No. ____

IN THE

Supreme Court of the United States

ROBIN PASSARO LOUQUE, Individually and on Behalf of All Others Similarly Situated,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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April 21, 2003

QUESTION PRESENTED

In *Free v. Abbott Laboratories*, 529 U.S. 333 (2000), this Court granted review to address an important question on which the courts of appeals are in conflict regarding the scope of diversity jurisdiction in small-claims class actions. The Court affirmed the Fifth Circuit's decision in *Free* by a four-four vote, with Justice O'Connor not participating, and thus was unable to resolve the question presented. The circuits are more deeply divided on that question now than they were at the time the Court granted certiorari in *Free*. This case presents exactly the same question as presented in *Free*:

> Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, overrules *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and thus expands federal subject matter jurisdiction in a class action to encompass class members whose claims do not satisfy the amount-in-controversy requirement of 28 U.S.C. § 1332, as long as diversity jurisdiction exists over the claims of one named plaintiff.

PARTIES

The caption includes all of the named parties. Petitioner Robin Passaro Louque was the named plaintiff and appellant below. Respondent Allstate Insurance Company was defendant and appellee below. Petitioner Louque is the class representative for a class of Allstate insureds who are also petitioners before this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robin Passaro Louque, and a class of all others similarly situated, respectfully petition this Court for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 314 F.3d 776 (5th Cir. 2002), and is reproduced in the appendix at 1a. The Fifth Circuit's unreported order denying petitioners' petition for rehearing is reproduced in the appendix at 25a. The opinion of the United States District Court for the Eastern District of Louisiana is unofficially reported at 2001 WL 736759 (E.D. La. June 27, 2001), and is reproduced in the appendix at 16a.

JURISDICTION

The judgment of the Fifth Circuit affirming the denial of petitioners' motion to remand this action to state court and the dismissal of petitioners' class action petition was entered on December 13, 2002. Pet. App. 1a. Petitioners' timely petition for rehearing was denied on January 24, 2003. Pet. App. 25a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1332 provides, in relevant part:

> **Diversity of citizenship; amount in controversy; costs**
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter

in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —

(1) citizens of different States . . . .

28 U.S.C. § 1441 provides, in relevant part:

Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1367, provides in relevant part:

Supplemental jurisdiction

(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.

(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.

STATEMENT OF THE CASE

This class action presents claims arising solely under state law. The named plaintiff, petitioner Robin Louque, filed the action in Louisiana state court on behalf of herself and all those similarly situated. The defendant, respondent Allstate Insurance Company, removed the class action to federal district court on the basis of diversity of citizenship under 28 U.S.C. §§ 1441(a) and 1332(a)(1). It is undisputed that the unnamed class members do not individually have $75,000 in controversy, as is generally required to establish diversity jurisdiction under section 1332(a). However, the district court assumed jurisdiction over the class members' claims on the strength of the Fifth Circuit's prior ruling in *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995) ("*Abbott Labs*"), *aff'd by an equally divided court sub nom. Free v. Abbott Laboratories*, 529 U.S. 333 (2000).

Abbott Labs held that the federal supplemental jurisdiction statute enacted in 1990, 28 U.S.C. § 1367, overruled this Court's decision in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). *Zahn* held that to meet the requirements for diversity jurisdiction under 28 U.S.C. § 1332(a)(1) in a class action, the claims of each class member, including the unnamed members of the class, must exceed the statute's amount-in-controversy threshold. In *Abbott Labs*, this Court granted review to decide whether *Zahn* survived the enactment of section 1367. The Court affirmed the Fifth Circuit's ruling by a four-to-four vote, without opinion, and thus it was unable to resolve that important question. This petition presents the Court with the opportunity to do so.

1. Petitioner Louque, a citizen of Louisiana, filed a Class Action Petition for Damages on March 16, 2001, in the Twenty-First Judicial District Court of Tangipahoa Parish, Louisiana. The petition explained that Louque had been involved in a car accident in which the other motorist was injured and thereafter sued Louque in Louisiana state court. Respondent Allstate, Louque's insurer, defended the action and refused to settle it. Judgment was entered for the injured motorist for more than $7,500 in damages, plus $5,000 in statutory penalties for failure to make a reasonable offer to settle, as required by La. Stat. Ann. § 22:1220. Respondent paid the damages judgment, but successfully appealed the statutory penalties. The judgment against Louque became a public record and thus was available to creditors, credit reporting agencies, and the like. Class Action Petition ¶¶ 3-8; Pet. App. 2a.

In their state court class action petition, petitioners alleged that respondent has a general policy not to settle minor-

impact, soft-tissue injury ("MIST") claims where the claimant is represented by a lawyer, even when respondent believes the case is meritorious and would result in a judgment greater than could be negotiated in settlement, in a concerted effort to discourage claimants from retaining counsel. Pet. App. 2a; *see* Class Action Petition ¶¶ 12-17 (describing policy in some detail). Petitioners alleged that this no-settlement policy was pursued even in cases where respondent knew that it would harm its own insureds because "the resulting delays and judgments adversely affected Allstate policy holders' creditworthiness." Pet. App. 2a; *see also* Class Action Petition ¶¶ 8-10 (describing how judgment harmed Louque's credit).[1]

Petitioners alleged that respondent's policy regarding non-settlement of MIST claims violated the plain language of their contracts of insurance, constituted a breach of fiduciary duty, and violated La. Stat. Ann. § 22.1220, which imposes on insurers a "duty of good faith and fair dealing," including a duty to make a reasonable effort to settle claims. Pet. App. 2a; Class Action Petition ¶¶ 18-20. Petitioners alleged that respondent's policy had harmed their creditworthiness (*id.* ¶ 18), and each class member so harmed demanded compensatory damages and statutory damages. *Id.* ¶¶ 19-21. The class action petition explicitly disavowed damages in excess of $75,000 for any class member. *Id.* ¶ 1.

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[1]The class was defined to include all persons with automobile insurance issued by respondent where (1) the insured was involved in an automobile accident, (2) the insured was sued as a result of that accident; and (3) a judgment rendered against the insured within policy limits was paid by respondent, which judgment appeared on the insured's credit report. Class Action Petition ¶ 23.

On April 26, 2001, respondent, a citizen of Illinois, removed the case to the United States District Court for the Eastern District of Louisiana on the basis of 28 U.S.C. §§ 1332, 1441, and 1367. Notice of Removal (Doc. 1). Respondent noted that there was diversity between the named parties, and it alleged that "the amount in controversy as to the named plaintiff [Louque]" exceeded $75,000, as required for establishing diversity jurisdiction under 28 U.S.C. § 1332(a). In arguing that Louque had the requisite amount in controversy, respondent relied on provisions of Louisiana insurance law that it contended would entitle petitioner Louque (if the suit was successful) to an award of attorney's fees in the class action that, respondent maintained, would exceed $75,000. Notice of Removal, at 3-4.

As to the unnamed class members, respondent did not maintain (and has never since contended) that they individually had the requisite amount in controversy. Rather, respondent asserted that the court had supplemental jurisdiction over them based solely on the fact that the "representative plaintiff ... satisfies the jurisdictional amount," *id.* at 5, relying on the Fifth Circuit's decision in *Abbott Laboratories*. Petitioners promptly moved to remand the class action to state court on the ground that attorney's fees are not available under the Louisiana statutes upon which respondent relied.

Respondent, meanwhile, moved to dismiss the class action for failure to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6). In that motion, respondent argued principally that the contract of insurance that it had entered into with each of the petitioners gave it the right to settle (or not settle) third-party claims whenever it chose. Motion to Dismiss at 10 (Doc. 6).

2. In an order entered on June 28, 2001, the district court denied petitioners' motion to remand, granted respondent's motion to dismiss, and entered judgment for respondent. The court agreed with respondent that attorney's fees were available to petitioner Louque under Louisiana law, and that, because Louque had sought relief on behalf of thousands of class members, her "attorneys' fees will easily exceed the $75,000 jurisdictional threshold." Pet. App. 19a. Moreover, of particular relevance here, the court ruled that, "in accordance with the Fifth Circuit's holding in *Abbott Laboratories*," it would "exercise supplemental jurisdiction over the claims of the remaining putative class members under 28 U.S.C. § 1367." Pet. App. 19a-20a (citation omitted). On the merits, the district court agreed with respondent, principally on the ground that the insurance contract gave respondent complete discretion whether or not to settle claims. The court therefore dismissed the suit. Pet. App. 23a-24a.

3. The Fifth Circuit affirmed in all respects. Pet. App. 1a. First, it agreed that the relevant Louisiana insurance statutes "presently afford a basis for recovery of attorney's fees for an insured" (Pet. App. 9a), and that, therefore, the amount-in-controversy requirement was met for petitioner Louque. Second, relying on its decision in *Abbott Laboratories*, the court of appeals ruled that "through its exercise of supplemental jurisdiction," the district court had jurisdiction "over the claims of the class." Pet. App. 11a (citing 28 U.S.C. § 1367). Finally, on the merits, the court affirmed the dismissal of the complaint on the basis of the district court's opinion. Pet. App. 12a.[2]

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[2]Judge Barksdale filed a special concurrence stating that he had "some misgivings" about whether the jurisdictional amount could be met by virtue of a claim for attorney's fee under the (continued...)

Petitioner filed a timely petition for panel rehearing with respect to both the jurisdictional issue and the merits. That petition was denied on January 24, 2003.

REASONS FOR GRANTING THE WRIT

This Petition Presents A Deep Conflict Among The Circuit Courts On An Important Question Of Federal Law.

1. The Fifth Circuit's view, first enunciated in *Abbott Labs*, that section 1367 overruled *Zahn* has been followed by the Fourth, Seventh, and Ninth Circuits, but has been rejected by the Third, Eighth, and Tenth Circuits. *Compare Abbott Labs*, 51 F.3d at 529 ("under § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement, as did the class representatives"); *Rosmer v. Pfizer Inc.*, 263 F.3d 110 (4th Cir. 2001) (same), *cert. dismissed*, 123

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[2](...continued)
relevant Louisiana insurance statutes. Pet. App. 15a. However, in light of the Fifth Circuit's recent decision in *Grant v. Chevron Phillips Chemical Co.*, 309 F.3d 864 (5th Cir. 2002), *cert. denied*, ___ S. Ct. ___, 2003 WL 327444 (Mar. 31, 2003), holding that requests for attorney's fees under Louisiana's general-purpose class action statute are attributable to the named plaintiff for amount-in-controversy purposes, Judge Barksdale noted that the attorney's fee issue under the Louisiana insurance statutes would not likely arise again. The petition for a writ in certiorari in *Grant* focused exclusively on the issues regarding attribution of attorney's fees under Louisiana law and did not raise the *Zahn* issue presented by this petition. *See* Petition in No. 02-1140 (filed Jan. 9, 2003).

S. Ct. 14 (2002); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997) (same); *Stromberg Metal Works, Inc.*, 77 F.3d 928, 930-33 (7th Cir. 1996) (following *Abbott Labs* in a case involving joinder under Fed. R. Civ. P. 20); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001) (same in Rule 23 context), *cert. denied sub nom., DaimlerChrysler Corp. v. Gibson*, 534 U.S. 1104 (2002), *with Meritcare Inc. v. St. Paul Mercury Ins. Co.,* 166 F.3d 214 (3d Cir. 1999) (*Zahn* survives enactment of section 1367); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8th Cir. 2000) (same); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640-41 (10th Cir. 1998) (same). This split in authority is both deep and mature (and even deeper and more mature than when the Court granted review in *Abbott Labs*), and it warrants this Court's attention now.[3]

The argument that *Zahn* was overruled by section 1367 can be stated rather simply. First, section 1367(a) provides that "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" the claims within the courts' original jurisdiction as to constitute "the same case or controversy under Article III." Second, under section 1367(b), "the district courts shall not have supplemental jurisdiction under subsection (a)" over claims to

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[3]This Court's denial of certiorari last Term in *Gibson* does not suggest that the *Zahn* issue is not worthy of review. *Gibson* held that section 1367 overruled *Zahn*, but then went on to conclude that the *named plaintiff's* claims did not satisfy the amount in controversy requirement, thus precluding federal jurisdiction regardless of which way the *Zahn* issue was resolved. *See Gibson*, 261 F.3d at 940-43. The *Zahn* issue was therefore not squarely presented to this Court in *Gibson.*

join or add parties under Federal Rules of Civil Procedure 14 (third party practice), 19 (necessary joinder), 20 (permissive joinder), and 24 (intervention). Thus, the argument goes, because Rule 23 (class actions) is not among the rules excluded under section 1367(b), if one named plaintiff in a class action is diverse from the defendant and has the requisite amount in controversy, the absent class members are within the "supplemental jurisdiction" of the district court under section 1367(a). *See, e.g., Gibson*, 261 F.3d at 934; *Rosmer*, 263 F.3d at 114-15.

The principal error in this argument is that it wrongly assumes that class actions involve assertions of "supplemental jurisdiction" described in 28 U.S.C. § 1367(a). In fact, historically, unnamed class members were not viewed as "supplemental" to the original action and, thus, the supplemental jurisdiction statute was not intended to affect class actions one way or the other. As Judge Niemeyer has put it, "[u]nlike the other forms of aggregation permitted under the Federal Rules—impleader, joinder, and intervention—Rule 23 is not a mechanism to add parties. In a class action, both the parties and the class members whom the parties purport to represent are already 'in' the action." *Rosmer v. Pfizer Inc.*, 272 F.3d 243, 250 (4th Cir. 2001) (Niemeyer, J., dissenting from denial of rehearing en banc). Put in section 1367's terms, a class action does not come within the district court's "original jurisdiction" unless the named plaintiffs *and* the unnamed class members have the minimum amount in controversy required by 28 U.S.C. § 1332(a). That, after all, is the holding of *Zahn,* and section 1367 does not purport to alter or even define the "original jurisdiction" of the district courts. Thus, because a district court does not have "original jurisdiction" in a case where the absent class members do not have the requisite amount in controversy, the question of what types of

supplemental claims are excepted from coverage—the question addressed in section 1367(b)—is simply never reached in class actions. *See Rosmer*, 263 F.3d at 127 (Motz, J., dissenting).

There are other reasons, based on the text and purpose of section 1367, that explain why section 1367 does not overrule the historical understanding of section 1332 enunciated in *Zahn*. *See, e.g., Rosmer*, 272 F.3d at 250-51 (Niemeyer, J., dissenting from denial of rehearing en banc) (claims of various class members in Rule 23(b)(3) class actions not part of the "same" Article III case or controversy within the meaning of section 1367(a)); *Leonhardt*, 160 F.3d at 640 (upholding *Zahn* based in part on language of section 1367(b) forbidding exercise of supplemental jurisdiction that is "inconsistent with the jurisdictional requirements of section 1332"); *Trimble*, 232 F.3d at 962 (same); *Rosmer*, 263 F.3d at 127 (Motz, J., dissenting) (interpreting section 1367 to overrule *Zahn* "utterly conflicts with the steadfast Congressional policy of restricting, rather than expanding, diversity jurisdiction.").[4]

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[4]The legislative history of section 1367 states that the statute was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions" and specifically cites *Zahn* as one of these requirements. H.R. Rep. No. 101-734, *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 & n.17. Even some courts that have held that *Zahn* was overruled by section 1367 acknowledge that the legislative history shows that Congress intended to retain the *Zahn* rule. *See, e.g., Gibson*, 261 F.3d at 939 (legislative history citing *Zahn* "strongly suggest[s] that the proposed statute was intended to preserve the outcome in that case."). *See also Russ v. State Farm Mut. Auto Ins. Co.,* 961 F. Supp. 808, 820 (E.D. Pa. 1997) (Pollak, J.) (characterizing court ruling that section 1367 overrules *Zahn* as follows: "We

(continued...)

If this Court grants review, there will be time enough to set forth all of these arguments in detail. For present purposes, however, the key point is that there is a deep conflict among the circuits on a recurring issue of federal law that demands this Court's attention.

2. The question presented has not only deeply divided the lower courts, but it is important, as this Court apparently believed just a few years ago when it granted review in *Abbott Labs*. In the circuits where *Zahn* no longer prevails, a single plaintiff is now able to maintain a federal-court class action that presents only state-law claims against a diverse defendant whenever the value of that plaintiff's claims exceeds the jurisdictional amount, no matter how small the value of all the other class members' claims may be. Similarly, a defendant can remove the same class action, filed in state court, to federal court.

In Louisiana, for instance, under the Fifth Circuit's decisions in *Abbott Labs* and its progeny (*see supra* note 2), any state-law diversity class action in which the aggregate potential attorney's fee plausibly exceeds $75,000 may be litigated in federal court, even if no class member's claim (let alone all of the class members' claims) on the merits is worth more than a few hundred dollars. This result flies in the face of the amount-in-controversy requirement and the purpose of the non-aggregation rule upheld in *Zahn*: to prevent "the transfer into the federal courts [of] numerous local controversies involving exclusively questions of state law." *See Rosmer*, 263 F.3d at

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[4](...continued)
know what you meant to say, but you didn't quite say it. So the message from us in the judicial branch to you in the legislative branch is: 'Gotcha! And better luck next time.'").

127 n.3 (Motz, J., dissenting) (quoting *Snyder v. Harris*, 394 U.S. 332, 340 (1969)); *Rosmer*, 272 F.3d at 248 (Niemeyer, J., dissenting from denial of rehearing en banc) (noting that, absent the rule in *Zahn*, "virtually *every* class action under state law may be brought in federal court because only one claimant needs to satisfy the jurisdictional requirements of § 1332.") (emphasis in original).[5]

More fundamentally, the decision below and others like it upset the federal-state balance because they place before federal courts issues of state law that are properly the province of the state courts. In this case, for instance, the courts below opined on important issues of Louisiana contract and insurance law that petitioners believe are matters for the Louisiana courts. Similarly, in *Abbott Labs*, the Fifth Circuit opined on novel issues of state antitrust law. *Free v. Abbott Laboratories*, 176 F.3d 298 (5th Cir. 1999). In short, the effect of the ruling below is "to amplif[y] manyfold the circumstances in which diversity jurisdiction is available, [and] increase[] vastly the power of federal class actions, all at the expense of the states' long-standing privilege to decide state-law cases in their own courts." *Rosmer*, 272 F.3d at 253 (Niemeyer, J., dissenting from denial of rehearing en banc). That situation should not persist without this Court's blessing.

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[5]The question whether section 1367 overruled *Zahn* is also important because it arises frequently. In addition to the seven circuits that have opined on the question, a large number of reported (and similarly divided) district court decisions have addressed it as well. *See generally* 13 Wright, Miller, Cooper & Freer, *Federal Practice and Procedure* § 3523.1 nn. 74-76 (Supp. 2002) (citing cases).

CONCLUSION

In *Free v. Abbott Laboratories*, this Court was poised to decide whether supplemental jurisdiction can be asserted over class members who do not have the requisite amount in controversy under the federal diversity statute, 28 U.S.C. § 1332. As result of one Justice's recusal, the issue had to be put off for another day. That day has come. The petition for a writ of certiorari should be granted.

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