No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents, citizens of Texas, filed this products-liability suit in state court against Petitioners Hain Celestial Group, Inc., then a citizen of Delaware and New York, and Whole Foods, Inc., a citizen of Texas. Hain removed based on diversity jurisdiction, arguing that Whole Foods should be dismissed as fraudulently joined. The district court agreed, dismissing Whole Foods with prejudice. After two additional years of federal-court litigation and a two-week jury trial, the district court granted judgment as a matter of law to Hain. On appeal, without ruling on the merits, the Fifth Circuit held that the district court erred in dismissing Whole Foods, vacated the final judgment, and ordered the matter remanded to state court to start from scratch. Relying on Respondents' post-removal amended complaint, the panel held, in conflict with several other courts of appeals, that the district court lacked jurisdiction to enter judgment as to the completely diverse parties before it.

The questions presented are:

1. Whether a district court's final judgment as to completely diverse parties must be vacated when an appellate court later determines that it erred by dismissing a non-diverse party at the time of removal.

2. Whether a plaintiff may defeat diversity jurisdiction after removal by amending the complaint to add factual allegations that state a colorable claim against a nondiverse party when the complaint at the time of removal did not state such a claim.

PARTIES TO THE PROCEEDING BELOW

Petitioner The Hain Celestial Group, Inc. was an appellee in the Fifth Circuit and a defendant in the district court.

Petitioner Whole Foods Market, Inc., also known as Whole Foods Market Rocky Mountain/Southwest, L.P., was an appellee in the Fifth Circuit and a defendant in the district court.

Respondents Sarah Palmquist, individually and on behalf of E.P., a minor, and Grant Palmquist were appellants in the Fifth Circuit and plaintiffs in the district court.

CORPORATE DISCLOSURE STATEMENT

Petitioner The Hain Celestial Group, Inc. has no parent corporation and no publicly held company owns ten percent or more of its stock.

Petitioner Whole Foods Market, Inc. is a wholly owned indirect subsidiary of Amazon.com, Inc. which is a publicly traded company (AMZN). Amazon.com, Inc. has no parent corporation and no publicly held company owns ten percent or more of its stock.

RELATED PROCEEDINGS

No other case is directly related to the case in this Court within the meaning of Rule 14.1(b)(iii).

This is one of a number of lawsuits seeking to impose liability against baby food manufacturers based on allegations that trace amounts of heavy metals found in almost all foods cause autism and ADHD in children. Since the judgment in the district court in this case, the Judicial Panel on Multidistrict Litigation has centralized all similar cases in MDL 3101. In all but one of those cases, no retailers were named, and in the one case where a retailer was named, the MDL Court has granted defendants' motion to dismiss.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Consititional Provision

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

The Hain Celestial Group, Inc. and Whole Foods Market, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the District Court denying a motion to remand and dismissing Whole Foods is reported at 2021 WL 4137525 (S.D. Tex. June 15, 2021) and is reproduced at Pet.App. 24a–28a. The oral ruling of the District Court granting Hain Celestial Group's Rule 50 motion is unreported and is reproduced at Pet.App. 29a–32a. The District Court's subsequent judgment in favor of Hain is reproduced at Pet.App. 33a–34a.

The decision of the Court of Appeals is reported at 103 F.4th 294 (5th Cir. 2024) and is reproduced at Pet.App. 1a–23a. The Court of Appeals' order denying panel rehearing and rehearing en banc is unreported and is reproduced at Pet.App. 35a–36a.

JURISDICTION

The Fifth Circuit entered judgment on May 28, 2024, and denied Petitioners' timely rehearing petitions on September 9, 2024. Pet.App. 1a, 35a. On November 26, 2024, Justice Alito extended the time to file a petition to and including January 7, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the United States Constitution provides in relevant part:

> The judicial Power shall extend to . . . Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1332(a) provides in relevant part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different states.

28 U.S.C. § 1441(a) provides in relevant part:

> [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1447(c) provides in relevant part:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

INTRODUCTION

This case presents the exceptionally important question of whether a court of appeals *must* vacate a district court's final judgment in a removed diversity case when it determines that the district court erred earlier in dismissing a nondiverse party after removal. The decision of the Fifth Circuit directly conflicts with decisions of other courts of appeals, ignores this Court's teachings about federal jurisdiction in removed diversity actions, and egregiously wastes judicial and party resources with no apparent benefit. This Court should grant the petition and reverse.

After this case was removed to federal court under diversity jurisdiction, the district court dismissed a nondiverse defendant as fraudulently joined. Nearly two years later, after extensive discovery and a trial, the district court entered judgment as a matter of law for the only remaining defendant, who is diverse from the plaintiffs. On appeal, a panel of the Fifth Circuit held that the district court had erred in dismissing the nondiverse defendant at the time of removal. But rather than adhering to this Court's practice of preserving final judgments in federal court when it is determined on appeal that a nondiverse dispensable defendant has or should have remained in the case, the Fifth Circuit did the opposite. The court held that it had no choice but to vacate the final judgment entered as to diverse parties and to remand the case to

state court to start all over again—where the non-diverse defendant may well be dismissed again, leaving the same parties to duplicate the federal proceedings in state court. That decision was wrong on the law and produces no practical benefit. It also entrenches a circuit conflict by aligning with the Eleventh Circuit in conflict with the Eighth, Ninth, and Fourth Circuits. The circuit split is as concrete as it can be: a materially identical case came out the opposite way in the Eighth Circuit.

The Fifth Circuit also erred by requiring the district court to consider new factual allegations asserted by the plaintiffs after removal to defeat diversity jurisdiction. Petitioners are not aware of any other court of appeals that allows a plaintiff to defeat diversity jurisdiction by newly alleging non-jurisdictional facts after removal. The Court should consider holding this petition for its forthcoming decision in *Royal Canin U.S.A., Inc. v. Wullschleger*, No. 23-677 (argued Oct. 7, 2024), which will shed light on whether and to what extent a plaintiff may defeat federal jurisdiction with post-removal amendments to her complaint.

The questions presented are important and recurring. Reversal on either would independently require reversal of the Fifth Circuit's decision. And it is untenable to have different jurisdictional rules apply in different parts of the country. This Court should grant the petition and reverse the decision below.

STATEMENT

1. Petitioner The Hain Celestial Group, Inc. ("Hain") is a leading health and wellness company that produces and sells, among other things, organic baby food. Petitioner Whole Foods Market, Inc.

("Whole Foods") is a leading retailer of natural and organic foods with more than 500 locations in the United States and abroad. Among other products, Hain manufactures Earth's Best™—a line of organic baby food made from healthful fruits, grains, and vegetables and designed in coordination with experts in pediatrics and nutrition. *See* Pet.App. 2a–3a. Earth's Best is sold at stores including those operated by Whole Foods. *See* Pet.App. 2a–3a.

Respondents, citizens of Texas, are Sarah and Grant Palmquist, Texas residents, and their son E.P., who suffers from an unusually profound case of Autism Spectrum Disorder (ASD). Pet.App. 3a. Respondents allege that their son consumed Earth's Best throughout his childhood. Pet.App. 2a–3a. In March 2021, after a congressional subcommittee released a staff report showing that many baby foods contain trace amounts of metals—which occur in the environment and are ineradicable in the food supply—Respondents sued Hain in Brazoria County, Texas district court, alleging that Earth's Best baby food contained heavy metals that caused their son's ASD. Pet.App. 3a–4a; *see also* Orig. Petition ¶¶ 1–3, Doc. 1-1 at 5–6.

Against Hain, then a citizen of Delaware and New York, Respondents asserted Texas-law claims for negligence, manufacturing defect, design defect, and failure to warn. Am. Petition ¶¶ 43–59, Doc. 1-1 at 117–23; *see* Pet.App. 4a. Respondents also sued Texas citizen Whole Foods—one retailer from whom they allegedly purchased Hain baby food—for negligence and breach of warranty. Pet.App. 4a. The warranty claim against Whole Foods referred only to "Whole Foods'

implied warranties." Am. Petition ¶ 66, Doc. 1-1 at 124.

Hain timely removed the action to the Southern District of Texas based on diversity jurisdiction. Notice of Removal, Doc. 1 at 2; *see* 28 U.S.C. §§ 1332(a), 1441, 1446. In its notice of removal, Hain argued that nondiverse defendant Whole Foods had been fraudulently joined and thus did not destroy the court's diversity jurisdiction. Pet.App. 24a; *see Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146, 152 (1914) (observing that "right of removal cannot be defeated by a fraudulent joinder of a resident defendant"). Petitioners argued that, under Texas law, a "seller" like Whole Foods "that did not manufacture a product is not liable for harm caused . . . by that product" unless an exception applies—and that no exception was alleged or plain on the face of Respondents' complaint. Tex. Civ. Prac. & Rem. Code Ann. § 82.003(a); *see Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003) (fraudulent joinder may be shown by the "inability of the plaintiff to establish a cause of action against the non-diverse party in state court.").

After Hain removed, Respondents filed an amended complaint alleging new causes of action against Whole Foods based on novel theories. Pet.App. 5a. In the post-removal complaint, Respondents left the allegations against Hain unchanged, but added new allegations that Whole Foods had made "express factual representations" about Hain baby food on which Respondents relied, Second Am. Compl. ¶ 62, Doc. 6 at 24–25, and deleted some references to implied warranties. The next day, Respondents filed a motion to remand, arguing that Whole Foods was properly joined because

Respondents now stated a claim that they argued fell within the express-warranty exception to the state-law rule that sellers are not liable for harm caused by products they did not manufacture. Pet.App. 5a; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 82.003(a)(5) (express warranty exception to retailer non-liability).

The district court agreed with Hain and denied Respondents' motion to remand. Pet.App. 28a. The district court reasoned that, under the "time-of-filing rule," *see Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 571 (2004), it could not consider Respondents' post-removal amendments; it further held that Respondents' amended, post-removal complaint did not state an exception to Texas's bar on seller liability and therefore did not state a colorable claim against Whole Foods. Pet.App. 25a–26a. The district court thus denied Respondents' motion to remand and dismissed Respondents' claims against Whole Foods with prejudice. Pet.App. 28a. Respondents did not seek interlocutory review.

With Whole Foods out of the case, Respondents and Hain conducted more than a year of discovery, took nearly twenty fact and expert depositions, filed cross-motions for summary judgment, litigated extensive motions *in limine*, and, in February 2023—21 months after the district court dismissed Whole Foods with prejudice—went to trial. *See* Pet.App. 33a. Two days after Respondents rested, the district court granted Hain's Rule 50(a) motion for judgment as a matter of law. Pet.App. 31a; *see* Fed. R. Civ. P. 50(a). The district court concluded that, even after seven days of testimony, Respondents had not presented sufficient evidence to establish general causation—that is, Respondents offered "no testimony from a

qualified expert that the ingestion of heavy metals" could have "cause[d] the array of symptoms" suffered by E.P. Pet.App. 30a. As the trial court explained, "general causation"—a required element of Respondents' case—"[was] simply not supported by the science." Pet.App. 30a. The district court thus entered judgment in Hain's favor. Pet.App. 33a–34a.

2. Respondents appealed. In addition to arguing that the district court erred in ruling for Hain on the merits—an argument the Fifth Circuit did not rule on, Pet.App. 23a—Respondents urged the court of appeals to vacate the district court's final judgment and remand the entire matter to state court for a complete do-over because, they argued, the district court erred in concluding that Respondents fraudulently joined Whole Foods. Respondents argued that, because nondiverse Whole Foods should have remained a party to the case, the district court lacked subject matter jurisdiction when it entered final judgment (or ever), even though the parties as to whom the court entered final judgment were completely diverse. Respondents never argued that their state-court pre-removal complaint stated a colorable claim under Texas' innocent-seller statute. Instead, they argued that, because the legal theories outlined in their state-court complaint were sufficiently broad to encompass an express-warranty claim—even though they explicitly discussed implied warranties and failed to even mention any express warranty—and because their post-removal amendments added sufficient factual allegations to support such a claim, the post-removal amended version of their complaint stated a colorable claim under the innocent-seller statute.

A panel of the Fifth Circuit expressed no view on the merits of the district court's final judgment but vacated that take-nothing judgment and sent the case back to the starting line in state court because, it concluded, the district court never had jurisdiction over the matter, including when it entered judgment as to completely diverse parties. Pet.App. 23a. The panel first held that the district court erred in dismissing Whole Foods as fraudulently joined. Although the Fifth Circuit did *not* hold that Respondents' complaint stated a colorable claim against Whole Foods at the time of removal, it held that the legal theories outlined in that complaint were "broad enough to encompass" an express warranty claim and that, combined with factual allegations Respondents added in a post-removal amended complaint, they stated a colorable claim for breach of express warranties under Texas law. Pet.App. 8a–14a. The court thus concluded, based on the post-removal amendments to Respondents' complaint, that Whole Foods was not fraudulently joined and that the district court erred in denying Respondents' motion to remand. Pet.App. 14a–21a.

The Fifth Circuit then turned to whether its conclusion that the district court erred in dismissing Whole Foods "require[d]" the panel "to vacate the take-nothing judgment," even though, as Hain argued, the parties before the district court when it entered final judgment were completely diverse. Pet.App. 21a. The panel held that, in fact, "complete diversity did not exist at the time judgment was entered" because Whole Foods should not have been dismissed earlier in the case. Pet.App. 22a. In the panel's view, the initial lack of complete diversity

"linger[ed]" through to final judgment, even though the only nondiverse defendant was dismissed with prejudice long before trial and final judgment. Pet.App. 22a. The panel therefore vacated the district court's final judgment and instructed that the case be remanded to state court to start anew. Pet.App. 23a.

Hain and Whole Foods each timely petitioned for rehearing en banc. The Court of Appeals stayed the mandate and ordered Respondents to answer the petitions. The court later denied the petitions. Pet.App. 36a. On remand, the state trial court denied motions by Hain and Whole Foods to place proceedings into abeyance. Discovery has commenced and the state trial court has initially scheduled a trial for September 2025.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with decisions of other courts of appeals, flouts the reasoning of this Court's decisions, and guarantees that judicial and party resources will be wasted. This case is an ideal vehicle to address either question presented, each of which independently warrants reversal of the Fifth Circuit's decision and reinstatement of the district court's final judgment. This Court's review is plainly warranted. Sup. Ct. R. 10(a).

The panel decision entrenches the Fifth Circuit squarely on the wrong side of an existing 3-2 circuit split about whether 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 in dismissing a nondiverse defendant as fraudulently joined. In this case, the Fifth Circuit aligned itself with the Eleventh Circuit in holding

that a final judgment must be vacated in such circumstances. Three other circuits disagree, requiring that a district court's final judgment should be preserved. In particular, an Eighth Circuit case materially identical to this one came out the opposite way. *Junk v. Terminix Int'l Co.*, 628 F.3d 439, 442–43 (8th Cir. 2010). The circuit conflict on this important and recurring question is intractable, perpetuates divergent jurisdictional rules in different regions, and imposes intolerable burdens on courts and parties.

In addition, the panel forged a new path, not embraced by any other court of appeals we are aware of, when it created a new exception to the foundational rule that jurisdiction in removed diversity cases is determined as of the time of removal. On appeal and in the district court, Respondents never argued that their complaint at the time of removal stated a colorable claim against Whole Foods. But the Fifth Circuit held that Respondents could resuscitate that failed claim by filing a post-removal amended complaint with new factual allegations. That holding was error, creates enormous inefficiencies, and should be reversed. The second question presented is closely related to the question this Court is considering in *Royal Canin U.S.A., Inc. v. Wullschleger*, No. 23-677 (argued Oct. 7, 2024). If this Court opts not to grant the petition on one or both questions, it should hold the petition for the decision in *Royal Canin* and then grant the petition, vacate the Fifth Circuit's decision, and remand for further consideration in light of *Royal Canin*.

I. The Court Should Grant Review To Resolve A Circuit Split About Whether A District Court's Final Judgment As To Completely Diverse Parties Must Be Vacated When It Is Later Determined That The Court Erred By Dismissing A Non-diverse Party At The Time Of Removal.

The decision below further entrenches an existing circuit conflict between the Fifth and Eleventh Circuits on one side, and the Fourth, Eighth, and Ninth Circuits on the other. The conflict could not be more stark: on materially identical facts, the Eighth Circuit reached the opposite conclusion to the Fifth Circuit here. *Junk v. Terminix Int'l Co.*, 628 F.3d 439, 442–43 (8th Cir. 2010). The approach adopted by the Fifth and Eleventh Circuits cannot be squared with the clear implications of this Court's decisions in *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), and *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). And it guarantees that enormous judicial and party resources will go to waste in those circuits. This Court should grant the petition to settle this important jurisdictional question.

The Fifth Circuit committed legal error and deepened a circuit conflict when it held that the district court's final judgment must be reversed and the case remanded to state court because, in the panel's view, the district court erred in dismissing non-diverse defendant Whole Foods years earlier.[1] The panel

[1] Petitioners strongly disagree with the Fifth Circuit's conclusions (1) that Respondents' amended complaint states a viable claim under Texas law against Whole Foods and (2) that the district court erred in dismissing Whole Foods as fraudulently joined. Although nothing in this petition should be viewed as

reasoned that the district court lacked subject matter jurisdiction at the time it entered judgment because, *if* the district court had not dismissed Whole Foods, the parties would not have been diverse. Pet.App. 22a–23a. But there is no question that there was complete diversity between the parties that litigated the issues to final judgment in the district court. At least three courts of appeals correctly hold in those circumstances that a district court has subject matter jurisdiction and that its judgment should remain intact; two hold the opposite. The first question presented is important and recurring—and the division among the courts of appeals is intractable. Because jurisdictional rules should be uniform throughout the federal system, this Court should grant the petition and reverse the Fifth Circuit's decision.

The Fifth and Eleventh Circuits' rule guarantees immense waste of judicial and party resources in cases where a district court makes an early remand error in a diversity case before proceeding with the case and entering final judgment as to completely diverse parties. Although in such cases, there is complete diversity among the parties that litigate the case to final judgement, the Fifth and Eleventh Circuits would require that all of that judicial work be erased, and the case remanded to state court to start anew. That approach is intolerably wasteful and inefficient, undermines principles of finality, and has no doctrinal foundation or practical benefit.

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concessions on these points, those questions are not presented in this petition and this Court need not reach them in order to address the questions that are presented here and to reverse.

A. The Decision Below Further Entrenches A Circuit Conflict.

The Fifth Circuit's holding deepens an existing circuit conflict by aligning with the Eleventh Circuit, in conflict with the Fourth, Eighth, and Ninth Circuits.

Even if the Fifth Circuit were correct that Whole Foods should not have been dismissed (a premise Petitioners dispute), the panel was wrong to conclude that the district court's judgment must be vacated because the district court lacked jurisdiction at the time it entered final judgment. The Fifth Circuit held that it must assess the district court's jurisdiction at the time of final judgment *not* with reference to the form the case took at that time but instead with reference to the form the case hypothetically would have taken if the district court had not dismissed Whole Foods. That approach aligns with the Eleventh Circuit's but squarely conflicts with the approach correctly adopted by the Fourth, Eighth, and Ninth Circuits.

1. The majority side of the circuit split faithfully applies this Court's teachings in holding that, when a district court errs by dismissing a non-diverse party and declining to remand a case, and then proceeds to final judgment, the final judgment should be preserved if the parties that participated in the litigation through to final judgment were completely diverse. Under that correct approach, the decision below would have come out the other way.

When faced with a situation materially indistinguishable from this case, the Eighth Circuit did the opposite of what the Fifth Circuit did here, leaving the district court's final judgment in place. In *Junk v. Terminix International Co.*, the plaintiffs, citizens of

Iowa, filed product-liability and negligence claims in state court against defendants Terminix and Dow. 628 F.3d 439, 442–43 (8th Cir. 2010). The plaintiffs were diverse to Terminix and Dow, but joined an individual Terminix employee who was also a citizen of Iowa. *Id*. at 443. As Hain did here, Dow removed based on diversity jurisdiction, arguing that the Terminix employee had been fraudulently joined. *Ibid*. The plaintiffs moved to remand, but the district court agreed with Dow, holding that the plaintiffs had no state-law claims against the nondiverse employee, dismissing the claims against that employee, and declining to remand. *Id*. at 443. Following discovery, the district court granted summary judgment to Terminix and Dow because the plaintiffs could not show specific causation. *Id*. at 444.

On appeal, the Eighth Circuit held that the district court erred in dismissing the nondiverse defendant and declining to remand the matter to state court. But the court held that the district court's grant of summary judgment in favor of the diverse defendants should not be disturbed because all relevant "federal jurisdictional requirements [we]re met at the time judgment [wa]s entered." *Junk*, 628 F.3d at 447. Critically, that holding did not turn on any aspect of the case that is distinguishable from this one: in both cases, the court of appeals held that the district court erred in dismissing a nondiverse defendant and in both cases, the district court entered final judgment with respect to remaining completely diverse parties. The Eighth Circuit correctly held that whether the district court had jurisdiction at the time it entered judgment should be assessed with reference to the parties actually before it at that time; the Fifth Circuit

erroneously held that the district court's jurisdiction should be assessed with reference to the parties that *would have been* in the case absent the district court's dismissal of the nondiverse defendant. The difference in outcome is not attributable to any exercise of discretion by the district court or court of appeals. The difference in outcome stems entirely from the respective courts' application of conflicting legal rules.[2]

The outcome of the appeal in this case would also have been different in the Ninth Circuit, which has similarly concluded that when, at the time of judgment "[t]he only parties before the court [are] diverse," the district court has subject matter jurisdiction even when a nondiverse party was erroneously dismissed earlier in the case. *Gould v. Mut. Life Ins. Co. of N.Y.*, 790 F.2d 769, 774 (9th Cir. 1986); *accord Dep't of Fair Emp. & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 736 (9th Cir. 2011); *Lewis v. Time, Inc.*, 710 F.2d 549, 551–52 (9th Cir. 1983). In *Gould*, the Ninth Circuit held that the district court erred in denying the plaintiff's motions to remand because the state court had erred in dismissing nondiverse parties prior to removal. *Gould*, 790 F.2d at 773. But the court declined to reverse the district court's final judgment—even though the "initial removal was improper" and the dismissal

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[2] In slightly different circumstances, the Eighth Circuit has described the approach dictated by *Caterpillar* as "a categorical rule, not a case-by-case inquiry into how much time was spent litigating each particular case in the district court." *Ellingsworth v. Vermeer Mfg. Co.*, 949 F.3d 1097, 1100 (8th Cir. 2020) (quoting *Buffets, Inc. v. Leischow*, 732 F.3d 889, 898 (8th Cir. 2013)). The Fifth Circuit applied the opposite categorical rule in this case by requiring that the final judgment be vacated and the case remanded, guaranteeing that all of the work will have been for naught.

of the non-diverse parties was thereafter "overturned on appeal"—because the district court would have had original jurisdiction over the case if it had been brought in the federal court in the form it had at the time of final judgment. *Id.* at 773–74. In *Lewis*, the Ninth Circuit applied the same legal rule, holding that a district court's final judgment should not be disturbed if the district court earlier erred in dismissing a nondiverse party after removal, without deciding whether that dismissal was in fact error. 710 F.2d at 551–52. Under the approach outlined in those cases, this case would have come out the opposite way had it arisen in the Ninth Circuit rather than the Fifth. And, although *Gould* and *Lewis* predate *Caterpillar*, the Ninth Circuit has applied their jurisdictional analysis more recently. *See Lucent Techs., Inc.*, 642 F.3d at 736.

Like the Eighth and Ninth Circuits, the Fourth Circuit has held that a judgment entered as to diverse parties after the erroneous dismissal of a nondiverse party "works no expansion of federal jurisdiction" and should not be disturbed if "[t]he posture of the case at the time of judgment supported the exercise of federal jurisdiction." *Able v. UpJohn Co., Inc.*, 829 F.2d 1330, 1331, 1333 (4th Cir. 1987), *overruled on other grounds by Caterpillar*, 519 U.S. at 74 n.11[3]; *see also Marshall v. Manville Sales Corp.*, 6 F.3d 229, 231–33 (4th Cir. 1993) (acknowledging holding of *Able*).

[3] The Court in *Caterpillar* disagreed with the holding in *Able* that a plaintiff who failed to seek an interlocutory appeal from a denial of a motion for remand was estopped from raising the issue on appeal but had no quarrel with the Fourth Circuit's jurisdictional analysis.

In *Able*, a child sued a diverse drug manufacturer and a nondiverse physician for injuries he allegedly suffered *in utero* due to his mother's use of a prescribed drug. 829 F.2d at 1331. The drug manufacturer removed the case, and the plaintiff sought a remand. *Id.* at 1331–32. The district court severed the claims against the defendants, remanding the claim against the physician to state court and retaining the claim against the diverse defendant, and later entered summary judgment for the defendant. *Id.* at 1332. On appeal, the Fourth Circuit expressed serious doubt about whether the district court's refusal to remand the entire case was appropriate. *Id.* at 1332–33. But the court held that any error in declining to remand would not justify overturning the district court's ultimate grant of summary judgment for the diverse defendant and forcing the parties to relitigate the claims against that defendant in state court, explaining that "judicial economy and finality require that the district court's judgment be allowed to stand." *Id.* at 1334. Although *Able* took a different procedural path than this case, it raises the same jurisdictional considerations as those raised in this case, with final judgment against a diverse defendant and a view on appeal that the case should have been remanded to state court. But while considerations of judicial economy and finality prevailed in *Able*, the Fifth Circuit disregarded them here.[4]

[4] The Tenth Circuit has also held that a district court's final judgment should not be overturned because the parties lacked complete diversity at the time of removal as long as the parties were completely diverse at the time judgment was entered. *Hollander v. Sandoz Pharms. Corp.*, 289 F.3d 1193, 1203 (10th Cir. 2002). In so holding, that court did not decide whether the district court's initial refusal to remand was erroneous. And in a

2. In conflict with these circuits, the Eleventh Circuit has charted a course consistent with the Fifth Circuit's, holding that when a district court errs by dismissing a nondiverse party as fraudulently joined, any final judgment it later issues against the remaining (completely diverse) parties must be overturned for lack of jurisdiction. *Henderson v. Wash. Nat'l Ins. Co.*, 454 F.3d 1278, 1284 (11th Cir. 2006). The procedural journey in *Henderson* was similar to that here: (1) diverse defendants removed, arguing that the only nondiverse defendant should be dismissed as fraudulently joined; (2) the district court agreed with the removing defendants, denying the plaintiff's motion to remand and dismissing the nondiverse defendant; and (3) the district court later entered final judgment for the remaining defendants at a time when the parties before the court were completely diverse. *Id.* at 1280–81. In that case, as in this case, the court of appeals held that, because the nondiverse defendant should not have been dismissed, the district court lacked jurisdiction over the matter when it entered final judgment. *Id.* at 1284. The Eleventh Circuit followed the same course in *Florence v. Crescent Res., LLC*, 484 F.3d 1293, 1299 (11th Cir. 2007), holding that the district court "lacked subject matter jurisdiction to" enter final judgment between completely diverse parties because it had erred in earlier dismissing a nondiverse defendant.

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somewhat different procedural posture, the Second Circuit has relied on *Caterpillar* to hold that, "if a jurisdictional defect exists at some time prior to a district court's entry of judgment, the court's judgment is still valid if the jurisdictional defect is cured before final judgment is entered." *Brown v. Eli Lilly & Co.*, 654 F.3d 347, 356–57 (2d Cir. 2011).

In the decision below, the Fifth Circuit adopted the same approach as the Eleventh Circuit, and not for the first time. In *McKee v. Kansas City S. Ry. Co.*, 358 F.3d 329, 336–37 (5th Cir. 2004), the Fifth Circuit reached the same conclusion in a materially identical posture. In that case, after finding that the district court erred in dismissing a nondiverse defendant, the Fifth Circuit vacated a jury verdict and final judgment as to completely diverse parties and ordered the case remanded to state court to start anew. *Id.* at 337. Both the Fifth and Eleventh Circuits justify their approach by ignoring the fact that, at the time the district court entered judgment, the court in each case had jurisdiction over the parties before it—and instead treating what it viewed as the earlier improper dismissal of a nondiverse party as incurably defeating subject matter jurisdiction. That approach is wrong and conflicts with the approach adopted by the Fourth, Eighth, and Ninth Circuits.

3. The 3-2 circuit split will not resolve without this Court's intervention. Hain and Whole Foods each filed a petition for rehearing en banc below, pointing out that the court's decision is inconsistent with decisions of other courts of appeals and of this Court. COA Docs. 146 (Whole Foods), 147 (Hain); *see* Pet.App. 36a. After initially holding the mandate to consider the petitions, the Fifth Circuit denied them. Pet.App. 36a. Without this Court's intervention, parties in these situations will be subject to different jurisdictional regimes in different parts of the country, with dramatic consequences for defendants and for the administration of justice, as explained below.

B. The Decision Below Is Wrong.

The Fifth Circuit's decision ignores the principles this Court announced in *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), and *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), which prioritize preserving final judgments as to completely diverse parties even in cases where there was not complete diversity at the time of removal or filing. Although this case, and the other cases implicated by the circuit conflict, present a question distinct from those decided in *Caterpillar* and in *Newman-Green*, the rationales underlying those decisions plainly warrant reversal of the panel's decision.

In *Caterpillar*, the parties lacked complete diversity at the time of removal, but the nondiverse defendant settled the claims against it and was dismissed prior to trial and final judgment. 519 U.S. at 64. The Court held that, although the district court erred in declining to remand the matter to state court upon removal, the court's final judgment need not be disturbed because the district court had jurisdiction over the case in the form that it existed at the time final judgment was entered, *id.* at 77—and because "[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law. . . , considerations of finality, efficiency, and economy become overwhelming," *id.* at 75. In so holding, the Court departed from the traditional rule that jurisdiction in a removed case must be determined at the time of removal, explaining that, "[s]o long as "federal subject-matter jurisdiction" exists "at the time of trial and judgment," 519 U.S. at 73, the fact that a district court should have remanded a case at the time of removal provides no basis to overturn the district court's final

judgment if the district court entered judgment as to completely diverse parties.

The Court in *Caterpillar* built in part on the Court's earlier holding in *Newman-Green, Inc. v. Alfonzo-Larrain*, where the Court confronted a case that lacked complete diversity at the time it was filed *and* at the time of final judgment and appeal. 490 U.S. at 828–30. The Court held in that case that a panel of the court of appeals correctly dismissed the dispensable nondiverse defendant (before being reversed by the en banc court of appeals) in order to preserve the final judgment as to the remaining completely diverse parties. 490 U.S. at 838. And that decision built on earlier decisions in which appellate courts (including this Court) had dismissed dispensable nondiverse parties in order to preserve jurisdiction as to diverse parties. *See Newman-Green*, 490 U.S. at 834–836 (discussing cases). In *Caterpillar* and in *Newman-Green*, the Court sought to avoid wasting time and resources by throwing out a final judgment and forcing litigants to start over. *Caterpillar*, 519 U.S. at 76–77; *Newman-Green*, 490 U.S. at 838. The Fifth Circuit did the opposite here.

This case falls somewhere between *Caterpillar* and *Newman-Green*. Like both of those cases, the court of appeals determined in this case that the parties were not completely diverse when the case was removed to (or filed in) federal court. Like *Caterpillar*, the parties that participated in the litigation all the way to final judgment were completely diverse. But in the view of the Fifth Circuit, nondiverse Whole Foods remained a party for jurisdictional purposes because it should not have been dismissed—which would make the case more like *Newman-Green*, where everyone agreed

that the parties that participated in the case were not completely diverse from inception all the way to final judgment. But whether you view the case as more like *Caterpillar* or more like *Newman-Green*, the outcome of those cases for our purposes was the same: this Court held that the court of appeals should preserve the district court's final judgment as to the parties that were completely diverse in order to avoid wasting judicial and party resources and for the sake of finality.

In vacating the final judgment here, the Fifth Circuit ignored the fundamental principles underlying those cases. As the Court explained in *Grupo Dataflux*, both the voluntary dismissal of the nondiverse defendant in *Caterpillar* and the court of appeals' dismissal of the nondiverse defendant in *Newman-Green* "cured the jurisdictional defect" because "the less-than-complete diversity which had subsisted throughout the action had been converted to complete diversity between the remaining parties to the final judgment." 541 U.S. at 573. The same was true in this case.

There is no question that Whole Foods was a dispensable party in this suit. And there is no dispute that Whole Foods did not participate in the proceedings leading up to and through trial to final judgment. But the Fifth Circuit considered itself compelled to vacate the district court's judgment and to order the parties to start anew in state court because in its view the district court never had jurisdiction. It is not possible to square that view with the decision in *Newman-Green*. In that case, it was undisputed that the district court lacked jurisdiction over the parties that participated to final judgment, and this Court

nevertheless held that the court of appeals properly dismissed the nondiverse defendant in order to preserve the judgment as to the diverse parties when doing so would not prejudice any party. 490 U.S. at 837–38. Here, the Fifth Circuit did the opposite, reinstating a dispensable nondiverse defendant in order to destroy the jurisdiction of the federal court, with great prejudice to the defendants. If left uncorrected, the rule of law the Fifth Circuit has adopted will continue to visit asymmetrical prejudice on defendants going forward by allowing plaintiffs who lose in federal court to get a brand-new bite at the apple in state court.

C. This Jurisdictional Question Is Important And Recurring.

The first question presented is important and recurring. The Fifth Circuit's jurisdictional holding undermines important principles of finality in removed cases premised on diversity jurisdiction, will inevitably waste judicial and party resources, and will subject parties to conflicting jurisdictional rules in different regions. The rules governing federal jurisdiction in removed cases and the remedies available for erroneous dismissals of nondiverse parties are recurring issues that are critical to the uniform administration of justice. And for the sake of courts and parties alike, they should be uniform throughout the federal system.

The outcome below is also profoundly unfair. Respondents had a full and fair opportunity to litigate their state-law claims against Hain, and the Fifth Circuit identified no error in the district court's holding that Respondents simply failed to establish causation. But now Respondents will have a chance to try again

in state court, forcing Hain to a litigate the same issues of law and fact against the same plaintiffs. This Court should not countenance that waste of resources.

The first question presented is recurring, as reflected in the circuit split, and presents high stakes for the resources of parties and federal courts. This Court has already grappled with—and condemned—the inefficiency and waste that an approach like that of the Fifth and Eleventh Circuits would wreak. The Court explained in *Caterpillar* that "considerations of finality, efficiency, and economy become *overwhelming*" "[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law." 519 U.S. at 75 (emphasis added). The Court had earlier relied on the same considerations in *Newman–Green*, where the lack of complete diversity went undetected until the final judgment was on appeal. 490 U.S. at 828–30. In holding that the court of appeals had authority to dismiss the dispensable nondiverse defendant in order to create diversity and preserve the final judgment, the Court explained "[n]othing but a waste of time and resources would be engendered by . . . forcing these parties to begin anew." *Id.* at 838. Although that suit was filed initially in federal, not state, court, the Court in *Caterpillar* held that the same principles apply to removal cases—and that "requiring dismissal 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 (quoted in *Caterpillar*, 519 U.S. at 76).

Left in place, the Fifth Circuit's approach would flout those overwhelming considerations, wasting judicial resources by requiring diverse defendants who have prevailed once to relitigate a case from scratch.

In this case alone, the price will be years of judicial attention, to say nothing of the parties' time and expenses, for the sake of rehashing claims that, as the district court found after a trial, are "simply not supported by the science." Pet.App. 30a. That "exorbitant cost" is "incompatible with the fair and unprotracted administration of justice." *Caterpillar*, 519 U.S. at 77.

The consequences for Hain are staggering. The district court found—after a two-week jury trial, significant pretrial expert discovery and Rule 702 briefing, extensive motions in *limine*, cross motions for summary judgment, and years of discovery—that Respondents failed to establish causation. But if the Fifth Circuit's decision is allowed to stand, Hain will have to go back to the starting gate in state court. Once in state court, Whole Foods will seek to be dismissed again; but at that point, it will be too late for Hain to re-remove the case to federal court. *See* 28 U.S.C. § 1446(c)(1). Hain will be left to go through the additional considerable expense of defending itself all over again, despite the fact that the underlying case is so flimsy on the science that the district court granted Rule 50(a) judgment against Respondents even before Hain presented a defense. There is no benefit to requiring that kind of duplicative litigation.

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The jurisdictional rule adopted by the Fifth and Eleventh Circuits is all down-side with no benefit. It is incorrect as a legal matter, will inevitably waste judicial and party resources, and undermines finality. This Court should grant this petition to resolve the

circuit split on this important and recurring question of federal jurisdiction.

II. The Court Should Reverse The Fifth Circuit's Holding That A Plaintiff Can Defeat Diversity Jurisdiction By Relying On Factual Allegations Added After Removal To Create A Colorable Claim That Did Not Exist At Removal.

This Court has long held that, when a case is removed to federal court based on diversity jurisdiction, a post-removal "amended complaint should not [be] considered in determining the right to remove, which" should instead "be determined according to the plaintiffs' pleading at the time of the petition for removal." *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939). The Court broke no new ground in *Pullman*, instead applying the longstanding rule that "the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal." *St. Paul Mercury Indem. Co. v. Red Cab. Co.*, 308 U.S. 283, 291 (1938); *accord Mollan v. Torrance*, 22 U.S. (9 Wheat.) 357, 359 (1824) (Marshall, C.J.) ("It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events.").

Although every court of appeals, including the Fifth Circuit in this case, Pet.App. 8a, purports to adhere to that principle, courts have also recognized limited exceptions. As relevant here, courts of appeals generally depart from this background principle to allow consideration of post-removal amendments or other filings that clarify *jurisdictional* facts—*i.e.,* the citizenship of parties or the amount in controversy—

that existed at the time of removal but were not apparent on the face of the pleadings.[5] But the Fifth Circuit in this case vastly expanded that exception by requiring a district court to consider post-removal amendments alleging new *non-jurisdictional* facts that would have the effect of asserting a new claim by converting a claim that was not colorable at the time of removal into what the Fifth Circuit viewed as a colorable claim.[6] Pet.App. 13a–21a. Nothing in this Court's cases justifies that sort of expansion, and Petitioners are not aware of any other court of appeals that recognizes a plaintiff's ability to defeat diversity jurisdiction by alleging new non-jurisdictional facts after removal. That is unsurprising given how out of step the decision below is with this Court's embrace of the time-of-filing rule in diversity cases. *See*, *e.g.*, *Grupo Dataflux*, 541 U.S. at 570–571. The Fifth Circuit's departure from *Pullman*'s rule that a district

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[5] *See*, *e.g.*, *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005) (in case removed based on diversity, amount in controversy may be clarified by post-removal pleadings); *BEM I, LLC v. Anthropologie, Inc.*, 301 F.3d 548, 552–53 (7th Cir. 2002) (same); *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 949 (11th Cir. 2000) (same); *see generally* 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3723 (Rev. 4th ed.) (explaining that, in removed diversity cases, district courts may look beyond complaint to assess "certain matters critical for determining diversity jurisdiction, such as the citizenship of the parties or the amount in controversy").

[6] Although the panel below appeared at one point to recognize the difference between jurisdictional facts and facts relevant to whether a plaintiff has stated a colorable claim, Pet.App. 7a, in passing it later described the new facts that Respondents asserted in their amended complaint as "jurisdictional facts," Pet.App. 14a. That imprecise use of language is immaterial here as it is undisputed that Respondents did not seek to allege new facts relevant to the amount in controversy or the citizenship of the parties in its amended complaint.

court's jurisdiction should "be determined according to the plaintiffs' pleading at the time of the petition for removal," 305 U.S. at 537, undermines certainty about jurisdictional rules and invites exactly the sort of forum manipulation the rule is intended to guard against. Without this Court's intervention, plaintiffs in the Fifth Circuit will have a roadmap to defeat diversity jurisdiction by alleging new non-jurisdictional facts after removal.

This question has serious implications for both diverse and nondiverse defendants because it allows plaintiffs to manipulate their pleadings to defeat diversity jurisdiction in cases over which a district court plainly has subject matter jurisdiction at the time of removal. That approach—coupled with the Fifth Circuit's new rule that errors in dismissing nondiverse parties as fraudulently joined require vacatur of final judgments regardless of how time-consuming and resource-intensive proceedings in federal court were—is inefficient, unfair to defendants, and destined to waste judicial resources. District courts should be able to determine at the time of removal whether they have jurisdiction over a matter. The Fifth Circuit's rule allowing plaintiffs to amend their allegations after removal in order to defeat diversity jurisdiction that existed at the time of removal cannot be reconciled with overarching principles of judicial economy and will impose a serious burden on courts and defendants alike.

To be sure, the Fifth Circuit's adoption of this approach is of recent vintage. And, although other courts of appeals recognize the importance of adhering to the time-of-filing rule in terms that do not contemplate the exception the Fifth Circuit applied

here,[7] Petitioners are not aware of other courts of appeals that have directly addressed this question. But the Court should grant this petition to address this issue now because it is likely to evade review in the future. Going forward, when plaintiffs in the Fifth Circuit or elsewhere strategically add post-removal allegations requiring remand, the resulting remand orders will generally be unreviewable. *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.").[8] The Court should therefore correct this error immediately.

In the alternative, the Court may wish to hold this petition for the result in No. 23-677, *Royal Canin U.S.A., Inc. v. Wullschleger* (argued on Oct. 7, 2024), which presents related questions about whether and to what extent a plaintiff in a removed action can defeat federal jurisdiction by filing an amended complaint. In *Royal Canin*, the case was removed on federal-question grounds rather than diversity

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[7] *See*, *e.g.*, *In Touch Concepts, Inc. v. Cellco P'ship*, 788 F.3d 98, 101–02 (2d Cir. 2015); *Gossmeyer v. McDonald*, 128 F.3d 481, 487–88 (7th Cir. 1997); *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1488 (10th Cir. 1991).

[8] In cases removed pursuant to the Class Action Fairness Act (CAFA), another species of diversity cases, in contrast, Congress has authorized appellate review of remand orders. 28 U.S.C. § 1453(c). And in those cases, courts of appeals have rejected the type of approach adopted below. Before the panel's decision in this case, the Ninth Circuit observed in the CAFA context that "the circuits have unanimously and repeatedly held that whether remand is proper must be ascertained on the basis of the pleadings at the time of removal," explaining that the panel had "not found any other circuit decisions permitting post-removal amendment of the complaint to affect the existence of federal jurisdiction". *Broadway Grill, Inc. v. Visa Inc.*, 856 F.3d 1274, 1277–78 (9th Cir. 2017).

grounds. And the plaintiff in *Royal Canin* sought to destroy federal jurisdiction by dismissing the federal questions rather than by adding factual allegations. Although the two cases are distinct in those ways, the first question presented in *Royal Canin* and the second question presented here are closely related, asking how much leeway a plaintiff has to defeat removal by changing her claims post-removal. However the Court resolves *Royal Canin*, it will inevitably shed light on the time-of-filing rule and the extent to which a plaintiff can amend her complaint in order to destroy federal jurisdiction. If the Court opts not to grant review of one or both of the questions presented, it should hold this petition pending resolution of *Royal Canin* and then grant this petition, vacate the judgment of the Fifth Circuit, and remand for reconsideration in light of that decision.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari.

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