No. 23-677

IN THE

Supreme Court of the United States

ROYAL CANIN U.S.A., INC. AND
NESTLÉ PURINA PETCARE COMPANY,
Petitioners,

v.

ANASTASIA WULLSCHLEGER AND GERALDINE BREWER,
Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

In pleading state-law claims, Respondents alleged a litany of damning facts, including some violations of the Food, Drug, and Cosmetic Act (FDCA). State law supplied both the causes of action and the remedies, but under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) the case may nonetheless arise under federal law if the federal violations are necessarily raised, actually disputed, substantial, and resolvable without upsetting federalism. This Court held that even necessarily raised FDCA violations embedded in state-law claims are not substantial, *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), but the lower court upheld jurisdiction, relying on *Grable* and discounting *Merrell Dow*.

Immediately, Respondents demonstrated that each federal issue was neither necessary nor substantial by amending the complaint as of right to excise them entirely. The questions for this Court are:

1. Whether the jurisdictional test from *Grable* should be overruled.

2. Whether jurisdiction to decide federal questions survives the plaintiffs' voluntary abandonment of every federal question.

3. Whether a district court retains supplemental jurisdiction under 28 U.S.C. § 1367 over state-law claims even after the plaintiffs have voluntarily eliminated all federal issues.

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BRIEF FOR RESPONDENTS

INTRODUCTION

A good jurisdictional rule paints with clean lines: complete diversity; more than $75,000 in controversy; the well-pleaded complaint rule. Some rules, if incapable of being completely clearcut, at least strive for discernable standards: injury in fact; minimum contacts. Just one jurisdictional rule is so subjective and chaotic that an opinion of the Court compared it to a "canvas . . . that Jackson Pollock got to first." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). The rule, of course, is the test for "arising under" jurisdiction.

In 1916, when Jackson Pollock was four years old, Justice Holmes supplied a clean interpretation of the jurisdiction-conferring statutory text: "A suit arises

under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). This Court has been flinging paint on the canvas ever since. The current test encompasses state-law claims that implicate a "federal issue [that] is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. The first two prongs have little case law, and the second two are hopelessly indeterminate.

This case is exhibit A. In February of 2019, Anastasia Wullschleger and Geraldine Brewer alleged Missouri-law claims by Missouri citizens against Missouri defendants based on antitrust, unjust enrichment, and deceptive marketing. The original complaint's facts section alleged that the pet food companies violated the Food, Drug, and Cosmetic Act (FDCA), sold misbranded products, dominated the market, and colluded on misrepresenting ordinary pet food as a prescription product, among other acts.

The district court held that *no* claim was federal, but the Eighth Circuit reversed, holding that the Missouri antitrust and unjust enrichment claims—but not the consumer deception claim based on the same facts—were federal. Because the federal violations were peripheral to the case, Respondents amended their complaint, stripping them out from the facts section and cutting the antitrust and unjust enrichment claims altogether, but adding civil conspiracy. This time, the district court found federal jurisdiction for *just* the civil conspiracy count, but the Eighth Circuit again reversed. The jurisdictional skirmishes have consumed more than five years of judicial resources for a case that remains at the starting gate.

Inconsistent, years-long litigation over federal jurisdiction occurs throughout the federal courts. *Grable* is unworkable, and its test is far inferior to the *American Well Works* standard. Scholars and lower courts have criticized its incoherence for years. This Court should take this opportunity to overturn it.

If the Court retains *Grable*, it should either reaffirm *Merrell Dow* or affirm that amended complaints supersede old complaints for purposes of jurisdiction just as for every other purpose. The only real justification Petitioners provide for departing from that rule are vague "forum manipulation" fears that do not occur now and, of course, have no bearing on the meaning of a jurisdictional statute's text. Jurisdiction should turn on clear rules and first principles, not chimerical policy concerns.

STATEMENT OF THE CASE

A. Pet food companies deceive consumers with bogus "prescription" foods.

This action is about overpriced pet food. Royal Canin U.S.A., Inc., Nestlé Purina Petcare Co., and other non-defendant pet food makers marketed so-called "Prescription Pet Food" to treat certain conditions. They have agreed among themselves to require a veterinarian's "prescription" before consumers may purchase it, to mimic the experience of purchasing an actual prescription product. Real prescription medications are regulated by state laws governing the practice of medicine and Food and Drug Administration regulations which require rigorous testing for safety and efficacy. The active ingredient in prescription medication is, in general, not available without a prescription. Accordingly, prescription products command high prices.

The pet food prescriptions at issue in this suit are bogus—there is no basis in any law for requiring prescriptions, there is no FDA review of safety or efficacy, and pet food with the same ingredients can be purchased *without* a prescription. The companies misrepresent the Prescription Pet Food as:

> (a) a substance medically necessary to health; (b) a drug, medicine, or other controlled ingredient; (c) a substance that has been evaluated by the FDA as a drug; (d) a substance as to which the manufacturer's representations regarding intended uses and effects have been evaluated by the FDA; and (e) a substance legally required to be sold by prescription. Prescription Pet Food is none of these.

J.A. 75 (original complaint); J.A. 129-30 (amended). The companies agreed among themselves to impose similar "prescription" requirements, reducing competition and conditioning consumers to accept their misrepresentations. Consumers believe these misrepresentations, paying more for "prescription" chow.

This conduct is not only deceptive, but also violates federal law. The complaint alleges in detail that each "prescription" pet food purports to prevent or treat specific conditions. J.A. 82-83 (quoting claims such as improving "Renal Health," "intestinal health," or "glucose fluctuations"). The FDCA classifies products that purport to treat diseases as drugs, and imposes a bevy of safety and quality requirements. There is no real question that Petitioners are violating these provisions. Take it from the FDA:

> [M]ost dog and cat food products that claim on their labels or in their labeling or other manufacturer communications to treat or

> prevent disease are not approved new animal drugs, and do not comply with drug registration and listing requirements, or with current good manufacturing practices applicable to drugs even though the products are drugs under the FD&C Act.

FDA, *Compliance Policy Guide*, *§ 690.150 Labeling and Marketing of Dog and Cat Food Diets Intended to Diagnose, Cure, Mitigate, Treat, or Prevent Diseases* at 4 (Apr. 2016); *see* J.A. 89 (citing this policy).

Respondents (the "pet owners") purchased "prescription" pet food on the understanding that it was a prescription product, included medicine to treat their pets' maladies, and had undergone FDA-reviewed testing. They paid more based on those beliefs. They brought a putative class action, alleging claims under the Missouri Antitrust Law, J.A 105-08, the Missouri Merchandising Practices Act ("MMPA"), J.A. 108-11, and unjust enrichment common law, J.A. 112-14.

B. Pet owners file a complaint with only Missouri-law claims, but the Eighth Circuit holds that their case "arise[s] under" federal law.

After the pet owners filed suit in Kansas City, Missouri, Purina removed, invoking federal-question jurisdiction. Pet. App. 60a. The pet owners moved to remand. They explained that no federal issue in the case was necessary to any claim or substantial. The district court agreed, examining each claim and concluding that each "can be evaluated with reference only to state law." Pet. App. 21a. The companies sought interlocutory review under 28 U.S.C. § 1453(c).

The Eighth Circuit granted the petition and reversed. It recognized the similarity of this case to *Merrell Dow*

Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986), since both cases involved state-law causes of action that invoke violations of the FDCA as a theory of liability. Pet. App. 30a. It noted that the FDCA provisions at issue had no private right of action, as *Merrell Dow* had emphasized. Pet. App. 31a. But *Merrell Dow* "merely include[d] a violation of federal law as an element of the offense, without *other* reliance on federal law." *Id.* (emphasis added). The proper test, in the Eighth Circuit's view, came from *Grable*, 545 U.S. 308, and turned entirely on whether "a federal forum may entertain a state law claim implicating a disputed and substantial federal issue 'without disturbing any congressionally approved balance of federal and state judicial responsibilities.'" Pet. App. 31a (quoting *Grable*, 545 U.S. at 314).

The Eighth Circuit applied that interest-balancing test by assessing the gestalt of the complaint, finding it, in a word, federal enough. The MMPA claims need "not depend on federal law," but the antitrust and unjust enrichment claims were too federal since they "included no fewer than 20 paragraphs" addressing FDCA violations. Pet. App. 31a. The complaint alleged "that defendants violated the FDCA, were non-compliant with FDA guidance, and that their refusal to submit the prescription pet food to FDA review was improper." Pet. App. 32a. The court particularly focused on the prayer for relief, seizing on paragraph 138, which, among eleven paragraphs of other remedies, mentioned federal law once, in the alternative.[1] After

[1] That paragraph requests an order "enjoining Defendants to comply with all federal and Missouri provisions applicable to the manufacturer of such drugs, *or alternatively, enjoining Defendants from making the disease treatment claims on the packaging of Prescription Pet Food*." J.A. 115 (emphasis added). The court

conveying the federal feel of the complaint—but without examining whether each claim could be proved by reference only to state law, as the district court had done—the Eighth Circuit concluded that the action arose under federal law.

C. Pet owners file an amended complaint with fewer Missouri-law claims, which the Eighth Circuit holds does not arise under federal law.

Back in district court, the pet owners filed an amended complaint as of right under Rule 15(a), excising the antitrust and unjust enrichment counts entirely, but adding civil conspiracy allegations that would support joint and several liability for the MMPA claim. J.A. 118. Next, they moved to remand. This time, the district court denied remand with cryptic reasoning that the amended claims put at issue whether "a prescription was required," for which "federal law must be examined." Pet. App. 44a. Since it found federal question jurisdiction for the amended claims, it did not address supplemental jurisdiction. The district court dismissed all claims under Rule 12, and the pet owners appealed.

Again, the Eighth Circuit reversed. Judge Stras, writing for a unanimous panel, first addressed the amended complaint. The MMPA claim and the civil conspiracy claim, he explained, did "not *necessarily* raise a substantial federal issue" because they are "based on the . . . [theory that] the manufacturers misled pet owners into believing that prescription pet

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omitted the "alternative" language, eliding the key "necessarily raised" inquiry. *Compare* Pet. App. 32a *with* J.A. 115.

food legally required a prescription," and so "there is nothing federal about it." Pet. App. 6-7a.

Second, the panel explained why the amended complaint controlled over the original complaint. It started with the black-letter rule that amended complaints supersede original complaints. Pet. App. 7a. That is why amended complaints can *create* federal question jurisdiction that was originally lacking. Next, it plumbed the "subtle" distinctions between the "state of things" at the time of filing and the "*alleged* state of things." Pet. App. 8-9a. Jurisdiction is determined by the facts at the time of filing (the citizenship of the parties, the amount in controversy, the minimum contacts with the forum, a plaintiff's injury in fact), rather than the facts at some other time. Pet. App. 9a. But an amended complaint is not amending the alleged facts as of the amendment, but rather is amending the plaintiff's allegations about what facts were true at the time of filing. In the parlance of the Federal Rules, the allegation "relates back." Fed. R. Civ. P. 15(c)(1). This principle stretched back "nearly 100 years." Pet. App. 11a. The panel acknowledged that some circuits disagreed, chiefly based on "forum-manipulation concerns" of the sort Petitioners and their amici reprise here, but it applied "jurisdictional rigor," declining the invitation "to apply a one-way forum-manipulation ratchet." Pet. App. 10a.

Third, the panel rejected supplemental jurisdiction. Pet. App. 11-12a. This holding flowed from the previous one: with no federal question in the case, this was not a "civil action of which the district courts have original jurisdiction," and so 28 U.S.C. § 1367(a) does not apply. Pet. App. 12a.

This Court granted certiorari.

SUMMARY OF THE ARGUMENT

This Court should hold that an action arises under federal law only when federal law creates the cause of action. Well-reasoned cases for many decades consistently held that when state law incorporates federal law, there is no federal question. State law could incorporate a dissenting opinion of this Court as readily as federal law, but whatever it incorporates remains state law. A case does not come into being, or arise under, federal law where state law creates the cause of action.

That clear rule was in force from the earliest cases until the unprincipled departure in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). Without briefing, on an expedited schedule, the Court in *Smith* failed to cite the wealth of on-point precedent and gave erroneous descriptions of the cases it did cite. After *Smith*, this Court upheld federal-question jurisdiction in *Grable*, crafting an unworkable test that turns on the necessity and substantiality of a disputed federal question the adjudication of which will not disrupt the proper balance of federal and state courts. 545 U.S. at 318.

The lower court decisions in this case illustrate *Grable's* pitfalls. The embedded federal issues are plainly not substantial and may not even be disputed. No federal issue is necessary, since the pet owners could prevail on each claim without them. Placing ordinary state-law claims like these into federal court upsets the federal and state court balance. That the Eighth Circuit reversed the district court twice demonstrates how difficult *Grable* is to apply.

Stare decisis cannot save *Grable*. Its reasoning is unpersuasive. Its standard is entirely unworkable. No

one modifies their primary behavior based on *Grable*. Overturning it will save decades of pointless litigation with minimal offsetting costs. Since 1875, when Congress first enacted the analog to section 1331, this Court has upheld arising-under jurisdiction of purely state-law cases a grand total of four times. The expensive game of bogging federal courts down in extensive jurisdictional litigation is plainly not worth the candle.

If the Court nonetheless retains *Grable,* the plain text of sections 1367 and 1331 compel affirmance. Under section 1367, this appeal turns on whether this "civil action" is one over "which the district courts have original jurisdiction." 28 U.S.C. § 1367(a). To exercise supplemental jurisdiction over state-law claims, there must be "claims in the action" that arise under federal law. And the operative complaint, not an abandoned pleading, determines which claims are "in the action." Congress knows how to focus on the "initial pleading" to determine jurisdiction, *cf.* 28 U.S.C. § 1446(c)(2), but it did not do so here.

Black-letter law teaches that an amended complaint replaces and supersedes the original complaint. Rule 15(c) explains that amendments relate back to the time of filing. This means that when sections 1331, 1332, and 1367 refer to a civil action in the present tense, they refer to the amended complaint. Even Petitioners agree that the amended complaint controls for complete diversity, original federal-question cases, and removed federal-question cases where an amendment adds a federal claim. There is no textual basis for consulting the initial complaint *only* for removed federal-question cases where an amendment eliminates the federal claims.

Amendments are different from dismissals. Where a court dismisses a claim, it remains in the action and

can be appealed. But when a claim is voluntarily amended away, it is truly gone and cannot be appealed.

Petitioners' pre-1367 case law, legislative history, and policy arguments are insufficient and unpersuasive. The *Cohill* case's discussion of amendment was dicta, and the issue was neither briefed nor decided there. Moreover, Congress codified *Cohill's* holding in section 1367(c)(3), which allows discretionary remand where "the district court has dismissed all claims over which it has original jurisdiction." 18 U.S.C. § 1367(c)(3). That language does not apply to amendments, which is why Petitioners are forced to rely on the intentions of two law professors and their proposed, unenacted version of the statute. It should be settled by now that those sorts of atextual materials do not say what the law is.

Free-floating forum manipulation concerns do not define the statutory text either. Regardless, Petitioners' rule would not stop any manipulation, since plaintiffs could file originally in federal court (and then amend away the federal issues), or, after removal, they could voluntarily dismiss under Rule 41 (and then refile in state court). Either would allow the very manipulation Petitioners fear, no matter how this Court rules in this case. The only serious forum manipulation problem is defendants' meritless removal efforts.

ARGUMENT

I. The Court Should Restore Clarity To Federal Jurisdiction By Overturning *Grable*.

The Eighth Circuit's first opinion finding federal-question jurisdiction when it is so clearly lacking is confirmation that *Grable* offers an unworkable test. This case is indistinguishable from *Merrell Dow*, and the federal issues are not even arguably necessary to

any claim. Yet the Eighth Circuit found jurisdiction—and this happens all the time. Applications of *Grable* are among the most frequently reversed determinations in the federal courts. Scholars cannot reconcile the cases. Litigants cannot predict how courts will rule. The result is years of pointless litigation over jurisdiction, burdening courts and litigants alike. It is time to call the experiment of federal-question jurisdiction over state-law causes of action a failure and embrace Justice Holmes's test.

A. The Holmes rule is correct.

Legal claims created by a given source of law arise under that law only, because the law that creates a claim is authoritative on its scope. The text of section 1331 confers "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Aside from a now-removed amount in controversy requirement, that text is indistinguishable from the words Justice Holmes construed from the Jurisdiction and Removal Act of 1875. The "common usage of the word 'arise'" is "'come into being; originate' or 'spring up.'" *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382-83 (2004) (quoting American Heritage Dictionary 96 (4th ed. 2000); Black's Law Dictionary 138 (rev. 4th ed. 1968); Oxford English Dictionary 629 (2d ed. 1989)). The question, then, is whether a claim created by state law can "come into being," or "originate" or "spring up" from *federal* law merely because state law directs that federal law shall somehow be relevant to the merits.

The answer is no. This Court explained why in an 1893 dispute over land, *Miller's Executors v. Swann*, 150 U.S. 132 (1893). There, an 1856 Act of Congress conferred land for building railroads, permitting resale only after a certification on the progress of construction.

Id. at 135. In turn, Alabama granted the land to a railroad company, allowing resale only "in accordance with" federal law. *Id.* The hapless railroad quickly resold the land and became insolvent, leading creditors to contest the sale as void because no certification on construction progress had been made. Even though the federal certification requirement was dispositive, this Court held that the state-law suit did not arise under federal law:

> The question is not what rights passed to the state under the acts of Congress, but what authority the railroad company had under the statute of the State. The construction of such a statute is a matter for the state court . . . . The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the state **does not make the determination of such rights a Federal question**. A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character.

Id. at 136-37 (emphasis added).

This logic arose in multiple opinions, most famously authored by Justice Holmes. The Court rejected federal question jurisdiction over a state-law claim that turned on a federal-law issue because "[t]he state

law is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfilment is like the reference to a document that it adopts and makes part of itself. The suit is not maintained by virtue of the Act of Congress, but by virtue of the Louisiana statute that allows itself to be satisfied by that act." *Louisville & Nashville R.R. Co. v. W. Union Tel. Co.*, 237 U.S. 300, 303 (1915). This stream of cases is why *American Well Works* could be so pithy: "A suit arises under the law that creates the cause of action." 241 U.S. at 260. The reason for this holding was the insight that "[t]he State is master of the whole matter," and federal law plays a role in such cases only insofar as it can be enforced as *state* law. *Id.*

This reasoning is powerful and persuasive. In this case—as in all *Grable*-style cases—federal law would be inert and irrelevant to the claim but for a provision of *state* law that gives it force. It is the state sovereign that causes everything—federal or otherwise—to "spring up" in the dispute. State law can incorporate as a rule of decision the Uniform Commercial Code, another state's law, federal law, international standards, federal law as of 1925, federal law as construed by a dissenting justice of this Court, or myriad other options; whatever is incorporated becomes, for that purpose, *state* law. To be sure, federal law *as federal law* can limit or entirely block a state-law claim, but chiefly as a preemption defense under the Supremacy Clause, which turns on statutory law made in pursuance of the Constitution, *i.e.* on statutory law enacted by Congress, not a state. Art. vi, cl. 2. And "a suit brought upon a state statute does not *arise* under" the Supremacy Clause where

preemption is raised as a defense. *Gully v. First Nat'l Bank*, 299 U.S. 109, 116 (1936) (emphasis added).[2]

B. The cases that departed from *American Well works* were poorly reasoned.

The cases that abandoned Justice Holmes's rule gave weak justifications (where they gave any at all). The original sin was *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), an expedited, high-stakes case in which shareholders sued to enjoin corporate officers from purchasing federal farm-loan bonds on the theory that the bonds were constitutionally infirm. Both parties supported federal jurisdiction. *Id.* at 199.

The Court breezily noted that the "general rule is" to uphold jurisdiction "where it appears from the [pleadings] . . . that the right to relief depends upon the construction or application of the Constitution or laws of the United States." *Id.* That is not the general rule—recall *Miller's Executors* and *Louisville & Nashville R.R.*, where relief depended upon federal law. Next, the Court bulldozed the well-pleaded complaint rule, quoting that a "case . . . consists of the right of the one party, as well as of the other" and so there is arising under jurisdiction "whenever its correct decision depends on the construction" of federal law." *Id.* (quoting *Cohens*, 19 U.S. (6 Wheat) at 379). *Cohens* upheld jurisdiction "only in its appellate form," which has

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[2] This Court's appellate jurisdiction from state courts follows a different rule. A federal defense "may appear in the progress of the case" in state court, grounding "jurisdiction [that] can be exercised only in its appellate form." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 394 (1821); *see also* Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 Duke L.J. 263, 338 (2007); *cf.* 28 U.S.C. § 1257 (authorizing writs of certiorari from state courts without a well-pleaded complaint rule).

never been subject to the well-pleaded complaint rule, but *Smith* ignored that. Last, *Smith* cited the notorious case *Pollock v. Farmers' Loan & Trust Co.*, as supporting jurisdiction, omitting that jurisdiction was secure in *Pollock* as "a controversy between citizens of different states." 157 U.S. 429, 675 (1895), *modified*, 158 U.S. 601 (1895).

Justice Holmes's trenchant dissent explained again why embedded federal issues—embedded only because a state sovereign chose to embed them—cannot support jurisdiction: "If the Missouri law authorizes or forbids the investment according to the determination of this Court upon a point under the Constitution or Acts of Congress, still that point is material only because the Missouri law saw fit to make it so. The whole foundation of the duty is Missouri law, which at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up, so I repeat once more the cause of action arises wholly from the law of the State. . . . [S]o it has been decided by this Court again and again." *Smith*, 255 U.S. at 214-15 (Holmes J., dissenting) (citing cases). Indeed, Justice Holmes declared: "I know of no decisions to the contrary." *Id.* at 215.

Underscoring how aberrational *Smith* was, the Court essentially ignored it for decades. In 1934, the Court held that a Kentucky statute that incorporated federal laws "for the safety of employees" as its standard of care did not present a federal question. *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 213 (1934) (not citing *Smith*). In *Gully*, the Court rejected arising-under jurisdiction because "the right . . . is one created by the state" 299 U.S. at 116. Afterwards, it mused on "[a]nother line of reasoning," riffing on

"kaleidoscopic situations" and "disputes that are necessary" versus "merely possible." *Id.* at 117-18. Whatever end of the kaleidoscope one looks through, the holding followed from the Holmes rule.

The next case after *Smith* to squarely confront and uphold federal jurisdiction came some 70 years later in *Grable*. Regrettably, "no one [] asked [the Court] to overrule [*Smith*] and adopt the rule Justice Holmes set forth." 545 U.S. at 320 (Thomas J., concurring). Instead, the Court added new, indeterminate factors to assess whether the case "arise[s] under" federal law, requiring the federal issue to be necessarily raised, actually disputed, substantial, and of the type that federal courts can decide "without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314. That test, supposedly, explained why *Merrell Dow* correctly decided that there was no "arising under" jurisdiction. *Id.* at 318.

The Court has not upheld federal question jurisdiction under *Grable* since *Grable* itself, though it has needed to clarify that no federal jurisdiction exists over an embedded federal question in an attorney malpractice suit, *Gunn*, 568 U.S. at 258, or over a subrogation claim in the context of insurance for federal employees, *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 682 (2006). No doubt each area of law will need its own case.

C. The *Grable* standard is unworkable.

Scholars and judges have long lamented the incoherence of this Court's federal question jurisdiction case law. This case supplies a vivid illustration of how difficult *Grable* is to apply for lower courts. Not only does this case flunk all four prongs of *Grable*, but the various courts that examined the question have also

disagreed among themselves on a hodgepodge of issues, with no pattern to explain the discord and no intelligible principle to apply in future cases.

1. *Grable* is widely acknowledged to be unworkable.

The *Grable* test injects confusion and imponderables into what should be a clear rule. Other than necessity, no factor is determinate. How could any court tell what issues are "actually disputed" based only on the well-pleaded complaint? As for whether an issue is "substantial," the Court has offered little guidance. Does it matter if the question is difficult? If a large amount of money is at stake? If the party seeks an injunction? The fourth factor—the congressionally approved balance between federal and state court responsibilities—is, at best, a finger in the wind. Courts consult no facts about the volume of particular kinds of cases, and this Court has not said whether the inquiry is historical (examining the traditional role of state and federal courts), descriptive (examining the *current* role of state and federal courts), based wholly on congressional intent (and so ignoring tradition and the interests of state courts), or some other principle. Strangest of all, the open-ended inquiry required by *Grable* confers no discretion—review is *de novo*.

It is bad enough for any rule of law to be malleable and difficult to apply, but as a *jurisdictional* rule, *Grable* is calamitous. "Jurisdictional rules should be clear." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 14 (2015) (quoting *Grable*, 545 U.S. at 321 (Thomas, J., concurring)). "Complex jurisdictional tests," of which *Grable* is the epitome, "complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

"Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it. So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Id.* (citations omitted). "Predictability is valuable to corporations" and "also benefits plaintiffs deciding whether to file suit in a state or federal court." *Id.* at 94-95.

Few deny the force of these critiques. The Court has compared *Grable's* rule to a "Jackson Pollock" painting. *Gunn*, 568 U.S. at 258. Despite *Autumn Rhythm's* importance in the world of art, in the sphere of law the analogy was hardly a compliment. Justice Thomas has called *Grable*'s rule "anything but clear" and expressed eagerness "to reconsider" it. *Grable*, 545 U.S. at 321 (Thomas J., concurring). Lower courts cry out for clarity. *See, e.g.*, *Almond v. Capital Props.*, 212 F.3d 20, 22 (1st Cir. 2000) (calling this a "remarkably tangled corner of the law"); *Hartland Lakeside Joint No. 3 Sch. Dist. v. WEA Ins. Corp.*, 756 F.3d 1032, 1033 (7th Cir. 2014) (Easterbrook, J.) ("*Grable* announced a multifactor approach that has been hard to use consistently."). Legal scholars have been unsparing in their criticism.[3]

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[3] Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 Notre Dame L. Rev. 1891, 1915 (2004) (departing from Justice Holmes' view "comes at too high a price in uncertainty"); Linda R. Hirshman, *Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction over Cases of Mixed State and Federal Law*, 60 Ind. L.J. 17, 72 (1985) (The test, "resting on an unreliable ad hoc analysis about the federal quality of each dispute, was always an unprincipled and unsatisfying solution,"

Since the test is indeterminate but appellate review is *de novo*, it should be no surprise that the reversal rate is sky-high. One study found that federal jurisdiction findings rooted in embedded federal issues were reversed 65% of the time.[4] Another study found reversal rates of 55%.[5] Counsel is aware of no other area of law in which district courts and courts of appeals disagree *more often than not*. These numbers represent *decades* of fruitless litigation, benefitting no one except appellate attorneys. The two appellate reversals in this case match the trend.

Perhaps the most objectionable aspect of this jurisprudential failure story is how minimal the benefits of

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and "courts should turn, or return, to the straightforward analysis set forth by Justice Holmes."); Simona Grossi, *A Modified Theory of the Law of Federal Courts: The Case of Arising-Under Jurisdiction*, 88 Wash. L. Rev. 961, 1019 (2013) (Calling *Grable's* rule "inconsistent with the rule of law principle, for it designs a completely unpredictable and unworkable procedure"); David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. Chi. L. Rev. 268, 268 (1969) (lamenting that "nobody knows how to define" federal question jurisdiction); Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 Notre Dame L. Rev. 97, 140 (2006) ("The *Grable* test for embedded federal questions is a quintessential open-ended 'consider everything' standard offering neither guidance nor constraints."); Douglas D. McFarland, *The True Compass: No Federal Question in a State Law Claim*, 55 U. Kan. L. Rev. 1, 1 (2006) (*Grable* is the issue "that has caused the most analytical difficulty for the allocation of jurisdiction over the past [half] century").

[4] Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction Over State Law Claims Post-Merrell Dow*, 115 Harv. L. Rev. 2272, 2280 (2002).

[5] *See* John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. Cin. L. Rev. 145, 165 (2006).

the *Grable* rule are. "In cases lacking a federal cause of action, the Supreme Court has clearly upheld jurisdiction under §1331 in *only four instances*[6] . . . . Even in the lower courts, rather few decisions uphold jurisdiction in such cases." Richard H. Fallon Jr. et al., *The Federal Courts and the Federal System* 836 (7th ed. 2015) ("*Hart & Wechsler*") (emphasis added). And so, the question, from *Hart & Wechsler*: "is the game worth the candle?" *Id.* It is not. As Justice Scalia warned for another jurisdictional rule: "The time expended on such rare freakish cases will be saved many times over by a clear jurisdictional rule that makes it unnecessary to decide, in hundreds of other cases" whether the four-part *Grable* standard is met, which "produce[s] the sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible." *Sisson v. Ruby*, 497 U.S. 358, 374-75 (1990) (Scalia J., concurring).

This very case illustrates the unworkability of *Grable* and the waste it creates.

2. The manifestly wrong result below illustrates why *Grable* is unworkable.

Whichever complaint one considers, jurisdiction is plainly lacking, yet this case has been mired in jurisdictional litigation for *more than five years*. The lower courts' inability to consistently apply *Grable* and unprincipled distinctions is a microcosm of the larger problem in *Grable* litigation.

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[6] Two are *Smith* and *Grable*. A third is *Hopkins v. Walker*, 244 U.S. 486 (1917), which Justice Holmes joined, and is arguably consistent with his rule. *See* Douglas D. McFarland, *supra* note 3, at 14 n.81 (discussing *Hopkins*). The fourth is *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), though the analysis is fairly cursory.

a. The FDCA issues in this case are not substantial.

This case is *Merrell Dow* but for pets, not humans. In *Merrell Dow*, the complaint pleaded state-law claims, including one relying on an allegation that the "drug Bendectin was 'misbranded' in violation of the Federal Food, Drug, and Cosmetic Act (FDCA)," apparently in relation to sales in "Canada and Scotland." 478 U.S. at 805, 816. This Court rejected federal-question jurisdiction on the ground that because the FDCA had no private right of action, any federal question raised in the case would not be "substantial." *Id.*

Here, just as in *Merrell Dow*, every claim sounds in state law, federal violations constitute a theory of breach, and the federal violations lack a congressionally authorized private right of action. Drilling down, the federal violations in both cases are from the *very same statute*—the FDCA—and specifically the "misbranding" provisions, that is, the *very same provisions of the very same statute*. *Compare* J.A. 83-84, 89, 91, 102 (alleging misbranding) *with Merrell Dow*, 478 U.S. at 805 (same). Even *Grable* recognized that *Merrell Dow's* holding still applied to the FDCA, based on the "combination of no federal cause of action and no preemption of state remedies for misbranding." *Grable*, 545 U.S. at 318. It simply thought the reasoning could not expand to *every* statute.

One would think this question is well-settled. Every court of appeals that had previously considered a *Grable*-style assertion of federal-question jurisdiction based on a state-law claim and a federal violation rooted in the FDCA rejected jurisdiction, applying *Merrell Dow*. *See Burrell v. Bayer Corp.*, 918 F.3d 372, 388 (4th Cir. 2019) (no jurisdiction where medical device was misbranded under FDCA); *Bailey v. Johnson*,

48 F.3d 965, 966 (6th Cir. 1995) (no jurisdiction where lack of FDCA-mandated prescription was alleged); *Crook-Petite-el v. Bumble Bee Foods L.L.C.*, 723 Fed. App'x 974, 975 (11th Cir. 2018) (no jurisdiction where FDCA violation alleged); *cf. Clark v. Velsicol Chem. Corp.*, 944 F.2d 196, 199 (4th Cir. 1991) (no jurisdiction for FIFRA violation). This question rarely even *reaches* the courts of appeals, because "a substantial majority of district courts" addressing the FDCA remand (and remands are not usually appealable). *Burrell*, 918 F.3d at 380 (citing cases).

The lower court ignored *Merrell Dow* because it was too confused by *Grable*, an all-too-common result.

b. The FDCA issues in this case are not necessarily raised.

Even if the questions were substantial, the pet owners could prevail without them. The most thorough explication of the necessity prong comes from *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), which applied the federal-question "arising under" test in the context of determining which claims arose under federal patent law. There, the plaintiff alleged monopolization and group-boycott claims. Following the "well-pleaded complaint rule," the Court "focuse[d] on claims, not theories, and just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim 'arises under' patent law." *Id.* at 811. There, monopolization occurred by means of false assertions of trade secret protection in letters and pleadings, and the invalidity of certain patents was *one* theory for why the trade secrets were not protected. *Id.* But the letters could have been false for other reasons, and the trade secrets unprotected for other reasons, destroying jurisdiction:

"Since there are 'reasons completely unrelated to the provisions and purposes' of federal patent law why petitioners 'may or may not be entitled to the relief [they] see[k]' under their monopolization claim, the claim does not 'arise under' federal patent law." *Id.* at 812 (quoting *Franchise Tax Bd.*, 463 U.S. at 26) (alterations in original).

The same is true here. The complaint alleges that the antitrust conspirators "have a market share of at least 95 percent," a stunning figure. J.A. 69, 73. They got there via collusion, including exclusive dealing—Mars Inc. owns companies that make pet food (Defendant Royal Canin) and companies that employ 17% of veterinarians. J.A. 69. Those veterinarians endorse the "prescription" fiction, and PetSmart has an exclusive arrangement to sell "prescription" pet food only via a prescription card issued by a *Mars veterinarian*. The companies imposed the prescription requirement on retailers and consumers "with the purpose and effect of raising . . . prices." J.A. 79. Each company chose to collude, requiring "prescriptions" rather than competing on price or convenience. J.A. 80. They jointly agreed to exclude pet food from competitors from retail stores they controlled. J.A. 74, 80-81. Their practices violate Missouri law, including "legend drug" regulations, J.A. 90, and registration requirements, J.A. 91-92. Notice that there has been no mention of federal law yet.

The argument for unjust enrichment is even easier. Surely if—as every court has found—the deceptive marketing claim is based only on state law, the same deception can ground an unjust enrichment claim. A "claim supported by alternative theories in the complaint may not form the basis for [federal question] jurisdiction unless [federal] law is essential to each of

those theories." *Christianson*, 486 U.S. at 810. Here, no issue of federal law is *essential* to *every* unjust enrichment or antitrust theory.

To be sure, the complaint does discuss federal law, but mere mention is not enough. That the FDA has concluded the companies *are* violating federal law is relevant context for the companies' coordination and refutes in advance potential defenses they might raise, but "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow*, 478 U.S. at 813.

If there were any doubts *originally* that the federal issues were not necessarily raised, the amended complaint dispels them. Plaintiffs will not lightly abandon legal contentions that are *necessary* to their claims. Presumably, abandoning necessary contentions would be tantamount to defaulting on the action. Yet here the pet owners promptly excised the federal issues, precisely because they were never a critical part of the action.

Finally, Petitioners and the Eighth Circuit make much of one paragraph in the "prayer for relief" which supposedly requests an injunction to follow federal law, but that is insufficient. The paragraph at issue expressly requests an injunction requiring compliance with "federal and Missouri" law "*or alternatively*" removing the "disease treatment claims on the packaging." J.A. 115 (emphasis added). Where a party would be satisfied with either of two alternatives, definitionally neither one is necessary. More fundamentally, outside of default judgments, federal courts are *obliged* to "grant the relief to which each party is entitled, even if the party has *not* demanded that relief in its pleadings." Fed. R. Civ. P. 54(c) (emphasis added). *Asking* for an injunction makes no difference, and

cannot possibly turn an otherwise unnecessary federal question into a necessary one.

c. No one knows which, if any, issues are "actually disputed."

The "actually disputed" prong is perhaps the most vexing factor, and none of this Court's precedents elucidate it. The pet owners have no way of knowing which—if any—federal law issues are "actually disputed." The companies have never said, even though they bear the burden to demonstrate removal jurisdiction.

The notice of removal flags as federal issues the allegations that no "Prescription Pet Food . . . contains a drug, and none has been submitted to the FDA for its review, analysis or approval," and that "[a]ll of the Prescription Pet Food of Mars/Royal Canin, Purina, and Hill's lacked an approved New Animal Drug Application or met other [FDCA] requirements, and therefore all of their Prescription Pet Food was 'unsafe,' 'adulterated,' and 'misbranded' in violation of the [FDCA]." Dkt. 1 at 5. The pet owners doubt that the companies dispute these allegations, since they simply reflect widely known facts and the FDA's own position. But before receiving an answer, who can tell what the companies plan to dispute? Even an answer would deny or admit *facts*. It would not state the companies' position on disputed questions of federal *law*.

The problems with the first three factors compound when considered jointly. After all, it is not enough to identify *a* substantial federal issue, *a* necessary federal issue, and *an* actually disputed federal issue—there must be a federal issue that is necessary, substantial, *and* disputed. That joint hurdle is much harder to analyze, because the strongest candidates for "necessary"

issues are not substantial and disputed (for example, "federal law does not require prescriptions for dog food").

d. Federal jurisdiction here harms federalism.

Because this case is on all fours with *Merrell Dow*, it flunks the fourth factor. The concern that "exercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues" applies here too. *Grable*, 545 U.S. at 318. Again, since the federal law at issue is the FDCA—and even more granularly, the misbranding provisions—congressional intent should be identical. It would be highly implausible for Congress to want cases about misbranded *human* pharmaceutical drugs out of federal court, but pet-food cases within federal court. The companies may argue that the "prescription" food issue is new, but "[t]he novelty of an FDCA issue is not sufficient to give it status as a federal cause of action; nor should it be sufficient to give a state-based FDCA claim status as a jurisdiction-triggering federal question." *Merrell Dow*, 478 U.S. at 817.

e. The lower courts' inconsistency proves unworkability.

The almost random collection of positions from the litigants, district court, and court of appeals powerfully demonstrates *Grable's* unworkability. After the district court held that no claim was federal, the Eighth Circuit reversed, holding that the antitrust and unjust enrichment claims—but only those two—were federal. But when the district court later held that the newly pleaded civil conspiracy count was federal, the Eighth Circuit reversed *that* too, as illustrated below:

Initial Complaint	MMPA	Antitrust	Unjust Enrichment
Pet owners	X	X	X
Petitioners	✓	✓	✓
District Court	X	X	X
Eighth Circuit	X	✓	✓

Amended Complaint	MMPA	Civil Conspiracy
Pet owners	X	X
Petitioners	✓	✓
District Court	X	✓
Eighth Circuit	X	X

How did the claims differ for federal question purposes when each incorporates the same facts, derives from Missouri law, and alleges the same federal violations of the same federal laws? No one knows, and neither side defends the result. The pet owners and companies have made no such distinctions—either every claim is federal or none are on their views. No one could predict from reading the complaint that the MMPA is less federal than the unjust enrichment claim. Yet here we are.

The point of canvassing these errors and inconsistencies is not to cast doubt on the abilities of the lower courts. The point is that high levels of error and arbitrary application of *Grable* is the rule, not the exception. Professor Meltzer found enough "surprising statements" in appellate decisions that he became "doubtful whether federal judges, as intelligent and dedicated as most of them are" can identify federal

questions embedded in state-law claims. Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 Notre Dame L. Rev. 1891, 1913 (2004). The pet owners share that doubt. The "reversal rate" for *Grable's* progeny largely "reflects . . . the incoherence of the legal doctrine," and the profound difficulty of applying it in real cases. John F. Preis, *supra* note 6, at 165.

D. *Stare decisis* provides little support.

Stare decisis does not require preserving *Grable*. This Court has "identified several factors to consider in deciding whether to overrule a past decision, including 'the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision." *Knick v. Township of Scott, Pennsylvania*, 588 U.S. 180, 203 (2019) (quoting *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 917 (2018)).

The reasoning in *Grable* and *Smith* is unpersuasive. *Smith* flatly ignored contrary cases and misstated the precedents it did cite. *Grable* simply assumed *Smith's* validity without considering it afresh. Neither case grappled with the longstanding, powerful arguments from *Miller's Executors*, *Louisville & Nashville R.R.* and *American Well Works*, which each explained that federal law embedded into state-law causes of action is merely incorporated-by-reference *state* law, and thus cannot ground arising-under jurisdiction. *Grable* "launched and sustained a cottage industry of scholars attempting to decipher its basis and meaning," and its rule has always been slippery, "if it was ever coherent enough to be called a rule at all." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2270 (2024).

Grable and *Smith* are egregiously unworkable. The content of what is a "substantial federal question" or

what respects the federal/state balance "has always evaded meaningful definition." *Id.* Its test is "impressionistic and malleable," and its principles "so indeterminate and sweeping, [the Court has] been forced to clarify the doctrine again and again." *Id.* at 2271. This unworkability is especially damaging because the question is jurisdictional, which should be the province of the very clearest rules.

Reliance interests are at their nadir. After all, *Grable* regulates which court system governs rather than serving "as a guide to lawful behavior." *Knick*, 588 U.S. at 205. Besides, *Smith* and *Grable* announce no "clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *South Dakota v. Wayfair*, 585 U.S. 162, 186 (2018). Rather than legitimate reliance, litigants under *Grable* are left in "an eternal fog of uncertainty" that this Court should pierce through. *Loper Bright*, 144 S. Ct. at 2272. And *Grable* "cannot be constrained by admonishing courts to be extra careful, or by tacking on a new batch of conditions"—that type of tinkering is what exacerbated the problem. *Id.*

* * *

This Court should resolve this appeal by overturning *Grable* or, at a bare minimum, reaffirming *Merrell Dow*. There is no federal jurisdiction no matter which complaint controls.

II. The Amended Complaint Controls

Black-letter law provides that an amended complaint supersedes the original complaint for all purposes. That rule controls here, and there is neither a textual basis nor any other sound reason to carve out an exception.

Both parties agree that the plain text of section 1367 is dispositive. But nothing about Petitioners' "textual" argument is about reading and interpreting the text Congress enacted into the United States Code. Normally, textual interpretation begins by determining what the words of a statute mean to an ordinary English speaker. *Van Buren v. United States,* 593 U.S. 374, 388 (2021) (reading a statute "consistent with the way an 'appropriately informed' speaker of the language would understand" the words) (citing Nelson, *What is Textualism?* 91 Va. L. Rev. 347, 354 (2005)); *id.* at 397 (Thomas, J., dissenting) (the question is what "an ordinary reader of the English language" would understand). Petitioners do nothing like that. Their analysis *starts* by citing broad principles from precedents that predate the statutory text. Pet. Br. 17-22. They hope to classify those cases as "old soil" that tell this Court the answer before even reading section 1367. Pet. Br. 17. But when the lynchpin of the argument arrives—the time to identify which ambiguous *words* the old soil clarifies—Petitioners gesture broadly to Congress's choice of "invoking *Gibbs* and its progeny," then leap from generalities to the claim that Congress "incorporated . . . the specific rule at issue here," which is, apparently, "that a federal court may 'guard against forum manipulation.'" Pet. Br. 27.

That is not how plain-text analysis works. Petitioners are kicking up dirt, not attempting to interpret genuinely ambiguous words based on old soil. The actual, plain meaning of the words Congress chose unambiguously supports the pet owners. That is why Petitioners never really grapple with the text in the section of their brief supposedly dedicated to that enterprise, and why they spill far more ink on unhelpful legislative history, Pet. Br. 27-29, and

textually meaningless public policy considerations, Pet. Br. 35-38, 47-48.

A. The text of section 1367 makes jurisdiction turn on the claims in the operative pleading.

"[T]o determine the scope of supplemental jurisdiction authorized by § 1367, then, we must examine the statute's text in light of context, structure, and related statutory provisions." *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 558 (2005). That text reads as follows:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). Supplemental jurisdiction operates by securing a jurisdictional foothold and then tethering other claims to that foothold. Thus, first, the district court must "have original jurisdiction" by virtue of "claims *in the action* within such original jurisdiction." *Id.* (emphasis added). Only if the district court has jurisdiction over "claims in the action" is there any question of tethering related claims. *See Allapattah*, 545 U.S. at 559 ("If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a 'civil action' within the meaning of § 1367(a).").

1. The text of section 1367 points to the current complaint.

Under the plain text, supplemental jurisdiction depends upon "claims in the action within such original jurisdiction." And a claim is only "in the action" if it is pleaded in the operative complaint. One can surely say that a claim that was originally pleaded but later dropped *was* in the action, and so the district court *had* original jurisdiction over it, but section 1367 is phrased in the present tense. "[T]he present tense generally does not include the past." *Carr v. United States*, 560 U.S. 438, 448 (2010).

This conclusion becomes even clearer when one considers where to look to find the "other claims" over which supplemental jurisdiction is asserted. Those "other claims" *must* come from the operative complaint, since a court would never consider exercising supplemental jurisdiction to decide dropped claims. There is no textual basis in the statute or the Federal Rules of Civil Procedure to look to the operative complaint to find the "other claims" over which supplemental jurisdiction is putatively asserted while gazing at an abandoned pleading for "claims in the action within such original jurisdiction."

When Congress wishes to depart from this textual rule and instead make the initial complaint controlling, it does so expressly. In assessing the amount in controversy in removed diversity cases, Congress directs courts to examine the initial pleading: "the sum demanded in good faith in the *initial pleading* shall be deemed to be the amount in controversy." 28 U.S.C. § 1446(c)(2) (emphasis added).[7] The different text of

[7] The term "initial pleading" appears repeatedly in the federal code and federal rules. *E.g.*, 28 U.S.C. § 1446 ("initial pleading"

section 1367 imports the ordinary rule of looking to the *operative* complaint, rather than the initial pleading.

Section 1331 confirms this approach. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Here again, the key word "arising" is phrased in the present tense. It is not enough that the action *arose*—before amendment—under federal law. Rather, the action must be "arising" under federal law *now*. Section 1332 similarly refers to "civil actions where the matter . . . is between—(1) citizens of different states." 28 U.S.C. § 1332(a). No matter what an initial complaint says, amending a party's alleged citizenship to destroy diversity also destroys diversity jurisdiction. *See Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 578 (2004). By using the present tense to describe the necessary jurisdictional requisites of a "civil action," the text of sections 1331, 1332, and 1367 command a parallel construction.

2. Background pleading rules complement the plain text of section 1367.

Under the federal rules, a plaintiff commences a "civil action" by "filing a complaint." Fed. R. Civ. P. 3. "[T]he complaints . . . determine the nature of the suits," *Pan Am. Petroleum Corp. v. Super. Ct.*, 366 U.S. 656, 662-63 (1961), and the "plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). A plaintiff "may amend [her] pleading once as a matter of course," and,

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appears 7 times); 28 U.S.C. § 1332(d)(7) (discussing "the initial pleading"); Fed. R. Civ. P. 81(c)(2) (same); Fed. R. Bankr. P. 9027(a)(3) (same).

with exceptions not relevant here, an "amendment to a pleading relates back to the date of the original pleading." Fed. R. Civ. P. 15(a), (c)(1). Rule 15(c) "mandates relation back . . . it does not leave the decision . . . to the district court's equitable discretion." *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 553 (2010).

All agree that an amended pleading "supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified." 6 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1476 (3d ed. 2024). Indeed, "[o]nce an amended pleading is interposed, the original pleading *no longer performs any function* in the case and any subsequent motion made by an opposing party should be directed at the amended pleading." *Id.* (emphasis added) (footnotes omitted); *accord Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 456 n.4 (2009) ("Normally, an amended complaint supersedes the original complaint," citing Wright & Miller). Under that rule, the pet owners cannot recover on antitrust or unjust enrichment claims. Those claims are gone—and, critically, gone *as of the time the civil action was commenced,* because the slimmed down pleading relates back to that date. Fed. R. Civ. P. 15(c).

That bedrock principle applies every bit as much to allegations relevant to jurisdiction as it does to ones that go to the merits. An amendment to a complaint's allegations about minimum contacts could strengthen or destroy personal jurisdiction; an amendment to a party's citizenship could create or destroy diversity jurisdiction; an amendment to the plaintiff's professed plans could confer or destroy the imminence of harm and thus injury in fact. An amendment in state court to add a federal claim could create grounds for removal. In most every instance, the rule is that the

original complaint is a nullity, substituted for the amended complaint.

The reason amendment has this effect is that the plaintiff is the master of the suit. The plaintiff sets the scope of the case or controversy in the complaint and can correct the scope of the controversy by amending the complaint. If a plaintiff amends to remove a federal issue from a suit, that issue is gone, and relation back means it is *as if* it were never present when the civil action was first commenced. The initial pleading is treated as a nullity. Where subject matter-jurisdiction depends on the presence of a pleaded federal claim, an amendment to remove a federal claim *as of* the commencement of the civil action removes the basis for jurisdiction.

That rule has been applied in a variety of contexts. It is common ground that the amended complaint controls for cases filed *initially* in federal court. As Justice Scalia explained for the Court, "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007). Petitioners, conveniently, agree that amended complaints control for removed cases to *create* federal question jurisdiction. Pet. Br. 45. Amended complaints control the citizenship of the parties in removed or original cases, and joinder (a form of amendment) of non-diverse parties destroys jurisdiction. Plaintiffs may "seek[] to join additional defendants whose joinder would destroy subject matter jurisdiction" and "the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e). So how could the rule possibly be that the amended pleading is jurisdictionally dispositive in all contexts

except for determining arising-under jurisdiction in removed, but not originally federal, actions?[8]

What Petitioners seek is a good-for-defendants only definition of the "claims in the action," 28 U.S.C. § 1367, which properly looks to the amended complaint to identify those claims for: 1) all diversity cases, 2) all original federal-question cases, 3) those removed federal question cases in which the amendment *creates* a federal claim. But when it comes to removed federal-question cases in which the amendment *eliminates* the federal claim, the "claims in the action" transmogrify into claims in the original pleading. Whatever the basis for that rule, it is not textualism. Or any other neutral principle.

Applying an even-handed rule here, amending the complaint to remove the antitrust and unjust enrichment claims wholly excised those issues from the case or controversy between the parties. Examining the case *as amended*, the Eighth Circuit rightly found there was no federal claim. With no federal claim "in the action" at all, there was also no basis for supplemental jurisdiction under the plain text of section 1367(a). That holding is correct under first principles and should be affirmed.

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[8] The closest counter-example is the amount in controversy, which turns on the "initial pleading." 28 U.S.C. § 1446(c)(2). That rule originated before section 1446 was codified, *see St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938), but the current wording demonstrates how Congress actually codifies rules it approves of—using text. The forum manipulation concerns Petitioners raise have left no imprint on the United States Code.

3. Judicially adjudicated claims in the operative pleading remain part of the same case or controversy.

To resist this logic, Petitioners invoke precedents in which a federal court exercised jurisdiction to dispose of federal issues, leaving only state-law claims unresolved on the merits. Respondents *agree* that there is supplemental jurisdiction over those unadjudicated claims. That is because there is a vast difference in law and logic between a plaintiff *losing* a federal issue on the merits—which depends upon the tribunal properly exercising adjudicatory authority—and amending away any federal issue *prior to an adjudication* such that *nothing* federal will ever be reached by the court. A court cannot supplement its determination of a federal question without first adjudicating a federal question.

The text of section 1367(c), which Petitioners invoke, confirms the principle. A court "may," not must, "decline to exercise supplemental jurisdiction over a claim" where "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). *Cf. United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). This wording does *not* apply to amendments, since amendments are not dismissals by "the district court."[9] And the statutory text of section 1367(c)(3) is entirely harmonious with section 1367(a)'s present-tense reference to claims "in the action" alongside the "other" state-law claims.

Unlike an amendment, when a "district court has dismissed" a federal claim, that claim remains, *presently*, "in the action." Judicial dismissal of a claim

[9] Notably, Petitioners once agreed. They argued that section 1367(c)(3) cannot apply after amendment in this case because "[n]o such dismissal has taken place." Dkt. 52 at 11.

is interlocutory until final judgment. Fed. R. Civ. P. 54(b). Any interlocutory order is "subject to reconsideration, and would continue to be so up to the passing of a final decree." *Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co.*, 260 U.S. 261, 267 (1922). Interlocutory orders merge into a final judgment and can be appealed. At all points, the federal issue is *live*, and the plaintiff may yet prevail.

The textual and historical distinction between amendment—which removes claims from an action—and judicial disposition—which does not—explains the vast majority of cases Petitioners cite. For example, in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 636 (2009), an action included various state law claims and one federal Racketeer Influenced and Corrupt Organizations Act claim. The district court dismissed the RICO claim under Rule 12(b)(6), and then remanded the state-law claims. *Id.* at 637. Though the district court declined to exercise supplemental jurisdiction, it could have, since the RICO claim was dismissed *by the court*, and thus was still "in the action."

Rosado v. Wyman also follows this rule. 397 U.S. 397 (1970). There, plaintiffs sued to enjoin New York's social services laws, raising both federal constitutional claims and state claims. The defendants removed. The federal court determined the constitutional claims were moot and dismissed them. *Id.* at 400. This Court upheld jurisdiction over the other claims under pendent jurisdiction. *Id.* Here, again, the federal claims were eliminated by action of the court.[10] The plaintiff could

[10] This explains the Eighth Circuit's caveat that courts look at the original complaint if the amendment was ordered by the court. Pet. Br. 45. Courts cannot remove a claim from an action—even by requiring amendment—because a plaintiff can appeal. The same rule applies in state court under the voluntary

have challenged the mootness determination on appeal, so of course the federal claims were still part of the case.

In sum, claims that are removed by amendment are different from claims dismissed by a court. The former redefine the scope of the case or controversy and do so as of the time of filing. The latter remain part of the case or controversy, supplying statutory discretion to consider state-law issues.

B. Petitioners' atextual appeals to pre-enactment cases, legislative history, and policy goals cannot trump statutory text.

Unable to marshal a compelling textual argument, Petitioners invoke pre-1367 case law and argue that the statute should be read to implement the policy goals articulated in those cases. These cases do not support Petitioners on their own terms and cannot overcome the text.

1. The *Cohill* case and legislative history does not require upholding jurisdiction.

Petitioners rely chiefly on *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), but that pre-1367 case neither considered nor decided the issues presented here. *Cohill* addressed the question of "whether a federal district court has discretion under the doctrine of pendent jurisdiction to remand a properly removed case to state court when all federal-law claims in the action have been eliminated and only pendent state-law claims remain." *Id.* at 345. The case arose because the district court, through Judge Cohill—with only

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/ involuntary doctrine. *See, e.g.*, *Am. Car & Foundry Co. v. Kettelhake*, 236 U.S. 311, 316 (1915) (voluntary dismissal of the resident defendant allows removal, but not court-ordered dismissal).

state law claims remaining—remanded the case. The defendants filed a petition for a writ of mandamus, arguing that there was no statutory or inherent authority to remand. This Court denied the writ, holding there was inherent authority to remand. *Id.* at 348.

This case differs from *Cohill*. Most obviously, *Cohill* affirmed a remand, while Petitioners seek to prevent one. That *Cohill* involved an amendment rather than dismissal was completely ignored by the parties and the Court, largely because the amendment occurred after discovery showed the federal "claims were not tenable." *Id.* at 346. No one argued that the amendment was effective as of the commencement of the suit such that remand was mandatory rather than discretionary. Since no one made that argument, it is hardly surprising that the Court did not pass on it.

It is true that the litigants assumed the district court had pendent jurisdiction, but Congress did not codify that unreflective assumption. Quite the opposite. Congress departed from *Cohill* by phrasing section 1367(c)(3) in terms of dismissal *by the court* rather than amendment by the parties. Seeing the textual problem, Petitioners invoke legislative history. Though the codified text applies where "the district court has dismissed" all federal claims, the Court should apparently read the textually compelled district-court involvement out of the statute because "Professors Arthur Wolf and John Egnal" once "recommended adding language similar to what now appears in Subsection (c)(3)." Pet. Br. 29. This *different* text that Congress *did not* adopt was subjectively intended by these two professors to cover "a voluntary withdrawal of the claim." *Id.* This is precisely the kind of legislative history the Court warned against using in *Allapattah*—musings from "law professors who

participated in drafting," but whose proposals were not reflected in the text. 545 U.S. at 570.

Petitioners also attempt to find their rule not from the text, but the soil around it, but that argument is unavailing. *Cohill* mentions forum manipulation, but "it would be a mistake to read judicial opinions like statutes," ascribing critical significance to every word. *Loper Bright*, 144 S. Ct. at 2281 (Gorsuch, J., concurring); *see also Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 373 (2021) (Alito, J., concurring in the judgment) (same). The fact that a concern appears in *Cohill* but is not reflected anywhere in the text of section 1367 is a strong reason to reject it as irrelevant. Had Congress actually intended to shape jurisdiction based on forum manipulation, it would have done so. Here, there is no transplant to speak of when it comes to forum manipulation. With no ambiguous statutory term that the context of *Cohill* clarifies, the "old soil" stays right where it was. Pet. Br. 17.

2. Forum manipulation concerns do not justify Petitioners' rule.

Forum manipulation concerns are pure policy, divorced from text, and "policy arguments cannot supersede the clear statutory text." *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 192 (2016). Still, on its own terms the argument is meritless.

a. There is no reason to believe any forum manipulation occurs, or that Petitioners' rule would reduce it.

Petitioners profess a concern that, absent their atextual rule, "a plaintiff could always file in state court and wait for defendants to remove. If the plaintiff dislikes the federal judge assigned to the case, the

plaintiff could then amend the complaint to remove the federal question and force a remand." Pet. Br. 13. This concern is difficult to take seriously.

To begin with, nothing the Court does in this case would prevent the manipulation Petitioners fear. If this Court reverses, a plaintiff could accomplish exactly the same thing by filing suit in state court, waiting for removal, then, if he dislikes the judge, voluntarily dismissing without prejudice under Rule 41(a)(1)(A)(i), and refiling in state court *with a modified complaint* that removes the federal claims. Rule 41(a)(1)(A)(i) dismissals are automatic. Just as with a first amendment under Rule 15(a), district courts have no discretion to prevent their use. Alternatively, the supposedly manipulative plaintiffs Petitioners fear could file *initially* in federal court, identify their judge, and, if they do not like her, choose to amend away the federal question (which Petitioners concede would destroy jurisdiction), Pet. Br. 13, *Rockwell*, 549 U.S. at 473-74, and refile in state court.

To adequately enforce Petitioners' forum manipulation rule, the Court would have to allow defendants to remove even after *those* tactics, presumably with an enhanced artful pleading doctrine. In short, Petitioners' "rule is simple for plaintiffs to avoid—or else, excruciating for courts to police" since it would require "that a judge should go behind the face of a complaint to determine whether it is the product of 'artful pleading.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 392-93 (2016) ("That [a rule] threatens to become either a useless drafting rule or a tortuous inquiry into artful pleading is one more good reason to reject it.").

In truth, the forum manipulation in this case—and in the typical removal case—is by defendants. *Cf.*

Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 Harv. L. Rev. F. 87 (2021) (discussing the growing trend of baseless removals). Here even though the exclusively Missouri plaintiffs sued *only* Missouri citizens and brought *only* Missouri claims, Petitioners have been able to waste five years by filing a notice of removal that was insubstantial before and is ludicrous after the pet owners dropped the two supposedly federal claims. To nonetheless complain that the "right to remove" has been "frustrate[d]" is astounding, since plaintiffs' method of frustrating the "right" was by *conceding every purportedly federal issue*. Petitioners are like a grocery store clerk who tells a customer with 14 items not to go through the express line, and then objects when the shopper returns to the express line after putting 4 items back. What Petitioners actually want is to leverage discarded federal questions to gain a federal forum for *non-federal* claims. *That* is forum manipulation.

This lens helps explain why Petitioners are arguing for a standard under which they will almost always lose. Recall that the lead case *they* rely upon says that "when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court *should decline the exercise of jurisdiction*." *Cohill*, 484 U.S. at 350 (emphasis added). And the circuits *they* point to as exemplary essentially always remand in cases like this.[11] Their goal is not

[11] *E.g.*, *Packard v. Farmers Ins. Co. of Columbus Inc.*, 423 F. App'x 580, 584 (6th Cir. 2011) (supporting "a strong presumption against the exercise of supplemental jurisdiction" where no federal claims remain); *Dirauf v. Berger*, 57 F.4th 101, 108-09, 108 n.6 (3d Cir. 2022) (affirming remand where the plaintiff eliminated the federal-law claim post-removal and endorsing the district court's application of a "presumption in favor of remand"); *Watson v. City of Allen*, 821 F.3d 634, 642-43 (5th Cir. 2016)

really to *win* under the section 1367 standard, but to preserve a colorable argument for removal. After all, corporate defendants gain tremendous advantages in being able to tie up litigation in jurisdictional knots for years. A discretionary standard that they will eventually lose 95% of the time will still allow years of delay and impose extra costs.

If, in some hypothetical case there were egregious forum manipulation that a court felt compelled to stop, it has the tools. Courts can deny leave to amend under Rule 15. That was not possible here because the pet owners acted with alacrity, but most amendments will require leave from the court. In particular, a district court will always be able to prevent a plaintiff from seeking to amend when he "anticipates receiving an imminent adverse ruling," Pet. Br. 36, since that would only occur after the time to amend by right has passed, and the court would know if it plans to rule imminently.

b. The case quotations about forum manipulation are ill-considered dicta that this Court should reject.

Most fundamentally, the Eighth Circuit is emphatically right to favor "jurisdictional rigor" over "forum-

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(holding that the district court abused its discretion by failing to remand after a post-removal amendment eliminated the federal claim); *Enochs v. Lampasas Cnty.*, 641 F.3d 155, 161-63 (5th Cir. 2011) (same); *Gamel v. City of Cincinnati*, 625 F.3d 949, 952-53 (6th Cir. 2010) (holding that forum-manipulation concerns did not authorize retention of supplemental jurisdiction and affirming remand); *Arrington v. City of Raleigh*, 369 F. App'x 420, 422–23 (4th Cir. 2010) (vacating the lower court judgment and directing remand as "precedent[] make[s] clear" that jurisdiction should have been declined where the plaintiff amended her complaint to dismiss the federal claims post-removal).

manipulation concerns." Pet. App. 10a. Jurisdiction should be decided based on clear rules and first principles. A concern that some plaintiff, somewhere, might be able to gain remand at the cost of abandoning all federal claims is not that, especially since this Court has taught that plaintiffs "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392. Were there any doubt, this Court has taught that, "statutory procedures for removal are to be strictly construed." *Syngenta Crop Protec., Inc. v. Henson*, 537 U.S. 28, 32 (2002).

When this Court has raised forum manipulation, it has always been in dicta, most of which was issued before Congress enacted binding statutory text. *Cohill* mentioned "manipulative tactics" solely to refute an argument from one of the parties. *Cohill*, 484 U.S. at 357. Without ever endorsing the argument, the Court summarized what the "concern appears to be," and then stated that the "concern" cannot "justif[y] a categorical prohibition on [] remand" and that in any case "district courts . . . can guard against forum manipulation." *Id.* Presumably a similar passage will appear in this case if the Court affirms, saying that any concern could be mitigated. That sort of language is not a sound basis for a jurisdictional rule. "An opinion's holding and the reasoning essential to it (the *ratio decidendi*) merit[] careful attention. Dicta, stray remarks, and digressions warrant[] less weight." *Loper Bright*, 144 S. Ct. at 2277 (Gorsuch, J., concurring).

Justice Scalia, again in dicta, referenced this passage, explaining: "when a defendant removes a case to federal court based on the presence of a federal claim, an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction," "[b]ut removal cases raise forum-manipulation concerns

that simply do not exist when it is the *plaintiff* who chooses a federal forum and then pleads away jurisdiction through amendment." *Rockwell*, 549 U.S. at 474 n.6. The case, of course, was not removed, so the footnoted remark was not even plausibly necessary to support the judgment. Petitioners' attempt to convert drive-by concerns into a "crucial footnote" that abrogates the statutory text of section 1367—text that the Court did not even consider—is hardly a faithful accounting of the case. Pet. Br. 44. It is certainly not faithful to Justice Scalia's approach to jurisprudence.

In no other context has this Court made jurisdiction turn on a generalized fear of "forum manipulation." There are no holdings of this Court recommending that path, and so the Court should proceed from first principles. Under first principles, the amended complaint controls.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed, and the case remanded.

Respectfully submitted,

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