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June 14, 2004

BY HAND

Clerk, United States Court of Appeals
U.S. Courthouse
1 Courthouse Way
Boston, Massachusetts 02210

Re: Consolidated cases

Citizens Awareness Network, Inc. et al. v. United States NRC, et al., No. 041145

Public Citizen Critical Mass Energy and Environment Program, et al. v. United States, et al., No. 04-1349

Dear Sir or Madam,

Enclosed for filing in the above captioned consolidated cases, please find the original and eight copies of Brief for Amici Curiae states of Massachusetts, New Hampshire, Connecticut, New York and California

Please stamp and return one copy in the enclosed self-addressed envelope. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Nora J. Chouder".

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CONSOLIDATED CASES NOS. 04-1145 and 04-1359

United States Court of Appeals
for the First Circuit

No. 04-1145

CITIZENS AWARENESS NETWORK, INC., ET AL.,
Petitioners,
and

NATIONAL WHISTLEBLOWER CENTER AND COMMITTEE FOR SAFETY AT PLANT ZION,
Petitioner Intervenor

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.,
Respondents,

No. 04-1349

PUBLIC CITIZEN CRITICAL MASS ENERGY AND ENVIRONMENT PROGRAM, ET AL.,
Petitioners,

v.

UNITED STATES, ET AL.,
Respondents,
and

NUCLEAR ENERGY INSTITUTE, INC.
Respondent Intervenor

ON PETITION FOR REVIEW OF A FINAL RULE ISSUED
BY RESPONDENT NUCLEAR REGULATORY COMMISSION

**BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS AND THE
STATES OF NEW HAMPSHIRE, CONNECTICUT, NEW YORK AND CALIFORNIA
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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I. INTRODUCTION

There are over one hundred nuclear power plants in the United States, some of which are more than 40 years old, and all of which were originally licensed before 1979. The licenses for these older facilities, which were valid for a 40 year term, are now beginning to expire. The Nuclear Regulatory Commission (the "NRC") has already received dozens of applications for license renewals, and will likely receive dozens more in the next decade.¹ The NRC will evaluate these applications on a facility-by-facility basis. The NRC will then decide whether to allow the older plants to operate for another 40 to 60 years and, if so, what the terms of each renewed license will be. This case is about the nature of administrative hearings on these license renewal applications, and the quality of the administrative record that will be created for judicial review.

The NRC seeks to restrict public and State participation in licensing matters just when licenses for these aging facilities are beginning to expire. For almost 50 years, the NRC and its predecessor agency, the Atomic Energy Commission, took

¹While no new licenses have been issued since 1979, applications for new licenses may be forthcoming. Just two months ago a consortium of seven companies announced to the press that it will apply for a license to build a new commercial nuclear power plant. Although this brief focuses on license renewal hearings, the States are also concerned about new licenses and license amendments. The arguments made herein would apply equally to license amendments and with at least as much force in the context of original licensing.

the position that the Administrative Procedure Act's formal adjudicatory provisions apply to nuclear licensing hearings (with a few exceptions not relevant here). In a careful and detailed 1989 memo, the NRC's Office of General Counsel reaffirmed the correctness of this approach with respect to nuclear power plant license renewals. See William Parler, General Counsel, NRC, memo to Victor Stello, NRC Exec. Dir. Operation, re: "OGC Analyses of Legal Issues Relating to Nuclear Power Plant Life Extension" (1989), 2 J.A. at 798-830 ("1989 NRC OGC Analysis"). However, in January 2004, the NRC adopted regulatory changes to its adjudicatory process which established informal hearing procedures for all but a few types of licensing proceedings. Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2,181-2282 (2004) (to be codified at 10 CFR Parts 1, 2, 50 et al.) ("Final Rule"). These informal procedures will apply to license renewal hearings and to any hearings on new license applications. They will eliminate the parties' right to discovery, severely restrict cross-examination, and adversely impact the quality of the record for judicial review.

The Court should reject this newer agency position. With respect to the States – which are subject to the new regulations – Congress explicitly mandated certain procedural formalities. The regulations violate the APA as well as the AEA's mandate that States be afforded a hearing with an opportunity to

interrogate witnesses and advise the NRC in nuclear licensing proceedings. The NRC's position is not entitled to deference under Chevron because the statutory scheme clearly contemplates formal adjudicatory procedures for facility licensing hearings. Moreover, the agency is not interpreting solely its governing statute, but rather the relationship between its governing statute and another statute – the APA. In any event, the NRC's position is unreasonable, and inconsistent with the APA and the Atomic Energy Act (“AEA”). The AEA specifies that NRC actions are subject to APA requirements. License renewal hearings are precisely the type of quasi-judicial proceedings for which the adjudicatory procedures of the APA were intended. Even the NRC admits that there is nothing in the Atomic Energy Act or its legislative history to indicate that Congress intended to allow informal hearings in these cases. 69 Fed. Reg. 2,183 (Preamble to Final Rule). In fact, the AEA, taken as a whole and in light of its legislative history, shows that Congress recognized the need for formal adjudicatory hearings in nuclear licensing matters.

II. INTEREST OF AMICI CURIAE

Amici the Commonwealth of Massachusetts, and the states of New Hampshire, Connecticut, New York and California have an interest in active and meaningful participation in the evaluation of the factual issues raised in the process of licensing nuclear power plants. The States' interests include their

interest in the safety of their citizens, the environmental impact of the plants on the States, and the States' economic well being.

The safety of their citizens is the States' foremost concern when nuclear plants are being licensed or relicensed. For example, when aging plants are being relicensed, States may wish to inquire about the condition of these plants, either through cross-examination or discovery. In light of the magnitude of the potential impacts from an accident at one of these facilities, the States believe it is of the utmost importance to ensure that relicensing hearings include adjudicatory procedures designed to bring out a complete factual picture. In addition, the States may wish to inquire or comment about the operation, the safety record, or the environmental impacts of the facilities.

The outcome of a licensing decision can have significant impacts upon the State's economic well-being. For example, an unjustified shutdown of a nuclear power plant may have tremendous economic costs to the State. When Consolidated Edison's Indian Point No. 2 plant suffered a steam tube rupture, the unit was forced to remain shut down for close to a year. The shutdown cost the citizens of New York hundreds of millions of dollars in increased power costs.

The States have an important interest in protecting the environment. Even the normal operation of a nuclear power plant can have significant environmental

impacts. Because of their tremendously high operating temperatures, nuclear power plants use enormous volumes of water for cooling. For example, the Indian Point nuclear power plant in New York State draws up to 2.5 billion gallons of water per day from the Hudson River, killing millions of fish and fish eggs annually.

In the event of a nuclear emergency, State and local governments play a critical role. Evacuation plans for the areas around nuclear power plants are developed and, in the event of a nuclear emergency would be carried out by, State and local governments. State and local police departments, local fire departments, and other first responders with detailed knowledge of their communities should have a meaningful opportunity to acquire and help develop a full factual picture of appropriate public safety issues in the context of facility licensing.

Because of these safety, environmental and economic concerns, the relicensing of existing or siting of new nuclear facilities can affect the character of local communities and can have a significant impact on property values. It is essential that members of the public be given a meaningful opportunity to participate in licensing hearings. Without this opportunity, the public will have little confidence that government decision-makers will address or consider their concerns during the relicensing process.

State and local governments can also play an important role in relicensing proceedings, by helping to develop a factual record regarding the plant's responsiveness to community concerns, day-to-day effects on the host community, and environmental impacts that may not otherwise come to light. These factors are important to a decision maker in considering whether a facility should be relicensed.

The States therefore have a substantial interest and are entitled to play a substantive role in the nuclear power plant licensing process.

III. STATUTORY AND REGULATORY BACKGROUND

Amici States rely on Petitioners' and Intervenor's description of the AEA, the APA, and the NRC's new regulations, adding only the following points:

As the NRC's Office of General Counsel has recognized, a proceeding for the grant of a "renewed license" is a "proceeding for the granting . . . of any license" within the meaning of section 189(a). See 1989 NRC OGC Analysis, 2 J.A. at 803-804.²

²OGC pointed out several reasons for reaching this conclusion, including the following: (1) Congress probably understood that a renewal was a "license" and therefore already covered by the statutory language, (2) the expiration of a license terminates its existence, thus a renewal is actually the grant of a new license, and (3) a contrary interpretation would result a hearing being required for less important actions and not for more important license renewals. Id.

In addition, section 274 of the AEA, entitled “Cooperation with the States,” guarantees certain formal procedural protections to the States in hearings on NRC licensing matters. 42 U.S.C. § 2021. The purpose of section 274, which was added to the Act in 1959, was to turn over to individual States certain defined areas of regulatory jurisdiction. Joint Committee on Atomic Energy, Amendments to the Atomic Energy Act of 1954, As Amended, With Respect to Cooperation With States, S. REP. NO. 870 (attached hereto as Exhibit A). The principal provisions of the bill “authorize the Commission to withdraw its responsibility for regulation of certain materials – principally radioisotopes – but not over more hazardous activities such as the licensing and regulation of reactors.” *Id.* While Congress continued to prohibit most State regulation of nuclear power plants, in return it guaranteed to the State in which the plant was to be located a hearing on licenses for activity regulated by the NRC. Section 274(l) requires the NRC to provide the State prompt notice of the filing of the license application, and a “reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.” 42 USC § 2021(l). With respect to nuclear licensing activities by the States, section 274(o) requires the States to follow procedures which include “(i) an opportunity,

after public notice, for written comments and a public hearing, with a transcript, (ii) an opportunity for cross-examination, and (iii) a written determination which is based upon findings included in such determination and upon the evidence presented during the public comment period and which is subject to judicial review.” 42 U.S.C. § 2021(o).

IV. ARGUMENT

A. License Adjudications Under the Atomic Energy Act are Subject to the APA’s Formal Hearing Requirements.

1. Formal Adversarial Hearings Are Required Where They Will Help Guarantee “Reasoned Decision Making and Meaningful Judicial Review.”

As discussed in Petitioners’ and Intervenor’s Briefs, is well established that a statute need not use the precise words “on the record” to trigger APA’s formal hearing procedures. Rather, this Court has determined that, where a statute specifically provides for administrative adjudication after an agency hearing, a formal on the record hearing is implied, absent indication of contrary Congressional intent in the statute, its context, or its legislative history. See Public Citizen Brief at 17-19. Even aside from the presumption in favor of formal APA adjudicatory procedures, the question of whether such procedures are required should “turn[] on the substantive nature of the hearing Congress intended

to provide.” Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 877 (1st Cir. 1978); Dantran v. Dep’t of Labor, 246 F.3d 36, 46 (1st Cir. 2001). In other words, if adversarial hearings are needed in a particular case to “guarantee reasoned decision making and meaningful judicial review,” then the case is “the kind of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended.” See Seacoast 572 F.2d at 876. In making this determination, a Court should look to whether the proceeding is one in which:

- * the agency must decide whether to grant a license to a specific applicant, based on the agency’s factual findings;
- * only the rights of the specific applicant will be affected, as opposed to rule-making, which tends to influence general policy and affect numerous entities; and
- * factual issues may be sharply disputed.

Seacoast 572 F.2d at 876. Also relevant is:

- * whether the public is likely to benefit from regulation of the activity being licensed, id. at 876-877 (“The panoply of procedural protections provided by the APA is necessary not only to protect the rights of an applicant for less stringent pollutant discharge limits, but

is also needed to protect the public for whose benefit the very strict limitations have been enacted.”); and

- * whether the reviewing court is likely to require an evidentiary record to review the agency’s decision, id. at 877 (“If determinations such as the one at issue here are not made on the record, then the fate of the Hampton-Seabrook Estuary could be decided on the basis of evidence that a court would never see, or what is worse, that a court could not be sure existed. We cannot believe that Congress would intend such a result.”)

2. NRC License Renewal Hearings Are the Type of Proceedings to Which Formal APA Provisions Were Intended By Congress to Apply.

Nuclear power plant license renewal hearings satisfy the factors articulated by this Court in Seacoast. They are precisely “the type of quasi-judicial proceedings for which the adjudicatory procedures of the APA were intended.” Seacoast, 572 F.2d at 876.

The NRC will decide whether to grant or deny a renewal license to a particular applicant based on factual findings. The regulations themselves require the parties to file written post-hearing proposed findings of fact and conclusions of law. 10 CFR § 2.1209. The decision must include findings, conclusions and

rulings, with the reasons or basis for determinations on material issues of fact or law. 10 CFR § 2.1210(c). While “general policy considerations may influence the decision, the decision will not make general policy. Only the rights of the specific applicant will be affected.” See Seacoast, 572 F.2d at 876. Factual disputes are often a central component of licensing proceedings. See e.g. Massachusetts v. United States Nuclear Regulatory Com., 924 F.2d 311, 315 (D.C. Cir. 1991), cert. den. 502 U.S. 899 (1991)(Massachusetts challenged, among other things, adequacy of offsite emergency response plans and potential consequences of hypothetical radiological emergencies at Seabrook).

Because of the magnitude of the risks posed by nuclear facilities,³ the nuclear industry’s exemption from most State or local regulation of nuclear power

³Effective regulation of nuclear power is crucial to public safety, as Congress and courts have expressly recognized. Congress’ concern about this was at the very heart of its enactment of the Atomic Energy Act. Under the AEA, the Nuclear Regulatory Commission is empowered to prescribe such regulations or orders as it may deem necessary . . . to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property . . . 42 U.S.C. § 2201(i)(3); See MidAmerican Energy Co. v. IBEW Local 499, 345 F.3d 616, 620 (D.C. Cir. 2003)(“The framework within which [the nuclear] industry functions is a result of the unique dangers and attendant safety requirements of generating electric power by way of atomic fission. . . . The statutory and regulatory framework that was put in place to protect the public from the hazards of harnessing nuclear energy was a dominant, explicit, and well-defined public policy.”)

plants,⁴ and the limitation on the industry's liability through the Price-Anderson Act,⁵ adequate public participation in and judicial review of NRC license renewal decisions is essential. The assumption that Congress intended determinations as crucial to public safety as the relicensing of aging nuclear power plants to be potentially "decided on the basis of evidence that a court would never see or, what is worse, that a court could not be sure existed" is simply untenable. See Seacoast, 572 F.2d at 578.

3. The Decisions of This Court Support The Conclusion That Formal APA Procedures Are Required for Facility Licensing Hearings.

This Court has held that sections 316(a) and 402(a)(1) of the Federal Water Pollution Control Act ("CWA") require on the record proceedings in permit issuance hearings, even though neither states that the hearing must be "on the record." Seacoast, 572 F.2d 872; see also Marathon Oil Co. v. EPA, 564 F.2d 1253, 1262-63 (9th Cir. 1977). As discussed above, the reasoning in Seacoast is equally applicable in the context of nuclear power plant licensing.⁶ In the 2001

⁴See Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983).

⁵See Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59 (1978).

⁶Significantly, the CWA, unlike the AEA, does not have a provision stating that agency actions are subject to the provisions of the APA. Therefore, Congress'

case of Dantran v. Dep't of Labor, this Court reaffirmed its decision and reasoning in Seacoast. 246 F.3d at 46-47.

The cases cited by the NRC in its Preamble to the Final Rule do not support a different conclusion. The Court in City of West Chicago v. NRC – a Seventh Circuit case declining to require NRC compliance with formal APA procedures in a materials licensing hearing – in fact emphasized that its holding would not apply to the licensing of nuclear facilities. 701 F.2d 632 (7th Cir. 1983). The only other case to allow the NRC to depart from formal adjudicatory procedures for licensing, Kelley v. Selin, did not involve facility licensing, but approval of the use of a particular concrete cask for storage of spent nuclear fuels. 42 F.3d 1501 (6th Cir. 1995), cert. den. 515 U.S. 1159 (1995). While Amici States believe that the Courts in City of West Chicago and Kelley should not have deferred to the NRC's interpretation of the relationship between the APA and the AEA, see section A(4), below, it is notable that the new NRC regulations and interpretation go significantly farther than those cases do. See 1989 NRC OGC Analysis, 2 J.A.

intent in requiring formal APA hearings in NRC licensing proceedings is even more evident than in the CWA context. The fact that the judicial review provision of the CWA (§ 509(c)) specifies that the court's review be on the record does not make those cases distinguishable. Section 189 of the AEA, which incorporates the judicial review provisions of the AEA, also contemplates on the record judicial review. 42 U.S.C. § 2239(b); 5 U.S.C. § 2112.

at 829 (pointing out that the City of West Chicago case was “carefully limited to materials licensing”).⁷

4. The NRC’s Contrary Position Is Not Entitled to Deference.

The NRC’s position that licensing hearings need not be formal on the record proceedings is entitled to no special deference under Chevron⁸ because the agency is not interpreting its governing statute alone, but rather the relationship between its governing statute and another statute – the APA. See Dantran, 246 F.3d at 47-

⁷Nor is the NRC’s position supported by Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir. 1992). That case held only that the APA does not require every hearing in a licensing process to encompass every material issue of fact, so long as parties are “uncontestably permitted their day in court on every material issue at some point in the licensing process.” Id. at 174. Moreover, in Union of Concerned Scientists v. NRC, 920 F.2d 50 (D.C. Cir. 1990), it was undisputed that the NRC procedures at issue met APA requirements, and the Court did not reach the question of whether a formal on the record adjudicatory hearing was required in nuclear licensing hearings. While the Court recognized this issue was still an “open question,” it is important to note that the same Circuit has twice before indicated that APA procedures are required in NRC facilities licensing hearings. Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1443 (D.C. Cir. 1984); Porter County v. NRC, 606 F.2d 1363, 1368 (D.C. Cir. 1979).

⁸Under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), a reviewing court must first ask “whether Congress has directly spoken to the precise question at issue.” Id. at 842. If Congress has done so, the inquiry is at an end; the court “must give effect to the unambiguously expressed intent of Congress.” Id. at 843. But if Congress has not specifically addressed the question, a reviewing court must respect the agency’s construction of the statute so long as it is permissible. Id. at 866.

48 (deference to Department of Labor not warranted when agency interpreting relationship between the Service Contract Act and the Equal Access to Justice Act); see also Johnson v. United States R. R. Retirement Board, 969 F.2d 1082, 1088 (D.C. Cir. 1992), cert. den. 507 U.S. 1029 (1029); Costello v. United States R. R. Retirement Bd., 780 F.2d 1352, 1354 (8th Cir. 1985); Johnson v. United States R.R. Retirement Bd., 925 F.2d 1374, 1378 (11th Cir. 1991)(all cases involving US Railroad Retirement Board's interpretation of effect of Social Security Act on Railroad Retirement Act). The question of whether an on the record hearing is required for nuclear licensing matters necessarily involves an interpretation of the APA. See Seacoast, quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 36 (1950)("Determination of questions of [the APA's] coverage may well be approached through consideration of its purposes as disclosed by its background").

The NRC's new construction of Section 189(a) is not entitled to deference for the additional reasons discussed Petitioners' and Intervenor's briefs, including the fact that its current position is a reversal of its prior policy, which was in place for more than four decades. See Public Citizen's Brief at 30-31.

The Court should not defer to the NRC's position that no formal adjudicatory hearing is required for license renewal hearings, in light of Congress'

contrary intent as evident in the statute, its context and its legislative history. Even if the NRC's position were entitled to special deference, it should still be appropriately rejected as unreasonable for the reasons discussed elsewhere in this brief.

B. Nothing in the AEA or Its Legislative History Indicates Congress' Intent to Exempt NRC's Licensing Hearings from APA's Formal Adjudicatory Procedures.

This Court has held that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be formal. Seacoast 572 F.2d at 877 ("We have no reason to doubt that Congress intended this adjudication to be governed by standard APA procedures."); Dantran, 246 F.3d at 46-47 ("Neither the SCA itself nor case law excludes proceedings under the Act from APA coverage."). There is nothing in the AEA or its legislative history to support the NRC's position that informal procedures are sufficient in nuclear licensing hearings.

Congress explicitly delegated to the NRC responsibility for designing hearings to determine a facility's *compliance* with the terms of a license. See

Section 189(a)(1)(B)(iv).⁹ In contrast, the AEA is silent on the type of procedures required for hearings related to the issuance, modification and/or revocation of licenses. 189(a)(1)(A). Congress therefore did not authorize the NRC to restrict the application of formal APA procedures in licensing matters. See Backcountry Against Dumps v. EPA, 100 F.3d 147, 150 (D.C. Cir. 1996)(rejecting EPA's argument that Congress' silence on the granting of a power creates an ambiguity in the state); Ethyl Corp. v. EPA, 51 F.3d 1053 (D.C. Cir. 1995)(to suggest that a statutory ambiguity is created "any time a statute does not expressly *negate* the existence of a claimed administrative power ... is both flatly unfaithful to the principles of administrative law ... and refuted by precedent.")

As to the legislative history, the NRC itself concedes that "the legislative history for the AEA provides no clear guidance on whether Congress intended agency hearings to be formal on-the-record hearings." 69 Fed. Reg. 2,183 (Preamble to Final Rule).

⁹For this limited set of hearings, the NRC has authority to, in its discretion, "determine appropriate hearing procedures, whether informal or formal adjudicatory . . ." 189(a)(1)(B)(iv).

C. The NRC's Position is Contrary to the AEA, Taken as a Whole and In Light of Its Legislative History.

The lack of any indication that Congress intended to allow informal procedures in NRC licensing hearings is sufficient to conclude that formal proceedings are required under the APA. Nonetheless, it is clear that in enacting and revising the AEA, Congress *recognized* the need for formal adjudicatory hearings in nuclear licensing matters. This further undercuts the NRC's position.

1. The Regulations Conflict with Section 274 of the AEA.

The new NRC regulations directly conflict with section 274(l) of the AEA, which guarantees to the States certain formal procedural rights in hearings on NRC licensing of activity within their borders. The NRC must provide a "reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application." 42 USC § 2021(l). The NRC's informal adjudicatory hearing regulations apply to State intervenors, 10 CFR § 2.309(d)(2), and apply to actions subject to the requirements of 274(l), such as license renewal proceedings. 10 CFR § 2.1200.

The regulations' prohibition on discovery and restriction on the States' right to cross-examination unlawfully limits the States' right to interrogate witnesses.¹⁰

The NRC's position also conflicts with section 274(o) of the AEA, which requires the States to hold formal adjudicatory hearings when they license nuclear related activities within their jurisdiction. See 42 U.S.C. § 2021(o). As discussed above, States are authorized to regulate only the *less* hazardous activities under the AEA. Authority to control the *more* hazardous activities such as the licensing and regulation of reactors is reserved for the NRC. It is unreasonable to interpret the AEA as mandating more protective adjudicatory proceedings for the less hazardous activities. Instead, 189(a) and 274(o) should be read in harmony to ensure NRC licensing proceedings involve the same procedural protections as those provided by the States. "It is well established that a court's task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose." Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 631-632 (1973) (internal quotations omitted).

¹⁰Even the previous regulations violated the statute because the requirement that a petition for intervention be submitted with detailed contentions within 60 days of notice of agency action essentially requires the State to "take a position for or against the granting of the application."

2. Congress Explicitly Granted the NRC Authority to Provide for Informal Procedures in Other Licensing Hearings.

As previously discussed, Congress explicitly delegated to the NRC responsibility for designing hearings to determine a facility's *compliance* with the terms of a license, but did not give the NRC similar authority to do so for facility licensing. See Section 189(a)(1). This change makes clear that Congress knows how to authorize the NRC to depart from formal APA adjudicatory requirements when it wishes. See *Ortega v. Star-Kist Foods, Inc.*, 2004 WL 1205720 (1st Cir. 2004)(attached hereto as Exhibit B) at 13. At the time that Section 189(a)(1)(B)(iv) was added to the statute, Congress knew that the agency was requiring formal adjudicatory hearings for facility licensing hearings. The fact that Congress did not provide the agency with the same flexibility to design facility licensing hearings indicates that it did not intend to grant such expansive authority to the NRC. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537(1994)("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another"); Chicago v. Environmental Defense Fund, 511 U.S. 328, 338 (1994).

3. Congress Recognized the Need for Formal Adjudicatory Hearings in NRC Licensing Matters.

In its 1989 Analysis, the NRC's Office of General Counsel concluded that the AEA's legislative history "strongly" indicates Congress intended the hearings afforded in power reactor licensing cases to be "on the record." 1989 NRC OGC Analysis, 2 J.A. at 829. Amici States agree with this conclusion, and with Petitioners' and Intervenor's descriptions of the relevant legislative history.

D. The Regulations Do Not Provide for Formal APA Adjudicatory Procedures in Relicensing Hearings.

Amici States highlight the following aspects of the regulations, which are inconsistent with the APA's formal adjudicatory procedures:

1. Cross-Examination By the Parties Is Significantly Curtailed.

The regulations generally prohibit cross-examination unless a party files a motion and the presiding officer determines, in his or her discretion, that cross-examination by the parties is necessary to ensure development of an adequate record for adjudication. Even then, cross-examination of industry experts to test scientific and technical opinions is not allowed. Ordinarily, participants and witnesses are to be questioned only by the presiding officer or his or her designee. The presiding officer will ask questions submitted by the participants only at his or her discretion. No party may submit proposed questions to the presiding officer at

the hearing, except upon request by, and in the sole discretion of, the presiding officer.

This restriction is inconsistent with the trial-type proceedings required for formal adjudications. Section 7(d) of the APA, 5 U.S.C. § 556(d)(requiring that parties be permitted to cross-examine witnesses). In addition, as applied to the states, it conflicts with section 274(l) of the AEA, which specifically provides the state with the right to interrogate witnesses.

2. The NRC Controls the Available Evidence.

The regulations establish a procedure in which only a limited set of documents are available to the parties in the form of a "hearing file," and the parties are prohibited from discovering additional evidence "from any other party or the NRC or its personnel, whether by document production, deposition, interrogatories or otherwise." The hearing file documents are the application, any amendment to the application, any NRC environmental impact statement or assessment, any NRC report related to the proposed action, and any correspondence between the applicant/licensee and the NRC that is relevant to the proposed action. The NRC decides what correspondence is relevant. Excluded from the hearing file, for example, are enforcement related documents, unless the NRC deems them relevant. Enforcement documents are often highly relevant, and

are likely to be especially so in license renewal hearings. This restriction on available evidence conflicts with section 274(l), which specifically allows the states to interrogate witnesses. To the extent it is interpreted as limiting access to public documents, it also violates the Freedom of Information Act. 5 U.S.C. § 552. In addition, the limitation improperly restricts the information a reviewing court will have before it in when deciding on the correctness of the agency's action.

3. The Deadlines and Requirements for Submission of a Motion to Intervene are Overly Restrictive.

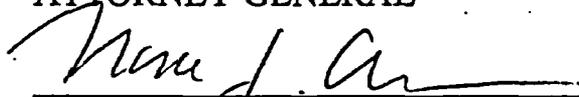
The APA requires notice and an opportunity to participate in hearings. 5 U.S.C. § 554(c). "In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." 5 U.S.C. § 554(b). Section 274(l) of the AEA explicitly requires that the States be provided with a "reasonable opportunity" to participate in a hearing. 42 U.S.C. § 2021(l). As discussed in Petitioners' and Intervenor's Briefs, the short deadlines

in the regulations – combined with the need to provide detailed contentions –
deprives intervenors of a meaningful opportunity to participate in the hearings.¹¹

V. CONCLUSION

For all of the reasons set forth above, the States respectfully ask this Court
to conclude that the regulations are inconsistent with the Administrative Procedure
Act and the Atomic Energy Act and to require the NRC to comply with formal
adjudicatory procedures in facility licensing hearings.

Respectfully submitted,
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¹¹Amici States also note that even the existing regulation conflicts with
section 274(l), because it conditions a State's participation on its filing of a
petition to intervene with contentions. Under Section 274(l) States have the right
to participate without taking a position for or against the application. 42 U.S.C.
§ 2021(l).

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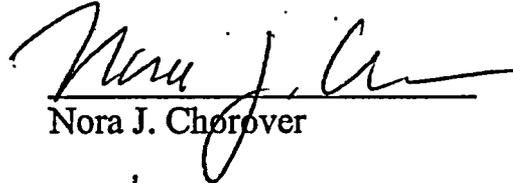
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,355 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by our word processing software (WordPerfect).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it is composed in 14-point proportional typeface, Times New Roman.


Nora J. Chorover

6/14/04

ADDENDUM

Exhibit A:

Joint Committee on Atomic Energy, Amendments to the Atomic Energy Act of 1954, As Amended, With Respect to Cooperation With States, S. REP. NO. 870

Exhibit B:

Ortega v. Star-Kist Foods, Inc., 2004 WL 1205720 (1st Cir. 2004)

1. In (1) JOINT COMMITTEE ON ATOMIC ENERGY
S. REP. No. 870, 86th Cong., 1st Sess. (1959)

**AMENDMENTS TO THE ATOMIC ENERGY ACT OF 1954,
AS AMENDED, WITH RESPECT TO COOPERATION
WITH STATES**

SEPTEMBER 1 (legislative day, AUGUST 31), 1959.—Ordered to be printed

Mr. ANDERSON, from the Joint Committee on Atomic Energy
submitted the following

REPORT

[To accompany S. 2568]

The Joint Committee on Atomic Energy, having considered S. 2568, an original committee bill to amend the Atomic Energy Act of 1954, as amended, with respect to cooperation with States, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments to the bill adopted by the Joint Committee are as follows:

1. On page 3, line 6, strike out the words "and license".
2. On page 3, line 17, after the word "production", strike out the word "of" and insert in lieu thereof the word "or".
3. On page 5, line 1, strike out the word "three" and insert in lieu thereof the word "four".
4. On page 5, strike out all of lines 6 through 17, and on line 18 renumber clause (3) as clause (2).
5. On page 6, line 10, strike out all after "h.", strike out all of lines 11 through 20, and in line 21, strike out the words "radiation hazards and standards" and the period, and insert in lieu thereof the following words:

There is hereby established a Federal Radiation Council, consisting of the Secretary of Health, Education, and Welfare, the Chairman of the Atomic Energy Commission, the Secretary of Defense, the Secretary of Commerce, the Secretary of Labor, or their designees, and such other members as shall be appointed by the President. The Council shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the

[p. 1]

Exhibit A

duced by Senator Anderson (by request) on May 19, 1959. The objectives of the predecessor bill were explained by the letter dated May 18, 1959, to Chairman Anderson from A. R. Luedecke, General Manager of the AEC, as follows:

Essentially, the objectives of this proposed bill are to provide procedures and criteria whereby the Commission may "turn over" to individual States, as they become ready, certain defined areas of regulatory jurisdiction. Certain areas, as to which interstate, national, or international considerations may be paramount, would be excluded. In addition, certain areas would be excluded because the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future.

To assist the States to prepare themselves for assuming independent regulatory jurisdiction, the new bill (like the 1957 bill) specifically authorizes the Commission to provide training and other services to State officials and employees and to enter into agreements with the States under which the latter may perform inspections and other functions cooperatively with the Commission.

The bill includes criteria which would need to be met before the Commission could turn over any of its responsibilities to a State; and provisions pursuant to which the Commission might reassert its authority. The bill provides that the Commission may, upon request of the Governor or upon its own initiative, terminate or suspend its

[p. 3]

agreement with the State and reassert its regulatory authority if the Commission finds that such termination or suspension is required to protect public health and safety. Opportunity for hearing is provided.

The bill also contains specific provisions designed to remove doubt as to the relative responsibilities of the Commission and the States * * *.

In summary, the principal provisions of the bill authorize the Commission to withdraw its responsibility for regulation of certain materials—principally radioisotopes—but not over more hazardous activities such as the licensing and regulation of reactors. The bill requires compatibility of Federal and State radiation standards, and authorizes programs to assist the States to assume independent regulatory jurisdiction.

This bill, as amended by the Joint Committee, contains all the principal provisions, and is intended to accomplish the objectives

Dr. Roy Cleere, Colorado Department of Health

Mr. Leo Goodman, United Automobile Workers

In addition the Joint Committee received comments from the AEC concerning possible revisions to the bill at a hearing on August 26, 1959.

COMMENTS BY THE JOINT COMMITTEE

1. This proposed legislation is intended to clarify the responsibilities of the Federal Government, on the one hand, and State and local governments, on the other, with respect to the regulation of byproduct, source, and special nuclear materials, as defined in the Atomic Energy Act, in order to protect the public health and safety from radiation hazards. It is also intended to increase programs of assistance and cooperation between the Commission and the States so as to make it possible for the States to participate in regulating the hazards associated with such materials.

2. The approach of the bill is considered appropriate, in the opinion of the Joint Committee, for several reasons:

(a) The approach is on a State-by-State basis. It authorizes the Commission to enter into agreements with Governors of individual States, after proper certifications and findings by both the Governor and the Commission as to the adequacy of the State's program. A few States have indicated they will be ready in the near future to begin discussions leading to an agreement to assume regulatory responsibility for such materials. Others will not be ready without more effort, more assistance, and more experience for several, or perhaps many, years. The bill does not authorize a wholesale relinquishment or abdication by the Commission of its regulatory responsibilities but only a gradual, carefully considered turnover, on a State-by-State basis, as individual States may become qualified.

(b) The bill applies to some, but not all, atomic energy activities now regulated exclusively by AEC. It applies principally to radioisotopes, whose use and present licensing by AEC is widespread, but whose hazard is local and limited. Moreover, the radiation hazard from radioisotopes has similarities to that from other radiation sources already regulated by States—such as X-ray machines and radium. Licensing and regulation of more dangerous activities—such as nuclear reactors—will remain the exclusive responsibility of the Commission. Thus a line is drawn between types of activities deemed appropriate for regulation by individual States at this time, and other activities where continued AEC regulation is necessary.

(c) The bill authorizes increased training and assistance to

States, and thus enhances the protection of the public health and safety, because most citizens look to their local health officers for advice and protection against hazardous materials used in the community. The capacity of such officials to control hazards from byproduct, source, and special nuclear materials would be increased by the training and programs of assistance authorized under this bill. Presumably the capacity of such officials to deal with other materials already under their responsibility—such as X-ray machines and radium—would also be increased, thus further protecting the public health and safety. [p. 8]

3. It is not intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating byproduct, source, or special nuclear materials. The intent is to have the material regulated and licensed either by the Commission, or by the State and local governments, but not by both. The bill is intended to encourage States to increase their knowledge and capacities, and to enter into agreements to assume regulatory responsibilities over such materials.

4. The bill authorizes the Commission to provide training and other services to State officials and employees and to enter into agreements with the State under which the latter may perform inspections and other functions cooperatively with the Commission. By these means, it is intended to assist the States to prepare themselves for assuming independent regulatory jurisdiction.

5. The Joint Committee believes it important to emphasize that the radiation standards adopted by States under the agreements of this bill should either be identical or compatible with those of the Federal Government. For this reason the committee removed the language "to the extent feasible" in subsection g. of the original AEC bill considered at hearings from May 19 to 22, 1959. The committee recognizes the importance of the testimony before it by numerous witnesses of the dangers of conflicting, overlapping, and inconsistent standards in different jurisdictions, to the hindrance of industry and jeopardy of public safety.

6. The bill establishes, in subsection h., a Federal Radiation Council to advise the President with respect to radiation matters. It is hoped that this Council will assist in obtaining uniformity of basic standards among Federal agencies, as well as in programs of cooperation with States. The Council, as established in the bill, increases the membership from four to five, including the original four members and the Secretary of Labor, or their designees, and such other members as shall be appointed by the President. The President, if he deems it appropriate, may appoint representatives

vide training with or without charge, and such other assistance to employees of any State or political subdivision thereof, or groups of States, as the Commission deems appropriate. The last sentence added by the Joint Committee, after hearings, provides that any such assistance shall take into account the additional expenses that may be incurred by the State as the consequence of the State entering into an agreement with the Commission. It is not intended that a cash grant shall be provided to pay for the administration of State regulatory programs. It is anticipated that training, consulting, and similar arrangements may be made by the Commission to reimburse State or State employees for expenses, or pay salaries of such employees while associated with the AEC.

Subsection j. of the bill provides that the Commission, upon its own initiative after reasonable notice and opportunity for hearings, or upon request of the Governor of a State, may terminate or suspend its agreement with the State and reassert the licensing and regulatory authority vested in the Commission under the Atomic Energy Act, if the Commission finds that such termination or suspension is required to protect the public health and safety. This provision represents a reserve power, to be exercised only under extraordinary circumstances.

Subsection k. provides that nothing in the new section 274 shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards. This subsection is intended to make it clear that the bill does not impair the State authority to regulate activities of AEC licensees for the manifold health, safety, and economic purposes other than radiation protection. As indicated elsewhere, the Commission has exclusive authority to regulate for protection against radiation hazards until such time as the State enters into an agreement with the Commission to assume such responsibility.

Subsection l. provides appropriate recognition of the interest of the States in activities which are continued under Commission authority. Thus, the Commission is required to give prompt notice to the States of the filing of license applications and to afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application.

Subsection m. of the bill is the same as subsection c. of the original AEC bill and is designed to make it clear that the bill does not affect the Commission's authority under the Atomic Energy Act to issue appropriate rules, regulations, or orders to protect the common defense and security, to protect restricted data, and to guard

ministration of State regulatory programs. It is anticipated that training, consulting, and similar arrangements may be made by the Commission to reimburse State or State employees for expenses, or pay salaries of such employees while associated with the AEC.

Subsection j. of the bill provides that the Commission, upon its own initiative after reasonable notice and opportunity for hearings, or upon request of the Governor of a State, may terminate or suspend its agreement with the State and reassert the licensing and regulatory authority vested in the Commission under the Atomic Energy Act, if the Commission finds that such termination or suspension is required to protect the public health and safety. This provision represents a reserve power, to be exercised only under extraordinary circumstances.

Subsection k. provides that nothing in the new section 274 shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards. This subsection is intended to make it clear that the bill does not impair the State authority to regulate activities of AEC licensees for the manifold health, safety, and economic purposes other than radiation protection. As indicated elsewhere, the Commission has exclusive authority to regulate for protection against radiation hazards until such time as the State enters into an agreement with the Commission to assume such responsibility.

Subsection l. provides appropriate recognition of the interest of the States in activities which are continued under Commission authority. Thus, the Commission is required to give prompt notice to the States of the filing of license applications and to afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application.

Subsection m. of the bill is the same as subsection c. of the original AEC bill and is designed to make it clear that the bill does not affect the Commission's authority under the Atomic Energy Act to issue appropriate rules, regulations, or orders to protect the common defense and security, to protect restricted data, and to guard against the loss or diversion of special nuclear materials.

Subsection n. defines the term "State" as meaning any State, Territory, or possession of the United States, the Canal Zone, Puerto Rico, and the District of Columbia. In addition, it is

[p. 12]

understood that the term "Governor" means the chief executive officer of any such entity.

as amended, with respect to cooperation with States.

This bill was originally requested by the AEC, and the Joint Committee then held extensive public hearings from May 19 through 22, 1959, and received testimony from representatives of Federal agencies, State agencies, scientific and health experts, and other interested groups. This bill is supported by all of the major State organizations, including the Council of State Governments, and the Governors' Conference, the National Association of Attorneys General, and the Southern Regional Advisory Council on Nuclear Energy, and representatives of various individual States. After the hearings, the Joint Committee made certain proposed revisions to the bill and then received comments from the AEC on this bill, S. 2568, on August 15, 1959. The hearings have now been published and are available to Members of Congress and the public under the title of "Federal-State Relationships in the Atomic Energy Field," consisting of 504 pages.

I believe it is important that Congress enact this amendment to the Atomic Energy Act this year in order to clarify the respective responsibilities of the Federal Government, on one hand, and the State and local governments, on the other, with respect to regulation of the radioactive materials defined in the Atomic Energy Act. At the present time, the Federal Government has exclusive responsibility for the licensing and basic regulation of these materials, although States may require registration and inspection. The Atomic Energy Act of 1954 is silent as to the regulatory role of the States; and if this silence is allowed to continue, I believe that there will be confusion and possible conflict between Federal and State regulations and uncertainty on the part of industry and possible jeopardy to the public health and safety. In order to clarify this situation and indicate clearly which materials and activities should be the responsibility of the Federal Govern-

ment and which materials—less dan-
[p. 19042]

gerous and hazardous—might be gradually turned over to the States, this bill would be helpful this year. In addition, since it will take the AEC a matter of 6 months or more to promulgate regulations under this legislation and to enter into discussions with certain States, it would be advisable to pass this bill now rather than postpone it until the next session of Congress.

The bill authorizes the Commission to enter into agreements with State Governors providing for discontinuance of certain of the Commission's regulatory authority, after proper certification by the Governor and findings by the Commission that the State program is adequate. The withdrawal by the Commission and the corresponding assumption of responsibility by States, will be on a State-by-State basis, beginning with those States most advanced in the atomic energy field and eager to assume their responsibilities.

The Joint Committee believed that this State-by-State approach was wise and appropriate, and it stated as follows on page 8 of the committee report:

A few States have indicated they will be ready in the near future to begin discussions leading to an agreement to assume regulatory responsibility for such materials. Others will not be ready without more effort, more assistance, and more experience for several, or perhaps many, years. The bill does not authorize a wholesale relinquishment or abdication by the Commission of its regulatory responsibilities but only a gradual, carefully considered turnover, on a State-by-State basis, as individual States may become qualified.

This bill draws a line between the types of materials where continued exclusive Federal regulation and licensing is deemed necessary—such as in licensing of reactors, and disposal of radioactive wastes into the ocean—and those other materials and activities which are considered less hazardous and capable of State regulation, such as radioisotopes. Here again the committee report states at page 8, as follows:

H

Only the Westlaw citation is currently available.

United States Court of Appeals,
First Circuit.

Maria Del ROSARIO ORTEGA; Sergio Blanco,
by themselves and representing minors
Beatriz Blanco-Ortega and Patrizia Blanco-Ortega,
Plaintiffs, Appellants,

v.

STAR-KIST FOODS, INC., Defendant, Appellee.

No. 02-2530.

Heard Nov. 5, 2003.
Decided June 2, 2004.

Background: In personal injury suit brought by injured young girl and her family members, the United States District Court for the District of Puerto Rico, Salvador E. Casellas, J., 213 F.Supp.2d 84, dismissed the case for lack of jurisdiction, and plaintiffs appealed.

Holdings: The Court of Appeals, Lynch, Circuit Judge, held that:

- (1) it could not be said to a legal certainty that girl could not recover a jury award meeting amount-in-controversy requirement;
- (2) emotional distress claims of family members could not meet the \$75,000 amount-in-controversy threshold; and
- (3) supplemental jurisdiction statute did not authorize jurisdiction over claims of injured girl's family members where family members' claims did not independently satisfy the amount-in-controversy requirement.

Affirmed in part; vacated and remanded in part.

[1] Federal Courts ⇨350.1

170Bk350.1 Most Cited Cases

[1] Federal Courts ⇨358
170Bk358 Most Cited Cases

[1] Federal Courts ⇨359
170Bk359 Most Cited Cases

A plaintiff's allegations of damages that meet the amount-in-controversy requirement suffices unless questioned by the opposing party or the court; once a defendant questions jurisdiction by challenging the amount of damages alleged in the complaint, the burden shifts to the plaintiff to show that it is not a legal certainty that the claims do not involve the requisite amount. 28 U.S.C.A. § 1332.

[2] Federal Courts ⇨345
170Bk345 Most Cited Cases

When there are several plaintiffs, each must present claims that meet the jurisdictional amount. 28 U.S.C.A. § 1332.

[3] Federal Courts ⇨776
170Bk776 Most Cited Cases

Once a district court dismisses for failure to meet the jurisdictional amount, the Court of Appeals reviews that judgment de novo. 28 U.S.C.A. § 1332.

[4] Federal Courts ⇨1024
170Bk1024 Most Cited Cases

In personal injury action, district court erred in evaluating the amount-in-controversy by reference to amounts that the Supreme Court of Puerto Rico had found reasonable in tort cases; analogy was imperfect in multiple respects, most notably because Puerto Rico did not have jury trials in civil cases. 28 U.S.C.A. § 1332.

[5] Federal Courts ⇨1024
170Bk1024 Most Cited Cases

Given young girl's 3% partial permanent impairment of the functioning of her hand, her

— F.3d —

(Cite as: 2004 WL 1205720 (1st Cir.(Puerto Rico)))

surgery, and the claimed pain and suffering, it could not be said to a legal certainty that girl could not recover a jury award meeting amount-in-controversy requirement for cut to her pinky finger while opening a can of defendant's tuna; girl damaged her nerves and tendons, which required surgery and physical therapy, which was painful, three times a week for a three-month period, and medical prognosis was that the injury could become worse as she grew and that she could need more surgery. 28 U.S.C.A. § 1332.

[6] Federal Courts ⇄1024
170Bk1024 Most Cited Cases

Emotional distress claims of mother, father and sister of young girl, who damaged her nerves and tendons when she cut her pinky finger while opening a can of defendant's tuna, could not meet the \$75,000 amount-in-controversy threshold in diversity case; mother did not personally witness the accident or the immediate aftermath and did not seek any counseling relating to the injury, sister did not return home from Washington, D.C. due to the accident, and father was divorced from girl's mother and did not live with girl. 28 U.S.C.A. § 1332.

[7] Federal Courts ⇄339
170Bk339 Most Cited Cases

Courts may resort to analogous cases involving remittitur in determining whether a plaintiff can meet the amount-in-controversy requirement in a diversity case; for an analogy to a remittitur case to be useful, the difference between the numbers involved in the remittitur case must be taken being (1) the jury award that was deemed excessive in a remittitur case and (2) the amount to which that award was remitted. 28 U.S.C.A. § 1332.

[8] Federal Civil Procedure ⇄2377
170Ak2377 Most Cited Cases

Remittitur of a jury award is ordered when the award is grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand; in such cases, jury award should be remitted to the maximum that would be upheld by the trial court as not excessive.

[9] Federal Civil Procedure ⇄2377

170Ak2377 Most Cited Cases

When jury award is grossly excessive, a plaintiff has a choice between accepting a remittitur amount or opting for a new trial.

[10] Courts ⇄90(2)
106k90(2) Most Cited Cases

An unexplained affirmance by an equally divided Court has no precedential value.

[11] Federal Courts ⇄1024
170Bk1024 Most Cited Cases

In a diversity action, supplemental jurisdiction statute did not authorize jurisdiction over claims of injured girl's family members, which were joined with girl's claims pursuant to Rule 20, where family members' claims did not independently satisfy the amount-in-controversy requirement. 28 U.S.C.A. §§ 1332, 1367; Fed.Rules Civ.Proc.Rule 20, 28 U.S.C.A.

[12] Federal Courts ⇄306
170Bk306 Most Cited Cases

Original jurisdiction over civil action based on diversity of citizenship may be achieved by dismissing certain dispensable nondiverse parties, but as long as the offending parties are present, original jurisdiction over the civil action cannot exist. 28 U.S.C.A. § 1332.

[13] Statutes ⇄217.4
361k217.4 Most Cited Cases

Resort to legislative history is appropriate where the text of a statute is susceptible to two textually plausible interpretations.

Appeal from the United States District Court for the District of Puerto Rico, Salvador E. Casellas, U.S. District Judge.

Freddie Pérez-González, with whom Juan J. Martínez-Rodríguez and Freddie Pérez-González & Assoc., P.S.C. were on brief, for appellants.

David C. Indiano, with whom Alexander H. Bopp and Indiano & Williams, P.S.C. were on brief, for appellee.

— F.3d —

(Cite as: 2004 WL 1205720 (1st Cir.(Puerto Rico)))

Before BOUDIN, Chief Judge, TORRUELLA and LYNCH, Circuit Judges.

LYNCH, Circuit Judge.

*1 In April 1999, Beatriz Blanco-Ortega, then nine years old, cut her right pinky finger on a can of Star-Kist tuna. That is not normally the stuff of lawsuits in federal court, but her injuries were more than trivial and led to surgery, the prospect of future surgery, and minor permanent disability and scarring. Beatriz, along with her parents and sister, sued in federal court, asserting diversity jurisdiction. 28 U.S.C. § 1332. The claims of Beatriz's family members were composed of emotional distress damages, with the mother asserting medical expenses as well. Plaintiffs' choice of federal court was no doubt influenced by the fact that civil jury trials are unavailable in the local courts of Puerto Rico.

The case raises two issues. First is the classic question whether each of the plaintiffs meets the amount-in-controversy requirement for diversity jurisdiction. 28 U.S.C. § 1332(a). The district court, using an analytic approach that we have since rejected, *see Stewart v. Tupperware Corp.*, 356 F.3d 335, 339 (1st Cir.2004), held that it was a legal certainty that none of the plaintiffs' claims was worth \$75,000 and so dismissed the case for lack of jurisdiction. As to the injured child, Beatriz, we reverse and hold that it is not a legal certainty that she could not recover an award over \$75,000. But we uphold the district court's conclusion that none of Beatriz's family members satisfies the amount-in-controversy requirement.

The second question is whether Beatriz's family members may nonetheless remain as plaintiffs under the supplemental jurisdiction statute, 28 U.S.C. § 1367. This is a very difficult question, new to this court, on which the circuits have split. We hold that by limiting supplemental jurisdiction to "civil action [s] of which the district courts have original jurisdiction," § 1367(a), Congress preserved the traditional rule that each plaintiff in a diversity action must separately satisfy the amount-in-controversy requirement. Accordingly, we affirm the dismissal of Beatriz's family members' claims for lack of subject-matter jurisdiction.

I.

On April 17, 2000, Beatriz Blanco-Ortega, along with three family members, filed a diversity suit against Star-Kist Foods Inc., Star-Kist Caribe Inc., and their unnamed insurers in the district of Puerto Rico. Besides Beatriz, the plaintiffs consisted of her mother, Maria del Rosario-Ortega; her father, Sergio Blanco; and her sister, Patrizia Blanco-Ortega. The defendants promptly moved to dismiss the complaint for lack of jurisdiction, claiming that there was not complete diversity of citizenship because Star-Kist Caribe Inc., the branch of Star-Kist that does business in Puerto Rico, was a Puerto Rico citizen for purposes of the diversity statute. The district court agreed and dismissed the complaint without prejudice.

The plaintiffs re-filed their complaint on February 28, 2001, this time only naming Star-Kist Foods, Inc. and its unnamed insurers as defendants. The complaint alleged that Beatriz had suffered physical damages of not less than \$500,000 and emotional damages of not less than \$400,000. It also alleged that each of her three family members had suffered emotional damages in excess of \$150,000 and that Mrs. Ortega had also incurred \$4,927.07 in past medical expenses and \$25,000 in estimated future medical expenses.

*2 On October 24, 2001, Star-Kist moved for summary judgment, alleging that none of the plaintiffs could satisfy the \$75,000 amount-in-controversy requirement. The district court agreed and on July 18, 2002, once again dismissed all of the plaintiffs' claims without prejudice for want of jurisdiction. The four plaintiffs appeal that decision.

II.

A. Amount-in-Controversy Requirement

In 1938, the Supreme Court established the basic standard by which to evaluate a challenge that a plaintiff has not met the jurisdictional amount-in-controversy requirement:

The rule governing dismissal for want of jurisdiction in cases brought in federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than

the jurisdictional amount to justify dismissal. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89, 58 S.Ct. 586, 82 L.Ed. 845 (1938) (internal citations omitted).

[1][2][3] "Under *St. Paul*, a plaintiff's allegations of damages that meet the amount-in-controversy requirement suffices unless questioned by the opposing party or the court." *Spielman v. Genzyme Corp.*, 251 F.3d 1, 5 (1st Cir.2001). Once a defendant questions jurisdiction by challenging the amount of damages alleged in the complaint, the burden shifts to the plaintiff to show that it is not a legal certainty that the claims do not involve the requisite amount. [FN1] *Id.* at 4; *Barrett v. Lombardi*, 239 F.3d 23, 30- 31 (1st Cir.2001). "A party may meet this burden by amending the pleadings or by submitting affidavits." *Dep't of Recreation & Sports v. World Boxing Ass'n*, 942 F.2d 84, 88 (1st Cir.1991). When there are several plaintiffs, each must present claims that meet the jurisdictional amount. [FN2] *Clark v. Paul Gray Inc.*, 306 U.S. 583, 589, 59 S.Ct. 744, 83 L.Ed. 1001 (1939). Once a district court dismisses for failure to meet the jurisdictional amount, the court of appeals reviews that judgment de novo. *Spielman*, 251 F.3d at 4.

[4] The basic error committed by the district court was to evaluate the amount-in-controversy by reference to amounts that the Supreme Court of Puerto Rico has found reasonable in tort cases. As we noted in *Stewart*, the analogy is imperfect in multiple respects, most notably because Puerto Rico does not have jury trials in civil cases. 356 F.3d at 339. We thus conduct the amount-in-controversy inquiry de novo, looking to each plaintiff individually.

[5] The plaintiffs presented the following evidence in response to Star-Kist's challenge to the amounts alleged in the complaint: the deposition testimony of each of the four plaintiffs, the medical report of Dr. Zegarra (Beatriz's treating physician), hospital records, receipts for the payment of Beatriz's treatment, pictures of Beatriz's hand after the surgery, and the testimony of both the school nurse and the school paramedic who initially treated Beatriz when she cut herself.

*3. This evidence established that after Beatriz cut her pinky finger while opening a can of Star-Kist

tuna, she went to the school infirmary. The nurse and a paramedic were able to stop the bleeding after fifteen to thirty minutes. The nurse said that the cut was deep and bled profusely. A school official called Mrs. Ortega at home to tell her about Beatriz's injury, and Mrs. Ortega went to the school to pick up Beatriz. Mrs. Ortega then took Beatriz to the emergency room of a nearby hospital, where a doctor indicated that Beatriz may have severed her tendons and nerves. Mrs. Ortega contacted Dr. Zegarra, a hand surgeon, by phone while she was at the hospital, and scheduled an immediate appointment. Together, Mrs. Ortega and Beatriz went immediately from the hospital to Dr. Zegarra's office.

Dr. Zegarra confirmed that Beatriz had in fact damaged her nerves and tendons and determined that she required surgery. He was unable to secure an operating room for that day, so the surgery was scheduled for April 22, the next day. The surgery, which required Beatriz to be put under general anesthesia, successfully repaired Beatriz's deep flexor tendon and digital nerve. After the surgery, Beatriz attended physical therapy, which was painful, three times a week for a three-month period. Beatriz continued the physical therapy for eight months in total and wore a cast throughout that entire period. The therapy impaired her ability to write and paint in school and forced her to drop out of a volleyball tournament. Her finger bears a small scar and is slightly bent. Despite the successful surgery, Beatriz has been diagnosed with a 3% partial permanent impairment of the functioning of her hand. The medical prognosis is that the injury could become worse as she grows and that she may need more surgery.

Given Beatriz's permanent physical impairment, the surgery, and the claimed pain and suffering (bearing in mind the potential impact of the injury and its aftermath on a young girl), we cannot say to a legal certainty that Beatriz could not recover a jury award larger than \$75,000. See *Stewart*, 356 F.3d at 340 (plaintiffs met jurisdictional minimum where evidence suggested that each had suffered permanent physical impairment, had endured non-trivial pain and suffering damages by having to spend honeymoon in a hospital, and might require future medical services); *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir.2000) (plaintiff's allegations that, as a result of falling in

defendant's store, she sustained injuries to her wrist, knee and back, resulting in permanent disability and disfigurement and causing pain and suffering and lost wages, were sufficient to meet jurisdictional amount-in-controversy requirement); *Rosenboro v. Kim*, 994 F.2d 13, 18-19 (D.C.Cir.1993) ("[T]he presence of medical evidence showing that a plaintiff is suffering from a continuing or permanent physical impairment [is] an important indicator" in determining whether the plaintiff meets the amount-in-controversy requirement).

*4 [6] The other plaintiffs fare differently. Mrs. Ortega presented evidence that she paid \$4,927.07 for past medical expenses and says that she anticipates paying \$25,000 in future medical expenses. She also claims that her emotional distress damages totaled \$250,000. We assume arguing that Mrs. Ortega can claim the past medical expenses and some future medical expenses. [FN3] But there was no support at all for the \$25,000 figure for future medical expenses that she alleged, and a lower figure appears to be in order, given that past expenses were less than \$5,000. Even if she could claim all \$25,000, there is still quite a gap between the medical expenses and \$75,000.

We conclude that Mrs. Ortega cannot fill this entire gap with her emotional distress damages. Cf. *Jimenez Puig v. Avis Rent-A-Car Sys.*, 574 F.2d 37, 40 (1st Cir.1978) (amount-in-controversy requirement of \$10,000 was not met in claim for short-lived embarrassment and anger resulting from a car-rental clerk's public destruction of credit card and announcement that plaintiff had failed to pay his bills). One of the normal responsibilities of parenthood is dealing with a child's cuts and scrapes, and here the injuries were relatively minor. Neither Beatriz nor her mother sought any counseling relating to the injury. Moreover, Mrs. Ortega did not personally witness Beatriz's accident or the immediate aftermath.

[7] Mrs. Ortega tries to argue that she meets the jurisdictional amount by relying on remittitur cases. Certainly courts may resort to analogous cases involving remittitur in determining whether a plaintiff can meet the amount-in-controversy requirement in a diversity case. But the utility of remittitur cases will vary depending on at least three factors—the factual similarities between the cases,

the difference in viewpoints between the start of a case and the end of a case, and both the jury award in the remittitur case and the amount to which it was reduced.

[8][9] Remittitur of a jury award is ordered when the award is "grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand." *Correa v. Hosp. San Francisco*, 69 F.3d 1184, 1197 (1st Cir.1995). In such cases, the rule in this circuit is that the jury award should be remitted "to the maximum that would be upheld by the trial court as not excessive." *Jones & Jones v. Pineda & Pineda*, 22 F.3d 391, 398 (1st Cir.1994). The plaintiff has a choice between accepting the remittitur amount or opting for a new trial. See *Liberty Mut. Ins. Co. v. Cont'l Cas. Co.*, 771 F.2d 579, 588 (1st Cir.1985).

While remittitur determinations are based on what has been proved at trial, amount-in-controversy determinations are made at the outset of the case. See generally 14B Wright & Miller, *Fed. Prac. & Proc.* § 3702 (2d ed.2003). This different procedural lens complicates determining whether there is sufficient factual similarity between the remittitur case and the jurisdictional case. To be useful, the facts of injury and damages that were actually proved to the jury in the remittitur case must be similar to the facts, taken in the light most favorable to the plaintiff, that could be proved in the jurisdictional case.

*5 Moreover, for an analogy to a remittitur case to be useful, the difference between the numbers involved in the remittitur case must be taken into account. These amounts are (1) the jury award that was deemed excessive in a remittitur case and (2) the amount to which that award was remitted. If, assuming the cases are otherwise similar, both numbers are above the jurisdictional minimum (*i.e.*, \$75,000), then the remittitur case supports the conclusion that the amount-in-controversy requirement has been met. Similarly, if both the jury award and the amount to which it was remitted are less than \$75,000, that supports the conclusion that the amount-in-controversy requirement cannot be met.

More problematic are remittitur cases hovering around the jurisdictional amount—*i.e.*, cases in

which the jury award is above the jurisdictional amount but the amount to which the award was remitted is below the jurisdictional amount. In theory, the amount to which the award was remitted should be the maximum possible amount that was legally permissible, and thus should be the applicable basis of comparison. But theory is often a long way from reality. As we have noted before, "converting feelings such as pain and suffering and the loss of enjoyment of life into dollars is not an exact science." *Smith*, 177 F.3d at 33 n. 5. One safety valve for the inherent difficulty in selecting a remittitur amount is that the plaintiff is given the choice of accepting the reduced amount or opting for a new trial. *See Liberty Mut. Ins. Co.*, 771 F.2d at 588. The difficulty in converting pain and suffering into a dollar amount makes each case very fact-specific, thus decreasing the usefulness of a remittitur case hovering around the jurisdictional amount.

Mrs. Ortega argues by reference to a remittitur case, *Smith v. Kmart Corp.*, 177 F.3d 19 (1st Cir.1999). In that case, a husband and wife were shopping in defendant's store when the wife was struck on the head by a cooler that fell from a shelf. *Id.* at 22. As a result of the blow, the wife lost consciousness for close to a minute, leading the husband to administer mouth-to-mouth resuscitation. *Id.* at 22. He testified that he believed his wife was dead. *Id.* at 23. Eventually an ambulance arrived, and paramedics placed a cervical collar around the wife's neck and transported her on to the ambulance using a stiff board that had been placed underneath her. *Id.* at 22. The wife suffered from the blow for months after the injury. *Id.* The jury awarded the husband \$250,000 in emotional distress damages, and the appellate court remitted that award to \$100,000. *Id.* at 32-33. Mrs. Ortega argues that her case is similar to the husband's in *Smith* and that even the \$100,000 amount to which damages were remitted in that case is larger than the \$75,000 minimum.

Mrs. Ortega's reliance on *Smith* fails even though both the original award and the reduced amount were greater than the jurisdictional minimum, because Mrs. Ortega's case is not sufficiently factually similar to *Smith*. Beatriz's injury, on the basis of the plaintiffs' complaint, was not nearly as dramatic or disruptive as the wife's injury in *Smith*. No one believed that Beatriz would die of the cut on

her finger and there was no dramatic witnessing of the accident, unlike in *Smith*. Moreover, unlike the husband in *Smith*, Mrs. Ortega has not alleged that the accident has in any way strained her relationship with Beatriz. *See id.* at 23.

*6 Beatriz's sister Patrizia has an even less substantial claim for emotional distress damages than her mother. Patrizia was a student in Washington, D.C. at the time of the injury and did not return home due to the accident. Although she did take Beatriz to some physical therapy sessions after she returned from school over the summer, Patrizia did not miss any work or school obligations to do so. Like the others, there is no evidence of Patrizia's receiving any counseling services in connection with her little sister's injury. It is legally certain that Patrizia could not recover an award over \$75,000 for her emotional distress.

It is also legally certain that the claims of Beatriz's father, Sergio Blanco, do not meet the \$75,000 threshold. Mr. Blanco is divorced from Beatriz's mother and does not live with Beatriz. He spent half a day at the hospital during Beatriz's surgery, but he did not bring Beatriz to any medical appointments. Mr. Blanco's claim to emotional distress damages over \$75,000 is too tenuous.

In short, only Beatriz's claim satisfies the jurisdictional requirements of § 1332. Her family members' claims do not meet the minimum amount-in-controversy, and no other independent basis for federal jurisdiction (e.g., federal question jurisdiction) exists over those claims.

B. Supplemental Jurisdiction under § 1367

This leaves the issue of supplemental jurisdiction. Beatriz's family members cannot file their own suits against Star-Kist in federal court. The question is whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, allows them to proceed in federal court nonetheless on the basis of Beatriz's jurisdictionally sufficient claim.

[10] Though simple to state, the question has not been answered in this circuit, [FN4] and its proper resolution is far from clear. The courts of appeals are sharply divided over whether § 1367 allows parties who cannot themselves satisfy § 1332's amount-in-controversy requirement to sue in federal

court by joining forces with a plaintiff who can. The Supreme Court once granted certiorari to resolve the matter, but it ultimately split 4-4 and affirmed without opinion. *See Free v. Abbott Labs., Inc.*, 529 U.S. 333, 120 S.Ct. 1578, 146 L.Ed.2d 306 (2000). [FN5]

The problem has actually arisen in two contexts, each of which is the subject of a circuit split. First, there are cases—like *Beatriz's*—involving the ordinary joinder of additional plaintiffs under Fed.R.Civ.P. 20. Compare *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 932 (7th Cir.1996) (where one plaintiff satisfies the amount-in-controversy requirement, § 1367 permits jurisdiction over transactionally related claims by co-plaintiffs who do not), with *Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 216 (3d Cir.1999) (each co-plaintiff must independently satisfy the amount-in-controversy requirement). Second, there are cases involving the claims of absent class members in diversity-only class actions. Compare *Allapattah Serv., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1254 (11th Cir.2003) (section 1367 authorizes jurisdiction over all class members' claims if the named plaintiffs satisfy the amount-in-controversy requirement); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 934 (9th Cir.2001) (same); *Rosmer v. Pfizer, Inc.*, 263 F.3d 110, 114 (4th Cir.2001) (same); and *In re Abbott Labs.*, 51 F.3d 524, 528 (5th Cir.1995) (same), with *Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8th Cir.2000) (section 1367 does not extend jurisdiction over class members who do not independently meet the amount-in-controversy requirement); and *Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 640 (10th Cir.1998) (same). [FN6] Because the same statutory language applies in both contexts, some courts have lumped the two together for purposes of § 1367. *See, e.g., Meritcare*, 166 F.3d at 218; *Stromberg*, 77 F.3d at 931. Our case involves only Rule 20 joinder, however, and we express no view regarding the application of § 1367 in class actions. [FN7]

*7 [11] Even aside from the circuit split, this is an area where courts are wise to tread carefully. The problem of pendent-party jurisdiction implicates some of the most sensitive and enduring issues in the law of federal jurisdiction, and it directly affects the allocation of judicial business among the state and federal courts. In the end, certainty can come

only from Congress or the Supreme Court. For now, we disagree with the Seventh Circuit and join the Third Circuit in holding that, at least in cases of Rule 20 joinder, § 1367 did not upset the settled rule that each plaintiff must independently satisfy the diversity statute's amount-in-controversy requirement.

1. Background

Before 1990, it is clear, *Beatriz's* family members could not have joined in *Beatriz's* diversity suit unless they each stood to recover more than the minimum amount required for jurisdiction. As early as 1911, the Supreme Court declared that "[w]hen two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount." *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40, 32 S.Ct. 9, 56 L.Ed. 81 (1911). That rule is now commonly associated with *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001 (1939), which reaffirmed *Troy Bank* after the adoption of the Federal Rules of Civil Procedure. *See* 306 U.S. at 589. Even after *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), in which the Supreme Court approved pendent-claim jurisdiction in federal-question cases, *see id.* at 725, *Clark* remained good law: "[M]ultiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in the federal courts." *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 294, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973); *see also Aldinger v. Howard*, 427 U.S. 1, 15-16, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976) (distinguishing pendent-party jurisdiction from the type of pendent-claim jurisdiction permitted in *Gibbs*). If the *Clark* rule applies in this case, we should affirm the dismissal as to *Beatriz's* family members but vacate as to *Beatriz*, thereby leaving *Beatriz* free to choose between proceeding alone in federal court or voluntarily dismissing her complaint and re-filing together with her family in the Puerto Rico courts. *See Clark*, 306 U.S. at 590.

Whether *Clark* continues to apply today depends on how one reads 28 U.S.C. § 1367, the supplemental jurisdiction statute, which was enacted by Congress in 1990. *See* Judicial Improvements Act of 1990, Pub.L. No. 101-650, 104 Stat. 5089, § 310. In relevant part, § 1367

provides:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in 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. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

*8 (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

The impetus for Congress's adoption of § 1367 was the Supreme Court's 5-4 decision in *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989). See generally *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 539-40, 122 S.Ct. 999, 152 L.Ed.2d 27 (2002). *Finley* did not deal with the amount-in-controversy requirement. Rather, the plaintiff in *Finley* had filed suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), alleging that the government's failure to maintain certain airport runway lights had contributed to the death of her husband and children in an airplane accident. 490 U.S. at 546. Later, she amended her complaint to add state-law tort claims against two new defendants, a municipality and a utility company. No independent basis for federal subject-matter jurisdiction existed over those claims. *Id.* The Supreme Court acknowledged that the plaintiff could not have brought her entire action in state court because federal jurisdiction in FTCA cases is exclusive, but it held nevertheless that the district court lacked jurisdiction over the "pendent-party" state-law claims. *Id.* at 555-56. The Court concluded by noting that Congress was free to reverse that result if it wished. *Id.* at 556.

Congress did so in § 1367. See *Raygor*, 534 U.S. at 540; *id.* at 550 (Stevens, J., dissenting); *Ponce Fed. Bank, F.S.B. v. The Vessel "Lady Abby"*, 980 F.2d 56, 58 (1st Cir.1992) (Breyer, C.J.) (section 1367 overturns *Finley*). The text of the statute, however, can be read to do more than overturn *Finley*. [FN8] The jurisdictional grant, which appears in section (a), is not limited to cases like *Finley* involving exclusive federal jurisdiction, or even to federal-question cases generally. Instead, subsection (a) permits the district courts to hear any claim arising from the same constitutional case or controversy "in any civil action of which the district courts have original jurisdiction." Subsection (b) then creates an exception to that grant for certain claims in diversity cases. The result is a jurisdictional grant of such apparent breadth that, as one commentator succinctly put it, "the statute has created confusion in a number of areas in which principles were thought to be well established." 13B Wright, Miller, & Cooper, *Fed. Prac. & Proc.* § 3567.2 (2d ed.2003).

2. Section 1367 and the Clark Rule

*9 One such area of confusion involves the continued validity of *Clark* in the wake of § 1367. The case law on this issue is split between two competing interpretations of § 1367.

The first, adopted by the Seventh Circuit in *Stromberg*, turns on Congress's failure to include Rule 20 plaintiffs among those parties who cannot rely on supplemental jurisdiction where doing so would be inconsistent with § 1332. See § 1367(b) (restricting supplemental jurisdiction over parties joined as plaintiffs under Rules 19 or 24, but omitting Rule 20 plaintiffs). On this reading, § 1367 overturns *Clark* and extends supplemental jurisdiction over claims asserted by diversity plaintiffs who cannot meet the amount-in-controversy requirement, provided that at least one plaintiff in the action has a jurisdictionally sufficient claim. See *Stromberg*, 77 F.3d at 930-32.

The second interpretation, originally suggested in an article by Professor Pfander [FN9] and later adopted by the Tenth Circuit in *Leonhardt*, emphasizes the requirement in § 1367(a) that the district court must first have "original jurisdiction" over an action before supplemental jurisdiction can

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apply. See *Leonhardt*, 160 F.3d at 640 (citing Pfander). On this reading, § 1367 preserves the rule in *Clark* and thus does not supply supplemental jurisdiction where, as in this case, only one of the named plaintiffs meets the amount in controversy. Although *Leonhardt* was a class action case, the Third Circuit subsequently endorsed its reasoning in *Meritcare*, a Rule 20 joinder case with facts analogous to the case at bar. See 166 F.3d at 221-22 (citing *Leonhardt* with approval).

We recognize that plausible textual arguments can be made in favor of either of these readings. For the reasons that follow, however, we conclude that *Leonhardt* and *Meritcare* embody the better reading of § 1367.

a. Text of § 1367

We begin with the text of the statute. *BedRoc Ltd. v. United States*, — U.S. —, —, 124 S.Ct. 1587, 1593, 158 L.Ed.2d 338 (2004). Given the historical and legal background against which Congress enacted § 1367, we think the *Leonhardt/Meritcare* approach makes the best sense of the statutory text. Still, neither *Leonhardt* nor *Meritcare* fully explained the historical and doctrinal significance of Congress's choice of words in § 1367. Given the long history of the Judicial Code and the enormous body of law and scholarship that surrounds it, that context provides a crucial guide to the meaning of the statute. See *Nat'l Archives & Records Admin. v. Favish*, — U.S. —, —, 124 S.Ct. 1570, 1579, 158 L.Ed.2d 319 (2004) (assuming, in interpreting a federal statute, that "Congress legislated against [a] background of law, scholarship, and history").

The first sentence of § 1367 specifies that supplemental jurisdiction can only apply in a "civil action of which the district courts have original jurisdiction." § 1367(a). That phrase unambiguously invokes the language that Congress has used for more than two hundred years to confer jurisdiction on the federal district courts in civil cases. Nearly every jurisdictional grant in Title 28 provides that "the district courts shall have original jurisdiction" of "civil action[s]" within the scope of the grant. See, e.g., 28 U.S.C. §§ 1331 (federal questions), 1332 (diversity), 1335 (interpleader), 1337 (antitrust), 1338 (intellectual property), 1339 (postal matters), 1340 (internal revenue). Such grants, in turn, have been the subject of judicial

interpretation for centuries. E.g., *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806). By invoking the concept of a district court's "original jurisdiction" over a "civil action," Congress presumptively incorporated into § 1367 the longstanding, judicially developed doctrines that determine whether those statutes confer "original jurisdiction" over a particular civil action. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 614-15, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) (Scalia, J., concurring) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken" (quoting *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952))).

*10 That is important because, under well-settled law, joinder and aggregation have different implications for the existence of "original jurisdiction" in federal-question and diversity cases. Under the federal-question statute, 28 U.S.C. § 1331, the original jurisdiction of the district courts is triggered if the action "aris[es] under the Constitution, laws, or treaties of the United States." All that is required is the federal question. *Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738, 822, 6 L.Ed. 204 (1824) (Marshall, C.J.); see *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164-66, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997). Joinder questions arise only after "original jurisdiction" is established, and only to the extent that the court seeks to decide non-federal questions incident to disposition of the federal question. [FN10] See *Osborn*, 22 U.S. at 822.

Under § 1332, by contrast, joinder and aggregation questions can actually determine whether the district court has "original jurisdiction" over the action. Joinder affects original jurisdiction through the complete diversity rule of *Strawbridge v. Curtiss*, *supra*. See *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 389, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) ("The presence of [a] nondiverse party automatically destroys original jurisdiction...."). Aggregation issues affect original jurisdiction because *Clark* prohibits multiple plaintiffs from combining their claims to clear the amount-in-controversy bar. See 306 U.S. at 589.

Strawbridge and *Clark*, in turn, are binding interpretations of the diversity statute. See *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967) (complete diversity rule is statutory); *Snyder v. Harris*, 394 U.S. 332, 336, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969) (*Clark* anti-aggregation rule is statutory). Unless both rules are satisfied, the statute does not confer original jurisdiction on the district court. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L.Ed. 1147 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

Thus, Congress preserved both *Clark* and *Strawbridge* by providing that, before supplemental jurisdiction can attach, the district court must first have "original jurisdiction" over the action. See Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. Pa. L.Rev. 109, 148-49 (1999). In a diversity case, if the *Clark* rule is not met, or if the parties are not completely diverse, then the "original jurisdiction" requirement in § 1367(a) is not satisfied and supplemental jurisdiction will not attach. On the other hand, if the parties are completely diverse and each plaintiff separately meets the amount-in-controversy requirement, then § 1332 is satisfied and the "original jurisdiction" requirement is met. If so, § 1367 will support any transactionally related claims that the plaintiffs may wish to bring—but only so long as § 1367(b) is satisfied, and only as long as original jurisdiction is not destroyed. This last qualification is important because it precludes a plaintiff from, for example, using § 1367 to circumvent *Strawbridge* by amending her complaint to add a nondiverse party after "original jurisdiction" is initially established. Cf. *Grupo Dataflux v. Atlas Global Group, L.P.*, — U.S. —, —, 124 S.Ct. 1920, 1926, — L.Ed.2d —, — (2004) (noting that a post-filing change in the parties to an action, unlike a change in the initial parties' citizenship, can affect subject-matter jurisdiction); *Am. Fiber & Finishing, Inc. v. Tyco Healthcare Group, L.P.*, 362 F.3d 136, 140-41 (1st Cir.2004) (subject-matter jurisdiction was destroyed and dismissal was required where a diversity plaintiff amended its complaint to join a non-diverse party).

*11 On this reading of § 1367, Beatriz's family members cannot rely on supplemental jurisdiction

to support their claims: their complaint does not satisfy *Clark*, so "original jurisdiction" fails under § 1332. *Snyder*, 394 U.S. at 336. As a result, this "civil action" is not one "of which the district courts have original jurisdiction," and § 1367 does not apply.

[12] We are persuaded to adopt this reading of the statutory text for several reasons. First, it gives effect to Congress's requirement that the district court must have "original jurisdiction" over the "civil action" before supplemental jurisdiction can apply. See *Bui v. DiPaolo*, 170 F.3d 232, 237 (1st Cir.1999) (statutes should be interpreted to give effect to every word and phrase). Congress could have applied a different test in § 1367(a)—for example, it could have permitted supplemental jurisdiction whenever any single claim in the action would have supported original jurisdiction if it had been brought by itself. [FN11] But that is not what the statute says. [FN12] See Pfander, *supra*, at 141 (noting that the statute "appears to reject the notion that a single, jurisdictionally sufficient claim will support the exercise of plenary pendent jurisdiction in diversity matters").

Second, our reading of § 1367's "original jurisdiction" requirement is consistent with the settled meaning of identical language in 28 U.S.C. § 1441, the removal statute. Section 1441, like § 1367, applies only if the "civil action" in question is one "of which the district courts ... have original jurisdiction." § 1441(a). Relying on that language, the Supreme Court has interpreted § 1441 to prohibit removal unless the entire action, as it stands at the time of removal, could have been filed in federal court in the first instance. See, e.g., *Sygenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 33, 123 S.Ct. 366, 154 L.Ed.2d 368 (2002); *Okl. Tax Comm'n v. Graham*, 489 U.S. 838, 840, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989) (per curiam). Section 1441 has thus been held to incorporate the well-pleaded complaint rule, see *City of Chicago*, 522 U.S. at 163; the complete diversity rule, see *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 73, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996); and rules for calculating the amount in controversy, see *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291-92, 58 S.Ct. 586, 82 L.Ed. 845 (1938). By the time Congress enacted § 1367 in 1990, this interpretation of § 1441(a) was well-settled. See, e.g., *Okl. Tax Comm'n*, 489 U.S.

at 840; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987); *Met. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 27, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

Given this background, it is significant that Congress included the same "original jurisdiction" requirement in § 1367. See *Erlenbaugh v. United States*, 409 U.S. 239, 243-44, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972) (noting that "practical experience in the interpretation of statutes [indicates that] a legislative body generally uses a particular word with a consistent meaning in a given context"). Congress purposefully employed language in § 1367(a) that had already been interpreted in § 1441 to incorporate the traditional doctrines of federal jurisdiction—including *Strawbridge* and *Clark*.

*12 Another advantage of our interpretation of § 1367 is that it aligns statutory supplemental jurisdiction with the judicially developed doctrines of pendent and ancillary jurisdiction as they existed prior to *Finley*. Congress took the opportunity in § 1367 to codify the doctrines of pendent and ancillary jurisdiction under a single heading. See *City of Chicago*, 522 U.S. at 165; *Iglesias v. Mut. Life Ins. Co.*, 156 F.3d 237, 241 (1st Cir.1998). Neither of those doctrines permitted a diversity plaintiff to circumvent the requirements of § 1332 simply by joining her claim in an action brought by another, jurisdictionally competent diversity plaintiff. [FN13] We see no indication in § 1367 that Congress wanted to alter that rule. Notably, where Congress *did* intend to alter existing law in § 1367, it took pains to do so directly and unequivocally. See § 1367(a) (repudiating *Finley* in a separate sentence: "Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.").

Finally, our interpretation explains the omission of Rule 20 plaintiffs from § 1367(b). This was the "apparent incongruity" on which the Seventh Circuit relied in *Stromberg*. See 77 F.3d at 932. *Stromberg* reasoned that because Congress omitted claims by Rule 20 plaintiffs from § 1367(b), it must have intended to allow permissively joined plaintiffs to bring claims that § 1332 would not otherwise support. *Id.* at 931-32. In our view, there

is a better explanation. The permissive joinder of a nondiverse party, whether in the original complaint or afterwards, destroys complete diversity and thus deprives the court of "original jurisdiction." *Schacht*, 524 U.S. at 389; *Am. Fiber & Finishing*, 362 F.3d at 140-41. Likewise, "original jurisdiction" is destroyed by the joinder of a Rule 20 plaintiff who, like Beatriz's family members, cannot satisfy the amount-in-controversy requirement. See *Snyder*, 394 U.S. at 336-37 (noting that the requirement that each plaintiff must separately pass the amount-in-controversy bar derives from § 1332). [FN14] Supplemental jurisdiction in such a case fails at the threshold of § 1367(a), so there was simply no need for Congress to include Rule 20 plaintiffs in subsection (b) in order to preserve *Clark* or *Strawbridge*. See Pfander, *supra*, at 148.

A few courts have rejected this reading of § 1367 on the ground that nothing in the statute suggests the phrase "original jurisdiction" has a different meaning in diversity cases than in federal-question cases. See, e.g., *Gibson v. Chrysler Corp.*, 261 F.3d 927, 936 (9th Cir.2001); *Payne v. Goodyear Tire & Rubber Co.*, 229 F.Supp.2d 43, 50-51 (D.Mass.2002). That argument is misplaced. The requirement of "original jurisdiction" in § 1367(a) has the same meaning in every case: that some underlying statutory grant of original jurisdiction must be satisfied. What differs between federal question and diversity cases is not the meaning of "original jurisdiction" but rather the requirements of sections 1331 and 1332. Under § 1331, the sole issue is whether a federal question appears on the face of the plaintiff's well-pleaded complaint; the identity of the parties and the amounts they stand to recover are largely irrelevant. Section 1332, by contrast, predicates original jurisdiction on the identity of the parties (*i.e.*, complete diversity) and their ability to meet the amount-in-controversy requirement. So the "original jurisdiction" language in § 1367 operates differently in federal-question and diversity cases not because the meaning of that term varies, but because the requirements of the underlying statutes are different.

*13 Nor does this reading of the statute make § 1367(b) superfluous. By itself, § 1367(a) would authorize a wide variety of supplemental claims in diversity cases—counterclaims by defendants, cross-claims among plaintiffs, claims by and against

intervenors, and so on. Section § 1367(b) is important because it ensures that this authorization does not functionally undermine the requirements of § 1332. Suppose, for example, that the defendant in a diversity case impleads a nondiverse party under Fed.R.Civ.P. 14. Section 1367(b) would prevent the plaintiff from asserting a non-federal claim against the impleaded party. This example, of course, is *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978), in which the Supreme Court held that permitting ancillary (now supplemental) jurisdiction over such a claim would allow diversity plaintiffs to "defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants." *Id.* at 374. Section 1367(b) codifies *Kroger's* anti-circumvention rationale, not merely as against parties impleaded under Rule 14, but in a variety of situations in which "original jurisdiction" may technically exist but the exercise of supplemental jurisdiction "would be inconsistent with the jurisdictional requirements of section 1332." See Rowe, Burbank, & Mengler, *A Coda on Supplemental Jurisdiction*, 40 Emory L.J. 993, 995 (1991) (explaining that subsection (b) implements *Kroger's* rationale). Nothing about our interpretation of § 1367(a) obviates this provision.

Admittedly, our reading of § 1367 is not perfect. One difficulty is that while § 1367(b) does not mention Rule 20 plaintiffs, it does refer to "claims by persons proposed to be joined as plaintiffs under Rule 19"—a reference that is technically unnecessary under our reading of the statute, since the joinder of a nondiverse party as an indispensable plaintiff would likewise destroy original jurisdiction under § 1332. [FN15] See, e.g., *Gonzalez v. Cruz*, 926 F.2d 1, 5 (1st Cir.1991). And, on policy grounds, there are certainly litigation efficiencies to be gained by an interpretation of § 1367 that would permit Beatriz's family members' claims to proceed in federal court alongside her own. See *Stromberg*, 77 F.3d at 932.

But no reading of § 1367 is perfect—the alternative approach embodied in *Stromberg*, for example, accords no significance to Congress's use of the term "original jurisdiction." In light of the historical and legal context to Congress's enactment of § 1367, including the settled interpretation of § 1441 and

the established limits on pendent and ancillary jurisdiction, we conclude that Congress intended to preserve the *Clark* anti-aggregation rule by requiring that the district courts must have "original jurisdiction" over the "civil action" before supplemental jurisdiction will lie.

b. Section 1367 and the Complete Diversity Rule

*14 There is a further reason why we reject the alternative reading of § 1367 set out in the Seventh Circuit's opinion in *Stromberg*. As we have said, *Stromberg's* reading of the statutory text is, while imperfect, at least plausible. Yet it also has surprising and far-reaching consequences: if § 1367 permits the permissive joinder of plaintiffs who cannot meet the amount-in-controversy requirement, then it also permits the joinder of non-diverse plaintiffs. Nothing in the statute distinguishes between the *Clark* amount-in-controversy requirement and the complete diversity rule in *Strawbridge*. So if *Stromberg's* interpretation of § 1367 is correct, Congress overturned nearly 200 years of case law interpreting § 1332 and authorized a potentially huge expansion of the federal docket. Moreover, it did so not by amending the diversity statute itself, but instead by failing to mention Rule 20 plaintiffs in § 1367(b). [FN16]

We do not think Congress intended § 1367 to work such a revolution in the law of diversity jurisdiction. Cf. *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 467-68, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) ("Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Congress has long maintained a policy of restricting diversity jurisdiction, not expanding it, chiefly by raising the amount-in-controversy bar. [FN17] Indeed, the same congressional Federal Courts Study Committee that proposed overturning *Finley* and codifying supplemental jurisdiction also proposed eliminating most forms of diversity jurisdiction. See Federal Courts Study Committee, *Report of the Federal Courts Study Committee* 39 (1990) ("We believe that diversity jurisdiction should be virtually eliminated... [N]o other step will do anywhere nearly as much to reduce federal caseload pressures and contain the growth of the federal judiciary."). Congress did not accept that proposal, to be sure,

but that hardly suggests it wanted to *expand* diversity jurisdiction. On the contrary, only a few years after enacting § 1367, Congress again raised the amount-in-controversy bar in an effort to reduce the diversity caseload in the federal courts. See Federal Courts Improvement Act of 1996, Pub.L. No. 104-317, § 205, 110 Stat. 3847 (raising the minimum amount in controversy from \$50,000 to \$75,000). The Supreme Court, too, has repeatedly admonished that in light of the burgeoning federal caseload, diversity jurisdiction must be narrowly construed. See, e.g., *Snyder*, 394 U.S. at 340-41; *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76, 62 S.Ct. 15, 86 L.Ed. 47 (1941); *Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 78 L.Ed. 1248 (1934).

Against this background, it is implausible to us that Congress undermined *Strawbridge* and overturned *Clark* by such an unlikely and obscure device as the omission of Rule 20 plaintiffs from § 1367(b). *Nixon v. Mo. Mun. League*, — U.S. —, —, 124 S.Ct. 1555, 1564, 158 L.Ed.2d 291 (2004) (refusing to adopt a textually plausible interpretation of a statute because it was "farfetched that Congress meant ... to start down such a road in the absence of any clearer signal"); *Chisom v. Roemer*, 501 U.S. 380, 396 & n. 23, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991) ("[I]f Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it.... Congress' silence in this regard can be likened to the dog that did not bark.").

*15 Moreover, Congress has continued to regard *Strawbridge* as good law even after § 1367. Since 1990, Congress has enacted at least two statutes limiting the rule of complete diversity. Each time, Congress has done so clearly and conspicuously, carefully circumscribing the situations in which *Strawbridge* will not apply. See Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub.L. No. 107-273, § 11020(b)(1)(A), 116 Stat. 1758 (codified at 28 U.S.C. § 1369) (granting the district courts original jurisdiction over "any civil action involving minimal diversity" between adverse parties arising from any single accident in which 75 natural persons died, and further defining "minimal diversity" in the case of both natural and corporate parties); [FN18] Y2K Act, Pub.L. No. 106-37, § 15(c), 113 Stat. 185 (1999) (codified at 15 U.S.C. § 6614(c)) (granting the district courts original

jurisdiction over "any Y2K action that is brought as a class action," except where a "substantial majority" of the plaintiff class is from the same state as the "primary" defendants and the claims in the action will be governed primarily by the law of that state).

Congress thus knows how to limit *Strawbridge* clearly when it wishes, and it would have had little reason to enact these statutes if it believed that it had already undermined the complete diversity rule in the supplemental jurisdiction statute. Plainly it did not so believe, and that understanding informs our choice among plausible interpretations of § 1367. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings.... This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.").

c. Legislative History of § 1367

[13] Finally, the legislative history of § 1367 strongly corroborates the conclusion that Congress did not intend to repudiate *Clark* or *Strawbridge*. Resort to legislative history is appropriate where, as here, the text of a statute is susceptible to two textually plausible interpretations. *Lapine v. Town of Wellesley*, 304 F.3d 90, 97 (1st Cir.2002); *Hernandez-Colon v. Sec. of Labor*, 835 F.2d 958, 960 (1st Cir.1988). That is particularly true in this case, given that our sister circuits have reached conflicting answers to the same question based on the same statutory text. Cf. *In re BankVest Capital Corp.*, 360 F.3d 291, 297 (1st Cir.2004) ("[W]e are hard-pressed to endorse any 'plain meaning' argument where, as here, other federal courts have reached conflicting answers to the same question based on the same 'plain' language.").

The legislative history of § 1367 is somewhat muddled in its details, but one fact is certain: Congress did not believe that § 1367 would make significant changes to the law of diversity jurisdiction. The House Judiciary Committee report—the only congressional report concerning the provision that became § 1367—stated that the bill was intended to "essentially restore the pre-*Finley*

understandings of the authorization for and limits on ... supplemental jurisdiction." H. Rep. No. 101-734, at 28 (Sept. 10, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, at 6874. The same report made clear that Congress anticipated no sweeping changes in the operation of § 1332: "In diversity cases, the district courts may exercise supplemental jurisdiction, except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute." *Id.*

*16 The bill's sponsors similarly did not believe that § 1367 would alter the fundamental rules of diversity jurisdiction. Senator Grassley stated that the bill did not "represent major changes in the law." 136 Cong. Rec. at S17578 (Oct. 27, 1990). He and other sponsors repeatedly described the bill as "noncontroversial." *See, e.g., id.; id.* at H13313 (Oct. 27, 1990) (statement of Rep. Kastenmeier). And Congress treated it that way—committee hearings on the bill lasted only one day. *See* Rowe, Burbank, & Mengler, *supra*, at 1005 (describing the process afforded to the bill in Congress as "meager"). At no point in the legislative process did any member of Congress suggest that § 1367 would overturn *Clark*, undercut the complete diversity rule, or otherwise dramatically expand federal diversity jurisdiction. [FN19]

III.

We hold that § 1367 does not authorize jurisdiction over Beatriz's family members' claims. Those claims would have been barred under *Clark* before 1990, and we conclude that Congress did not upset that rule when it overturned *Finley* and codified the prior law of pendent and ancillary jurisdiction in § 1367. [FN20]

The judgment of the district court is *affirmed* as to Beatriz's family members. As to Beatriz, the judgment is *vacated* and the case is *remanded*. On remand, Beatriz may elect to proceed alone in federal court or, if she wishes, voluntarily dismiss her complaint so that she and her family may re-file in the Puerto Rico courts.

TORRUELLA, Circuit Judge (Concurring in part, dissenting in part II.B).

I concur in part II.A of the majority opinion. I also agree that courts are wise to tread carefully when deciding cases, such as this, where a court must interpret a statute defining the parameters of its own powers. My agreement with the majority opinion, however, ends there.

In an attempt to limit diversity jurisdiction, the majority opinion mixes a "sympathetic textualist" approach to statutory interpretation with a dash of legislative intent to reach a conclusion that is contrary to the plain language of § 1367. The irony of the majority opinion is that it espouses the virtue of legislative intent, yet adopts a reading of § 1367 that was never articulated by any Congressperson or their staff, by any judge or jurist, nor by any academics, or, most importantly, by any of the very drafters of the statute from the time the statute was adopted in 1990, until such "intent" was just espoused in 1998. Section 1367 was the law for over seven years before a new alternative interpretation of § 1367 was proposed by Professor Pfander and adopted by the Tenth Circuit. *See Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 639 n. 6 (10th Cir.1998). This dubious approach has now been adopted by this circuit, despite the fact that it ignores the plain meaning of § 1367, causes the same word in the statute to have two meanings, and makes an entire provision of § 1367 meaningless.

*17 It is because I believe that a court's role is limited to applying the statute, not changing the statute, that I respectfully dissent. In doing so, I join the majority of our sister circuits that have interpreted 28 U.S.C. § 1367 to grant a district court jurisdiction to hear a plaintiff's claim that does not meet the amount-in-controversy, if a co-plaintiff's claim satisfies the amount-in-controversy requirement.

I. Joinder and class actions

Before analyzing § 1367 and its meaning, one observation must be made. The majority begins its analysis of § 1367 by noting that our sister circuits are evenly split on the issue of whether § 1367 allows a plaintiff who does not independently meet the amount-in-controversy requirement of § 1332 to remain in federal court. This statement is misleading. While it is true that only two circuit courts, the Third and Seventh Circuits, have addressed § 1367's applicability outside the context

of a class action, in reality, five circuit courts have interpreted § 1367 to allow a plaintiff who does not independently meet the amount-in-controversy requirement of § 1332 to remain in federal court, whereas three circuit courts require them to take their claims to state court. [FN21] Rather than addressing these cases and their arguments, the majority opinion casts them aside by arguing that the class action context differs from the Rule 20 joinder context. Such a characterization is misguided for several reasons.

First, the majority opinion fails to acknowledge that for § 1367 purposes, *Clark* and *Zahn* stand for the same principle. In *Clark v. Paul Gray, Inc.*, the Supreme Court held that each plaintiff's claim must meet the amount-in-controversy requirement. 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001 (1939). In *Zahn v. Int'l Paper Co.*, the Supreme Court held that each class member's claim must meet the amount-in-controversy requirement. 414 U.S. 291, 301, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). Thus, *Clark* "is the nonclass analog to *Zahn*. Section 1367, on its face, overrules *Clark*, just as it overrules *Zahn*." Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 *Emory L.J.* 55, 58 n. 19 (2004).

This position has been adopted by every circuit court to consider the issue. As the Seventh Circuit noted, "§ 1367 does not distinguish class actions from other cases ... [and section 1367] affects *Clark* and *Zahn* equally." *Stromberg Metal Works*, 77 F.3d at 931. [FN22] Similarly, the Third Circuit, the only circuit with which the majority aligns itself, admits that "the line of cases from *Pinel* to *Zahn* applies equally to joinder cases and class action." *Meritcare Inc.*, 166 F.3d at 218. [FN23] The purpose of *Zahn* was to clarify that, for amount-in-controversy purposes, the proposition established in *Clark* applies in the class action context. See *Zahn*, 414 U.S. at 301; *Snyder v. Harris*, 394 U.S. 332, 335-37, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969) (treating class actions the same as cases with joined plaintiffs for purposes of aggregation rules).

*18 Second, if a distinction were to be made between class actions and joinder, the distinction would favor allowing supplemental jurisdiction in joinder situations, and not in class action situations,

as "it is hard to avoid remarking that allowing thousands of small claims into federal court via the class device is a substantially greater expansion of jurisdiction than is allowing a single pendent party." *Stromberg Metal Works*, 77 F.3d at 931. Thus, it is "easy to imagine wanting to overturn *Clark* but not *Zahn*; it is much harder to imagine wanting to overturn *Zahn* but not *Clark*, and we have no reason to believe that Congress harbored such a secret desire." *Id.*

II. The plain meaning of § 1367

When interpreting a statute, the starting point is the statute's text. See *Bennett v. City of Holyoke*, 362 F.3d 1, 9 (1st Cir.2004). Section 1367(a) provides that district courts shall have supplemental jurisdiction over claims that form part of the same case or controversy as any civil action of which the court has original jurisdiction. [FN24] For diversity purposes, a district court has original jurisdiction if the plaintiff's citizenship differs from the defendant's and the claim exceeds \$75,000. See 28 U.S.C. § 1332.

Section 1367(b) creates exceptions to § 1367(a) if (1) jurisdiction is based on diversity (§ 1332), (2) the plaintiff is the party seeking to assert supplemental jurisdiction against persons made parties under Rule 14 (third-party practice), 19 (mandatory joinder), 20 (permissive joinder), or 24 (intervention) of the Federal Rules of Civil Procedure or persons proposed to be joined as plaintiffs or intervene as plaintiffs under Rules 19 and 24 respectively, and exercising jurisdiction over the supplemental claims would be inconsistent with the statutory requirements of diversity jurisdiction under § 1332. [FN25]

Section 1367(c) creates further exceptions, notably awarding a district court discretion to decline supplemental jurisdiction if the supplemental jurisdiction claim predominates over the claim that has original jurisdiction. [FN26]

Applying § 1367(a) to the present case is straightforward. Before supplemental jurisdiction can apply, a district court must have original jurisdiction over a claim. In this case, the district court has jurisdiction over Beatriz's claims because Beatriz is a citizen of a different state than Star-Kist and has alleged claims for which it is not a legal

certainty that the damages are less than \$75,000. *See* 28 U.S.C. § 1332. Since the district court has jurisdiction over Beatriz's claims, it may assert supplemental jurisdiction over Beatriz's family members' claims if they arise out of the same case or controversy. *See* 28 U.S.C. § 1367(a). There is no dispute that all of the claims in this case arise out of the same case or controversy.

Supplemental jurisdiction may attach unless one of the exceptions applies. *See* 28 U.S.C. § 1367(b) & (c). The exceptions pertaining to Federal Rule of Civil Procedure 14 (third-party practice), Rule 19 (mandatory joinder), Rule 20 (permissive joinder), or Rule 24 (intervention) are inapplicable to this case as there are no claims by plaintiffs *against* persons made parties under those rules. The further exception pertaining to Federal Rule of Civil Procedure 19 does not apply as Beatriz's family members are not indispensable parties. The last exception pertaining to Federal Rule of Civil Procedure Rule 24 does not apply as the family members are not seeking to intervene. Thus, none of the exceptions in § 1367(b) apply.

*19 The exceptions in § 1367(c) also do not apply. The claims of Beatriz's family members do not raise novel or complex issues of Commonwealth law, their claims do not substantially predominate Beatriz's claims, and there do not tend to be any compelling reasons for declining jurisdiction. Thus, a plain, straightforward reading of § 1367 results in the district court having jurisdiction over Beatriz's family members' claims.

III. The majority opinion's alternative approach

The majority opinion disagrees with this conclusion, however, by arguing that the term "original jurisdiction" in § 1367(a) has two distinct meanings. In federal-question cases, § 1367 applies if *at least one* claim qualifies for "original jurisdiction." But, in diversity cases, the majority argues, § 1367 applies only if *all* claims qualify for original jurisdiction. This contrived reading of § 1367 is wrong for several reasons.

First, the majority's interpretation of § 1367(a) violates "the basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479, 112 S.Ct. 2589, 120 L.Ed.2d

379 (1992). In this case, not only does the majority opinion define identical terms differently, it defines the same term differently. There is "nothing in the text of subsection (a) to suggest, even remotely, that there is such a difference in meaning." *See Gibson*, 261 F.3d at 936; *Rosmer*, 263 F.3d at 115-16.

The majority opinion appears to be oblivious to this blatant violation of the rules of statutory construction because it believes Congress "presumptively" incorporated into § 1367 the longstanding, judicially developed doctrines that determine whether those statutes confer 'original jurisdiction.' " (emphasis added). In addition to there being no authority for this "presumption," the majority incorrectly applies another longstanding doctrine that accompanies original jurisdiction to reach that conclusion. For supplemental jurisdiction purposes, the majority contends that the term "original jurisdiction" in a diversity case requires that *every* claim meet the requirement of "original jurisdiction." In stating this principle, the majority overlooks the process by which a court determines if "original jurisdiction" exists. Both §§ 1331 and 1332 "confer original jurisdiction over designated 'civil actions' ... [which] consist of a cluster of claims, ... [and which] the rules of federal subject-matter jurisdiction apply on a claim-by-claim basis." John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 Ind. L.J. 25, 41-42 (1998); *see also* Freer, 53 Emory L.J. at 82-83. One claim's failure to qualify for original jurisdiction does not mean that all claims fail to qualify for original jurisdiction. Whether the case is filed in federal court or removed to federal court, "it is incontrovertible that [§ 1332] ... requires only the dismissal of the jurisdictionally insufficient claims, not the entire action." Oakley, 74 Ind. L.J. at 47; Freer, 53 Emory L.J. at 82-83; *see also* Clark, 306 U.S. at 590 (maintaining jurisdiction over one claim that met the amount-in-controversy and dismissing the claims that failed to meet the amount-in-controversy). Thus, the fact that a case contains claims that destroy diversity does not prevent the court from maintaining jurisdiction over the claims that qualify for "original jurisdiction." *See* Oakley, 74 Ind. L.J. at 47; Clark, 306 U.S. at 590; *see also* Fed.R.Civ.P. 21; *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 834-35, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989) (holding that courts

of appeals have the authority to dismiss a dispensable non-diverse party).

*20 The very language of § 1367 incorporates this concept. Section 1367(a) states that a court shall have supplemental jurisdiction over all other claims that are "so related to claims in the action." The "other claims" join the related claims (those qualifying for original jurisdiction) as part of the civil action.

In this case, Beatriz's claims qualified for "original jurisdiction." On remand, it will be undisputed that Beatriz's claims constitute "a civil action of which the district courts have original jurisdiction." See 28 U.S.C. § 1367. Once the majority opinion concluded that the district court had "original jurisdiction" over the "civil action" consisting of Beatriz's claims, it should have turned to § 1367's statement that "in any civil action of which the district courts have original jurisdiction [(Beatriz's claims)], the district courts shall have supplemental jurisdiction over all other [related] claims [Beatriz's family's claims] ." *Id.* Instead of taking this step, the majority opinion attempts to redefine the practice of interpreting § 1332 claims to achieve a result contrary to that dictated by § 1367. [FN27]

Further, the majority's interpretation of § 1367(a) violates "[t]he cardinal principle of statutory construction ... to give effect, if possible, to every clause and word of a statute, ... rather than to emasculate an entire section." *United States v. Menasche*, 348 U.S. 528, 538, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (internal quotations and citations omitted). The majority's interpretation of § 1367(a) eviscerates portions of § 1367(b). As the majority is forced to admit, its interpretation of § 1367 makes the Rule 19 exception in § 1367(b) "unnecessary." What the majority does not admit is that its interpretation makes other provisions of § 1367 superfluous. See Freer, 53 Emory L.J. at 81. For example, according to the majority's interpretation of § 1367, "original jurisdiction" would not exist over a claim made by a plaintiff against a non-diverse defendant joined under Rule 20 of the Federal Rules of Civil Procedure. The majority's interpretation cannot be correct, however, because section 1367(b) specifically excepts supplemental jurisdiction over a claim made by a plaintiff against a non-diverse defendant joined under Rule 20. See *Gibson*, 261 F.3d at 936; *Rosmer*, 263 F.3d at 115.

The only reason § 1367(b) would contain such an exception is if § 1367(a) provides jurisdiction for joined claims against non-diverse defendants. If, as the majority contends, " 'original jurisdiction' under subsection (a) were determined by looking at all the claims in the complaint, there would have been no jurisdiction under § 1332 (and hence no 'original jurisdiction') in the first place." *Gibson*, 261 F.3d at 936. Thus, the exclusion of supplemental jurisdiction of claims by non-diverse parties joined under Rule 20 would be surplusage.

IV. Congressional Intent & legislative history

*21 Recognizing that its interpretation of § 1367 results in an "imperfect" reading based on "presumptions," the majority opinion attempts to buttress its position by referring to Congressional intent and legislative history. The majority opinion begins by noting that "Congress has long maintained a policy of restricting diversity jurisdiction." Relying on "long maintained" policy is problematic for several reasons. First, Congressional action in the past sheds little light on what the 101st Congress believed when it passed § 1367. Rather than speculate on what was done in the past, it is more fruitful to look at the actions of the Congress that adopted § 1367. In 1990, the same Congress that passed § 1367 was given the *Report of the Federal Courts Study Committee* which recommended "diversity jurisdiction should be virtually eliminated." This recommendation was *rejected* by Congress. We should not achieve through judicial action what the Federal Courts Study Committee could not convince Congress to achieve. Ultimately, it is not unreasonable to believe that Congress read the plain language of § 1367, recognized that it allowed diversity jurisdiction for supplemental plaintiffs, and voted for it.

Second, the continued validity of Congress's "long maintained policy" of restricting diversity jurisdiction is called into question by Congress's expansion of federal jurisdiction based upon minimal diversity in the Multiparty Multi-Forum Trial Jurisdiction Act in 2002. See 28 U.S.C. § 1369

Third, and perhaps most convincing is the fact that a proposed amendment achieving the majority's result in this case, that would limit supplemental

jurisdiction in Rule 20 & 23 cases has been circulating in Congress since 1998. Freer, 53 Emory L.J. at 58-59. This amendment has done nothing more than circulate for six years. *Id.* Congress has reasonably rejected that view.

To conclude its opinion, the majority cites to an admittedly "muddled" legislative history for support. The legislative history, however, is so sparse and contradictory that it neither supports nor undermines the majority opinion's conclusions. Section 1367 was passed by the House of Representatives with no floor discussion on any part of the statute. Freer, 53 Emory L.J. at 73. The Senate voted on § 1367 with little debate. *Id.* The bill was introduced by Senator Grassley as "noncontroversial."

What little legislative history surrounds § 1367 is internally contradictory. For example, § 1367 "was said to be part of the 'less controversial' proposals of the ... Federal Courts Study Committee ... [but] that Committee never drafted a statute on supplemental jurisdiction." Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life after Finley and the Supplemental Jurisdiction Statute*, 40 Emory L.J. 445, 471 (1991). Further, despite the Senator's words, and excluding the controversy surrounding supplemental jurisdiction, § 1367 was highly controversial because of its treatment of Rule 19 and its adoption of a proposal that differed substantially from the Federal Court Study Committee proposal. See Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute*, 28 U.S.C. § 1367, 19 Seton Hall Legis. J. 157, 164 (1994).

*22 Perhaps the most relevant piece of legislative history is the fact that Congress passed § 1367 in reaction to the Supreme Court's holding in *Finley*, which held that a plaintiff suing the United States in a Federal Tort Claims Act case could not join a defendant, against whom there were only state law claims, without an independent basis for federal jurisdiction. See *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989). Had *Finley* not been overturned by § 1367, a plaintiff, such as the one in *Finley*, would have been required to either (1) split the case in two and bring the federal claim in federal court and the state claims in state court, or (2) forsake one of the two claims. To prevent such a result, Congress enacted § 1367.

The majority opinion in this case achieves a result similar to that Congress was trying to avoid by overruling *Finley*. As in *Finley*, the plaintiffs in this case must either (1) pursue Beatriz's claims in federal court and her family's claims in state court, (2) dispose of her family's claims altogether, or (3) pursue all of the claims in state court. The first option leads to a waste of judicial resources and a potential for inconsistent verdicts. The second option deprives Beatriz's family of their day in court. The third option, not present in *Finley*, deprives Beatriz of a federal forum and of her right to a trial by jury, as her case would not receive a jury trial in the Commonwealth courts. [FN28] As Congress showed by overturning *Finley*, being faced with these options should be avoided.

Ultimately, as the majority concedes, the legislative history is muddled and can be used to support or to contradict either position. In the end, the unclear legislative history leaves us where we started: with the text of the statute.

V. Conclusion

The majority proposes an interpretation of § 1367 that not one Congressman or drafter of § 1367 ever espoused, much less envisioned. In contrast, I support a plain reading of § 1367 that even the drafters admitted was the correct plain reading of the statute. [FN29] The majority proposes an interpretation of § 1367 that violates many rules of statutory construction. In contrast, I support a reading of the statute in which words are not required to have double meanings and each phrase has a purpose. Last, the majority's interpretation leads to a waste of judicial resources and the possibility of inconsistent verdicts. In contrast, I support a reading which preserves judicial resources.

I am comforted by and conclude with a statement by the Supreme Court in *Finley*: "Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress" or, in this case, by the Supreme Court. *Finley*, 490 U.S. at 556.

FN1. At one point, the district court wrongly said that "once the defendant challenges the amount of damages alleged in the complaint, then the burden shifts to

the plaintiffs to establish facts indicating that, to a legal certainty, the claims involve more than the jurisdictional minimum." This is incorrect; the plaintiff need only show it is *not* a legal certainty that the claims will *not* result in a verdict for the amount in controversy. The double negative has substantive meaning. Ultimately, it appears the district court did use the correct standard regarding the plaintiffs' burden despite this error in laying out the law.

FN2. We address the supplemental jurisdiction question below.

FN3. As for future medical expenses, Mrs. Ortega suggested in her deposition that any future surgery Beatriz might have on her finger would be elective.

FN4. We noted the issue in the class-action context in *Spielman v. Genzyme Corp.*, 251 F.3d 1, 7 n. 5 (1st Cir.2001).

FN5. An unexplained affirmance by an equally divided Court has no precedential value. See *Rutledge v. United States*, 517 U.S. 292, 304, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996).

FN6. The district courts in our circuit are similarly split. Compare *Payne v. Goodyear Tire & Rubber Co.*, 229 F.Supp.2d 43, 52 (D.Mass.2002) (section 1367 permits supplemental jurisdiction over pendent party plaintiffs who do not themselves satisfy requirements of § 1332); and *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 60 (D.Mass.1997) (same), with *Arias v. Am. Airlines, Inc.*, 163 F.Supp.2d 111, 115 (D.P.R.2001) (each plaintiff must independently meet the requirements of diversity jurisdiction); and *Mayo v. Key Fin. Servs., Inc.*, 812 F.Supp. 277, 278 (D.Mass.1993) (same).

FN7. In our view, class actions raise unique problems that will be better addressed with the benefit of briefing and argument in a case requiring us to consider them. See *infra* note 19.

FN8. See Arthur & Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 Emory L.J. 963, 980 (1991) ("Congress could have overruled the holding in *Finley* quite simply and cleanly, without affecting other areas.... Why the statute had to go further, we do not know. That the statute went further, there can be no doubt.").

FN9. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. Pa. L.Rev. 109 (1999).

FN10. Until 1980, the federal question statute also had an amount-in-controversy requirement. See Act of Dec. 1, 1980, Pub.L. No. 96-486, § 2, 94 Stat. 2369 (eliminating the amount-in-controversy requirement from § 1331). If that requirement were still in effect today, aggregation issues would affect the existence of "original jurisdiction" under § 1331.

FN11. The dissent would apply such a test in this case. According to the dissent, § 1367 authorizes supplemental jurisdiction whenever the district court has "original jurisdiction over a claim." (emphasis added). The problem with the dissent's theory is that § 1367(a) does not refer to original jurisdiction over "claims." Rather, the statute requires a "civil action of which the district courts have original jurisdiction." § 1367(a) (emphasis added). That distinction is critical. The Supreme Court has never held that original jurisdiction exists over a "civil action" under § 1332 simply because *one claim* in the action is between diverse parties and

exceeds the jurisdictional minimum. On the contrary, original jurisdiction does not lie unless *all* of the parties in the case are diverse. *See Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) ("A case falls within the federal district court's 'original' diversity 'jurisdiction' only if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same State."). Similarly, § 1332 is not satisfied, and original jurisdiction over the "civil action" does not exist, unless *each* plaintiff independently satisfies the amount-in-controversy requirement. *Snyder*, 394 U.S. at 336; *Clark*, 306 U.S. at 589. Because the complaint in this case fails this requirement, original jurisdiction over the "civil action" is absent and § 1367 is inapplicable.

FN12. The dissent argues that a single claim is sufficient to create original jurisdiction over a "civil action" under § 1332 because courts are not normally required to dismiss the entire action when a jurisdictional flaw is discovered. Rather, a court may simply dismiss the offending parties. *See, e.g., Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989) (courts of appeals may cure jurisdictional defects by dismissing dispensable nondiverse parties); *Clark*, 306 U.S. at 590 (dismissing parties who failed to meet the amount-in-controversy requirement but retaining jurisdiction over the party that satisfied it). This argument confuses the *existence* of original jurisdiction with remedies for its absence. Original jurisdiction over the "civil action" may be *achieved* by dismissing certain dispensable parties. But as long as the offending parties are present, original jurisdiction over the "civil action" cannot exist, *see Schacht*, 524 U.S. at 389 ("The presence of [a] nondiverse party automatically destroys original jurisdiction"), regardless of whether any single claim in the action would satisfy § 1332 by itself.

FN13. The doctrine of pendent jurisdiction, which allowed plaintiffs to assert non-federal claims in federal court, was applicable only in federal-question cases. *See* 7C Wright, Miller, & Kane, *Fed. Prac. & Proc.* § 1917 n. 7 (2d ed.2004); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 348-49, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *see also Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978) (noting that the lower court had erred in relying on *Gibbs*, a pendent jurisdiction case, because the case before the court did not involve a federal claim). Ancillary jurisdiction, by contrast, applied in both federal-question and diversity cases, but that doctrine "typically involve[d] claims by a defending party haled into court against his will." *Kroger*, 437 U.S. at 376 (emphasis added); *see also id.* at n. 18. Moreover, the Court in *Kroger* made clear that a party could not resort to ancillary jurisdiction where doing so would effectively circumvent the complete diversity rule. *See id.* at 375-77.

FN14. The Supreme Court has not specifically held that plaintiffs joined under Rule 20 after the filing of the original complaint must also satisfy the amount-in-controversy requirement. That result, however, is probably inevitable in light of *Clark* and *Snyder*, for "[o]therwise an appellate court could be called on to sustain a decree in favor of a plaintiff who had not shown that his claim involved the jurisdictional amount, even though the suit were dismissed on the merits as to the other plaintiffs who had established the jurisdictional amount for themselves." *Clark*, 306 U.S. at 590; *cf. Am. Fiber & Finishing, Inc. v. Tyco Healthcare Group, LP*, 362 F.3d 136, 140-41 (1st Cir.2004) (addition of a non-diverse party after filing of original complaint destroyed diversity jurisdiction).

FN15. Congress may have included the reference to Rule 19 plaintiffs simply to be

clear that a plaintiff joined as an indispensable party under Rule 19 is in exactly the same situation as one who intervenes as of right under Rule 24(a). Before the enactment of § 1367, ancillary jurisdiction worked differently under Rules 19 and 24. *See generally* Rowe, Burbank, & Mengler, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 *Judicature* 213, 215 (Dec./Jan.1991) (describing the identical treatment of plaintiffs under Rules 19 and 24 as the "one modest but significant way" in which § 1367(b) was intended to alter prior law).

Similarly, others have offered explanations for the reference in § 1367(b) to claims against persons made parties under Rule 19 or 20. *See, e.g.,* Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 *U. Pa. L.Rev.* 109, 144-46 (1999) (Rule 20 defending parties); Rowe, Burbank, & Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 *Emory L.J.* 943, at 957-58 (1991) (hereinafter Rowe et al., *Compounding or Creating Confusion*) (Rule 19 defending parties).

FN16. *Stromberg* itself recognized that "[s]upplemental jurisdiction has the potential to move from complete to minimal diversity." 77 F.3d at 932. Nevertheless, the court concluded that § 1367(b) is adequate to protect the interests served by the *Strawbridge* complete diversity rule. *Id.* Like many commentators, we disagree. *See, e.g.,* Fallon, Meltzer, & Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 1491 (5th ed.2003) (describing the omission of Rule 20 plaintiffs from § 1367(b) as "puzzling" because it allows plaintiffs "to circumvent the complete diversity requirement of § 1332"); Gold, Note, *Supplemental Jurisdiction over Claims by Plaintiffs in Diversity Cases: Making Sense of 28 U.S.C. § 1367(b)*, 93 *Mich. L.Rev.* 2133,

2167 n. 140 (1995) (the omission of Rule 20 plaintiffs must be "inadvertent []" because a literal reading of § 1367(b) "would allow plaintiffs to strategically circumvent the complete diversity requirement"); Rowe et al., *Compounding or Creating Confusion, supra*, at 961 n. 91 (describing § 1367(b)'s silence about Rule 20 plaintiffs as a "potentially gaping hole in the complete diversity requirement").

FN17. In 1887, the minimum amount in controversy was \$2,000. *See* Act of March 3, 1887, 24 *Stat.* 552. Since that time, Congress has repeatedly raised, and never lowered, the required sum. *See* Act of March 3, 1911, 36 *Stat.* 1091 (raising the minimum amount in controversy to \$3,000); Act of July 25, 1958, Pub.L. No. 85-554, § 2, 72 *Stat.* 415 (raising the minimum amount to \$10,000); Judicial Improvements and Access to Justice Act, Pub.L. No. 100-702, § 201, 102 *Stat.* 4642 (1988) (raising the minimum amount to \$50,000); Federal Courts Improvement Act of 1996, Pub.L. No. 104-317, § 205, 110 *Stat.* 3847 (raising the minimum amount to \$75,000). We leave aside the special case of class actions. *See infra* note 19.

FN18. The dissent points to the Multiparty, Multiforum Trial Jurisdiction Act (MMTJA) as evidence that Congress is backing away from its long history of restricting diversity jurisdiction. We disagree. Our conclusion is that Congress is keenly aware of the limits on diversity jurisdiction and expects those limits to apply except where, as in the MMTJA, it specifically and unambiguously alters them.

FN19. We express no view on the related but distinct issue of whether § 1367 overturns the Supreme Court's holding in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), that each class member in a diversity-only class action must meet the jurisdictional

amount in controversy. *See id.* at 301. The application of § 1367 to diversity-only class actions is a different problem for several reasons, including because (1) the complete diversity rule applies with diminished force in the class-action context, *see Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366, 41 S.Ct. 338, 65 L.Ed. 673 (1921); (2) section 1367(b) does not mention Rule 23 at all, while it mentions Rule 20 at least as to defending parties; and (3) there are conflicting signals in the legislative history as to whether Congress intended to overrule *Zahn*, *see Payne*, 229 F.Supp.2d at 51-52 (summarizing the "murk[y]" legislative history on this point).

FN20. The dissent argues that Congress could not have intended this result because it is too similar to the outcome in *Finley*, which Congress meant to overturn. The analogy to *Finley*, however, is both inaccurate and unpersuasive. *Finley* involved an exclusively federal claim under the FTCA; this case is predicated only on diversity. That is a critical difference: the rules of pendent jurisdiction have always been more flexible in federal-question cases than in diversity cases, *see supra* note 13, no doubt to facilitate a federal forum for claims arising under federal law. The federal interest in Beatriz's family members' ability to assert their state-law claims in federal court is much more attenuated.

In *Finley*, moreover, there was no forum available in which the federal plaintiff could assert all of her claims. *See Finley*, 490 U.S. at 555- 556. In this case, by contrast, such a forum is readily available: the courts of Puerto Rico. It was the plaintiffs who chose to sue in federal court. Against that background, the dissent's judicial efficiency arguments ring hollow. *Cf. Kroger*, 437 U.S. at 376 ("A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims in a case such as this one, since it is he who has chosen the federal rather than the state forum....").

FN21. Compare *Allapattah Serv., Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir.2003) (holding supplemental jurisdiction exists in a diversity class action as long as one named plaintiff satisfies the amount-in-controversy requirement); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir.2001) (same), *cert. denied*, 534 U.S. 1104, 122 S.Ct. 903, 151 L.Ed.2d 872 (2002); *Rosmer v. Pfizer Inc.*, 263 F.3d 110 (4th Cir.2001) (same), *cert. dismissed*, 536 U.S. 979, 123 S.Ct. 14, 153 L.Ed.2d 878 (2002); *Stromberg Metal Works, Inc. v. Press Mech. Inc.*, 77 F.3d 928 (7th Cir.1996) (holding supplemental jurisdiction exists over a party who failed to meet the amount-in-controversy requirement); *In re Abbott Labs.*, 51 F.3d 524 (5th Cir.1995) (holding supplemental jurisdiction exists in a diversity class action as long as one named plaintiff satisfies the amount-in-controversy requirement), with *Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir.2000) (holding supplemental jurisdiction does not exist in class action diversity case); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir.1999) (holding supplemental jurisdiction does not apply to a diversity case); *Leonhardt*, 160 F.3d 631 (holding supplemental jurisdiction does not exist in class action diversity case).

FN22. *See also In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 607 (7th Cir.1997) (agreeing that § 1367 allows supplemental jurisdiction in either a class action or joinder situation); *Rosmer*, 263 F.3d at 122-29 (Motz, J., dissenting) (interpreting the majority's interpretation of § 1367 to apply to Rule 20 joinder as well as class actions).

FN23. *See also*, Richard D. Freer, *Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 Ind. L.J. 5, 21-22 (1998).

FN24. Section 1367(a) states: "(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in 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. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

FN25. Section 1367(b) states: "In any civil action of which the district courts have original jurisdiction founded solely on [diversity], the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14 [third-party practice], 19 [mandatory joinder], 20 [permissive joinder], or 24 [intervention] of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."

FN26. Section 1367(c) states: "(c) The district courts may decline to exercise supplemental jurisdiction over a claim ... if—(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."

FN27. The majority attempts to justify its

approach by arguing that Congress should have explicitly stated that supplemental jurisdiction exists if one claim supports original jurisdiction. First, such specificity is not required as it is undisputed that one claim can constitute a civil action.

Second, we can argue "could have" or "should have" ad infinitum. If Congress had wanted to limit supplemental jurisdiction in cases such as this, for example, it could have inserted a Rule 20 plaintiff exception into § 1367(b), as it did for other Rules of Civil Procedure. If Congress had done so, the majority would not need to resort to its dubious "sympathetic textualist" interpretation of the statute.

In a case like this, a debate over what Congress could have done is unproductive and unnecessary when a plain reading of the statute produces one clear result: a district court has jurisdiction over supplemental claims if the district court has original jurisdiction over a claim in the civil action.

FN28. The third option is also unrealistic considering judgments in the Commonwealth courts are far below those awarded in the federal courts. *See, e.g., Stewart v. Tupperware Corp.*, 356 F.3d 335 (1st Cir.2004).

FN29. *See Rowe Jr., Burbank, & Mengler, Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 Emory L.J. 943, 961 n. 91 (1991) (recognizing that the § 1367 left a "potentially gaping hole in the complete diversity requirement").

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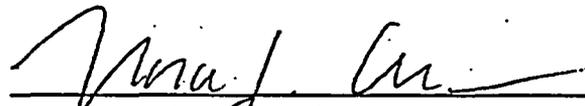
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