No. _____

IN THE

Supreme Court of the United States

MYLAN LABORATORIES, INC., *ET AL.*,
Petitioners,

—v.—

BLUE CROSS BLUE SHIELD OF MASSACHUSETTS, *ET AL.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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June 13, 2011

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QUESTIONS PRESENTED

Subject matter jurisdiction in this case is premised solely on diversity of citizenship, but it is undisputed that diversity has been lacking since the day the complaint was filed. At least one Plaintiff and one Defendant were both citizens of the same state, and there was no evidence at trial to establish the citizenship of some 1400 other Plaintiffs. Nevertheless, the Court of Appeals did not order the case dismissed for lack of jurisdiction. Instead, it remanded for consideration of whether some unknown number of the 1400 Plaintiffs—Plaintiffs whose citizenship had not been pleaded, proven at trial, or even provided in discovery—might validly be dismissed from the case to create jurisdiction. The questions presented are:

1. Under *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804) and *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), may diversity jurisdiction be created retroactively after a trial where the plaintiffs' citizenship was never pleaded or proven?

2. Was the Court of Appeals correct in deciding, contrary to the Seventh and Eighth Circuits, that the narrow exception for a single dispensable "jurisdictional spoiler" recognized in *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), can be expanded to permit a court to use Fed. R. Civ. P. 21 to sever up to 1400 non-diverse parties who are also real parties in interest under Fed. R. Civ. P. 17?

PARTIES TO THE PROCEEDING

Petitioners are Mylan Laboratories, Inc. (n/k/a Mylan Inc.), Mylan Pharmaceuticals Inc., Gyma Laboratories of America, Inc., and Cambrex Corporation. Of particular relevance here, Cambrex Corporation is a Delaware corporation. Petitioners were Defendants below.

Respondents are Blue Cross Blue Shield of Massachusetts, Blue Cross Blue Shield of Minnesota, Federated Mutual Insurance Company, and Health Care Service Corporation. Respondents were Plaintiffs below. Respondents brought claims for themselves *and* approximately 1400 of their self-funded customers. As the Court of Appeals held, those self-funded customers were real parties in interest under Federal Rule of Civil Procedure 17(a), and thus are considered Plaintiffs for diversity purposes. The record demonstrates that one of the self-funded customers is 3M Company ("3M"), a Delaware corporation. The record does not contain evidence regarding the identity or citizenship of almost all of the remaining self-funded customers.

The multi-district litigation below included numerous additional Plaintiffs, but all have settled or otherwise exited the litigation.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, Petitioner Mylan Laboratories, Inc. (n/k/a Mylan Inc.) states that it has no parent company and that no publicly held company owns 10 percent or more of its stock.

Petitioner Mylan Pharmaceuticals Inc. states that it is a wholly owned subsidiary of Mylan Inc. The name of the sole publicly held company that owns 10 percent or more of Mylan Pharmaceuticals Inc.'s stock is Mylan Inc.

Petitioner Gyma Laboratories of America, Inc. states that it has no parent company and that no publicly held company owns 10 percent or more of its stock.

Petitioner Cambrex Corporation states that it has no parent company and that no publicly held company owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Mylan Laboratories, Inc. (n/k/a Mylan Inc.), Mylan Pharmaceuticals Inc., Gyma Laboratories of America, Inc., and Cambrex Corporation respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 631 F.3d 537 (2011). The unpublished opinion of the United States District Court for the District of Columbia granting Plaintiffs' motion for leave to obtain authorization from their self-funded customers to pursue claims on the customers' behalf pursuant to Rule 17(a) is reproduced in the Appendix. Pet. App. 14a.

JURISDICTION

The Court of Appeals entered its judgment on January 18, 2011. A timely petition for rehearing was denied on March 14, 2011. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332(a) provides, in relevant part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States . . . ."

28 U.S.C. § 1332(c)(1) provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."

STATEMENT OF THE CASE

This case arises under state antitrust and consumer protection laws, and thus can be maintained in federal court only pursuant to diversity jurisdiction. Respondents are "indirect purchasers" who sued Petitioners on their own behalf and on behalf of a group of nearly 1400 of their customers as real parties in interest. They were awarded amounts currently aggregating over $75 million in damages and interest. As discussed below, Respondents never pleaded the customers' citizenship or proved it at trial. On appeal, it became clear that at least one of the customers is a citizen of the same state as at least one of the Defendants, and thus that federal jurisdiction had been lacking from the start.

1. The Underlying Suit

This petition concerns one part of a multi-district antitrust litigation regarding Lorazepam and Clorazepate, two prescription anti-anxiety medications. Profarmaco, an Italian manufacturer of each drug's active pharmaceutical ingredient (API), entered a partially exclusive supply agreement in November 1997 with Mylan, a manufacturer of generic versions of the drugs.[1] Profarmaco

[1] As used herein, "Mylan" refers collectively to Petitioners Mylan Laboratories, Inc. (n/k/a Mylan Inc.) and Mylan Pharmaceuticals Inc.

is a wholly owned subsidiary of Petitioner Cambrex Corporation and contracted through its U.S. distributor, Petitioner Gyma Laboratories of America.

Under the agreements, Mylan became the exclusive U.S. generic purchaser from Profarmaco of each drug's API. In late 1997 and early 1998, Mylan increased prices substantially on thirteen products (ten of which were not subject to any kind of exclusivity), including Lorazepam and Clorazepate. The Federal Trade Commission opened an investigation into Mylan's pricing activity in 1998, and several lawsuits followed. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 100-01 (D.C. Cir. 2002) (describing case background). All such suits have been resolved except for the present actions. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369 (D.D.C. 2002) (approving government and indirect purchaser class settlements); *In re Lorazepam & Clorazepate Antitrust Litig.*, No. MDL 1290, 99MS276, Civ. 99-0790, 2003 WL 22037741 (D.D.C. June 16, 2003) (approving direct purchaser class settlement).

The cases at issue here are brought by a group of health insurance companies who, on behalf of themselves and their customers, opted out of the indirect purchaser class settlement. They assert that the agreements in question violated the antitrust and consumer protection laws of Minnesota, Massachusetts, and Illinois, and "unjustly enriched" Petitioners. Although indirect purchasers lack standing to sue under the federal antitrust laws, *see Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), they may sue for antitrust

violations under the laws of some states. *See* Minn. Stat. § 325D.57; *Ciardi v. F. Hoffman-LaRoche, Ltd.*, 762 N.E.2d 303, 305-11 (Mass. 2002) (Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A §§ 1-11, permits certain indirect purchaser suits for conduct violating federal antitrust law); 740 Ill. Comp. Stat. Ann. 10/7(2).

Because their claims arise only under state law, Respondents' alleged basis for federal jurisdiction was diversity of citizenship under 28 U.S.C. § 1332(a). The named Respondents are citizens of Minnesota, Massachusetts, and Illinois; Petitioners are citizens of Delaware, Pennsylvania, New York, New Jersey, and West Virginia. Pet. App. 3a. Although the citizenship of one customer, 3M, became subject to judicial notice on appeal, there was no evidence in the record in the district court regarding the citizenship of any of the 1400 other Plaintiffs.

2. The Self-Funded Plaintiffs' Claims

Respondents have more than 1400 "self-funded" customers. Pet. App. 6a. The self-funded customers are companies that contracted with Respondents to administer their prescription drug programs. *Id.* at 3a. Under these arrangements, the insurance companies merely administer the self-funded customer's plan, while the self-funded customer acts as its own insurer, bears all the risk, and pays any benefits due under the plan. *Id.*

When Respondents commenced the suits at issue here, they sued "on behalf of themselves and as claims administrators for their self-funded customers." *Id.* Respondents asserted throughout the

litigation that the self-funded customer claims were an integral part of the lawsuit. The citizenship of the self-funded customers, however, was not alleged. The named Respondents contended that they had contractual authority to assert the self-funded claims, a point which, if true, would have allowed them to sue on behalf of the self-funded customers without including them as parties.

Despite the centrality of the self-funded customer claims to the overall suit, Respondents repeatedly refused to provide discovery regarding both the identity of the self-funded customers and the asserted contractual basis for Respondents' claimed authority to sue on the customers' behalf. Respondents essentially ignored Petitioner Mylan's first document requests and interrogatories on the issue, leading Mylan to seek and obtain an order compelling this discovery. Even in the face of the Magistrate Judge's order, Respondents persisted in their failure to produce required information concerning the identities of the self-funded customers. The Magistrate Judge accordingly recommended that Respondents be held in contempt. In lieu of a contempt citation, the District Court imposed sanctions for the discovery violations.

Although Respondents still failed to produce the required identifying information regarding their self-funded customers, they eventually produced evidence (including sample contracts) demonstrating that they lacked contractual authority to pursue the self-funded customer claims as they had asserted. Petitioners moved *in limine* to preclude Respondents from presenting any evidence

regarding the self-funded customer claims, and the District Court granted the motion on the basis that the asserted contractual authority did not exist. Pet. App. 16a.

In response to the decision on Petitioners' motion *in limine*, Respondents sought reconsideration or, alternatively, leave to obtain "ratification" from their self-funded customers pursuant to Rule 17(a), which permits a real party in interest to ratify claims brought on its behalf. Respondents explicitly argued that the self-funded customers were the real parties in interest with respect to the claims brought on the customers' behalves. *Id.* at 17a-18a. The District Court refused to reconsider its ruling that Respondents lacked contractual authority to assert the claims, but it approved Respondents' request to seek ratification and allowed the claims to be asserted as those of real parties in interest under Rule 17.[2] *Id.* at 21a. The District Court adopted the ratification procedure proposed by Respondents, under which Respondents, on April 7 and 8, 2005, sent "negative option" letters to which a customer had to respond by April 15, 2005 or it would be deemed to have ratified. Only five of the 1402 self-funded customers sent letters opting out; the remaining 1397 were silent. In a status report regarding ratification, Respondents stated that they were continuing to assert claims on behalf of 3M, which was one of only three "ratifying" self-funded customers that Respondents identified.

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[2] Petitioners had objected to the ratification procedure. The validity of the procedure is not at issue on this petition.

At trial, the District Court received evidence regarding damages on the claims of the self-funded customers. The jury returned a verdict in favor of Respondents, awarding the full amount of damages asserted by their damages expert. On February 7, 2008, the District Court entered a final judgment awarding Respondents compensatory and punitive damages of $69,325,406.[3] Pet. App. 23a. There is no evidence in the trial record identifying the amount of damages attributable to any self-funded customer.

3. Jurisdictional Objections Below

Petitioners appealed the judgment to the United States Court of Appeals for the District of Columbia Circuit.

Among the grounds for reversal urged by Petitioners was the defectiveness of the ratification procedure in light of the fact, among others, that Respondents had not proved the citizenship of the self-funded customers. While preparing for oral argument on the appeal, Petitioners' appellate counsel noticed that 3M was mentioned in the status report regarding ratification as one of the self-funded customers that had ratified claims under Rule 17(a). Pet. App. 6a. 3M is incorporated in the State of Delaware. *See* Defendants-Appellants Request for Judicial Notice, Case No. 08-5044 (D.C. Cir. Oct. 3, 2010). Petitioner Cambrex Corporation is also a Delaware corporation. Given that this action was not brought as a class action, the complete diversity requirement of 28 U.S.C.

[3] On July 16, 2009, the judgment was amended to include prejudgment interest, bringing the total award to $76,823,943.

§ 1332(a) applies. Because 3M was a real party in interest, federal jurisdiction over the case was lacking.

Petitioners accordingly moved to dismiss. Pet. App. 4a. On January 18, 2011, the Court of Appeals issued an opinion agreeing with Petitioners that complete diversity was lacking. *Id.* at 7a. The Court observed: "Ordinarily a finding that the district court lacked jurisdiction would lead us to vacate the court's judgment and remand for dismissal." *Id.* at 9a.

However, rather than following that course, the Court decided: "The prudent course here is to remand to the district court to proceed under Rule 21." *Id.* at 10a. Observing that the identity and citizenship of the self-funded customers were largely absent from the record, the Court held that the District Court may "determine which, if any, of the self-funded customers may be dismissed" to create complete diversity and may "decide that plaintiffs' self-funded customers are not indispensable parties to the case." *Id.* The Court also indicated that a "partial retrial" on damages may be needed. *Id.* at 11a.

REASONS FOR GRANTING THE WRIT

Over the past two centuries, this Court has formulated basic precepts regarding diversity jurisdiction. First, the burden is on the plaintiffs to plead and prove the facts establishing diversity jurisdiction, including the citizenship of all real parties in interest. Second, where jurisdiction rests on diversity of citizenship under 28 U.S.C. § 1332(a), each plaintiff must be diverse from each

defendant, a principle known as "complete diversity." Third, a party may raise jurisdictional defects at any time, and diversity jurisdiction cannot be created by consent of the parties or by waiver. Fourth, diversity is determined by the facts existing at the commencement of the action. Finally, where a case has proceeded to judgment with incomplete diversity, the appropriate disposition by the appellate court is to remand for dismissal of the case.

This case should have been resolved by straightforward application of these principles. In addition to their own claims, Respondents brought claims on behalf of approximately 1400 of their "self-funded" customers under Rule 17(a). Both sets of claims were tried and resolved in Respondents' favor, and judgment was entered accordingly. The District Court, however, lacked jurisdiction to enter the judgment. First, as the Court of Appeals concluded, judicially noticed facts established that at least one of the self-funded customers has the same citizenship as one of the Petitioners. Second, and more generally, Respondents never pleaded or proved the citizenship of any of the customers. Because subject-matter jurisdiction can be raised at any time and cannot be waived, the Court of Appeals should have remanded for dismissal of the action.

Rather than disposing of the case as this Court's precedents mandate, the Court of Appeals invoked a narrow exception from *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), permitting dismissal of a single dispensable non-diverse party under Federal Rule of Civil Procedure 21. The Court of Appeals thus allowed the District

Court discretion to conduct a wide-ranging post-trial inquiry into the citizenship of the 1400 customers and, if it chooses, simply to dismiss whichever of those parties happened to be non-diverse. Indeed, the full scope of the problem is unknown as Respondents repeatedly failed to provide the court-ordered discovery necessary even to identify their self-funded customers. In two centuries' worth of diversity jurisdiction cases, this Court has never approved such a procedure, potentially involving a reopening of the record, substantial motion practice, a determination of the citizenship of 1400 parties, jurisdictional and damages discovery, severance of the non-diverse parties, determination of the applicable law based on the remaining parties' citizenship, and a retrial on damages.

The Court of Appeals' disposition stretches the narrow Rule 21 exception to the breaking point, disposing of two centuries of this Court's precedents concerning the limits of federal jurisdiction in order to preserve a judgment that the District Court lacked jurisdiction to enter. *Newman-Green* sanctioned dismissal of only a single non-diverse party who was otherwise irrelevant to the case. It neither envisioned nor approved dismissal of an indefinite number of real parties in interest in order retroactively to manufacture diversity jurisdiction where complete diversity was lacking from the inception of the case.

Further, the decision below conflicts not only with this Court's precedents but also with decisions of the Seventh and Eighth Circuits holding that Rule 21 cannot be used to dismiss a real party in interest from a case simply to create

federal jurisdiction that would otherwise be lacking. By contrast, the D.C. Circuit's holding that an indefinite number of real parties in interest may be dismissed from a case after trial and judgment in order to create federal jurisdiction threatens to expand the narrow *Newman-Green* exception, and hence the federal judicial power, beyond its limits.

This Court should grant *certiorari* to resolve these conflicts. The federal courts are already overburdened, and the D.C. Circuit's judgment in this case creates an open invitation for insurers and other entities with large customer bases to bring large, complex state-law cases into the federal courts on behalf of their customers without regard for the diversity jurisdiction problems that such suits may create. Numerous cases are brought on a representative basis, with associations suing on behalf of their members in a context where diversity jurisdiction requires a finding that all the members are diverse from all the defendants. Rather than fearing the loss of a potentially favorable verdict on jurisdictional grounds, such plaintiffs will be assured by the decision below that the worst outcome to be faced is merely a post-trial dismissal of the represented parties and a remittitur. Further, the disposition by the Court of Appeals raises the important and recurring question of how far federal courts may go to remedy jurisdictionally defective judgments.

This Court's review is required to resolve these jurisdictional issues and to reaffirm the proper limits on federal judicial power in cases arising solely under state law.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S LONG-STANDING PRECEDENT BECAUSE, IN THE ABSENCE OF PROOF OF COMPLETE DIVERSITY, THE COURT OF APPEALS FAILED TO REMAND FOR DISMISSAL OF THE ACTION

A. The Decision Below Conflicts with More Than Two Centuries of This Court's Precedents

This Court's diversity jurisprudence "has a pedigree of [over] two centuries." *See Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 582 (2004). Under *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804) and *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), a court of appeals must reverse a judgment premised on diversity jurisdiction when the plaintiffs have failed to plead or prove complete diversity. "A failure of complete diversity . . . contaminates every claim in the action" because "the presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum." *Exxon-Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 562, 564 (2005). The disposition by the Court of Appeals—remand without directing dismissal of the case—contravenes this Court's clear direction that a judgment entered without jurisdiction cannot stand. *See Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539-40 (1824).

Failure to prove diversity, regardless of whether diversity exists in fact, is itself a ground for dismissal. In *Capron*, the federal trial court rendered a judgment on the merits in favor of the defendant

in an apparent diversity suit, but on the plaintiff's appeal this Court reversed for want of jurisdiction. 6 U.S. at 127. The Court did not find, however, that diversity was absent in fact. Rather, it concluded that the plaintiff had failed sufficiently to prove the parties' citizenship. *Id.* The Court so held despite the paradoxical result that the plaintiff who improperly invoked diversity jurisdiction and lost on the merits could get a second chance in state court by noting his own error on appeal. *See Mansfield, C. & LMR Co. v. Swan*, 111 U.S. 379, 382 (1884) ("This rule was adopted in *Capron v. Van Noorden*, 2 Cranch, 126, decided in 1804, where a judgment was reversed, on the application of the party against whom it had been rendered in the Circuit Court, for want of the allegation of his own citizenship, which he ought to have made to establish the jurisdiction which he had invoked."). Thus, *Capron* has come to stand for the proposition that "[a] litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (citing *Capron*).

The companion to *Capron*'s rule that any party may raise lack of federal jurisdiction at any time is the *Strawbridge* rule that, "where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts." 7 U.S. at 267. In that case, this Court summarily affirmed a jurisdictional dismissal, stating that "the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to

sue, or liable to be sued, in the courts of the United States." *Id.* at 267-68. Relying on *Strawbridge*, this Court has consistently held that "diversity jurisdiction does not exist unless each defendant is a citizen of a different State from each plaintiff." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). This requirement of complete diversity applies to all "real and substantial parties to the controversy." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460 (1980). Moreover, diversity is to be determined by the facts existing as of the commencement of the action. *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957) (citing *Mollan*, 22 U.S. at 539).

The Court of Appeals' disposition of this case runs counter to these well-established principles. To begin with, the decision is directly contrary to *Capron*. *Capron* establishes that a failure to prove diversity at trial requires an appellate court to remand only for dismissal for lack of jurisdiction. In *Capron*, the parties may well have had complete diversity of citizenship; the problem was that diversity was not *proven*. The record was silent. Contrary to the opinion below here, this Court did not remand for a reopening of discovery and an inquiry into the parties' citizenships. Instead, it ordered the case dismissed for lack of jurisdiction. The ruling below cannot possibly be squared with that holding.

The disposition of the Court of Appeals improperly relieves the Plaintiffs of their burden of pleading and proving federal jurisdiction *in the first instance*. This Court has long held that the party invoking diversity jurisdiction bears the burden of pleading and proving the citizenship of

every party to the action. *See Anderson v. Watt*, 138 U.S. 694, 702 (1891) ("[I]t is essential that in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctively and positively averred in the pleadings, or should appear affirmatively with equal distinctness in other parts of the record."). In this case, Respondents never submitted evidence regarding the citizenship, or even the identity, of 1400 Plaintiffs. It is contrary to this Court's precedent to remand the case and reopen a closed trial record to determine the citizenship of 1400 parties where Respondents simply failed—indeed, did not even attempt—to meet their burdens of pleading and proof.

Moreover, given the known citizenship of 3M, it is perfectly clear, as the Court of Appeals held, that complete diversity never existed, despite the absence of record evidence regarding the identity and citizenship of nearly 1400 other Plaintiffs. Pet. App. 7a ("[T]he presence of just one nondiverse plaintiff—here 3M—destroys diversity jurisdiction under § 1332."); *id.* at 9a ("[I]t was not the district court's [Rule 17] ruling that brought the self-funded customers into the case. Plaintiffs did that when they started the lawsuit."). Thus, the decision below needlessly raises the specter of protracted discovery to determine, for each of those 1400 entities, not only the state of incorporation but also the principal place of business—that is, "the place where [each] corporation's high level officers direct, control, and coordinate the corporation's activities." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1186 (2010). This procedure cannot be

reconciled with this Court's insistence on dismissal as the ordinary remedy for incomplete diversity. *See Mansfield, C. & LMR Co. v. Swan*, 111 U.S. 379, 382 (1884) ("[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.").

B. *Newman-Green, Inc. v. Alfonzo-Larrain* Does Not Authorize a Federal Court to Create Jurisdiction Where the Record Contains No Evidence Regarding Some 1400 Plaintiffs

The decision below relied principally on *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). There, the plaintiff had sued five defendants, one of whom defeated diversity jurisdiction because he was a U.S. citizen resident abroad. The Court reaffirmed *Strawbridge*'s requirement of complete diversity. 490 U.S. at 829. The Court then held that an appellate court could properly dismiss a dispensable non-diverse party under Rule 21 because of (1) the general consensus that a district court could do so and (2) the principle that an appellate court may allow such amendments as a district court may. *Id.* at 832-34. Holding that the non-diverse defendant's presence did not give the plaintiffs a tactical advantage and that the joint and several liability of all defendants rendered the non-diverse defendant dis-

pensable under Federal Rule of Civil Procedure 19(b), the Court permitted dismissal of a single non-diverse defendant. *Id.* at 838. The Court explained that dismissal of the entire action, as opposed to the lone non-diverse defendant—whose precise citizenship was in fact proven on the record—would be a "waste of time and resources," *id.*, as the plaintiff would "simply refile" against the remaining defendants, submit the same evidentiary materials, and proceed to a "preordained judgment." *Id.* at 837.

The common sense outcome reached in *Newman-Green* is a narrow one, and wholly consistent with *Capron*, *Strawbridge*, and this Court's other jurisdictional jurisprudence. The *Newman-Green* Court directed that lower courts "sparingly" exercise their authority to dismiss non-diverse parties and "carefully consider whether the dismissal of a non-diverse party will prejudice any of the parties in the litigation." *Id.* at 837-38.

This narrow exception is inapplicable here for several reasons. First, the party dismissed in *Newman-Green* was a defendant, and hence was an unwilling litigant. By contrast, Respondents were Plaintiffs below and had the duty to plead and prove complete diversity to allow for jurisdiction in federal court. The Court in *Newman-Green* did not authorize any kind of post-trial "do over" for plaintiffs who fail to meet their jurisdictional burden.[4]

[4] Contrary to this Court's repeated mandate, the Court of Appeals effectively treated the subject-matter jurisdiction issue here as waived, at least in part, by the length of the District Court proceedings, including a jury trial. *See Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a

Second, *Newman-Green* sanctioned the dismissal of a single party that was otherwise irrelevant to the case. Here, by contrast, the District Court would need to dismiss up to 1400 parties, whose claims were integral to the damages award, in order to salvage the defective judgment. Indeed, Respondents have until this point insisted that the claims were a central part of the case.

Third, in *Newman-Green*, the jurisdictional defect was easily curable. Here, by contrast, the defects are far more numerous and complex; and any cure would require a reopening of the record and extensive discovery of more than 1400 parties. Indeed, the parties will not only have to determine the identity, place of incorporation, and principal place of business for 1400 companies; they will also have to undergo extensive additional discovery to determine which state law applies to each self-funded customer, as many state laws reject recovery outright for indirect purchasers and others have different requirements and remedial schemes from the state laws applied to Respondents' claims. *See generally* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 639-41 (6th ed. 2007) (explaining variances in state law regarding indirect purchaser recovery). Determining the applicable state law will require the parties and the District Court to determine, for example, where the contracts were negotiated, where the drugs in question were shipped, the location of the wholesalers or warehouses responsible for shipment, and the location of the

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federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.").

employees receiving the products. Further, retrying damages would require development of individualized damages evidence for each customer. By sanctioning these inquiries, the Court of Appeals' remand will create the very prejudice that *Newman-Green* instructs courts to avoid.

Finally, *Newman-Green* did not address dismissal of a real party in interest under Rule 17. As discussed below, the Seventh and Eighth Circuits have held that the exception recognized in *Newman-Green* does not extend to dismissal of non-diverse real party-*plaintiffs* in interest who are otherwise properly before the Court. Given Respondents' prior insistence on including the self-funded customers as real parties in interest (and hence parties for diversity purposes), they cannot now claim that the non-diverse self-funded customers can be excised from the case to create diversity, and they certainly cannot rely on the narrow holding of *Newman-Green* to do so.

C. This Court Should Grant Review Because the Decision Below Invites a Flood of State-Law Cases Where Complete Diversity is Lacking

The error in this case is no mere misapplication of a correctly stated rule of law. Rather, it is an open invitation to litigants with multiple customers, or groups with multiple members, to bring the participants' claims into federal court without regard for the presence or lack of complete diversity. The preference of some attorneys for litigating in federal court is well-known. *See Zee Med. Distrib. Ass'n v. Zee Med., Inc.*, 23 F. Supp. 2d 1151, 1158 (N.D. Cal. 1998) (refusing to "approve

an unnatural manipulation of the pleadings designed to keep a case involving a pure question of state law, with citizens of California on both sides of the dispute, merely because the parties—or perhaps more to the point, the litigators—apparently find it more convenient to be here"). Attorneys cannot always be expected to assist the federal courts in policing jurisdictional issues. *See, e.g., Belleville Catering v. Champaign Mkt. Place*, 350 F.3d 691, 692 (7th Cir. 2003) ("Once again litigants' insouciance toward the requirements of federal jurisdiction has caused a waste of time and money.").

This issue will arise again. Insurance companies, collection agents, and other litigating agents often litigate on behalf of customers. Depending on the interest retained by the represented customers in the outcome, their citizenship may control for diversity purposes. *See, e.g., Associated Ins. Mgmt. Corp. v. Ark. Gen. Agency, Inc.*, 149 F.3d 794, 797-98 (8th Cir. 1998) (creditor, not collection agent, was real party in interest). Likewise, this Court recently held that "aggregators" of multiple claims have Article III standing to assert those claims on behalf of their customers. *See Sprint Commc'ns Co. v. APCC Servs.*, 554 U.S. 269, 271 (2008). The citizenship of the holders of the claims will likely control the diversity inquiry as they retain an interest in the claims. *See Kramer v. Caribbean Mills*, 394 U.S. 823, 827-28 (1969). Thus, a substantial number of future cases will require courts and litigants to pay careful attention to the citizenship of entities that are not formally named as parties (or even identified in the pleadings) but that are nonetheless real and substantial parties to the litigation.

Federal courts are already over-burdened by filings asserting diversity jurisdiction, with no end in sight. *See* JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR, 19 ("Filings of diversity of citizenship cases . . . grew 4 percent to an all-time high of 101,202."); Admin. Office of the U.S. Courts, *Article III Vacancies–As of 05/20/2011* (May 20, 2011), http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx (noting total of 86 current vacancies in federal judiciary with only 45 nominations pending). The decision below will only exacerbate the problem. Despite repeated requests, Respondents never identified the overwhelming majority of their self-funded customers, and thus utterly failed in their obligation to plead and prove the citizenship of all real and substantial parties to the case. That Respondents would potentially be able to obtain a jurisdictional "mulligan" with only a partial remittitur from a judgment entered without jurisdiction will hardly inspire caution in similarly positioned litigants. Only the complete dismissal of the case will suffice to warn litigants and their counsel of their obligation to ensure that all plaintiffs—including customers, members, and others, as appropriate—are diverse from all defendants.

Especially in light of the importance of the questions presented to the federal judicial system, the interlocutory posture of this case should not pose an obstacle to the granting of this petition. Indeed, as *Newman-Green* and other cases demonstrate, this Court has not hesitated to consider questions of jurisdiction despite the interlocutory

posture of the case.[5] Moreover, where, as here, resolution of the question presented has the potential to resolve the case completely, the Court has intervened despite the lack of finality. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) ("The judgment of the Court of Appeals was not a final one, but we considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.'") (quoting *Land v. Dollar*, 330 U.S. 731, 734 (1947)); *Bruer v. Jim's Concrete of Brevard*, 538 U.S. 691 (2003) (reviewing interlocutory order denying motion to remand to state court).

Here, the proper application of this Court's diversity jurisdiction precedents will result in complete dismissal of the case. This Court should intervene to reaffirm the necessity of respecting

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[5] In *Newman-Green*, the panel of the Seventh Circuit had held that it could dismiss the non-diverse party on its own, but the *en banc* court held that only a District Court could do so and remanded the case to the District Court. 490 U.S. at 829-30. This Court intervened to reverse the *en banc* decision despite the interlocutory posture. Likewise, in *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567 (2004), the Fifth Circuit had reversed the District Court's dismissal of the case for lack of subject-matter jurisdiction, holding that because the case had already gone to a jury verdict and because the jurisdictional defect existing at the time the complaint was filed had been "cured" by a post-filing change in the citizenship of the non-diverse party, the district court should continue to exercise jurisdiction. 541 U.S. at 570. This Court did not refrain from intervening even though there was to be further litigation on remand before entry of a final judgment. Rather, this Court granted *certiorari* and reversed the Fifth Circuit's attempt to create an exception to the time-of-filing rule. *Id.* at 582.

the limits on federal jurisdiction in every case and at every stage of litigation.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SEVENTH AND EIGHTH CIRCUITS BY PERMITTING DISMISSAL OF NON-DIVERSE REAL PARTIES IN INTEREST RATHER THAN MANDATING DISMISSAL OF THE ENTIRE CASE

A. The Seventh and Eighth Circuits Have Held That the Presence of Non-Diverse Real Parties in Interest Requires Dismissal of the Entire Case

1. The Seventh Circuit

In *Sta-Rite Industries, Inc. v. Allstate Insurance Co.*, 96 F.3d 281 (7th Cir. 1996), the Seventh Circuit held that a real party-plaintiff in interest could not be severed from the case in order to create diversity jurisdiction that would otherwise be lacking. The plaintiffs had filed their case in federal district court but had failed to join a necessary, and non-diverse, party. The district court dismissed the case under Rule 19(b), and the plaintiffs appealed.

On appeal, the plaintiffs realized that one plaintiff and one defendant shared Delaware citizenship. The plaintiffs accordingly asked the Seventh Circuit to dismiss the non-diverse plaintiff under *Newman-Green*. The Seventh Circuit denied the request. Concluding that the district court lacked subject matter jurisdiction, the Seventh Circuit affirmed the dismissal. The court held that the

non-diverse plaintiff "[met] the requirements of a real party in interest under Fed. R. Civ. P. 17 and thus must be retained as a plaintiff." 96 F.3d at 286. The court explained that dismissal of the plaintiff would not allow the federal courts "to render complete relief, and would likely lead to duplicative actions." *Id.* at 287. Tellingly, the court refused "to allow the exception *Newman-Green* provides to swallow Fed. R. Civ. P. 17 & 19 and the complete diversity requirement." *Id.*

Respondents here insisted that their self-funded customers were real parties in interest. On that basis, Respondents convinced the District Court to permit them to proceed with the customers' claims. Respondents cannot now deny that these self-funded customers are necessary "to render complete relief" or that their dismissal would "likely lead to duplicative actions." Thus, under the Seventh Circuit's approach, this action would be dismissed. Contrary to the *Sta-Rite* holding, the decision below improperly holds out the possibility that, by dismissing a non-diverse real party in interest, the District Court can somehow manufacture diversity jurisdiction where it never existed.

2. The Eighth Circuit

The Eighth Circuit likewise refused to dismiss a non-diverse real party in interest in *Associated Insurance Management Corp. v. Arkansas General Agency, Inc.*, 149 F.3d 794 (8th Cir. 1998) (citing *Sta-Rite*, 96 F.3d at 285). In that case, a collection agent brought claims on behalf of two insurers as real parties in interest, and the district court found that the collection agent lacked authority to

assert those claims. 149 F.3d at 796-97. Moreover, one of those insurers had the same citizenship as one of the defendants. *Id.* at 797. To solve the diversity problem, the agent and insurers could have sought voluntary dismissal of the non-diverse insurer's claims. *Id.* Instead, however, they sought, and the district court granted, leave for the agent to preserve the claims of the non-diverse insurer by obtaining ratification under Rule 17(a) (on the mistaken theory that the agent could then proceed with the suit in the place of the non-diverse insurer). *Id.* The other insurer, whose citizenship was diverse, formally joined the litigation as a plaintiff. *Id.* The district court held a full trial and awarded a "substantial judgment" to the plaintiffs. *Id.* at 796.

On appeal, the Eighth Circuit held that the citizenship of the non-diverse insurer, as the real party-plaintiff in interest, and not the citizenship of the agent, determined the presence or absence of complete diversity. *Id.* In response to the plaintiffs' request, made for the first time on appeal, to dismiss the non-diverse insurer and preserve the portion of the judgment attributable to the diverse plaintiff's claims, the court "decline[d] to recast the cause of action to create diversity jurisdiction that was neither pleaded nor requested in the district court." *Id.* at 798. The court held that where a named plaintiff (*i.e.*, the agent) meant to litigate the non-diverse real party's claims in federal court, fought to preserve rather than dismiss those claims, and had not been surprised by factual or legal developments undermining diversity, courts should not retroactively cure the defect. *Id.* The Eighth Circuit thus remanded the case for

dismissal, observing, "As we see it, the parties have only themselves to blame for a diversity problem of their own making." *Id.*

Respondents in this case intended to litigate on behalf of all their self-funded customers, styling their suit as "on behalf of themselves" and "on behalf of [their] self-funded customers." Given that they had access to their own contracts and could determine which customers were covered by that statement, they cannot claim to be surprised by the fact that certain of their self-funded customers are Delaware corporations or are otherwise non-diverse. Thus, under the Eighth Circuit's rule, as under the Seventh Circuit's, this case should be dismissed. Contrary to the Eighth Circuit's holding, the D.C. Circuit's approach would permit the District Court on remand to excise the very non-diverse parties whom Respondents zealously kept in the case under Rule 17(a), and thus to fashion a *post hoc* remedy for a jurisdictional defect of Respondents' "own making."

B. This Court Should Resolve This Conflict Because It Raises the Fundamental Question of How Far a Federal Court Can Go to Remedy a Jurisdictionally Defective Judgment

This Court has consistently held that "absence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties." *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005). In this case, the demonstrable lack of complete diversity, and Respondents' failure to plead or prove the citizenship of nearly 1400 Plaintiffs, rendered the trial and final judgment in the district court "the meaningless act[s] of a court

having no adjudicative jurisdictional power." *Associated Ins. Mgmt.*, 149 F.3d at 797. The D.C. Circuit sought to avoid the consequences of the jurisdictional defect by inviting the District Court to determine "which, if any, of the self-funded customers may be dismissed" in order retroactively to create complete diversity. Pet. App. 10a.

Under the Seventh and Eighth Circuits' approach, courts in cases such as this would respect the limits on federal subject-matter jurisdiction by dismissing cases where complete diversity is lacking. Under the D.C. Circuit's approach, however, a federal court may fashion a *post hoc* remedy for the jurisdictional defect by dismissing real parties in interest from the case and reducing the judgment's award of damages. This Court's guidance is needed to reaffirm that, where the appellate court determines a judgment to have been entered without jurisdiction, the proper disposition is to remand for dismissal of the action. *See Anderson v. Watt*, 138 U.S. 694, 707 (1891) ("It is clear that the Circuit Court, upon the development of the facts, should have proceeded no further, and dismissed the case.").

"Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers . . . ." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). Allowing the D.C. Circuit's judgment to stand would offend this equilibrium by permitting federal courts to "acquire power by adverse possession." *See Newman-Green*, 490 U.S. at 839 (Kennedy, J., dissenting). This Court has not hesitated to order dismissal of jurisdictionally defective cases, even after many years of litiga-

tion. *See, e.g.*, *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 582 (2004) (ordering dismissal of case for lack of diversity jurisdiction after more than six years of litigation, including jury trial). It should not hesitate to do so here.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully Submitted,

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