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, AND SONTERRA CAPITAL MASTER FUND, LTD.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a case or controversy prosecuted by a viable plaintiff with standing to assert the relevant claim becomes a jurisdictional "nullity" not subject to the express timing provisions of the Federal Rules of Civil Procedure, like Rules 15 or 17, if that plaintiff first files the claim in the name of the wrong party—here, a dissolved corporation.

RULE 29.6 STATEMENT

Respondents have no parent company, and no publicly held company owns 10 percent or more of their stock.

RELATED CASES

Fund Liquidation Holdings LLC v. Citibank, No. 16-cv-05263 (S.D.N.Y.)

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INTRODUCTION

The petition for certiorari in this case suffers from a number of problems, but the most serious is that this case does not present its "Question Presented." Petitioners ask "whether a district court lacking Article III jurisdiction can create such jurisdiction by adding a new plaintiff via Federal Rule of Civil Procedure 17." Pet. i. But the Second Circuit held below that the district court always had jurisdiction in this case because it was prosecuted by a viable plaintiff with standing to assert the relevant claim who had merely named the wrong party at the outset—exactly the pleading error Rule 17 exists to address. Worse, this Court has held at least twice that federal courts can remedy a lack of subject-matter jurisdiction present at a case's inception through subsequent modifications of the parties: Once per Chief Justice Marshall, *see Conolly v. Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829), and once per Justice Scalia, *see Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 575 n.5 (2004) (acknowledging rule that courts have "permitted a postfiling change to cure a jurisdictional defect" where there was "a *change of party*"). Meanwhile, Judge Sullivan's detailed decision below carefully explains why historical pleading practices at the Founding foreclose the real argument petitioners are making, which is that the Constitution (somehow) requires filing a new suit rather than an amendment that relates back to the initial complaint when the originally injured party (rather than the real party in interest) is named in the caption at the outset. *See* Pet. App. 34a-37a. It is hard to imagine a worse candidate for certiorari than a question this Court has already answered and was not even presented below

in a lower-court decision that is plainly correct on its own terms.

Petitioners' creativity in framing the question presented is necessary, however, to construct a circuit split where none exists. In reality, the decision below is the first published opinion to carefully consider the question whether naming the wrong party at the outset of a suit should result in an incurable jurisdictional "nullity." Given its persuasive elucidation of the relevant principles and historical practices, the Second Circuit's view is likely to be followed by its sister circuits. And at an absolute minimum, the novelty of the issue and the Second Circuit's analysis strongly recommends in favor of percolation rather than petitioners' rush to have this Court resolve a poorly framed question the case does not present.

That rush is also particularly ill-considered given that the petition here is interlocutory, the Second Circuit unanimously denied a stay, and defendants themselves are now both actively settling these disputes and arguing for immediate dismissal on other grounds in the ongoing litigation in district court. That means this case might be moot in multiple ways before this Court can even consider it. To be sure, the "nullity" issue will not come up often in other vehicles because it only matters in a miniscule number of cases where the defendants wait until the statute of limitations has run to argue that the case was brought in the name of the wrong party. But that rarity is itself a reason to deny certiorari, and if this Court nonetheless remains interested in the issues this case might raise, it can consider them in this very case in a safer and more final posture down the road. At that point, this Court will also at least know whether a single federal

appellate judge in the entire country has considered the Second Circuit's reasoning and disagreed.

At bottom, the petition is a bad vehicle seeking error correction without any circuit conflict or hint of error below; even petitioners' own best cases cut directly against them. *See infra* pp.25-27 (discussing *Conolly*). Certiorari should be denied.

STATEMENT OF THE CASE

I. Factual Background

For the last decade, federal courts have been adjudicating cases related to widespread illegal manipulation of LIBOR (the London Interbank Offered Rate), a well-known floating-rate benchmark for financial instruments. *See, e.g.*, *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68 (2d Cir. 2018); *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759 (2d Cir. 2016). Further background about floating rates like LIBOR, the bank panels that create them, the rules that govern the process, and how petitioners (defendants below) conspired to circumvent those rules and manipulate these benchmarks for their mutual benefit can be found in those decisions. *See, e.g.*, *Gelboim*, 823 F.3d at 765-67. For present purposes, it suffices to note that, around the time that many of the world's largest banks were discovered conspiring to manipulate LIBOR, they were discovered manipulating other, closely related benchmarks in similar ways as well.

In this case, petitioners are accused of conspiring to manipulate two such benchmarks: SIBOR (the Singapore Interbank Offered Rate) and SOR (the Singapore Swap Offered Rate). Evidence of that conspiracy was uncovered by multiple regulators, including the Monetary Authority of Singapore (MAS), the

Commodities and Futures Trading Commission, and the U.K. Financial Services Authority. For example, MAS censured each of the petitioners for their traders' attempts to manipulate SIBOR and SOR, and three petitioners have admitted their manipulation to the CFTC. The effect of petitioners' conspiratorial price-fixing was necessarily to reduce the amount of money paid to certain holders of SIBOR- and SOR-based financial instruments. This is to say that the case at issue here involves an effort to secure recovery for a class consisting of the very real victims of defendants' acknowledged misbehavior.

II. District Court Proceedings

This litigation began over five years ago as a putative class action brought on behalf of the named plaintiffs and other holders of SIBOR- and SOR-denominated instruments who lost money because of petitioners' price fixing. Pet. App. 8a-9a. The original complaint, filed in July 2016, named two representative plaintiffs: Cayman Islands investment funds known as FrontPoint and Sonterra. *Id.* Plaintiff-Respondent Fund Liquidation Holdings (FLH) had received both assignments of claims and irrevocable powers of attorney from those entities, C.A. J.A. 457-505, prior to the funds' dissolution. But at the time they initiated this action, FLH and its counsel did not yet know that FrontPoint and Sonterra had dissolved or might otherwise lack capacity to sue. Resp. C.A. Br. 9. Thus, believing it the appropriate method as a matter of Cayman law to sue under the powers of attorney it had received, FLH filed this case in the names of the funds that had themselves been injured by petitioners' misconduct, rather than in its own name. *Id.*

Plaintiffs' First Amended Complaint (FAC), filed in October 2016, asserted Sherman Act, RICO, and state common-law claims. *See* Pet. App. 115a. Petitioners moved to dismiss on various grounds, and in August 2017, the district court dismissed most of the FAC's claims. *Id.* at 108a-111a. Because the court determined that any and all dispositive issues might be cured by further pleading, the dismissals were without prejudice. *Id.* In September 2017, Plaintiffs filed a Second Amended Complaint (SAC). *Id.* at 11a. In addition to making changes responsive to the district court's opinion, the SAC clarified that FrontPoint and Sonterra no longer had any separate corporate existence. *See id.* Accordingly, where the FAC had alleged that FrontPoint/Sonterra "is an investment fund," the SAC alleged that FrontPoint/Sonterra "was an investment fund." *Id.* Petitioners responded by moving to dismiss on a fresh set of grounds, including the theory that plaintiffs lacked "capacity to sue" because they had been dissolved.[1] *Id.* at 144a. As noted, FLH was prosecuting the case under the irrevocable powers of attorney set forth in asset purchase agreements, which had assigned to FLH the claims arising out of FrontPoint's and Sonterra's SIBOR- and SOR-based transactions. But in order to avoid further confusion, FLH requested that it be substituted as plaintiff under Federal Rule of Civil Procedure 17(a)(3), and that it be allowed to continue litigating the claims originally

[1] Notably, petitioners themselves did not style this capacity argument as relating to Article III standing or otherwise affecting the subject-matter jurisdiction of the district court at the time that they first made it. *See* Pet. App. 144a. The Federal Rules themselves clarify that capacity to sue is not ordinarily jurisdictional and does not even need to be pled in typical cases. Fed. R. Civ. P. 9(a)(1)(A).

held by both Sonterra and FrontPoint in its own name. *See* Pet. App. 145a.

The district court's second opinion dismissed some claims with prejudice, sustained others, found that "FLH … has the capacity to sue here," and granted "leave to substitute FLH as the plaintiff in a third amended complaint," citing Rule 17(a)(3). Pet. App. 145a-147a. As directed, plaintiffs then filed their Third Amended Complaint (TAC), updated to reflect the issues the court had already decided (including the dismissal of Sonterra's claims on non-jurisdictional grounds) and to plead the pre-existing assignment of claims. *Id.* at 12a-13a & n.4. The substantive allegations and misconduct at issue were otherwise indistinguishable from the initial complaint. *Id.*

Petitioners then moved to dismiss the TAC, arguing among other things that, although the district court had granted leave to substitute FLH for FrontPoint, that substitution was in fact inappropriate because the dissolution of FrontPoint and Sonterra made the case a legal nullity from its outset. *See* Dist. Ct. Doc. 319 at 21. According to petitioners, this meant FLH's claims could not relate back to FrontPoint's or Sonterra's complaint (even though FLH was asserting claims for the very injuries those entities suffered), making the whole suit untimely. *Id.* at 2-3.

In July 2019, the district court dismissed the TAC on the grounds that it lacked subject-matter jurisdiction over the entire action at its outset. *See* Pet. App. 62a, 65a. It also denied plaintiffs leave to amend the complaint to name the "Moon Funds" (members of the putative class asserting identical claims arising out of the same conspiracy) on the grounds that the court had lacked subject-matter jurisdiction over the original

case, making any claims by those plaintiffs a "new" case brought outside the statute of limitations. *Id.* at 64a-65a.

III. Proceedings on Appeal and Thereafter

A unanimous panel of the Second Circuit (Sullivan, Park, and Nardini, JJ.) reversed. Pet. App. 8a. Judge Sullivan's opinion stated that the dissolved entities' lack of post-dissolution legal existence under Cayman Islands law had deprived *them* of Article III standing—but that "Fund Liquidation's presence and standing ensured that there was a live controversy when the action was initiated." *Id*. at 39a.

Surveying federal and state appellate precedents as well as treatises, the Second Circuit observed that pleading rules have evolved over time, such that the requirement embodied in Rule 17 of prosecuting a case in the name of the real party in interest came about well after the Founding and became the standard even later. Pet. App. 34a-36a. Given the evolution of pleading practice, the court concluded that "the rule concerning which party's name a case must be prosecuted under … is non-jurisdictional." *Id.* at 36a. And FLH, the real party in interest, did have standing, because it—rather than "the *nominal* plaintiff"—was "the party invoking jurisdiction" and "the party with the stake in the controversy." *Id.* at 37a (citation and quotation marks omitted). So where (as here) a real party in interest has been on the scene the whole time, "is willing to join the case[,] and has had standing since the case's inception, …. filing a complaint in the name of a … non-existent nominal plaintiff is akin to an error in the complaint's *allegations* of jurisdiction." *Id.* at 36a-37a. "And it is well-understood that a plaintiff may cure defective jurisdictional allegations, unlike

defective jurisdiction itself, through amended pleadings." *Id.* at 37a (citing, *inter alia*, 28 U.S.C. §1653). Demonstrating that the result was in fact overdetermined, the Second Circuit went on to cite to "numerous courts [that] have made clear that, in certain instances, subject-matter jurisdiction can even be obtained after a case's initiation and given retroactive effect through procedural rules." *Id.* at 39a. The opinion also noted that "the approach we adopt today will not result in unchecked abusive practices by plaintiffs," because courts "retain[] the discretion to dismiss" suits where plaintiffs act deceptively or in bad faith. *Id.* at 42a-43a. Such dismissals would occur under the rules themselves, however, and are not required by the Constitution. *See id.*

The Second Circuit then directed the district court on remand to reconsider plaintiffs' motion to add the Moon Funds as plaintiffs, explaining that *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), posed no bar because it concerned only "*follow-on* class actions," not "new class representatives joined within the *same* class action." Pet. App. 46a (citing 138 S. Ct. at 1804).

Following this loss, petitioners moved the court of appeals for a stay of its mandate pending disposition of this petition. C.A. Doc. 249. The Second Circuit unanimously denied petitioners' motion, C.A. Doc. 257, which petitioners did not renew before this Court. The court likewise denied petitioners' request for rehearing, with no judge even requesting a response. Pet. App. 153a-154a. Since the issuance of the Second Circuit's mandate, petitioners have continued vigorous litigation in the district court, and have recently filed *three* new motions to dismiss the Fourth Amended Complaint on various grounds. *See* Dist. Ct.

Docs. 445-447. Meanwhile, six of the initial defendants have now settled their claims, including four who have settled since the decision below.

REASONS TO DENY THE WRIT

The petition should be denied on multiple, independent grounds.

I. First, the petition does not correctly or candidly describe the decision below and thus frames a question the case does not present. Even a cursory review of Judge Sullivan's opinion for the unanimous panel reveals that the Second Circuit did not employ Rule 17 to "create jurisdiction"; rather, it found that the real party in interest had always been present and had standing, and that substitution of that party as plaintiff was thus permissible under the plain text of Rule 17 without raising any possible jurisdictional issue. In other words, and contrary to the assumption built into petitioners' question presented, there was no jurisdictional problem here to begin with that needed to be "cured."

Meanwhile, there is no split on the question—which the petition does *not* pose—whether a jurisdictional "nullity" results when the right party (who has always been present) names the wrong party in the caption at the outset. Indeed, for all its handwaving about how the courts of appeals are deeply divided on the "nullity doctrine," the petition produces only *one* precedential opinion that actually decides a "nullity"-related issue—an opinion that is nineteen years old, has been severely criticized by the leading treatise, and has not been precedentially followed by any other court of appeals. To the extent there is any kind of nascent disagreement among lower-court opinions on

issues within this general orbit, percolation is plainly necessary, as no court or appellate judge has considered or rejected the reasoning in the unanimous decision below, which is the first published opinion to carefully consider this universe of issues.

II. Petitioners' disagreements with the decision below also lack any merit. Indeed, the decision the Second Circuit actually reached is unassailable on at least two separate grounds. First, as Judge Sullivan carefully explained, historical practice confirms that naming the wrong party—and particularly the party originally injured by defendants' misconduct—cannot be a jurisdictional or constitutional concern. It is, instead, a basic pleading error, governed by the pleading rules that Congress and the courts have adopted. And second, this Court has twice made very clear that amendments to complaints that alter the named parties *can* cure alleged jurisdictional defects. Notably, all that is really at stake here is a timing question: Should a complaint filed in the name of the right party relate back to one initially filed with the wrong name in the caption? The Federal Rules expressly say "yes," and that is plainly not something that concerns Article III in the least.

III. No version of the question presented is important. The lack of published authority on it confirms that it rarely comes up, particularly in a way that makes a difference. Indeed, naming the wrong party at the outset can only matter if the defendant has allowed the statute of limitations to run before raising this issue. So even in cases that nominally present a "nullity" issue, it usually makes no difference at all.

IV. Finally, this case is a bad vehicle for several reasons. Among other problems, the petition is inter-

locutory, the Second Circuit unanimously denied a stay, and petitioners did not even bother to seek one from this Court. Meanwhile, defendants are attempting to secure dismissal on other grounds in the district court at this very moment, and many defendants have settled in the interim. These and other problems—including disputed premises—could prevent the Court from reaching any "nullity" issue even if it granted certiorari here. The petition should thus be denied.

I. There Is No Circuit Disagreement On Any Question Properly Presented

A. The Second Circuit Did Not Decide Petitioners' "Question Presented"

The premise of the "Question Presented" is that the Second Circuit found that jurisdiction was lacking over the suit that was initially filed, but then allowed the district court to "create such jurisdiction by adding a new plaintiff under Federal Rule of Civil Procedure 17." Pet. i. That premise is unambiguously wrong. The Second Circuit did not find Article III jurisdiction lacking in this case—"conceded[ly]," "technical[ly]," or otherwise. *Contra* Pet. 1. Rather, the Second Circuit explicitly (and repeatedly) held that

> Article III is satisfied so long as a party with standing to prosecute the specific claim in question exists at the time the pleading is filed. If that party (the real party in interest) is not named in the complaint, then it must ratify, join, or be substituted into the action within a reasonable time.

Pet. App. 30a-31a; *see also id.* at 39a ("Fund Liquidation's presence and standing ensured that there was live controversy when the action was initiated[.]"); *id.*

at 36a-37a ("Article III would therefore seem to be satisfied so long as the real party in interest is willing to join the case and has had standing since the case's inception."); *id.* at 44a ("[W]e conclude that Article III is satisfied by Fund Liquidation's standing to bring suit and willingness to join the action under Rule 17."); *id.* at 8a ("Article III was nonetheless satisfied because Fund Liquidation, the real party in interest, has had standing at all relevant times and may step into the dissolved entities' shoes without initiating a new action from scratch.").

The petition's lack of candor on this and other related points is itself a reason to deny certiorari. This Court simply cannot trust petitioners' framing of Judge Sullivan's opinion or the relevant record facts or law at any turn. Indeed, the Second Circuit's decision itself makes plain that petitioners egregiously misstate the holdings they claim warrant this Court's review. For example, petitioners summarize the Second Circuit's decision this way:

> According to the Second Circuit, the conceded lack of Article III jurisdiction in [this] case was no more than "a technical error." "The boundaries of Article III are not … rigid," the Second Circuit opined, because procedural rules can expand Article III for "practical" reasons and demanding more was a "needless formality."

Pet. 1 (quoting Pet. App. 39a, 43a; internal citation omitted). But the Second Circuit said no such things. Far from "conced[ing]" a "lack of Article III jurisdiction," *id.*, the court found that "there *was* a live controversy when the action was initiated," Pet. App. 39a (emphasis added). So, of course, the "technical error"

the court identified was not a "lack of Article III jurisdiction," Pet. 1, but an "error in the original pleading's caption," Pet. App. 43a. Rather than opining that "[t]he boundaries of Article III are not … rigid," Pet. 1 (ellipses in original), the court rejected petitioners' arguments that the caption error was jurisdictional in the first place, stating that "the boundaries of Article III are not as rigid *as the [petitioners] suggest*," Pet. App. 39a (emphasis added). And, having found there to have been jurisdiction from the outset, the court had no occasion to "opine[]" that "procedural rules can expand Article III." Pet. 1. Instead, the court reasoned that "it is plainly the more practical approach to permit parties to circumvent the needless formality and expense of instituting a new action," Pet. App. 43a—to permit them, in other words, to swap the real party in interest into the original complaint under the plain text of Rule 17.

Critically, petitioners' cavalier framing overlooks again and again the special fact that actually decided this case: namely, the Second Circuit's recognition that FLH (the real party in interest) had always been prosecuting the case and had merely filed it in the wrong party's name. *See, e.g.*, Pet. App. 39a (relying on FLH's "presence" in the case since inception); *id.* at 9a-10a (noting that, while the complaint was initially filed "in the names of" others, FLH had always been "pulling the strings"). That fact made the complaint amendment the court of appeals directed the district court to consider an especially formal exercise lacking any real legal substance—jurisdictional or otherwise. Petitioners cite to *no* published case law even suggesting that the courts of appeals disagree about the jurisdictional nature of that kind of technical error. And the

petition's failure to identify a split on the question the Second Circuit explicitly used to decide this case is reason enough to deny certiorari.

B. There Is No Conflict Of Authority Over Whether Naming The Wrong Party Is A Jurisdictional Defect, Let Alone An "Incurable" One

Perhaps recognizing that its own question presented does not accurately track the decision below, the body of the petition attempts in passing to identify a circuit disagreement on the very different and antecedent question whether "a case brought by a non-existent plaintiff is a legal nullity under Article III." Pet. 10. Whether and when such antecedent questions are "fairly included" within a question presented for purposes of this Court's Rule 14.1(a) is itself a controversial issue that has caused frequent and "vigorous" disagreement, with the "approach the Court will take in a particular case [being] difficult to predict." Stephen M. Shapiro et al., *Supreme Court Practice* 6-96 (11th ed. 2019). At a minimum, however, freighting a petition with such distractions is a bad place to start.

Even assuming arguendo that the question presented fairly includes this anterior question about "case[s] brought by [] non-existent plaintiff[s]," however, petitioners have utterly failed to identify any conflicting authority on that question, either. In fact, the sole relevant case petitioners rely upon to identify a split on this issue *does not involve a "non-existent plaintiff." See* Pet. 10-11 (discussing *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir. 2002)). Meanwhile, apart from the decision below, the sole published appellate decision on this issue that does involve a "non-existent plaintiff" is a Tenth Circuit case

in which the named plaintiff was a deceased natural person, and while that case contains little reasoning, it agrees with the Second Circuit's holding. *See Esposito v. United States*, 368 F.3d 1271 (10th Cir. 2004). And while the Fourth Circuit recently reached the opposite outcome in an *unpublished* decision about a case naming a deceased natural person as plaintiff, *House v. Mitra QSR KNE LLC*, 796 F. App'x 783 (4th Cir. 2019), it also decided even more recently in a published case that naming a fictitious person as a pseudonym without the court's permission was *not* a jurisdictional problem. *See B.R. v. F.C.S.B.*, 17 F.4th 485 (4th Cir. 2021).

These cases are described in more detail below, but the important point is that this is not even a nominal division of circuit authority, let alone the kind of deep and mature split this Court would typically review. In truth, there is not even one circuit that would be doctrinally committed to treating a case like this one as a jurisdictional "nullity," and the closest case petitioners have on that score is as stale as they come.

That case is *Zurich*, 297 F.3d 528, a nineteen-year-old Sixth Circuit decision that has been severely criticized by the leading treatise, 13A Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* §3531 n.61, Westlaw (database updated Apr. 2021) (Wright & Miller), and has not been relied on by that court or any court of appeals since for the relevant proposition. In *Zurich*, the wrong party filed suit, erroneously believing itself to be the insured's subrogee. 297 F.3d at 530. By the time this error came to light, the statute of limitations had run. *Id.* The district court denied the named plaintiff's Rule 17 motion to substitute the actual subrogee (a sister company under

the same parent), then dismissed the case because the named plaintiff was not the proper plaintiff. *Id.* In a perfunctory analysis of little more than a thousand words—roughly half of which are block quotes—the Sixth Circuit affirmed, reasoning that, because the named plaintiff "admittedly has not suffered injury in fact by the defendants, it had no standing to bring this action and no standing to make a motion to substitute the real party in interest." *Id.* at 531.

On its face, *Zurich* was not what petitioners say: *i.e.*, "a case … commenced by a non-existent plaintiff." Pet. 10. It was, instead, a case brought by a real, extant corporation that had no identifiable interest in the suit. The Sixth Circuit's decision to elevate even that pleading error to the level of an incurable jurisdictional "nullity" is dubious, as Wright & Miller observes. *See* Wright & Miller §3531 n.61 (calling *Zurich* a "particularly troubling" case, because "[c]learly there was a plaintiff with standing" that, consistent with "[t]he policies embodied in Rule 17," should have been allowed to substitute). But nothing would require the Sixth Circuit to extend that holding to a situation where a very real plaintiff with standing has been litigating the entire time and had mistakenly named a non-existent entity in the caption. Indeed, the Sixth Circuit has since refused to extend the "nullity" idea to a case where the named plaintiff had assigned away its claim to the real party in interest before the suit, a circumstance that petitioners themselves identified below (Pet. C.A. Br. 34-35) as logically indistinguishable. *See Cranpark, Inc. v. Rogers Grp., Inc.*, 821 F.3d 723, 732-33 (6th Cir. 2016) (rejecting relevant argument and applying Rule 17 instead). Petitioners' best-case scenario of a shallow split on an antecedent issue

thus requires invoking a stale, criticized decision that has been given very limited compass even in its own home circuit.

Other courts of appeals have joined the Sixth Circuit in regarding *Zurich* warily: In the nineteen years that have elapsed since *Zurich*'s issuance, no other circuit has published an opinion in accord. The closest any court of appeals has come is the Fourth Circuit's nonprecedential opinion in *House*, 796 F. App'x 783, respecting a case mistakenly filed in the name of a dead person. But, critically, the Fourth Circuit has recently issued a *published* decision casting serious doubt on its adherence to the "nullity" idea. That case, *B.R. v. F.C.S.B.*, 17 F.4th 485, concerned an unnamed plaintiff who had filed under a pseudonym without securing leave of court until after the running of the applicable statute of limitations. *Id.* at 489. The defendants-appellants there, relying on *House*, argued stridently for application of the "nullity doctrine," *e.g.*, Reply Br. at 1, 18, *B.R.*, No. 21-1005 (4th Cir. May 19, 2021), but the Fourth Circuit refused to either enshrine *House* in binding precedent or give jurisdictional valence to "*a pleading rule*," *B.R.*, 17 F.4th at 494. Instead, the Fourth Circuit explained that a plaintiff's failure to properly identify herself "in no way detracts from" "the components of … an Article III case or controversy," and is in fact "immaterial to whether that civil action qualifies as a case or controversy." *Id.* What matters for Article III purposes, the Fourth Circuit concluded, is whether a case involves "a 'real controversy with real impact on real persons.'" *Id.* at 493 (quoting *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021)). This recognition of the immateriality of a "plaintiff identification rule," *id.* at

494, severely undercuts petitioners' claim of any kind of "entrenched" circuit split, *see* Pet. 8.

Nor do any of petitioners' other citations help them establish the necessary split of authority. Instead, it is clear from the cases petitioners cite (and others they neglect) that percolation is required. For instance, petitioners stretch to suggest a contrary rule in the D.C. Circuit by misleadingly citing to dicta, Pet. 11 (citing *Kurtz v. Baker*, 829 F.2d 1133, 1145 (D.C. Cir. 1987)), and a case turning on state law rather than federal jurisdictional principles, *id.* (citing *Karrick v. Wetmore*, 22 App. D.C. 487, 492-93 (D.C. Cir. 1903)); *see, e.g.*, 22 App. D.C. at 495 ("[S]uch a proceeding is a nullity *in this jurisdiction*.") (emphasis added). In fact, the D.C. Circuit's clearest gesture towards this issue is a case petitioners oddly fail to mention. In *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C. Cir. 1963), that court stated that a suit listing the wrong plaintiff in the caption but "brought for the use of the real parties in interest" "was *not* a nullity," *id.* at 615 (emphasis added). Importantly, *Link Aviation*'s analysis was confined to the Rules, and the D.C. Circuit has yet to take a position on the jurisdictional question the Court would have to decide here. So while *Link Aviation* indicates that court's *dis*inclination to adopt the nullity doctrine as petitioners advocate for it, *contra* Pet. 11, it also reveals that the key question remains open in the D.C. Circuit—as it does practically everywhere else.

Similarly, petitioners misconstrue the Fifth Circuit's unpublished opinion in *Hernandez v. Smith*, 793 F. App'x 261 (5th Cir. 2019) (per curiam), as holding that the suit at issue there "could not be saved by Rule 17 because such procedural rules 'cannot be used to cure a jurisdictional defect,'" Pet. 12 (quoting 793

F. App'x at 265). In addition to (again) assuming the answer to the question they in fact need the Court to decide, petitioners misread *Hernandez*'s plain text, *see* 793 F. App'x at 266 (declining to apply Rule 17 for reasons having nothing to do with jurisdiction); *see also id.* at 265 ("*Rule 15* cannot be used …") (emphasis added). In fact, the closest the Fifth Circuit has come to deciding the key issue was in another case petitioners seem to have missed: *Magallon v. Livingston*, 453 F.3d 268 (5th Cir. 2006), which reversed the district court's dismissal for want of "standing" with instructions to permit the correct plaintiff to be substituted under Rule 17, *id.* at 270-71, 273.

That said, just like the D.C. Circuit, the Fifth Circuit has taken no position on the question this case actually presents. *Magallon* thus contains *no* discussion as to whether the initial naming of the incorrect plaintiff deprived the lower court of jurisdiction.

Reaching even further for appellate authority on one side or the other, petitioners claim that the Third, Seventh, First, Tenth, and Ninth Circuits have also weighed in. Pet. 12-15 (asserting that "other circuits [have] adopt[ed] the nullity doctrine" and citing cases from the Third, Seventh, and Ninth Circuits; purporting to cite "cases [that] support" petitioners' preferred approach in the First and Ninth Circuits; and casting a Tenth Circuit case as "rejecting the nullity doctrine"). But again, *none* of the cases from which petitioners cherry-pick quotations actually take a position on whether a federal court's jurisdiction over a case is determined by reference only to the nominal plaintiff or whether a federal court lacks jurisdiction over a case where the complaint mistakenly names the wrong plaintiff.

In *Fuller v. Volk*, 351 F.2d 323 (3d Cir. 1965), the Third Circuit briefly discussed (but declined to decide) the distinct issue whether *new plaintiffs* with *new claims* could intervene under Federal Rule of Civil Procedure 24, *id.* at 328-29; *contra* Pet. 12-13. Meanwhile, *Unalachtigo Band of the Nanticoke Lenni Lenape Nation v. Corzine*, 606 F.3d 126 (3d Cir. 2010), concerned a tribe's motion to intervene *as a defendant* after the district court's dismissal of the complaint for plaintiff's want of standing, *id.* at 128 (noting that would-be intervenors sought to assert sovereign immunity and dismiss complaint); *contra* Pet. 13. Petitioners' citation to *Hofheimer v. McIntee*, 179 F.2d 789 (7th Cir. 1950), fares no better. Contrary to petitioners' insinuation, the Seventh Circuit did not find jurisdiction lacking "because" of the plaintiff's (post-filing) death, *see* Pet. 13, but rather due to the failure of the would-be intervenor/substitute plaintiff to make "proper and prompt application," under Federal Rule of Civil Procedure 25, to be made a party in her stead, 179 F.2d at 792. That one must look back *seventy years* to find even cases so plainly inapposite is an indication that there is no meaningful split here—let alone a split on an important question that arises with any frequency.

Meanwhile, petitioners themselves eventually acknowledge that neither the First nor Tenth Circuit opinions on which they rely has anything to say on the questions presented here. As the petition hints, *see* Pet. 13, the First Circuit did not decide, in *Yan v. ReWalk Robotics Ltd.*, 973 F.3d 22 (1st Cir. 2020), whether a complaint that names the wrong plaintiff is jurisdictionally defective, because there the original plaintiff unambiguously had standing to assert other

claims, *id.* at 38. Concluding that "the requirements of standing presented no impediment in this case to the granting of the motion to add Geller as a named plaintiff" on the claims for which the original plaintiff lacked standing, *id.* at 39, the First Circuit made no holding at all on the issues presented in this case. Similarly (as petitioners again obliquely acknowledge, *see* Pet. 15 n.4), *Esposito*, 368 F.3d 1271, did not address any jurisdictional implications of that complaint's failure to name the correct party. The Tenth Circuit reasoned in passing that "[f]ailure to name the real party in interest does not ordinarily create a jurisdictional defect," but explained "[t]he issue of subject matter jurisdiction arises here" because of the deceased plaintiff's failure to administratively exhaust his wrongful-death claim or timely file suit thereon. *Id.* at 1274 & n.1. Such a drive-by jurisdictional ruling would recommend in favor of percolation even if it were on petitioners' side of the split, rather than the Second Circuit's.

Finally, neither of petitioners' Ninth Circuit cases helps them either, and in fact the Ninth Circuit's case law typifies why this question is not ripe for this Court's review. *LN Management, LLC v. JPMorgan Chase Bank, N.A.*, 957 F.3d 943 (9th Cir. 2020), cited in the petition at 13-14, concerned a motion to substitute a new party for "a dead *defendant*," 957 F.3d at 951 (emphasis added). Moreover, after commenting on *House* in dictum, *LN Management* distinguished *House* while expressly declining to take up the "tricky" question of "[w]hether or not substitution ought to be allowed, notwithstanding that the party had been dead *ab initio*." *id.* at 952-53, 955-56. And while *Lierboe v. State Farm Mutual Automobile Insurance*

Co., 350 F.3d 1018 (9th Cir. 2003), cited in the petition at 13, seems to take a position on the "nullity" question, the Ninth Circuit's own opinion in *LN Management* confirms that it is not remotely done thinking through any "nullity" issues. 957 F.3d at 952-53, 955-56 (deeming an analogous question "tricky" and declining to address it); *see also Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1128-29 (9th Cir. 2017) (finding, where plaintiffs "didn't have standing," that the district court "abused its discretion by failing to give plaintiffs a reasonable opportunity to substitute the proper party and thus cure the defective complaint"); *Hajro v. USCIS*, 743 F. App'x 148, 150 (9th Cir. 2018) (affirming, in a nonprecedential decision, a district court's denial of plaintiffs' Rule 17 substitution motion following dismissal of their complaint for mootness and lack of standing). Like other courts of appeals, the Ninth Circuit is far from reaching a definitive view on the antecedent jurisdictional questions petitioners purport to identify here.

C. At A Minimum, Generalized Issues About The "Nullity" Doctrine Should Percolate

As the foregoing demonstrates, the very best petitioners can show is that different courts have said different—and, often, internally inconsistent—things about whether some kind of "nullity" doctrine exists and/or whether it arises under constitutional principles or various different Federal Rules that may be implicated in specific cases. That is the perfect scenario for percolation in the lower courts rather than a headlong rush to resolve the matter in this Court.

That is particularly so because the Second Circuit is plainly the first court to have deeply considered the relevant issues, and the other courts of appeals should

thus be given the opportunity to assess and adopt its persuasive reasoning. After laying plain the preexisting disharmony in its own precedent, Pet. App. 31a-33a, the Second Circuit devoted substantial attention to the requirements of Article III, considering both the practices of early common-law courts and the rise of code pleading, *id.* at 34a-36a. The Second Circuit then unwound the conceptual underpinnings of a "real party in interest," *id.* at 36a-39a, before giving a multitude of examples of instances in which federal appellate courts—including this Court—have gone even further and "made clear that, in certain instances, subject-matter jurisdiction can even be obtained after a case's initiation and given retroactive effect through procedural rules," *id.* at 39a-41a[2]; *see also id.* at 39a (first observing that "Fund Liquidation's presence and standing ensured that there was a live controversy when the action was initiated"); *contra* Pet. 8 ("Article III standing, the court concluded, can 'be obtained after a case's initiation and given retroactive effect through procedural rules.'") (quoting Pet. App. 39a). In addition to undergirding its substantive correctness, discussed below, this novel and persuasive attention to this web of messy issues is unusually likely to influence the other circuits—should they ever encounter this relatively rare issue. At an absolute minimum, that process should be allowed to play out.

II. The Decision Below Is Correct

Certiorari should also be denied because the decision below is plainly correct for (at least) two wholly independent reasons.

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[2] The Second Circuit collected at least seven cases from this Court or the courts of appeals in this regard. *See* Pet. App. 39a-41a.

1. First, as Judge Sullivan's decision very persuasively explains (and as petitioners ignore), the history of common-law practice makes it utterly impossible to say that it is *unconstitutional* under Article III to allow a party to correct a pleading error—particularly when that "error" is naming the originally injured party in the caption. Put another way, whether the caption correctly identifies the real party in interest is not something that concerns Article III at all. As the decision below highlights, the requirement reflected in Rule 17 that a case be prosecuted in the name of the real party in interest (rather than a nominal plaintiff) is of relatively recent advent: "At early common law, courts of law recognized only those plaintiffs whose *legal* rights had been affected by the act of the defendant, a group into which courts determined assignees did not fall." Pet. App. 34a. Assignees of claims thus frequently sued in the name of a party that no longer had an interest in the case, and courts did not require that pleadings even identify the assignee. *Id.* at 34a-35a. Under petitioners' "nullity" theory, this approach to pleading somehow violates Article III. And just to state that conclusion is to see that it makes no sense: As Judge Sullivan aptly observed after reviewing the history of pleading practice, "the rule concerning which party's name a case must be prosecuted under (either the nominal plaintiff or the real party in interest) is non-jurisdictional. After all, if it were jurisdictional, it's not clear how it could be changed over time without offending the Constitution." *Id.* at 36a.

One easy way to see this is to recognize that the central issue in this case is not about jurisdiction or standing at all; rather, it's about *timing*, and whether Rule 17 allows a complaint naming the real party in

interest here to relate back to the initial complaint. Rule 17's answer is "yes." But more importantly, it should be self-evident that the answer to that question is not governed by *the Constitution* in any way, shape, or form. Indeed, one could easily rewrite Rule 17 as follows: "Every claim shall be filed in the name of the real party in interest, but the time for the real party in interest to file such claim shall be tolled from the date on which an action pursuing that claim was filed by or in the name of another." It makes no sense to argue that such a rule would run afoul of the Constitution; after all, Congress makes timing rules all the time—including the applicable statute of limitations itself. Dressing this argument up in confounding jurisdictional garb does not make it any less ridiculous.

2. Second, and separately, petitioners' argument necessarily fails because—even if naming the wrong plaintiff in a complaint was somehow "jurisdictional" in a way that could somehow make Rule 17's timing rule unconstitutional—this Court has twice expressly acknowledged that changes to a suit that alter or correct the named parties *can* cure any alleged jurisdictional defect. In fact, the best case for this proposition is one on which petitioners (at 16) try to rely: *Conolly v. Taylor*, 27 U.S. (2 Pet.) 556 (1829).

This Court held in *Conolly* that, where a complaint was filed in the name of a nominal plaintiff as well as several foreign nationals, it was permissible to "[s]trike out [the nominal plaintiff's] name as a complainant" in order to create complete diversity and remove "the impediment … to the exercise of [federal] jurisdiction" under the then-prevailing diversity-jurisdiction statute. 27 U.S. at 565. In other words, almost two hundred years ago, this Court sanctioned the very

practice the Second Circuit sanctioned below: looking through the party named in the caption to the real party in interest, amending the complaint to reflect the true state of affairs, and thereby retaining the jurisdiction the court had all along. To rule for petitioners, this Court would have to say that Chief Justice Marshall had it precisely backwards; on any logical reading, petitioners' position commits them to the view that, because there was no jurisdiction over the parties' suit at the outset of the suit in *Conolly*, that case was an incurable "nullity" too. *E.g.*, Pet. 20.

Petitioners' sole attempt to escape this box is itself foreclosed by this Court's unambiguous precedent. According to petitioners, there are certain types of jurisdictional issues that are somehow more jurisdiction-y, and thus more important, than others. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 88, 90 (1998) ("Jurisdiction … is a word of many, too many, meanings.") (quotation marks omitted). The argument seems to go that any alleged jurisdictional flaw that can be traced directly to Article III is incurable, while other types of jurisdictional issues—such as those that concern "requirement[s] based on statute, not Article III of the Constitution," Pet. 16 (quotation marks omitted)—can be cured. Petitioner thus tries to explain *Conolly* as governed by the fact that constitutional minimal diversity was present there, even though statutorily required complete diversity was not. Of course, if that was the explanation for *Conolly*, one might expect it to say something like that. Instead, it says nothing about "constitutional" versus statutory jurisdiction as justifying its rule.

Worse, this Court already made clear in *Grupo Dataflux*, 541 U.S. 567, that *Conolly* is governed by an

entirely different rule. As Justice Scalia carefully explained, *Conolly* permitted an amendment to a complaint to cure a jurisdictional defect precisely because that amendment (like the one here) altered the named parties. *See id.* at 574-75 & n.5. Indeed, the opinion places the rule that a jurisdictional defect is incurable "where there is *no change of party*" in literal emphasis, *thrice*. *See id.* (brackets omitted). Conversely, a rule that jurisdictional defects should be curable only when there was always constitutional minimal diversity and not statutory complete diversity was floated by the dissent in *Grupo Dataflux* and expressly rejected by the majority. *See id.* at 577-78 & n.6 (noting that "[u]nlike the dissent, our opinion does not turn on whether the jurisdictional defect here contained at least 'minimal diversity'"). Petitioners' theory of *Conolly*—and of the law generally—thus confuses the doctrine with its exact opposite.

Meanwhile, petitioners' theory is also jurisdictional gobbledygook, because it is equally unconstitutional under Article III to exercise the judicial power of the United States without jurisdiction whether the defect in subject-matter jurisdiction comes from Article III itself or an act of Congress. Indeed, this Court has repeatedly clarified that with respect to all federal courts but this one, "two things are necessary to create jurisdiction …. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. … To the extent that such action is not taken, *the power lies dormant*." *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868) (emphasis added). Accordingly, there is simply no basis for treating Article III standing as more hallowed jurisdictional ground than, for example, congressionally

mandated complete diversity. *Cf. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("[T]here is no mandatory 'sequencing of jurisdictional issues.'") (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)). Petitioners' line-drawing between jurisdiction "based on … Article III" and other aspects of federal subject-matter jurisdiction is thus nonsensical and cannot save their rule from being squarely in the teeth of multiple decisions from this Court.

Ultimately, this case presents the easiest possible fact pattern, because the real party in interest was always present and merely filed in the wrong name. As the Second Circuit explained, *see* Pet. App. 37a, that makes a plaintiff's pleading error akin to a defective jurisdictional allegation, and Congress has explicitly permitted the correction of jurisdictional allegations mid-stream by statute. *See* 28 U.S.C. §1653. Petitioners thus have no prospect of prevailing on the merits, and the petition should be denied for this reason as well.

III. No Version Of The Question Presented Is Important Enough To Merit Review

The distance petitioners must reach to find cases that even touch on the "nullity" doctrine, *see supra* pp.14-22, demonstrates that this issue rarely arises—even on the broadest possible understanding of the question presented. Moreover, this issue only matters where the statute of limitations has run, and the real party in interest thus cannot respond by simply filing a new suit. Such cases will be very few and very far between. And, of course, if the question is properly narrowed to the one the Second Circuit actually decided—namely, whether the presence of the real party

in interest from the outset foreclosed any jurisdictional issue—the relevant cases become even rarer still.

Moreover, the policy concerns raised by petitioners and their amici—which involve potential shenanigans in cases supported by litigation financing, U.S. Chamber of Commerce Amicus Br. 11-15—are tellingly bizarre. For one thing, neither this case nor any other cited by any party has anything to do with litigation financing, and petitioners do not even challenge the Second Circuit's holding that assignments of claims do not create jurisdictional issues. *See* Pet. App. 19a-22a. And for another, any parade of horribles involving strategic bad-faith pleading of the wrong parties by plaintiffs runs headlong into the problem that the Federal Rules already prohibit such bad-faith pleading *of their own force*—a point the Second Circuit explicitly highlighted, *see id.* at 42a-43a. The question here is not whether plaintiffs should be permitted to substitute under Rule 17 no matter what; instead, the sole issue is whether the Constitution somehow forecloses Rule 17's timing rule for cases joined by the real party in interest when the Rules themselves do permit the joinder. Accordingly, it is impossible for this case to achieve anything other than severely punishing a handful of plaintiffs for an exceedingly rare pleading mistake.

Given their acknowledged wrongdoing, petitioners are understandably eager to escape liability in this singular case on some technicality or another. But that is hardly the kind of issue that merits this Court's review.

IV. This Petition Presents Serious Vehicle Problems

Even ignoring all the problems above, this petition would be an exceedingly poor vehicle through which to review the question presented, for several reasons.

1. First and foremost is that this petition is interlocutory in the strictest sense. After petitioners failed to secure a stay below—without a single judge dissenting or calling for a response to their petition for rehearing en banc—they did not bother to even seek a stay from this Court. The litigation is thus proceeding in the district court. And, there, defendants have now filed *three* new motions to dismiss on various grounds. *See* Dist. Ct. Docs. 446-448. One of those grounds even purports to question the premise on which the Second Circuit decided this case—namely, that one of the dissolved funds (Sonterra) had in fact assigned its claims to the real party in interest. *See* Pet. App. 44a-45a (noting this premise); Dist. Ct. Doc. 447 at 13, 20 (arguing that district court can ignore the Second Circuit's holding—*i.e.*, how it "applied" its legal discussion "to the procedural history of this case,"—because that application was "based on a mistaken understanding of the procedural history of this action").[3] Accordingly, by the time this Court considers this case, it may well have been dismissed on other grounds. Or, worse, this Court might be stuck dismissing the writ to avoid rendering an advisory opinion on whether there *would*

[3] Respondents of course believe this argument is meritless and contrary to the Second Circuit's mandate. But defendants have led the district court into error several times before and are thus threatening to frustrate the review they seek here by failing to seek a stay while taking such steps below.

have been a jurisdictional issue in a case, like the one the Second Circuit "mistaken[ly]" described, where the real party in interest filed the suit in the name of the injured party that assigned the real plaintiff its claims.

2. Nor is this the only way this Court's review might be stymied. Following the Second Circuit's decision here, four defendants have settled, joining two defendants that had settled before. *See* Pet. App. 11a. In this posture, cases like these are frequently resolved through a case-wide settlement among all remaining defendants, ending the matter entirely. That could well happen here; indeed, given the weakness of their arguments on the merits and their acknowledged wrongdoing, defendants might try to leverage a grant of certiorari to that end. This is why interlocutory review of ongoing, complex civil litigation is dangerous, and why this Court strongly prefers to review cases on final judgment.

3. The decision below also embraces a potential independent ground for its outcome on which petitioners did not seek review—namely, the option to swap the "Moon Funds" in as a new named plaintiff in this ongoing class action. In principle, there is no reason why a jurisdictional problem with a claim brought by one *representative* plaintiff in a class action should foreclose substituting into the named-plaintiff position a different party that is already participating in the case as an unnamed class member. *See*, *e.g.*, *Mullaney v. Anderson*, 342 U.S. 415 (1952) (allowing substitution of two union members as plaintiffs to cure standing defect in plaintiff union's suit). Accordingly, the Second Circuit expressly held that such a move is not foreclosed by this Court's decision in *China Agritech,*

Inc. v. Resh, 138 S. Ct. 1800 (2018), and that the substitution of the Moon Funds would "amount[] to an ordinary pleading amendment governed by [Rule] 15." Pet. App. 47a (quoting *Carpenters Pension Tr. Fund for N. Cal. v. Allstate Corp.*, 966 F.3d 595, 616 (7th Cir. 2020)). Petitioners did not seek review of this holding, *see* Pet. 8, and acknowledged below that it is "independent of the Article III question." C.A. Doc. 253. Petitioners thus appear to have left an adequate ground for the decision below entirely unchallenged.

4. Finally, this case involves yet another antecedent question that respondents will challenge if certiorari is granted and that will deeply confound review of any question related to "nullity" doctrine. Below, the Second Circuit agreed with petitioners that corporate dissolution creates an issue of standing and thus a potential jurisdictional problem. But that is wrong: As petitioners *themselves* recognized when they first raised this issue, *see supra* p.5 n.1, corporate dissolution affects whether the real human beings who brought the suit have the "capacity" to sue through the corporation they named, and the Federal Rules themselves make clear that corporate capacity to sue is not itself a jurisdictional issue. *See* Fed. R. Civ. P. 9(a) (explicitly stating that a plaintiff need not plead the "legal existence of an organized association of persons that is made a party" or "capacity to sue" and making the absence of such existence or capacity a waivable defense). This Court thus may never reach even the muddled question presented petitioners have offered and instead spend its time deciding whether the particular facts of this case concern only capacity to sue and thus have nothing to do with jurisdiction at all.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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