jurisdiction." Pet. Br. 9-19. That argument is based on two erroneous assumptions.

First, petitioners assume that the statute requires "original jurisdiction" over an *entire* "civil action" before supplemental jurisdiction can be exercised. That assumption, however, collapses the original and supplemental jurisdiction inquiries, and makes no sense. "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." *International College of Surgeons*, 522 U.S. at 167. If the supplemental jurisdiction statute required original jurisdiction over *all* claims in a particular "civil action," then supplemental jurisdiction would be entirely superfluous. By definition, supplemental jurisdiction applies *only* to claims outside the federal courts' original jurisdiction. Petitioners' assumption would thus render the entire supplemental jurisdiction statute a nullity.

The statutory requirement of "original jurisdiction," in other words, applies to *some*, but not *all*, claims in a particular "civil action." The statute underscores this point by authorizing supplemental jurisdiction "over all *other* claims" that form part of the same constitutional case or controversy as "claims in the action within such original jurisdiction." 28 U.S.C. § 1367(a) (emphasis added). If the statute required original jurisdiction over *all* claims in the "civil action," then by definition there

would be no "other claims" over which to exercise supplemental jurisdiction.

This Court confirmed this common-sense point just two Terms ago in *International College of Surgeons*. The party opposing supplemental jurisdiction there, like petitioners here, argued against supplemental jurisdiction on the ground that its nonfederal claims were not within the "original jurisdiction" of the federal courts. *See* 522 U.S. at 166. This Court squarely rejected that argument. *See id.* at 166-69. The initial inquiry, the Court explained, was whether *any* of the claims in the "civil action" were within the district court's "original jurisdiction." *Id.* at 166. If so, "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 contrary approach, which would require *all* claims to fall within the "original jurisdiction" of the federal courts, "would effectively read the supplemental jurisdiction statute out of the books." *Id.*

Second, petitioners erroneously assume that a court cannot exercise "original jurisdiction" over the claims of *any* plaintiff in a "civil action" based on diversity where the statutory matter-in-controversy requirement is not met with respect to the claims of *every* plaintiff. That assumption, which petitioners dub the "matter-in-controversy rule," Pet. Br. 7, is flatly inconsistent with settled law.

Petitioners' error stems from their misreading of the long line of cases holding that "the claims of *each* plaintiff must satisfy the jurisdictional minimum." Pet. Br. 13 (emphasis added). What that long line of cases establishes is that multiple plaintiffs cannot satisfy the matter-in-controversy requirement by simply aggregating their claims. *See, e.g., Zahn v. International Paper Co.*, 414 U.S. 291, 295 (1973); *Snyder v. Harris*, 394 U.S. 332, 336 (1969); *Rogers v. Hennepin County*, 239 U.S. 621, 622 (1916); *Wheless v. City of St. Louis*, 180 U.S. 379, 382 (1901); *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143, 147-48 (1832). Contrary to petitioners' assumption, that

line of cases does not establish that the presence of "*any* plaintiff with claims for less than the jurisdictional minimum" necessarily defeats diversity jurisdiction with respect to every *other* plaintiff in the same civil action. Pet. Br. 16 (emphasis added).

Indeed, just the opposite is true. It has been settled for well over a century that federal courts *can* exercise original jurisdiction over the claims of those plaintiffs who satisfy the statutory matter-in-controversy requirement, even if the claims of one or more *other* plaintiffs in the same action fail to satisfy that requirement. Thus, in *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588-90 (1939), this Court dismissed the claims of those plaintiffs who failed to satisfy the matter-in-controversy requirement, but *not* the claims of the single plaintiff who satisfied that requirement. As the *Clark* Court explained, "[p]roper practice requires that where each of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed *as to those who fail to show that the requisite amount is involved.*" *Id.* at 590 (emphasis added); *see also Grosjean v. American Press Co.*, 297 U.S. 233, 241-42 (1936) (holding that district court properly exercised jurisdiction over claims that satisfied the jurisdictional amount, even though other claims did not); *Rich v. Lambert*, 53 U.S. (12 How.) 347, 352-53 (1851) (exercising jurisdiction over claims that satisfied the jurisdictional amount, but dismissing claims that did not).

This point, in fact, is underscored by *Zahn*, a case that petitioners otherwise embrace. The *Zahn* Court held that a district court could not exercise diversity jurisdiction over absent class members whose claims did not satisfy the statutory matter-in-controversy requirement. 414 U.S. at 301. But the Court did not hold that this deficiency defeated diversity jurisdiction over the *entire* civil action. To the contrary, the *Zahn* Court explained that the matter-in-controversy requirement "requires dismissal of those litigants whose claims do *not* satisfy the jurisdictional amount," not those litigants

who *do* satisfy that amount. *Id.* at 295 (citing, *inter alia*, *Clark*; emphasis added). Indeed, *Zahn* expressly reaffirmed *Clark*'s holding that the matter-in-controversy requirement "requires that *any plaintiff without the jurisdictional amount* must be dismissed from the case, even though others allege jurisdictionally sufficient claims." *Id.* at 300; *see also id.* at 295-96 (noting with approval that the *Clark* Court, "[u]pon ascertaining on its own motion that only one of the plaintiffs in the District Court had presented a claim satisfying the jurisdictional amount, . . . reached the merits of *that* claim but directed the District Court to dismiss the claims of all *other* plaintiffs for want of jurisdiction") (emphasis added); *id.* at 300 (noting with approval that in *Clark* "only one of several plaintiffs had a sufficiently, large claim and all *other* plaintiffs were dismissed from the suit"); *id.* at 300 n.9 ("*Clark* requires the dismissal of any named plaintiff in an action whose case does not satisfy the jurisdictional amount."); *id.* at 301 ("Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and *any plaintiff who does not* must be dismissed from the case.") (emphasis added).

It is not true, in short, that "an exercise of supplemental jurisdiction over the absent class members in this case necessarily would defeat the original jurisdiction requirement that each and every plaintiff in the action has claims exceeding the jurisdictional minimum." Pet. Br. 16. That erroneous assumption apparently stems from petitioners' failure to distinguish between the two distinct requirements of the diversity statute: (1) complete diversity of citizenship, and (2) a matter in controversy in excess of the jurisdictional minimum. *See* 28 U.S.C. § 1332. With respect to the complete diversity requirement, it is true that the presence of a single plaintiff who is a citizen of the same State as a single defendant defeats jurisdiction over the *entire* action, at least where the relevant parties are indispensable. *See, e.g., Peninsular Iron Co. v. Stone*, 121 U.S. 631, 633 (1887); *Corporation of New Orleans v. Winter*, 14 U.S. (1 Wheat.) 91, 94-95 (1816); *Strawbridge v.*

Curtiss, 7 U.S. (3 Cranch) 267 (1806) (Marshall, C.J.).[4] As noted above, however, that has never been true with respect to the matter-in-controversy requirement.

Petitioners thus err by arguing that the statutory predicate for supplemental jurisdiction is lacking here because this case is not a "civil action of which the district courts have original jurisdiction." This case, like *International College of Surgeons*, is a "civil action" in which the district court has "original jurisdiction" over some, but not all, claims. And here, as in *International College of Surgeons*, the exercise of supplemental jurisdiction over the claims outside the court's original jurisdiction would not defeat the original jurisdiction requirement. Accordingly, as in *International College of Surgeons*, the statutory requirement of a "civil action of which the district courts have original jurisdiction" is clearly satisfied. And because all of the claims in this case "form part of the same case or controversy under Article III of the United States Constitution"—a point that petitioners do not even contest—it follows that the absent class members' claims fall within the broad scope of supplemental jurisdiction under subsection (a) of the statute.

B. The Plain Text of Subsection 1367(b) Does Not Carve Out the Claims of Absent Class Members.

The only remaining textual question is whether the absent class members' claims are carved out of the broad scope of supplemental jurisdiction by subsection (b) of the statute. That subsection provides in its entirety:

> (b) In any civil actions of which the district court have original jurisdiction founded solely on section 1332 of this title, the district courts

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[4] Where the relevant parties are *not* indispensable, in contrast, the court can cure a lack of complete diversity by simply dismissing a non-diverse party and retaining original jurisdiction over the rest of the action. *See, e.g., Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832-38 (1989); *Salem Trust Co. v. Manufacturers' Fin. Co.*, 264 U.S. 182, 189-90 (1924).

> shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs 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 would be inconsistent with the jurisdictional requirements of section 1332.

This subsection must be considered here because (in contrast to *International College of Surgeons*), the "original jurisdiction" of the district court in this case is "founded solely on section 1332 of this title," the diversity statute. Subsection (b) precludes the exercise of supplemental jurisdiction over two categories of claims: (1) claims by plaintiffs against persons made parties under Federal Rules of Civil Procedure 14 (third-party practice); 19 (mandatory joinder); 20 (permissive joinder); and 24 (intervention); and (2) claims by persons proposed to be joined as plaintiffs under Rule 19 or seeking to intervene as plaintiffs under Rule 24. These exceptions sharply limit the scope of supplemental jurisdiction in diversity cases, and prevent plaintiffs from evading the requirements of diversity jurisdiction under Section 1332.

As the Fifth Circuit recognized, however, this subsection does not prevent the exercise of supplemental jurisdiction over the claims of absent class members under Rule 23 of the Federal Rules of Civil Procedure, for the simple reason that Rule 23 is "not among the enumerated exceptions" in that provision. Pet. App. 87a. This is nothing more than a straightforward application of the traditional maxim *expressio unius est exclusio alterius*. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993); *TVA v. Hill*, 437 U.S. 153, 188 (1978). If Congress had intended to preclude supplemental jurisdiction

over the claims of absent class members, it could have done so by simply adding Rule 23 to the list of rules in subsection (b). But Congress did not do so, and that omission is dispositive here. "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.). Where, as here, a statute "contains no exception applicable to petitioner's situation[,] we are not at liberty to create an exception where Congress has declined to do so." *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 27 (1989); *see also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134-35 (1989).

Petitioners neither challenge this straightforward interpretation of subsection (b), nor ask this Court to insert Rule 23 into the list of rules in that subsection. Instead, they base their "textual" argument entirely on their interpretation of the "original jurisdiction" clause of subsection (a), and simply assert that "the language, purpose, and operation of Section 1367(b) strongly suggest that Congress intended to leave the matter-in-controversy rule intact." Pet. Br. 19 (capitalization modified). That assertion, however, presupposes the existence of a "matter-in-controversy" rule that would preclude the exercise of original jurisdiction over the claims of *every* plaintiff in an action where the claims of *any* plaintiff fail to satisfy the jurisdictional minimum. As explained above, no such "rule" has ever existed, and hence Congress could not have "intended" to leave any such rule "intact." Pet. Br. 19.

Petitioners also contend that subsection (b) reveals an underlying "purpose" of limiting supplemental jurisdiction in diversity actions, and that allowing courts to exercise supplemental jurisdiction over the claims of absent class members would be "inconsistent" with that purpose. Pet. Br. 19-22. The short answer to that argument is that Congress expressed its "purpose" in the text of the statute by precluding the exercise of supplemental jurisdiction over *some*, but not *all*, nonfederal claims in diversity actions. The fact that subsection (b) does not "carve out" the claims of absent class members under Rule 23 is as much a reflection of congressional intent as

the fact that subsection (b) does "carve out" specified other claims. The purpose of a statute is reflected not only in what it includes, but also in what it omits. *See, e.g., West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

C. A Textual Interpretation of Section 1367 Is Not Absurd.

Petitioners finally contend that the Fifth Circuit's textual interpretation of the supplemental jurisdiction statute would lead to "absurd results" that Congress could not possibly have intended. Pet. Br. 23-25, 35-36. That is not true. A textual reading of the statute is not only rational, but necessary to achieve the statutory goal of "clarify[ing] and codify[ing] instances appropriate for the exercise of pendent or 'supplemental' jurisdiction in district courts." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 48 n.6 (1995). The canon of avoiding absurd results is not a license for courts to substitute their own policy choices for those of Congress. *See, e.g., Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("[T]o justify a departure from the letter of the law based upon [absurdity], the absurdity must be so gross as to shock the general moral or common sense."); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring in judgment) (canon of avoiding absurd results "remains a legitimate tool of the Judiciary . . . only as long as the Court acts with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone.").

It is true that a textual interpretation of the statute has the effect of superseding the result of this Court's decision in *Zahn*.[5] But, as the Fifth Circuit explained, "[a]bolishing the

[5] It is important to note that *Zahn*, on its face, held only that absent class members do not fall within the federal courts' original diversity jurisdiction (continued...)

strictures of *Zahn* is not an absurd result." Pet. App. 88a. *Zahn*'s implicit (and hence unexplained and unexamined) holding—that federal courts lack common-law ancillary jurisdiction over the claims of absent class members who do not satisfy the statutory matter-in-controversy requirement even where the named plaintiffs satisfy that requirement—was criticized by the three dissenters, *see* 414 U.S. at 302-12, and subsequently by commentators, *see, e.g.*, David P. Currie, *Pendent Parties*, 45 U. Chi. L. Rev. 753, 766 (1978) (characterizing *Zahn* as "the bad apple" in the law of ancillary jurisdiction); Richard D. Freer, *Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 Ind. L.J. 5, 19-20 & n.79 (1998) (noting that "the overwhelming majority of academic commentary has criticized *Zahn*," and citing such commentary); Thomas D. Rowe, Jr., *1367 And All That: Recodifying Federal Supplemental Jurisdiction*, 74 Ind. L.J. 53, 63 (1998) (observing that *Zahn* "has few defenders" and should be overruled).

Indeed, overturning the result in *Zahn* is not only rational, but eminently sensible. *Zahn* created the possibility of wasteful duplicative litigation: those members of a class who

[5] (...continued)
unless they individually satisfy the matter-in-controversy requirement, even where the named plaintiffs satisfy that requirement. 414 U.S. at 301. The *Zahn* majority did not address the distinct (but related) question whether a district court, having properly exercised original jurisdiction over the named plaintiffs, could thereafter exercise common-law ancillary jurisdiction over the absent class members. The dissent in *Zahn* did address that question, and concluded that such ancillary jurisdiction was proper. *See id.* at 308-09 (Brennan, J., dissenting); *see also* Charles Alan Wright, *The Law of Federal Courts* 214 (5th ed. 1994) ("*Zahn* is a puzzling case, particularly because of its failure even to consider the argument of three dissenters that recent principles of ancillary jurisdiction, which had been held to overcome the jurisdictional-amount requirement in other contexts, should do so also in connection with joinder of parties.") (footnote omitted); Pet. Br. 14 (acknowledging that the *Zahn* majority "did not directly address th[e] ancillary jurisdiction argument").

could satisfy the amount-in-controversy requirement could proceed in federal court, but those members of that same class who could not were forced to litigate the very same issues in state court. That result is not necessary to preserve the traditional federal rule against claim aggregation: "[i]t is one thing to hold one cannot independently force a flock of petty controversies upon a federal court by combining them in a single complaint; it is quite another to remit the holders of petty claims to a duplicative state court suit when there is a substantial federal suit pending." Currie, *Pendent Parties*, 45 U. Chi. L. Rev. at 756.

Overturning *Zahn*, in fact, does not open the federal courts to a single case that could not already be filed there, but simply allows claims that are properly in federal court to be brought on behalf of a class. Although that result may entail some additional burden on the federal courts, "[i]t should be a sufficient answer that denial of ancillary jurisdiction will impose a much larger burden on the state and federal judiciary as a whole, and will substantially impair the ability of the prospective class members to assert their claims." *Zahn*, 414 U.S. at 308 (Brennan, J., dissenting); *see also* Freer, *Principled Approach*, 74 Ind. L.J. at 20 ("[O]verruling *Zahn* will better equip federal courts to resolve complex interstate disputes that may not be well handled in the courts of some states.").[6]

[6] Petitioners and their *amicus* Louisiana distort the federalism issues in this case by asserting that a textual interpretation of Section 1367 undermines "state sovereignty" by "the inevitable encroachment that would result from an increase in the number of diversity cases in federal court." Pet. Br. 18; *see also* La. Br. 3. This case is about the scope of *supplemental* jurisdiction, not the scope of *diversity* jurisdiction. Section 1367 specifies that a federal court must have original jurisdiction over some claims in a case before it can exercise supplemental jurisdiction over other claims in that case. Because there is no question here of expanding the federal courts' *original* jurisdiction, any federalism concerns are insubstantial. In any event, Louisiana's invocation of federalism principles here is ironic, as Louisiana itself chose to file a related lawsuit against respondents in federal, rather (continued...)

Overturning *Zahn* also creates a sensible symmetry in class actions between the two requirements of the diversity statute. Since this Court's decision in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 366 (1921), it has been settled that the requirement of complete diversity of citizenship in class actions is assessed solely by reference to the citizenship of the named plaintiffs, not the absent class members. But *Zahn* rejected that approach with respect to the statutory matter-in-controversy requirement, holding that absent class members whose claims did not meet the jurisdictional minimum must be dismissed even where the named plaintiffs' claims satisfied that requirement. *See* 414 U.S. at 301. As the *Zahn* dissent noted, "it is difficult to understand why the practical approach the Court took in *Supreme Tribe of Ben-Hur* must be abandoned where the purely statutory 'amount in controversy' requirement is concerned." 414 U.S. at 309 (Brennan, J., dissenting); *see also* Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 Va. L. Rev. 1769, 1818 (1992) (*Zahn* created a "wholly illogical dichotomy" with *Ben Hur*); Thomas C. Arthur & Richard D. Freer, *Close Enough For Government Work: What Happens When Congress Doesn't Do Its Job*, 40 Emory L.J. 1007, 1008 n.6 (1991) ("*Zahn* is inconsistent with the Court's holding in *[Ben Hur]*.").

The issue here, of course, is not whether overturning *Zahn* is a good idea or a bad one, but only whether the idea is absurd. Because it is not, this Court must take the statute at face value. As the Fifth Circuit put it, "the wisdom of the statute is not our affair beyond determining that overturning *Zahn* is not absurd." Pet. App. 89a.

[6] (...continued)
than state, court. *See, e.g., In re Infant Formula Antitrust Litig.*, MDL No. 878 (N.D. Fla. Sept. 30, 1996).

Petitioners, however, assert that the Fifth Circuit "wrongly applied the absurdity rule by narrowly looking only at whether reversing the result in *Zahn* would be absurd." Pet. Br. 36 n.12. According to petitioners, the Fifth Circuit's textual analysis must be rejected because it would produce *other* allegedly absurd results. *See id.* In particular, petitioners contend that the Fifth Circuit's analysis would effectively abrogate the complete diversity requirement as construed in *Strawbridge*, 7 U.S. (3 Cranch) at 267, by allowing courts to exercise supplemental jurisdiction over claims where the parties lack complete diversity. Pet. Br. 23. The plain text of the statute, however, refutes that contention.

For one thing, as petitioners themselves point out, the statute's subsection (a) authorizes the exercise of supplemental jurisdiction only where the district court has "original jurisdiction" over at least some claims in a "civil action." As noted above, *see supra* at 14-15, the *Strawbridge* rule precludes the exercise of original jurisdiction over an entire action unless there is complete diversity between every indispensable party. Accordingly, any case in which the indispensable parties are not completely diverse is not within the federal courts' original diversity jurisdiction. (Where non-indispensable parties are not completely diverse, the court can simply dismiss those parties. *See supra* note 4).

In addition, the statute's subsection (b) specifically carves out of supplemental jurisdiction "claims by plaintiffs against persons made parties" under Rule 20 of the Federal Rules of Civil Procedure (which authorizes multiple defendants to be joined in a single lawsuit) where doing so "would be inconsistent with the jurisdictional requirements of section 1332." That exception, of course, protects *Strawbridge* (one of the "jurisdictional requirements of section 1332") by

preventing the exercise of supplemental jurisdiction over claims against multiple non-diverse defendants.[7]

Petitioners' further argument that the inclusion of Rule 20 in subsection (b) produces "at least one" anomaly, *see* Pet. Br. 23, is wholly beside the point. This case is about the exercise of supplemental jurisdiction over claims under Rule 23, not Rule 20. Whether the *inclusion* of Rule 20 in subsection (b) produces anomalous results is different than whether the *exclusion* of Rule 23 from that subsection produces such results. The anomaly identified by petitioners would not be solved by the addition of Rule 23 to subsection (b). "Whether § 1367(b) is a model drafting exercise may be doubted," but that does not give courts license to ignore the plain text of the statute. *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 932 (7th Cir. 1996). The bottom line is that Rule 23 is nowhere to be found among the statutory exceptions to supplemental jurisdiction, and that omission does not produce absurd results. Whether any *other* aspect of subsection (b) produces any "apparent incongruity," *id.*, and how courts should address any such incongruity, are simply not questions presented in this case.

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[7] Petitioners seek to limit the scope of this exception by asserting that Rule 20 applies only to defendants "added to an existing action." Pet. Br. 8; *see also id.* at 21, 23. That alleged limitation, however, has no basis in the text of the Rule, which authorizes permissive joinder both at the outset of a lawsuit *and* afterwards. *See* Fed. R. Civ. P. 20 ("All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."); *see also United States v. Mississippi*, 380 U.S. 128, 142 (1965) (multiple parties can be joined at the outset in a single action under Rule 20); *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 705 n.2 (1972) (additional parties can be brought into a case under Rule 20 joinder).

II. THE LEGISLATIVE HISTORY OF SECTION 1367 CANNOT AND DOES NOT OVERRIDE THE STATUTE'S PLAIN TEXT.

Because the plain text of Section 1367 unambiguously authorizes the exercise of supplemental jurisdiction over the claims of absent class members, and that result is not absurd, it is neither necessary nor appropriate to consult the legislative history in this case. Petitioners, however, essentially ask this Court to ignore the statute altogether, and to decide the case by reference to a single sentence and footnote from a committee report. Whatever the merits of consulting legislative history as a general matter, there is no basis for giving authoritative weight to an isolated passage that does not address or clarify any textual ambiguity. Indeed, careful examination of the whole legislative history actually *supports* the straightforward textual conclusion that the supplemental jurisdiction statute supersedes the result in *Zahn*.

A. The Legislative History Cannot Override the Statute's Plain Text.

As a threshold matter, it is inappropriate to consult the legislative history at all where, as here, the text of the statute is unambiguous and does not produce an absurd result. "When the words of a statute are unambiguous, . . . judicial inquiry is complete." *Connecticut Nat'l Bank*, 503 U.S. at 254 (internal quotation omitted); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947) ("There is . . . no ambiguity in this Act to be clarified by resort to legislative history.").

Where the meaning of a statute is plain, after all, consulting the legislative history can only create—not resolve—ambiguities. "[I]t is a poor cause that cannot find some plausible support in legislative history." Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 125 (1948). But courts are not free to circumvent the plain language of the statute by combing through the legislative history for contradictory statements. To the contrary, it has long been settled that legislative history is "only admissible to

solve doubt and not to *create* it." *Railroad Comm'n of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 589 (1922) (emphasis added); *see also United States v. Gonzales*, 520 U.S. 1, 6 (1997) (refusing "to resort to legislative history" that does not "clarif[y] the statute, [but] only muddies the waters.").

The fundamental flaw in petitioners' approach is their assumption that "[t]he purpose of statutory construction is to determine Congress's intent." Pet. Br. 33. Rather, the purpose of statutory construction is to determine the meaning of a statute. *See* Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means."). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank*, 503 U.S. at 254; *see also Caminetti*, 242 U.S. at 490 ("[T]he language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."). Petitioners thus err in pointing to the legislative history as the definitive repository of congressional "intent." Legislative history may clarify the meaning of an ambiguous law, but is not itself law. *See, e.g., Train v. City of New York*, 420 U.S. 35, 45 (1975) ("[L]egislative intention, without more, is not legislation."); *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989) ("Legislative history helps us learn what Congress meant by what it said, but it is not a source of legal rules competing with those found in the U.S. Code."). A contrary approach would violate the Constitution's most basic structural provisions, including the requirements of bicameralism and presentment. *See id.*

To be sure, it is not only possible but inevitable that Congress will occasionally enact laws that do not succeed in reflecting its true intent. "But in such case the remedy lies with the lawmaking authority, and not with the courts." *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982) (internal

quotation omitted); *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 64 (1953) ("[W]hen Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final—save for questions of constitutional power which have not even been intimated here."). If a statute does not say what Congress meant, then Congress is free to amend the statute. *See, e.g., Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it."); Ruth B. Ginsburg, *A Plea for Legislative Review*, 60 S. Cal. L. Rev. 995, 1013 (1987) ("Congress, few would disagree, can mend prescriptions of a nonsensational kind more efficiently and more decisively than courts can.") (internal quotation and brackets omitted). Courts have neither the constitutional power nor the institutional competence to enforce free-floating legislative "intent" divorced from the text of a statute.

B. The Legislative History on Which Petitioners Rely Does Not Purport to Clarify Any Textual Ambiguity.

Petitioners, however, contend that the legislative history is not only relevant but dispositive here. *See, e.g.*, Pet. Br. 11 n.3, *id.* at 19 n.6; *id.* at 22 n.9; *id.* at 25-33. In particular, they rely on a passage from the House Judiciary Committee Report on H.R. 5381, a bill that was ultimately subsumed into the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, the law that included Section 1367 among its many and varied provisions. The House Report analyzes the various provisions of the bill, including Section 114(b), the provision that became subsection (b) of Section 1367. The Report states that subsection (b) "prohibits a district court in a case over which it has jurisdiction founded solely on the general diversity jurisdiction, 28 U.S.C. § 1332, from exercising supplemental jurisdiction in specified circumstances." H.R. Rep. No. 101-734, at 29 (Sept. 10, 1990), 1990 U.S.C.C.A.N. 6860, 6875.

The Report then describes the operation of subsection (b), and concludes with the following sentence and footnote:

> The section 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*.[FN17]
>
> [FN17] *See Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 65 L. Ed. 673, 41 S. Ct. 338 (1921); *Zahn v. International Paper Co.*, 414 U.S. 291, 38 L. Ed. 2d 511, 94 S. Ct. 505 (1973).

In essence, petitioners' entire case boils down to the proposition that this Court should give the force of law to this sentence and footnote. But that sentence and footnote on their face do not support petitioners' interpretation of the supplemental jurisdiction statute. That sentence and footnote cite *Zahn* in the context of pointing out that subsection (b) is not intended to affect the "requirements of 28 U.S.C. § 1332," the diversity statute. This case, however, has nothing to do with the requirements for *original* jurisdiction under Section 1332; rather, this case is all about *supplemental* jurisdiction. As noted above, *see supra* note 5, the *Zahn* Court limited itself to the question whether a federal court could exercise *original* jurisdiction under Section 1332 over the claims of absent class members who did not individually satisfy the matter-in-controversy requirement; the Court did *not* address the distinct (but related) question whether a federal court could exercise common-law *ancillary* jurisdiction over those same claims. Accordingly, the sentence and footnote on which petitioners rely have no relevance to this case: respondents do not contend that the supplemental jurisdiction statute in any way altered *Zahn*'s explicit holding involving the original jurisdiction requirements of Section 1332.

In any event, even if the passage of legislative history on which petitioners rely could be interpreted to ratify *Zahn*'s

implicit holding on ancillary jurisdiction, that passage could not possibly override the statutory text. Although the "Members of this Court have expressed differing views regarding the role that legislative history should play in statutory interpretation," one point at least is common ground: this Court has "never given authoritative weight to a single passage of legislative history that is in no way anchored to the text of the statute." *Shannon v. United States*, 512 U.S. 573, 583 (1994). That is precisely the situation here. The sentence and footnote identified by petitioners in the legislative history do not purport to clarify any particular textual provision. Rather, the sentence and footnote simply declare a free-floating "intent" divorced from the text of the statute. "To give effect to this snippet of legislative history," as the *Shannon* Court explained, "we would have to abandon altogether the text of the statute as a guide in the interpretation process." *Id.*; *see also id.* at 583-84 ("'[C]ourts have no authority to enforce a principle gleaned solely from the legislative history that has no statutory reference point.'") (quoting *International Bhd. of Elec. Workers v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987) (Edwards, J.); brackets omitted); *Gonzales*, 520 U.S. at 6 (refusing to credit legislative history that "injects into [a statute] an entirely new idea . . . [that] is 'in no way anchored in the text of the statute.'") (quoting *Shannon*, 512 U.S. at 583)).

Indeed, the sentence and footnote from the legislative history on which petitioners rely are not only divorced from the text of the statute, but also inconsistent with petitioners' own "textual" theory. That sentence and footnote purport to describe the intention of subsection (b). But, as noted above at p. 11, petitioners' textual theory is squarely based on subsection (a). Petitioners can hardly claim that the sentence and footnote clarify any textual ambiguity in subsection (a) when the sentence and footnote do not even purport to describe that subsection. This Court has never ratified any such "mix-and-match" approach to legislative history.

To refuse to give the force of law to the snippet of legislative history on which petitioners rely is not to say to Congress: "'We know what you meant to say, but you didn't quite say it. . . . Gotcha! And better luck next time.'" Pet. Br. 36 (quoting *Russ v. State Farm Mut. Auto Ins. Co.*, 961 F. Supp. 808, 820 (E.D. Pa. 1997)). That approach presumes that what Congress "meant to say" is best expressed in the legislative history, not the statute itself. But that presumption runs contrary to our entire constitutional structure, in which both Houses of Congress pass legislation, and present it to the President for signature. The President, legislators, judges, and citizens all must rely on the premise that the law of the land is set forth in the U.S. Code, not in the U.S.C.C.A.N. The contrary position, in fact, would allow any congressional staffer (or interest group) to say "Gotcha!" to all other participants in the legislative process by simply slipping into the legislative history some statement contrary to the statute, and then asking the courts to enforce that statement as the true "intent" of Congress. It is impossible to overstate the danger to the rule of law from the proposition that a single statement in the legislative history can trump the plain text of a statute.

C. The Legislative History Actually Supports a Textual Interpretation.

Finally, it is worth noting that petitioners' description of the legislative history as "entirely one-sided," Pet. Br. 31, is inaccurate. To the contrary, examination of the legislative background of Section 1367 only underscores the conclusion that the statute means what it says. To the extent that analyzing the legislative history is like entering a crowded cocktail party and looking for one's friends, *see* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983), respondents' friends are at least as much in evidence here as petitioners'.

The supplemental jurisdiction statute was part of an overall package of legislative changes intended to improve the

operation of the American judicial system. "In November 1988, the 100th Congress created within the Judicial Conference of the United States a fifteen-member Federal Courts Study Committee and directed it, by April 2, 1990, to 'make a complete study of the courts of the United States and of the several States and transmit a report to the President, the Chief Justice of the United States, [and] the Congress . . . on such study." *Report of the Federal Courts Study Committee* 31 (Apr. 2, 1990) ("*Committee Report*"); *see also* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (Nov. 19, 1988).

The Committee, which was chaired by Judge Joseph F. Weis Jr., delegated its work to various subcommittees. *See generally* 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). The issues of ancillary and pendent jurisdiction were assigned to the Subcommittee on the Role of the Federal Courts and their Relation to the States, which was chaired by Judge Richard A. Posner. *See* Report of the Subcomm. on the Role of the Federal Courts and Their Relation to the States, title page (Mar. 12, 1990), *reprinted in* Federal Courts Study Comm., 1 *Working Papers and Subcomm. Reports* (1990). In May 1989, this Court rendered its decision in *Finley v. United States*, 490 U.S. 545, 556 (1989), in which it refused to expand common-law pendent-party jurisdiction, and invited Congress to codify the law in this area.

The Subcommittee drafted a supplemental jurisdiction statute broadly similar to the one that was ultimately enacted. The draft statute provided as follows:

> (a) except as provided in subsections (b) and (c) or in another provision of this Title, in any civil action on a claim for which jurisdiction is provided, the district court shall have jurisdiction over all other claims arising out of the same transaction or occurrence, including claims that require the joinder of additional parties.
>
> (b) In civil actions under § 1332 of this Title jurisdiction shall not extend to claims by the plaintiff against parties joined under Rules 14 and 19 of the Federal Rules of Civil Procedure, or to claims by parties who intervene under Rule 24(b) of the Federal Rules of Civil Procedure, *provided*, that the court may hear such claims if necessary to prevent substantial prejudice to a party or third-party.
>
> (c) The district court may decline to exercise jurisdiction over a claim under subsection (a) if the claim presents a novel or complex issue of state law, state law issues predominate, or there are other appropriate reasons (including judicial economy, convenience, and fairness to litigants) to refuse jurisdiction.

1 *Working Papers* at 567-68. This draft established the overall structure of the provision that was ultimately enacted into law: the first subsection authorized supplemental jurisdiction to the limits of Article III, the second subsection carved out a number of express exceptions (*not* including the claims of absent class members under Rule 23), and the third subsection allowed courts to decline supplemental jurisdiction on a discretionary basis.

The draft statute is significant because the Subcommittee expressly acknowledged that its intention was to supersede *Zahn*. As the Subcommittee explained, [t]he proposal basically restores the law as it existed prior to *Finley*," with "[t]he exception . . . that our proposal would overrule the Supreme Court's decision in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973)." 1 *Working Papers* at 561 & n.33. "Although *Zahn* did not discuss pendent jurisdiction," the Subcommittee noted, "the lower courts have correctly understood it to preclude the joinder of claims for less than the requisite amount

in controversy to a claim that satisfies the requirement." *Id.* at 561 n.33. "From a policy standpoint, this decision makes little sense, and we therefore recommend that Congress overrule it." *Id.*

The Subcommittee then forwarded its recommendations to the full Committee. The Committee did not take any position on those recommendations, and did not draft a proposed statute, but simply included a brief and general discussion of supplemental jurisdiction in its overall report to Congress. *See Committee Report* at 47-48. (That discussion takes up just over a single page of the Committee's 188-page Report. *See id.*) The Committee did not address the *Zahn* case or any other issues relating to the exercise of supplemental jurisdiction in class actions. *See id.* Rather, the Committee simply expressed a general endorsement of supplemental jurisdiction, in sharp contrast to its overall hostility toward diversity jurisdiction. (The Committee recommended the virtual elimination of diversity jurisdiction. *See id.* at 38-42). "Abolishing or radically curtailing pendent and ancillary jurisdiction would eliminate some cases and claims from the federal courts, but this is a situation in which it is unwise to do so." *Id.* at 47. The Committee then recommended that Congress extend supplemental jurisdiction to the limits of Article III without even addressing the possibility of carving out certain claims to protect the traditional limitations of diversity jurisdiction. *See id.*[8]

[8] Judge Weis (the Chairman of the Committee) has stated that "the Committee did not adopt the subcommittee's footnote reference to *Zahn*." *Meritcare, Inc. v. St. Paul Ins. Co.*, 166 F.3d 214, 219 (3d Cir. 1999); *see also id.* at 219 n.4. But that statement is misleading to the extent it implies that the Committee *rejected* the Subcommittee's recommendation. The Committee neither adopted nor rejected the Subcommittee's recommendation to overrule *Zahn*; the Committee Report is entirely silent on this point. (It is interesting to note that Judge Posner, in contrast to Judge Weis, has concluded that the supplemental jurisdiction statute as ultimately enacted did overrule *Zahn*. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997).)

Congress immediately rejected the Committee's proposal to virtually eliminate diversity jurisdiction, and drafted a bill designed to enact the Committee's less controversial recommendations into law. *See* Federal Courts Implementation Act, H.R. 5381, 101st Cong., 2d Sess. (July 26, 1990). The original language of that bill relating to supplemental jurisdiction was not based on, and differed substantially from, the language drafted by the Subcommittee. *See* Fairman, *Abdication*, 19 Seton Hall Legis. J. at 164-65. Concerned that this language would effectively overrule *Strawbridge*, the Committee Chairman, Judge Weis, testified during the half-day of hearings on that bill that the provision on supplemental jurisdiction should be replaced. *See Hearings Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice*, Ser. No. 124, 101st Cong., 2d Sess. 86, 94 (Sept. 6, 1990) (testimony of Judge Weis). Judge Weis offered an alternative provision that was substantially similar to the provision originally drafted by the Subcommittee. *Compare id.* (addendum), at 98 *with* 1 *FCSC Working Papers* at 567-68. *See generally* Fairman, *Abdication*, 19 Seton Hall Legis. J. at 166 ("The Weis alternative is basically a return to the earlier FCSC Subcommittee proposal.").

Following this hearing, the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Administration of Justice drafted a substitute supplemental jurisdiction section of the bill. *See* 136 Cong. Rec. H8256, H8262 (Sept. 27, 1990) (remarks of Rep. Kastenmeier). This substitute section essentially adopted the text proposed by Judge Weis, but inserted a clause in subsection (b) (underscored in the margin), that fixed Section 1367(b) in its final form. H.R. Rep. No. 101-734 at 11.[9] (Significantly, the

[9] "(b) DIVERSITY CASES.- 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 by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons

(continued...)

new clause placed additional restrictions on the availability of supplemental jurisdiction in diversity cases, but still contained no exception for Rule 23 class actions.) The substitute section on supplemental jurisdiction was drafted by three law professors, Thomas D. Rowe, Jr., Stephen B. Burbank, and Thomas M. Mengler, who had an interest in the subject. *See* Fairman, *Abdication*, 19 Seton Hall Legis. J. at 168-69 & n.68.

The House Subcommittee accepted the law professors' draft, and reported the bill favorably without any discussion of supplemental jurisdiction. *See id.* at 170. The bill later passed the entire House without any discussion of supplemental jurisdiction. *See id.* In the Senate, the bill was subsumed into an omnibus bill, the Judicial Improvements Act of 1990, which was taken up and passed on a single day without any discussion of supplemental jurisdiction. *See id.* The President thereafter signed the bill without any discussion of supplemental jurisdiction. *See id.*

In this context, it is fanciful for petitioners to assert that "Congress *actually and specifically intended*" to preserve the result in *Zahn*. Pet. Br. 6 (emphasis in original). To the contrary, "[o]ne inescapable conclusion of this survey of the development of [statute] is the general *absence* of congressional concern over the impact and merits of this statute." Fairman, *Abdication*, 19 Seton Hall Legis. J. at 172 (emphasis added); *see also id.* ("The House Subcommittee on Courts provided little oversight. . . . [T]he committee abdicated to the academics."). The statute was "rushed through the legislative gauntlet without meaningful review or discussion," Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life after* Finley *and the Supplemental Jurisdiction Statute*, 40 Emory L.J. 445, 486 (1991), and was

[9] (...continued)
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."

not evaluated by the American Law Institute or any other professional organization. Even the three professors who drafted the supplemental jurisdiction provision concede that "the process afforded by Congress [on the proposed legislation] was meager." Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *A Coda on Supplemental Jurisdiction*, 40 Emory L.J. 993, 1005 (1991).

Petitioners, however, purport to discern congressional "intent" to retain *Zahn* in the House Report. But the relevant provisions of that Report, like the supplemental jurisdiction statute itself, "can be attributed to the efforts of [Profs.] Rowe, Burbank, and Mengler." Fairman, *Abdication*, 19 Seton Hall Legis. J. at 170. And these professors concede that "on its face, section 1367 does not appear to forbid supplemental jurisdiction over claims of class members who do not satisfy section 1332's jurisdictional amount requirement, which would overrule *Zahn v. International Paper Co.*, 414 U.S. 291 (1973)." Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 Emory L.J. 943, 960 n. 90 (1991). Unlike petitioners in this case, in fact, the professors make no pretense at arguing that this straightforward textual interpretation is incorrect. Rather, the drafters explain that "[i]t would have been better had the statute dealt explicitly with this problem, and *the legislative history was an attempt to correct the oversight.*" *Id.* (emphasis added). While Profs. Rowe, Burbank, and Mengler may not have wanted to supersede *Zahn*, they at least recognized that the statute on its face actually did so.[10]

[10] The professors cannot resist going on to assert that "[t]he resulting combination of statutory language and legislative history . . . creates the delicious possibility that despite Justice Scalia's opposition to the use of legislative history, he will have to look to the history or conclude that section 1367 has wiped *Zahn* off the books." Rowe, *et al.*, *Compounding or Creating Confusion*, 40 Emory L.J. at 960 n. 90 (1991). Indeed, the
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The evolution of the supplemental jurisdiction statute thus refutes petitioners' assertion that there is "not a shred of evidence in the legislative history" contrary to their position. Pet. Br. 9. The statute as ultimately enacted is identical in all relevant respects to the draft prepared by the Federal Courts Study Commission Subcommittee that was expressly intended to overrule *Zahn*. Rather than a "deafening" silence regarding an intention to supersede *Zahn*, Pet. Br. 33, the legislative history thus reveals a specific intention to do just that, even if that intention was not shared by the three professors who drafted the final revisions to the bill and the relevant portions of the House Report. In this regard, this case is far easier than *International College of Surgeons*, where this Court gave the supplemental jurisdiction statute a straightforward textual interpretation that had the revolutionary (and apparently unforseen) effect of sweeping into federal court state-law claims for on-the-record review of local administrative action. *See* 522 U.S. at 172-72; *see also id.* at 176 (Ginsburg, J., dissenting) ("The Court's expansive reading . . . takes us far from anything Congress conceivably could have meant."). Here, Congress not only "could have meant" to supersede *Zahn*, but key participants in the legislative process demonstrably *did* mean to do so.

In the final analysis, petitioners' invitation to this Court to give the legislative history precedence over the text of the supplemental jurisdiction statute would undermine the very clarity and consistency the statute was designed to promote. As this Court explained in *Finley*, "what is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the

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[10] (...continued)
professors—who believe that the appropriate way to "correct" a perceived statutory deficiency is simply to express a counter-textual intent in the legislative history—caustically recommended to their critics "readings on the legislative process that include more than the writings of Justice Scalia." Rowe, *et al.*, *Coda*, 40 Emory L.J. at 1005 n.59.

effect of the language it adopts." 490 U.S. at 556. The cardinal interpretive rule, of course, is that Congress must express its intention in the statutory text. *See, e.g., Connecticut Nat'l Bank*, 503 U.S. at 254. To the extent the statutory text requires a different result than the thicket of common-law rules it replaced, the text controls. *See, e.g., Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587-88 (1993); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259, 262-63 (1993). "Now that Congress has codified the supplemental jurisdiction in § 1367(a), courts should use the language of the statute to define the extent of their powers." *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379, 385 (7th Cir. 1996).

Indeed, giving the legislative history the force of law would open a veritable pandora's box of inconsistencies and ambiguities, and would make this area of the law even more confusing than before the enactment of the statute. Courts and citizens must be able to rely on the statute as a complete and accurate expression of the scope of federal subject-matter jurisdiction. Indeed, the need for clear and simple rules is particularly compelling in the area of jurisdiction, because few things are more wasteful than litigation about jurisdiction. *See, e.g.*, Freer, *Close Enough*, 40 Emory L.J. at 1007 (rules of federal subject-matter jurisdiction "ought to be as clear and capable of near-mechanical application [as] possible"). Accordingly, as in *International College of Surgeons*, this Court should reaffirm that the supplemental jurisdiction statute means what it says.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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