No. 24-724

IN THE

Supreme Court of the United States

THE HAIN CELESTIAL GROUP, INC.,
WHOLE FOODS MARKET, INC.,
Petitioners,

v.

SARAH PALMQUIST, INDIVIDUALLY AND AS NEXT FRIEND OF E.P., A MINOR, GRANT PALMQUIST,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

The disclosure made in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

Respondents twist themselves in knots offering shifting theories of why any initial jurisdictional defect in this case was incurable. Most of Respondents' arguments are question-begging; and the rest either mischaracterize this Court's holdings or cannot withstand the slightest pressure-testing (or both). The Fifth Circuit plainly erred in holding that it was required to vacate the district court's final judgment between diverse parties after concluding that the district court erred in dismissing Whole Foods.

Respondents do not dispute that they had a full and fair opportunity to litigate their claims against Hain through trial to final judgment. They are not happy with the result because the district court found that they failed to prove their case. But that loss on the merits had nothing to do with any post-removal jurisdictional defect. Whole Foods was not a party to this case after being dismissed, even if the dismissal order was in error and was not final for purposes of appeal. With Whole Foods out of the case, the district court had jurisdiction to enter final judgment between the remaining diverse parties. The Fifth Circuit's holding that Whole Foods should not have been dismissed means that Respondents can assert their claims against Whole Foods in state court now.

But even assuming Respondents are correct that Whole Foods remained an invisible party to the proceedings after being dismissed, the plain teaching of *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), is that Whole Foods should be dismissed *now* to preserve the final judgment as to completely diverse parties. That issue is squarely encompassed in the question presented and was briefed in the court of

appeals and in the certiorari papers. Respondents' varied attempts to wriggle out of the shadow of *Newman-Green* simply reflect that they cannot prevail in securing a complete do-over in state court.

ARGUMENT

I. The District Court Had Jurisdiction To Adjudicate The Dispute Between Hain And Respondents.

At the time it entered final judgment, the only parties before the district court were completely diverse. Even if the court of appeals was correct that the district court should not have dismissed nondiverse (and dispensable) Whole Foods and should instead have remanded the case to state court, the dismissal of Whole Foods cured any initial jurisdictional defect, clearing the way for what came next: years of litigation, a trial, and entry of final judgment for Hain.[1] The court of appeals' holding that it had no choice but to vacate the final judgment was wrong. Respondents' arguments to the contrary lack doctrinal foundation and defy common sense.

A. After Being Dismissed, Whole Foods Was No Longer a Party.

Respondents argue that the district court never had jurisdiction over any part of this case because nondiverse Whole Foods remained a party in some

[1] In their brief to this Court, Respondents present their allegations as proven facts, *see* Resp.Br.1-2, 5-7—an improper and credibility-damaging approach in proceedings on appeal from a final judgment in favor of the defendant. Petitioners strongly disagree with Respondents' version of the facts, as did the district court after hearing presentation of Respondents' evidence at trial.

theoretical sense after it was dismissed. Respondents cite zero cases establishing that a dismissed party remains a party. Instead, their primary theory is that, because a plaintiff ordinarily cannot appeal an order dismissing a defendant until that order merges with final judgment, the dismissed defendant must remain a party. Respondents are wrong.

1. To be sure, parties ordinarily cannot immediately appeal interlocutory orders but must await final judgment to challenge all orders together. That is not a rule about subject-matter jurisdiction. The final-order rule is designed to "serve[] the important purpose of promoting efficient judicial administration." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). That a plaintiff may not immediately appeal dismissal of a defendant does not mean that the dismissal order has no effect. A dismissal order does what it purports to do: it dismisses a party from the case, at which point that entity ceases to be a party in any formal or practical sense. A court of appeals may later determine that the dismissal was erroneous, as happened here. But that does not mean the dismissed party was a party the whole time, lurking in spectral form but neither shouldering the burdens nor enjoying the benefits of an actual party. Where, as here, the party was dispensable, any erroneous dismissal does not automatically render the final judgment void.

The rule is no different in a case premised on diversity jurisdiction when the erroneously dismissed party is nondiverse. Respondents' theory is that, because the dismissal order was not immediately appealable, the "jurisdictional defect lingered through judgment." Resp.Br.21. That theory cannot survive even slight scrutiny. If Respondents' theory were

correct, the district court would have lacked jurisdiction to enter final judgment even if the Fifth Circuit had *affirmed* the dismissal of Whole Foods—because Whole Foods would have been lurking as a party the whole time.

That is obviously wrong and would eviscerate the fraudulent-joinder doctrine if it were correct. Even Respondents acknowledge that district courts have the "power to inquire into the validity of a claim against a nondiverse defendant." Resp.Br.16. And courts of appeals, including the Fifth Circuit, routinely affirm district court judgments entered after dismissal of nondiverse defendants. *See, e.g., Bolden v. Brooks,* 138 F. App'x 601 (5th Cir. 2005); *see also, e.g., Tayal v. Bank of N.Y. Mellon,* No. 20-1790, 2022 WL 563240 (4th Cir. Feb. 24, 2022); *Iloominate Media, Inc. v. CAIR Fla., Inc.,* 841 F. App'x 132 (11th Cir. 2020). Those decisions are correct only if the order dismissing a nondiverse party takes effect when entered, even if it is not yet appealable. That is precisely what happened here.

2. Respondents argue at length that the only way to cure any jurisdictional defect at the time of removal was for Hain or Whole Foods to obtain a partial final judgment as to the dismissal order pursuant to Federal Rule of Civil Procedure 54(b). That, too, is wrong.

Respondents do not cite a single case holding that dismissal of a party immediately takes effect for purposes of jurisdiction—or for any other purpose—only if the defendant secures a Rule 54(b) judgment as to the dismissal. And multiple courts have held the opposite. The Second Circuit, for example, has held that "[b]ecause the purpose of [Rule 54(b)] is thus only to clarify the appealability of an order, a dismissed

defendant who fails to obtain a Rule 54(b) certification does not remain a party to the case for purposes of determining diversity." *In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 162-63 (2d Cir. 1987). Other courts have reached the same conclusion—that a dismissed party is no longer a party even absent a Rule 54(b) judgment—with respect to other aspects of federal litigation, including discovery and assertion of cross- or counter-claims.[2] And in an analogous context, where a district court dismisses a defendant based on misjoinder under Federal Rule of Civil Procedure 20, that party's dismissal is effective immediately—the plaintiff may either file a new lawsuit against the dismissed defendant or wait until final judgment against the remaining defendants to appeal the dismissal. *See Kitchen v. Heyns*, 802 F.3d 873, 875 (6th Cir. 2015). The weight of authority among the lower courts, to say nothing of common sense, thus strongly supports the view that Whole Foods was no longer a party to the district court proceedings for *any* purpose after it was dismissed, and therefore the court had jurisdiction to enter final judgment for Hain.

Respondents attempt to prop up their Rule 54(b) theory by pointing out, repeatedly (Resp.Br.1, 2, 8, 11,

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[2] *See*, *e.g.*, *de Fernandez v. CMA CGM S.A.*, No. 1:21-CV-22778, 2024 WL 3580949, (S.D. Fla. July 30, 2024); *Marcello v. Maine,* No. CV-06-68-B-W, 2006 WL 3804891, at *3-6 (D. Me. Dec. 22, 2006) (Rule 33 interrogatories); *see also Bowen Eng'g Corp. v. Pac. Indem. Co.*, No. 14-CV-1224-JTM-TJJ, 2014 WL 6908747, at *1 (D. Kan. Dec. 8, 2014) (cross-claims); *Wagle v. Mich. Dep't of Corr.*, No. 10-CV-10506, 2012 WL 4795638 (E.D. Mich. Oct. 9, 2012) (discovery); *Tungsten Parts Wyo., Inc. v. Omanoff*, No. 21-CV-99-ABJ, 2023 WL 2630417, at *10 (D. Wyo. Feb. 27, 2023) (cross-claims).

20, 24, 33-34, "Appendix A"), that the order dismissing the nondiverse defendant in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), was effectuated through a Rule 54(b) dismissal while the order dismissing Whole Foods was interlocutory. But no amount of repetition can make that distinction matter. If, as Respondents contend, the jurisdictional holding in *Caterpillar* depended on the fact that the nondiverse defendant was dismissed pursuant to a Rule 54(b) judgment, you might expect the Court to have mentioned that in its opinion. But neither this Court nor the Sixth Circuit made any mention of Rule 54(b) in their decisions. Not only that—no party breathed a word of Rule 54(b) in any of the briefing in this Court or the court of appeals, and no Justice or advocate mentioned the rule at oral argument. Those are strong indications that dismissal of the nondiverse defendant under Rule 54(b) was a non-dispositive quirk of the case, not an unmentioned linchpin of the Court's jurisdictional holding.

Contrary to their suggestions (Resp.Br.33-34), Respondents' approach of requiring a Rule 54(b) judgment would not address any of the "overwhelming" "considerations of finality, efficiency, and economy" that motivated this Court in *Caterpillar*, 519 U.S. at 75, or the desire to avoid "unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention" that concerned the Court in *Newman-Green*, 490 U.S. at 836. Although Respondents may (or may not) have appealed a Rule 54(b) judgment dismissing Whole Foods, there is no guarantee that doing so would have solved the conundrum presented in this case. First, the Fifth Circuit might have determined on appeal that the

district court abused its discretion in entering the Rule 54(b) judgment—an outcome that would presumably put the parties right back in the situation they are in now. Second, there is no guarantee that any appeal from a Rule 54(b) judgment would have been resolved before entry of final judgment—again threatening the enormous waste of judicial and party resources that Respondents argue in favor of here. Adopting Respondents' view would both open the door to the sort of wasteful do-overs the Fifth Circuit ordered here and slow down every case involving a fraudulent-joinder dismissal as the parties seek Rule 54(b) judgments.

B. Respondents' Arguments Assume the Answer to the Question Before the Court.

Rather than grapple with the logical consequences of their positions, Respondents walk the Court through an extended question-begging exercise, proceeding from the premise that the jurisdictional flaw in this case was never cured. But Respondents cannot prevail by simply presuming their preferred answer to the core question presented in this case.

Respondents brush off the import of *Caterpillar* by arguing (Resp.Br.27) that its final-judgment-preservation holding cannot apply here because, unlike in *Caterpillar*, the initial jurisdictional flaw in this case had not been cured by the time of final judgment. But as discussed above, any jurisdictional flaw *was* cured when the district court dismissed Whole Foods, even if the dismissal was later determined to be in error and even if the dismissal was not subject to immediate appeal. *Caterpillar* itself does not answer the question whether the jurisdictional flaw was cured in this

case. The same is true of Respondents' assertions (Resp.Br.30-31) about *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567 (2004), and *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). Both decisions confirm the holding in *Caterpillar* that a jurisdictional flaw at the time of removal does not require vacatur of a later final judgment when the jurisdictional flaw is cured before entry of final judgment. On that, all parties agree. But merely insisting that no such cure occurred here cannot mask the absence of doctrinal or common-sense support for that view.

Nor does *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951) (Resp.Br.22), help Respondents because the nondiverse defendant in that case was not dismissed prior to entry of final judgment. Looking at the "posture . . . at the time of judgment" to determine whether the district court possessed diversity jurisdiction, *id.* at 17—which is exactly what Hain asks the Court to do here—the Court affirmed the notion that the judgment in a case that was improperly removed can nevertheless be affirmed when (as here) "the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment." *Id.* at 16. Because the nondiverse defendant in that case was never dismissed, the final judgment had to be vacated because—unlike here—"the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment." *Id.* at 18.[3]

[3] In subsequent proceedings in *Finn*, the nondiverse defendant was dismissed, and the original final judgment was reinstated, *see Finn v. Am. Fire & Cas. Co.*, 207 F.2d 113, 114 (5th Cir. 1953),

Respondents' reliance (Resp.Br.19, 29-30) on *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), makes even less sense. *Lexecon* was about a venue statute, not jurisdiction. And in *Lexecon*, the district court never complied with the relevant statutory command to transfer the case to a different jurisdiction whereas here (as in *Caterpillar*), the district court complied with the statutory command of complete diversity when it dismissed the nondiverse defendant before entering final judgment. *See* 523 U.S. at 43.

Respondents also err (Resp.Br.21, 24) in arguing that the district court violated 28 U.S.C. § 1447(c) by refusing to remand. That statute provides: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Congress thus required that a case "shall be remanded" when two conditions are satisfied: (1) when "it appears" to a district court that it lacks jurisdiction and (2) when the appearance that jurisdiction is lacking arises "*at any time before final judgment*." 28 U.S.C. § 1447(c) (emphasis added). But when a court of appeals determines *after* final judgment that there was a jurisdictional defect, the command to remand no longer applies because it did not "appear" to the district court that jurisdiction was lacking before final judgment. Properly understood, Section 1447(c) supports Petitioners' position because it confirms that the rules governing diversity jurisdiction favor remand in the face of jurisdictional doubts *before* entry of final judgment, but that a different rule

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an outcome that presumably would not be permissible under Respondents' view of the law.

applies *after* final judgment. At that point, the question is whether any initial jurisdictional defect was cured prior to final judgment or can be cured to preserve the final judgment. *See Grupo Dataflux*, 541 U.S. at 573.

C. None of Respondents' Alternative Theories Is Viable.

Struggling to distinguish this Court's decisions affirming that a lack of complete diversity can be cured by dismissing a nondiverse defendant, Respondents offer a litany of arguments why those cases are different. But none holds up under examination.

Respondents argue (Resp.Br.23, 26-27) that dismissal of a nondiverse defendant can cure a jurisdictional flaw, but only when the plaintiff who initially sought to litigate in state court voluntarily dismisses the defendant, thereby consenting to the jurisdiction of the federal court. But Respondents are wrong that *Caterpillar* indicates that only the plaintiff who originally sued in state court can choose to reconfigure the parties to create federal jurisdiction. Although Respondents make much of the voluntary settlement and Rule 54(b) judgment in *Caterpillar*, the original plaintiff who filed in state court was not a party to that settlement, which was between the nondiverse defendant and an insurance company that intervened as an additional plaintiff. *See* Resp.Br. Appendix A. The original plaintiff never consented to federal jurisdiction, as illustrated by his efforts in this Court to secure a remand to state court. This Court nonetheless held that the federal courts had jurisdiction after the nondiverse defendant was dismissed. It is therefore neither here nor there that *Respondents*

"never dropped Whole Foods from the litigation." Resp.Br.21. The district court dropped Whole Foods, thereby perfecting diversity jurisdiction. The court of appeals later held the dismissal was erroneous, but Whole Foods was in fact dismissed—and remained dismissed when the district court rendered final judgment.

Respondents' reliance (Resp.Br.22-23) on the so-called "voluntary-involuntary rule" fails for a simple reason: that doctrine applies to involuntary changes that happen in *state court* prior to removal, not to events that occur post-removal. 16 *Moore's Federal Practice* § 107.140[3][a][ii][C] (2025). The rule thus prevents a state-court suit that lacks complete diversity from becoming removable through the involuntary dismissal of a defendant by the state court, while allowing such a case to become removable if the plaintiff voluntarily dismisses a nondiverse defendant early in the case. Setting aside whether the "voluntary-involuntary rule" is consistent with the text of Section 1446(b)(3) (allowing a defendant to remove a case after receiving an "order" indicating that the case "is removable"), that rule has nothing to do with "cur[ing] a jurisdictional defect," Resp.Br.23, which by definition cannot exist in a *state court* case. As such, it cannot support Respondents' effort to undo the final judgment below.

Respondents further err (Resp.Br.27-28) in relying on this Court's discussion of waiver in *Caterpillar*, arguing that the discussion would have been unnecessary "if the erroneous dismissal of a nondiverse defendant 'cured' a jurisdictional defect." The Court's waiver discussion addressed a question that was *separate* from whether the jurisdictional issue had been

cured—*i.e.*, whether a plaintiff waives his right to challenge a refusal to remand if he does not seek to appeal such an order immediately. *See* Petition at i, *Caterpillar Inc. v. Lewis*, No. 95-1263, 1996 WL 33413834 (U.S. filed Feb. 8, 1996) (listing separate questions presented). After holding that a failure to immediately appeal does not constitute a waiver, *Caterpillar*, 519 U.S. at 74, the Court moved on to the jurisdictional question. But Respondents get it backwards in claiming that discussion of waiver would not have been necessary if the dismissal had cured the jurisdictional defect. If the plaintiff had waived his right to challenge the initial refusal to remand, that would have been the end of the case. That question was antecedent to the jurisdiction-curing question, which determined the effect of the subsequent dismissal of the nondiverse defendant.

D. Respondents' Arguments About Efficiency Are Misplaced.

In addition to being wrong on the law and common sense, Respondents' arguments turn principles of fairness, finality, and efficiency on their head.

Respondents argue that concerns about efficiency cannot create Article III jurisdiction where none exists. Resp.Br.19. True enough. But the task for this Court is to decide whether the dismissal of Whole Foods cured a jurisdictional defect (and, if not, whether any defect is curable now, see *infra*), not to assume the answer to that question. And here, as in *Caterpillar*, the answer should be informed by "overwhelming" "considerations of finality, efficiency, and economy." 519 U.S. at 75. Each of Respondents' purported efficiency considerations should be rejected.

Respondents and their amici propose an incentive system that is punitive, not efficient. Respondents posit that district courts considering fraudulent-joinder arguments will be more likely to get it "right on the front end" (Resp.Br.12) if they know that getting it wrong might result in years of wasted time and money by courts and litigants alike. *See* Resp.Br.36; Profs.Am.Br.11. But reasonable and well-intentioned judges often disagree on close questions of law. It is a grim view of efficiency to urge, as Respondents do, that an honest mistake on a close question deserves to be punished by wiping out years of subsequent efforts among diverse parties. Respondents make no effort to hide the self-serving nature of their approach, instead extolling as a virtue (Resp.Br.36) that the threat of wasted effort will motivate district courts to rule more often for plaintiffs in these circumstances. Congress has already established the appropriate balance by making a district court's remand decision unreviewable while leaving refusals to remand open to appeal. 28 U.S.C. § 1447. No additional extra-statutory sticks are needed to encourage district courts to faithfully apply the law in this area.

Respondents similarly propose to replace this Court's concerns about efficiency with a punitive approach by asserting (Resp.Br.33) that Hain is to blame for arguing that Whole Foods was fraudulently joined. Respondents acknowledge (Resp.Br.16) that district courts may address fraudulent joinder—and far from being frivolous, the district court agreed with Hain's argument that Whole Foods was fraudulently joined. Although the Fifth Circuit later disagreed, that is an ordinary feature of our federal system, not a sign that either Hain or the district court was acting in bad

faith and should now be punished. Requiring vacatur of the final judgment "after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green*, 490 U.S. at 836. "The same may be said of the remand to state court [Respondents] seek[] here." *Caterpillar*, 519 U.S. at 76.

Finally, Respondents brush off the waste that will inevitably result from erasing years of federal court litigation, asserting (Resp.Br.34) that "discovery from the federal proceeding can be used in state court." While the federal discovery would certainly be available for a state-court do-over, plaintiffs would certainly seek additional discovery in state court in an attempt to cure the defects in their case—exactly as Respondents here have now done. The ability to repurpose some discovery hardly makes up for resources that would ultimately be wasted by wiping out a two-week jury trial, starting over on experts, and repeating significant pretrial expert briefing, extensive motions *in limine*, and motions for summary judgment. As Respondents' own amici explain, "[e]very good lawyer knows that pre-trial litigation is where many and even most litigation costs accrue." Profs.Am.Br.13. It may be that only "a few days" were spent in the trial in this case, Resp.Br.34, but surely Respondents' counsel can confirm that pretrial costs go far beyond discovery costs. Respondents' insistence (Resp.Br.35) that only a small proportion of federal cases go to trial only reinforces how labor- and cost-intensive trials are for parties and for courts, underscoring the importance of preserving final judgments in those cases that do go to trial.

II. Any Lingering Jurisdictional Defect May Be Cured By Dismissing Whole Foods Under Rule 21.

If there is any doubt that the dismissal of Whole Foods cured the initial jurisdictional defect, this Court should still vacate the Fifth Circuit's judgment and remand with instructions to dismiss (or consider dismissing) Whole Foods under Federal Rule of Civil Procedure 21. That result is compelled by the Court's decision in *Newman-Green*. Rather than engage with this argument on the merits, Respondents primarily seek to evade it.

A. Petitioners' Arguments About *Newman-Green* and Rule 21 Are Properly Before this Court.

Respondents argue that whether Whole Foods can be dismissed under Rule 21 is not encompassed within the question presented and was not pressed below. That is nonsense.

1. The question presented is "[w]hether a district court's final judgment as to completely diverse parties must be vacated when an appellate court later determines that the district court erred by dismissing a non-diverse party at the time of removal." Pet. i. This Court's rules provide that the "question presented is deemed to comprise every subsidiary question fairly included therein." R.14.1(a); *see also* Steven M. Shapiro et al., *Supreme Court Practice* § 6.25(G) (11th ed. 2019). As explained in the petition for a writ of certiorari and in Petitioners' opening brief, the answer to the question presented is "no" if *either* the district court had jurisdiction at the time it entered final judgment *or* nondiverse Whole Foods can be dismissed

now under Rule 21. There can be no doubt that the *Newman-Green*/Rule 21 argument is therefore encompassed in the question presented.

Respondents claim that Petitioners' arguments about *Newman-Green* and Rule 21 are attempts to "change" the question or to "raise additional questions." Resp.Br.38 (quoting S. Ct. R. 24.1(a)). That is a transparent attempt to avoid grappling with an argument to which they have no real answer by tapping into this Court's frustration in recent years with some parties' attempts to change the question presented at the merits stage. Petitioners here have done nothing like that.

Nor have Respondents been unfairly surprised at the merits stage. The Petition expressly argued that the Fifth Circuit's decision "could not be squared with" *Newman-Green*, Pet. 2, and that the use of Rule 21 this Court approved in *Newman-Green* would have cured any jurisdictional defect in this case if the Fifth Circuit had dismissed dispensable Whole Foods, Pet. 22-24. Respondents plainly understood Petitioners to be raising this issue as they dedicated more than a page of argument in their brief in opposition to the possibility of "drop[ping] Whole Foods" under Rule 21—contending that such a disposition would have been improper on the merits, BIO 23-24, but never suggesting the issue lay outside the question presented. Respondents also conceded in their brief in opposition both that "[t]he district court might have been permitted to create complete diversity by exercising its discretion to drop Whole Foods from the case if it concluded that Whole Foods was a 'dispensable nondiverse party,'" BIO 23 (citing *Grupo Dataflux*, 541 U.S. at 573, and Fed. R. Civ. P. 21), and that "on

appeal, the Fifth Circuit might have cured the jurisdictional error by exercising its discretion to drop Whole Foods as a 'dispensable nondiverse party,'" *id.* (citing *Grupo Dataflux*, 541 U.S. at 573, and *Newman-Green*, 490 U.S. 826). Respondents cannot now feign shock that Petitioners have briefed *Newman-Green* after conceding that it is properly part of the case and engaging its merits at the certiorari stage.

2. Respondents also overreach in arguing that Petitioners did not raise the *Newman Green*/Rule 21 argument below. That assertion is particularly surprising given Respondents' own concession in their brief in opposition that "the Fifth Circuit was invited to consider the discretionary power extended by *Newman-Green*," BIO 24, to "dismiss a dispensable party whose presence spoils statutory diversity jurisdiction," *Newman-Green*, 490 U.S. at 826. They now attempt to disclaim that concession, Resp.Br.40 n.8, by reimagining the briefing in the court of appeals.

In the Fifth Circuit, both Hain and Whole Foods argued vacatur was not required, explaining that preserving the district court's final judgment "makes particular sense because [the Fifth Circuit] has authority to dismiss Whole Foods under Federal Rule of Civil Procedure 21 on its own motion to preserve jurisdiction." CA5 Hain Br. 28; *see also* CA5 Whole Foods Br. 16. Respondents understood that argument for what it was, contending in their reply brief that it would be prejudicial to Respondents if the court of appeals dismissed Whole Foods because it would deprive them of their chosen forum. CA5 Reply Br. 18. The same arguments were repeated at the en banc stage. CA5 Hain Reh'g Pet. 8; CA5 Combined Resp. to Reh'g Pets. 13.

Respondents also argue that Petitioners were required to file a separate motion in the court of appeals to dismiss Whole Foods under Rule 21. Resp.Br.40-41. But no such motion was required because Rule 21 expressly authorizes a court to dismiss a party "on its own motion." Hain had no reason to file a Rule 21 motion in the district court, where Whole Foods was no longer a party. And by arguing to the court of appeals that the court could use Rule 21 to dismiss Whole Foods if necessary to preserve the final judgment, both Hain and Whole Foods took all necessary procedural steps to preserve the argument.

B. If Necessary to Preserve the Final Judgment, Whole Foods Should Be Dismissed Pursuant to Rule 21.

Beyond attempting to avoid the issue, Respondents offer no valid argument why Whole Foods should not be dismissed if necessary to preserve the final judgment. Whole Foods is a dispensable party whose absence from the trial did not prejudice Respondents or give Petitioners a tactical advantage.

1. The Court in *Newman-Green* confirmed the long-held understanding that appellate courts can dismiss a dispensable nondiverse party to preserve a final judgment. 490 U.S. at 833-37. That authority should be applied here. Echoing their arguments about *Caterpillar*, Respondents try to cabin the reach of *Newman-Green* by asserting that its judgment-preserving dismissal power can be invoked only at the behest of—or at least with the approval of—a plaintiff. *Newman-Green* never hints at any such limitation.

Respondents continue to confuse correlation with causation, arguing that because the request to dismiss

the nondiverse defendant in that case—and in *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570 (1873)—came from the plaintiffs, such dismissals are permissible *only* if requested by a plaintiff. That assertion cannot be reconciled with the text of the rule itself, which contemplates that a Rule 21 dismissal may come at the behest of "any party" or at the court's "own initiative." Fed. R. Civ. P. 21. And it finds no support in *Newman-Green*. Quite the opposite: the Court in *Newman-Green* described as "well settled" the notion that "a dispensable nondiverse party" can "be dropped at any time, even after judgment has been rendered," citing three cases in support. 490 U.S. at 832 & n.6. One of those cases involved the dismissal of a nondiverse plaintiff after entry of final judgment and over the objection of the remaining plaintiff, to preserve the judgment in favor of the defendant. *See Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1068-69 (3d Cir. 1979).

It is hardly surprising that the plaintiffs in *Newman-Green* and *Horn* sought to dismiss jurisdiction-spoiling defendants—because the plaintiffs won in those cases and wanted to preserve their victories. But where—as here and in *Publicker*—the defendant won, *Newman-Green* and Rule 21 allow the post-judgment dismissal of a nondiverse party to preserve the favorable judgment. *See Gorfinkle v. U.S. Airways, Inc.*, 431 F.3d 19, 22 (1st Cir. 2005) (nondiverse defendant added after removal was dismissed over plaintiff's objection in order to preserve judgment for defendant); *Highland Cap. Mgmt. LP v. Schneider*, 198 F. App'x 41, 45 (2d Cir. 2006) (same); *Ingram v. CSX Transp., Inc.*, 146 F.3d 858, 862-63 (11th Cir. 1998) (same).

2. Although the Court in *Newman-Green* blessed the practice of dismissing a nondiverse defendant on appeal to preserve a final judgment, it cautioned that Rule 21 should not be used to cause prejudice to any party, including when "the presence of the nondiverse party produced a tactical advantage for one party or another." 490 U.S. at 837-38. No such concerns are present here.

No party obtained a tactical advantage from the dismissal of Whole Foods. Respondents do not suggest that Whole Foods' absence influenced the trial or the judgment in favor of Hain. That is unsurprising as the district court's judgment turned on Respondents' failure to present evidence of causation, a failure that had nothing to do with Whole Foods and everything to do with the lack of scientific support for Respondents' case. *See* Pet.App. 30a-31a. Nor have Respondents argued that Whole Foods was an indispensable party—also unsurprising given that Whole Foods was the only retailer Respondents sued despite admitting that they purchased Hain's products from multiple different retailers. *See* Doc. 69-6 at 13.

More generally, Respondents err in arguing that they will suffer prejudice from having to live with the judgment below.

First, Respondents assert that they have suffered prejudice from being forced to litigate in federal court a claim they had the right to litigate in state court. Resp.Br.45. But that is not true; Respondents had no right to litigate a claim against Hain alone in state court, and they will now have the chance to assert their claims against nondiverse Whole Foods in state court. The only thing Respondents "lost" was the convenience of suing both defendants in the same

litigation. That is an ordinary consequence of a district court's dismissal of a defendant, not prejudice.

Second, Respondents complain that they will have to face the preclusive consequences of their loss on the merits to Hain, arguing that "[a]llowing an improper use of federal judicial power to give rise to a preclusion defense in state court would furnish the ultimate example of prejudice." Resp.Br.48. That audacious claim fails at every step. The district court *did* have jurisdiction to consider and rule on Respondents' claims against diverse Hain. And it was not the exercise of jurisdiction but Respondents' failure to prove their case that will give rise to a preclusion defense in state court.

Respondents' related argument that application of *Newman-Green* to this case would risk "conflicting jury findings" as to the two defendants is equally puzzling. If this Court vacates the Fifth Circuit's decision and preserves the final judgment, the Fifth Circuit on remand will consider Respondents' arguments challenging the merits of that judgment. In the unlikely event that Respondents prevail, the judgment will be vacated, and Respondents will be able to sue both Hain and Whole Foods in state court. Otherwise, the judgment for Hain will remain, and Respondents will be able to assert claims against Whole Foods in state court—where they will face the preclusive effect of the federal judgment. There is no conceivable prejudice to Respondents in either situation and no risk of inconsistent judgments.

Third, Respondents contend that under Texas law, any relief awarded by the district court would be "inadequate" because Hain and Whole Foods would not be jointly and severally liable for any injuries to

Respondents. Resp.Br.46-47. That argument is mystifying; the district court has already concluded that Respondents failed to prove they suffered any injury from Hain's products. They are therefore entitled to no relief. The same can be said of their "empty chair" argument. Resp.Br.47. There was no empty chair: it was occupied by Hain. And the suggestion that Hain "blame[d]" Whole Foods is belied by the fact that Whole Foods was not even mentioned at trial except with reference to several retailers that sold Hain products. *Id.* The inquiry under *Newman-Green* is whether any actual party would suffer prejudice from a jurisdiction-curing post-judgment dismissal. Respondents cannot establish prejudice *to them* by positing hypothetical scenarios in which different plaintiffs might suffer prejudice from having to sue alleged tortfeasors separately.[4]

In sum, although Respondents are unhappy that they lost, they would face no legally cognizable prejudice from having to live with that result.

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[4] Even assuming Respondents have alleged a divisible injury, moreover, they would have been entitled to the full measure of damages from Hain had they prevailed below. *See* Tex. Civ. Prac. & Rem. Code Ann. § 33.013(b)(1) (providing that defendants liable for more than 50% of an injury are jointly and severally liable for all damages).

CONCLUSION

For the reasons set forth above and in the opening brief, the judgment of the court of appeals should be vacated and the case remanded to the court of appeals with instructions to dismiss Whole Foods and to consider the other arguments Respondents raised on appeal.

Respectfully submitted,

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