No. _____

In the Supreme Court of the United States

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES REAGAN,
Petitioners,

v.

JON MICHAEL WITHROW,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a district court, upon the plaintiff's written consent, refers a case to a magistrate judge for trial, *see* 28 U.S.C. §636(c), and all parties, the magistrate judge, and the jury proceed in a manner consistent with that referral, must a court of appeals *sua sponte* vacate the judgment for lack of jurisdiction because defendants did not expressly consent, or can defendants cure that alleged defect by confirming, in a post-judgment filing with the district court, their consent to trial before the magistrate judge?

LIST OF PARTIES

The caption for this petition includes all parties to the Fifth Circuit appeal. *See* SUP. CT. R. 14.1(b). Petitioners note, however, that the Fifth Circuit caption lists a fourth "Defendant-Appellee," Jerry Ballard. App. 1a. Ballard was not a party in the Fifth Circuit.

Plaintiff Withrow's claims against Ballard were dismissed prior to service and, therefore, Ballard never appeared at trial or in the Fifth Circuit. *See* R.713, 809.[1] Although the final judgment vacated by the Fifth Circuit reflects Ballard's pre-service dismissal, App. 28a, Withrow did not contest the dismissal on appeal. Because Ballard was never served, never appeared in the trial court or Fifth Circuit, and his dismissal was not challenged by Withrow, Petitioners do not list Ballard as a party "to the proceeding in the court whose judgment is sought to be reviewed." SUP. CT. R. 14.1(b).

1. References to documents that are in the Fifth Circuit record, but not included in the Appendix, will be designated "R.[page #]."

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PETITION FOR WRIT OF CERTIORARI

The courts of appeals are divided on the validity of a party's post-judgment consent to trial before a magistrate judge pursuant to 28 U.S.C. §636(c). The Fifth Circuit erroneously vacated a judgment after determining, *sua sponte*, that two parties did not expressly consent to the magistrate judge's authority prior to trial. The court disregarded the parties' post-judgment confirmation of consent, creating a square conflict with the Seventh and Eleventh Circuits, which consistently effectuate consent offered after judgment—even for the first time on appeal. The Ninth Circuit, like the Fifth, has rejected post-judgment consent; but its prohibition has been directed at statements outside the district-court record, not a post-judgment, trial-court filing, which occurred in this case. The conflict over post-judgment consent injects uncertainty into §636(c)'s civil-trial scheme, which is designed to promote speedy justice, not multiply proceedings. And further uncertainty arises from the Fifth Circuit's "jurisdictional" perception of consent, which is inconsistent with the Tenth Circuit's views on §636.

Both the Fifth Circuit's rigid interpretation of §636(c)—and its perception that consent controls subject-matter jurisdiction—raise significant questions about magistrate judges' civil-trial authority under §636(c). The Court should grant the petition for writ of certiorari to resolve these important and unsettled questions of federal law. *See* SUP. CT. R. 10(a), (c).

CITATION OF OPINIONS AND ORDERS

The Fifth Circuit's opinion is reported as *Withrow v. Roell*, 288 F.3d 199 (CA5 2002). App. 1a. The Fifth Circuit's limited remand order is unreported. App. 12a. Also unreported are the district court's order on remand adopting the magistrate judge's report and recommendation on consent, App. 14a, and the report and recommendation itself. App. 16a. The magistrate judge's final judgment on the merits, which the Fifth Circuit vacated for lack of consent, is unreported. App. 28a.

BASIS FOR JURISDICTION

The Fifth Circuit delivered its judgment and opinion on April 8, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

"Notwithstanding any provision of law to the contrary —

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. . . .

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." 28 U.S.C. §§636(c)(1)-(2).

STATEMENT OF THE CASE

Jon Michael Withrow, an inmate in custody of the Texas Department of Criminal Justice (TDCJ), brought this *pro se* suit under 42 U.S.C. §1983 alleging that various TDCJ doctors and

nurses were deliberately indifferent to his medical needs when he injured an ankle dismounting his cell bunk.

Prior to service on defendants, Withrow filed written consent to trial before a magistrate judge pursuant to 28 U.S.C. §636(c). App. 20a.[2] The district court referred the action to a magistrate judge for all purposes, including trial and entry of final judgment, but noted that the reference would be vacated if defendants, upon service, did not consent. App. 21a.

After being served and answering, Defendants Joseph C. Roell, M.D., Petra Garibay, L.V.N., and James Reagan, M.D., filed motions for summary judgment, which the magistrate judge denied. The magistrate judge's order confirmed that "[b]y order of reference entered December 30, 1997, this case was referred to the undersigned to conduct all further proceedings, including entry of final judgment, in accordance with 28 U.S.C. §636(c)(1)." App. 26a. At no point did any of these Defendants, or Plaintiff Withrow, object to the magistrate judge's representation of her authority.

At a subsequent status conference, the parties discussed the need for a newly added defendant's consent,[3] and the magistrate judge represented that "all of the other parties have consented" to her presiding at trial. App. 4a. Again, Defendants Roell, Garibay, and Reagan did not contest their consent, and neither did Withrow.

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2. Withrow also executed a consent form at a pre-service, screening hearing, R.821, but that first form is not in the record. At the hearing, an assistant attorney general appearing for the State of Texas as *amicus curiae* did not execute a consent form on behalf of the TDCJ employees named in Withrow's complaint because they had not been served, were not parties, and thus were not yet represented by the Office of the Attorney General. *See id.*

3. This added defendant, Danny Knutson, settled with Withrow before trial, mooting the issue of his consent.

Withrow's claims against Defendants Roell, Garibay, and Reagan proceeded to trial before a jury, with the magistrate judge presiding and Withrow representing himself. On the first day of trial, the magistrate judge informed the jurors: "In this case—or in any civil case in which both parties consent to my jurisdiction, I do have a civil jurisdiction to hear civil jury trials and that's what we have scheduled this morning." App. 27a. Consistent with all prior proceedings, no party objected to the magistrate judge's authority.

After hearing the evidence, the jury returned a unanimous verdict for Defendants Roell, Garibay, and Reagan, and the magistrate judge entered a final judgment in their favor. App. 28a. Withrow appealed, *pro se*, but prior to briefing the Fifth Circuit remanded the case, *sua sponte*, for the limited purpose of determining whether all parties had consented to trial before the magistrate judge. App. 12a-13a. The remand order noted that the record contained written consent by Plaintiff Withrow and Defendant Reagan, but not the other defendants. App. 13a. Accordingly, the Fifth Circuit instructed the district court "to determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written." *Id.*

On remand, Defendants Roell, Garibay, and Reagan filed written consent in the district court, expressly stating their "consent to have this case heard by the United States Magistrate Judge . . . for all purposes, including entry of judgment and jury trial." App. 22a. They also expressly confirmed "that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." *Id.*

The magistrate judge prepared a memorandum and recommendation for the district court, finding that Defendant

Reagan was the only defendant who timely filed written consent.[4] Regarding Defendants Roell and Garibay, the magistrate judge noted that "by their actions they clearly implied their consent to the jurisdiction of a magistrate," but that "implied consent does not confer jurisdiction" and Fifth Circuit precedent precludes curing that defect through belated, express consent. App. 19a.[5]

Defendants objected to the magistrate judge's report, but the district court adopted her findings and conclusions, agreeing that "Defendants Roell and Garibay did not expressly consent before trial" and that "belated consent is insufficient to cure this jurisdictional defect." App. 14a (citing *Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1108 (CA9 1999)).

The Fifth Circuit affirmed. Despite Plaintiff Withrow's and Defendant Reagan's express, pre-trial, written consent to proceed before the magistrate judge—and the express, post-judgment consent of Defendants Roell and Garibay—the Fifth Circuit

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4. The magistrate judge's order for service of process had directed each defendant to answer and to file a statement as to whether they consented to the jurisdiction of a United States Magistrate Judge. App. 17a. Defendant Reagan, then represented by private counsel, filed an answer and a separate statement consenting to trial before the magistrate judge. Defendants Roell and Garibay, both represented by the Texas Office of the Attorney General, filed answers but did not include a statement regarding consent. At the time of remand, all three Defendants, now represented by the same assistant attorney general, filed a written statement confirming their consent to proceed before the magistrate judge at all times prior and subsequent to entry of judgment. App. 22a.

5. The magistrate judge also determined that Roell and Garibay had not orally consented at hearings, App. 17a, and the Fifth Circuit held that this finding was not clearly erroneous. App. 4a-5a. Petitioners do not challenge the oral-consent finding, *per se*, in their petition for writ of certiorari.

determined that the magistrate judge lacked jurisdiction to try the case and enter judgment on the jury's verdict, requiring a remand for new trial. Acknowledging that the Seventh and Eleventh Circuits have repeatedly held post-judgment consent effective under 28 U.S.C. §636(c), the Fifth Circuit rejected these decisions as "contrary to the statute." App. 5a-10a. Like the district court, the Fifth Circuit referenced the Ninth Circuit's refusal to consider belated consent in *Hajek*, App. 6a, and aligned itself with that court. The Fifth Circuit also went further and specified that consent to a §636(c) referral must be not only express but in writing, filed before trial commences, to confer jurisdiction for the magistrate judge to preside and enter judgment. App. 11a.

In rejecting the Seventh and Eleventh Circuits' approach—under which belated, express consent cures technical defects in §636(c) referrals—the Fifth Circuit recognized that its repudiation of post-judgment, confirmatory consent imposes significant costs: "Our holding that consent must be pre-trial requires, unfortunately, that this matter be re-tried at the expense of the parties and the judicial system." App. 10a.

SUMMARY OF ARGUMENT

The Fifth Circuit's categorical rejection of post-judgment consent conflicts with the better reasoned decisions of the Seventh and Eleventh Circuits and thwarts the goals of the Federal Magistrate Act of 1979. By expanding magistrate judges' civil-trial authority, Congress sought to promote judicial efficiency and provide an alternative forum for speedy resolution of civil suits. Congress made consent the lynchpin of magistrate judges' new power, but insisted only that consent be voluntary, not that parties manifest consent in a particular manner.

Despite Congress's concern with voluntariness, not formality, the Fifth Circuit adopted a formalistic approach to consent that prohibits parties from expressly confirming—post-judgment—their

voluntary and knowing consent to proceed before a magistrate judge. In this case, the rule defeats Plaintiff Withrow's and all Defendants' trial expectations, nullifies a jury verdict, and burdens the federal docket by sending the parties back to relitigate claims already adjudicated on the merits. This perverse result is not commanded by the text of §636(c), and it defeats Congress's goal of facilitating speedy justice.

By squarely conflicting with decisions of the Seventh and Eleventh Circuits—and pushing the envelope of the Ninth Circuit's more limited rejection of post-judgment consent—the Fifth Circuit's stance exacerbates uncertainty over the type of consent necessary to effectuate magistrate judges' authority to conduct civil trials pursuant to 28 U.S.C. §636(c). This is inconsistent with Congress's desire for litigants in all federal courts—regardless of the governing circuit—to enjoy an equal opportunity to expedite litigation through the voluntary use of magistrate judges.

Additionally, the Fifth Circuit's *sua sponte* investigation into consent confuses statutory referral requirements with subject-matter jurisdiction. The Tenth Circuit, by contrast, has held that defects in referral procedures are not jurisdictional errors. This disagreement over subject-matter jurisdiction, along with the circuit conflict over post-judgment consent, warrant the Court's attention. The Court should grant the petition for writ of certiorari to answer these important and unsettled questions of federal law. *See* SUP. CT. R. 10(a), (c).

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION RAISES IMPORTANT AND UNSETTLED QUESTIONS ABOUT THE TYPE OF CONSENT REQUIRED TO INVOKE MAGISTRATE JUDGES' CIVIL-TRIAL AUTHORITY UNDER 28 U.S.C. §636(C).

In 1979, Congress amended 28 U.S.C. §636 to authorize federal magistrate judges to conduct and enter final judgments in civil trials. *See* Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (1979). In expanding magistrate judge's authority, Congress aimed "to improve access to the Federal courts," *id.*, provide relief to overburdened district judges, and "prevent inattention to a mounting queue of civil cases pushed to the back of the docket." S. REP. NO. 96-74, at 4 (1979).

To protect individual litigants' rights and the integrity of the Article III district court, magistrate judges' new authority was contingent on two factors: (1) the parties' consent; and (2) a special designation by the district court. *See* Pub. L. No. 96-82, §2(2), 93 Stat. at 643 (codified as amended at 28 U.S.C. §636(c)(1)). The consent requirement was critical, since litigants would be waiving their right to proceed before an Article III judge. *See, e.g., Peretz v. United States*, 501 U.S. 923, 931 n.8 (1991); S. REP. NO. 96-74, at 4; *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 & H.R. 2202 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice, of the House Comm. on the Judiciary*, 96th Cong. 375-80 (1979) [hereinafter "*1979 Hearings*"] (report of U.S. Department of Justice, Office for Improvements in the Administration of Justice (Jan. 19, 1978) [hereinafter "D.O.J. Report"]).[6]

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6. The federal courts of appeals have consistently upheld the constitutionality of magistrate-judges' civil-trial authority, with parties' consent, under §636(c). *See* MAGISTRATE JUDGES DIVISION OF THE

Congress did not, however, specify the form of consent a litigant must give to authorize a referral under §636(c). This is not surprising, because the legislative history of §636(c)(1) does not reveal an overriding concern with the formalities of consent. Rather, the goal was to ensure the voluntariness of consent and devise safeguards to prevent courts from coercing litigants to consent to magistrate-judge referrals against their wishes. *See infra* Part I.B.

The Seventh and Eleventh Circuits' acceptance of post-judgment consent protects parties' interests, promotes judicial efficiency, and satisfies the statutory scheme for civil-trial referrals established in §636(c). By contrast, the Fifth Circuit's rigid construction of §636(c) exalts form over substance to the detriment of the parties, the district courts, and magistrate judges.

This Court previously has recognized "the importance of magistrates to an efficient federal court system." *Peretz*, 501 U.S., at 929. To preserve the effectiveness of magistrate judges' vital role—and to promote consistency in parties' utilization of this valuable resource—the Court should determine whether post-judgment consent ensures the validity of judgments rendered pursuant to §636(c).

A. The Court Should Resolve the Circuit Split Over Post-Judgment Consent.

The Fifth Circuit's rejection of post-judgment consent squarely conflicts with decisions of the Seventh and Eleventh Circuits, which have repeatedly deemed post-judgment consent effective

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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES 148-50 (3d ed. 1999) [hereinafter "INVENTORY OF DUTIES"] (collecting cases). The constitutionality of §636(c) has never been questioned in this case by any party or the Fifth Circuit.

under §636(c). *Compare Withrow*, 288 F.3d, at 203-04 (rejecting permissibility of post-judgment filing confirming parties' pre- and post-trial consent), *with, e.g., Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 883 (CA7 1998) (holding that parties' consent following appellate oral argument satisfied §636(c)'s consent requirement); *Gen. Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1496-97 (CA11 1997) (holding post-judgment consent effective when parties withdrew their request for a new trial, thereby accepting the magistrate judge's authority to enter judgment); *Am. Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381, 1385 (CA7 1995) (accepting statement of consent in party's supplemental appellate filing); *Smith v. Shawnee Library Sys.*, 60 F.3d 317, 320-21 (CA7 1995) (stating that appellate court must accept parties' offer to cure lack of consent by submitting a belated consent after appellate oral argument); *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1185 (CA7 1987) (relying on parties' joint stipulation to magistrate judge's authority filed weeks after entry of the appealed order); *cf. Rembert v. Apfel*, 213 F.3d 1331, 1335 & n.1 (CA11 2000) (reconfirming that "[p]arties can consent even after judgment" but dismissing appeal when party would not consent at oral argument); *Mark I, Inc. v. Gruber*, 38 F.3d 369, 371 (CA7 1994) (vacating judgment when party was offered a belated opportunity to consent on appeal but declined to do so); *Silberstein v. Silberstein*, 859 F.2d 40, 41-43 (CA7 1988) (recognizing that absence of consent can be "cured" when parties "stipulate *after* judgment that they had previously consented," but vacating judgment when the record contained no such stipulation).

Although the Fifth Circuit's prohibition against post-judgment consent clashes with the views of the Seventh and Eleventh Circuits, it is generally consistent with the Ninth Circuit's approach in *Hajek*. 186 F.3d, at 1108 & n.9 (rejecting party's attempt to consent, in its appellate brief, to a magistrate judge's trial authority). The Fifth and Ninth Circuits' views on consent are not, however, identical. Whereas the Fifth Circuit categorically bans

post-judgment consent and requires pre-trial consent to be in writing, App. 7a-11a, the Ninth Circuit has not been so rigid. That court declined, in *Hajek*, to foreclose the possibility that post-judgment consent might satisfy §636(c) in certain circumstances. Indeed, the Ninth Circuit recently gave credence to post-judgment written consent when it was filed in the district court and the party also had orally consented prior to the magistrate judge's dispositive ruling. *See Kofoed v. Int'l Bhd. of Elec. Workers, Local 48*, 237 F.3d 1001, 1004 (CA9 2001).

The Fifth Circuit, therefore, stands at the extreme of the circuit spectrum. And its unforgiving stance is driven by two fundamental misconceptions: first, that defining consent solely by *pre-trial* express statements prevents "gamesmanship"; and, second, that accepting post-judgment consent would impermissibly imply consent from a party's conduct. App. 8a-10a. The Fifth Circuit is mistaken on both counts.

The potential for gamesmanship is not eliminated by requiring pre-trial consent, as the Fifth Circuit erroneously reasoned. App. 9a (concluding that post-judgment consent allows parties to withhold consent until a verdict is reached and then decide whether to consent based on the outcome, but that requiring pre-trial consent removes that potential for abuse). As the Seventh Circuit has recognized, the potential for "strategy games" exists under any rule. *Smith*, 60 F.3d, at 321. Thus, "if we did not accept late consents, a litigant who knew that the *other* side had not consented could wait until judgment and raise the problem only if he lost." *Id.*

Indeed, the Fifth Circuit has encountered such strategic maneuvers. In *Caprera v. Jacobs*, 790 F.2d 442 (CA5 1986) (per curium), the court reluctantly vacated a magistrate judge's dismissal of plaintiffs' §1983 suit when all original parties consented to the magistrate judge's civil-trial authority but a defendant added by plaintiffs in an amended complaint neglected to file a form. After the magistrate judge granted defendants' Rule 12(b)(6) motion and

dismissed plaintiffs' claims, the plaintiffs protested his authority, citing the added defendant's failure to file written consent. As the Fifth Circuit bemoaned:

> "We recognize that it is unfair to allow a party, as the plaintiffs did here, to remain silent on the jurisdictional problem while awaiting the magistrate's decision, knowing it will get a second chance from the appellate court should the magistrate rule against the party. This court does not favor giving such parties 'a second bite at the apple.' However, when the objection is to jurisdiction, it cannot be waived." *Id.*, at 445.[7]

Recognizing the potential for gamesmanship under any rule, the Seventh Circuit has declined to "write a treatise on game theory," *Smith*, 60 F.3d, at 321, or let suspicion of parties' motives determine its views on consent. Its steadfast acceptance of post-judgment consent is the most appropriate approach—not because it solves the problem of gamesmanship, but because it best satisfies the goals underlying the Federal Magistrate Act. It effectuates the parties' express, voluntary consent; and it ensures effective use of judicial resources. This is particularly true when, as in Withrow's suit, all parties proceed before a magistrate judge in a manner consistent with consent; and the only parties who previously did not express consent on the record do so, post-judgment.

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7. Technical defects in consensual referrals implicate a magistrate judge's authority, not the subject-matter jurisdiction of the district court. *See infra* Part II. The *Caprera* plaintiffs objected to the magistrate judge's authority post-judgment, both in a Rule 60(b) motion and on appeal, placing the issue of consent squarely before the Fifth Circuit. But when, as in this case, no party contests consent, an appellate court should not raise the issue *sua sponte*. *See id.*

Moreover, post-judgment consent is not "implied" from the parties' conduct, as the Fifth Circuit erroneously concluded.[8] App. 9a-10a. Rather, it is an express statement of parties' agreement to proceed before a magistrate judge. *See Smith*, 60 F.3d, at 321 ("A late-submitted consent is 'an unequivocal representation that the magistrate was acting with the parties consent.'") (quoting *King*, 825 F.2d, at 1185). As the Seventh Circuit has observed, "while many courts (including our own) refuse to infer consent from the parties' behavior, and some have even insisted (without basis in the statute) on 'a clear statement by the parties,'" post-judgment consent "*is* a clear statement by the parties" and satisfies those concerns. *King*, 825 F.2d, at 1185 (citation omitted). Post-

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8. Courts have generally agreed with the Fifth Circuit's view that consent under §636(c) must be express, not implied. *See, e.g., Kofoed*, 237 F.3d, at 1004; *Rembert*, 213 F.3d, at 1334; *N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, 996 F.2d 21, 24 (CA Cir.1993); *King*, 825 F.2d, at 1185; *Ambrose v. Welch*, 729 F.2d 1084, 1085 (CA6 1984) (per curiam). *But see Archie v. Christian*, 808 F.2d 1132, 1137 (CA5 1987) (en banc) (Higginbotham, J., specially concurring) (reasoning that when parties knowingly proceeded to trial before a magistrate judge but failed to execute written consent, and "no parties objected to the magistrate's having presided over the trial, although they were well aware that a magistrate had presided . . . . [i]n every real sense they consented").

Notwithstanding courts' aversion to implied consent, the Judicial Conference Committee on the Administration of the Magistrate Judges System has endorsed "opt out" systems in which cases are randomly referred to magistrate judges and a party must expressly object to the referral if they wish to proceed instead before an Article III judge. COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM, SUPPLEMENT TO THE LONG RANGE PLAN FOR THE MAGISTRATE JUDGES SYSTEM: CIVIL AND FELONY CONSENT AUTHORITY OF MAGISTRATE JUDGES 3-4 (1993 & Supp. 1994) [hereinafter "LONG RANGE PLAN"].

judgment consent may confirm what previously was implicit in the parties' conduct, but that does not render it implied consent.

The post-judgment consent filed by Defendants Roell, Garibay, and Reagan in the district court not only was consistent with their consensual conduct before the magistrate judge, but also was an unequivocal declaration of express consent:

> "Defendants Roell, Garibay, and Reagan consent to have this case heard by the United States Magistrate Judge in the United States District Court for the Southern District, Corpus Christi Division for all purposes, including entry of judgment and jury trial. Defendants Roell, Garibay, and Reagan further notify the Court that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." App. 22a.

This express statement unconditionally confirmed Defendants' consent to proceed before the magistrate judge in accordance with §636(c), and it should have settled any question of the magistrate judge's authority to enter final judgment—as it would have in the Seventh and Eleventh Circuits. But such is not the case for litigants like Defendants Roell, Garibay, and Reagan who are sued in jurisdictions bound by the Fifth Circuit's rule.

Indeed, the circuit conflict over post-judgment consent will produce inconsistent results whenever parties knowingly and voluntarily try their case to a magistrate judge without formalizing their pre-trial consent. This defeats Congress's intent to provide "all parties in the district courts [with] equal opportunity to avail themselves of the new provisions to expedite the disposition of litigation." S. REP. NO. 96-74, at 13. To protect parties' rights, conserve judicial resources, and preserve "the importance of magistrates to an efficient federal court system," *Peretz*, 501 U.S., at 929, the Court should grant the petition for writ of certiorari and

resolve whether post-judgment consent confirms a magistrate judge's civil-trial authority under §636(c).

B. Legislative History Demonstrates That Congress's Concern Was Coercion, Not the Formalities of Consent.

The Fifth Circuit erroneously determined that both the plain language in §636(c) and the statute's legislative history compelled the court's rejection of post-judgment, confirmatory consent. App. 8a-10a. Congress, however, was concerned with preventing coercion, not dictating the manner in which parties agree to try their case before a magistrate judge.

As the Seventh Circuit has correctly observed, §636(c) "does not require a specific form or time of consent or even that it be in writing (unless the jurisdiction is to be exercised by a part-time magistrate)." *King*, 825 F.2d, at 1185; *see also* 28 U.S.C. §636(c)(1). The magistrate judge who presided over Withrow's trial was not part-time; therefore, written consent was not statutorily required to invoke her authority.

The Fifth Circuit misconstrued §636(c)'s language that "[u]pon the consent of the parties" magistrate judges "may conduct" civil trials and enter final judgments. App. 8a (quoting 28 U.S.C. §636(c)(1)). The court reasoned that post-judgment consent is "contrary to the scheme established by this language," because consent is a "condition precedent" to the magistrate judge's assuming a §636(c) role. App. 8a. Petitioners agree that a magistrate judge cannot act under §636(c) without the parties' consent, but dispute the court's inference that post-judgment consent is inconsistent with Congress's vision.

Neither Withrow nor Defendants contend that the magistrate judge acted at any time without their consent. Although Defendants Roell and Garibay did not expressly confirm consent until after judgment, App. 22a, that does not mean they did not previously

consent to proceed before the magistrate judge—to whom the case already was referred at the time of service. App. 21a.

The "upon the parties consent" language in §636(c) does not require an immediate, written expression of consent. *See King*, 825 F.2d, at 1185 (noting that while some courts insist on "a clear statement by the parties," that requirement is "without basis in the statute").[9] Rather, that language prohibits referrals to magistrate judges against the parties' wishes.

The legislative history of the Federal Magistrate Act of 1979 is replete with discussions about consent that consistently focus on its voluntariness, not its form. The Joint Explanatory Statement of the Committee of Conference to the House and Senate is particularly instructive:

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9. Federal Rule of Civil Procedure 73, which complements §636(c), instructs parties to file written consent and includes a model form to submit to clerks of court. *See* FED. R. CIV. P. 73; *id.* Form 34. A magistrate judge's authority, however, comes from the statute, not this rule. Thus, many courts, including the Fifth Circuit, have not enforced strict compliance with the rule when the record otherwise documents consent. *See, e.g., Kofoed*, 237 F.3d, at 1004 (referencing Rule 73 but deeming adequate pre-judgment oral consent confirmed by post-judgment written consent); *Kadonsky v. United States*, 216 F.3d 499, 502 (CA5 2000) (accepting consent of party who did not sign the form officially recognized by Rule 73 because "he did sign a document evincing his willingness to proceed before a magistrate judge"), *cert. denied*, 531 U.S. 1176 (2001); *Silberstein*, 859 F.2d, at 43 (referencing Form 34 and expressing a preference for, but not requiring, written consent). *But see N.Y. Chinese TV Programs,* 996 F.2d, at 23-24 (emphasizing Rule 73's literal requirements). The Judicial Conference Committee on the Administration of the Magistrate Judges System has suggested that Rule 73 be amended to eliminate the written consent requirement. *See* LONG RANGE PLAN, at 4.

> "[T]he *voluntary* consent of the parties is required before a civil action may be referred to a magistrate for final decision. . . . The conferees felt that because of the possibility of coercion a strong warning should remain in the legislation that neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference . . . . [R]ules of the court must include procedures to *protect the voluntariness, knowingness, and willingness* of the consent. . . . [O]nce pretrial proceedings have commenced before a district judge or magistrate, the parties could consent to trial by a magistrate before either of these judicial officers. Of course, they also could return to the clerk's office and file their consent there. Again, in this circumstance, no coercion is to be tolerated." S. CONF. REP. NO. 96-322, at 7-8 (1979) (emphasis added).

Other discussions of voluntariness abound. And all focus on preventing coercion, not formalizing consent. *See, e.g.,* S. REP. NO. 96-74, at 5 ("The bill clearly requires the voluntary consent of the parties as a prerequisite to a magistrate's exercise of the new jurisdiction. The committee firmly believes that no pressure, tacit or expressed, should be applied to the litigants to induce them to consent to trial before the magistrates."); H.R. REP. NO. 96-287, at 2 (1979) ("The bill makes clear that the knowing and voluntary consent of the parties is required before any civil action may be referred to a magistrate; no coercion will be tolerated.").[10]

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10. When Congress's fears of coercion were not borne out in practice, it amended §636(c) in 1990 to permit magistrate and district judges to encourage parties to consent to referrals, provided the encouragement was not coercive. *See* Pub. L. No. 101-650, §308(a)(2), 104 Stat. 5089, 5112 (1990) (codified at 28 U.S.C. §636(c)(2)); H.R. REP. NO. 101-734, at 27 (1990). No amendments to §636(c) since the Federal Magistrate Act of 1979 have added specifications regarding the form of consent.

Congress's concerns about voluntariness are satisfied in this case by all parties' express consent—whether pre-trial or post-judgment—coupled with indicia of consent from their litigating this case in a manner consistent with consensual referral. Neither Plaintiff Withrow, nor any defendant, alleges coercion. And all parties received the benefit of their bargain: expedient resolution before a magistrate judge.

The Fifth Circuit's effort to engraft formalities onto §636(c) is inconsistent with the parties' expectations and Congress's intent. Nothing in the statute or legislative history prohibits post-judgment consent, and the interests of justice and judicial economy are best served by respecting the final judgment entered by the magistrate judge in this case.

II. THE COURT SHOULD DECIDE WHETHER §636(C) IMPLICATES SUBJECT-MATTER JURISDICTION AND REQUIRES APPELLATE COURTS TO NULLIFY JUDGMENTS, *SUA SPONTE*, FOR LACK OF CONSENT.

Neither Plaintiff Withrow, the Defendants, nor the magistrate judge questioned the parties' consent in the district court. Yet, when Withrow appealed from the adverse jury verdict and judgment, the Fifth Circuit raised the issue of consent *sua sponte*: "When the magistrate judge enters final judgment in a suit pursuant to 28 U.S.C. §636(c), lack of consent and defects in the order of reference are jurisdictional errors that cannot be waived." App. 12a-13a.

Initiating the consent inquiry, the Fifth Circuit equated lack of consent with lack of subject-matter jurisdiction, which requires *sua sponte* consideration. But the trial court's subject-matter jurisdiction in this case was premised on federal-question jurisdiction, *see* 28 U.S.C. §1331, not any provision of the Federal Magistrate Act. And the Fifth Circuit's identification of an alleged defect in the statutory referral procedure—to which no party

objected—did not nullify the federal question that conferred subject-matter jurisdiction over Withrow's §1983 suit.[11]

Unlike the Fifth Circuit, the Tenth Circuit has correctly recognized that "[a] magistrate judge's lack of statutory authority is not a jurisdictional defect." *In re Griego*, 64 F.3d 580, 583 (CA10 1995) (holding that party's objection that the magistrate judge acted without a proper order of referral under §636(b) did not implicate subject-matter jurisdiction); *see also Clark v. Poulton*, 963 F.2d 1361, 1366-67 (CA10 1992) (distinguishing statutory authority under §636 from subject-matter jurisdiction). Thus, in the Tenth Circuit, alleged errors in a referral procedure are waived if not raised in the district court. *In re Griego*, 64 F.3d, at 583; *Clark*, 963 F.2d, at 1366-67.

Regarding Withrow's suit, no litigant objected that the referral was defective for lack of consent. Thus, that alleged defect should be deemed waived—particularly when, as here, all parties not only proceeded in a manner consistent with consent, but also expressly

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11. Other courts of appeals have examined consent *sua sponte*, but framed the inquiry in terms of their own appellate jurisdiction, which is limited to appeals from final judgments. *See* 28 U.S.C. §1291. These courts conclude that, absent consent, the magistrate judge had no authority to enter a final judgment; therefore, no reviewable order exists on appeal. *See, e.g., McNab v. J. & J. Marine, Inc.*, 240 F.3d 1326, 1327-28 (CA11 2001); *Kofoed*, 237 F.3d, at 1003-04. This justification for *sua sponte* consideration is also flawed. When a party appeals a judgment rendered by a magistrate judge pursuant to §636(c), there is a facially valid judgment within the meaning of §1291 before the court of appeals. Thus, no *sua sponte* need to consider jurisdiction exists as it would, for example, with facially interlocutory orders appealable solely under §1291's collateral-order exception. When a final judgment facially satisfies §1291, appellate courts should not delve, *sua sponte*, beneath its surface, foraging for a defect that has not drawn an objection and does not implicate the subject-matter jurisdiction of the trial court.

confirmed consent pre- or post-trial. *See Archie*, 808 F.2d, at 1137 (Higginbotham, J., specially concurring) (reasoning that when parties knowingly proceed to trial before a magistrate judge but fail to execute written consent, "I would neither find this violation of the rule to be 'jurisdictional' and not waivable, nor so substantial that we ought to consider it, *sua sponte*").

Although this Court has described magistrate judges' trial authority under §636(c) in terms of "expanded jurisdiction," it did so while discussing the scope of statutorily authorized duties, not *subject-matter* jurisdiction. *Gomez v. United States*, 490 U.S. 858, 870 (1989) (contrasting Congress's explicit grant of consensual civil-trial authority under §636(c) with delegation of felony-trial duties under §636(b)(3)). Similarly, while §636 is captioned "Jurisdiction, powers, and temporary assignment," the statute's provisions address magistrate-judge authority, not subject-matter jurisdiction. *See* 28 U.S.C. §636. This is understandable because "'jurisdiction' is a many-hued term":

> "[The Court] used it in *Gomez* as a synonym for 'authority,' not in the technical sense involving subject-matter jurisdiction. The judgment here is the judgment of the District Court; the relevant question is whether *it* had subject-matter jurisdiction; and there is no doubt that it had. The fact that the court may have improperly delegated to the Magistrate a function it should have performed personally goes to the lawfulness of the manner in which it acted, but not to its jurisdiction to act." *Peretz*, 501 U.S., at 953 (Scalia, J., dissenting) (citation omitted).[12]

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12. Justice Scalia's dissent was the only opinion in *Peretz* to discuss the distinction between statutory authority and subject-matter jurisdiction—an analysis the majority did not refute. And, although *Peretz* involved the delegation of *voir dire* supervision in a felony trial pursuant to 28 U.S.C. §636(b)(3), not a referral to a magistrate judge for

Indeed, the Tenth Circuit has drawn on Justice Scalia's reasoning in *Peretz* to conclude that errors regarding magistrate judges' statutory authority do not deprive a court of subject-matter jurisdiction. *See Clark*, 963 F.2d, at 1367 (quoting *Peretz*, 501 U.S., at 953 (Scalia, J., dissenting)).

Congress was aware of the distinction between a district court's subject-matter jurisdiction and a consensual referral to a magistrate judge when it expanded magistrate judges' civil-trial authority in 1979. As a Department of Justice report submitted to Congress explained, "[i]t is the court, not the judge, to which these doctrines of subject-matter jurisdiction apply":

> "The magistrate exercises no independent jurisdiction. . . . The magistrate exercises only that subject-matter jurisdiction which is authorized by the Constitution, delegated to the district court by Act of Congress, and designated by the court itself to be available through its magistrate with the consent of the parties. . . .
>
> Therefore, jurisdiction remains in the district court, which exercises its jurisdiction through the medium of the magistrate. The defendant consents merely to an alteration on trial procedure, not to a transfer of jurisdiction from the district court to another tribunal." D.O.J. Report, at 376 (citation omitted).

Accordingly, when consent to trial before a magistrate judge is invalid, the only risk it poses is "to the authority of the court or the rights of the litigants," not subject-matter jurisdiction. *Id.*

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trial and entry of judgment pursuant to §636(c), Justice Scalia's jurisdictional reasoning still resonates because "the jurisdiction exercised by magistrates at trial is clearly that of the Article III federal district court." D.O.J. Report, at 375; *see also* INVENTORY OF DUTIES, at 1.

Other contemporaneous congressional sources echo this theme. *See* H.R. REP. NO. 96-287, at 8 ("[T]he magistrate is an adjunct of the United States District Court, appointed by the court and subject to the court's direction and control. When the magistrate tries a case, jurisdiction remains in the district court and is simply exercised through the medium of the magistrate."); *1979 House Hearings*, at 385 (Judicial Conf. of the U.S., Comm. on the Admin. of the Fed. Magistrate Sys. (Jan. 30-31, 1978), Comments on S. 1613—The Magistrate Act of 1977) [hereinafter "Judicial Conf. Comments"] (same).

The district court that referred Withrow's case to the magistrate judge had subject-matter jurisdiction because Withrow brought federal constitutional claims under §1983. *See* 28 U.S.C. §1331. And it was the district court's subject-matter jurisdiction that the magistrate judge exercised pursuant to the §636(c) referral. *See* H.R. REP. NO. 96-287, at 8; D.O.J. Report, at 375-76; Judicial Conf. Comments, at 385; INVENTORY OF DUTIES, at 1.

At the time the case was referred to the magistrate judge for trial, only Plaintiff Withrow had consented in writing because no defendants had yet been served. If that referral was defective because all parties had not yet filed written consent, the defect went only to the lawfulness of the referral, not subject-matter jurisdiction. *See In re Griego*, 64 F.3d, at 583; *Clark*, 963 F.2d, at 1366-67; *cf. Peretz*, 501 U.S., at 953 (Scalia, J., dissenting); *Archie*, 808 F.2d, at 1137 (Higginbotham, J., specially concurring).

The Fifth Circuit's elevation of a statutory referral defect to an issue of subject-matter jurisdiction provides litigants like Withrow an unwarranted litigation windfall. Although Withrow expressly consented to the magistrate judge's authority, never alleged lack of consent by Defendants, and proceeded to try his case to a jury that found against him, he now gets a second bite at the apple. That result—which unjustly comes "at the expense of the parties and the judicial system," App. 10a—should not stand.

If a "jurisdictional" approach to consent is not required, the Fifth Circuit had no obligation to investigate consent *sua sponte*, and it had no basis to vacate the judgment for lack of consent when no party raised that objection. The Court should grant the petition for writ of certiorari and determine whether judicial—and litigant—resources must be squandered when no party contends that judgment was rendered without its consent.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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