No.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court lacking Article III jurisdiction can create such jurisdiction by adding a new plaintiff via Federal Rule of Civil Procedure 17.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b)(i), the following parties were defendants-appellees in the district court and/or court of appeals:[1]

- ANZ Securities, Inc.;
- Australia and New Zealand Banking Group, Ltd.;
- Bank of America Corporation;
- Bank of America, N.A.;
- Bank of Tokyo-Mitsubishi UFJ, Ltd., n/k/a MUFG Bank, Ltd.;
- Barclays Bank PLC;
- Barclays Capital Inc.;
- Barclays PLC;
- BNP Paribas North America, Inc.;
- BNP Paribas Prime Brokerage, Inc.;
- BNP Paribas Securities Corp.;
- BNP Paribas, S.A.;
- Commerzbank AG;
- Crédit Agricole Corporate and Investment Bank;
- Crédit Agricole S.A.;
- Credit Suisse AG;
- Credit Suisse Group AG;
- Credit Suisse International;
- DBS Bank Ltd.;
- DBS Group Holdings Ltd;

[1] A number of defendants-appellees, including those that were dismissed with prejudice by the district court (App. 108a-109a) and whose dismissals were not vacated by the Second Circuit (App. 48a), do not join this petition. All petitioners appearing before this Court are identified in the Corporate Disclosure Statement and in the signature block of this petition.

- DBS Vickers Securities (USA) Inc.;
- Deutsche Bank AG;
- The Hongkong and Shanghai Banking Corporation Limited;
- HSBC Bank USA, N.A.;
- HSBC Holdings plc;
- HSBC North America Holdings Inc.;
- HSBC USA Inc.;
- ING Bank N.V.;
- ING Capital Markets LLC;
- ING Groep N.V.;
- Macquarie Bank Ltd.;
- Macquarie Group Ltd.;
- Oversea-Chinese Banking Corporation Limited;
- RBS Securities Japan Limited;
- The Royal Bank of Scotland Group plc;
- Royal Bank of Scotland plc;
- Standard Chartered Bank;
- Standard Chartered plc;
- UBS AG;
- UBS Securities Japan Co. Ltd.;
- UOB Global Capital, LLC;
- United Overseas Bank Limited.

Fund Liquidation Holdings LLC, as assignee and successor-in-interest to FrontPoint Asian Event Driven Fund L.P. and Sonterra Capital Master Fund, Ltd., was a plaintiff-appellant below and is a respondent in this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned petitioners make the following disclosures:

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

Petitioner Australia and New Zealand Banking Group Limited ("ANZ") has certified that while certain companies hold equity interests in ANZ as nominees on behalf of various beneficial owners, no publicly traded company owns a beneficial interest in 10% or more of the ordinary shares of ANZ.

BANK OF AMERICA, N.A.

Petitioner Bank of America, N.A. is a direct, wholly owned subsidiary of BAC North America Holding Company. BAC North America Holding Company is a direct, wholly owned subsidiary of Bank of America Corporation. Bank of America Corporation is a publicly held company whose shares are traded on the New York Stock Exchange and has no parent corporation. Based on the U.S. Securities and Exchange Commission Rules regarding beneficial ownership, Berkshire Hathaway, Inc., 3555 Farnam Street, Omaha, Nebraska 68131, beneficially owns greater than 10% of Bank of America Corporation's outstanding common stock.

THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., N/K/A MUFG BANK, LTD.

Petitioner MUFG Bank, Ltd. ("MUFG Bank"), f/k/a The Bank of Tokyo-Mitsubishi UFJ, Ltd., is a wholly owned subsidiary of Mitsubishi UFJ Financial

Group, Inc. ("MUFG"). MUFG is a publicly held corporation, and no publicly held company owns 10% or more of MUFG's stock.

BARCLAYS BANK PLC

Petitioner Barclays Bank PLC is a wholly owned subsidiary of Barclays PLC, which is a publicly held corporation, and no other publicly traded company owns 10% or more of Barclays Bank PLC's stock.

BNP PARIBAS, S.A.

Petitioner BNP Paribas, S.A. is a publicly traded company organized under the laws of France. BNP Paribas, S.A. has no parent company and no publicly held corporation owns 10% or more of its shares.

COMMERZBANK AG

Petitioner Commerzbank AG has no parent company and no publicly held company owns 10% or more of its stock.

CRÉDIT AGRICOLE CORPORATE AND INVESTMENT BANK

Petitioner Crédit Agricole Corporate and Investment Bank has certified that Crédit Agricole S.A. owns more than 10% of Crédit Agricole Corporate and Investment Bank. Crédit Agricole S.A. is a publicly held corporation. SAS Rue la Boétie holds a majority of its stock. No publicly held corporation owns more than 10% of Crédit Agricole S.A.'s stock.

DBS BANK LTD.

Petitioner DBS Bank Ltd. is a wholly owned subsidiary of DBS Group Holdings Ltd. DBS Group

Holdings Ltd has no parent corporation and no publicly held corporation owns 10% or more of its stock.

DEUTSCHE BANK AG

Petitioner Deutsche Bank AG is a publicly held corporation organized under the laws of Germany that has no parent corporation, and no publicly held company owns 10% or more of Deutsche Bank AG's stock.

THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED

Petitioner The Hongkong and Shanghai Banking Corporation Limited is a wholly owned indirect subsidiary of HSBC Holdings plc. HSBC Holdings plc has no parent corporation and no public corporation owns 10% of the shares in HSBC Holdings plc.

OVERSEA-CHINESE BANKING CORPORATION LTD.

Petitioner Oversea-Chinese Banking Corporation Ltd. is a publicly held corporation. No publicly held corporation owns 10% or more of its stock.

THE ROYAL BANK OF SCOTLAND PLC

Petitioner the Royal Bank of Scotland plc (n/k/a NatWest Markets plc) is a wholly owned subsidiary of the Royal Bank of Scotland Group plc (n/k/a NatWest Group plc) ("RBS Group"). RBS Group is a public limited company organized under the laws of the United Kingdom. RBS Group has no parent company and no publicly held company owns 10% or more of its stock.

STANDARD CHARTERED BANK

Petitioner Standard Chartered Bank states that it is a subsidiary of Standard Chartered Holdings Limited, which, in turn, operates as a subsidiary of Standard Chartered plc, a publicly held company. No publicly held corporation owns 10% or more of Standard Chartered plc's common shares.

UBS AG

Petitioner UBS AG is wholly owned by UBS Group AG, a publicly traded corporation. No publicly held corporation holds 10% or more of UBS Group AG's stock.

UNITED OVERSEAS BANK LIMITED

Petitioner United Overseas Bank Limited is a publicly traded company on the Singapore Exchange. It has no parent corporation, and no other publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

This case deepens an acknowledged circuit split on a fundamental question of Article III jurisdiction: whether federal courts may use the Federal Rules of Civil Procedure to manufacture Article III jurisdiction that otherwise does not exist. The Second Circuit held that, despite the absence of a named plaintiff with Article III standing, the district court could create subject matter jurisdiction by using Federal Rule of Civil Procedure 17 to substitute a new party purporting to have Article III standing. In bypassing the constitutional limits on federal court jurisdiction, the Second Circuit expressly recognized that "[t]he far more common view" is "that a case initiated in the name of a plaintiff that lacks [Article III] standing is an incurable nullity." App. 31a.

The majority of courts of appeals to have considered the issue have held that where a case (like this one) is commenced in the name of a non-existent plaintiff, a federal court lacks Article III jurisdiction and has no power to do anything except dismiss the case. The Second Circuit rejected the majority view and joined the Tenth Circuit in what it noted is "[a]dmittedly" the short side of the circuit split. App. 31a.

According to the Second Circuit, the conceded lack of Article III jurisdiction in such a case was no more than "a technical error." App. 43a. "[T]he boundaries of Article III are not *** rigid" (App. 39a), the Second Circuit opined, because procedural rules can expand Article III for "practical" reasons and demanding more was a "needless formality." App. 43a. Under Rule 17, the court of appeals held, so long as a

new plaintiff "materialize[d]" within "a reasonable time," the Constitution could bend to procedural devices. App. 31a. Here, that meant a new plaintiff not named in the complaint could be substituted years after the complaint had been filed in the names of what plaintiffs' counsel belatedly confessed were non-existent entities.

The Second Circuit's decision not only represents the minority view among the clearly divided courts of appeals, but also contravenes established Supreme Court precedent. It is a foundational principle that Article III jurisdiction must exist for a federal court to exercise authority. "[P]ractical" or not, the federal rules of civil procedure do not, indeed cannot, change that constitutional principle or expand the bounds of Article III. Once the Second Circuit determined that the named plaintiffs lacked Article III standing, it could not "proceed at all in any cause"; "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

The question presented is significant both legally and practically. Any exercise of federal court jurisdiction in the face of an overt Article III defect calls out for this Court's review. The entrenched circuit conflict heightens the problem, as cases that would be a constitutional "nullity" in one circuit will proceed with the aid of federal civil procedural rules in another. Worse still, the Second Circuit has created a rule that opens the door to mischief: its holding invites the use of placeholder suits that will waste court and party resources, encourage forum shopping (especially in the class-action context), and potentially undercut

statute of limitations law. This Court should grant certiorari, resolve the pronounced and growing circuit split, and restore Article III to its essential and proper role.

OPINIONS BELOW

The opinion of the court of appeals is reported at 991 F.3d 370. App. 1a-48a. The district court's opinion granting petitioners' motion to dismiss is reported at 399 F. Supp. 3d 94. App. 49a-66a.

JURISDICTION

The court of appeals issued its decision on March 17, 2021, and denied petitioners' timely petition for rehearing on May 6, 2021. App. 153a-154a. Pursuant to this Court's orders of March 19, 2020, and July 19, 2021, the deadline to file a petition for a writ of certiorari was extended to 150 days from the date of a judgment, order denying discretionary review, or order denying a timely petition for rehearing that was issued prior to July 19, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

Article III states, in pertinent part: "The judicial Power shall extend to all Cases *** arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; *** [and] to Controversies between Citizens of different States *** and between a State, or the

Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2.

STATEMENT OF THE CASE

A. District Court Proceedings

1. This putative class action was initiated in 2016, in the names of two plaintiffs identified in the original complaint as FrontPoint Asian Event Driven Fund, L.P. and Sonterra Capital Master Fund, Ltd. App. 67a. The complaint stated (incorrectly) that both plaintiffs were going concerns. App. 9a-10a. The complaint named no other plaintiff and contained no allegation about any assignment of claims or other real-party-in-interest. App. 9a-10a. The complaint alleged that various banks had conspired to manipulate certain Singapore-based benchmark interest rates to enhance the banks' financial positions. App. 8a-9a. The plaintiffs—two Cayman Islands investment funds—claimed to have held financial instruments that relied on the manipulated benchmark interest rates. App. 9a-10a.

Unbeknownst to petitioners and the district court, the purported plaintiffs had been dissolved and no longer existed by the time suit was filed—meaning the district court lacked Article III jurisdiction from day one of this lawsuit. App. 144a-145a. Having no knowledge of the defect, petitioners moved to dismiss a materially identical amended complaint for lack of personal jurisdiction and failure to state a claim. App. 9a-11a. The district court granted petitioners' motion but allowed plaintiffs to replead. App. 145a-147a.

The second amended complaint revealed for the first time that neither plaintiff existed. App. 144a-145a. In fact, the named investment funds had been dissolved years before the lawsuit was commenced. App. 144a. But again, the complaint named no other plaintiff and did not allege that any other proper plaintiff existed. App. 11a. Petitioners thus moved to dismiss for (among other grounds) lack of Article III jurisdiction. App. 89a.

Plaintiffs argued in response that they had assigned their claims to a third party called Fund Liquidation Holdings LLC ("FLH"). Rather than have FLH file a new complaint (presumably because its claims would have been time-barred), plaintiffs requested to substitute FLH as a real-party-in-interest under Federal Rule of Civil Procedure 17(a)(3). App. 11a.

Without deciding the issue, the district court tentatively suggested that the contracts supposedly assigning plaintiffs' claims "appear to show a full assignment of rights." App. 144a-145a. But it noted that the dissolved plaintiffs, not FLH, were the named plaintiffs. *Id.* The court thus granted FLH leave to file a complaint to allege "how they got their assignment and give *** an interpretation of the contract to show that they have the ability to sue." App. 53a.

FLH subsequently filed a so-called third amended complaint as the purported "assignee and successor-in-interest to FrontPoint." App. 12a-13a. That is, FLH filed an amendment to the original, non-existent plaintiffs' complaint instead of a new action

in its name. Petitioners moved to dismiss on the ground that the court, lacking Article III jurisdiction, could not exercise authority under Rule 17 to allow a substitution. App. 62a.

2. The district court agreed with petitioners. It held that the dissolved plaintiffs could not substitute FLH into a case commenced solely in the name of non-existent entities. App. 62a.

The district court explained that the original complaints were defective under Article III and could not be salvaged through after-the-fact procedural maneuvers such as amendment or substitution. "Although I gave leave to [dissolved plaintiffs] to substitute [FLH], my order could not confer jurisdiction where it did not originally exist." App. 62a. Concluding that it had been "deprived *** of subject matter jurisdiction," the district court also denied plaintiffs leave to file a fourth amended complaint to add as new plaintiffs Moon Capital Partners Master Fund, Ltd. and Moon Capital Master Fund, Limited (collectively the "Moon Plaintiffs"). App. 64a-65a.

The district court determined that, even aside from the subject matter jurisdiction defect, the Moon Plaintiffs' putative class claims were untimely. The district court declined to apply *American Pipe* tolling to these new class claims, concluding that doing so would be inconsistent with this Court's decision in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018). App. 62a.[2]

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[2] Because the district court concluded that it lacked Article

B. Proceedings On Appeal

The Second Circuit reversed. It agreed with the district court that the original plaintiffs lacked Article III standing. But it held that a federal court may exercise subject matter jurisdiction "so long as a party with standing to prosecute the specific claim in question exists at the time the pleading is filed" and "materialize[s]" within a "reasonable time" thereafter. App. 30a-31a. In other words, as long as a potential plaintiff with standing existed *somewhere*, it did not have to be a party to the case or even referenced in the pleadings at the time of filing. In the Second Circuit's view, dismissal is required "[o]nly if [a] real party in interest either fails to materialize or lacks standing itself." App. 31a. Because FLH existed at the time of filing and was "willing to join [the] action," the Second Circuit concluded "that Article III is satisfied in this case." App. 31a.

The Second Circuit expressly rejected what it "[a]dmitted[]" is the "far more common view"—namely, "that a case initiated in the name of a plaintiff that lacks [Article III] standing is an incurable nullity." App. 31a. The court did so because, in its view, "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." App. 43a. Ultimately, the Second Circuit believed that "the boundaries of Article III are not as

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III jurisdiction, it also held that it could not address any other pending motions, including motions to approve settlements between plaintiffs and two defendants. App. 63a.

rigid as [petitioners] suggest." App. 39a. Article III standing, the court concluded, can "be obtained after a case's initiation and given retroactive effect through procedural rules." App. 39a.[3]

The Second Circuit denied petitioners' petition for panel rehearing or rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision directly conflicts with decisions of other courts of appeals on an important question of Article III jurisdiction, is incorrect under longstanding Supreme Court precedent, and will undercut statute of limitations law and procedural fairness. This Court should grant review.

The decision below deepens an entrenched circuit conflict regarding a federal court's ability to use procedural rules to cure Article III jurisdictional defects. The Second Circuit agreed that, when this case was originally filed, no plaintiff had Article III standing because none of the named plaintiffs existed. But the Second Circuit departed from the majority of courts by holding that a district court could create

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[3] The Second Circuit also rejected the district court's holding that, under *China Agritech*, the Moon Plaintiffs' class claims were time-barred and not tolled under this Court's decision in *American Pipe*. The Second Circuit concluded that because *China Agritech* concerned "follow-on" class-action lawsuits, "[n]othing in *China Agritech* purports to say that equitable tolling does not apply to new class representatives joined within the *same* class action." App. 46a. Although the Second Circuit misinterpreted *China Agritech*, petitioners do not seek this Court's review on that issue.

Article III jurisdiction by permitting a new party to be substituted pursuant to Federal Rule of Civil Procedure 17. The Sixth and D.C. Circuits (among others) have held that "a case initiated in the name of a plaintiff that lacks [Article III] standing is an incurable nullity." App. 31a. Rejecting this "far more common view," the Second Circuit joined the Tenth Circuit, allowing procedural rules to resuscitate a case that fails to satisfy Article III. App. 31a. That split has matured; in the last two years alone, three circuits have weighed in with decisions on both sides of the question.

The Second Circuit's decision is also wrong and invites litigation abuses. When the Second Circuit acknowledged that no plaintiff had Article III standing (App. 26a-28a), its analysis should have ended and it should have dismissed the case. Nearly two centuries of precedent from this Court compels the conclusion that procedural maneuvering cannot cure the Article III jurisdictional defect in a lawsuit filed by a non-existent plaintiff. But in the Second and Tenth Circuits, those suits will proceed as courts use procedural rules to manufacture jurisdiction. Making matters worse, such an outcome encourages gamesmanship in the form of placeholder lawsuits and other tactics.

Certiorari is warranted to resolve the increasing division on this important issue of Article III jurisdiction, to conform the decision below to Supreme Court precedent, and to prevent the mischief that the minority rule will create.

I. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER A PROCEDURAL RULE CAN BE USED TO CURE A LACK OF ARTICLE III JURISDICTION IN A CASE BROUGHT BY A NON-EXISTENT PLAINTIFF.

As the Second Circuit recognized, its decision conflicts with "the far more common view" among the federal courts of appeals: that a case brought by a non-existent plaintiff is a legal nullity under Article III, and this constitutional defect cannot be cured through application of a federal procedural rule. App. 31a. The courts of appeals remain divided on that question, and recent decisions confirm that it will recur absent this Court's intervention.

A. Multiple Circuits Have Held That Cases Brought By Entities That Do Not Exist Give Rise To An Incurable Nullity Under Article III.

The Sixth and D.C. Circuits, since joined to varying extents by a number of other circuits, have held that where a case is commenced by a non-existent plaintiff (who therefore lacks Article III standing), the case is a nullity, the district court lacks jurisdiction, and the substitution of a new party cannot cure the Article III problem.

In *Zurich Insurance Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir. 2002)—a seminal case the Second Circuit acknowledged conflicts with its holding (App. 31a)—the Sixth Circuit held that, because the originally named plaintiff lacked Article III standing, a new plaintiff could not be substituted under Rule

17(a). In *Zurich*, an insurer, mistakenly named as the subrogee of an insured property owner, filed a negligence action. 297 F.3d at 530. Shortly before trial—and after the defendant had filed a motion arguing that the plaintiff was not the true subrogee—the plaintiff sought to substitute the correct subrogee as the real-party-in-interest. *Id.* The Sixth Circuit held that the district court properly denied that request because it lacked Article III jurisdiction. *Id.* at 531. The court of appeals explained that Rule 17(a) "must be read with the limitation that a federal district court must, at a minimum, arguably have subject matter jurisdiction over the original claims." *Id.* Because the named plaintiff "had no claims whatsoever against the defendants, and no Article III standing to sue," the suit suffered from an incurable Article III defect. *Id.* at 532.

The D.C. Circuit adopted the same approach long ago in *Karrick v. Wetmore*, holding that it "was beyond the power of the court" to grant leave to substitute the administrator of an estate for a party that had died before the suit was filed because "[a] proceeding begun in the name of a deceased plaintiff is a nullity." 22 App. D.C. 487, 492-493 (D.C. Cir. 1903). The D.C. Circuit has continued to apply that rule. *See, e.g.*, *Kurtz v. Baker*, 829 F.2d 1133, 1145 (D.C. Cir. 1987) (rejecting the argument that one can "cure a problem of Article III standing by substituting parties").

Albeit in unpublished decisions, the Fourth and Fifth Circuits recently reached the same conclusion. In *House v. Mitra QSR KNE LLC*, a lawsuit was initiated in the name of a plaintiff who lacked Article III standing because he had died two days before the

case was filed. 796 F. App'x 783 (4th Cir. 2019). The Fourth Circuit held that Rule 17 could not be used to substitute the real-party-in-interest because "[t]here must be a real plaintiff at the inception of the suit," *id.* at 787, and "when jurisdiction does not exist at that time, the court's only role is to dismiss the case," *id.* at 789. The Fourth Circuit declined to adopt an approach that would allow a "procedural rule" to "revive a lawsuit that a federal court lacks power to adjudicate at the outset." *Id.* at 788-789 (citing *Zurich*, 297 F.3d at 531-532). The Second Circuit expressly rejected *House* and its reasoning, holding that Article III's interest in having "an actual and live plaintiff" is satisfied "whenever there is a real party in interest ready and willing to join the action." App. 41a-42a.

The Second Circuit also acknowledged, but did not follow, a similar recent decision from the Fifth Circuit. App. 27a-28a. In *Hernandez v. Smith*, the Fifth Circuit held that the claims of a plaintiff who had died before filing suit (and therefore lacked Article III standing) could not be saved by Rule 17 because such procedural rules "cannot be used to cure a jurisdictional defect." 793 F. App'x 261, 265-266 (5th Cir. 2019).

These cases are in accord with authority from other circuits adopting the nullity doctrine and holding that, where a court lacks Article III jurisdiction, the doctrine precludes a federal court from even considering a motion to intervene. "[I]ntervention contemplates an existing suit in a court of competent jurisdiction and *** intervention will not be permitted to breathe life into a 'nonexistent' law suit." *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir.

1965); *see also Unalachtigo Band of Nanticoke Lenni Lenape Nation v. Corzine*, 606 F.3d 126, 129-130 (3d Cir. 2010) (vacating district court's denial of motion to intervene as an "advisory opinion[]" because the district court lacked Article III jurisdiction over the original action); *Hofheimer v. McIntee*, 179 F.2d 789, 792 (7th Cir. 1950) (intervention prohibited after the plaintiff died because "[a]n existing suit within the court's jurisdiction is a prerequisite of an intervention"); *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1023 (9th Cir. 2003) (intervention of a new party could not cure plaintiffs' lack of standing from the outset).

Still other cases support the majority approach. For instance, as the court of appeals here observed, the First Circuit has not expressly decided whether procedural rules can cure a jurisdictional defect. App. 40a. But the First Circuit suggested that whether a jurisdictional defect is constitutional might limit whether Rule 17 substitution is available to solve the problem. *Yan v. ReWalk Robotics Ltd.*, 973 F.3d 22, 38-39 & n.6 (1st Cir. 2020) (permitting Rule 17 substitution "because the district court at all times actually did have Article III subject matter jurisdiction over the action" and noting that a majority of the panel members "limit their joining in this portion of the opinion on the basis that the standing defect in this case may be viewed as a lack of statutory standing"). Similarly, the Ninth Circuit recently agreed with the Fourth Circuit that a deceased plaintiff lacks Article III standing. *See LN Mgmt., LLC v. JPMorgan Chase Bank, N.A.*, 957 F.3d 943, 953 (9th Cir. 2020) (finding the "reasoning" in *House*

"persuasive"). But because the Ninth Circuit considered a lawsuit against a deceased defendant—not a suit initiated by a deceased plaintiff—it did not address the "tricky substitution questions that divided the Fifth Circuit *** and the Fourth in *House*, on the one hand, from the Tenth in *Esposito*, on the other." *Id.* at 955.

B. The Second Circuit Joined The Tenth Circuit In Holding That An Article III Defect Can Be Cured By Resort To A Procedural Rule.

In the decision below, the Second Circuit joined the Tenth Circuit in adopting the minority view rejecting the nullity doctrine and permitting the court's substitution of a new party under Rule 17.

In *Esposito v. United States*, 368 F.3d 1271 (10th Cir. 2004), the Tenth Circuit considered whether a Federal Tort Claims Act suit filed in the name of a deceased individual could be saved by party substitution. The district court had denied substitution, citing the plaintiff's lack of legal capacity without deciding the larger jurisdictional question. *Esposito v. United States*, No. 02-2078, slip op. at 1 (D. Kan. Mar. 7, 2003). The Tenth Circuit reversed. It allowed the Rule 17 substitution and rejected the nullity argument. *Esposito*, 368 F.3d at 1271 ("We further reject the United States' argument that the attempted suit by a decedent was a nullity, and therefore provides nothing to relate back to.").

Given the Tenth Circuit's express rejection of the nullity doctrine, the Second Circuit cited *Esposito* as

support for its decision below.[4] App. 43a-44a. The Second Circuit expanded on *Esposito*'s problematic analysis by discounting the Article III implications. The Second Circuit determined that "pleading requirements have evolved over time" to permit a less "rigid" approach to jurisdictional questions. App. 34a, 39a. The Second Circuit held that "failing to initially name the correct party is not itself a constitutional problem" because Article III's interests in concreteness and adversity are satisfied when a party with a "stake in the controversy" is waiting in the wings. App. 36a-38a.

In sum, the conflict among the circuits is entrenched and mature, with three decisions in the last two years landing on opposite sides of this conflict.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS AND FUNDAMENTAL PRINCIPLES OF ARTICLE III JURISDICTION.

The Second Circuit is clearly on the wrong side of the split. Its conclusion that courts can employ procedural devices to create Article III jurisdiction, despite the lack of any plaintiff with standing at the outset of the case, contradicts established precedent of this Court. This Court has long recognized that a plaintiff must satisfy the requirements of Article III

[4] By contrast, the Fourth Circuit criticized the Tenth Circuit's decision for "fail[ing] to address the jurisdictional implications of [allowing substitution for] a deceased plaintiff." *House*, 796 F. App'x at 789.

when the suit is commenced and that such a lack of Article III jurisdiction cannot be cured.

Nearly two centuries ago, Chief Justice Marshall explained that a federal court has the power to cure a jurisdictional defect by removing a party that destroys complete diversity—a statutory requirement—but only if minimal diversity otherwise exists. *Conolly v. Taylor*, 27 U.S. (2 Pet.) 556 (1829). That is because without minimal diversity—an Article III requirement—the court would have "no jurisdiction either in form or substance." *Id.* at 565. This Court's precedents since *Conolly* are in accord: federal courts can use procedural rules to cure statutory but not Article III defects. *See, e.g.*, *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829 n.1, 837-838 (1989) (holding that "courts of appeals have the authority to dismiss a dispensable nondiverse party" to preserve complete diversity—a requirement based on "statute, not Article III of the Constitution").

The principle underlying the Court's precedents is fundamental: the plaintiff invoking the jurisdiction of the federal courts must have Article III standing when a case is commenced. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *see also, e.g.*, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) ("In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant."); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself

or any other member of the class."). And it is consistent with this Court's recognition that "[t]he requirement that jurisdiction be established as a threshold matter *** is 'inflexible and without exception,' for '[j]urisdiction is power to declare the law,' and '[w]ithout jurisdiction the court cannot proceed at all in any cause.'" *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (alterations and ellipsis in original) (internal citations omitted) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) at 514).

Despite the foregoing precedent, the Second Circuit held that a district court that lacks Article III jurisdiction at the outset can create it through the substitution of a real-party-in-interest pursuant to Federal Rule of Civil Procedure 17(a)(3) within "a reasonable time." FED. R. CIV. P. 17(a)(3). As this Court has made clear, however, "Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983) (citing *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809), and *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1923)). The Federal Rules of Civil Procedure, promulgated pursuant to the Rules Enabling Act, expressly acknowledge this limitation in Rule 82: "These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts." FED. R. CIV. P. 82.

It is black-letter law that a court cannot use procedural rules to supply itself with Article III jurisdiction that would not otherwise exist. Yet, under the Second Circuit's decision, federal courts can use those rules to *create* jurisdiction lacking at the outset,

so long as a party with Article III standing exists *somewhere* and is substituted into the case "within a reasonable time" (whatever a court may deem that to be). This Court's precedents do not countenance such judicial handiwork when it comes to Article III jurisdiction.

III. ONLY THIS COURT CAN RESOLVE THE IMPORTANT QUESTION OF ARTICLE III JURISDICTION AND PREVENT MISCHIEF FROM THE SECOND CIRCUIT'S DECISION.

The Second Circuit's rule is not a mere procedural nicety, allowing courts to skip a step of dismissal and re-filing to promote efficiency. To the contrary, treating Article III jurisdiction as a "needless formality" (App. 43a) contravenes bedrock constitutional principles. Resolution of the question presented here will not only be dispositive in this case; it will also ensure nationwide uniformity on a frequently recurring issue of constitutional law and civil procedure. Indeed, in the last two years alone, three circuits (including the Second Circuit below) have confronted this precise issue and reached different conclusions. *See* pp. 10-14, *supra*.

In addition, the Second Circuit's approach risks significant substantive impacts on parties, courts, statute of limitations law, and class tolling rules. It will encourage plaintiff counsel to file placeholder suits in the name of straw plaintiffs, who may lack Article III standing, while they search for proper plaintiffs that may never materialize—all the while, as here, causing courts and defendants to waste

resources litigating a nullity or a fiction. Indeed, under the Second Circuit's rule, counsel might not need *any* named plaintiff in its placeholder suit so long as some entity could theoretically "materialize" within a "reasonable time." App. 30a-31a. "To permit [such] plaintiff-less complaints," though, "is to permit the federal courts to issue advisory opinions and non-advisory orders in all manner of circumstances." *In re: 2016 Primary Election*, 836 F.3d 584, 588 (6th Cir. 2016).

The incentive to file placeholder complaints would be particularly strong when there is a rush to file. *See, e.g.*, *In re: 2016 Primary Election*, 836 F.3d at 588 (rejecting a placeholder lawsuit for lack of standing in the elections context). Suppose, for example, that the underlying claims are subject to a looming statute of limitations deadline. Counsel could seek to end-run limitations laws through a combination of placeholder suits, substitution, and attempts to apply the "relation back" doctrine. Such a strategy would allow procedural rules not only to trump Article III, but also to undercut statute of limitations laws and the fairness concerns they reflect.

Moreover, as this case well illustrates, the Second Circuit's new jurisdictional rule could undermine this Court's limits on tolling in the class-action context. The Second Circuit here allowed two separate sets of plaintiffs (first FLH, and later the Moon Plaintiffs) to use two sets of amendments to attempt to join this null action so that they could bring class claims, long after the limitations period on those claims had run. The Second Circuit held that *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018)—and its bar on asserting class

claims after a statute of limitations has expired—did not stand in plaintiffs' way because their successive class claims were added via amendment to an "ongoing action." App. 47a. That holding was a direct consequence of the Second Circuit's refusal to recognize that the action in question was void *ab initio*. Had the FLH plaintiffs been required to file a new action, as the nullity doctrine requires, both FLH's and the Moon Plaintiffs' claims would have been time-barred. Through procedural maneuvering, the Second Circuit purported to create an exception to *China Agritech*, demonstrating that its technical substitution was anything but a procedural efficiency.

The Second Circuit's rule also invites forum shopping. Under that rule, counsel can file placeholder suits and give the real-party-in-interest the option, but not the obligation, to come forward—including after motions to dismiss are decided. That is what happened here. The Second Circuit's rule allowed FLH to wait and see how the litigation was unfolding before deciding whether to seek substitution or (potentially) to file a new action in a different court. The Second Circuit did note that "Rule 17 permits courts to deny joinder of a real party in interest where the motion is made in bad faith or in an effort to deceive or prejudice the defendants or where granting the motion would otherwise result in unfairness to defendants." App. 42a-43a (internal quotation marks omitted). But such broad discretion is unlikely to deter bad behavior. To a supposed real-party-in-interest like FLH, there is little downside to waiting and watching.

Enforcing proper Article III limits, on the other hand, means that a new complaint may be untimely or subject to new defenses like waiver or unclean hands. It also eliminates the incentive for gamesmanship, and avoids wasting party and court resources on null cases. That is part and parcel of Article III's purpose: to stop federal courts from adjudicating shadow proceedings brought by disinterested parties that result in advisory opinions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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