No. _____

IN THE

Supreme Court of the United States

CADIAN CAPITAL MANAGEMENT, LP, ET AL.,
Petitioners,

v.

TERRY KLEIN, DERIVATIVELY ON BEHALF OF QLIK TECHNOLOGIES INC., and QLIK TECHNOLOGIES INC.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a shareholder action under § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), must be dismissed for lack of jurisdiction once the sole plaintiff has lost any financial interest in the outcome of the litigation.

2. Whether a court must deny a request to substitute a new plaintiff for an original plaintiff under Federal Rule of Civil Procedure 17(a)(3) when there was no mistake in naming the original plaintiff.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Cadian Capital Management, LP, Cadian Fund LP, Cadian Master Fund LP, Cadian GP, LLC, Cadian Capital Management GP, LLC, and Eric Bannasch. None of the petitioners have any corporate parents, and no publicly held company holds 10% or more of their stock.

Respondents are Terry Klein and Qlik Technologies, Inc. Qlik Technologies, Inc. is a subsidiary of Thoma Bravo, LLC, a private equity investment firm. Thoma Bravo, LLC has no corporate parent, and no publicly held company holds 10% or more of its stock. Klein has been dismissed as plaintiff in this case because the parties agree that she no longer has any financial interest in the outcome of the litigation. Klein is nonetheless named as a respondent because she was a party to the proceeding in the Court of Appeals. *See* Sup. Ct. R. 12.6. Qlik is named as a respondent because it has been substituted for Klein as plaintiff, pursuant to the ruling of the Court of Appeals. The legality of that substitution is challenged in this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Cadian Capital Management, LP, Cadian Fund LP, Cadian Master Fund LP, Cadian GP, LLC, Cadian Capital Management GP, LLC, and Eric Bannasch (collectively, "Cadian") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (Pet. App. 31a–58a) is unreported. The opinion of the Court of Appeals for the Second Circuit (Pet. App. 1a–30a) is reported at 906 F.3d 215 (2d Cir. 2018), and its order denying rehearing en banc (Pet. App. 59a–60a) is unreported.

JURISDICTION

The Court of Appeals entered judgment on October 2, 2018 and denied Cadian's timely petition for rehearing on November 30, 2018. Cadian timely filed this petition for a writ of certiorari on February 28, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The pertinent constitutional, statutory, and rule provisions are reproduced in the appendix to this petition. Pet. App. 61a–65a.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), provides that, for "purposes of preventing the unfair use of information," any profit by certain insiders of certain equity issuers that is realized "from any purchase and sale, or any sale and purchase, of any equity security" of the issuer "within any period of less than six months" "shall inure to and be recoverable by the issuer." 15 U.S.C. § 78p(b). Section 16(b) suits to recover profits from such a transaction must be brought within "two years after the date such profit was realized." *Id.* Suit may be brought by the issuer of the security or "the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter." *Id.*

A suit cannot "be maintained by someone who is subsequently divested of any interest in the outcome of the litigation," because Section "16(b) requires a plaintiff security holder to maintain some financial interest in the outcome of the litigation" "throughout its course." *Gollust v. Mendell*, 501 U.S. 115, 125, 126 (1991).

II. FACTS AND PROCEDURAL HISTORY

1. Terry Klein alleges that in 2014 petitioner Cadian engaged in purchase and sale transactions in Qlik Technologies, Inc. stock, within six months and while it was a statutory insider, resulting in profits recoverable by Qlik under § 16(b). Pet. App. 33a.

In June 2015, Klein requested that Qlik pursue a claim against Cadian to recover the profits. Pet. App. 33a. Qlik declined to bring such a suit and notified Klein of that determination in July 2015. In October 2015, Klein (then a Qlik shareholder[1]) filed suit "derivatively on behalf of Qlik" against Cadian, and named Qlik as a nominal defendant.[2] Pet. App. 31a, 33a. The case was stayed between November 2015 and September 2016, pending resolution of a motion to dismiss in a related case. Pet. App. 34a.

In the summer of 2016, Qlik merged with the private equity firm Thoma Bravo. Under the merger agreement, which was publicly announced in June 2016, all Qlik shareholders would receive cash payments for their shares and Qlik would become a wholly owned subsidiary of Qlik Parent, Inc., an entity controlled by investment funds affiliated with Thoma Bravo. Pet. App. 34a. When the merger closed in August 2016, Klein's shares were retired, leaving her with no financial interest in the outcome of the suit against Cadian. Pet. App. 34a.

Cadian subsequently moved to dismiss Klein's suit for lack of jurisdiction, arguing that the retirement of her shares mooted her suit. Pet. App. 35a. Klein conceded that she lacked standing to continue the action, but moved to substitute Qlik for her as plaintiff. Pet. App. 35a. And Qlik, reversing its earlier decision not

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[1] Klein stated in her complaint that she was a Qlik stockholder, but has not alleged that she owned the stock during the alleged short-swing trading in 2014. Pet. App. 34a.

[2] Klein also filed two other § 16(b) suits against Cadian, pertaining to trades in securities issued by other companies. *See Klein v. Cadian Capital Mgmt., LP*, 15-cv-8143-ER (S.D.N.Y.); *Klein v. Cadian Capital Mgmt., LP*, 15-cv-8145-ER (S.D.N.Y.).

to sue Cadian, sought to join Klein's substitution motion. Pet. App. 34a–35a.

2. The district court granted Cadian's motion to dismiss. The court held that because Klein, the sole plaintiff, lost her financial interest in the suit's outcome, she no longer had Article III standing to pursue the suit and the court lacked jurisdiction. Pet. App. 47a–50a. Accordingly, the court concluded that it lacked authority to entertain her substitution motion and that "the action must be dismissed." Pet. App. 55a.

The district court also held, in the alternative, that even assuming it retained jurisdiction to entertain Klein's motion, the motion would fail. The court observed that Federal Rule of Civil Procedure 17(a)(3), which Klein invoked as a vehicle to obtain substitution, serves "'to avoid forfeiture and injustice when an understandable mistake has been made in selecting the party in whose name the action should be brought' and 'codifies the modern judicial tendency to be lenient when an honest mistake has been made in selecting the proper plaintiff.'" Pet. App. 57a (quoting *Cortlandt St. Recovery Corp. v. Hellas Telecomm.*, 790 F.3d 411, 423 (2d Cir. 2015)).

Here, however, neither Klein nor Qlik had made any mistake "in selecting the proper party" as plaintiff to bring suit. Pet. App. 57a. As a Qlik shareholder, Klein was "clearly authorize[d]" under § 16(b) to bring suit at the time she commenced the litigation because Qlik had declined the request to sue Cadian. Pet. App. 57a. "It was only after the cash-out merger divested Klein of her shares—and thirteen months after she filed the lawsuit—that Qlik decided to litigate the Section 16(b) claims on its own behalf." Pet. App. 57a. In

short, the court concluded, this was not a Rule 17(a)(3) scenario of "inadverten[t] fail[ure] to bring a claim in the name of the real party in interest." Pet. App. 57a.

3. A divided panel of the Court of Appeals for the Second Circuit reversed.

The majority (Pooler, J., joined by Sullivan, J., then sitting by designation) invoked the "more relaxed rule of mootness" applied in "class action jurisprudence." Pet. App. 11a, 13a. The majority observed that "[n]amed plaintiffs in class litigation represent not just—or even primarily—themselves, but also those sufficiently similarly situated that Rule 23 enables judicial recognition of their shared interest." Pet. App. 11a. In addition, "[m]embers of a class who are not named plaintiffs (and do not opt out) will be bound by the result of the litigation." Pet. App. 11a. As a result, courts commonly allow "'[s]ubstitution of unnamed class members for named plaintiffs who fall out of the case because of settlement or other reasons' that would deprive them of standing if present at the outset of litigation." Pet. App. 11a–12a (quoting *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006)).

The majority added, more generally, that "Rule 17 contemplates that federal courts maintain jurisdiction over an action in which a representative plaintiff has lost her stake long enough to determine whether" a substitute plaintiff can maintain the suit. Pet. App. 13a.

The majority then analogized yet a third type of suit, a "derivative action" under Federal Rule of Civil Procedure 23.1, to class actions under Rule 23. Pet. App. 14a–15a. It concluded that "a derivative action

is like a class action in the relevant ways" because it "involves a representative plaintiff" who "formally represent[s] the interests of others," and "[a] corporation is 'bound by the judgment' of derivative litigation brought on its behalf and is 'considered [a] part[y] to the litigation in many important respects.'" Pet. App. 14a–15a.

Then the majority applied the analysis from the Rule 23 class-action context to Klein's § 16(b) suit, which is neither a class action nor a Rule 23.1 derivative action. Pet. App. 17a–18a. The majority acknowledged that had Klein lacked standing *ab initio*, the court would not have had jurisdiction to entertain a motion for substitution. Pet. App. 21a ("[I]n the absence of a plaintiff with standing . . . there [is] . . . no lawsuit pending for the real party in interest to 'ratify, join, or be substituted into' under Rule 17(a)(3) or otherwise." Pet. App. 21a (quoting *Cortlandt St.*, 790 F.3d at 423)). But the majority reasoned that because Klein lost her financial interest in the litigation after suit had been commenced, a different rule should apply. Characterizing Klein as "a representative plaintiff," the majority held that the district court "maintain[ed] its jurisdiction at least long enough to determine . . . whether a substitution could avoid mootness." Pet. App. 18a.

Having concluded that the court retained jurisdiction to consider the substitution motion, the majority relied on Rule 17(a)(3) for a "procedural route to substitution." Pet. App. 18a. The majority ruled that "an 'honest mistake in selecting the proper party'" "is not a precondition" for granting substitution under Rule 17(a)(3). Pet. App. 18a, 21a. Rather, "Rule 17(a)(3) allows substitution of the real party in interest so long

as doing so does not change the substance of the action and does not reflect bad faith from the plaintiffs or unfairness to the defendants." Pet. App. 3a. Because the majority saw no evidence that Qlik or Klein had acted in bad faith, and allowing substitution would not "alte[r] the . . . complaint's factual allegations," the majority ruled that the district court erred in denying substitution. Pet. App. 19a–20a.

Judge Lohier dissented on both issues.

As to jurisdiction, Judge Lohier reasoned that Klein's suit "became moot and the District Court lost jurisdiction the moment [Klein] ceased to have any financial stake in Qlik." Pet. App. 24a. Once Klein was stripped of her financial interest in the outcome of her suit, "the District Court, divested of a concrete dispute, was obligated to dismiss [the suit] as moot." Pet. App. 25a. Judge Lohier emphasized that this Court has confined its "more flexible mootness doctrine" "exclusively to class actions" and has repeatedly explained that reliance on it "in other contexts would be 'misplaced.'" Pet. App. 24a–25a (quoting *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018)).

As to substitution under Rule 17(a)(3), Judge Lohier concluded that "a movant under Rule 17(a)(3) [must] show that the failure to timely select the proper plaintiff reflected an honest mistake." Pet. App. 27a. He emphasized that "[t]he 'honest mistake' requirement did not come out of thin air." Pet. App. 28a. To the contrary, "[t]he Rules Advisory Committee has long described Rule 17(a)(3) as a mechanism to account for 'when an honest mistake has been made in choosing the party in whose name the action is to be filed.'" Pet. App. 28a. Accordingly, Judge Lohier

concluded, because "Klein and Qlik failed to demonstrate that they made an 'understandable' or 'honest' mistake in not earlier seeking to make Qlik the plaintiff," the district court rightly denied the Rule 17(a)(3) motion. Pet. App. 30a.

4. Cadian timely petitioned for rehearing and rehearing en banc. The Second Circuit denied the petition. Pet. App. 59a–60a.

REASONS FOR GRANTING THE PETITION

I. THE JURISDICTIONAL RULING BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *GENESIS HEALTHCARE* AND *SANCHEZ-GOMEZ*

This Court concluded in *Gollust* that a "serious constitutional question" would arise if a court were to permit a plaintiff to continue "a § 16(b) action after he had lost any financial interest in its outcome." 501 U.S. at 126. This case presents for review a practical consequence of that question: whether a court must dismiss a § 16(b) action for lack of jurisdiction once the sole plaintiff loses her financial interest in the outcome of that litigation, thereby precluding an effort to substitute in a new plaintiff.

The Second Circuit's divided ruling that a court retains jurisdiction even after the plaintiff's loss of financial interest conflicts with this Court's decisions in *Genesis Healthcare* and *Sanchez-Gomez*. The Second Circuit majority inappropriately relied on the narrow mootness analysis that applies only in the Rule 23 context of class actions.

This Court's review is warranted to resolve that conflict. Review is particularly important here in light of the sweeping scope of the Second Circuit's ruling, which could create an exception from Article III for representative capacity suits of nearly every type and afford limitless opportunities to revive § 16(b) suits after the original plaintiff has lost any financial stake in the outcome.

A. The Second Circuit Created an Unsupportable Exception to This Court's Cardinal Rule of Article III Jurisdiction

Article III requires that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* at 72 (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477–478 (1990)).

The Second Circuit's ruling created an exception to this cardinal rule of Article III jurisdiction. When Klein's shares in Qlik were converted to cash, Klein lost "all financial interest in the outcome of the litigation [she] had begun." *Gollust*, 501 U.S. at 126. As the dissent below correctly observed, "[a]t that point, 'the action [could] no longer proceed,' and the District Court, divested of a concrete dispute, was obligated to

dismiss it as moot." Pet. App. 25a (quoting *Genesis Healthcare*, 569 U.S. at 72).

The majority nonetheless determined that a federal court maintains "its jurisdiction at least long enough to determine . . . whether a substitution could avoid mootness," Pet. App. 26a, by creating an exception from Article III that it analogized to Rule 23 class-action jurisprudence. The panel's exception is not supported by this Court's Article III jurisprudence because the Rule 23 class-action doctrine is premised on a unique legal feature of the nature of a certified plaintiff class. This Court has explained that a plaintiff class takes on an "independent legal status" at the time it is certified by a federal court. *See Genesis Healthcare*, 569 U.S. at 75. Accordingly, where a plaintiff class has been certified by the time that the named plaintiff loses a stake in the outcome of the litigation, the case may proceed because members of that certified class retain a stake in the outcome of the litigation. *Sosna v. Iowa*, 419 U.S. 393, 399, 401 (1975). And, for the same reasons, a court retains jurisdiction where a class of plaintiffs would have been certified absent an erroneous denial of certification, *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980), and where a plaintiff class cannot be certified before the named plaintiff loses her personal interest in the litigation because the underlying claims are inherently transitory, *Gerstein v. Pugh*, 420 U.S. 103, 110–111 (1975); *see also Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991).

This Court has consistently limited this narrow doctrine to the context of Rule 23 certification of plaintiff classes, declining to extend it to "functional class

actions" or cases with "representative" plaintiffs that share some of the traits of class actions. Specifically, in *Genesis Healthcare*, this Court held that a collective action brought under the Fair Labor Standards Act "became moot when [the named plaintiff's] individual claim became moot, because she lacked any personal interest in representing others in this action." 569 U.S. at 73. That was true notwithstanding that the plaintiff sought to represent other employees who might have had Article III standing had they originally brought suit in their own names. Rejecting the named plaintiff's invitation to apply its Rule 23 doctrine to another context, this Court ruled that *Sosna* and *Geraghty* were "inapposite" because "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Id.* at 74. Given these differences, "the mere presence of collective-action allegations in the complaint" could not "save the suit from mootness once the individual claim" was extinguished. *Id.* at 73.

Sanchez-Gomez reaffirmed the limits that *Genesis Healthcare* enumerated. In *Sanchez-Gomez*, four criminal defendants sought "class-like relief" from a policy that required that they and other defendants be bound in full restraints during pretrial proceedings. 138 S. Ct. at 1536. Reversing a decision that had applied the Rule 23 class-action doctrine to this "functional class action," this Court reiterated the "essential" point articulated in *Genesis Healthcare*: Outside the "class action setting," the "'mere presence of . . . allegations' that might, if resolved" in favor of plaintiffs, also "benefit other similarly situated individuals" cannot save a suit from mootness once plaintiffs' "'individual claim[s]' have dissipated." *Id.*

at 1539, 1540 (quoting *Genesis Healthcare*, 569 U.S. at 73, 75).

The exception adopted by the Second Circuit in this case squarely conflicts with *Genesis Healthcare* and *Sanchez-Gomez*. The Second Circuit held that what these decisions "teach" is that, to determine whether a "relaxed" rule of mootness applies, the question is "not whether a derivative action *is* a class action" but instead "whether a derivative action is *like* a class action." Pet. App. 14a (emphases added). Precedent is to the contrary, as Judge Lohier's dissent recognized. *Genesis Healthcare* and *Sanchez-Gomez*, and the long line of precedent they interpreted, reach just the opposite conclusion. By asking the wrong question, the Second Circuit arrived at the wrong answer, improperly expanding the unique Rule 23 doctrine related to certification of plaintiff classes to § 16(b) suits, derivative actions, and representative suits more generally.

B. The Second Circuit's Ruling Deepens a Conflict Among Circuits Regarding Whether Loss of Jurisdiction Can Be Cured After the Fact by Addition or Substitution of a Plaintiff

This Court's review is also necessary to resolve a circuit split regarding whether a court can add or substitute a plaintiff even after the sole plaintiff loses her personal stake in the outcome of the litigation. The Ninth Circuit has held that a court lacks Article III jurisdiction to do so. *See Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206 (9th Cir. 2018). In contrast, the Sixth

Circuit reached the opposite conclusion, ruling that a court may cure the loss of jurisdiction by replacing the original plaintiffs. *See Corbin v. Blankenburg*, 39 F.3d 650 (6th Cir. 1994) (en banc). The Second Circuit's ruling, which accords with the Sixth Circuit's, exacerbates this split of authority.

1. The Ninth Circuit has recognized that "having been deprived of jurisdiction by way of mootness," a court cannot "resurrect jurisdiction by adding a party to the suit." *Bain*, 891 F.3d at 1215. In *Bain*, three public school teachers brought a constitutional challenge to the requirement that they pay a fee used to fund their unions' political activities. *Id.* at 1208–1209. At the start of the suit, all three members had elected to join their respective teachers' unions, but all three left their teaching positions—and their unions—during the pendency of their suit. *Id.* at 1210. Seeking to breathe new life into a case in which they no longer had a personal stake, the former teachers filed a "fourth-quarter motion" to add an organization of educators as a plaintiff. *Id.* at 1214. The court rejected that attempt: The Federal Rules of Civil Procedure regarding substitution and addition of new plaintiffs are "not designed to swap in new plaintiffs for the sake of securing a judicial determination on the merits where the original plaintiffs no longer have a stake in the outcome." *Id.* at 1216. Although the injunction that the plaintiffs had pursued would have inured to the benefit of all union members, the representative nature of the claims did not change the mootness calculus.

"[A]bsent the unique circumstance of class certification," the Ninth Circuit held, "courts lack the

authority to replace a party with a new one once a case becomes moot." *Id.* at 1217. Outside the class-action context, a motion to add a new party is simply "an improper vehicle to resuscitate a moot case." *Id.* at 1209; *see also Hajro v. U.S. Citizenship & Immigration Servs.*, 743 F. App'x 148, 150 (9th Cir. 2018) ("A narrow exception to this general [mootness] rule applies in class actions," but "because Appellants did not bring this case as a class action," the "district court could not grant [the Rule 17 motion] brought by plaintiffs" after they had lost "a legally cognizable interest in the relief they were seeking.").

2. The Sixth Circuit, sitting en banc, reached the opposite conclusion in *Corbin v. Blankenburg*, 39 F.3d 650. After a trustee brought claims for breaches of fiduciary duty against current and former trustees of a pension plan, the plaintiff resigned his trusteeship. *Id.* at 651–652. After stepping down, the plaintiff, who no longer had any constitutionally cognizable stake in the outcome, moved to substitute his successor as plaintiff. A panel of the Sixth Circuit had determined that a court lacked jurisdiction to entertain such a motion. *See Corbin v. Blankenburg*, 999 F.2d 1037 (6th Cir. 1993), *vacated*, 39 F.3d 650 (6th Cir. 1994) (en banc). Over two dissenting opinions, the en banc majority held otherwise, concluding that a court maintained jurisdiction to substitute the original plaintiff even after he resigned his position as fiduciary and no longer had a personal interest in the dispute. 39 F.3d at 654. The court acknowledged that "a procedural rule cannot be used to restore jurisdiction once it is lost," but held that "subject matter jurisdiction was not irretrievably lost the moment [the

plaintiff] resigned his trusteeship." *Id.* The court determined that it accordingly maintained jurisdiction during "the pendency of a motion to substitute." *Id.* at 651.

This "novel theory" did not persuade the three dissenters. *Id.* at 655, 657 (Celebrezze, J., dissenting, joined by Keith and Martin, JJ.). The lead dissent concluded that the successor trustee could not be "substituted for the former trustee after his resignation for the purpose of recapturing standing to proceed with the action." *Id.* at 655–656. The "action simply could not proceed because the plaintiff had lost standing to continue as of the effective date of his resignation from the board of trustees" and thus "there was no subject matter jurisdiction to preserve at the time the substitution was attempted." *Id.* at 656–657.

C. The Second Circuit's Article III Exception Has Far-Reaching Implications

This Court's review is warranted given the wide-ranging consequences of the Second Circuit's decision.

1. By its terms and logic, the majority's holding is not limited to § 16(b) suits. The Second Circuit reasoned that "Rule 17 contemplates that federal courts maintain jurisdiction over an action in which a *representative* plaintiff has lost her stake long enough" to entertain a motion to substitute. Pet. App. 13a (emphasis added). Cases involving "representative" plaintiffs extend far beyond § 16(b) suits and so too would the court's ruling.

At the very least, the majority's exception from Article III would apply to Rule 23.1 derivative actions. The court reasoned that Rule 23.1 "derivative action[s]" are similar to "class action[s] in the relevant ways" because in both cases the "plaintiff . . . must . . . formally represent the interests of others." Pet. App. 14a–15a. From this flawed premise, the court concluded that § 16(b) suits too should be governed by Rule 23 class-action doctrine. It is unclear how the court made this leap. But what is apparent is that, despite the differences between § 16(b) suits and Rule 23.1 derivative actions, the court did not distinguish between them. Pet. App. 26a (Lohier, J., dissenting); *see also Mendell ex rel. Viacom, Inc. v. Gollust*, 909 F.2d 724, 728 (2d Cir. 1990), *aff'd sub nom. Gollust v. Mendell*, 501 U.S. 115 (1991) (explaining different standing requirements for § 16(b) and Rule 23.1 plaintiffs); 9 Louis Loss et al., *Securities Regulation* 384 (5th ed. 2018) (same).

The only limitation the Second Circuit announced was a vague, undefined temporal one: "When a representative plaintiff's ongoing stake in the outcome is at issue, a federal court maintains its jurisdiction *at least long enough* to determine whether the represented parties maintain an interest and whether a substitution could avoid mootness." Pet. App. 18a (emphasis added). How long is "long enough" the court does not say. But, if the case below is any indication, attorneys will be permitted months to search for an alternative plaintiff after their first client's interest in the case no longer exists. *See* Pet. App. 34a (Klein sought leave to move for substitution approximately three months after she had lost her financial stake in the outcome of the suit).

The Second Circuit's exception also presents significant practical problems. Future courts will confront the difficult task of assessing whether a particular "representative" suit is more like a class action than an FLSA collective action. Pet. App. 14a; *cf.* Pet. App. 26a (Lohier, J., dissenting) (class-action analogy to Section 16(b) suit "is surely even further afield" than analogy to FLSA collective action). That inquiry is bound to generate disagreement and confusion, and it is far more complicated than asking whether the court has certified a plaintiff class pursuant to Rule 23—the test required by *Genesis Healthcare* and *Sanchez-Gomez*.

2. Even if its reach were limited to § 16(b) suits, the Second Circuit's exception could allow attorneys to substitute new plaintiffs years after a suit is brought and after the statute of limitations has run. Unlike Rule 23.1 derivative actions, § 16(b) suits do not require that the shareholder plaintiff have owned the issuer's stock at the time that the challenged profits accrued. *Compare* Fed. R. Civ. P. 23.1(b)(1) (requiring that the plaintiff be a shareholder "at the time of the transaction complained of"), *with* 15 U.S.C. § 78p(b) (allowing any "owner of any security of the issuer" to bring suit after the issuer fails or refuses to do so); *see also Mendell*, 909 F.2d at 728. Instead, attorneys can recruit an individual to buy a single share after the fact and then bring suit. *See Gollust*, 501 U.S. at 123 (explaining that even "a subsequent purchaser of the issuer's securities has standing to sue for prior short-swing trading" no matter "the number or percentage of shares" he acquires).

Allowing substitution after a plaintiff sells or is divested of shares would permit § 16(b) suits to live on indefinitely with new shareholder plaintiffs—including individuals who would otherwise be barred by the statute of limitations from filing a suit. "[S]uch a 'revolving door' theory of representation through the imaginative use of the amendment process . . . would vest in plaintiffs' counsel a power and control over litigation . . . not recognized by the federal courts." *Summit Office Park, Inc. v. U.S. Steel Corp.*, 639 F.2d 1278, 1281 (5th Cir. 1981) (quotation marks and citation omitted).[3]

II. THE SUBSTITUTION CREATES A CIRCUIT SPLIT REGARDING THE SCOPE OF RULE 17(A)(3)

The Second Circuit held that Rule 17(a)(3) provides a "procedural route" under which a real party in interest may be substituted for a named plaintiff "so long as doing so does not change the substance of the action and does not reflect bad faith from the plaintiffs or unfairness to the defendants." Pet. App. 3a, 18a.

In reaching this conclusion, the Second Circuit held that Rule 17(a)(3) does *not* impose a further requirement that substitution be granted only when the

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[3] That attorneys could perpetually resuscitate a § 16(b) dispute is not a hypothetical. Respondent lost her financial stake in another pending § 16(b) suit when her shares were "sold to satisfy a judgment creditor." Order at 1, *Klein v. Cadian*, No. 15-cv-8143-ER, ECF No. 62 (S.D.N.Y. June 4, 2018). Respondent's counsel informed the District Court that a "new shareholder" would like to substitute "itself in place of original plaintiff Klein." Stipulation and Order at 2, *Klein v. Cadian*, No. 15-cv-8143-ER, ECF No. 69 (S.D.N.Y. Jan. 15, 2019).

parties made an "honest mistake" regarding the original plaintiff as a proper plaintiff. Pet. App. 3a.

That ruling conflicts with the decisions of three other Circuits, each of which has held that Rule 17(a)(3) applies only when, as the result of an honest mistake, an ineligible party (specifically, a party other than the real party in interest) has been named as plaintiff and the action is subject to dismissal on that basis. The Second Circuit's ruling also conflicts with reasoning expressed by three additional Circuits, each of which has indicated that substitution under Rule 17(a)(3) is a tool to cure technical pleading errors regarding selection of the original plaintiff.

The Circuits that require an honest mistake for Rule 17(a)(3) to come into play are correct. Rule 17(a)(3)'s text and context, as well as other authorities, confirm that the Rule serves solely to cure inadvertent pleading errors pertaining to the identity of the party in whose name an action must be instituted.

This Court's review is necessary to resolve the split of authority created by the Second Circuit's ruling, and to clarify the proper—and properly limited—scope of Rule 17(a)(3).

A. Three Circuits Have Held That Rule 17(a)(3) Allows Substitution Only When the Original Plaintiff Was Named by Mistake

1. In the Fifth, Tenth, and Eleventh Circuits, substitution of a new plaintiff pursuant to Rule 17(a)(3) is available only when, due to an honest mistake, an incorrect party was originally named as plaintiff.

The Fifth Circuit has explained that "Federal Rule 17 recognizes that . . . questions about who may prosecute a case may not be simple and provides for the possibility of relief when a reasonable mistake is made." *Rideau v. Keller Indep. Sch. Dist.*, 819 F.3d 155, 165 (5th Cir. 2016). Accordingly, "[a] good-faith nonfrivolous mistake of law triggers Rule 17(a)(3) ratification, joinder, or substitution." *Id.* at 166. The Fifth Circuit has specified that Rule 17(a)(3) "is 'applicable *only* when the plaintiff brought the action in her own name as the result of an understandable mistake, because the determination of the correct party to bring the action is difficult.'" *Id.* at 165 (quoting *Wieburg v. GTE Sw. Inc.*, 272 F.3d 302, 308 (5th Cir. 2001)) (emphasis added).

The Eleventh Circuit has reached the same conclusion: "Rule 17(a)(3) is only available . . . when an understandable mistake has been made in the determination of the proper party or where the determination is difficult." *In re Engle Cases*, 767 F.3d 1082, 1109 n.31, 1110 (11th Cir. 2014).

So has the Tenth Circuit. In *Esposito v. United States*, 368 F.3d 1271 (10th Cir. 2004), the court reiterated that a party seeking substitution under Rule 17(a) must demonstrate an "honest" "mistake in naming the incorrect party plaintiff," while holding that that mistake need not *also* be "understandable." *Id.* at 1276. Cautioning "against an over-emphasis on the 'understandability' of counsel's mistake as a separate factor in the analysis," the court declined to read into Rule 17 "a separate 'understandability' requirement, *in addition to the 'honest mistake' requirement*." *Id.* (emphasis added).

2. The Second Circuit's conclusion is likewise at odds with reasoning adopted by three other Circuits, each of which has framed the Rule 17(a)(3) analysis as focusing on whether an incorrect party was mistakenly named as plaintiff.

For example, the Ninth Circuit has stated that "Rule 17 relief is available where counsel makes an 'understandable' error in naming the real party in interest." *Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1128 (9th Cir. 2017) (citation omitted). It has also observed that "Rule 17(a) is the codification of the salutary principle that an action should not be forfeited because of an honest mistake," and warned that the rule "is not a provision to be distorted by parties to circumvent the limitations period." *United States v. CMA, Inc.*, 890 F.2d 1070, 1075 (9th Cir. 1989); *see also Arabian Am. Oil Co. v. Scarfone*, 939 F.2d 1472, 1477 (9th Cir. 1991) ("Rule 17(a) permits a court to allow ratification by the real party in interest where an understandable mistake has been made.").

Other Circuits have similarly construed Rule 17(a)(3). The Third Circuit has explained that the Rule's "protection against dismissal 'is designed to avoid forfeiture and injustice when an understandable mistake has been made in selecting the party in whose name the action should be brought.'" *Gardner v. State Farm Fire & Cas. Co.*, 544 F.3d 553, 562 (3d Cir. 2008); *see also Nelson v. Cty. of Allegheny*, 60 F.3d 1010, 1015 n.8 (3d Cir. 1995). And the Fourth Circuit has noted that "Rule 17 specifically provides that plaintiffs should have a right to cure a defect regarding the naming of a proper party," and that "the purpose of [Rule 17(a)(3)] [is] 'to allow the court to

avoid forfeiture and injustice when a technical mistake has been made in naming the real party in interest.'" *Shetterly v. Raymark Indus., Inc.*, 117 F.3d 776, 785 (4th Cir. 1997) (quoting *Lavean v. Cowels*, 835 F. Supp. 375, 388 (W.D. Mich. 1993)).

The Second Circuit's holding that an honest mistake is not a precondition for substitution under Rule 17(a)(3) thus conflicts with the holding or reasoning of every court of appeals to have addressed the issue.

B. The Text and Context of Rule 17(a)(3) Confirm Its Limited Scope

The Second Circuit's broad view of Rule 17(a)(3) is unmoored from the rule's text, context, and purpose.

1. Rule 17(a)(3) provides: "The court may not *dismiss an action for failure to prosecute in the name of the real party in interest* until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." (emphasis added). On its face, the rule applies only in a specific scenario: when an action is subject to dismissal on the basis that it has been impermissibly prosecuted in the name of a party other than the real party in interest. *See Intown Prop. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 171–172 (4th Cir. 2001) (Luttig, J., concurring in the judgment) (reasoning that unless an action is subject to dismissal "*on the ground that it is not prosecuted in the name of the real party in interest* . . . Rule 17(a) simply cannot apply"); *United States v. Triumph Gear Sys.*, 870 F.3d 1242, 1250 (10th Cir. 2017) (same).

Rule 17(a)(3) also provides: "After ratification, joinder, or substitution, the action proceeds as if it had

been *originally commenced* by the real party in interest." (emphasis added). The relation-back provision confirms that the Rule applies where an action was instituted by the wrong party—not when a proper party initiates suit but later seeks a substitution to address an intervening jurisdictional problem.

Rule 17(a)(3)'s context reinforces the plain meaning of its text. Rule 17(a)(1) provides that "[a]n action must be prosecuted in the name of the real party in interest," while adding that enumerated categories of parties "may sue in their own names without joining the person for whose benefit the action is brought." When an action becomes subject to dismissal because Rule 17(a)(1) has been violated, Rule 17(a)(3) provides counsel an opportunity to correct their pleading error by joining, substituting, or obtaining ratification from the real party in interest who should have been named as the plaintiff at the suit's inception.

2. Other authorities buttress the conclusion that Rule 17(a)(3) applies solely when an action has been mistakenly brought in the wrong party's name.

The perspective of the drafters of Rule 17 is revealing. *See Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("Although the Advisory Committee's comments do not foreclose judicial consideration of the Rule's validity and meaning, the construction given by the Committee is of weight." (citation and quotation marks omitted)); *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002) ("[T]he Advisory Committee Notes provide a reliable source of insight into the meaning of a rule . . . .").

The Advisory Committee on the Rules of Civil Procedure has long described Rule 17(a)(3) as a

mechanism to account for "when an honest mistake has been made in choosing the party in whose name the action is to be filed." Fed. R. Civ. P. 17 advisory committee's note to 1966 amendment. The Committee has specifically warned that Rule 17(a)(3) "should not be misunderstood or distorted. It is intended to prevent forfeiture *when determination of the proper party to sue is difficult or when an understandable mistake has been made*." *Id.* (emphasis added). In other words, Rule 17(a)(3) applies only where plaintiff's counsel needs to correct a mistake in the original selection of the party in whose name the action was filed.

The leading treatises on federal practice agree. According to Wright and Miller, Rule 17(a)(3) permits "a correction in parties" "when an understandable mistake has been made in selecting the party in whose name the action should be brought." 6A Charles Alan Wright et al., *Federal Practice & Procedure* § 1555 (3d ed. 2018). Similarly, Moore construes Rule 17(a)(3) as requiring courts to allow counsel to "cure a real party defect," "only when the failure to bring the action originally in the name of the correct party was the result of an 'honest and understandable mistake.'" 4 James Wm. Moore et al., *Moore's Federal Practice* § 17.12-1 (2019). Indeed, Moore distinguishes Rule 17 from Rule 25 ("Substitution of Parties") on the basis that it "applies when proper parties have not been named in the suit," whereas Rule 25 applies "when the original parties were proper" but an intervening event created the need for substitution. *Id.*

C. The Second Circuit's Decision Unduly Enlarges Rule 17(a)(3)'s Domain

The Second Circuit's ruling improperly expands Rule 17(a)(3) to suits brought by a party other than the real party in interest as a result of that real party in interest's *refusal* to pursue the claim. Whenever the plaintiff in such an action loses her eligibility to prosecute the claim, the rule adopted by the Second Circuit would allow a real party in interest to pick up a lawsuit that it had declined to pursue until that point. But a party that refused to bring an action, and did not join it after it was instituted by someone else, should not be able to reverse course *after the limitations period has expired*. Rule 17(a)(3) was designed for pleading mistakes resulting from counsel's erroneous identification of the real party in interest; it cannot and should not empower real parties in interest who refuse to pursue claims to change their minds after their causes of action have become time-barred.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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February 28, 2019