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, SONTERRA CAPITAL MASTER FUND, LTD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The petition demonstrated a circuit split on the dispositive question on appeal: Whether courts can use Rule 17 to add a new plaintiff and create Article III jurisdiction that otherwise does not exist. Respondents tie themselves in knots pretending the case involves no Article III question, but the Second Circuit's holding was clear:

> We hold today 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. Only if the real party in interest either fails to materialize or lacks standing itself should the case be dismissed for want of subject-matter jurisdiction.

App. 30a-31a. And despite respondents' claim that this is the "first" decision addressing the issue (BIO 22), the Second Circuit was far more candid:

> Admittedly, this is not a view adopted by many courts. The far more common view is the so-called "nullity doctrine" exemplified by *Zurich Insurance Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir. 2002), which says that a case initiated in the name of a plaintiff that lacks standing is an incurable nullity.

App. 31a. In deciding whether the Second Circuit's decision presents an Article III question that has divided the circuits, the Court need not accept either

side's characterization; the decision below speaks for itself.

Respondents seize upon the formulation of the question presented, disputing whether the Second Circuit's rule "create[d] jurisdiction." BIO 9. But respondents' tactic only underscores the crux of the conflict: whether (as the Second Circuit held) Article III jurisdiction existed all along *even though no plaintiff with Article III standing emerged until years into the case*. What respondents (and the Second and Tenth Circuits) wave away as a simple "caption error" fixable under procedural rules (BIO 13), other courts of appeals (including the Sixth and D.C. Circuits) have found to pose an insurmountable constitutional defect (Pet. 11-15).

Respondents' reliance on cases involving statutory (not constitutional) defects in jurisdiction cannot justify the Second Circuit's "flexible" approach to Article III's limits. And respondents' efforts to characterize this case as involving an "exceedingly rare pleading mistake" (BIO 29) are disingenuous. As *amici* attest, this case presents an exceptionally important question that will recur with deleterious consequences.

Faced with that reality, respondents resort to vehicle arguments. But if the Court agrees with petitioners, this case will be over: the absence of Article III standing at the outset compels dismissal. Only two of the fifteen petitioners have settled. And although litigation has recently restarted on remand, the Court's review of whether this case is a jurisdictional nullity presumably will halt those proceedings.

The Court should grant review to resolve the fundamental question of Article III jurisdiction that this case presents.

A. The Courts Of Appeals Are Divided As To Whether Article III Permits A Procedural Fix When The Plaintiff Lacks Standing.

Respondents deny the existence of a split that the Second Circuit itself recognized. Their attacks on the petition's framing cannot obscure the circuit conflict.

1. Respondents fault petitioners for arguing that the Second Circuit's rule "create[s] *** jurisdiction," (*e.g.*, Pet. (i)), because (they say) the Second Circuit held that "the district court always had jurisdiction" (BIO 1). Semantics aside, the dispute here remains clear: whether "a case brought by a non-existent plaintiff"—or any other plaintiff that lacks constitutional standing—"is a legal nullity under Article III" that "cannot be cured through application of a federal procedural rule." Pet. 10.

The obvious point—openly acknowledged in the opinion below—is that the Second Circuit relied on the existence of a non-party, later seeking to be substituted via Rule 17, to find Article III jurisdiction even though no original plaintiff had standing (or even existed). Pet. 7, 10. Far from "overlook[ing]" the "special fact that actually decided this case" (BIO 13), petitioners highlighted that "special fact": the Second Circuit's erroneous conclusion that FLH's presence in the shadows was enough to satisfy Article III (Pet. 7, 12, 15, 18). Respondents' quotations (BIO 11-12) from the Second Circuit's opinion confirm that the petition identified the key question. *E.g.*, App. 39a ("Fund

Liquidation's presence and standing ensured that there was a live controversy when the action was initiated[.]"); App. 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.").

2. As the Second Circuit acknowledged, it departed from the "view adopted by many courts *** exemplified by [the Sixth Circuit's decision in] *Zurich*, *** which says that a case initiated in the name of a plaintiff that lacks standing is an incurable nullity." App. 31a. Respondents downplay the square conflict with *Zurich* (BIO 15-17, 21), but their arguments border on the absurd: they complain that *Zurich* was a short decision (as if that reduces its precedential effect); characterize the decision and related split as both "stale" and yet "not ripe for this Court's review" (neither conflicting characterization is true); and try to distinguish *Zurich* because it involved the wrong plaintiff, not a non-existent one (which only reinforces the Article III error in this case).

The Sixth Circuit has not disavowed the approach it took in *Zurich*. Respondents cite *Cranpark, Inc. v. Rogers Group, Inc.*, 821 F.3d 723 (6th Cir. 2016). BIO 16. But the Sixth Circuit there cited *Zurich* approvingly for the very principle at issue here: "the distinction between Article III standing and Rule 17(a)." *Cranpark*, 821 F.3d at 732-733. And the Sixth Circuit emphasized that the plaintiff in *Cranpark* always had Article III standing because it was a live entity that "had suffered a paradigmatic economic injury." *Id.* at 730-731. By contrast, the dissolved funds (the only original plaintiffs here) had ceased to exist and had no standing to sue. App. 27a.

Zurich remains binding circuit precedent and, as petitioners showed (Pet. 11-12), multiple circuits have followed its reasoning—including two within the last two years. *See House v. Mitra QSR KNE LLC*, 796 F. App'x 783 (4th Cir. 2019); *Hernandez v. Smith*, 793 F. App'x 261 (5th Cir. 2019). Despite respondents' unfounded arguments (BIO 18-19), both *House* and *Hernandez* held that filing suit in the name of a non-existent plaintiff is a threshold jurisdictional impediment that cannot be cured by procedural rules (Pet. 11-12). Even accepting respondents' invitation (BIO 19-20) to disregard the many other cases expressing agreement with the majority approach (Pet. 11-12), the split is pronounced—with the Second and Tenth Circuits permitting and four other circuits prohibiting (two in precedential decisions) suits initiated by plaintiffs without Article III standing. Pet. 10-15.

None of the cases that respondents cite (BIO 17-19, 21-22) suggests that the Fourth, Fifth, or D.C. Circuits have renounced the majority approach articulated in *Zurich*. Respondents do not (and cannot) point to a single case filed in the name of a non-existent plaintiff that these circuits have permitted to proceed, with help from Rule 17 or any other principle.

Indeed, respondents' cases confirm the constitutional problem with the Second Circuit's approach. The Fourth Circuit's decision in *B.R. v. F.C.S.B.*, 17 F.4th 485 (4th Cir. 2021), involved an anonymous—but alive and present—plaintiff with standing. *Id.* at 493-494. Far from disavowing its decision in *House*, the Fourth Circuit in *B.R.*

emphasized the Article III interests that a live named plaintiff furthers. *Id.* at 494 (Article III ensures an "*adversarial process* to resolve a genuine dispute between *real parties* with a *real stake in the outcome*") (emphases added). The D.C. Circuit's decision in *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C. Cir. 1963), and the Fifth Circuit's decision in *Magallon v. Livingston*, 453 F.3d 268 (5th Cir. 2006), both involved existing, but mistakenly named, plaintiffs. *See Link Aviation*, 325 F.2d at 614 (insureds mistakenly named as plaintiffs where insurer was real party in interest); *Magallon*, 453 F.3d at 272 (Mexican Consul General mistakenly believed he could sue as next friend of Mexican national). Neither case addressed Article III jurisdiction or, as respondents appear to concede (BIO 19), diminished the force of the circuit conflict.

To be sure, there are situations where this Court might prefer to wait for even more courts of appeals to announce that they are "doctrinally committed" to a particular side of a split. BIO 15, 22. But this is a context where the costs of waiting are unusually high. Article III's limits are "inflexible and without exception," and thus do not tolerate gray areas, fuzzy lines, and conflicting rules. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). This Court alone has the power to enforce these fundamental boundaries, which implicate the most important structural interests underlying our Constitution. *See* U.S. Chamber of Commerce Amicus ("Chamber") Br. 7; Washington Legal Foundation Amicus ("WLF") Br. 5-6. Differences among the circuits will be outcome-determinative and lead to forum shopping. Pet. 20-21. Prompt resolution from this Court, not further percolation, is warranted.

B. The Decision Below Is Manifestly Incorrect And Will Have Negative Consequences.

1. Respondents struggle to defend the Second Circuit's decision as consistent with precedent and history. BIO 24-28. They are wrong on both counts.

As to precedent, respondents rely on cases in which this Court has allowed procedural rules to cure defects in statutory jurisdiction. BIO 24-27 (discussing *Conolly v. Taylor*, 27 U.S. (2 Pet.) 556 (1829), and *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567 (2004)). But those cases prove the point: procedural rules can address *statutory* jurisdictional defects, but not *constitutional* ones. Pet. 16; *see also* Chamber Br. 6 n.2. Respondents gloss over that distinction, complaining that petitioners treat certain jurisdictional issues as "more jurisdiction-y" than others. BIO 26. But that is a distinction the Court itself has drawn time and again. *See, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (noting the "important difference" between statutory and constitutional injury); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 (1978) (distinguishing between constitutional and statutory "limits of federal judicial power"); *see also* WLF Br. 8.

Respondents also fail to address the many Court decisions that contradict the Second Circuit's holding. Pet. 16-17. Under this Court's Article III precedents, a plaintiff must have standing when it files suit. *E.g.*, *Kenne Corp. v. United States*, 508 U.S. 200, 207 (1993) (There is a "longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought.") (internal

quotation marks omitted); *Minneapolis & St. Louis R.R. Co. v. Peoria & Perkin Union Ry. Co.*, 270 U.S. 580, 586 (1926) ("The jurisdiction of the lower court depends upon the state of things existing at the time the suit was brought."). But under the Second Circuit's outlier rule, Article III is satisfied if some entity somewhere, named nowhere in the pleadings, could have asserted standing and steps forward years into the litigation. App. 30a-31a.

Respondents' discussion of history is also misplaced. Like the Second Circuit, they point to historical tradition allowing parties to correct pleading errors. BIO 24-25. But "[t]he fact that the rules as to *who* should be deemed the proper plaintiff might evolve over time does not mean that a case may proceed where there was concededly *no* proper plaintiff before the Court." Chamber Br. 10. And the history confirms that courts traditionally did not permit suits by non-existent plaintiffs to proceed. *Id.* at 8. Regardless, respondents do not explain how the "evolution of pleading practice" (BIO 7) could control a constitutional jurisdictional requirement. Pet. 17; WLF Br. 14.

2. The Second Circuit's decision is not just wrong, it is dangerous. Respondents barely address the concerns about forum shopping, procedural maneuvering, and other practical considerations that petitioners and *amici* have identified. Pet. 18-21; Chamber Br. 11-15. Respondents do not deny (indeed, they trumpet) that FLH was "pulling the strings" from the sidelines. BIO 13. Under respondents' view (and the Second Circuit's), Article III permits absent entities, unknown to the court or defendants, to

control the litigation from behind the scenes before swooping in at some indeterminate point to cure the court's lack of jurisdiction. The potential for unfair surprise, gamesmanship, undisclosed conflicts of interest, and wasteful litigation could not be more obvious. *See, e.g.*, Chamber Br. 18. Indeed, the Court need look no farther than this case for potential shenanigans: By supposedly "naming the wrong party" (BIO 14) (formatting omitted), plaintiffs' counsel has cycled through three sets of plaintiffs, the last of whom (the Moon Funds) bear no apparent connection whatsoever to the original plaintiffs but, if substituted years after the case began, would avoid any statute-of-limitations bar. App. 47a.

Unable to deny the inevitable chicanery, respondents brush it aside. They claim the Second Circuit's rule implicates "a miniscule number of cases" and will affect only defendants who "wait until the statute of limitations has run" before objecting. BIO 2, 29. But if other plaintiffs adopt respondents' tack of waiting for years to reveal themselves, how can defendants be faulted for the resulting delay? And how does the unsupported assertion that these circumstances are "rare" (BIO 23) square with the many cases showing how frequently the issue arises? *E.g.*, Pet. 14-15; BIO 17-22. When combined with the recent trend toward third-party litigation funding (Chamber Br. 11-15), the "rare" occurrence can become a business model.

Respondents also claim that this case involves a supposed "mistake" in naming parties. BIO 29. But the Second Circuit's decision is not so limited. App. 30a-31a. And it is hardly clear that the Second Circuit

believed a mistake (honest or otherwise) had been made: the Second Circuit chided plaintiffs for filing pleadings that "failed to reflect that the Dissolved Funds were no longer in existence" and for waiting "until briefing and oral argument" on the motion to dismiss the second amended complaint before "eventually explain[ing] that the Dissolved Funds had assigned their claims." App. 10a-11a.

C. This Case Is An Ideal Vehicle.

Predictably, respondents claim to detect a host of vehicle problems with this case. But these purported concerns only highlight the need for the Court's review here and now.

1. To start, the Second Circuit's (erroneous) remand to the district court (BIO 31-32) is not a reason to deny certiorari. The district court cannot revisit the Second Circuit's jurisdictional ruling. The only related jurisdictional issue on remand pertains to the underlying question of whether FLH ever received a valid assignment (such that it had Article III standing to step into the shoes of the dissolved fund plaintiffs under the Second Circuit's "flexible" rule). *See* Pet. App. 44a-45a.

In any event, the fact that litigation is proceeding on remand heightens, not diminishes, the need for review. Respondents have wrapped themselves in the Second Circuit's opinion, telling the district court that the decision dictates next steps in the case. Conference Tr. at 4:12-14 (Oct. 21, 2021), D. Ct. ECF No. 438 ("[T]he Second Circuit has made clear how we should go forward."). Pursuant to that view, respondents now wish to compel discovery from petitioners. *Id.* at 5:4-8. The potential for wasteful

discovery, ordered in proceedings flowing directly from the Second Circuit's erroneous decision, is a reason this Court should intervene now.

Respondents claim that settlement might moot this case. BIO 31. Setting aside that any respondent could assert that risk in any case, it is hard to believe that outcome would come to pass here—for all thirteen remaining petitioners. If this Court reverses, respondents' suit is worth zilch. The likelihood that all petitioners will settle after a grant of certiorari is thus vanishingly slim (and even less than in most cases involving just one petitioner). And respondents neglect to mention that at least some (if not all) of the settlements to date are *contingent on completion of proceedings in this Court in respondents' favor*. Conference Tr. at 15:10-19 (noting that settlements will not consummate "until the Second Circuit's decision is run up all the way through the Supreme Court").

In a similar vein, further district court proceedings, including adjudication of yet-to-be-fully briefed motions to dismiss (BIO 30), would likely be stayed if this Court grants review. Neither the district court nor the parties are likely to move full steam ahead litigating a nullity pending a merits decision from this Court.

2. Respondents fare no better with their arguments about other issues supposedly clouding review. The "option to swap in the 'Moon Funds'" (BIO 31) is patently *not* an "independent ground" for the Second Circuit's decision.[1] Rather, whether the Moon

[1] Respondents misleadingly cite (BIO 32) briefing in which

Funds can seek to join the case *depends on the Second Circuit's Article III jurisdictional ruling*—the one on which this petition seeks review. The Second Circuit explicitly acknowledged as much, noting that the Moon Funds could potentially join "now that [the district court's] jurisdiction over the case is clear." App. 45a. That part of the Second Circuit's decision will fall, along with the rest of it, if the Court reverses on the question presented.

Similarly, respondents cannot threaten to derail this case by challenging the Second Circuit's conclusion that the dissolved funds (the original plaintiffs) lacked standing. BIO 32. No party has asked the Court to review that determination, and the time to do so has lapsed. Sup. Ct. R. 12.5. In any event, that subsidiary finding is correct and well within the Court's discretion to accept as a predicate. Accordingly, there are no impediments to the Court's consideration of the critical Article III question presented in this petition.

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petitioners said that the Second Circuit's error as to the Moon Funds was an independent ground "for [possible] Supreme Court review," C.A. ECF No. 253 at 7—not for the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

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