No. 01-896

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,
Petitioners,

v.

JOHN B. MCCAULEY, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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The petition presents two important and recurring questions concerning the jurisdiction of the federal courts to hear class actions, both of which have confounded and divided the lower courts: (1) what is the proper method for determining the amount in controversy in a class action seeking *injunctive relief*, and (2) what is the proper method for determining the amount in controversy in a class action seeking *punitive damages*. Respondents acknowledge that the first question warrants this Court's review, but suggest—erroneously—that it is not squarely presented by the facts of this case. Respondents' arguments against review of the second question also are unpersuasive. The prevailing approach in the courts of appeals erroneously restricts the availability of diversity jurisdiction over claims for punitive damages vastly in excess of the jurisdictional minimum.

1. Respondents recognize that this Court has not conclusively addressed whether a claim for injunctive relief may be evaluated from the defendant's perspective when determining the amount in controversy, *see* Opp. 1; they agree that the courts of appeals are divided on the question, *see id.* at 9-10; they acknowledge the "need for clarification" concerning the applicability of the "either viewpoint" rule in the class action context, *id.* at 2; and they concede that the issue "might merit consideration by this Court," *id.* at 12. Respondents contend, however, that the issue is not properly raised by this case. That is incorrect.

a. As the petition elaborates, some courts of appeals refuse to apply the "either viewpoint" rule in the class action context because of a perceived incompatibility with the non-aggregation principle of *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), whereas other courts—including in particular the Seventh Circuit—reconcile the "either viewpoint" rule with *Snyder* and *Zahn* by evaluating "the cost to each defendant

of an injunction running in favor of one plaintiff." *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998). Respondents' principal argument (*see* Opp. 2, 12-13) is that the facts of this case do not satisfy the amount-in-controversy requirement even under the approach adopted by the Seventh Circuit in *In re Brand Name*. In particular, Respondents contend that Petitioners failed in the courts below to establish that the cost to them of complying with an injunction running in favor of one class member would exceed $75,000, and that this case thus does not implicate the division between those courts that apply this version of the "either viewpoint" rule in class actions and those courts that adhere to the "plaintiff's viewpoint" rule.

Respondents' argument is flatly incorrect, and reflects a fundamental misunderstanding of the district court's opinion.[1] Respondents rely entirely on the statement in the district court's opinion that Petitioners had "failed to show that the value of the injunction as to any one cardholder would exceed $75,000." Pet. App. 29a. In Respondents' apparent view, that statement shows that the district court found Petitioners had failed to prove the jurisdictional fact required by the *In re Brand Name* test, *i.e.*, that the cost of reinstituting the credit card program as to only one plaintiff would exceed $75,000. *See* Opp. 12. But that is simply a misreading of the district court's opinion.

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[1] It bears emphasis that Respondents' argument on this point also is entirely irrelevant to the case if, as the petition explains (*see* Pet. 17-19), the class claim for injunctive relief in this case is better understood as asserting a "common and undivided" interest rather than "separate and distinct" claims. The non-aggregation rule of *Snyder* and *Zahn* does not apply to "common and undivided" claims, *see Snyder*, 394 U.S. at 335; instead, the relevant measure in such cases is the cost of complying with the injunction for the entire class, which, in this case, undisputedly exceeds $75,000.

As explained in the petition (*see* Pet. 15-16), the district court received undisputed evidence establishing that the fixed costs of complying with the injunction sought by the plaintiff class—reinstitution of the credit card rebate program, restoration of the opportunity to accrue rebates with proper purchases, and reestablishment of the business apparatus for tracking such accrual—would far exceed $75,000, even if the relief were awarded only to a single plaintiff. The district court acknowledged the undisputed evidence in its opinion, citing testimony that "the fixed costs in operating a rebate program . . . exceed $75,000" and "would not depend on the extent of cardholder usage." Pet. App. 28a (internal quotation marks omitted). The district court did not question the veracity of this evidence—nor could it, since the evidence was entirely uncontroverted. Instead, the court concluded that such costs are legally irrelevant to the jurisdictional analysis in the context of a class action. *See id.* at 28a. In the court's view, because cardholders could only accrue a maximum of $3,500 in rebates under the program, the "value" of each individual cardholder's claim for injunctive relief could not exceed that amount. *See id.* at 28a-29a.[2]

The Ninth Circuit's treatment of the issue confirms that the district court's decision was based on a legal conclusion barring consideration of the fixed costs of reinstituting the

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[2] The district court appears to have erroneously equated the maximum rebate an individual cardholder could earn under the program with the cost of establishing and maintaining a program to track the accrual of such rebates. But Respondents did not sue for any liquidated rebate because of the discontinuation of the program; rather, they sought reinstatement of the *opportunity* to accrue rebates when they used their credit cards. That is, they sought "specific performance of the Rebate Program to plaintiffs and Class members." Pet. App. 28a (quoting Consolidated Complaint at 13). The cost of providing that relief to a single plaintiff is not the cost of paying a particular amount in rebates, but rather the cost of reinstating the rebate program, tracking that individual's accrual of rebates, and crediting him for rebates properly accrued.

program rather than a factual finding that those costs would not exceed $75,000 as to one plaintiff. Any such factual finding would have provided the Ninth Circuit with an obvious and straightforward basis for its decision. But the Ninth Circuit did not affirm the district court on factual grounds, nor did it even suggest that the district court had made any factual findings adverse to Petitioners on this point. Rather, the Ninth Circuit recited the uncontested evidence in Petitioners' *favor*, thus properly accepting that the costs of the injunctive relief even as to one plaintiff would exceed $75,000. *See* Pet. App. 12a. But the Ninth Circuit, as Respondents themselves describe the opinion, held "as a matter of law" that the fixed costs of complying with the injunction (even as to one plaintiff) "could not satisfy the amount-in-controversy requirement." Opp. 7.

That legal conclusion conflicts directly with the Seventh Circuit's decision in *In re Brand Name*, which made clear that the amount-in-controversy requirement may be satisfied by looking at "the cost to each defendant of an injunction running in favor of one plaintiff." 123 F.3d at 610. In rejecting that approach, the Ninth Circuit deepened the inter-circuit conflict over whether, and how, the "either viewpoint" rule may be applied in the class action context.

b. Respondents submit that even if—as the undisputed evidence establishes—the cost of awarding injunctive relief to one plaintiff exceeds $75,000, "ministerial business costs" can never satisfy the amount-in-controversy requirement. Opp. 12. The costs at issue here, however, are in no sense merely "ministerial." The Seventh Circuit in *In re Brand Name* distinguished mere "clerical or ministerial costs of compliance," which might not count toward the jurisdictional minimum, from costs imposed by injunctions obliging a defendant to "restructure its business or give up a lucrative lawful business opportunity," which are properly included in the amount-in-controversy calculus. 123 F.3d at 610. As an example of the former, the court referred to "the cost of du-

plicating an injunction . . . and distributing the copies to all the relevant personnel." *Id.* Here, Petitioners would face far more than mere photocopying costs if required to reinstitute the credit card rebate program. At a minimum, Petitioners would be required to reestablish the business apparatus for tracking the accrual of rebates, maintain computer systems for verifying purchases and tracking the accrual of rebates, and employ people to operate these systems.[3]

c. Respondents' assertion (Opp. 15-16) that the underlying aim of the petition in this case is to "revisit" this Court's decisions in *Snyder* and *Zahn* is simply incorrect. Rather, this case presents an opportunity to *apply* the rule of *Snyder* and *Zahn* to class claims for injunctive relief, and to clarify whether, and how, the "either viewpoint" rule may be employed consistent with *Snyder* and *Zahn* in this context. And because *Snyder* and *Zahn*'s non-aggregation rule applies only to "separate and distinct" claims and not to claims asserting a "common and undivided" interest, *see Snyder*, 394 U.S. at 335, this case also presents an opportunity for the Court to clarify the proper application of these categories to class claims for injunctive relief. *See* Pet. 17-19 (explaining that the claim for injunctive relief in this case is better understood as "common and undivided").[4] As the petition shows,

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[3] Respondents' characterization of the injunction as requiring Petitioners only to "maintain[] the business status quo," Opp. 14, is inaccurate. The Consolidated Complaint requesting the injunction was filed after Petitioners had terminated the rebate accrual program. *See* Pet. App. 3a-4a. Thus, complying with the requested injunction in this case would not simply require continuing a program that is already in place or even restarting a program that is ready to go. Rather, it would entail reassembling the infrastructure and personnel necessary to reinstitute a program that ceased to exist four years ago. Petitioners would thus face not only the ongoing costs of maintaining the rebate accrual program, but also the substantial start-up costs associated with recreating the program.

[4] Respondents appear to suggest (Opp. 5 n.2) that Petitioners failed to argue before the court of appeals that the class claims for injunctive relief and for punitive damages are "common and undivided" rather than

these questions have divided the lower courts, and this Court's review is warranted to resolve them conclusively.[5]

2. The lower court opinions analyzing the proper treatment of punitive damages in the amount-in-controversy determination have reached conflicting conclusions, and the prevailing approach—which the Ninth Circuit followed below—is incorrect. Respondents' understanding of the relevant opinions is flawed. Moreover, Respondents offer no serious defense of the erroneous conclusion of the Ninth Circuit and other courts of appeals that punitive damages should be apportioned among the plaintiffs on a *pro rata* basis, which, as the petition explains (*see* Pet. 28), has the effect of revoking federal jurisdiction over claims that satisfy the jurisdictional amount requirement.

a. The Fifth Circuit concluded in *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), that plaintiffs possess a common and undivided interest in obtaining punitive dam-

"separate and distinct," but that suggestion is manifestly incorrect. *See* Pet. App. 10a ("Ford and Citibank first contend that the consolidated plaintiffs have a 'common and undivided interest' in the injunctive relief they seek."); *id.* at 15a ("Ford and Citibank argue that . . . the punitive damages sought in this case are a single collective right in which plaintiffs have a common and undivided interest.").

[5] Respondents' suggestion that this Court "await congressional action" amending the diversity statute rather than granting the petition in this case, Opp. 16-17, is unpersuasive. This Court's exercise of its certiorari jurisdiction is not affected by the mere introduction of proposed legislation in Congress. Moreover, while bills proposing modifications to the diversity statute have been introduced in Congress for several years, none have approached enactment (*see* Opp. 16 n.8), and Respondents provide no basis for believing that the bills introduced this year will fare differently. Indeed, the Senate has not scheduled any hearings on the matter. Finally, even if the proposed legislation were to pass, it would not affect cases outside the class action context. But the jurisdictional questions presented in this case arise in any case involving multiple plaintiffs, including where plaintiffs file suit together pursuant to conventional joinder rules rather than in a class action.

ages, and the Eleventh Circuit soon followed suit, *see Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1357-59 (11th Cir. 1996). While those courts have since limited that conclusion based on the "prior panel decision" rule, the prior decision in question, *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593 (5th Cir. 1978), does not purport to assess the merits of the issue. *See* Pet. 21-22. As a result, the only decisions in those courts to examine the merits of the question have found that punitive damages implicate a common and undivided interest. In addition, *Allen* remains binding in the Fifth Circuit at least in certain situations. *See Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998) (*Allen* governs in cases involving Mississippi law).

Respondents suggest that, for two reasons, the Fifth Circuit's analysis in *Allen* does not conflict with the opinion below. First, Respondents stress, *Allen* was not a class action, and instead involved the joinder of 512 plaintiffs. *See* Opp. at 18-19. But the treatment of punitive damages in the amount-in-controversy determination cannot vary with whether the circumstances involve the joinder of multiple plaintiffs or a class action. After all, the whole point of *Snyder* and *Zahn* is that the same amount-in-controversy rules that govern in actions involving joinder of multiple plaintiffs also control in class actions. *See Zahn*, 414 U.S. at 294-300; *Snyder*, 394 U.S. at 336-37 ("no reason to treat" class actions "differently from joined actions for purposes of aggregation"); *id.* at 340 ("[a]ny change in the doctrine of aggregation in class actions . . . would inescapably have to be applied as well to . . . joinder"). Accordingly, the Fifth Circuit decisions limiting *Allen*—all of which involve class actions—contain no suggestion that *Allen* is distinguishable on the basis that it involved the joinder of multiple plaintiffs.

Respondents also submit (*see* Opp. 19-20) that *Allen* turned on considerations unique to Mississippi law, based on the panel's statement that its opinion "reflects a result under

the Mississippi law of punitive damages" and does not necessarily control in cases "aris[ing] under the law of any other state." *Allen*, 70 F.3d at 26. Yet Mississippi's law of punitive damages is hardly unusual. To the contrary, *Allen* recognizes that "Mississippi's controlling law on punitive damages follows the majority rule" in serving the "fundamentally collective" interests of "punishing and deterring wrongdoing." 63 F.3d at 1332-33. But because some states have a different rationale for punitive damages, *see generally* John B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1126-30 (1984), the panel in *Allen* understood that its decision would not necessarily govern where punitive damages serve other purposes. And subsequent decisions limit *Allen*'s application to cases involving Mississippi law not because there is anything anomalous about Mississippi's punitive damages law, but because of the prior panel precedent rule.

The result is not only that the analysis in *Allen* conflicts with the Ninth Circuit's decision below, but also that the controlling rule in the Fifth Circuit conflicts with the controlling rule in the Ninth Circuit and other courts of appeals. In the Fifth Circuit, punitive damages implicate a common and undivided interest at least where Mississippi law applies. In contrast, the rule in the Ninth Circuit and in other courts of appeals is that plaintiffs *never* possess a common and undivided interest in punitive damages, and that punitive damages are always apportioned *pro rata* among the plaintiffs.[6]

b. Even assuming that the lower courts were in full agreement on the treatment of punitive damages in the amount-in-controversy determination, this Court still should

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[6] Because there is nothing unusual about the law of punitive damages in Mississippi, the Ninth Circuit and other courts that have adopted a blanket rule requiring apportionment of punitive damages on a *pro rata* basis would necessarily also apply that rule when confronting claims arising under Mississippi law.

grant certiorari because the issue is a highly important one and the prevailing rule is erroneous. *See, e.g., Eastern Enter. v. Apfel*, 524 U.S. 498, 519 (1998) (granting review based on importance of issue notwithstanding unanimity among courts of appeals, and rejecting unanimous view).[7] The rapid rise in extraordinary punitive damages verdicts against corporate defendants is well established, and this Court has frequently recognized the danger of excessive punitive damages awards against out-of-state businesses, *see Honda v. Oberg*, 512 U.S. 415, 432 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (plurality); *id.* at 493 (O'Connor, J., dissenting). As a result, the availability of a federal forum in diversity jurisdiction for suits seeking punitive damages against nonresident corporations presents a highly significant question. Because the competing views are fully developed in circuit court opinions adopting opposite positions on the merits, there is no need to await further elaboration of the issues.

As the petition explains (Pet. 24-28), moreover, the rule adopted by the Ninth Circuit below and by other courts of appeals is incorrect. First, the claims of a plaintiffs' class for punitive damages are generally common and undivided, and so the class-wide award—rather than the eventual *pro rata* distribution—should be attributed to each plaintiff. That is because, whereas each plaintiff has a separate and distinct entitlement to compensatory relief for his or her individual injuries, punitive damages normally serve collective societal interests in punishment and deterrence. The sole response in

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[7] Of course, if the Court grants certiorari to review the first question presented by the petition, there would be no reason not to grant review of the second question as well: the two questions present complementary issues concerning the proper application of *Snyder* and *Zahn*; the Court would have the opportunity to address—in a case already before it—a significant question as to which the courts of appeals are in error; and the Court's review of both questions would ensure a more complete and definitive resolution of the jurisdictional questions in this case.

the brief in opposition is that the recovery of punitive damages by one plaintiff does not necessarily foreclose a subsequent award to a different plaintiff for the same conduct. *See* Opp. 23. But this Court's decisions have not viewed the availability of relief in a subsequent action as a salient consideration. Instead, the Court weighs such factors as whether the defendant separately contests the claims of each individual plaintiff or instead contests only the overall award (with no interest in its apportionment among the plaintiffs), and whether the recovery of each plaintiff rests on separate evidence or instead depends on recovery by the others. *See* Pet. 25-26. Consideration of those factors in this case compels the conclusion that class plaintiffs have a common and undivided claim for recovery of punitive damages.

What is more, even if each plaintiff has a separate and distinct claim for punitive damages, the rule adopted by the Ninth Circuit below and by other courts of appeals—*viz.*, that punitive damages must be apportioned *pro rata* among class plaintiffs—still is plainly incorrect. As the petition explains (*see* Pet. 27-28), the relevant amount is not the eventual *pro rata* distribution to each plaintiff in the class, but rather the value of a plaintiff's claim for punitive damages if brought in a *separate action*. And because a single plaintiff could recover in a separate action the entire amount necessary to punish and deter the defendant's conduct, the amount in controversy should approach the size of the class-wide award, not the size of the *pro rata* distribution. The rule adopted by the Ninth Circuit below and other courts of appeals thus greatly undervalues the amount in controversy in a class claim for punitive damages, and effectively revokes federal jurisdiction over jurisdictionally sufficient claims.

CONCLUSION

For the foregoing reasons and the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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