No. 04-70

IN THE
Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al*.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS

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PARTIES TO THE PROCEEDINGS

Respondents (herein "Plaintiffs") incorporate by reference Exxon's identification of the parties to this proceeding in its brief. With respect to each of the corporate Respondents (all identified corporations other than Exxon Mobil Corporation), there is no parent corporation or publicly held corporation that has a 10% or greater ownership interest in the corporate Respondent.

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OPINIONS BELOW

In addition to the opinions identified in Exxon's brief, the district court's orders addressing the collective nature of Exxon's "on average" pricing obligation to all dealers, and Exxon's "on average, over time, across all markets" test of its performance of the obligation, are reported at 157 F. Supp. 2d 1291 (Order on Post-trial Procedure), 61 F. Supp. 2d 1335 (*Daubert* Order), 61 F. Supp. 2d 1308 (Order Denying Summary Judgment), 61 F. Supp. 2d 1300 (Order on Motion *in Limine*). Non-published orders are included in the record below at Doc. 1463 (Order Denying Rule 50 and 59 Post-Trial Motions), Doc. 912 (Order Denying Decertification), Doc. 908 (Order Denying Summary Judgment).[1] The transcript of the district court's recent order rejecting Exxon's assertion that a lack of supplemental jurisdiction over the lesser class members will require a retrial of the entire action is at Doc. 1778 at 38.

STATEMENT OF THE CASE

INTRODUCTION

In May 1991, the named Plaintiffs, Exxon service station dealers who were party to motor fuel sales agreements with Exxon, brought suit in federal district court on behalf of themselves and all others similarly situated. Their class action complaint alleged that, in connection with a program implemented by Exxon called "Discount for Cash," Exxon had undertaken a contractual obligation to all of its dealers to offset millions of dollars of credit cost recovery fees with "on average" reductions in the wholesale price of motor fuel. J.A.1. Plaintiffs claimed that Exxon breached the obligation, entitling them to recover damages.

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1. References to the record below shall be designated "Doc." for district court docket entries, "P.Ex." and "D.Ex." for Plaintiffs' and Exxon's trial exhibits, respectively, and "Doc. _ Tr._" for the trial transcript. J.A. refers to the Joint Appendix, and "Pet. App." refers to the Petitioner's Appendix.

Each of the named Plaintiffs met the requirements for diversity jurisdiction, as their citizenship was diverse from Exxon's, and their initial claims exceeded the then-$50,000 jurisdictional minimum under 28 U.S.C. § 1332. The putative class included many thousands of dealers whose claims also exceeded the jurisdictional minimum.[2] In addition, relying on 28 U.S.C. § 1367, which was adopted by Congress shortly before the complaint was filed, the named Plaintiffs also sought to include thousands of other Exxon dealers whose initial claims, standing alone, would not satisfy the jurisdictional minimum. Those class members are referred to herein as the "lesser claimants" and their claims as the "lesser claims."

This Court has accepted review of the district court's decision, affirmed by the Eleventh Circuit, that pursuant to the clear and unambiguous language of § 1367, the district court's original jurisdiction over the claims of the named Plaintiffs confers supplemental jurisdiction over the claims of those absent class members who do not independently meet the jurisdictional minimum. Both the district court and the Eleventh Circuit concluded that § 1367 overruled the outcome of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

Exxon's petition for writ of certiorari asked this Court to review and resolve the "split [among the circuits] concerning the continuing validity of *Zahn* . . . which holds that '[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case.'" Exxon Pet. at 2. In particular, the question presented asks:

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2. According to the most recent data, which includes claims filed immediately prior to the December 1, 2004 claims filing deadline, over eighty percent (80%) of the total damages is owed to more than 4,000 dealers and former dealers whose initial claims, like those of the named Plaintiffs, independently exceed the $50,000 jurisdictional minimum. The amount in controversy is determined as of the time the complaint is filed. In May 1991, the Plaintiffs reasonably believed their damages were 1.7 cents per gallon, plus the value of their additional claims. J.A. 1.

> Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes federal courts with diversity jurisdiction over the individual claims of named plaintiffs to exercise supplemental jurisdiction over the claims of absent class members that do not satisfy the minimum amount-in-controversy requirement of 28 U.S.C. § 1332?

J.A.9. Because both the plain language of § 1367 and the legislative history of the statute (if the legislative history is even relevant) compel the conclusion that the statute overruled the outcome in *Zahn*, the answer to Exxon's question is "yes," and the decision of the lower court should be affirmed.

BACKGROUND FACTS AND CIRCUMSTANCES

Had Exxon confined its brief to the narrow question upon which the Court granted review – whether *Zahn* requires dismissal of the lesser claimants – this brief would have spent little time discussing the complex history of the case, the factual underpinnings of the jury's determinations, and the circumstances leading the district court to create a procedure to segregate the lesser claimants and withhold entry of final judgment for damages in favor of any class members pending this interlocutory review. Exxon, however, went further, arguing that if this Court finds that there is no supplemental jurisdiction over the lesser claims, the entire case must begin anew.

Exxon's new argument is not "fairly included" in the question presented. Indeed, it contradicts it. In addition, Exxon's new argument is predicated in large part upon misstatements of the evidentiary and procedural record, requiring a discussion of the circumstances that recently caused the district court to conclude that Exxon's position in this regard is "frivolous."

The Contractual Relationship Between Exxon and its Dealers

The relationship between Exxon and its dealers is governed by uniform sales agreements under which Exxon was entitled to fix the wholesale price of motor fuel. P.Ex. 54. Such "open

price" term contracts for the sale of goods are governed by Uniform Commercial Code § 2-305, enacted in each of the 35 jurisdictions in which Exxon sold motor fuel to its dealers.

Section 2-305 "rejects the uncommercial idea that an agreement that the seller may fix the price means that he may fix any price he may wish." U.C.C. § 2-305(2) (Official Cmt. 3). Rather, the seller is required to fix prices "in good faith," defined in both subjective and objective terms as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Id.* (Official Cmt. 4).

Exxon's Discount for Cash Program

Exxon's Discount for Cash Program ("DFC") arose from events immediately following the termination of government-imposed price controls in 1981. After suffering huge losses of volume and market share, Exxon was forced to lower its prices below what it wanted to charge. P.Ex. 21, 55; Doc. 1532 Tr. 1097-1102; Doc. 1535 Tr. 1865-75. Analyzing its loss, Exxon discovered that, vis-à-vis its major competitors, its brand value was weak, its retail chain was aged, and its business was concentrated in unprofitable markets. P.Ex. 55, 67; Doc. 1532 Tr. 1098-1102; Doc. 1535 Tr. 1887-93.

Exxon also observed that, when it raised wholesale prices, its dealers were able to protect their incomes by raising their retail prices, accepting lower sales volumes in the process. That loss of sales volume, however, substantially reduced Exxon's market share and required it to sell its excess fuel at low, "rack" prices, circumstances that cost Exxon over $100 million in a short time. P.Ex. 21, 22, 56.

Exxon decided to accelerate its plans to reduce the size of its dealer network (which it had internally divided into "keepers" and "non-keepers") and at the same time to eliminate its dealers' ability to resist Exxon's wholesale price increases by increasing their retail prices. P.Ex. 22, 26, 32, 34, 35, 53, 55, 56, 59; Doc. 1532 Tr. 1113, 1116; Doc. 1535 Tr. 1868-69.

From this analysis emerged Exxon's DFC program. Exxon calculated that it could increase its profits by $85 million annually at the expense of its dealers if it could persuade them to segment retail prices into a "discounted" cash price and a higher credit price. P.Ex. 23, 24, 26, 28; Doc. 1532 Tr. 1136-60, 1219-21; Doc. 1533 Tr. 1521-35. The source of that additional profit would be a new 3% "credit cost recovery fee" (a price increase with a different label) that Exxon would charge dealers on all credit card sales. *Id.*

Exxon's internal business plan, approved at the highest levels of the company, documented an intent to induce the dealers into altering the economics of their retail pricing practices (which Exxon could not lawfully dictate) by promising that the new fee would be offset with "on average" wholesale price reductions. *Id.* The plan provided that, in the "short term," Exxon would provide the offset; but in the "long term," after the majority of its dealers had segmented their prices, Exxon would secretly "eliminate the short term requirement to reduce the [wholesale price]" and "recoup the offset." P.Ex. 22-26, 28, 47; Doc. 1532 Tr. 1136-60, 1219-21; Doc. 1533 Tr. 1521-35.

Exxon's planning documents recognized that for the plan to be fully effective, at least 75% of the dealers would have to segment their retail prices. *Id.* In that event, the price elasticity of demand of the dealers' retail product offerings would increase, making it impossible for dealers to protect their own profits by taking higher retail margins on lower volumes. P.Ex. 22, 24, 67, 69; Doc. 1532 Tr. 1109-1112; Doc. 1537 Tr. 2645; Doc. 1541 Tr. 3773. This, in turn, would enable Exxon to increase its income at the expense of its "keeper" and "non-keeper" dealers alike, and force its "non-keeper" dealers out of business in denial of their rights under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801 et seq.[3]

3. The PMPA requires oil companies to allow terminated dealers to purchase their stations at fair market value. As Exxon reduced its

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In August 1982, Exxon rolled out DFC nationwide to its dealers and the public through a highly sophisticated and uniform marketing campaign in which Exxon promised that the new 3% credit cost recovery fee was merely an incentive for dealers to segment prices and would not be a new cost because it would be offset with "on-average" wholesale price reductions. *E.g.*, P.Ex. 29; Doc. 1532 Tr. 1224. The campaign was a success; the overwhelming majority of Exxon dealers were induced into segmenting their retail prices. Doc. 1531 Tr. 942, 946.[4]

Exxon proceeded with its plan, and initially provided the offset in the "short term" by reducing wholesale prices across the board by 1.7 cents per gallon. Consistent with its "long term" plan, in March of 1983 Exxon secretly eliminated the "on average" wholesale price reduction.[5] P.Ex. 2, 5, 5A, 5B, 9, 32, 33, 34, 35, 36, 37; Doc. 1537 Tr. 2684-85, 2693-95, 2738. From that point forward until Exxon terminated DFC in August of

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dealer network by thousands of stations, the last thing it wanted was competition from its own former dealers in its own former stores. P.Ex. 53; Doc. 1535 Tr. 1876; Doc. 1532 Tr. 1108-09. Exxon therefore attempted to reduce dealer incomes to such an extent that the "non-keeper" dealers would be forced to shut down entirely. *Id.*

4. Exxon's specific and uniform promise that the credit cost recovery fee would be offset with "on-average" wholesale price reductions was proven at trial from Exxon's rollout presentations, videotapes, brochures, dealer newsletters, press releases, the testimony of Exxon officials before Congress, written materials provided to the dealers and to consumer groups, public advertisements, Exxon's interrogatory answers, and the admissions of Exxon's witnesses. P.Ex. 29, 29A, 29B, 30, 39, 40, 71, 72, 156, 170, 282; Doc. 1532 Tr. 1222-28, 1234, 1276-79, 1285-86. In later years, Exxon went so far as to add a specific line item to all dealer invoices purporting to represent the promised "on average" price reduction. P.Ex. 50; Doc. 1533 Tr. 1402.

5. Exxon was able to hide the effective price increase by lagging the market in reducing its prices during a period when oil prices were generally falling. P.Ex. 37; Doc. 1535 Tr. 2051.

1994 (a few days after the class was certified), Exxon failed to provide the promised "on average" wholesale price reduction.[6] P.Ex. 2, 4, 5, 5A, 5B; Doc. 1537 Tr. 2667-2695.

The effect was a reduction in the margins of both "keeper" and "non-keeper" dealers, which facilitated Exxon's reduction of its dealer network from 8,000 to 2,000 dealers with limited exercise of PMPA rights.[7] P.Ex. 18, 59, 79, 84; Doc. 1535 Tr. 1118-19, 1889-90; Doc. 1533 Tr. 1512.

Exxon's Admitted Duty to Provide the Promised "On Average" Wholesale Price Reduction, and the Asserted Measure of its Compliance

Exxon's witnesses all admitted at trial that Exxon would not have been acting "in good faith" if it failed to provide the

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6. Exxon kept its dealers in the program by using its National Dealer Advisory Council ("NDAC"), an Exxon-created group of dealer representatives which Exxon's attorney at trial aptly described as being "like a legislature." Doc. 1531 Tr. 923. Exxon used the NDAC to spread to regional dealer groups a carefully orchestrated series of false assurances that Exxon was in fact offsetting credit cost recovery fees with "on average" wholesale price reductions. P.Ex. 73-77, 79-81, 84; Doc. 1532 Tr. 1062-63, 1080, 1223-24, 1240, 1244-45; Doc. 1533 Tr. 1395, 1431-32, 1476, 1486, 1488; Doc. 1535 Tr. 2014-15; Doc. 1537 Tr. 2387-88. The same Exxon representatives simultaneously generated for senior management internal "before DFC" and "after DFC" graphs showing precisely the opposite. P.Ex. 32, 33, 34, 35, 60; Doc. 1535 Tr. 2015-18.

7. In its brief to this Court, Exxon asserts that "Plaintiffs argued that Exxon wanted to 'pick and choose' from among its dealers, *strengthening* the keepers while forcing the demise of the less profitable 'non keepers.'" Exxon Br. at 48 (emphasis added). This is incorrect. Plaintiffs proved at trial that Exxon's duty to provide the promised reduction in wholesale prices was owed and breached as to all dealers, and that all dealers suffered the same per-gallon loss. Indeed, the impact of price segmentation became so severe that Exxon's head of pricing at one point acknowledged that even the "keepers" were being driven out of business. P.Ex. 59.

promised offset, and that Exxon was legally obligated under the sales agreements and the U.C.C. to do so. Doc. 1536 Tr. 2170; Doc. 1540 Tr. 3679-80. The testimony of Exxon's senior vice president of petroleum marketing is illustrative:

> Q. Would you agree with me that it would not be good faith for Exxon to promise its dealers for twelve years that it had provided a price reduction and not provide it?
>
> A. I would agree with that.
>
> * * *
>
> Q. So, is it a legal obligation to provide the offset?
>
> A. It's a statement we made, it's a moral obligation, it's good faith. I think that makes it a legal obligation, yes.

Doc. 1532 Tr. 1087-88; Doc. 1533 Tr. 1537. The senior executive also agreed that the only real issue in the case was whether Exxon had in fact performed the obligation:

> Q. So really, the issue is did you provide it, did you provide the offset?
>
> A. Exactly.

Doc. 1532 Tr. 1179-80.

Plaintiffs' proof of Exxon's breach, and of the fact and amount of damages, was well established. In sworn interrogatory answers and the deposition testimony of its senior pricing personnel and economics expert, Exxon committed to the position that, because it priced in a "dynamic" marketplace, Exxon's performance of its "on average" pricing obligation had to be measured "on average, over time, across all markets." P.Ex. 39, 40, 69; Doc. 1536 Tr. 2170-71; Doc. 1541 Tr. 3769-70. Significantly, Exxon also committed to the position that its compliance with the obligation could be "verified" (Exxon's word) by a statistical analysis of dealer margins, again "on average, over time, across markets." P.Ex. 40, 69; Doc. 1541 Tr. 3773-75. In other words, according to Exxon, its compliance

with the obligation (or breach thereof) had to be tested through an "on average" nationwide analysis of *all* dealer margins, whether within the class or not, such that the proof would be literally identical regardless of whether the class included one, one thousand, or ten thousand dealers.

Plaintiffs' expert witness, a distinguished professor of economics, econometrics, and statistics, performed Exxon's proposed statistical analysis using Exxon's actual wholesale price data and dealer retail price data. His analysis demonstrated a statistically significant decline in average dealer margins within a precise three day period in March of 1983, when Exxon secretly eliminated the promised offset. It also demonstrated that Exxon never reinstated the offset thereafter. P.Ex. 2, 4, 5, 5A, 5B; Doc. 1537 Tr. 2667-79, 2684, 2694-95, 2738.

This statistical evidence was entirely consistent with Exxon's internal business plan, as well as Exxon's internal records showing a wholesale price increase relative to the market during the same three day period in March of 1983. P.Ex. 22-26, 28, 37, 47; Doc. 1532 Tr. 1136-60, 1219-21; Doc. 1533 Tr. 1521-35. It also was consistent with graphs generated for Exxon senior management documenting a consequent increase in Exxon's margins and decrease in dealer margins. P.Ex. 32, 33, 34, 35, 60; Doc. 1535 Tr. 2015-18.

In short, the proof of Exxon's liability and of the damages suffered by the dealers was overwhelming.[8]

8. At trial, Exxon attempted to demonstrate compliance with its obligation by presenting charts purportedly demonstrating that Exxon's prices were equal to or lower than its competitors' wholesale prices. D.Ex. 11-13, 20-29. Exxon's "proof" vanished, however, when all of its witnesses – including its expert witness – admitted that, because of the antitrust laws and the industry-wide practice of using hidden rebates, discounts, and allowances, Exxon did not know its competitors' actual wholesale prices. P.Ex. 41-46; Doc. 1532 Tr. 1077-78; Doc. 1535 Tr. 1863; Doc. 1541 Tr. 3812, 3819. Exxon's witnesses ultimately were forced to concede that Exxon's purported estimates were useless to set or compare prices. P.Ex. 44; Doc. 1535 Tr. 2025-26; Doc. 1536 Tr. 2120, 2143-44, 2157-58; Doc. 1537 Tr. 2380.

The District Court's Adoption of Procedures to Allow the Elimination of Claimants Based on Possible Trial and Appellate Outcomes

Prior to trial, Exxon asserted a number of defenses which, if successful, would have reduced the number of potential class members entitled to participate in an award of damages. One such defense is raised in the question under review. In furtherance of its class administration duties under Rule 23, the district court fashioned pre-trial, trial, and post-trial procedures to allow for the elimination or reduction of claims if Exxon were to succeed on any of its defenses.

These procedures were facilitated by the fact that Exxon's internal records established with certainty the total amount of credit cost recovery fees collected annually and the number of gallons of motor fuel sold to the dealers during the class period. P.Ex. 1; Doc. 1536 Tr. 2220-21. Using this data, the amount of the "on average" offset was calculated in cents per gallon on an annual basis.[9] *Id*.

With this measure of damages, the district court could eliminate ineligible class members if Exxon prevailed on any of its legal defenses at trial or on appeal, through the simple ministerial exercise of excluding those gallons sold to dealers whose claims are rejected. Through this mechanism, Exxon's liability would be reduced, but the proof necessary to establish Exxon's on-average obligation to all dealers, the breach thereof, or the measure of damages would not be affected. Exxon stipulated to this procedure. Doc. 1179 at 55-56.

The Jury's Special Verdict

The jury returned a special verdict in favor of the Plaintiffs and against Exxon on every disputed factual issue. In particular,

9. For instance, in 1983, Exxon collected $49,693,000 in credit cost recovery fees and sold 3,551,435,000 gallons of motor fuel, creating an "on average" obligation to provide its dealers a 1.4 cents-per-gallon wholesale price reduction. P.Ex. 1; Doc. 1536 Tr. 2220-21 (Exxon's stipulation to the data).

the jury's verdict: (1) found that Exxon had a contractual obligation to provide the "on average" wholesale price reduction and breached that obligation; (2) found clear and convincing evidence that Exxon fraudulently concealed its breach from its dealers; and (3) awarded damages measured in cents per gallon annually. Pet. App. 160a.

Exxon's Invocation of § 1367 to Assert Set Off Counterclaims Against Absent Class Members

Following the jury's verdict, Exxon sought, and was granted, leave to assert set off counterclaims against individual class members during the claims administration process. Exxon argued that, given the district court's original jurisdiction, § 1367(a) provided a broad grant of supplemental jurisdiction sufficient to cover its proposed counterclaims. It then went on to conclude that supplemental jurisdiction existed, because Fed. R. Civ. P. 13 is not listed among the exclusions to supplemental jurisdiction in diversity cases found in § 1367(b):

> Nor is there any basis in the text of the supplemental jurisdiction statute to suggest that the set-off exception to the requirement of an independent basis of subject matter jurisdiction no longer applies. Thus, the only exceptions to supplemental jurisdiction that are set forth in §1367(b) are specifically limited to [certain] claims . . . under Rule 14, 19, 20, or 24. . . . Neither of these exceptions applies to counterclaims by defendants under Rule 13.

Exxon Reply Memo. Regarding Entitlement to Set Off, at 9 [Doc. 1449].

The District Court's Adoption of a Claims Procedure Which Segregates the Claims Above and Below the Jurisdictional Minimum

After denying Exxon's post-trial motions, the district court entered an order on procedure designed to conclude the case. Pet. App. 95a. That order: (1) entered final judgment solely in

favor of the named Plaintiffs pursuant to Fed. R. Civ. P. 54(b); (2) denied – at Exxon's urging – entry of an aggregate final judgment in favor of the class; (3) ordered implementation of a claims process administered by a special master which required each class member to initiate a claim for recovery based on the jury's cents-per-gallon damage award; (4) required the identification and segregation of lesser claimants; and (5) limited Exxon's objections to ownership of stations, disputes over duration of ownership, and any applicable claims for set off. *Id.* at 143a-156a. The district court also certified for interlocutory review pursuant to 28 U.S.C. § 1292(b) the jury's verdict, the final judgment in favor of the named Plaintiffs, the decision not to enter an aggregate final judgment for the class, the intended claims administration process, and, finally, the Court's subject matter jurisdiction over the lesser claimants. *Id*.

Interlocutory Appellate Proceedings

The Eleventh Circuit granted interlocutory review, and on June 11, 2003, a panel of the Eleventh Circuit affirmed the district court's rulings across the board. Pet. App. 67a. Exxon then sought rehearing *en banc* on the issues of class certification and supplemental jurisdiction over the lesser class members. That request was denied on March 15, 2004, with two circuit judges filing a lengthy dissent solely on the issue of supplemental jurisdiction over the lesser claimants. Pet. App. 1a.

Exxon's subsequent petition for a writ of certiorari was denied in part and granted in part on October 12, 2004. J.A.9. The Court declined review of Exxon's challenge to the propriety of class certification, in which Exxon contended that its liability and damages to individual class members had improperly been established using average pricing data (an argument Exxon nonetheless persists in making here). *Id*. The Court accepted review of the narrow question of whether § 1367 overrules the outcome of *Zahn*.

SUMMARY OF ARGUMENT

In a reasoned decision aligning the Eleventh Circuit with the majority of other circuits to have considered the issue, a panel of the court (Judges Wilson, Fay, and Goldberg) held that § 1367 overrules the outcome of *Zahn*. This decision should be affirmed.

Section 1367 is clear. On its face, § 1367(a) provides federal courts which have original jurisdiction over one or more claims with supplemental jurisdiction over any other claim that forms part of the same case or controversy, unless such other claims are barred by §1367(b) or subject to discretionary declination under § 1367(c). Neither (b) nor (c) are applicable in this circumstance. Accordingly, because the district court has original jurisdiction over the named Plaintiffs' claims, it also has supplemental jurisdiction over the lesser claims.

Exxon incorrectly argues that, in diversity cases, each absent party or class member must establish an independent basis for original jurisdiction in order to be entitled to supplemental jurisdiction. Exxon's interpretation would effectively read § 1367(a) out of the books in diversity cases, and would obviate any need for § 1367(b), which provides specific limitations in diversity cases. It would also require § 1367(a)'s use of the term "civil action" to be construed differently in federal question cases than in diversity cases.

Exxon's argument that § 1367 cannot be given the plain reading accorded it below because original jurisdiction over a diversity-based class action is "destroyed" by the inclusion of lesser claimants is equally without merit. The notion that Congress would have countenanced this result – the destruction of original jurisdiction upon the exercise of supplemental jurisdiction – is absurd. Jurisdiction, "the power to decide a justiciable controversy," is not lost over justiciable claims meeting the jurisdictional minimum merely because of the inclusion of lesser claims.

In suggesting otherwise, Exxon conflates the historical difference between treatment of defects in *diversity of citizenship* (which is not implicated in this case) and the failure of some claimants to establish the requisite *jurisdictional minimum* (which is implicated both in *Exxon* and *Ortega*). No reported decision has ever held that the failure of some claimants to establish the requisite jurisdictional minimum results in the "destruction" of jurisdiction. Rather, as Exxon itself observed in its petition, under long-standing precedent of this Court, any claimant who does not meet the jurisdictional minimum (and is not otherwise entitled to supplemental jurisdiction) must simply "be dismissed from the case."

Exxon also advances the peculiar suggestion that § 1367 does not apply to class actions brought pursuant to Rule 23. It does. Section 1367 provides a sweeping grant of supplemental jurisdiction in "any civil action," except where provided otherwise, and class actions brought pursuant to Rule 23 are prominently *not* included in the "otherwise" category.

Exxon's argument that the majority view regarding the proper interpretation of § 1367 cannot be correct because it would inevitably lead to the abrogation of the statutory doctrine of complete diversity of citizenship raises issues not directly implicated in either of the consolidated appeals. It is also misguided. Federal courts have judicially eroded the doctrine of complete diversity in numerous decisions without Congressional authorization. In adopting § 1367, Congress codified those decisions. It cannot be correct that Congress, in adopting a statute ratifying the erosion of the complete diversity doctrine, believed that it lacked the power to further erode the doctrine. Congress unquestionably has the power to do so if it chooses. And, in § 1367, it did so.

Exxon's tortured reading of the plain language of § 1367 is equally unaided by its resort to the statute's legislative history. As an initial matter, where, as here, the statute under review is

clear and unambiguous, Congress is presumed to have said what it meant and meant what it said, rendering resort to legislative history improper. In this case, however, even if the Court were to examine the statute's history, the outcome would be the same.

At the time they wrote what would eventually become the final language of § 1367, the drafters of the text expressly stated that their words were intended to overrule *Zahn*. By contrast, what Exxon characterizes as "conclusive legislative history" was planted in the statute's House Report by staff consultants, in what they have admitted was an attempt to provide a "history" that would contradict the statute itself.

Exxon also substantially overstates the significance of Congress' decision to overturn the outcome of *Zahn*. Although a majority of the courts of appeals have concluded that class actions brought by named plaintiffs who meet the jurisdictional minimum may include absent class members who do not, plaintiffs continue to file large, multi-state class actions in *state* courts, framing their complaints in a manner to avoid the possibility of removal. Indeed, it is precisely for this reason that Exxon and many other large multi-national companies have lobbied Congress to federalize all significant multi-state class actions.

Finally, the question presented for review does not "fairly include" Exxon's new theory that, if the Court answers the question presented in the negative, the case must begin anew. Therefore, it should not be considered, although the result would be the same even if it were.

Because Exxon's self-created "on-average" obligation required it to perform – in Exxon's own words – "on average, over time, and across markets," the proof of Exxon's breach and the damages suffered by the class would be exactly the same if the case were to be retried without the lesser claimants. That is, the evidence of what the lesser claimants paid and received would still be included in the data used to determine performance of the obligation "on average, over time, and across markets."

Indeed, when this argument was recently presented to the district court in connection with Exxon's request for a stay pending this Court's decision, the district court expressly ruled that Exxon's purported claim of prejudice is "frivolous," and that "the manner in which [Exxon's certiorari] question is posed answers the question, which is that those who don't meet the supplemental jurisdiction requirements would be out and everybody else would be in." Tr., Hearing on Exxon's Motion for Stay Pending Supreme Court Review, Jan. 7, 2005, Doc. 1778 at 38.

Moreover, this class action is unusual in that Exxon's duty was found by the jury to be owed to all dealers collectively. Thus, it is appropriate to conclude that the amount in controversy in this civil action is the total amount taken from all dealers. The district court's conclusion that aggregation is not allowed because of the absence of a "res" was error, the correction of which provides an alternative ground to affirm the outcome of these proceedings.

In short, even were the Court to conclude that the answer to the question accepted for review is "no," there is no conceivable justification for setting aside fourteen years of judicial labor on behalf of the thousands of class members who indisputably meet the jurisdictional minimum, simply because of the inclusion of lesser claimants.

ARGUMENT

1. Section 1367(a) Authorizes Federal Courts with Original Jurisdiction to Exercise Supplemental Jurisdiction over Absent Class Members Who Do Not Meet the Jurisdictional Minimum

The Eleventh Circuit, consistent with the majority of the courts of appeals,[10] correctly concluded that the plain language of § 1367 provides supplemental jurisdiction over absent class members whose claims do not satisfy the amount-in-controversy requirement of § 1332.

In addressing whether supplemental jurisdiction extends to class members who do not independently establish the jurisdictional minimum, the Eleventh Circuit properly began by "examining the text of the statute," presuming "that a legislature says in a statute what it means." Pet. App. at 73a. Section 1367(a) provides:

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

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10. *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004) (Cudahy, J.); *Rosmer v. Pfizer, Inc.*, 263 F.3d 110 (4th Cir. 2001) (Wilkinson, C.J.); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001) (Fletcher, J.); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997) (Posner, C.J.); *In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995) (Higginbotham, J.); *accord* 13B Charles Alan Wright, et al., *Federal Practice and Procedure* § 3567.2 (Supp. 2004) ("The better approach is to interpret the statute as having overruled *Zahn* . . ."); Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 Emory L.J. 55, 69 (2004).

> supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

This subsection thus provides a broad grant of jurisdiction over any claim which forms part of the same case or controversy as a claim within the court's original jurisdiction.

In this case, "the parties agree that the district court had original jurisdiction over the class representatives' claims, because they satisfied the $50,000 jurisdictional minimum amount in controversy requirement." Pet. App. at 75a. Thus, because the lesser claims unquestionably form part of the same case or controversy, *id*., the court "shall have supplemental jurisdiction" over them. 28 U.S.C. § 1367(a).

This does not end the inquiry. It is next necessary to determine if § 1367(b) precludes the exercise of supplemental jurisdiction over these claims. It does not:

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

Section 1367(b) does not exclude claims by Rule 23 class members, and where Congress "explicitly enumerates certain exceptions" to a general grant of power or prohibition, "additional exceptions are not to be implied." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 615-17 (1980).

Accordingly, because supplemental jurisdiction over the lesser claimants is granted by § 1367(a) and is not withdrawn in § 1367(b), there is supplemental jurisdiction over them.

Pet. App. at 76a; *accord Olden*, 383 F.3d at 506-07; *Rosmer*, 263 F.3d at 117; *Gibson*, 261 F.3d at 938; *In re Abbott Labs.*, 51 F.3d at 528-29.

2. Section 1367 Must Be Interpreted to Provide that Supplemental Jurisdiction Exists in Diversity Cases

Exxon concedes that Congress would never have enacted a statute providing a grant of supplemental jurisdiction which, upon its exercise, would cause the basis for that jurisdiction to disappear.[11] That concession should end the discussion, because an "interpretation" of the statute leading to such an absurd consequence – such as Exxon's "interpretation" here – is not sustainable.

a. Requiring Original Jurisdiction Over Claims For Which Supplemental Jurisdiction is Sought Would Render Supplemental Jurisdiction Meaningless

To avoid the catch-22 of losing jurisdiction when receiving it, Exxon argues that the statute should be interpreted so that only those who have an independent basis for original jurisdiction in the first instance are entitled to enjoy supplemental jurisdiction. Of course, that assertion is itself absurd. As the Eleventh Circuit aptly stated in rejecting this argument:

> Exxon argues that "the text and structure of § 1367 preserve the jurisdictional requirement of *Zahn*." In so arguing, however, it essentially asks us to construe § 1367 in such a way as to apply only where the court already has original jurisdiction over every class members' claim. We do not believe that the statute can be read to suggest

11. Specifically, Exxon argues that "Section 1367 cannot logically be interpreted to provide that the addition of a party simultaneously authorizes supplemental jurisdiction *and* eliminates the original diversity jurisdiction on which that supplemental jurisdiction must be based." Exxon Br. at 3 (emphasis in original). Although Exxon's choice of words is odd, as it is not "the addition of a party" that "authorizes" supplemental jurisdiction, Exxon's statement recognizes a basic principle that undercuts its own argument.

> this. If a district court is required to have original jurisdiction over every class members' claim, the last sentence of § 1367(a), providing that "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of *additional parties*" would be superfluous. 28 U.S.C. § 1367(a) (emphasis added). There would be little reason for the statute to provide for the exercise of claims involving the joinder of additional parties if the district court first were required to have original jurisdiction over those claims. We therefore cannot read the statute in this way.

Pet. App. at 74a n.5 (citation omitted).

This Court reached the same conclusion in *City of Chicago*, a case applying § 1367 in the context of federal question jurisdiction:

> ICS' proposed approach – that we first determine whether its state claims constitute "civil actions" within a district court's "original jurisdiction" – would effectively read the supplemental jurisdiction statute out of the books. *The whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking*.

City of Chicago v. International College of Surgeons, 522 U.S. 156, 167 (1997) (emphasis added).

Section 1367 establishes supplemental jurisdiction in federal question and diversity cases. If Congress intended to limit supplemental jurisdiction to federal question cases only, it would have said so, and would not have included subsection (b) at all. Instead, it provided a broad grant of supplemental jurisdiction in diversity cases in subsection (a), subject only to the limitations of subsection (b).

Needless to say, it is not appropriate to adopt an interpretation of a statute that would render its terms superfluous. *See*, *e.g.*, *United States v. Menasche*, 348 U.S. 528, 538-39

(1955) (recognizing well established principle that, in interpreting a statute, it is the court's "duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section"); *Heckler v. Chaney*, 470 U.S. 821, 829 (1985) (same). As Chief Judge Wilkinson stated in *Rosmer* in rejecting the same argument: "[T]he text of § 1367 makes clear that 'original jurisdiction' in § 1367(a) includes diversity cases. If it were otherwise, . . . there would be absolutely no need for § 1367(b) at all since § 1367(b) only applies to cases brought under 28 U.S.C. § 1332." *Rosmer*, 263 F.3d at 115.

b. Original Jurisdiction is Not "Destroyed" Upon the Exercise of Supplemental Jurisdiction

The cornerstone of Exxon's entire argument is the notion that § 1367 cannot be read to bestow supplemental jurisdiction in a diversity case because the district court's original jurisdiction would be "destroyed" by the inclusion of the lesser claimants. This assertion, presented as a bedrock principle of law, is not supported by a single case in the annals of federal jurisprudence. Moreover, the notion that Congress would have enacted a statute providing a grant of supplemental jurisdiction which cannot be exercised without destroying it reflects a lack of appreciation for the exclusive power of Congress to determine the scope of federal jurisdiction. Even if a concept of destroyed jurisdiction had existed in jurisdictional amount cases (which it did not), this doctrine could not have survived the adoption of § 1367, which "explicitly confers" supplemental jurisdiction in such cases.

It has long been understood that "[j]urisdiction is the power to decide a justiciable controversy." *Moore v. New York Cotton Exch.*, 270 U.S. 593, 608 (1926) (quoting *Binderup v. Pathé Exch.*, 263 U.S. 291, 305 (1923)). Once established, that "power to decide" – by its very nature – is not lost merely by virtue of the presence or addition of other non-justiciable claims. *See*, *e.g.*, *Zahn v. International Paper Co.*, 414 U.S. 291, 295-296, 301 (1973); *Clark v. Paul Gray*, *Inc.*, 306 U.S. 583, 588-90 (1939).

In suggesting otherwise, Exxon attempts to confuse the distinction between defects in *complete diversity of citizenship* (not implicated here) with the failure of some claimants to independently establish the requisite *jurisdictional minimum* (implicated in both this case and *Ortega*). Whereas this Court has described the absence of complete diversity of citizenship as having "destroyed" original jurisdiction (a defect which may also be cured),[12] no reported decision has ever held that the failure of one or more claimants to satisfy the amount in controversy requirement results in the "destruction" of jurisdiction for those that do. To the contrary, the rule is exactly the opposite: § 1332 does not require dismissal of the entire action upon a determination that a claimant falls short of the jurisdictional minimum, but rather only "requires dismissal of those litigants whose claims do not satisfy the jurisdictional amount." *Zahn*, 414 U.S. at 295-296; *Clark*, 306 U.S. at 588-90; *Grosjean v. American Press Co.*, 297 U.S. 233, 241-42 (1936); *Walter v. Northeastern*, 147 U.S. 370, 373 (1893); *Stewart v. Dunham*, 115 U.S. 61, 65 (1885); *Inhabitants of the Township of Bernards v. Stebbins*, 109 U.S. 341, 356 (1883); *Rich v. Lambert*, 53 U.S. (12 How.) 347, 352-53 (1851).

In fact, Exxon itself recognized this principle in its petition, which stated that:

> [T]he issue is whether § 1367 legislatively overrules this Court's decision in *Zahn*, holding that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the

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12. As this Court stated in *Newman-Green*, in affirming the post-judgment appellate dismissal of a non-diverse party:

> [T]he weight of authority favors the view that appellate courts possess[] the authority to grant motions to dismiss dispensable nondiverse parties. . . . We decline to disturb that deeply rooted understanding of appellate power, particularly when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention.

Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 836 (1989).

> jurisdictional amount, and *any plaintiff who does not must be dismissed from the case*. . . ."

Exxon Pet. at 10 (quoting *Zahn*, 414 U.S. at 301) (emphasis added).[13]

In *Finley v. United States*, 490 U.S. 545 (1989), this Court clearly stated that there would be no further transgressions from the Constitutional requirement that federal jurisdiction be "explicitly conferred." *Id.* at 556. The Court additionally stated that "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress." *Id*. This principle applies when Congress has failed to "explicitly confer" jurisdiction. It applies just as forcefully when Congress *has* "explicitly conferred" jurisdiction. Judicial decisions based on a contrary view of public policy cannot override Congress' explicit expression.

Simply put, the district court's "power to decide" the jurisdictionally-sufficient claims of the named Plaintiffs and the larger class claimants is not lost by virtue of the mere presence of the lesser claimants or their claims.

c. Exxon's Alternative "Interpretation" Is an Improper Attempt to Deny the Exercise of Supplemental Jurisdiction in Diversity Cases

An interpretation of § 1367 must begin and end with an explanation of the circumstances that would allow a party to qualify for its exercise. Exxon's argument, which begins and ends with the notion that the words must be read to preclude jurisdiction because its exercise would cause its loss, is not an "interpretation" – it is an entreaty to obtain judicial nullification.

Exxon's argument centers on § 1367(a)'s requirement that there be original jurisdiction over a "civil action." Exxon argues that the use of the term "civil action" (instead of "claim")

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13. In a related context, the Court has observed that named plaintiffs are free to proceed on their individual claims following a denial of class certification, for it does not terminate the litigation. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978).

requires that *every* claim included within the lawsuit must independently meet the requirements for original jurisdiction. In short, according to Exxon, the district court could never have original jurisdiction over a civil action that included supplemental parties and, therefore, could never have the original jurisdiction necessary to confer supplemental jurisdiction.

Exxon's attempt to interpret the words "civil action" to render § 1367 meaningless in diversity cases depends on a mutually exclusive use of the same words in this statute and other jurisdictional statutes, and contradicts the decisions of this Court in *Finley* and *City of Chicago*.

Section 1332 requires that, in a "civil action," the amount in controversy must exceed the established minimum. *Zahn*, which was decided before supplemental jurisdiction was "explicitly conferred" by statute, concluded that the jurisdictional minimum for a "civil action" must be established by each plaintiff and each absent class member on a claim by claim basis. *Zahn*, 414 U.S. at 301. In § 1367, Congress' use of the same words, "civil action," cannot be read to require a different outcome.

Exxon's argument would also require "civil action" to mean something different in a diversity case than in a federal question case. In *City of Chicago*, the Court clarified that the term "civil action" means the opposite of what Exxon argues it means here. *City of Chicago*, 522 U.S. at 167. This Court, and other federal courts, have rejected similar attempts to interpret the same words in the same statute to mean different things. *See*, *e.g.*, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) ("[It is a] basic canon of statutory construction that identical terms within an Act bear the same meaning."); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *Rosmer*, 263 F.3d at 115-16; *Gibson*, 261 F.3d at 935-36. To paraphrase the dissent in *Ortega*, it is one thing to define the same term in two different statutes differently, it is quite another to interpret the same term in one

statute two different ways. *Ortega v. Star-Kist Foods*, 370 F.3d 124, 147 (1st Cir. 2004) (Torruella, J., dissenting).

Finley considered a similar argument concerning the distinction – or lack thereof – between the terms "civil action" and "claim." The issue was whether, in changing the Federal Tort Claims Act's jurisdictional provision to read "civil actions on claims against the United States" (it had previously read only "claims against the United States"), Congress intended to alter the scope of jurisdiction conveyed under the statute. In examining this issue, the Court observed that:

> [R]elatively soon after the adoption of the Federal Rules of Civil Procedure, which provide that "[t]here shall be one form of action to be known as 'civil action'" . . . . [Congress] inserted the expression "civil action" throughout the provisions governing district-court jurisdiction.

Finley, 490 U.S. at 554-55 (second alteration in original). Congress' intent was to achieve consistency. *Id.* (citing H.R. Rep. No. 308, 80th Cong., 1st Sess., App. A114-A125 (1947)). Thus, finding the term "civil action" to be merely "stylistic," and not substantive, the Court concluded that Congress did not intend to alter the scope of jurisdiction conveyed under the statute. *Id.*

The same result follows here. There is simply no basis in the text of § 1367 or otherwise to construe the term "civil action" differently in federal question and diversity cases, let alone to conclude that the statute was not intended to apply to diversity cases *at all*. The statute provides otherwise.

3. Section 1367 Applies to Class Actions

Exxon advances the peculiar suggestion that because § 1367(a) does not specifically reference Rule 23, it does not apply to class actions. Exxon also cites to § 1367(a)'s second sentence – "Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties" – as "evidence" that Congress intended to exclude from the statute

claims that do *not* involve "the joinder or intervention of additional parties," such as claims by absent class members. These arguments are makeweight.

On its face, Section 1367 provides a sweeping grant of supplemental jurisdiction "in any civil action" except as provided in subsection (b) or (c). Thus, the operative question is *not* – as Exxon submits – whether Rule 23 is mentioned in subsection (a), but whether it is listed among the exceptions found in (b) or (c). It is not.[14]

Likewise, nothing in § 1367 can be read to suggest that § 1367(a)'s first sentence was intended to be consumed by its second. The first sentence provides that, "in any civil action" in which the district court has original jurisdiction, the courts shall have supplemental jurisdiction over "all other claims" that form part of the same case or controversy. The second sentence merely clarifies that "all other claims" was intended to include claims that "involve the joinder or intervention of additional parties" – the "pendent party" claims that *Finley* had precluded. In other words, the second sentence is illustrative, not exhaustive.

Indeed, were Exxon's arguments in this regard correct, § 1367(a) would not even extend to counterclaims, as Rule 13 is not mentioned either, and counterclaims brought pursuant to Rule 13 do not "involve the joinder or intervention of additional parties." Yet, § 1367(a) clearly *does* extend to counterclaims, as Exxon correctly observed when it successfully sought leave to assert its set-off counterclaims.

4. Concerns about *Strawbridge* Are Not Implicated by this Case and Are Premised on a Belief That this Court Did Not Mean What it Said in *Finley*

Exxon further argues that the majority view regarding the proper interpretation of § 1367 cannot be correct because it would inevitably lead to the abrogation of the doctrine of

14. 28 U.S.C. §§ 1331 and 1332, of course, also do not mention Rule 23, yet provide jurisdiction in federal question or diversity-based class actions brought pursuant to Rule 23.

complete diversity of citizenship embodied in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), *overruled in part on other grounds by Louisville, Cincinnati, & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497 (1894). This argument is irrelevant to these consolidated appeals.

As an initial matter, *Strawbridge* addressed only the first of the two statutory requirements for original diversity jurisdiction, complete diversity of citizenship, which is not at issue in either of the consolidated appeals. Throughout the history of federal jurisprudence, the complete diversity requirement has always been treated differently than the amount in controversy requirement. Hence, the outcome of this case should have no legal effect on the relationship between § 1367 and the requirement of complete diversity. In other words, Exxon's argument, at best, amounts to a "look around the corner," and any discussion thereof simply previews the kind of debate the Court might hear in a case properly raising the issue.

We see the application of § 1367 to the original concept of complete diversity differently than the other litigants in this consolidated proceeding. In our view, a judicial adoption of one or more of the inventive interpretations of § 1367 offered to avoid the plain language of the statute – which "explicitly confers" supplemental jurisdiction even on non-diverse plaintiffs – would be a *rejection* of the true holding in *Strawbridge* and a return to the days when it was believed that federal courts could properly establish the scope of their own jurisdiction.

This Court should recognize that § 1367 is *not* an "absurd" encroachment upon the requirement of complete diversity of citizenship. Rather, it is an explicit codification of some of the prior judicial decisions expanding the scope of federal jurisdiction, a rejection of others, and an alteration of the scope of federal jurisdiction in ways that had not originated with the

courts – such as the plain language permitting non-diverse plaintiffs to join civil actions.[15]

a. Post-*Strawbridge*, the Statutory Requirement of Complete Diversity of Citizenship Was Significantly Eroded by the Courts

Exxon's argument about the sanctity of *Strawbridge* misidentifies the source of the doctrine of complete diversity of citizenship, overstates its reach, and ignores the power of Congress to alter it. The doctrine of complete diversity of citizenship originated in the Judiciary Act of 1789, not, as Exxon would have it, in this Court's opinion in *Strawbridge*. This Court, in *Strawbridge*, simply acknowledged the power of Congress to make such a decision, even where the grant of jurisdiction was less than that permitted by Article III. *Strawbridge*, 7 U.S. (3 Cranch) at 267. As reiterated 185 years later in *Finley*:

> The Constitution must have given to the court the capacity to take [judicial power], *and an act of Congress must have supplied it*. . . . To the extent that such action is not taken, the power lies dormant.

Finley, 490 U.S. at 548 (emphasis in original; internal quotation omitted).

Between the book-ends of *Strawbridge* and *Finley* are numerous decisions regarding the scope of federal jurisdiction, not all of which have been faithful to the Constitutional supremacy of Congress in this arena. *Strawbridge*, which came at the beginning, was written on a clean slate. *Finley*, by contrast,

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15. In the fourteen years since § 1367 was adopted, there has been no flood of litigation involving the joinder of non-diverse plaintiffs. No such case has even reached the point of appellate consideration. In any event, in § 1367(c), Congress gave to district courts broad discretion to decline the exercise of supplemental jurisdiction where it appears that the court's original jurisdiction is being used as a device to bring in cases in which non-diverse claims predominate. *See City of Chicago*, 522 U.S. at 174 (remanding to district court to determine if state law claims should be dismissed pursuant to § 1367(c)).

was written on a slate full of what the *Finley* Court described as "cases [that] do not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred." *Id.* at 556.

The inconsistent approach with respect to the necessity that jurisdiction be "explicitly conferred" has been noticeable in decisions permitting defendants to join non-diverse parties and in decisions establishing pendent and ancillary jurisdiction. Without any meaningful Congressional alteration of the diversity statute, federal courts have allowed, under the rubric of pendent and ancillary jurisdiction: plaintiffs' assertions of pendent non-diverse state law claims; defendants' joinder of non-diverse parties; defendants' assertion of non-diverse state law counterclaims; third-party defendants' non-diverse state law claims; and intervention of non-diverse parties. *See*, *e.g*, *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724-27 (1966); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 & n. 18 (1978) (collecting cases).

Finley was not the first of this Court's post-*Strawbridge* decisions to acknowledge Congressional supremacy over federal jurisdiction. Nor was it the first to attempt to draw the line on incursions into Congress' prerogatives in this area. *Finley* was unique for the clarity with which it conveyed the message that federal jurisdiction must be "explicitly conferred." It not only placed squarely before Congress the question of whether pendent party jurisdiction was a desirable extension of existing law, it also placed before Congress the concern that, absent specific Congressional authority, other well-entrenched and valued judicial enlargements of jurisdiction – including some that had eroded the doctrine of complete diversity of citizenship – were in jeopardy.[16]

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16. This concern was expressed in the report of the Congressionally-created Federal Courts Study Committee's Subcommittee, which recognized that *Finley* would appear to preclude federal courts from exercising forms of what is now known

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b. Post-*Finley*, Congress Codified Some, but Not All, of These Judicial Incursions, and Exercised its Prerogative to Go Further

In *Finley*'s wake, after two centuries of decidedly modest legislative activity regarding the scope of federal jurisdiction, Congress adopted a statute, 28 U.S.C. § 1367, that expanded the existing statutory grant of federal jurisdiction in significant ways.

Congress could have confined the statute to the specific issue of pendent party jurisdiction in federal question cases. Instead, it chose to assert its Constitutional power – underscored in *Strawbridge* and *Finley* – to establish a new across-the-board regime for the exercise of pendent and ancillary jurisdiction in both federal question and diversity jurisdiction actions, which it titled "supplemental jurisdiction." *See City of Chicago*, 522 U.S. at 165 ("Congress has codified those principles in the supplemental jurisdiction statute, which combines the doctrines of pendent and ancillary jurisdiction under a common heading.").

The resulting statute – § 1367 – represents a conscious Congressional effort to codify most, and reject some, of the judicial expansions of federal jurisdiction that were established during the preceding 200 years. The outcome of *Gibbs* is embraced, both with respect to the exercise of pendent and ancillary jurisdiction, and, most importantly, through the codification in § 1367(c) of district court discretion to decline such jurisdiction (discretion that, properly exercised, will avoid the misuse of diversity jurisdiction Exxon and others predict). *Gibbs*, 383 U.S. at 725-27. The outcomes in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), and the numerous prior decisions permitting defendants to join non-diverse parties, are similarly embraced. By contrast, other prior judicial

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as supplemental jurisdiction where "none of the existing jurisdictional statutes expressly confers such authority." 1 Fed. Cts. Study Comm., Working Papers & Subcomm. Reports (July 1, 1990), 547, 554.

outcomes affecting the scope of pendent and ancillary jurisdiction, including that reflected in *Zahn*, were rejected.[17]

No one can seriously deny that Congress approved prior judicial encroachments on the doctrine of complete diversity of citizenship in adopting § 1367. It therefore cannot seriously be argued that Congress lacked (or believed it lacked) the power to do more of the same. Yet, that is precisely the argument Exxon and others advance to ignore the plain reading of the statute which "explicitly conferred" supplemental jurisdiction.

Since *Finley*, this Court has scrupulously followed the plain language of § 1367, recognizing the power of Congress to establish and alter the scope of federal jurisdiction. *City of Chicago*, 522 U.S. at 167. These consolidated cases present a similar opportunity to hold the line against a return to the days when federal courts embarked on the path of public policy driven decision-making. The most significant opportunity to establish that the jurisdictional slate is once again clean (and firmly in Congressional control) will not arrive, however, until the *Strawbridge* issue properly reaches this Court.

It is no longer necessary or even possible for this Court to rely on Congressional acquiescence to prior judicial extensions or limitations on the scope of federal jurisdiction. Congress has spoken,[18] and the tortured interpretations offered to take this Court back to pre-*Finley* days should be rejected.

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17. It is frequently asserted that § 1367 "adopted" *Gibbs* and "overruled" *Finley*. This statement ignores the holding in both decisions concerning the necessity that judicial power be explicitly conferred. In enacting § 1367, Congress did not "adopt" or approve the *Gibbs* Court's view that federal courts have the power to shape the scope and limits of federal jurisdiction. It simply adopted the *outcome* in *Gibbs* long after the fact. Similarly, Congress' adoption of § 1367 did not "overrule" *Finley*, but simply exercised the legislative power that *Finley* had recognized as superior and exclusive.

18. The wisdom of deference to Congress on issues affecting the scope of federal jurisdiction is clear. A legislative process, being by (Cont'd)

5. Resort to Legislative History Is Improper Because § 1367 Is Clear and Unambiguous

Exxon ignores the critical bridge which must be crossed before resorting to legislative history:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *accord Bedroc Ltd. v. United States*, 541 U.S. 176, 124 S. Ct. 1587, 1593, 1595 & n.8 (2004); *Desert Palace Inc. v. Costa*, 539 U.S. 90, 98 (2003).

This Court has authorized departure from this settled rule of interpretation only "in rare and exceptional circumstances," *Garcia v. United States*, 469 U.S. 70, 75 (1984) (internal quotations omitted), and "only [upon] the most extraordinary showing of contrary intentions" in the legislative history. *Id.*; *see also Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 580-81 (1982).

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definition political rather than judicial, includes the entire nation through its elected representatives participating in decisions regarding issues that will affect every district court and every litigant. If a citizen like Exxon believes the outcome of the legislative process is undesirable public policy, the remedy is not judicial but legislative – in short, go see your Congressman. By contrast, the judicial process requires focus on particular cases and controversies, which necessarily limits the debate. Arguments such as Exxon's improperly seek an antidote for unhappiness with legislation though judicial decision (in this case, *dicta*).

In this regard, the Court has recognized that mere inconsistencies between a statute's language and its legislative history do not constitute the requisite extraordinary showing of contrary intentions. In *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994), for instance, this Court declined to interpret a statute granting a regulatory exemption for the "treating, storing, disposing of, or otherwise managing" hazardous wastes as extending to the "generation" of hazardous wastes, despite a contrary statement in the Senate Committee Report that the exclusion would include "'all waste management activities of such a facility, including the *generation* . . . of waste.'" *Id.* at 336-37. In reaching this conclusion, the Court observed that "it is the statute, and not the Committee Report, which is the authoritative expression of the law." *Id.* at 337. The Court also noted its agreement with the court of appeals, which had remarked: "Why should we . . . rely upon a single word in a committee report that did not result in legislation? Simply put, we shouldn't." *Id.*

Moreover, the Court has on several occasions noted that faithfulness to a statute's plain text is especially important when interpreting a statute affecting jurisdiction. *Bread Political Action Comm.*, 455 U.S. at 580-81 ("Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes[.]'") (quoting *Palmore v. United States*, 411 U.S. 389, 396 (1973)). This is, of course, because it is for Congress to specify the boundaries of federal jurisdiction, which the courts must honor precisely – no more, and no less.

Section 1367's text is clear and unambiguous. Hence, it provides no justification whatsoever for sifting through the waste bins of the legislative process to ascertain meaning. Ironically, however, if this Court were to indulge Exxon's request to examine the legislative history, it would find that the legislature intended to overrule *Zahn*.

6. The Legislative History Establishes That the Statute's Drafters Intended to Overrule *Zahn* and That the Contrary "History" is Not Legitimate

a. The Origins of the Statutory Text

In 1989, Congress passed the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988), which created the Federal Courts Study Committee ("FCSC"), an *ad hoc* group made up of members of Congress, members of the federal and state judiciary, and public and private practitioners. The FCSC was instructed to examine problems and issues facing the federal courts, and to recommend necessary changes in the law. *Id*.

The FCSC, in turn, formed a five member subcommittee ("FCSC Subcommittee") charged with examining the role of the federal courts. Congressman Robert Kastenmeier of Wisconsin was a member. Among the issues the FCSC Subcommittee addressed was what would eventually become known as "supplemental jurisdiction."

(i) The FCSC Subcommittee Proposes a Statute Expressly Intended to Overrule *Zahn*

In March of 1990, the FCSC Subcommittee issued a lengthy report discussing this Court's then-recent decision in *Finley*, and recommending that Congress codify the doctrines of pendent and ancillary jurisdiction in a comprehensive supplemental jurisdiction statute which would, among other things, overrule *Zahn*. 1 Fed. Cts. Study Comm., Working Papers & Subcomm. Reports (July 1, 1990), at 547, 560-61 & n.33. In particular, although the FCSC Subcommittee generally wanted to limit the expansion of diversity jurisdiction, it did not view *Zahn* to be a sensible limitation, and made clear in its report and proposed statute that its intent was to set *Zahn* aside:

> [O]ur proposal would overrule the Supreme Court's decision in *Zahn*. . . . From a policy standpoint, this

> decision makes little sense, and we therefore recommend that Congress overrule it.

Id. at 561 n. 33.

The following month, the full FCSC released its report making general recommendations on over 100 issues regarding the operations of the federal courts. Report of the Fed. Cts. Study Comm. (April 2, 1990). The FCSC also made reference to a general desire to limit the scope of diversity jurisdiction and recommended the adoption of a supplemental jurisdiction statute, but did not comment on its Subcommittee's recommendation to abrogate *Zahn*, and did not propose a specific statute. *Id.*

(ii) The House Judiciary Committee's Subcommittee on Courts Recommends Adoption of the Proposed Statute Drafted to Overrule *Zahn*

In July of 1990, several of the FCSC's recommendations made their way to the House of Representatives in the form of proposed legislation sponsored by Congressman Kastenmeier. *See* H.R. 5381, 101st Cong. (1990). The bill was referred to the House Judiciary Committee's Subcommittee on Courts, which was chaired by Congressman Kastenmeier.

Relative to the FCSC Subcommittee's proposal, the initial version of the proposed bill provided a far *broader* grant of supplemental jurisdiction. H.R. 5381, § 120. Specifically, the bill not only overruled the outcome in *Zahn*, but went further to overrule the outcome in *Kroger*. *Id.*; Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. at 28-32 (1990).

Before the bill was presented for debate before the House Judiciary Committee's Subcommittee on Courts, a group of three House Judiciary Committee consultants (law professors Thomas Rowe, Stephen Burbank, and Thomas Mengler) became concerned that the grant of supplemental jurisdiction under

consideration by the House Subcommittee was too broad, particularly because it would – as then drafted – overrule *Kroger*. The professors then corresponded with past FCSC Chairman Judge Joseph Weis (who while serving in that capacity had voiced opposition to diversity jurisdiction), and encouraged Judge Weis to advocate adoption of the form of the statute earlier presented by the FCSC Subcommittee (the proposed statute written to overrule *Zahn*, but not *Kroger*). *Id*. at 701-18 (letters to Judge Weis).

Judge Weis agreed and presented a statement at the House Subcommittee hearing on September 6, 1990, objecting to H.R. 5381, § 120 as being too great an extension of diversity jurisdiction. He mentioned his belief in the need to preserve the outcome in *Kroger*, and recommended that the language of the FCSC Subcommittee's proposed statute be utilized instead. *Id.* at 96-98 (prepared statement of Judge Weis).[19]

Congressman Kastenmeier's House Subcommittee accepted this recommendation and replaced H.R. 5381, § 120 with the proposed statute written to overrule *Zahn* (with minor alterations not relevant here). *Id.* at 722.

(iii) Three Consultants Plant "History" They Knew to Be Inconsistent with the Statute

There is no doubt that the three House Committee consultants who urged Judge Weis to encourage adoption of the FCSC Subcommittee's proposed statute recognized at some point prior to the ultimate passage of the bill that the plain language of these provisions would overrule *Zahn*. As they subsequently wrote: "[o]n its face, section 1367 does not appear to forbid supplemental jurisdiction over claims of class members that do not satisfy section 1332's jurisdictional amount requirement." Thomas D. Rowe, Jr., et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Prof. Freer*, 40 Emory L.J. 943, 960 n.90 (1991).

19. Neither the consultants' prior correspondence, the transcript of the hearing, nor the voluminous submissions to the Subcommittee even mention *Zahn*.

Considering this to be a "problem" as to which "[i]t would have been better had the statute dealt explicitly," and unable at that point to alter the language of the bill itself, these three non-legislators took it upon themselves to attempt "to correct the oversight" by inserting into the House Report a one-sentence disclaimer. *Id*. at 950, 960 n.90. It says: "The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R. Rep. No. 101-734 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875.

In other words, recognizing that the true intent and effect of the proposed legislation was to overrule *Zahn*, these consultants undertook to hijack the legislation by filling what they have described as a "a statutory gap" with "history" which, in their own words, actually "misrepresents what the statute accomplishes."[20] Rowe, 40 Emory L.J. at 960 n.90; 1990 U.S.C.C.A.N. at 6874-75; *see also Rosmer*, 263 F.3d at 121 (discussing illegitimacy of this history).

The House passed the bill on September 27, 1990, and the Senate passed it on October 27, 1990, without floor debate in either chamber.

b. Contrived "Legislative History" Cannot Be Used to Alter the Statute

While in some circumstances Congressional reports can provide authoritative statements of Congressional intent, they cannot be used to supplant otherwise unambiguous statutory text. *See Garcia*, 469 U.S. at 76, 78 (observing that even a legislator's intent to alter clear language of a bill by making statements inconsistent with its meaning does not provide

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20. Professors Rowe, Burbank, and Mengler later mocked this Court with their handiwork, stating: "[t]he resulting combination of statutory language and legislative history . . . creates the delicious possibility that despite Justice Scalia's opposition to the use of legislative history, he will have to look to the history or conclude that section 1367 has wiped *Zahn* off the books." Rowe, 40 Emory L.J. at 960 n.90.

"impressive" legislative history); *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) ("The legislative intent of Congress is to be derived from the language and structure of the statute itself, if possible, not from the assertions of codifiers directly at odds with clear statutory language."). This is particularly true in situations where, as here, there is evidence that the report has been manipulated in an effort to alter how the statute would later be interpreted. As Justice Scalia remarked in *Blanchard*:

> I am confident that only a small portion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote; [and] that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue. . . . *[T]he purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction*. . . . It is neither compatible with our judicial responsibility . . . nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.

Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring) (emphasis added).

In this instance, there can be no serious dispute that the sole purpose of the purported contrary "history" was "to influence judicial construction." The House Committee consultants' disclaimer is an example of the abuses possible if unelected individuals are able to alter laws passed by the elected representatives of the people.

c. The Legislative History Actually Undermines Exxon's Reading of the Statute

Finally, Exxon's argument that Congress intended subsection (a) to provide the desired limitations on supplemental jurisdiction in diversity suits is contradicted by the very legislative history Exxon is so desperate to reach. It is not subsection (a), but rather subsection (b), that is intended to achieve this result.

The House Report recognizes that § 1367(a) was intended to provide a sweeping grant of supplemental jurisdiction, and that subsection (b) was to fulfill the intent to impose certain limitations on that grant in diversity-only cases. It also equates the term "civil action" in subsection (a) with the terms "claim or claims":

> [Subsection (a)] generally authorizes the district court to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as *the claim or claims* that provide the basis of the district court's original jurisdiction. . . .
>
> * * *
>
> [Subsection (b)] prohibits a district court in a case over which it has jurisdiction founded solely on the general diversity provision, 28 U.S.C. § 1332, from exercising supplemental jurisdiction in specified circumstances. . . .

1990 U.S.C.C.A.N. at 6874-75 (emphasis added).[21]

The House Committee consultants who planted the so-called contrary "history" have described the mechanics of the statute and the meaning of the term "civil action" in the same way as set forth in the House Report:

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21. It is relevant that the sentence inserted by the professors in the House Report, on which Exxon relies, does *not* appear in the discussion of subsection (a), but rather in the discussion of subsection (b). 1990 U.S.C.C.A.N. at 6874-75.

> Section 1367(a), for example, generally authorizes the district courts to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as the claim that provides the basis of the district court's original jurisdiction. In reaching to the limits of Article III, subsection (a) codifies supplemental jurisdiction at the outer constitutional boundary that existed before *Finley*'s statutory revisionism.
>
> * * *
>
> Subsection (b) restricts the federal courts' exercise of supplemental jurisdiction in diversity cases by, in effect, codifying the principal rationale of *Owen Equipment & Erection Co. v. Kroger.*

Thomas D. Rowe, Jr., et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 Judicature 213, 215 (1991).[22]

Thus, there is simply no support in the legislative history for Exxon's contention of how the statute is to operate. As stated in the *Ortega* dissent: "The irony [of the minority view] is that it espouses the virtue of legislative intent, yet adopts a reading of § 1367 that was never articulated by any Congressperson or their staff, by any judge or jurist, nor by any academics, or, most importantly, by any of the drafters of the statute from the time the statute was adopted in 1990, until such 'intent' was just espoused in 1998." 370 F.3d at 144 (Torruella, J., dissenting).

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22. The House Committee consultants also recognized that § 1367 expressly provides for an additional exception to the statutory requirement of complete diversity of citizenship for Rule 20 plaintiffs. Rowe, 40 Emory L.J. at 961 n.91 ("[L]iterally, though, section 1367(b) does not bar an original complete diversity filing and subsequent amendment to add a non-diverse co-plaintiff under Rule 20, taking advantage of supplemental jurisdiction over the claim of the new plaintiff against the existing defendant.").

7. Exxon Vastly Overstates the Significance of § 1367's Overruling of *Zahn*

Exxon's related suggestion that § 1367 cannot have been intended to overturn the outcome in *Zahn* because it would lead to "absurd" consequences is similarly unsupportable, as there is no evidence that the end of *Zahn* will have adverse effects.

Consistent with the majority of commentators who had opined on the issue, the FCSC Subcommittee charged with examining the desirability of preserving *Zahn* concluded that, "[f]rom a policy standpoint, [*Zahn*] makes little sense." 1 Fed. Cts. Study Comm., Working Papers & Subcomm. Reports, at 561 n.33. Likewise, although a majority of the courts of appeals have now concluded that class actions brought by named plaintiffs who meet the jurisdictional minimum may include absent class members who do not, there has been no flood of federal court class actions. Plaintiffs continue to file large, multi-state class actions in state courts, specifically framing their complaints in a manner to avoid the possibility of removal. This has led many large multi-national companies, including Exxon, to lobby Congress to essentially federalize all significant multi-state class actions, by amending § 1332 to permit the aggregation of diversity-based class action claims for purposes of establishing the jurisdictional minimum.[23]

Indeed, it is precisely *because* the end of *Zahn* has done little to curtail plaintiffs' lawyers from "gaming the system" to avoid federal jurisdiction that Congress, supported by an announced majority of both houses, is currently considering the "Class Action Fairness Act" (S. 274; H.R. 1115), which would allow diversity jurisdiction in significant multi-state class actions

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23. Exxon has sponsored an article on the op-ed page of the New York Times urging the federalization of all class actions. N.Y. Times, May 25, 2000, at 29, reprinted in www.exxonmobil.com/files/corporate/000525.pdf. There can be little doubt that, had this case been brought in state court, Exxon would have removed the entire case to federal court.

even where (unlike here) no named plaintiff – let alone absent class members – can independently meet the jurisdictional minimum. As stated in the proposed Act's Senate Report:

> [C]lass action lawyers sometimes misuse the jurisdictional threshold to keep their cases out of federal court. For example, class action complaints often include a provision stating that no class member will seek more than $75,000 in relief, even though certain class members may be entitled to more and the class action seeks millions of dollars in the aggregate.
>
> This leads to the nonsensical result under which a citizen can bring a "federal case" by claiming $75,001 in damages for a simple slip-and-fall case against a party from another state, while a class action involving 25 million people living in all fifty states and alleging claims against a manufacturer that are collectively worth $15 billion currently must usually be heard in state court. In other words, under the current jurisdictional rules, federal courts can assert diversity jurisdiction over a typical state law claim arising out of an auto accident between a driver from one state and a driver from another, but cannot assert jurisdiction over claims covering large-scale, interstate class actions involving thousands of plaintiffs from multiple states, defendants from many states, the laws of several states, and hundreds of millions of dollars.

S.R. Rep. No. 108-123, at 12 (2003), 2003 WL 21811251; *see also* H.R. Rep. No. 108-144, at 20 (2003), 2003 WL 21321526, at *20.

8. The Question Accepted for Review Does Not Fairly Include Exxon's Resumed Attack on Class Certification, Which Is Meritless in Any Event

The question accepted for review in this case expressly recognizes the indisputable existence of original "diversity jurisdiction over the individual claims of named plaintiffs." It further assumes the also indisputable existence of

supplemental jurisdiction over the claims of absent class members that satisfy the amount-in-controversy requirement. From that premise, the question addresses whether that original jurisdiction also enables supplemental jurisdiction "over the claims of absent class members that do not satisfy the minimum amount-in-controversy requirement." Thus, the question, on its face, presumes that the remedy in the event of a negative answer would be the retention of diversity jurisdiction over the named plaintiffs and those class members that *do* satisfy the minimum amount-in-controversy requirement, and the mere dismissal of the lesser claimants. As Exxon itself explained:

> [T]he issue is whether § 1367 legislatively overrules this Court's decision in *Zahn*, holding that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and *any plaintiff who does not must be dismissed from the case*."

Exxon Pet. at 10 (quoting *Zahn*, 414 U.S. at 301) (emphasis added).

Having lost its attempt to seek review of class certification, Exxon now attempts to revive and shoehorn that issue into this proceeding, by arguing – for the very first time – that if the Court answers the question presented in the negative, it should vacate the jury's verdict and require this fourteen-year-old twice-tried case to be refiled, recertified without the lesser claimants, and retried.

Exxon's new theory regarding what the appropriate remedy should be if it prevails raises issues which are neither within the question accepted for review itself nor "fairly included" therein. In fact, it directly contradicts the question, attacking its very predicate: the indisputable existence of original diversity jurisdiction over the named Plaintiffs' claims (and, inferentially, supplemental jurisdiction over the larger class members' claims). Needless to say, to consider these new issues would significantly change the substance of both the question and accompanying

petition for review. Therefore, they are improperly presented, and should not be considered. Sup. Ct. R. 14(a), 24(1)(a); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system."); *Irvine v. California*, 347 U.S. 128, 129 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari.").

Were the Court to entertain Exxon's new argument, however, the result would be the same. From its unsupportable premise that "the courts below never had power in this case," Exxon Br. at 40, Exxon asserts that this "defect" cannot be cured through dismissal of the lesser claimants, because their inclusion "altered the proof of liability and damages in this case." *Id.* at 41.[24] Exxon is wrong.

Ironically, Exxon attempts to support its argument through reliance on *Newman-Green*. In that decision, the Court recognized that even a defect in complete diversity of citizenship does not "destroy" jurisdiction *ab initio* for the diverse parties, but may be cured through a *post*-judgment appellate dismissal of the non-diverse party. In particular, the Court directed that consideration must be made of the "practical" consequences of a case-wide dismissal, stating that parties "should not be compelled to jump through . . . judicial hoops merely for the sake of hypertechnical jurisdictional purity." *Newman-Green*, 490 U.S. at 837. It then went on to state:

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24. Exxon also generically complains that the certification of a "massive class" gives plaintiffs a "tactical advantage" because it "places intense pressure on a defendant to settle." Exxon's Br. at 41. In light of the fact that Exxon did *not* settle even in the face of certification of this "massive class," it is hard to fathom how it can possibly claim prejudice. Indeed, it seems beyond intelligent discussion that Exxon would be even *less* likely to achieve the "peace and finality" it purports to desire (*Id.* at 46) if thousands of class members are excluded, free to pursue multiple separate suits in friendly state courts offering punitive damages.

> In each case, the appellate court should carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation. It may be that the presence of the nondiverse party produced a tactical advantage for one party or another. If factual disputes arise, it might be appropriate to remand the case to the district court, which would be in a better position to make the prejudice determination.

Id. at 837-38 (affirming post-judgment appellate dismissal of non-diverse party).

In this case, there is no need to speculate as to whether the district court would find prejudice in the inclusion of the lesser claimants, or would simply dismiss them (the remedy specified in *Zahn*). For, as noted above, the district court has already rejected Exxon's argument, stating:

> I frankly find the argument to be frivolous and I think even if the question posed is answered for Exxon, the manner in which the question is posed answers the question, which is that those who don't meet the supplemental jurisdiction requirements would be out and everyone else would be in. I think it's that simple.

Tr., Hearing on Exxon's Motion for Stay Pending Supreme Court Review, Jan. 7, 2005, Doc. 1778 at 43. The reason for the district court's conclusion is clear: Exxon is confusing the issue of class membership with the nature of the evidence that proves its liability to all of its dealers.

Throughout this proceeding, not one but two trial judges[25] have repeatedly held that, by virtue of the collective nature of Exxon's on-average obligation to all dealers, Exxon's breach had to be proven on a collective basis. Accordingly, the proof would be literally identical regardless

25. This case was originally assigned to District Judge James Kehoe, who passed away in late 1998. The case was subsequently reassigned to District Judge Alan Gold.

of whether the class included one, one thousand, or ten thousand dealers.

On April 21, 1998, for instance, in denying Exxon's motion to decertify the class, Judge Kehoe held that:

> Exxon asserts that it has accomplished this "unbundling" of credit cost recovery fees .. . so that "on average, over time, across all markets," the reduction would be found in the ultimate price. By its very nature, this alleged obligation is owed to the entire class of dealers, the breach of which can be determined *only* by an "on average, over time, across all markets" analysis of Exxon's relationship with *all* of its dealers.

Order on Exxon's Motion to Decertify the Class for Counts I and III of the First Amended Complaint, April 21, 1998, at 1-2 (emphasis in original) [Doc. 912]. Judge Kehoe reiterated this view in denying Exxon's motion for summary judgment:

> Nor is particularized proof required for Plaintiffs to prove their case because Exxon's words, deeds and conduct were system-wide. . . . Indeed, the very essence of an obligation to reduce the wholesale price of motor fuel on average, over time, across all markets, to offset the credit cost recovery fee, involves system-wide proof regarding system-wide credit and pricing practices.

Order Denying Exxon's Motion for Summary Judgment on Count I, April 21, 1998, at 12 [Doc. 908].

This identical viewpoint was expressed again by Judge Gold shortly after he took over the case:

> Exxon's good faith duty, *according to the standard it established*, necessarily involves system-wide proof regarding system-wide credit and pricing practices. . . . For this reason, I disagree with Exxon's argument that such evidence is not "uniform" as to each dealer.

> Rather, the proffered evidence as to how Exxon was to carry out its good faith duty applies equally to all dealers, since all dealers were entitled to the same "on average" benefit, regardless of whether they individually received a dollar for dollar set off at all times within the twelve-year period of the DFC program.

Order on Exxon's Motion *in Limine* to Exclude Extrinsic Evidence to Establish the Alleged Obligation Under the Written Contracts, July 1, 1999, at 12 (emphasis added) [Doc. 1119]. Judge Gold subsequently clarified the on-average nature of the required proof, as follows:

> Consequently, while each class member asserts his or her individual claim based on their respective Sales Agreement with Exxon, Exxon owed the same duty of good faith performance to each and every dealer, and thereby, to the collective class as a whole. Specifically, Exxon's good faith performance obligation was to offset *on average among all its dealers from which the collective class of dealers nationwide would benefit.*

Order Denying Exxon's Renewed Motion for Summary Judgment on Count I, July 6, 1999, at 31-32 (emphasis in original) [Doc. 1129].

Similarly, in denying Exxon's *Daubert* motion challenging Plaintiffs' expert, whose opinion was based upon on-average data, Judge Gold stated that:

> Exxon's breach, if any, can be determined only by an "on average, over time, across all markets" analysis of Exxon['s] relationship with all of its dealers. . . . Exxon's stated position does not seem to be inconsistent. The use of "average nationwide" data for damage purposes is supported by Exxon's own answers to interrogatories. As set forth in Exxon's Interrogatory

> Response 67, . . . "*Exxon dealers were informed, and should have understood, that the reduction would only be 'on average' and that therefore the amount of their individual reduction in the wholesale prices would not necessarily offset the amount of the credit card processing charge each dealer individually paid.*"

Omnibus Order on *Daubert* and Related Matters, July 28, 1999, at 17 n.16 (emphasis in original) [Doc. 1176]. Judge Gold also offered a scathing criticism of Exxon's post-trial assertion of the same unsuccessful argument:

> Although Exxon did its best to confuse the jury as to its obligation to its dealers with the tests used to prove or disprove its performance, Plaintiffs presented the jury with substantial evidence from Exxon's own documents and words that it would reduce the wholesale price of motor fuel charged to its Dealers during the Class Period by an amount that, on average, offset the 3% credit card recovery fee. The evidence further established that Exxon agreed to do so even if a dealer did not adopt and implement the DFC Program. The tools used by Plaintiffs to prove non-performance of the pricing obligation do not redefine the obligation. In the Court's view, Exxon's argument regarding conflict in the verdict form is a "smoke-screen" to hide from its own self-created obligation established during the creation and implementation of the DFC Program.

Order Denying Exxon's Rule 50 and 59 Motions, August 7, 2001, at 5-6 [Doc. 1463].

As set forth above, the collective nature of the proof as to liability and damages, in turn, enabled Judge Gold to utilize Rules 23 and 49 to fashion specific procedures that would allow any necessary elimination of claims post-trial or post-appeal, should Exxon prevail on any of its various asserted defenses. Order on Procedure at 117a-118a, 148a-150a, 153-156a. This included, significantly, the rejection of Plaintiffs' request for

entry of an aggregate judgment, in favor of Exxon's recommendation to withhold entry of judgments for members of the class until after the appeal:

> In the event subject matter jurisdiction is lacking, the Court cannot include in an aggregate damage award those claims of class members over which it has no jurisdiction. To do so would expose Exxon to potential double liability in the event it is successfully sued in state court by a class member who is dismissed for lack of subject matter jurisdiction. Moreover, in the event of remand, untangling those class members who are included in a gross award, but who do not meet threshold jurisdictional amounts, will necessitate a second inquiry into the value of each dealer's claim if Plaintiffs' proposal is followed. . . . Under Exxon's proposal, both inquiries can be conducted simultaneously during the claims process.

Id. at 117a-118a.

In view of this record, there is no conceivable justification for setting aside fourteen years of judicial labor on behalf of the thousands of class members who indisputably meet the jurisdictional minimum, simply because of the inclusion of absent lesser claimants. Nor is there any need to remand the case to the district court to determine the issue of prejudice, as it has already considered and rejected the argument. In the words of this Court: "Nothing but a waste of time and resources would be engendered by remanding to the District Court or by forcing these parties to begin anew." *Newman-Green*, 490 U.S. at 838.

In short, if the Court answers the question presented "no," the lesser claimants should simply "be dismissed," as this Court has previously directed. *Zahn*, 414 U.S. at 301; *Clark*, 306 U.S. at 590. In the alternative, it is appropriate for this Court to remand to the district court with instructions to enter an aggregate final judgment for the class as a whole. Because the jury found that Exxon had a collective obligation to offset its wholesale prices on average to the dealer class as a whole, Pet. App. 161a-163a,

"the rights of the different class members were common and undivided; in such cases aggregation [is] permitted."[26] *Snyder v. Harris*, 394 U.S. 332, 335 (1969).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed. If, however, the Court determines that the district court lacked subject matter jurisdiction over the class members with claims less than the jurisdictional amount, it should remand with instructions to retain jurisdiction over the class members with sufficient claims, and to continue the process of identifying and segregating the lesser class members for dismissal, subject to their rights to refile in a court of competent jurisdiction pursuant to the tolling provisions of § 1367(d).

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26. The district court determined that aggregation is not permissible in this case because it did not believe that money can form the requisite "res." Pet. App. at 111a. This determination is incorrect. *Shields v. Thomas*, 58 U.S. (17 How.) 3, 5 (1854).