No. _____

# In The
# Supreme Court of the United States

THE ESTATE OF SAMUEL I. ROIG, *et al.*,

*Petitioners,*

v.

UNITED PARCEL SERVICE, INC.,
a Delaware corporation, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

This is a case in which the Defendants removed the matter to federal district court claiming there was diversity jurisdiction even though there were 4 Florida-citizen Plaintiffs and 2 Florida-citizen Defendants. The district court entered final judgment in favor of all 3 Defendants against all 4 Plaintiffs on a motion for entry of consent final judgment filed by the Plaintiffs because of the obvious lack of subject matter jurisdiction. A Panel of the Eleventh Circuit Court of Appeals refused to hear the matter on the merits and dismissed the appeal claiming it did not have jurisdiction to determine whether the district court had subject-matter jurisdiction or not, even though there were multiple parties on both sides of the "v." who had Florida-state citizenship.

Whether a Panel of the Circuit Court erred when it dismissed an appeal holding that there is no appellate jurisdiction to consider on the merits whether the trial court had subject-matter jurisdiction ("smj") to issue a final judgment involving 4 Florida-citizen Plaintiffs and 2 Florida-citizen Plaintiffs, based on its belief that Plaintiffs conferred smj on the district court, or waived the ability to contest whether the district court had smj by consenting to the entry of a final judgment in favor of Defendants.

The Panel decision is directly contrary to: *Clark v. Housing Auth. of Alma*, 971 F.2d 723, 726 (11th Cir. 1992) (holding that ***an exception*** to the general rule that one who consents to the entry of a final judgment

**QUESTIONS PRESENTED**—Continued

waives his right to appeal is where "there is a lack of federal jurisdiction because of the citizenship of the parties") (quoting *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928) (Brandeis, J.)) (citing *Pacific Railroad v. Ketchum*, 101 U.S. 289 (1879)). *Swift & Co.* and *Ketchum* both hold that a circuit court has the power to determine whether a district court has smj in precisely the situation here—where one party consents to the entry of final judgment to contest diversity jurisdiction. Here, this Court should GVR the circuit court's refusal to hear the matter on its merits, *e.g.*, determine whether the district court had smj, because the circuit court's decision is directly contrary to pellucid Supreme Court precedent. We cannot fathom American jurisprudence allowing a Circuit Court of Appeals to conclude it does not have the authority to determine whether a district court was possessed with smj, when there is a complete lack of diversity jurisdiction, as the end result is district courts unconstitutionally assuming jurisdiction over cases where smj does not exist, which would result in such assumptions of jurisdiction being nonappealable.

## PARTIES TO THE PROCEEDING

The Estate of Samuel I. Roig, Petitioner

Gail Olivera, Petitioner

Kyle Roig, Petitioner

Sam Roig, Petitioner

United Parcel Service, Inc., Respondent

Thomas O'Malley, Respondent

Romaine Seguin, Respondent

## RELATED CASES

Estate of Samuel I. Roig, Gail Olivera, Kyle Roig, and Sam Roig v. United Parcel Service, Inc., Thomas O'Malley, and Romaine Seguin, Case No. 20-003750(13) (Broward County Circuit Court).

Estate of Samuel I. Roig, Gail Olivera, Kyle Roig, and Sam Roig v. United Parcel Service, Inc., Thomas O'Malley, and Romaine Seguin, Case No. 20-60811 (Southern District of Florida).

Estate of Samuel I. Roig, Gail Olivera, Kyle Roig, and Sam Roig v. United Parcel Service, Inc., Thomas O'Malley, and Romaine Seguin, Case No. 21-11915 (Eleventh Circuit Court of Appeals).

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## OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals dismissing appeal and essentially affirming the Southern District Court of Florida's Final Judgment is unpublished. It is included in the appendix at App. 1. The district court's Final Judgment is also unpublished. It is included in the appendix at App. 4. The Eleventh Circuit's denial of rehearing is also unpublished, and included in the appendix at App. 30.

## STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was rendered on September 1, 2021. App. 1. Rehearing was denied on November 8, 2021. App. 30. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL AND/OR STATUTORY PROVISIONS INVOLVED

**(a)** The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

**(1)** citizens of different States[.]

The general removal statute, 28 U.S.C. § 1441(a) & (b), permits removal of any case over which the district court has original jurisdiction.

The applicable specific removal statute that applies here is 28 U.S.C. §§ 1446(b)(3) & (c)(1), which states:

> **(a) Generally.**—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and ***containing a short and plain statement of the grounds for removal***, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> **(b)** Requirements; generally.—**(1)** The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> **(2)(A)** When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.
>
> **(B)** Each defendant shall have 30 days after receipt by or service on that defendant of the

> initial pleading or summons described in paragraph (1) to file the notice of removal.
>
> **(C)** If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.
>
> **(3)** Except as provided in subsection (c), ***if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.***
>
> **(c) Requirements; removal based on diversity of citizenship.—**
>
> **(1)** ***A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.***

28 U.S.C. § 1446 (emphasis added). For purposes of § 1446(b)(3), a case filed which contains a non-diverse Defendant becomes removable to begin the running of the 30-day clock upon dismissal of that Defendant via a motion to dismiss or voluntary dismissal. Under

§ 1446(c), a Defendant has 1 year to obtain dismissal of the non-diverse Defendant, and if it fails to do so, may still remove, if it can convince the court that the addition of the non-diverse Defendant was in bad faith. Here, with 2 Florida citizens as Defendants, the statute required the Defendants to attempt in state court to have Defendants' dismissed so the sole remaining Defendant would be UPS, at which time, it could remove the case. Defendants' improper removal had the effect of evading all of these requirements in the removal statute.

## STATEMENT OF THE CASE

The Circuit Court's Panel decision is directly contrary to its own previous interpretation of this Court's precedent: *Clark v. Housing Auth of Alma*, 971 F.2d 723, 726 (11th Cir. 1992). Clark held that ***an exception*** to the general rule that one who consents to the entry of a final judgment waives his right to appeal is where "there is a lack of federal jurisdiction because of the citizenship of the parties." *Clark* quoted *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928) (Brandeis, J.) and *Pacific Railroad v. Ketchum*, 101 U.S. 289 (1879), which was cited by Justice Brandeis in *Swift & Co.*

This is a case in which all 4 Plaintiffs are citizens of the State of Florida and 2 of the 3 Defendants are citizens of the State of Florida, and were citizens when the Complaint was filed and when the case was

removed. (R1 at ¶¶8-9).[1] The Florida citizenship of multiple Florida Plaintiffs and Defendants required the conclusion that the case was not removable. *Moore v. North Am. Sports, Inc.*, 623 F.3d 1325, 1326-27 (11th Cir. 2010) (holding that in such case that the "case was not removable as originally filed. *See* 28 U.S.C. § 1441(b) (precluding removal when any Defendant is "'a citizen of the State in which such action is brought'")). "Because the case stated by the initial pleading was not removable, the removal of this case is governed by the second paragraph of § 1446(b), which provides:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

28 U.S.C. § 1446(b)." *Id.* at 1328. *Moore* follows binding precedent that holds a case must not be removed if citizens of the same state are on opposite sides of the "v," and a Defendant(s) must wait until receiving an amended pleading, order, or other paper which gives rise to diversity jurisdiction, which would then warrant removal. *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996). Nevertheless, here, in the absence of diversity jurisdiction, there is no other jurisdiction that a federal court could have over this action (*e.g.*, federal

[1] All references to docket entries in this Motion are to the district court record.

question), because all 9 counts involve either Florida statutory causes of action or common law tort claims, and despite repeated clear objections to the district court's lack of subject matter jurisdiction, (R10,23, 29,33,34,40,53,54,59,65,67,72, and 79), the district court eventually entered final judgment in favor of Defendants. (R1).[2]

Defendants' Notice of Removal disregarded the plain language of §§ 1446(b)(3) & (c)(1) and assumed the court was free to analyze the claims however it saw fit. (R1, *passim*). Notably, *the removal notice did not address the SA claim at all—no mention of how or why the SA claim is meritless and never addressed the GNIED claim as such, but only analyzed it as a simple negligence claim*. (R1).

Appellants hired undersigned counsel because they *read about how we had prevailed in an MTD hearing on tort claims against the individual Defendant in a similar case in Broward County Circuit Court called Cimino v. American Airlines, Inc., et al.*, Case No. 15-001723(26). (R10-1¶¶1-26). Summary judgment was

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[2] Plaintiffs filed a Complaint in State Court under *Florida Statutes* § 760.01 *et seq*. ("FCRA") against the corporate Defendant and under the Florida Whistleblower Act (FWA) (Counts I-V), and brought claims pursuant to the torts of gross negligent infliction of emotional distress: (GNIED) (Count VI); wrongful death (WD) and survival action (SA) claims (Counts VII and VII); claims pursuant to the Florida Constitution's unpaid wages/minimum wage provisions for hours worked for no pay; and retaliation for having complained of same (FC) (Counts VIII and IX). (R1).

denied on the SA claim. *Estate of Cimino v. American Airlines, Inc.*, 2020 WL 1068903 (Fla. Cir. Ct. 2020).

Plaintiffs filed a comprehensive Motion to Remand, given Defendants accused Plaintiffs' counsel and Plaintiffs of committing a "fraud" by bringing claims they knew or should have known have no merit to defeat diversity jurisdiction. (R10 and related filings R10-1 to R10-6) and (R12–R15)). The Remand Motion argued § 1446(b)(3) & (c)(1) supplants the old "fraudulent joinder" analysis, and that § 1446(b)(3) & (c)(1)'s plain language required remand to see if the diverse Defendants could obtain dismissal in 1 year's time, and, if so, then Defendants could remove. (R10pp.4;6-7). Plaintiffs objected to the court considering anything other than the four corners of the Complaint (as a state court would have to do when deciding a MTD), but exercising caution, submitted comprehensive declarations from Plaintiffs and counsel. (R10pp.4-5).

One of Plaintiffs' lawyers submitted a detailed declaration describing numerous cases in which MTD were denied in state court on the various state court claims he brought on behalf of Appellants. (R10-3 & 10-4). That counsel's declaration averred that he prevailed in the *Cimino* case and in many other cases at the MTD stage for GNIED and FC and WD/SA claims, prevailed in *Cimino* at the SJ stage as to the SA claim, and that workers' compensation exclusively does not apply to bar tort claims against individual supervisors and co-workers. (R10-4¶1). In paragraphs 7-9, we averred there were 13 times we have prevailed on MTD on GNIED without a physical impact including the

following cases with the complaints, motions to dismiss, responses thereto, and orders denying MTD attached: *Joerger*, *Salman*, *Sosa*, *Costigan*, *Herrera*, *Winter*, *Watson*, *Cimino*, *Trutie*, *Silvera*, and *Fullwood*. (R10-4¶¶7-9). We set forth how we have prevailed 3 times on motions to dismiss on FC claims (two for unpaid wages and 3 for retaliation)—*Lett*, *Edgecombe*, and *Watson*—and we cited the federal district court remand opinions we obtained that were issued in *Lett* and *Edgecombe*. (R4¶10,12). We set forth how the individual Defendants are liable under the FC. (R10-4¶¶13-14).

The Motion for Remand made clear that since the Removal Notice did not mention the SA claim, the court was required to remand even if the other claims had no merit, because waiver precedent requires same, and the court was barred from raising waived arguments for Defendants as Defendants' advocate. (R10pp.17-18) (noting "*Defendants do not even bother addressing the survival act claim, and the case should be remanded for that reason alone.*") (emphasis in original).

***The remand motion stressed that for there to be diversity jurisdiction every single Defendant must be diverse from every single Plaintiff and here there are 4 Florida-citizen Plaintiffs and 2 Florida-citizen Defendants.*** (R10p.5-6). ***We set forth how we prevailed on numerous of the same causes of action as those brought here, and thus they are recognized as valid claims in Florida.*** (R10pp.5-7&n.1). ***We set forth Plaintiff is the***

***master of his complaint and cases that can be removed are limited to those that could have been filed in federal court in the first place, but this is not one because there is no federal question or diversity jurisdiction.*** (R10pp.5-7 & n.1).

The fact the court issued a final judgment in favor of the 2 Florida in-state citizen Defendants against the 4 Florida in-state citizen Plaintiffs is noteworthy because "[a] litigant generally may raise a court's lack of subject-matter jurisdiction ***at any time*** in the same civil action, even initially at the highest appellate instance." *Kontrick v. Ryan*, 540 U.S. 443 (2004) (noting that "challenge to a federal court's subject-matter jurisdiction may be made at any stage of the proceedings, and the court should raise the question *sua sponte*"). "Lack of subject matter jurisdiction may be raised ***at any time*** by motion of a party or otherwise." *Harrell and Sumner Contracting v. Peabody Peterson Co.*, 546 F.2d 1277 (5th Cir. 1977). Any time means after a consent final judgment.

"The validity of an order of a federal court depends upon that court's having jurisdiction over . . . the subject matter." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). "[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." *Id.* (citations omitted). Plaintiffs brought this up because the final judgment suggests that Plaintiffs

conferred or consented to the district court's subject matter jurisdiction. Plaintiffs challenged the court's smj throughout the whole case. (R10,23,29,33,34,40, 53,54,59,65,67,72, and 79).

**The R&R and the Objections Thereto**

The Report & Recommendation of the magistrate is a 43-page safari of alleged Florida law that disregards the evidence submitted by Plaintiffs, questions its credibility, accepts Defendants' evidence, and raises arguments for Defendants they never raised, holding no cause of action has a reasonable probability of surviving a MTD in state court and we objected initially: to the court making credibility determinations; weighing conflicting evidence to resolve disputed factual issues, *Reese v. Herbert*, 527 F.3d 1253, 1271 (11th Cir. 2008) ("it was not for the district court to discount or disregard the[ affidavits] at the MSJ stage based on its assessment of the *quality* of the evidence"), but noting the R&R does this repeatedly. (R40pp.1-2). All of the legal arguments raised herein were asserted in the Objections to the R&R. (R40pp.1-30).

We noted that "since the R&R was issued, we have argued and obtained rulings in state court 3 times, *yes, 3 times with 3 different judges*, on GNIED and IIED claims and 2 times on the FC claims (both unpaid wages and retaliation) and prevailed on all such MTD." (R40pp.5-6). (It is now many more times than that). One of these cases was the *Edgecombe* case discussed above that was remanded by Judge Dimitrouleas and

had GNIED and FC claims. (R40pp.5-6). The R&R failed to demonstrate how no state court judge could possibly deny an MTD on Plaintiffs' claims, and used a "reasonable probability" standard to which we objected because it was the wrong standard (R40pp.13-14) (citing (R35p.11-12)), even though it acknowledged the "no possibility" standard is the correct standard. (R35at11) (citing *Stillwell* that applies it).

Undersigned counsel has now prevailed in several more such hearings including having sj denied on his client's claim of GNIED (which the R&R held did not exist in Florida)—significant analysis concerning the existence of the tort in Florida, pattern jury instructions concerning it, and holding that governmental entities in Florida are not entitled to sovereign immunity from GNIED claims based on appellate precedent in Florida and filed it supplementally in this case in response to Appellees' motion to dismiss because we felt it shows the district court has no subject matter jurisdiction. (R65) (citing *Hovenga v. The Trustees of Broward College, Florida, et al.*, 2021 WL 1115425 (Fla. Cir. Ct., Mar. 23, 2021)). For the denials of motions to dismiss, see, *e.g.*, *Morton v. 1621 JRA Lauderhill Food Corp.*, 2021 WL 2379425 (Fla. Cir. Ct., June 1, 2021) (denying MTD for GNIED claim) and *Gordon v. ABM Aviation, Inc.*, 2021 WL 2826400 (Fla. Cir. Ct., July 1, 2021), Order Denying MTD on FC unpaid wages, FC retaliation, and GNIED). We have since received a definitive ruling on GNIED from the Fourth DCA which affirmed the denial of a MTD a GNIED on the ground the tort does not exist finding that because

"wanton and willfulness" were pled, the MTD was properly denied. *Stratos v. South Broward Hosp. Dist.*, 326 So.3d 702 (Fla. 4th DCA 2021), *aff'g Stratos v. South Broward Hosp. Dist.*, 2020 WL 6540516 (Fla. Cir. Ct.) (against the employer) and *Stratos v. South Broward Hosp. Dist.*, 2020 WL 6540517 (Fla. Cir. Ct.) (against 2 co-workers) in a case in which gross negligent infliction of emotional distress (GNIED) was brought by the Plaintiff.

**The Motion for Entry of Final Judgment**

Appellants moved for final judgment only because they were exasperated by the district court refusing to acknowledge it did not have smj. [Doc67] (stating that "Plaintiffs request that the Court enter a final judgment in favor of Defendants on all counts, so they can appeal the denial of the remand motion, and Plaintiffs specifically reserve that right to appeal the denial of the remand motion herein, although they are under no obligation to do so because Plaintiffs question the subject matter jurisdiction of the Court. . . . While the law is clear that consent to entry of judgment without reservation of the right to appeal a particular claim bars an appeal, this is not so when the plaintiff questions the subject matter jurisdiction of the Court.") (citing *Dorse v. Armstrong World Industries, Inc.*, 798 F.2d 1372, 1375 (11th Cir. 1986)). While the law is clear that consent to entry of judgment without reservation of the right to appeal a particular claim bars an appeal, this is not so when the Plaintiff questions the [smj] of the Court:

> Where the parties have agreed to entry of an order or judgment without any reservation relevant to the issue sought to be appealed, one party may not later seek to upset the judgment, unless lack of "actual consent" or a failure of subject matter jurisdiction is alleged.

*Dorse v. Armstrong World Industries, Inc.*, 798 F.2d 1372, 1375 (11th Cir. 1986). *Dorse* is progeny of *Swift & Co.* and *Ketchum* and is often cited along with *Clark* in the Eleventh Circuit for this notion. We maintained steadfastly throughout the entire litigation that the district court had no smj. (R10,23,29, 33,34,40,53,54,59,65,67,72, and 79).

**The Hearing on the Entry of Final Judgment**

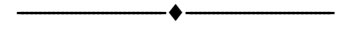
At the hearing on the entry of final judgment and in the Panel opinion, *Druhan v. American Mut. Life Ins. Co.*, 166 F.3d 1325 (11th Cir. 1999) is relied on where there was smj, as the court found that there was federal question smj. There was no final judgment issued, but rather after the federal court denied the remand motion because of the existence of federal question jurisdiction, the Plaintiff voluntarily dismissed the case. The Eleventh Circuit held that under those circumstances the Plaintiff waived her right to appeal. Unlike *Druhan*, here there is no smj, this was not a voluntary dismissal, but the entry of a final judgment. A subsequent panel of the Eleventh Circuit characterized the *Druhan* holding as being limited to the situation where a party invites a final dismissal order when neither party contends the entry of the dismissal order was

error. *Fitel v. Epstein, Becker & Green*, 549 F.3d 1344 (11th Cir. 2008) (noting that in *Druhan*, "[t]he Court concluded that because the final judgment was entered in response to the Plaintiff's motion for a dismissal with prejudice, and because neither party was contending the district court entered that judgment in error, "[t]here is therefore no adverseness as to the final judgment, and thus no case or controversy.") (emphasis added). *Here, we contended the final judgment was entered in error and without subject matter jurisdiction*. (R67 at 1, 2).

The case *Woodard v. STP Corp*., 170 F.3d 1043 (11th Cir. 1999) relied on by the Eleventh Circuit is also distinguishable. In *Woodard*, there was removal on the ground of diversity of citizenship, and it is unclear which parties were diverse. The motion for remand was denied, but the Court did not state why. It was not denied for lack of subject matter jurisdiction, as the Court implicitly found there was subject matter jurisdiction, as it reversed and remanded the conditions associated with the voluntary dismissal. Thereafter, there was no entry of final judgment, but rather Plaintiff filed a motion for voluntary dismissal in a case in which smj existed, and the Court found Plaintiff consented to dismissal which made the dismissal order not appealable. There is no reason to believe there was no smj in that case. In *Fitel v. Epstein, Becker & Green*, 549 F.3d 1344 (11th Cir. 2008), a case relied on by the lower court, the Eleventh Circuit held that there was adverseness such that there was appellate

jurisdiction. The issue had nothing to do with remand, but a sanctions issue.

The Panel's failure to follow *Dorse v. Armstrong World Industries, Inc.*, 798 F.2d 1372, 1375 (11th Cir. 1986) and *Clark* which are both progeny of *Swift & Co.* and *Ketchum*, constitutes the Eleventh Circuit applying contrary subsequent panel opinions in violation of the rubric that the earliest panel opinion controls until the Court resolves the issue *en banc*. *United States v. Dailey*, 24 F.3d 1323, 1327 (11th Cir. 1994) ("the earliest panel opinion resolving the issue in question binds this circuit until the court resolves the issue *en banc*."). The circuit court could have held that the mootness exception—capable of repetition yet evading review—should apply, because a litigant should not be put in the position where a court is without subject matter jurisdiction but they have to litigate in front of it for months and wait for a judgment on the merits either pursuant to Rule 56 or after a jury trial, then to be told that it would be a waste of resources to remand the case to state court. *Sierra Club v. EPA*, 315 F.3d 1295, 1303 n.11 (11th Cir. 2002). There simply has to be a way for a party in a diversity case to challenge lack of subject matter jurisdiction, without having to litigate for 1-2 years in front of a court that does not have it. This Court already (over 100 years ago) recognized this and the Eleventh Circuit's failure to pay heed to this Court's pellucid precedent warrants GVR.



## REASONS FOR GRANTING THE WRIT

### I. The decision below is directly contrary to the clear holdings of this Court's decisions in *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928) (Brandeis, J.) and *Pacific Railroad v. Ketchum*, 101 U.S. 289 (1879), which holdings were expressly recognized by the Eleventh Circuit Court of Appeals in *Clark v. Housing Auth of Alma*, 971 F.2d 723, 726 (11th Cir. 1992), that *an exception* to the general rule that one who consents to the entry of a final judgment waives his right to appeal is where "there is a lack of federal jurisdiction because of the citizenship of the parties" (quoting *Swift & Co.* and *Ketchum*)—which were brought to the attention of the circuit court.

The circuit court panel dismissed the Appeal, without first deciding whether the district court had smj over the matter, holding that because Appellants consented to a final judgment, that final judgment is not appealable. (*Opinion* at 1-2) (citing "[*s*]*ee Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1326-27 (11th Cir. 1999); *see also Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1233 (11th Cir. 2020) (explaining that "the litigant must be adverse as to the final judgment to appeal from that judgment")."

While those opinions state that general rule, there are prior panel opinions based on this Court's precedent which hold plainly that ***an exception*** to the general rule that one who consents to the entry of a final

judgment waives his right to appeal is where "there is a lack of federal jurisdiction because of the citizenship of the parties." *Clark v. Housing Auth of Alma*, 971 F.2d 723 (11th Cir. 1992) (quoting *Swift & Co.* and citing *Dorse v. Armstrong World Industries, Inc.*, 798 F.2d 1372 (11th Cir. 1986) and *White v. C.I.R.*, 776 F.2d 976 (11th Cir. 1985)). These opinions are based on the following rubrics: 1) a party cannot confer upon a district court smj when it does not exist; 2) an appellate court has an obligation to inquire into smj whenever the possibility that jurisdiction does not exist arises, *Cheffer v. Reno*, 55 F.3d 1517, 1523 (11th Cir. 1995); and 3) courts must dismiss an action where it appears that the court lacks jurisdiction. Fed.R.Civ.P. 12(h)(3) (specifically provides that lack of smj may be raised at *any* time during the proceeding—which means even after a consent judgment). "[B]ecause a federal court is powerless to act beyond its statutory grant of [smj], a court must zealously insure that jurisdiction exists over a case, and should itself raise the question of [smj] ***at any point in the litigation*** where a doubt about jurisdiction arises." *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001). Otherwise, the result is what occurred in this case, a trial court with no smj entertained a matter for 2 years.

Thus, the consented to final judgment with the reservation the lower court did not have smj did not divest the circuit court nor does it divest this Court of jurisdiction to determine whether the lower court had jurisdiction; indeed, a federal court, whether trial or appellate, is obliged to notice on its own motion its lack

of smj, ***or the lower court's lack of smj*** when a case is on appeal. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). Thus, the Supreme Court has said: "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). The Panel completely ducked its clear obligation in this regard and went to a procedural ground instead which is error.

A case falls within the "federal district court's 'original' diversity 'jurisdiction' only if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same state." *Wis. Dep't of Corrections v. Schacht*, 524 U.S. 381, 388 (1998). At the time of removal, there were 4 Florida-citizen Plaintiffs and 2 Florida-citizen Defendants. *Gibson v. Bruce*, 108 U.S. 561 (1883) (noting that time of filing notice of removal was "the time that matters" for purposes of determining diversity-of-citizenship jurisdiction).

"A federal court's entertaining a case that is not within its subject matter jurisdiction is no mere technical violation; it is nothing less than an unconstitutional usurpation of state judicial power." Wright and Miller, *Federal Practice & Procedure*, § 3522 p.1 (3d ed., 2021 update). Accordingly, there is a presumption that a federal court lacks smj, *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375 (1994), and the party seeking to invoke federal jurisdiction bears the burden to prove jurisdiction. *Id.* at 377.

Upon finding that it has no smj, the district court should dismiss the case or, if the case had been removed from state court, should remand to the state court. *Nashville v. Cooper*, 73 U.S. 247 (1867). The courts hold when faced with the issue previously that "[t]he first issue that we face is whether the district court had [smj] to decide Salmona's motion. Without [smj], a court has no power to decide anything except that it lacks jurisdiction." *United States v. Salmona*, 810 F.3d 806, 810 (11th Cir. 2016); *Alvarez v. ICE*, 818 F.3d 1194, 1200 (11th Cir. 2016) (unless and until smj is found, both trial and appellate courts should eschew substantive adjudication); *Steel Co. v. Citizens for Better Env't*, 523 U.S. 93, 93-102 (1998) (rejecting doctrine of hypothetical jurisdiction that would allow lower courts to rule on issues of law before deciding smj). Here, the trial court did not find it first had jurisdiction but entered a consent judgment it had no power to enter contrary to the rubric in *Salmona*. If there was no consent judgment, the case would have gone on for years, and put Plaintiffs in the untenable and unconstitutional position of hoping the court granted a MTD, or a MSJ, or a Rule 50, so it could challenge the unlawful/unconstitutional "jurisdiction," but if the court did not do so, keep waiting until a final judgment is entered Lord knows how many years from now, and after reversal fighting in the state court over how much of what was litigated under these conditions in federal court could or should be used in the state court that has different standards and rules. In two words: ridiculous, profligate.

The parties cannot confer on a federal court jurisdiction that has not been vested in that court by the

Constitution and Congress. *This means that the parties cannot waive lack of smj by express consent* (much less implicit consent here by the consented final judgment), *Sosna v. Iowa*, 419 U.S. 393 (1975); *Payroll Mgmnt. Inc. v. Lexington Ins.*, 566 F. App'x 796, 797-804 (11th Cir. 2014) (though Plaintiff did not challenge removal of its action from state court and district court did not address potential problem with smj, court of appeals raised the question *sua sponte*, vacated judgment of district court and remanded because nondiverse Defendant), *or by conduct*, *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986), *or even by estoppel*. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951). Indeed, the fact the final judgment was consented to means nothing, because "the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III." *Commodity Futures Trading Comm'n, v. Schor*, 478 U.S. 833, 850-51 (1986). There the Court held that Article III confers both a "personal right" that can be waived through consent and a structural component that "safeguards the role of the Judicial Branch in our tripartite system." *Id.* at 848, 850. In fact, consent is irrelevant. *California v. LaRue*, 409 U.S. 109 (1972).

The lower court's judgment is void if it had no smj and a void judgment is a legal nullity. *United Student Aid Funds v. Espinosa*, 130 S. Ct. 1367, 1377 (2010); *Oldfield v. Pueblo Bahia Lara*, 558 F.3d 1210, 1218 & n.21 (11th Cir. 2009). Thus, smj is unwaivable. *Gonzalez v. Thayer*, 132 S. Ct. 641, 648 (2012); *United States v. DiFalco*, 837 F.3d 1207, 1215 (11th Cir. 2016). The

Panel opinion wrongly holds Appellants consented to jurisdiction by consenting to a final judgment; this Court should GVR this based on *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928) and *see Pacific Railroad v. Ketchum*, 101 U.S. 289 (1879) (judgments are judgments; if final, a judgment is appealable, whether it is adversarial or by consent).

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. The Court should vacate and remand with instructions that the district court had no smj over this matter, alternatively, the Court should remand for the circuit court to hear the substantive appeal of Plaintiffs and determine on the merits whether the district court had subject matter jurisdiction.

Respectfully submitted,

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