No. _____

In The
Supreme Court of the United States

WILLIAM MAULDIN, INDIVIDUALLY
AND AS REPRESENTATIVE OF THE
ESTATE OF PAULINE GIBSON, DECEASED,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY;
MAYELLA GONZALES; THERESA HERNANDEZ,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

FIRST: Does Federal Rule of Civil Procedure 12(h)(3)[1] require every federal court, including this Court, to "dismiss" this case because the federal courts never acquired jurisdiction of this case, and thus, on the record of this case require this Court to reverse the holding of the court of appeals and to order that this case be remanded back to the state court from whence it was improvidently removed, in view of the plain language of the Rule, the applicable law pertaining to removal and to jurisdiction, and the prior recognition by this Court that: "Courts must apply the Federal Rules as they are written. . . ." *Carlton v. United States*, 135 S.Ct. 2399, 192 L.Ed.2d 911, 2015 U.S. LEXIS 4066 (2015) (opinion by Sotomayor, J.).

SECOND: Where in a case only one of three state court defendants, all of whom were sued and served but never appeared or answered in that state court proceeding, removes on sole basis of alleged diversity jurisdiction, but admits in the Notice of Removal document that one of the defendants [Gonzales] has not consented to removal and is in fact a citizen-resident of the same state as plaintiff, thereby admitting lack of diversity jurisdiction, and a timely motion to remand is filed, can a federal district court thus lacking jurisdiction commence to assume control over that case and issue orders, then purport to have created diversity jurisdiction by unilaterally dismissing the admittedly

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[1] Attached to the Appendix ("App") as **item 4** is a copy of Federal Rule of Civil Procedure 12(h)(3).

QUESTIONS PRESENTED – Continued

non-diverse defendant who did not even consent to removal, then proceed to issue various orders to dismember and destroy and *de facto* dismiss the case, notwithstanding that Article III courts have limited jurisdiction, and that it has been clear since 1806 that complete diversity is absolutely required in order to establish diversity jurisdiction, see *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 435 (1806) (opinion by Marshall, C.J.), and notwithstanding the clear command of Federal Rule of Civil Procedure 12(h)(3).

THIRD: Can a federal court of appeals ignore the clear command of Federal Rule of Civil Procedure 12(h)(3), and ignore failure of a removing party to properly comply with rules and procedures required in a removal process, and also ignore the requirements that (a.) a removing party trying to invoke federal court jurisdiction bears the burden to prove that the federal court to which the case is removed has jurisdiction, and (b.) there cannot be diversity jurisdiction an any multiparty case without [among other requirements] complete diversity, and can that appeals court proceed to treat the removal and jurisdictional issues before it as simply being procedural matters which do not require strict compliance by a removing party, and thereby contrive to affirm actions of a federal district court that has acted without jurisdiction to do so.

FOURTH: Did the honorable court of appeals, in this case, err in failing to permit supplementation [by Plaintiff-Appellant-Petitioner] of the record when that

QUESTIONS PRESENTED – Continued

supplementation would have provided a document [. . . . on letterhead and showing that state court Defendant Gonzales was in fact a direct employee of the removing party, Allstate, and was not simply some sort of innocent and uninvolved bystander as she was portrayed in the misleading "affidavit" improperly filed in the federal court record by the Allstate attorneys. . . .] which would have made it clear [in the record on appeal] that the attorneys for the removing party [an insurance company, Allstate] had practiced deception upon the district court by improperly filing in the federal court a supposed Rule 12(b)(6) motion purportedly "filed" there by the non-removing and non-consenting and non-diverse state court defendant [Gonzales] over whom the federal court clearly could not have acquired any jurisdiction as that party had not made any effort to come before the federal court, and attaching as an "exhibit" to that "motion" duplicitous "affidavit" which [like the "motion" to which it was attached] had never been filed in the state trial court, and which under these procedural circumstances should not have been filed in the federal district court, and which appears to have been drafted and then filed to trick the federal district court judge, and appears to have succeeded in so doing.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

(1) LIST OF PARTIES:

Pursuant to Rule 14(b) of the Supreme Court of the United States, Petitioner, William Mauldin, provides the following information:

A complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities that are financially interested in the outcome of the case:

1. Petitioner: Mr. William Mauldin
2. Counsel for Petitioner:
3. Respondent: Allstate Insurance Company
4. Respondent: Mayella Gonzales [not really a party – did not consent to or join in removal]
5. Respondent: Theresa Hernandez
   Claim Representative, Allstate Central Specialty Office

(2) CORPORATE DISCLOSURE STATEMENT:

Pursuant to Rule 29.6 of the Supreme Court of the United States, Petitioner, William Mauldin, provides the following information:

For a non-governmental corporate party, the name(s) of its parent corporation and any publicly held corporation that owns 10% or more of its stock (if none, state "None"):

None known to Petitioner.

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PETITION FOR WRIT OF CERTIORARI

William Mauldin, Individually and as Representative of the Estate of Pauline Gibson, Deceased, a natural born United States citizen, and a resident and domiciliary of Tarrant County, Texas, by and through Ernest Eugene Reynolds III [a/k/a in Fort Worth, the county seat of Tarrant County, Texas, as Ernest (Skip) Reynolds III], respectfully petitions this Court for a writ of Certiorari to review the judgment of the Alaska Court of Appeals.

OPINIONS BELOW

The opinion of The United States Court of Appeals For the Fifth Circuit [in its CASE NO.17-11274] denying Petitioner's direct appeal from an adverse judgment in Cause No. 4-17-CV-00641-A in the United States District Court for the Northern District of Texas [Fort Worth Division] is reported as ***Mr. William Mauldin, Individually and As Representative of The Estate of Pauline Gibson, Deceased v. Allstate Insurance Company; Mayella Gonzales; and Theresa Hernandez, Defendants-Appellees*, 2018 U.S. App. LEXIS 34697**. The opinion was filed on 10 December 2018, and later The United States Court of Appeals For the Fifth Circuit denied Petitioner's Petition For Rehearing by order of 14 February 2019. **That order** [of 14 February 2019] is attached as an exhibit to the Appendix ("App.") as **item 4**, and **that Opinion** is attached as an exhibit to the Appendix ("App.") as

item 1. Also attached to the Appendix ("App") as **item 5** is the entire **APPELLANT'S MOTION TO SUPPLEMENT RECORD** [Document 00514504112 as filed at the Fifth Circuit Court of Appeals on 7 June 2018, and including exhibit materials as filed with the motion, which are copies of the pages of the two page letter of "September 12, 2016" sent by Allstate Insurance Company employee Mayella Gonzales to Mr. Mauldin and stating clearly near top of its first page that all attorneys at the "firm" called Susan L. Florence & Associates are in fact "Employees of Allstate Insurance Corporation" and that this so-called "law firm" office "is not a Partnership or a Corporation."

JURISDICTION

Petitioner's motion for rehearing was timely presented to The United States Court of Appeals For the Fifth Circuit and was denied on February 14, 2019. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for a writ of certiorari within ninety days of the order that denied the request for rehearing, and thereby presently stands *de facto* as a final, and erroneous, judgment and determination to retain "jurisdiction" in federal court over this case, over which in fact and under law the federal court system has never acquired, and does not have, jurisdiction.

CONSTITUTIONAL PROVISIONS, STATUTES, AND PERTINENT AUTHORITIES

United States Constitution, Article III, grants jurisdictional power to federal courts in cases between citizens of two states. This is commonly referred to as "diversity jurisdiction;" and where a case has multiple parties, the federal courts do not have this jurisdiction unless diversity is complete. *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 485 (1806) (opinion by Marshall C.J.). In this case the removing party admitted in the Notice of Removal that diversity was not complete.

There are federal statutory provisions, see 28 U.S.C. § 1332(a) (removal permitted where the suit is between citizens of different states), that state requirements which must be met in order for any party to remove to a federal court a case first filed in a state court, and there are also federal statutory requirements pertaining to the removal process, 28 U.S.C. § 1446; *and see especially at* § 1446(b) regarding pleading requirements to state in the notice of removal the grounds for removal; *and see especially at* § 1446(a) regarding requirements for removing party to bring forward with the notice copies of all process, pleadings and orders served upon the party seeking removal; and there are also Local Rule requirements in the Northern District of Texas that must be complied with by a party removing a case to federal court. LR 81.1(a)(4)(A), (C) [indicating what should have been filed with the clerk of this federal court at the time when Allstate filed

removal papers].[2] In this present case the removing party did not comply with these rules completely or properly, and most significantly did not show diversity [and in fact admitted that there was not complete diversity]. These failures, including the admission by removing party of lack of diversity, were timely brought to the attention of the federal district court in a remand motion, and later all of this was specifically pointed out to the court of appeals, but at both levels these failures [including the admitted lack of diversity, which amounted to admission of lack of jurisdiction] were disregarded; and at both levels the courts seemed most interested in a duplicitous "affidavit" [see **Item 5** of Appendix] which was never a part of the state court record, and which removing party Allstate's attorneys improperly filed into the record before the federal district court [as an EXHIBIT to a Rule 12(b)(6) Motion filed before the remand motion had been considered and ruled upon, and filed by a "party" (Gonzales) not even before the federal district court in any way, as the Notice of Removal showed that she had not consented to removal, and had not joined in the removal . . . and thus had never attempted to come before the federal court or to invoke its jurisdiction. . . .].

It is Hornbook learning, see WRIGHT, LAW OF FEDERAL COURTS (5th ed. 1994 – WEST

[2] As Justice Sotomayor stated in the opinion in *Carlton v. United States*, 135 S.Ct. 2399, 192 L.Ed.2d 911, 2015 U.S. LEXIS 4066 (2015): "Courts must apply the Federal Rules as they are written. . . ." All federal courts, and all parties appearing before them, should follow and comply with all applicable rules and laws. *Cf.* F.R.C.P. 11.

PUBLISHING COMPANY) [hereinafter referred to as: WRIGHT], that federal courts are courts of limited jurisdiction, and "cannot be given authority beyond that conferred by the Constitution." WRIGHT at 1. This was recognized in the first case to hold an Act of Congress unconstitutional, *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). While there may be a "recurring temptation to view questions of federal jurisdiction as if they were simple procedural questions . . . it [must be] remembered that the delicate balance of a federal system is at stake, and that [the] expansion of the jurisdiction of the federal courts diminishes the power of the states, [and thus] it is apparent that efficiency cannot be the sole or the controlling consideration" in determining jurisdictional questions in the federal courts which in fact "are questions of constitutional law." WRIGHT at 2.

Article III § 2 of the Constitution provides in part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . [cases brought] between Citizens of different States. . . ." This is the fundamental basis for "diversity jurisdiction." It has been clear since 1806 that the determination of whether "diversity jurisdiction" exists requires "complete diversity." *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 435 (1806) (opinion by Marshall, C.J.), and that if complete diversity does not exist, then there is no "diversity jurisdiction."

In a case decided in 1809, Chief Justice Marshall, writing for the Court, made the following observation:

"Turn to the article of the Constitution of the United States, for [a] statute cannot extend the jurisdiction beyond the limits of the Constitution." *Hodgson v. Bowerbank*, 5 Cranch 303, 3 L.Ed. 108 (1809).

Diversity of Jurisdiction is assessed as of the time the action is initially filed. See WRIGHT at 171. This rule was reaffirmed by the Supreme Court at least as recently as 1991, in the case of *Freeport-McMoRan, Inc. v. K. N. Energy, Inc.*, 111 S.Ct. 858, 860, 498 U.S. 426, 428, 112 L.Ed.2d 951 (1991). That opinion observed the existence of "the well established rule that diversity of citizenship is assessed at the time the action is filed."

That federal courts have limited jurisdiction "is a principle of first importance." WRIGHT at 27. Federal courts may hear only such cases as are within the judicial power defined by the Constitution, and have been entrusted to those courts by a jurisdictional grant by Congress. *Bender v. Williamsport Area School Dist.*, 106 S.Ct. 1326, 1331, 475 U.S. 534, 541, 89 L.Ed.2d 501 (1988). The "rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the [jurisdictional] competence of such a court. The presumption is that the court lacks jurisdiction in [any] particular case until it has been demonstrated that jurisdiction over the [case] exists." WRIGHT at 27; making citation to *Turner v. Bank of North America*, 4 Dall. 8, 1 L.Ed. 718 (1799).

The doctrine that federal courts have limited jurisdiction is embodied in the language of Federal Rule of Civil Procedure 12(h)(3), which states: "If the court determines at any time that it lacks . . . jurisdiction, the court must dismiss the action." It would appear that every federal court, including this Court, must comply with this Rule. See *Carlton v. United States*, 135 S.Ct. 2399,192 L.Ed.2d 911, 2015 U.S. LEXIS 4066 (2015), wherein it is stated, in pertinent part: "Courts must apply the Federal Rules as they are written. . . ."

So firm is the fundamental rule of limited jurisdiction that parties cannot waive lack of jurisdiction, even if they might try to do so by express consent, *Jackson v. Ashton*, 8 Pet. 148, 8 L.Ed. 898 (1834); *Sosna v. Iowa*, 95 S.Ct. 553, 556-557, 419 U.S. 393, 398, 42 L.Ed. 2d 532 (1975); nor may the parties waive lack of jurisdiction by conduct, *Dred Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691 (1857) (defendant pleaded over after his plea in abatement, challenging jurisdiction, had been overruled); *Mitchell v. Maurer*, 55 S.Ct. 162, 293 U.S. 237, 79 L.Ed. 338 (1934) (party never raised lack of jurisdiction in any court); *Goldstone v. Payne*, 94 F.2d 855 (2d Cir. 1938) (party who counterclaimed in federal court allowed to assert lack of jurisdiction after losing on merits); nor may the parties waive lack of jurisdiction by estoppel. *Mansfield, C & L.M. Ry. v. Swan*, 4 S.Ct. 510, 111 U.S. 379, 28 L.Ed. 462 (1884). In fact the federal Court, whether it be a trial court or an appellate tribunal, is obligated to take notice of want of jurisdiction on its own motion. *Mansfield, C & L.M. Ry.*

v. Swan, 4 S.Ct. 510, 111 U.S. 379, 28 L.Ed. 462 (1884); *Cameron v. Hodges*, 8 S.Ct. 1154, 127 U.S. 322, 32 L.Ed. 132 (1888); *Louisville and N.R. Co. v. Mottley*, 29 S.Ct. 42, 211 U.S. 149, 53 L.Ed. 126 (1908); *Sumner v. Mata*, 101 S.Ct. 764, 769 n.2, 449 U.S. 539, 547 n.2, 66 L.Ed.2d 722 (1981). According to the "Hornbook": "Such a harsh rule could hardly be defended as a sensible regulation of procedure, and can only be justified by the delicate problems of federal-state relations that are involved." WRIGHT at 28.

A federal court that does not have jurisdiction, may not assume jurisdiction, may not create jurisdiction, and may not start to issue orders, or proceed to trial, or render a judgment. See WRIGHT at 30, giving an example of a trial court which fell into this sort of error, only to be reversed by the Supreme Court: On the third day of trial the party being sued, having previously admitted the jurisdictional allegations in the complaint, disclosed for the first time that its principal place of business was in Iowa, not in Nebraska as alleged in the complaint, and that diversity did not exist. The district court thought it would have discretion to complete the trial, did so, and ultimately signed a judgment. This was affirmed by the Eighth Circuit, but reversed by the Supreme Court. In a footnote to its opinion, the Supreme Court explained: "Our holding is that the District Court lacked power to entertain the . . . lawsuit. . . . Thus, the asserted inequity in the respondent's alleged concealment of its citizenship is irrelevant. Federal Judicial Power does not depend upon 'prior action or conduct of the parties.'" *Owen*

Equipment & Erection Co. v. Kroger, 98 S.Ct. 2396, 2404 n.21, 437 U.S. 365, 377 n.21, 57 L.Ed.2d 274 (1978).

Petitioner Mauldin's case presents to this Court questions of whether in the absence of diversity, and therefore lacking jurisdiction, a federal district court, in disregard of the constitutional limits on federal court jurisdiction and in violation of Federal Rule of Civil Procedure 12(h)(3), can set about to issue orders and attempt to "create" diversity jurisdiction by unilaterally purporting to dismiss a party defendant to the underlying state court case who has never even attempted to remove to federal court, also acting and then improvidently deny a timely filed remand motion, and proceed to act without real jurisdiction to issue orders and dismember and destroy the case, instead of remanding it to the state court from which it was removed; and questions of whether a federal court of appeals, also acting in disregard of the constitutional limits on federal court jurisdiction and in violation of Federal Rule of Civil Procedure 12(h)(3), can permit and affirm such conduct by the district court. Thus, this case presents an issue of constitutional significance, touching directly upon the nature of the federal union, and the interrelation of state and federal governments; and presents also the issue of whether all federal courts at all levels must comply with Federal Rule of Civil Procedure 12(h)(3); and this case presents to this Court for resolution and guidance a question of whether inferior courts can act to enlarge the Article III grant of jurisdiction, something that Congress is

clearly not permitted to do, and something which does not appear to be either expressly or impliedly granted to the federal courts by any provision within the four corners of the Constitution, and something which prior case rulings of this Court would appear to indicate cannot be done.

STATEMENT OF THE CASE

1. AT THE STATE COURT, AND AT THE FEDERAL DISTRICT COURT

The state court petition [see **item 7** to the Appendix] filed on 30 June 2017, named Allstate and Hernandez and Gonzales[3] as Defendants[4],[5] and was never challenged in the state court as being deficient. It was a proper state court pleading, accusing Defendants of several different categories of misconduct, not simply "fraud;" and one category of misconduct was "negligence." The Defendants were served, and prior to

[3] Gonzales (Mayella Gonzales) is actually employed full-time by, and paid by, Defendant Allstate; a fact which the removing party (Allstate) cleverly and effectively hid from the federal district judge when that sole removing party caused to be filed a deceptive affidavit in the federal court, an "Affidavit" that had never been a part of the state court record.

[4] Under Texas law it is permissible to sue both an insurance company and its attorneys or adjusters, together in one lawsuit. See *McKnight v. Riddle & Brown, P.C.*, 877 S.W.2d 59 (Tex.App.-Tyler 1994). (Attorney); and See also *Montes v. Am. Home Assn. Co.*, 2009 U.S. Dist LEXIS 12963 (N.D. Tex. 2005) (Adjuster).

[5] It was never challenged in the state court as being deficient in any way, and it was in fact a proper state court pleading.

Removal the returns of Citations showing service on all of the Defendants [including Gonzales] were properly filed [see **Item 8** in the Appendix] in the office of the state court clerk in Tarrant County, Texas, where the state case was filed and pending. No Defendant appeared or filed any answer or other pleading in the state court proceedings.[6]

On 4 August 2017 Allstate filed a Notice of Removal. It clearly admitted that there was not complete diversity, and did not seek to invoke federal court jurisdiction on any basis other than diversity. It admitted that one Defendant, Gonzales, resided in the same state [Texas] as Plaintiff, and also admitted that Gonzales had not consented to removal, and was not joining in the removal. [See **Item 6** in the Appendix].

Yet interestingly, on the same day the Notice of Removal was initially filed, defense attorneys representing Allstate purported to "file" an answer in federal court on behalf of each and all of the three (3) named defendants, one of whom was Gonzales who was not before the federal court as she had not consented to or joined in the removal.[7]

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[6] If defendant Gonzales had really believed that she was improperly named in the state court lawsuit, a challenge could have been filed in the state court.

[7] How could Gonzales file an answer in federal court when she had not removed [or even consented to remove] and was therefore not a party who had sought to invoke the jurisdiction of the federal court.

At the same time the defense attorneys representing Allstate purported to "file" on behalf of Gonzales, only, a Rule 12(b)(6) Motion,[8] to which these attorneys attached a short "Affidavit" not attached to or filed as part of the Notice of Removal [more on this "Affidavit" below. . . .].

The Notice of Removal generally claimed that Gonzales should never have been a party to the lawsuit, but it was not claimed that she had been joined through "actual fraud." In the Rule 12(b)(6) Motion the same general claim was made that Gonzales should not be in the case, but there was no claim of "actual fraud."[9]

Because the party trying to remove the case [Allstate, and its "outside" law firm that it had hired in Dallas for this purpose] clearly had the burden to show jurisdiction in federal court, and because that jurisdiction [if it were proven] would be a pre-requisite to any other activity or ruling by any federal judge or judges, Plaintiff filed on 21 August 2017 [DOC 16 – Page ID510 et seq., of district court record] a motion requesting an order to extend time/stay/postpone due date for responses to defense motions and requesting

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[8] How could Gonzales, who had not consented to or joined in the removal, was admittedly a resident of the same state as Plaintiff, and did not appear in any proper way to be before the federal court, undertake to file a Rule 12 Motion, or any other sort of motion.

[9] And this was specifically noted by the district court in an order [DOC 28] signed on 2 October 2017.

certain other relief. This pleading, at its paragraph V, specifically requested:

> "an expedited ruling in the form of an order to extend the time for the filing of any pleadings in this case not related directly to issues of removal and remand until those jurisdictional issues are fully resolved, and simply accomplishing that by staying and postponing any activity in this case not directly related to the jurisdictional issues of removal and remand until and unless this Court by further specific order commands the parties to address and deal with such other issues."
>
> [DOC 16 – Page ID516 et seq., of district court record]

By a court order [transmitted by e-mail] on 21 August 2017 the district judge granted this motion, stating:

> "granting [16] Motion to Extend Time. Motion to remand due by 9/5/2017. The consideration of the pending motion to dismiss and transfer is held in abeyance; if motion to remand denied, pltf file his responses to the motion to dismiss and transfer w/in 10 days of such denial."[10]

On 1 September 2017, Plaintiff had timely filed a detailed Motion to Remand, and filed along with it an Appendix.

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[10] But the district court later, on 2 October 2017, failed to give "pltf" [now petitioner] any time or opportunity to respond to the motion to dismiss.

On 2 October 2017, the district court [its DOC 28] issued its Opinion and Order to Deny Remand Motion; and also issued [its DOC 29] a very short order to dismiss Gonzales. The district court must have forgotten its prior order of 22 August 2017 which had indicated that if remand were denied Plaintiff would be given opportunity [and time] to respond to the Rule 12(b)(6) Motion, for the order of dismissing Gonzales effectively granted that Motion, and some of the language of the memorandum opinion [DOC 28] appeared to grant that motion. The Memorandum Opinion and Order analyzed not only the remand situation, but also the Rule 12 Motion. Recognizing that defendant Allstate and its attorneys had not claimed "actual fraud" in the naming of Gonzales and clearly declining to find fraud, the district court went on to analyze whether there was a claim against Gonzales[11] thereby clearly stepping into a posture of ruling upon the Rule 12(b)(6) Motion [which was the pleading to which Allstate had attached the short, misleading "Affidavit" regarding Gonzales].

When the district court *de facto* granted the 12(b) Motion, it analyzed Plaintiff's petition [which it referred to as "Complaint"] centering on the question of whether there was evidence of "fraud" by defendant Gonzales without recognizing various other theories of liability had been pleaded, including but not limited to

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[11] Which was unfair because no response to the 12(b) Motion was permitted. The state court petition was clearly adequate under state court standards, but the Opinion and Order analyzed it by federal court pleading standards.

"negligence," against Defendant Gonzales, and this analysis judged the petition not as to its adequacy as a state court pleading but rather in terms of the materially different federal court pleading requirements.[12]

A review of the Memorandum Opinion and Order shows that the federal district court appears to have thought that it could, and did, create diversity jurisdiction by dismissing Gonzales, and that once it "created" jurisdiction it could move forward. This "boot strap" approach to creation of non-existent federal court jurisdiction by judicial fiat on a case-by-case basis disregards the constitutionally limited nature of federal court jurisdiction, ignores Federal Rule of Civil Procedure 12(h)(3), and ignores the requirement that diversity jurisdiction must be determined no later than the moment of removal, and clearly disregards the unequivocal admission in this case of removing party Allstate in the Notice of Removal that Gonzales was a resident of Texas [the same state in which Plaintiff resided and resides] which admits lack of diversity and therefore admits lack of federal court jurisdiction when, in this present case, the only jurisdictional basis alleged in the Notice of Removal was "diversity jurisdiction." [see **Item 6** in the Appendix]. The Memorandum Opinion and Order also disregarded the presumption against federal jurisdiction and ignored the clear legal fact that the burden to establish federal jurisdiction rested with the removing party [Allstate] and not with the non-removing party [Mauldin], and

[12] The subsequently rendered Fifth Circuit opinion did the same thing.

later the Fifth Circuit made these same errors by disregarding presumption against jurisdiction and by failing to place the burden upon removing party to show existence of jurisdiction.

Why would the careful and learned federal district judge, who one would have expected[13] to see the admission of lack of diversity, and to note the failure of a named party defendant to join in the removal,[14] and therefore to grant the Remand Motion, have instead

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[13] See *Montes v. Am. Home Assn. Co.*, 2009 U.S. Dist LEXIS 12963 (N.D. Tex. 2005) (opinion by McBryde, U.S. District Judge).

[14] In deciding a remand motion in a prior case in which a named defendant had not joined in the removal, the trial judge [McBryde, U.S. District Judge] before whom issues of removal and remand were considered in this present Mauldin case, recognized that this procedural circumstance required remand, and did remand. See *Luckett v. Harris Hospital*, 764 F. Supp. 436 (N.D. Tex. 1991) (in that case the memorandum opinion observed, in part: "As a general rule, all defendants must join in the notice of removal in order to effectuate proper removal. *Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen and Assistants' Local 349*, 427 F.2d 325, 326-27 (5th Cir. 1970)*; Northern Illinois Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 272 (7th Cir. 1982). Furthermore, well-established policy dictates that, generally, ambiguities are construed against removal when there is a doubt as to the right to removal in the first instance. See *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979) *Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 663 (7th Cir. 1976). . . . While it may be true that consent to removal is all that is required under 28 U.S.C. § 1446, a defendant himself must consent to the removal. *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254, 1262 n.11 (5th Cir. 1988) . . . [T]here must be some timely 'written indication' from each served defendant, or from some representative purporting to have authority to formally act on the defendant's behalf in this respect, showing that the defendant has actually consented to such removal. Id. at 1262 n.11."

denied it? The sole explanation appears to be a misleading[15] "Affidavit" appended as the last EXHIBIT item filed by the attorneys representing Allstate when those attorneys purported to file the Rule 12(b)(6) Motion on behalf of a party [Gonzales] not even before the federal district court in any manner. That very brief "Affidavit" is a "*short story*," a "story" in which Ms. Gonzales is presented as if she were an innocent sparrow who happened to fly into the vicinity of a brutal cat fight, and thereby became in danger of being consumed in a "fracus" which she really had nothing to do with, and had no direct involvement in; but this is a very misleading "Affidavit." The "Affidavit" failed to disclose that Gonzales was at all times under the very direct control of Allstate, or to plainly state that in fact at all relevant times she was a direct employee of Allstate working out of an office in Dallas, Texas. The sly "Affidavit" was drafted to indicate something quite different than what was real in fact.

In the clever "Affidavit," most likely not drafted by the affiant, Ms. Gonzales claims that she is not an insurance adjuster and made "no representations to Plaintiff regarding his claim" and that she had no involvement with . . . Plaintiff's "claim" and that she "***represented Allstate*** as legal counsel ***solely for the discreet purpose*** of taking Plaintiff's EOU." She also claims that she is "an attorney with the **Law Firm** of Susan L. Florence & Associates in Dallas, Texas" and goes on to indicate that the firm serves as counsel for

[15] So misleading as to actually appear to be fraudulent.

various insurance carriers including Allstate. From the "Affidavit" it appears that Ms. Gonzales has only very limited involvement, and in fact that is what is noted by the federal court in the Memorandum of Opinion and Order;[16] and also noted as if true by the Fifth Circuit in its opinion; but in truth, Gonzales [and other attorneys at the "law firm" she claims to be a part of] was practicing in a "store front" law "office" operation which was really nothing more than an "arm" of Allstate Insurance; and in fact Gonzales and the other attorneys there were directly employed by Allstate; and in fact Gonzales had corresponded/communicated with Plaintiff Mauldin prior to taking his ["EOU"] statement, and a letter proves this [proves all of it. . . . see **Item 5** to the Appendix to this petition pleading]. Allstate and its attorneys probably thought the letter would never be seen by any court;[17] in any event, the letter [**Item 5**] now being referred to was never provided by Allstate, or its outside retained counsel, to any federal court, district or appellate.[18]

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[16] And this is later parroted by the Fifth Circuit in its opinion.

[17] And indeed why would Allstate not think that; it was premature for Plaintiff to respond to a Rule 12(b) Motion when the fundamental issue of jurisdiction had not been resolved and was still an issue. . . . especially in view of the district Court order of 21 August 2017 [as transmitted by e-mail].

[18] And as will be discussed further hereinbelow, when it became apparent that this "ploy" of Allstate had apparently "skewed" the understanding of the learned trial judge, and in fact tricked him, and caused him to make rulings adverse to the Plaintiff/Appellant/Petitioner, an attempt was made to make the appeals court [where these same sorts of phony arguments were

The trial court erred by engaging in a "bootstrap" maneuver to try to "create" diversity jurisdiction which did not exist, then compounded its error by proceeding to "handle" this case as though it had jurisdiction, all the while disregarding the constitutionally limited nature of federal court jurisdiction, and ignoring Federal Rule of Civil Procedure 12(h)(3). In fact, the district court never had jurisdiction; and as a proper remand motion had been timely filed this case should have been remanded by the federal district court.

2. AT THE FIFTH CIRCUIT COURT OF APPEALS

A motion for rehearing was filed timely and was denied by the Fifth Circuit in a very short order, so the real "meat of the coconut" in determining what the Fifth Circuit had in mind is found in its opinion. That opinion basically affirmed the trial court "lock, stock, and barrel;" and the opinion was wrong to do so. The opinion did not carefully or correctly recount the procedural history of ths case [it is correctly recounted hereinabove in this petition] and in some ways was not even correct about what rulings were made by the trial court: for example, the trial court made it clear that it was not finding "fraud" in the naming of Gonzales as a state court defendant, but the Fifth Circuit opinion

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being made on behalf of Allstate, as appellee] aware of the letter now referred to, and it was provided to the Fifth Circuit under cover of a motion requesting permission to supplement the record, but ultimately the honorable appeals court disregarded that letter and motion, and failed to make any mention of it in the Opinion now being appealed from.

seems to indicate that the federal district court did so find.

The discussion of procedural history recounted in the opinion is also factually incorrect. For example, the opinion fails to mention the filing in federal district court by attorneys for Allstate, the sole removing party, of a purported answer for all three state court defendants, does not clearly note that after all three had been served in state court the returns of service were all filed with the state court clerk before removal, fails to clearly indicate that no defendant answered or filed any pleading in state court to contest whether defendant Gonzales was properly named in the suit, fails to note that removability is determined as of the time when a case is removed, and fails to clearly indicate that at the time when the case was removed Allstate admitted in the Notice of Removal that there was not diversity and that state court defendant Gonzales had not consented to the removal and had not joined in the removal.

The opinion incorrectly asserts that Allstate filed a Rule 12(b)(6) Motion, when in fact that motion was filed by attorneys who represented Allstate but was not filed by Allstate and instead was purportedly "filed" on behalf only of Gonzales, who had not removed; and the opinion offers absolutely no explanation of how Gonzales, who had not joined in or consented to removal and thus was not before the federal court could have somehow have been the filing party on any pleading [whether or not that be a Rule 12 pleading].

The Fifth Circuit opinion correctly observes that: "Mauldin filed his original petition in Texas state court. . . . [and that] In addition to Allstate, Mauldin named two individual defendants: Mayella Gonzalez and Theresa Hernandez. Before answering the complaint in state court, Allstate timely filed its notice of removal in the Northern District of Texas. . . . [and that] With respect to Gonzalez, Allstate acknowledged that she was a citizen of Texas. . . .;" but that is about all that the Fifth Circuit opinion got correct. It obviously "took its cues" from the district court Opinion and Order, and from the "spin" put on that in the Brief of Appellee filed by the outside counsel retained by Allstate.

A review of the opinion of the Fifth Circuit shows that it seems to treat the entire question of jurisdiction, and remand, as a simple procedural question; which is wrong. But even if this case were viewed only as a procedural matter, Federal Rule of Civil Procedure 12(h)(3) would mandate any federal court to do a thorough and complete and properly oriented review, and then dismiss due to lack of jurisdiction, which in this case would mean that the Rule would procedurally require remand; and nowhere in the analysis of the Fifth Circuit opinion is anything like this discussed or even alluded to.

In fact, the opinion shows that the court of appeals has totally forgotten the constitutionally limited nature of federal court jurisdiction, and totally fails to mention that the burden to show jurisdiction when a case is removed is a heavy burden, and one which falls

directly and solely upon the removing party. Perhaps failure to recall this explains why the Fifth Circuit opinion took non-movant/plaintiff/appellant/petitioner "to task" for asserting "that Allstate did not offer sufficient proof of diversity." Even here, the opinion is deficient in its failure to properly mention and assess the legal significance of the admission in the Notice of Removal that there was not diversity [when "diversity jurisdiction" was the only claimed basis for removal], and deficient because comments in the opinion show that in fact the Fifth Circuit was starting out from an assumption that federal jurisdiction existed and placing the entire burden on the non-removing party to show otherwise, while ignoring the burden of the removing party to establish the existence of federal court jurisdiction and the legal presumption of lack of jurisdiction..

Why would the Fifth Circuit do this? Probably for the same reason as why the district court fell into error: the sly "affidavit" filed by Allstate attorneys in federal district court became a part of the appellate record and was a "keystone" in the argument brief of appellee; but in fact the Fifth Circuit had a chance to see the letter that shows that this "affidavit" is a misleading "story": counsel for Mauldin filed a motion and exhibit to prove this [see **Item 5** in the Appendix]; but in its rush to judgment the appellate court refused to consider it. The opinion concludes that the sly "affidavit" indicates that Gonzales had a "limited role" and then jumps to conclude that she had no duty [with no real discussion of any applicable law pertaining to "duty,"

and with a focus only on claims of fraud by the state court defendant while other pleaded claims in the state court petition were ignored by the opinion] and the opinion indicated that it was proper for the district court to grant a Rule 12(b)(6) Motion, with no explanation of how that motion, in fact nominally filed only by Gonzales who was not even before the federal district court as she had not joined in or consented to removal, could properly be considered, let alone granted, by the district court [except that somehow, though incorrectly, the opinion seems to indicate that the Rule 12 Motion is an Allstate motion; when in fact Allstate did not file any Rule 12 Motion on its own behalf or in its own name. . . .]. Whilst doing all of this, the opinion of the Fifth Circuit appears to review the state court petition under a federal court review standard, even going so far as to call it a "complaint;" but the opinion fails to recount how the district court granted [then forgot . . .] an extension that if honored would have allowed Mauldin an opportunity to file pleadings for a limited time period if the district court denied the remand motion [all of this procedural history regarding this district court order, and how it was "forgotten" by the district court, is properly recounted hereinabove]. In doing all of these strange things the Fifth Circuit affirmed the district court's action in granting a Rule 12(b)(6) Motion that in fact was filed in the name of and on behalf of only Gonzales, who was never a party before the federal court at any time: so she was a "phantom party," thus the Rule 12 Motion was a "phantom motion;" and as the purported granting of that phantom motion provided the "bootstrap" pretext for

the district court to erroneously conclude that it had "created" federal jurisdiction by "dismissing" Gonzales [who was never before the district court so as to be dismissed by that court], the affirming of these procedurally and legally strange district court actions by the Fifth Circuit opinion has the effect of ignoring well settled law that establishes that federal court jurisdiction is constitutionally limited, and improperly permitting a federal court to "create" jurisdiction where in fact there is none; which is just as impossible as turning lead into gold.

REASONS FOR GRANTING THE WRIT

A. TO PREVENT FEDERAL DISTRICT AND APPEALS COURTS FROM FAILING TO COMPLY WITH FEDERAL RULE OF CIVIL PROCEDURE 12(h)(3) BY DISREGARDING THE CONSTITUTIONALLY LIMITED NATURE OF FEDERAL COURT JURISDICTION AND THEREBY IMPROVIDENTLY ASSUMING JURISDICTION OVER CASES IN WHICH THEY LACK JURISDICTION, AND IN SO DOING IMPERMISSIBLY CREATING AN UNCONSTITUTIONAL ENLARGEMENT OF FEDERAL JURISDICTION AT THE EXPENSE OF STATES AND THEIR COURTS

Although the issues presented in this case are significant ones involving Article III of the Constitution, the case can likely be determined on more narrow

grounds involving duties of federal courts to comply with Federal Rule of Civil Procedure 12(h)(3). Because of the unique interplay of that Rule and the related constitutional law and statutory law and case law, the issues now presented come to this Court as a matter of first impression; but as a matter clearly guided by well established existing law. The only new element in this "legal puzzle" is the unique interplay in this case betwixt and between the existing laws, where in this case the settled constitutional and statutory law and the Rule may have been disregarded inadvertently because of the undue influence of the sly "affidavit" filed by the attorneys for Allstate, and purportedly filed by them in a Rule 12 Motion not filed by Allstate [but instead purportedly filed for a party, Gonzales, who in fact had not consented to or joined in the removal . . .].

As demonstrated above, the court of appeals opinion has led to error in more than one manner; and has strayed from the well worn path of what should be the controlling law. Procedural and legal irregularities in that opinion, starting as a failure to comply properly with Federal Rule of Civil Procedure 12(h)(3), have led the court of appeals to improperly affirm and condone a constitutionally impermissible "bootstrap" expansion of federal court jurisdiction, which is something that should neither be permitted nor encouraged.

This case presents this Court with an opportunity to clarify the procedural obligations of every federal court to comply fully with Federal Rule of Civil Procedure 12(h)(3), while reaffirming long established constitutional and legal principles of limited federal court

jurisdiction, and giving guidance to prevent any future improvident attempts to try to "create" jurisdiction when clearly it does not exist.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of Certiorari to review the opinion, and the subsequent order denying the motion for rehearing, from The United States Court of Appeals For the Fifth Circuit.

DATED this 15th day of May, 2019.

Respectfully submitted,

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