No. 21-505

IN THE

Supreme Court of the United States

BANK OF AMERICA CORPORATION, et al.,

Petitioners,

v.

FUND LIQUIDATION HOLDINGS LLC, as assignee and successor-in-interest to FRONTPOINT ASIAN EVENT DRIVEN FUND L.P., on behalf of itself and all others similarly situated, et al.,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CORY L. ANDREWS
Counsel of Record
JOHN M. MASSLON II
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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QUESTION PRESENTED

Whether a district court that lacks subject-matter jurisdiction under Article III must ignore that defect and, more than a year after suit is filed, substitute a new plaintiff under Federal Rule of Civil Procedure 17.

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INTEREST OF *AMICUS CURIAE**

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears here as an *amicus curiae* to urge the Court to confine the federal judiciary to deciding only true "Cases or Controversies" under Article III of the Constitution. *See, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013).

As the Petition ably shows, the decision below jettisons this Court's rigorous approach to Article III standing. By allowing the Federal Rules of Civil Procedure to circumvent an Article III defect, the Second Circuit's holding contradicts this Court's precedents, widens an entrenched circuit split, threatens to undermine statutes of limitations, and invites an avalanche of class-action suits by phantom named plaintiffs.

To safeguard Article III's crucial jurisdictional limits, this Court's intervention is sorely needed. WLF's brief elaborates on just how badly the Second Circuit mangled its Article III analysis and explains why the panel's departure from settled law and historical practice will erode the separation of powers.

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* No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, contributed money for preparing or submitting this brief. After timely notice, all counsel of record consented in writing to WLF's filing this brief.

STATEMENT

This case arose from a putative class-action by two Cayman Islands investment funds—FrontPoint Asian Event Driven Fund and Sonterra Capital Master Fund. Pet. App. 67a. The complaint alleged that Petitioners injured the plaintiffs by conspiring to manipulate certain Singapore-based benchmark interest rates. *Id.* at 7a. But the plaintiffs' attorneys who filed the complaint held a secret.

Although the complaint asserted that the investment-fund plaintiffs were going concerns, both entities had, in fact, been dissolved years earlier. Pet. App. 9a-10a. For more than 14 months, plaintiffs' counsel concealed from the district court and Petitioners that the only named plaintiffs in the suit had ceased to exist long before the suit was filed. *Id.*

When the second amended complaint revealed this true state of affairs, Petitioners moved to dismiss for lack of jurisdiction. Pet. App. 89a. The plaintiffs' response to that motion revealed yet another closely held secret: they had purportedly assigned their claims to a third party, Fund Liquidation Holdings (FLH). *Id.* at 9a-10a. Because a new action by FLH would have been time-barred, however, the plaintiffs sought to substitute FLH as a real party in interest under Rule 17(a)(3). *Id.* at 11a.

FLH then filed a "third amended complaint" as "assignee and successor-in-interest to FrontPoint." Pet. App. 12a-13a. Petitioners again moved to dismiss for lack of jurisdiction, contending that the district court lacked the power to proceed any fur-

ther—much less to allow a substitution under Rule 17. *Id.* at 62a.

The district court agreed. The court ruled that a lawsuit initiated by non-existent entities must be dismissed because a fully dissolved corporation, like a deceased natural person, has no legal interest in the outcome of the suit and lacks Article III standing. Pet. App. 62a-63a. The district court also rejected the plaintiffs' counsel's attempt to retroactively "cure" that jurisdictional defect by amending the complaint and substituting FLH as the named plaintiff. *Id.* In short, the court "could not confer jurisdiction where it did not originally exist." *Id.* at 62a.

The Second Circuit reversed. Although conceding that the original plaintiffs lacked Article III standing, the court held that a district court has subject-matter jurisdiction so long as someone who *would have had* standing to sue can be substituted under Rule 17 "within a reasonable time." Pet. App. 29a. Because FLH was "willing to join [the] action," the Second Circuit reasoned, "Article III is satisfied." *Id.* at 29a-30a. In other words, dismissal is permitted "[o]nly if [a] real party in interest either fails to materialize or lacks standing itself." *Id.* at 29a.

According to the Second Circuit, "the boundaries of Article III are not as rigid" as the district court insisted. Pet App. 37a. Rather than dismiss as an "incurable nullity" an action by a plaintiff who lacks Article III standing, the appeals court explained, the "more practical approach" is to "circumvent the needless formality and expense of instituting a new action simply to correct a technical error in the original pleading's caption." *Id.* at 29a, 41a.

SUMMARY OF ARGUMENT

This Court has long scrutinized—and consistently rejected—any attempt to expand the bounds of what constitutes a "Case or Controversy" under Article III of the Constitution. This case-or-controversy requirement limits federal courts to adjudicating disputes in which the litigants have an "actual" and "concrete" legal interest. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160-61 (2016).

Yet the decision below allows plaintiffs' attorneys in the Second Circuit to bring federal class actions on behalf of dissolved, non-existent entities with no legal interest in the case—so long as someone who *would have had* standing to sue can later be substituted under Rule 17. None of this Court's standing precedents blesses so anemic a view of Article III standing.

First, the Second Circuit's decision contravenes this Court's standing jurisprudence by virtually eliminating the case-or-controversy requirement as a meaningful check on federal-court jurisdiction. This Court has repeatedly insisted that Article III's jurisdictional limits are "inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). Review is thus warranted to bring the lower courts in line with this Court's long-settled understanding of Article III.

Second, and contrary to the Second Circuit's view, Article III's jurisdictional limits are neither picayune formalities nor pesky technicalities. They are "built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752

(1984). If those venerable constitutional protections are to continue to hold sway, this Court's review is critical.

Third, the Second Circuit's decision elevates a procedural rule above a bedrock constitutional duty. But even Congress "may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983). And the Rules Enabling Act, no less than Rule 82, expressly forbids extending the jurisdiction of the federal courts. Review is thus needed to ensure the predictable and uniform application of both the Rules Enabling Act and the Federal Rules of Civil Procedure.

"Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Valley Ford Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 475-76 (1982). The decision below—if left to stand—will carry the federal judiciary far beyond its traditional and proper role of adjudicating concrete disputes and remedying actual injuries. WLF urges the Court to grant review and bar non-existent named plaintiffs from maintaining federal suits, before phantom-led class actions swarm the federal courts.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NEEDED TO PREVENT A DRASTIC EROSION OF ARTICLE III'S CASE-OR-CONTROVERSY REQUIREMENT.

Federal courts "are courts of limited jurisdiction," *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct.

1743, 1746 (2019), bound under Article III to resolving only "Cases" and "Controversies." U.S. Const. art. III, § 2. A case or controversy is an "actual" and "concrete" dispute in which a plaintiff has a "personal stake." *Spokeo*, 578 U.S. at 339; *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

For a case or controversy to exist, the plaintiff must have standing to sue. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011) (citation omitted). A plaintiff who "lack[s] a legally cognizable interest in the outcome" lacks standing. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam). Article III's standing requirement thus "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

This bedrock requirement that a plaintiff must have standing—both "when filing suit" and "throughout all stages of litigation," *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013), is "inflexible and without exception." *Steel Co.*, 523 U.S. at 95. Whenever a federal-court action is brought by someone who lacks standing, "jurisdiction is lacking." *United States v. Providence J. Co.*, 485 U.S. 693 (1988).

Plaintiffs bear the burden of establishing standing. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). And because Article III standing must exist "when the suit is filed," *Davis v. FEC*, 554 U.S. 724, 734 (2008), an Article III jurisdictional defect cannot be cured by a later change in circumstances. *See Mollan v. Torrance*, 9 U.S. 537, 539 (1824)

("[T]he jurisdiction of the courts depends upon the state of things at the time of the action brought.").

Here the record shows—and no party disputes—that the initial named plaintiffs lacked standing to sue. Despite their *attorneys*' desire for a lucrative judgment or settlement, no named plaintiff had a "personal stake in the outcome of the controversy." *Flast*, 392 U.S. at 99. A "self-contained" cause of action cannot establish standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 (1992); it is no more than "a wager upon the outcome" of the suit, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000).

Even so, the Second Circuit held that a district court that lacks Article III jurisdiction at the outset must circumvent that defect by substituting a proper plaintiff under Rule 17 "within a reasonable time." Pet. App. 31a. But this Court has emphasized that "to qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review"—including "at the time the complaint is filed." *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 67 (1997) (cleaned up).

A central focus of this Court's standing jurisprudence has been legal adversity. A justiciable controversy is one that touches not merely the parties' adverse interests but their adverse *legal* interests. The clash between legally adverse parties "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult * * * questions." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); c*f. Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 93

(2009)) ("No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'").

As the district court correctly held, a lawsuit filed by a non-entity is not a legally adverse "case or controversy" and so must be dismissed. Such a constitutional defect goes to the validity of the proceeding. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing that fact and dismissing the cause." *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)).

Invoking "other jurisdictional contexts," the Second Circuit observed that courts "often ignore nominal plaintiffs and look only to the party with a real interest in the controversy." Pet. App. 37a-38a. But this Court has repeatedly lamented the lack of precision that accompanies the term "jurisdiction." "Courts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010).

"[R]ecent cases," however, "evince a marked desire to curtail such drive-by jurisdictional rulings, which too easily can miss the critical differences between true jurisdictional conditions and nonjurisdic-

tional limitations." *Id.* (cleaned up); *see Steel Co.*, 523 U.S. at 91 ("[D]rive-by jurisdictional rulings * * * have no precedential effect.").

The Second Circuit's opinion also includes a detailed history of real parties in interest and their capacity to sue. "But the question in this case is not simply whether there exists some background principle of analyzing the real parties in interest to a suit." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 174 (2014). The question is whether a district court lacking Article III jurisdiction at the outset of litigation must ignore that defect and, months or even years later, substitute a proper plaintiff under Rule 17.

The answer is no. This Court has held that "a private corporation['s] * * * dissolution puts an end to its existence, the result of which may be likened to the death of a natural person." *Chicago Title & Tr. Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 124-25 (1937) (collecting cases). And it has long been settled that "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. at 514).

The Second Circuit's holding, if allowed to stand, will upend Article III's jurisdictional limits and undermine this Court's standing caselaw. As the Sixth Circuit aptly put it, "[t]here is no plaintiff with standing to sue if there is no plaintiff." *In re: 2016 Primary Election*, 836 F.3d 584, 587 (6th Cir. 2016). Any "system that permits relief to be granted in connection with a plaintiff-less complaint is as close as

we will ever come to permitting ghosts that slay." *Id.* at 588 (cleaned up).

II. REVIEW IS NEEDED TO VINDICATE ARTICLE III'S VITAL ROLE IN POLICING THE CONSTITUTION'S SEPARATION OF POWERS.

Reversing the district court, the Second Circuit insisted that "it is plainly the more practical approach to permit parties to circumvent the needless formality and expense of instituting a new action simply to correct a technical error in the original pleading's caption." Pet. App. 41a. This Court has consistently rejected that misguided, "practical" approach to Article III.

Contrary to the view of the Second Circuit, Article III's case-or-controversy requirement is no "needless formality." Nor is lack of standing a mere "technical error." On the contrary, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases and controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

The Constitution's narrow limits on federal-court jurisdiction are "founded in concern about the proper—and properly limited—role of courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). At bottom, Article III's case-or-controversy requirement "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U.S. at 408. Review is thus needed to vindicate the Framer's view that "neither department may invade the province of the

other." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

Article III's case-or-controversy requirement is "a crucial and inseparable element" of the separation of powers. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983). It "makes possible the gradual clarification of the law through judicial application." *Allen*, 468 U.S. at 752; *Cuno*, 547 U.S. at 341 ("[T]he case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.").

"[I]f the judicial power extended * * * to every question under the laws * * * of the United States," John Marshall observed, "[t]he division of power [among the three branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary." 4 Papers of John Marshall 95 (C. Cullen ed. 1984); *see Ariz. Christian*, 563 U.S. 125 at 133. That is why this Court has insisted that federal courts "may exercise power only in the last resort" and only "when adjudication is consistent with a system of separated powers." *Allen*, 468 U.S. at 752 (cleaned up).

Because Article III limits the judiciary's accumulation of power, this Court has consistently refused to allow federal courts to exercise jurisdiction whenever the "irreducible constitutional minimum" of standing is lacking. *Lujan*, 504 U.S. at 560. This case is no different. Requiring a district court to overlook its lack of subject-matter jurisdiction and substitute another plaintiff under Rule 17—despite the 14-month absence of *any* named plaintiff with

Article III standing to sue—is sharply at odds with this Court's understanding of Article III.

Indeed, any time one branch of government exceeds the constitutional bounds of its own authority, it violates the separation of powers. *See Clinton v. Jones*, 520 U.S. 681, 701 (1997). Federal courts "must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches." *Steel Co.*, 523 U.S. at 102 n.4.

By preventing an unelected, life-tenured judiciary from issuing opinions divorced from any case or controversy, Article III cabins the federal courts to their proper role—redressing "actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). Failure to police Article III's core standing requirements leads to "an overjudicialization of the processes of self-governance." Antonin Scalia, *supra*, 17 Suffolk U. L. Rev. at 881 (citing Donald Horowitz, *The Courts and Social Policy* 4-5 (1977)). No matter how well-intentioned, this arrogation of judicial power comes at the expense of the people and their elected representatives.

"Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision." *Ariz. Christian*, 563 U.S. 125 at 146. Whatever merits the panel's critique of "needless formality" may have, "it is not as important as observing the constitutional limits set upon the courts in our system of

separated powers." *Steel Co.*, 523 U.S. at 109-10. Left to stand, the Second Circuit's holding will severely erode the Constitution's careful separation of powers.

III. REVIEW IS NEEDED TO CLARIFY THAT PROCEDURAL RULES CANNOT USURP A CONSTITUTIONAL DUTY.

"In an era of frequent litigation [and] class actions, * * * courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian*, 563 U.S. 125 at 146. Yet the Second Circuit held that Article III's demand for "an actual and live plaintiff" is satisfied "whenever there is a real party in interest ready and willing to join the action." Pet. App. 40a. Under this outlier view, an Article III jurisdictional defect can later be cured simply by substituting a real party in interest under Rule 17(a)(3).

But a procedural rule cannot salvage an action the court lacks the constitutional authority to adjudicate in the first place. The elements of Article III standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561. The Article III inquiry is "focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis*, 554 U.S. at 734. Even "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event * * * may Congress abrogate the Art. III minima.").

The Rules Enabling Act declares that the Federal Rules of Civil Procedure "shall not * * * enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Congress has required, in other words, that the Rules "really regulate procedure—the judicial process for enforcing rights and duties recognized by substantive law." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality). They may not alter "the rules of decision by which the court will adjudicate those rights" and duties. *Id.*

This Court has increasingly found it necessary to remind the lower courts that when they apply the Federal Rules of Civil Procedure, they must comply with the Act. *See Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013); *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 367 (2011); *Ortiz v. Firebrand Corp.*, 527 U.S. 815, 845 (1999); *Amchem Prods. v. Windsor*, 521 U.S. 591, 612-13, 628-29 (1997).

The Act ensures that "the right of a litigant to employ" the Rules "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). Yet if federal courts may ignore Article III standing defects, "they would be discarding a principle so fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and "Controversies' that are the business of the courts rather than of the political branches." *Lujan*, 504 U.S. at 576. The Second Circuit's rule—compelling district courts to exercise jurisdiction in a case brought by nonexistent plaintiffs who have no stake in the outcome of the litigation—does precisely that.

Using Rule 17 as a vehicle to slip real parties in interest into a jurisdictionally defective, phantom-led lawsuit does violence to the Rules Enabling Act. It also violates Rule 82, which provides that the federal rules "do not extend or limit the jurisdiction of the district courts." Fed. R. Civ. P. 82. The widening circuit split detailed in the Petition thus arises in part over a disagreement about the proper application not only of the Rules Enabling Act but also of the Federal Rules of Civil Procedure. Only review by this Court can ensure uniform construction and application of the Act and the federal rules.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
JOHN M. MASSLON II
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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