No. 24-329

IN THE

Supreme Court of the United States

MICHAEL ASHFORD, *et al.*,

Petitioners,

v.

AVIATION TECHNICAL SERVICES, INC.,

Respondent.

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

BRIEF IN OPPOSITION

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November 21, 2024

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

1. The district court found that Petitioners and their counsel engaged in "collusion from inception" to defeat federal diversity jurisdiction across these cases, and the Fifth Circuit affirmed diversity jurisdiction existed based on realignment of the parties. For over a hundred years, lower courts have been obliged by the realignment doctrine to examine the interests of the parties and align them to thwart collusive or fraudulent attempts to manufacture or defeat federal jurisdiction. Whether the case is removed to or first filed in federal court does not alter this affirmative duty: *City of Indianapolis v. Chase Nat'l Bank of New York,* 314 U.S. 63, 70 n.2 (1941), relies upon this Court's precedent in removed cases as the basis for its articulation of the realignment doctrine, and the circuits have consistently applied *City of Indianapolis* and the doctrine in removed cases. The question Petitioners present has therefore been answered, and the true question is whether Petitioners present a compelling reason for granting their petition for writ of certiorari in these consolidated cases given the well-settled status of the law?

2. Respondent presented two alternative bases for diversity jurisdiction to the courts below. First, the district court found Respondent demonstrated that the plaintiffs settled with the purportedly non-diverse defendant. Second, Respondent brought to the attention of the Fifth Circuit substantial evidence that the purportedly non-diverse defendant's citizenship was, in fact, diverse from the plaintiffs. Affirming the district court's application of the realignment doctrine, the Fifth Circuit did not reach either alternative basis for diversity jurisdiction because regardless the evidence established there was collusion from inception that aligned Petitioners. Given the alternative bases, are

these consolidated cases, involving collusion, appropriate for deciding whether to overturn this Court's precedent that the realignment doctrine applies equally to determine federal diversity jurisdiction in cases removed from state courts?

CORPORATE DISCLOSURE STATEMENT

In accordance with U.S. Supreme Court Rule 29.6, Respondent Aviation Technical Services, Inc. discloses that it is 100% owned by parent corporation ATS Parent Co., Inc., a corporation domiciled in the state of Washington.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Aviation Technical Services, Inc. ("ATS") submits this Opposition to the Petition for Writ of Certiorari and shows that the Petition should be denied.

INTRODUCTION

Petitioners colluded with counsel from inception to deprive diverse ATS of its right to litigate in federal court by manufacturing the appearance of non-diverse litigation. Over the decade-long dispute, ATS uncovered evidence that: (1) there was no actual controversy between the plaintiffs and the alleged non-diverse defendant, who agreed to stipulate to the amount owed, (2) the sole member of the supposed non-diverse defendant orchestrated the filing of 15 lawsuits (on behalf of 103 of his employees) against his defunct company, to save himself from being sued personally, and (3) plaintiffs' counsel handpicked counsel to represent the purportedly non-diverse defendant to work cooperatively to maintain the appearance of non-diverse litigation. On these egregious facts, the district court did as this Court's precedents provide—it realigned the parties according to their true interest adverse to ATS to thwart Petitioners' collusive attempts to defeat diversity jurisdiction. The Fifth Circuit affirmed the realignment.

For 145 years, this Court has allowed federal courts to realign the parties to determine diversity jurisdiction in removed cases. *City of Indianapolis v. Chase Nat'l Bank of New York*, 314 U.S. 63, 70 n.2 (1941), the seminal case on the realignment doctrine, relies on precedent directing courts to ascertain the real matter in dispute to determine whether diversity exists when a case is removed. *See Removal Cases*, 100 U.S. 457,

468-70 (1879) ("Under the new [removal] law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute according to the facts."); *Pac. R. Co. v. Ketchum*, 101 U.S. 289, 298 (1880) ("For the purposes of jurisdiction, the court had the power to ascertain the real matter in dispute, and arrange the parties on one side or the other of the dispute."), *Evers v. Watson*, 156 U.S. 527, 532 (1885) ("The power of the court under the act of 1875, thus to rearrange the parties, and to place them on different sides of the matter in dispute according to actual facts, has been recognized by this court in several cases.").

Thus, the circuit courts of appeals have consistently applied the realignment doctrine in removed cases. *See, e.g., Littlefield v. Acadia Ins. Co.,* 392 F.3d 1, 4 n.2 (1st Cir. 2004); *Broidy v. State Mut. Life Assur. Co. of Worcester, Mass.*, 186 F.2d 490, 492 (2d Cir. 1951); *Yellowbird Bus Co. v. Lexington Ins. Co.*, 450 F. App'x 213, 216 (3d Cir. 2011) (unpublished); *Godwin v. Farmers New Century Ins. Co.,* 123 F. App'x 97, 98-99 (4th Cir. 2005) (unpublished); *Peters v. Standard Oil Co. of Texas,* 174 F.2d 162, 163 (5th Cir. 1949), *Cleveland Housing Renewal Project v. Deutsche Bank Trust Co.,* 621 F.3d 554, 559-560 (6th Cir. 2010); *Randolph v. Empl'rs Mut Liab. Ins. Co. of Wis.*, 260 F.2d 461, 463-64 (8th Cir. 1958); *Standard Oil Co. v. Perkins*, 347 F.2d 379, 382 (9th Cir. 1965); *City of Vestavia Hills v. Gen Fid. Ins. Co.,* 676 F.2d 1310, 1314 (11th Cir. 2012).

The Fifth Circuit's own seventy-five-year-old precedent, *Peters,* 174 F.2d at 162, is in line with this Court's precedents and those of the other circuits.

Petitioners attempt to frame a question worthy of the Court's review by re-characterizing the weight of realignment cases as "nominal defendant" cases, but

as shown below, the facts of those cases belie Petitioners' descriptions. The law is settled and needs no clarification, and the courts below properly followed the law. Rather, Petitioners are asking the Court to *overrule* a harmonious and consistent body of law—though they failed to ask the Fifth Circuit to do so. The presumption against removal jurisdiction is the slim reed to which Petitioners tie their argument. But the law has always empowered federal courts to thwart collusive or fraudulent attempts to create *or destroy* federal jurisdiction. As the law has long recognized, the power of the federal bench to hear or decline a case is not a system to be gamed.

Yet this is exactly how Petitioners treated the question of federal jurisdiction. The district court found Petitioners' and their counsel's conduct to be a "ruse," "one huge exercise in bad faith," and "a sordid scheme to deprive th[e] court of subject matter jurisdiction, deny ATS the forum of its choice, impede th[e] court's ability to manage its affairs expeditiously, and hamstring ATS by forcing it to defend against unnecessarily multiplied proceedings that were meritless." The Fifth Circuit did not err, and it did not expand the law, in affirming the district court's application of the realignment doctrine.

Regardless, this ten-year-old jurisdictional dispute is a poor vehicle for re-examining the realignment doctrine. Respondent raised two alternative bases for a finding of diversity jurisdiction in the courts below: (1) the existence of a post-inception settlement between plaintiffs and the non-diverse defendant, and (2) new evidence that the purportedly non-diverse defendant's citizenship is in a different state. In affirming realignment, the Fifth Circuit reached neither alternative basis. Even if the Court granted

certiorari and reversed on realignment, remand to the Fifth Circuit would be required for consideration of the alternative grounds supporting diversity jurisdiction. Review here would be an unnecessary prolongment of this hoary dispute. The Petition should be denied.

STATEMENT OF THE CASE

A. Nature of the Cases.

These seventeen consolidated cases[1] involve three sets of parties: 105 Plaintiffs-Employees (Louisiana citizens); their former employer, Aeroframe Services, L.L.C. (alleged Louisiana citizen), and Defendant ATS (a Washington citizen who purchased an Aeroframe debt from a third party).

When Aeroframe failed to make payroll for the Plaintiffs-Employees, Aeroframe's sole member and principal, Roger Allen Porter (deceased), directed the Plaintiffs-Employees to his lawyers at Cox Cox Filo Camel & Wilson, LLC. The Cox Firm crafted fifteen lawsuits filed in various Louisiana state court parishes (in an obvious forum shopping endeavor) on behalf of the Plaintiffs-Employees against ATS (though ATS was a stranger to them) and against the purportedly non-diverse Aeroframe. Aeroframe asserted a cross-claim against ATS and Porter asserted an incidental demand against ATS.

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[1] 17 appeals were consolidated in the Fifth Circuit, which dismissed three of the appeals (31 Plaintiffs-Employees) for lack of appellate jurisdiction because they lacked final judgments. Pet. App. 24a-25a. The Fifth Circuit affirmed the post-settlement dismissals of two other single-plaintiff cases. *Id.* Petitioners include 102 of the 105 Plaintiffs-Employees across 15 of the 17 cases, but the Petition fails to explain how this Court has jurisdiction over the three cases lacking final judgments.

Over the course of two removals and two appeals in *Ashford*,[2] and separate removals and appeals in the 16 other cases, all consolidated on appeal, ATS uncovered evidence demonstrating that, through Cox Firm attorneys Thomas R. Filo and Somer Brown, the Plaintiffs-Employees, Porter and Aeroframe (the "non-ATS Parties") stipulated to the Plaintiffs-Employees' damages and agreed that Porter and/or Aeroframe would pay Plaintiffs-Employees their wages, penalties and attorney's fees if they recovered from ATS, in return for the Plaintiffs-Employees waiving the conflict of the Cox Firm representing both Porter and the Plaintiffs-Employees.

Ultimately, the lower courts found there was no actual, substantial controversy between Aeroframe and the Plaintiffs-Employees; instead, they colluded through their counsel to destroy diversity jurisdiction. The Fifth Circuit affirmed that from inception, the non-ATS Parties were aligned against ATS with the goal of pursuing ATS in a friendly state court forum. Pet. App. 23a. The Fifth Circuit did not reach the alternative bases for diversity jurisdiction.

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[2] Michael Ashford was one of 103 Plaintiffs-Employees represented by the Cox Cox Filo Camel & Wilson firm. Of the 15 lawsuits filed by the Cox Firm (two single-plaintiff suits were filed by a different law firm), Ashford's suit was treated as the bellwether. *Ashford I* refers to the fact that the case was appealed to the Fifth Circuit, remanded to state court, removed a second time (referred to as *Ashford II*), appealed to the Fifth Circuit a second time, and designated as the lead case of the 17 consolidated appeals.

B. Course of Proceedings and Disposition Below.

1. Porter fails to pay his employees.

Porter was the sole member of Aeroframe, a limited liability company in the airplane repair business. In 2013, Aeroframe was in dire straits, and Porter sought to sell its assets. He negotiated with two competitors—Respondent ATS and non-party AAR Corporation—and he sought an employment package from either potential purchaser.

ATS purchased from a third party a $9.7 million Note, a condition of the proposed transaction, and later accepted the Aeroframe assets as a voluntary dation on the Note's security. But after ATS bought the Note, its competitor AAR secured the hanger lease where Aeroframe conducted its business, and AAR offered Porter an employment package.

On August 9, 2013, Porter voluntarily closed Aeroframe without paying its employees' wages and benefits. The next day, an AAR operative wrote: (1) "[Porter] has committed the most grievous of business leadership/ownership mistakes by missing at least two payrolls" and (2) "[h]e blames his failure on his customers." AAR concluded, "[U]ntil he is fully wrapped up with his obligations with Aeroframe," Porter would not be employed with AAR. To secure his own employment, Porter needed a way to make things right with his employees. Attorneys Filo and Brown of the Cox Firm assisted.

2. *Ashford I* – The law firm representing Porter files lawsuits on behalf of Porter's former employees against ATS and Aeroframe.

a. The district court finds that an email from the Cox Firm to the Plaintiffs-Employees warranted realignment.

Two months after Aeroframe's closure, in October 2013, the Cox Firm began filing the first of its 15 lawsuits for unpaid wages on behalf of the Plaintiffs-Employees (Louisiana citizens) against their employer Aeroframe (a Louisiana LLC, whose sole member, Porter, had a residence in Louisiana) and ATS (Washington citizen). It appeared complete diversity was lacking and accordingly, ATS did not remove.

In April 2014, one of the Plaintiffs-Employees forwarded an email to an ATS employee who had been formerly employed by Aeroframe. The original email was sent to the Plaintiffs-Employees, including Ashford, by their counsel, Brown. In her email, Brown advised her clients that:

> (1) Aeroframe's counsel was working cooperatively with her firm,
>
> (2) Aeroframe would not defend against the Plaintiffs-Employees claims and would stipulate to their entitlement to wages, penalties and attorneys' fees,
>
> (3) Porter filed suit against ATS on his own behalf and on behalf of Aeroframe, and he wanted Filo to represent him, and
>
> (4) if the Plaintiff-Employee signed a conflict waiver, Porter would stipulate in writing that

> any monies he collected would be used to pay the Plaintiffs-Employees first.[3]

Pet. App. 6a-7a. The referenced conflict waivers were explicitly contingent on Porter's execution of an agreement that any monies collected by him individually or on behalf of Aeroframe would be used to pay the Plaintiffs-Employees' wages, penalties, and attorney's fees.

The ATS employee gave the email to an ATS executive. Based on the email, ATS removed the cases to federal court. The non-ATS Parties moved for remand.

Brown admitted an "obvious conflict" in her firm simultaneously representing the Plaintiffs-Employees against Aeroframe and representing Aeroframe's principal, Porter, in the same lawsuit. But she represented that she had obtained waivers from the Aeroframe employees. Despite the conflict waivers' condition on Aeroframe and Porter's stipulation to pay the Plaintiffs-Employees first if either recovered from ATS, Brown denied that there was any stipulation by Aeroframe. From that day forward the Plaintiffs-Employees, Aeroframe and Porter steadfastly denied the existence of a writing on behalf of Aeroframe stipulating to the Plaintiffs' wage claims.

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[3] Petitioners suggest that the simultaneous representation of the plaintiffs and Porter was approved by ethics counsel. Pet. 7. However, ethics counsel testified that if the Plaintiffs-Employees had even a potential claim against Porter, then "under Rule 1.7(a) of the Rules of Professional Conduct, that [simultaneous representation of the Plaintiffs-Employees and Porter] would have been a no-no." Although the Cox Firm shielded Porter by not naming him as a defendant, the Plaintiffs-Employees had a much more viable claim against Porter than they did against defunct Aeroframe. In other suits where different attorneys represented former Aeroframe employees, it was alleged that Porter diverted funds from Aeroframe. Pet. App. 133a n. 24.

Despite the protestations of no stipulation by Aeroframe, the Magistrate considered the Brown e-mail "very clear evidence of an attempt to reach an agreement among Ashford, Porter and Aeroframe whereby they would join forces against ATS." The Magistrate found that "it would be manifestly unjust to ATS to deprive them of their right to be in federal court 'to allow plaintiff to maintain non-diverse defendant, with whom he had already reached a settlement as a sort of perpetual talisman against federal jurisdiction.'" The district court agreed.

After entering summary judgment in favor of ATS and dismissing all claims with prejudice, Porter and Ashford appealed, primarily on jurisdictional grounds.

b. The Fifth Circuit reverses.

In *Ashford v. Aeroframe Servs., L.L.C.,* 907 F.3d 385 (5th Cir. 2018), Judge Higginson, writing for the 2-1 majority, held that for the doctrine of realignment to apply, the parties had to be aligned at the inception of the lawsuit and at the time of removal. Pet. App. 151a-152a. Relying on the Magistrate's initial finding that the parties became aligned after inception of the lawsuit, Judge Higginson held the realignment doctrine was not an appropriate vehicle for removal because diversity-of-citizenship jurisdiction "depends upon the state of things at the time of the action brought." Pet. App. 151a-152a.

Judge Davis, concurring in the result, concluded that the information presented did not constitute sufficient evidence that the parties had reached an enforceable settlement agreement. Pet. App. 157a. Specifically, Judge Davis noted, "we have nothing from Aeroframe confirming a promise to pay and/or stipulate to Ashford's requested relief." *Id.*

Judge Jones, dissenting, would have affirmed both the denial of remand and the grant of summary judgment. Judge Jones recognized "these cases have more than a whiff of professional impropriety and shenanigans. From this Court's vantage point, it is difficult to separate real litigation abuse from 'mere' hardball litigation tactics." Pet. App. 178a.

3. The evidence of fraud is revealed.

In December 2018, while ATS's petition for rehearing *en banc* in *Ashford I* was still pending in the Fifth Circuit, Porter testified in a separate case he filed against AAR in Tennessee. Referring to the Cox Firm cases, Porter testified that he and Aeroframe had an agreement with the Plaintiffs-Employees, that he and Aeroframe were not contesting the employees' claims, and, ultimately, the employees would be paid. As evidence of the agreement, Porter proffered his June 4, 2014, retainer agreement with the Cox Firm.

This was the writing that Judge Davis had wanted to see. It reads in pertinent part:

> Roger Porter expressly agrees to fund those [the Plaintiffs-Employees] unpaid wage claims from proceeds received by Aeroframe or Roger Porter in the event either Aeroframe or Roger A. Porter receives a recovery. . . .

Pet. App. 11a. This evidence confirmed the district court's original finding in *Ashford I* that there was a settlement between the Plaintiffs-Employees and Aeroframe—the Plaintiffs-Employees would be paid their wages, penalties, and attorney's fees if Aeroframe or Porter recovered from ATS.

Given the non-ATS Parties' steadfast denial of the existence of any writing or stipulation by Aeroframe

and the actual concealment of same, ATS brought the writing to the attention of the district court in the form of a Motion for Sanctions. Pet. App. 12a.

4. *Ashford II* – Following remand, ATS removes again based upon the new evidence.

In April 2019, in accord with the Fifth Circuit's mandate, the district court remanded *Ashford I* to state court. Pet. App. 12a. Within 30 days, ATS filed its second notice of removal based on the newly-discovered evidence. It set forth facts showing collusion from inception. The non-ATS Parties filed motions to remand.

a. The district court finds it has jurisdiction based on evidence of collusion from inception.

i. Facts unknown in *Ashford I* are revealed at the evidentiary hearings on sanctions.

The Magistrate held evidentiary hearings on the motion for sanctions, and attorney Brown testified. She was not merely "reluctant" about representing Plaintiffs; she testified unequivocally that she had no intention of representing the Aeroframe-employees against Aeroframe: "we're not taking these cases." Why? Because she "had seen the news where Aeroframe had no money." Pet. App. 20a.

The court learned that Brown's partner, Filo, called Porter to "see what's going on." After talking to Porter, Filo told Brown to include ATS in the lawsuits. What the Cox Firm learned was that there was a deep pocket to pursue, ATS, and Porter wanted to pursue it. Pet. App. 21a.

The court further learned that Porter had "no problem" with the Cox Firm representing the Aeroframe employees and suing Porter's wholly owned company, so long as he was not named a defendant and ATS was.

Having the Cox Firm represent the employees was Porter's ticket to not being sued personally. Defunct Aeroframe was included in the lawsuit to ensure the Cox Firm of a state court forum.

To broaden their forum shopping endeavor, Porter told Brown on October 1, 2013, "I am instructing previous employees to contact you to be added to the suite[sic]." Pet. App. 21a (emphasis added). In that same communication, Porter asked Brown for an extension to reply to the suits filed against Aeroframe.[4]

In the end, Porter, the sole owner of Aeroframe, with the help of the Cox Firm, orchestrated the filing of 15 suits, on behalf of 103 employees, in multiple Louisiana parishes, against his insolvent company, but not himself, with the singular goal of extracting money from ATS.

To maintain the ruse that the Plaintiffs and Aeroframe were adverse, Porter needed an attorney to represent Aeroframe. What the lower court learned is that Filo handpicked the Williams Firm, with whom he had a 10-year history of joint representation of numerous clients, to represent the Plaintiffs' supposed adversary, Aeroframe. Pet. App. 22a. The relationship between the Cox Firm and the Williams Firm was so intertwined that the Williams Firm found it necessary

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[4] The Magistrate highlighted the two-fold significance of this fact: "First, it shows that Porter speaks for Aeroframe and Brown knows it. Second it shows that Brown had no intention of naming Porter personally in the litigation." Pet. App. 133a n. 24. The Fifth Circuit also noted the significance. Pet. App. 21a.

to have Porter, acting on behalf of Aeroframe, waive any conflict inherent in the representation. *Id.*

Porter employed the Williams Firm to represent Aeroframe on its claim against ATS. But the contract says nothing about defending against the Plaintiffs' claims against Aeroframe, because there was never any intent to do so. *Id.*

ii. Based on the new evidence, the district court concludes Porter and Aeroframe were aligned with the Plaintiffs from inception and the suits were orchestrated to avoid federal jurisdiction.

In finding that the non-ATS Parties were aligned from the beginning, the Magistrate did as this Court instructed in *City of Indianapolis*: it "look[ed] beyond the pleadings, and arrange[d] the parties according to their sides in the dispute." *Id.* at 69 (citation omitted). The magistrate examined "the realities of the record" to discover the "real interest" of the parties." *Id.*

While no one denied that the Plaintiffs-Employees had statutory claims against defunct and judgment-proof Aeroframe, based on the evidence presented, the Magistrate found that the principal purpose of the suit was to extract money from ATS, to protect Porter, and to avoid federal jurisdiction. The Magistrate recommended denying the motions to remand, concluding: "[t]his entire litigation has been one huge exercise in bad faith designed to prevent removal engaged in by all non-ATS Parties and attorneys Brown and Filo." Pet. App. 145a. The district court adopted the recommendation to deny the motions to remand. Pet. App. 102a.

On the same day the Magistrate recommended that the motions to remand be denied, she recommended that the district court find sanctionable misconduct by Porter, Aeroframe, Brown and Filo. The district court adopted that recommendation also.

b. The district court grants summary judgments in favor of ATS and in favor of most of the Plaintiffs to clear the docket.

ATS filed a Motion for Summary Judgment against the non-ATS Parties. The Magistrate recommended that the "meritless" claims against ATS by the Plaintiffs-Employees, Aeroframe, and Porter be dismissed with prejudice. Pet. App. 38a-39a n.13, 100a. The district court adopted the recommendation. Pet. App. 26a.

In its Motion for Summary Judgment, ATS invited the court to dismiss the Plaintiffs-Employees' claims against Aeroframe, given the settlement agreement among the parties that the Plaintiffs be paid if Porter or Aeroframe recovered from ATS. With the summary dismissal of all claims against ATS, the condition for enforcing the agreement failed, and the court could achieve finality for purposes of appeal by dismissing the Plaintiffs-Employees' claims. The court took a different approach.

First, the Magistrate informed the parties of her intent to dismiss Aeroframe for the Plaintiffs-Employees' lack of prosecution—failure to effect service or failure to take a default judgment after service. Pet. App. 89a-90a n.51. As opposed to moving for dismissal, Aeroframe filed answers in the thirteen unserved or unanswered suits. As the Magistrate noted: "the plaintiff-employees needed lift no finger to remedy their lapses in prosecution—Aeroframe just voluntarily answered

each of the claims to keep them alive. [] That is what litigants do when they are on the same team!" Pet. App. 90a n. 51.

On more than one occasion, the Magistrate asked who was representing the Plaintiffs-Employees because it was obvious to her that no one was. Pet. App. 90a-92a. The Magistrate noted how easily the Plaintiffs-Employees claims could have been resolved, Pet. App. 92 n. 53, 99a n. 58, and concluded that the "entire litigation was pursued for Porter (and Aeroframe's) benefit in coordination with Brown and Filo . . . .[the Plaintiffs-Employees] have been the vehicle . . .to keep this conflict with ATS in the forum for which Porter shopped." Pet. App. 92a. Invoking the court's inherent authority to "clear [our calendars of cases], the Magistrate ordered Plaintiffs' counsel to file motions for summary judgments on their behalf to be "fair" to the Plaintiffs-Employees, "all who have been unwitting pawns." Pet. App. 92a-93a. In recommending the grant of the motions, the Magistrate wanted the Plaintiffs-Employees to receive "at least a document validating [their] claims for wages, penalties, and attorney fees." Pet. App. 100a. The district court agreed and entered judgments in favor of most of the Plaintiffs-Employees.

c. The Magistrate recommends the full amount of ATS's attorneys' fees and costs as a sanction against Porter, Aeroframe, Brown, and Filo.

On February 4, 2022, the Magistrate recommended that the full amount of ATS's fees and costs be awarded as a sanction against Porter, Aeroframe, Brown, and Filo:

> [T]he court finds that Respondents actions in this case—and in the 14 identical lawsuits

> filed in various courts—embody the type of exceptional litigation which justifies the shifting of all or a portion of a party's fees in one fell swoop because the entire course of conduct of the Respondents was part of a sordid scheme to deprive this court of subject matter jurisdiction, deny ATS the forum of its choice, impede this court's ability to manage its own affairs expeditiously, and hamstring ATS by forcing it to defend against unnecessarily multiplied proceedings that were meritless.

Ashford v. Aeroframe Servs., L.L.C., No. 14-992, 2022 U.S. Dist. LEXIS 119467, *22 (W.D. La. Feb. 4, 2022) (report and recommendation) (quotations omitted), *adopted in part, declined in part* (Nov. 19, 2024) (judgment). On November 19, 2024, the district court entered judgment adopting the recommendation in part, and awarding ATS a portion of its attorneys' fees and costs.

d. ATS's discovery upon Porter's death that he was always a citizen of Tennessee, not Louisiana.

ATS had no reason to suspect that Aeroframe was not a citizen of Louisiana when these lawsuits were filed on dates ranging from September 16, 2013, through August 5, 2016. However, Porter died on September 13, 2021, and, on March 17, 2022, the Magistrate tasked ATS with filing a "Notice of Death of Roger Porter" and effecting personal service on the appointed representative of his estate or his heirs or legatees, pursuant to Federal Rule of Civil Procedure 25. To comply with the order, ATS's counsel undertook public record searches.

In the meantime, the non-ATS Parties filed their notices of appeals in each case. Nevertheless, ATS's counsel continued comparing the non-ATS Parties' prior representations regarding Aeroframe's citizenship to public records related to Porter. Ultimately, except for Porter owning two Louisiana residential properties and operating Aeroframe in Louisiana, ATS's counsel could find no evidence supporting Porter's alleged Louisiana citizenship. In contrast, contents of the records of appeal and public records made plain that Porter had in actuality always been a citizen of Tennessee. Because Porter was the sole member of Aeroframe, Aeroframe's citizenship is that of Porter's. In short, the non-ATS Parties' steadfast premise that Aeroframe was a Louisiana citizen and diversity jurisdiction lacking was always wrong. ATS brought the evidence to the attention of the Fifth Circuit in a *"Motion to Amend Jurisdictional Facts and Request for Judicial Notice."*

e. The Fifth Circuit affirms that diversity exists after realigning the parties based on the evidence of collusion from inception.

On appeal, the Fifth Circuit was presented with three alternative bases to affirm the district court's proper exercise of diversity jurisdiction: (a) realignment based on collusion from inception, (b) post-inception settlement, and (c) Aeroframe's Tennessee citizenship, establishing that diversity jurisdiction always existed.

Using the same legal standard as in *Ashford I,* the Fifth Circuit considered the new evidence and re-evaluated the principal purpose for filing suit:

> We now know the employees, represented by Brown, were not interested in pursuing a

> claim against Aeroframe, which she understood had no assets. We now know that, instead, Brown and Filo of the Cox law firm were, from inception of the litigation, attempting to pursue deep-pocketed ATS in a friendly state court forum on behalf of Aeroframe's principal and Filo's client, Porter.

Pet. App. 23a. Considering this evidence, a unanimous three-judge panel held that diversity jurisdiction existed because "the non-ATS parties' interests were aligned from the inception of litigation." Pet. App. 23a. The court declined to reach the district court's alternative holding finding diversity jurisdiction based on post-inception settlement and also declined to address the motion to amend jurisdictional facts based on Aeroframe's citizenship because "the parties were aligned from the inception of the litigation." Pet. App. 3a n.1.

Petitioners petitioned for rehearing *en banc* yet failed to ask the Fifth Circuit to answer the question as presented here—whether realignment can be used in removed cases to determine whether diversity jurisdiction exists. The Fifth Circuit denied the *en banc* petition. Pet. App. 195a.

REASONS TO DENY THE PETITION

A. Petitioners present no compelling reason warranting review because the law is well-settled.

1. This Court's precedents have approved realignment in removed cases for over 145 years.

The Petition suggests that these cases present an important issue governing removal jurisdiction that has yet to be decided. Petitioners go so far as to suggest that "[t]his Court did not, in *City of Indianapolis* or any other case, hold that parties in a removed case may be realigned so as to create diversity jurisdiction and allow the federal court to adjudicate claims between non-diverse parties." Pet. at 3 (emphasis added). That is simply not true. *City of Indianapolis'* realignment teachings originated from removed cases as cited by the Court. 314 U.S. at 70 n. 2.

In 1879, in *Removal Cases*, the Court examined Congress's act of March 3, 1875 (18 Stat., part 3, 470), granting jurisdiction to federal courts and allowing for removal when "a controversy between citizens of different States," existed with a matter in dispute exceeding $500. 100 U.S. at 469. In deciding if a controversy existed between citizens from the different states for removal purposes, the Court instructed:

> Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute according to the facts. This being done, when all those on one side desire a removal, it may be had, if the necessary citizenship exists.

Id. See also Pac. R. Co., 101 U.S. at 298 (for the purposes of removal, the court had the power to ascertain the real matter in dispute, and arrange the parties on one side or the other of the dispute), *Evers,* 156 U.S. at 532 ("The power of the court under the act of 1875, thus to rearrange the parties, and to place them on different sides of the matter in dispute according to actual facts, has been recognized by this court in several cases.").

These cases, among others, were cited by the Court in *City of Indianapolis* as part of the "familiar doctrines governing the alignment of the parties for purposes of determining diversity of citizenship [which] have consistently guided the lower federal courts and this Court." 314 U.S. at 70 n.2 (emphasis added). In arguing that realignment is not available in removed cases, Petitioners fail in their duty to inform of controlling authority against their position. That realignment can be used to confirm diversity jurisdiction, not otherwise supported by the pleadings themselves, has been recognized for 145 years. Accordingly, there is no unsettled question for this Court to resolve. The Petition should be denied.

2. The circuits uniformly allow realignment in removed cases.

The Petition maintains that the Fifth Circuit's decision is inconsistent with other circuits but fails to show a split. The circuit courts have consistently applied the realignment doctrine post-removal to determine whether diversity jurisdiction exists. *See, e.g., Littlefield v. Acadia Ins. Co.,* 392 F.3d 1, 4 n.2 (1st Cir. 2004); *Broidy v. State Mut. Life Assur. Co. of Worcester, Mass.*, 186 F.2d 490, 492 (2d Cir. 1951); *Yellowbird Bus Co. v. Lexington Ins. Co.*, 450 F. App'x 213, 216 (3d Cir. 2011) (unpublished); *Godwin v.*

Farmers New Century Ins. Co., 123 F. App'x 97, 98-99 (4th Cir. 2005) (unpublished); *Cleveland Housing Renewal Project v. Deutsche Bank Trust Co.,* 621 F.3d 554, 559-560 (6th Cir. 2010); *Randolph v. Empl'rs Mut Liab. Ins. Co. of Wis*., 260 F.2d 461, 463-64 (8th Cir. 1958); *Standard Oil Co. v. Perkins*, 347 F.2d 379, 382 (9th Cir. 1965); *City of Vestavia Hills v. Gen Fid. Ins. Co.,* 676 F.2d 1310, 1314 (11th Cir. 2012).

The propriety of realignment in removed cases is so well-established, it is hornbook law. *See* Charles A. Wright, Arthur R. Miller & Edward H. Cooper, 14C Fed. Prac. & Proc. Juris. § 3723 (Rev. 4th ed. 2018) ("Before determining removability . . . on the basis of diversity-of-citizenship jurisdiction, a district court will realign the parties according to their true interests in the outcome of the litigation, as it would were the case originally brought in the federal court."). Under this consistent line of authority, courts uniformly hold that when there is no diversity of citizenship based on the initial alignment of the parties in an action commenced in state court, a defendant may nonetheless remove the case to federal court and request realignment of the parties to produce the requisite diversity. "The seldom stated, but sensible rationale for these decisions is that jurisdictional consequences should not be determined until the parties are properly aligned according to their interests, and this principle applies equally to cases that are originally filed in federal court as it does to cases that are removed from state court." *Lott v. Scottsdale Ins. Co.,* 811 F. Supp. 2d 1220, 1223 n.4 (E.D. Va. 2011) (collecting cases).

There is no split among the circuits as to whether realignment can be used post-removal to determine whether diversity jurisdiction exists. Contrary to the

Petition's mantra that the purpose of realignment is to avoid an unwarranted exercise of federal jurisdiction, the purpose of the realignment doctrine is to ensure that there is an "actual…substantial controversy between citizens of different states." *City of Indianapolis,* 314 U.S. at 69 (quotations omitted). There is no reason to grant certiorari; the Petition should be denied.

B. Petitioners present no compelling reason warranting review because the law needs no clarification.

Petitioners suggest that this Court should grant certiorari "to clarify that realignment is inapplicable in a removed case." Pet. 18-19. These consolidated cases reinforce why realignment is necessary in removed cases—the non-ATS parties, with assistance of counsel, manufactured the appearance of non-diverse litigation to deny a diverse defendant the right of removing a case where complete diversity actually existed. On these conspicuously bad facts, Petitioners ask this Court to judicially endorse their tactics to defeat diversity jurisdiction and overrule more than a century of law permitting courts to use realignment post-removal to determine if diversity jurisdiction exists. Clarification is not necessary; this Court's precedent on the issue is clear. The request for certiorari should be denied.

As an alternative to doing away with realignment in removed cases, Petitioners suggest that the Court should prohibit realignment where the non-diverse defendant is not a nominal party. Pet. 19. The convoluted argument conflates nominal defendant principles and realignment principles.

Petitioners acknowledge that courts apply the realignment doctrine in removed cases to determine

whether diversity jurisdiction exists, citing the Fifth Circuit's precedent in *Peters*, as well as *Cleveland Housing Renewal Project, Littlefield, City of Vestavia Hills,* and *White v. United States Fid. and Guar. Co.*, 356 F.2d 746, 748 (1st Cir. 1966). Pet. 16-17. Petitioners then proclaim that the cases "are more properly classified as nominal defendant cases," where the courts were required to disregard the citizenship of nominal or formal parties. Pet. 3, 16-17, citing *Navarro Sav. Ass'n v. Lee,* 446 U.S. 458, 461 (1980) ("[A] federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.") (emphasis added). But in the realignment cases Petitioners highlight, and in accord with *Navarro*, the parties realigned were real parties to the controversy so their citizenship could not be disregarded. The realigned parties were not named to satisfy "state pleading rules," "joined only as a designated performer of a ministerial act," or "otherwise had no control of, impact on, or stake in the controversy." Pet. 17 (quoting *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 82-83 (2005) (first citing *McNutt ex rel. Leggett, Smith & Lawrence v. Bland*, 43 U.S. (2 How.) 9, 14 (1844), then *Walden v. Skinner*, 101 U.S. 577, 589 (1879); and then *Wood v. Davis*, 59 U.S. (18 How.) 467, 469-70 (1856)). They had real interests in the litigation.

For example, in *Peters*, a removed case, there were multiple claims asserted, including a claim to terminate a lease. The Fifth Circuit found it "well-settled that federal courts are not bound by the alignment of the pleader as to parties plaintiff or defendant, but that they will work out the relation of each party to the suit according to the nature of his real interest and then decide the question of jurisdiction." *Peters,* 174 F.2d at 163 (citing *City of Indianapolis*, *Pacific Railway Co.*,

Evers, and *Harter v. Kernochan,* 103 U.S. 562, 566-567 (1881), among others).[5] Applying the well-settled law, the Fifth Circuit recognized that plaintiff lessor and defendant co-lessor shared the same interest and would benefit in the same way. Accordingly, the court realigned the co-lessor defendant as a plaintiff. *Id.* The co-lessor was not a nominal party because he had an interest in the lease to which he was a party.

In *Cleveland Housing Renewal Project*, another removed case, the Sixth Circuit affirmed the district court's decision to realign the defendant City of Cleveland as a plaintiff, which confirmed the existence of diversity jurisdiction. Recognizing its responsibility to ensure the parties were properly aligned according to their interests in the litigation, the court found that the primary controversy stemmed from the plaintiff's demand that Deutsche Bank abate alleged nuisances related to its property. *Cleveland Housing*, 621 F.3d at 559. The Court found the City's interests were not adverse and that the City would benefit. *Id*. In fact, the City had filed a crossclaim against Deutsche Bank to recover the costs of abating nuisances at several of the properties, corroborating the alignment of the City's interest with the plaintiffs'. *Id.* at 560. The City was a real party in interest.

Littlefield was a declaratory judgment action seeking indemnity and defense in a wrongful death suit filed by Hartman. 392 F.3d at n.2. Littlefield named his diverse insurer and non-diverse Hartman as defendants; Hartman was named with her consent because she had standing under state law to contest the insurer's denial of coverage. The First Circuit found realignment

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[5] Like *City of Indianapolis*, *Peters* alerted Petitioners to controlling authorities against their position.

proper because Hartman's interests were identical to Littlefield's. *Id.* Again, Hartman was not a nominal party—Hartman had a real interest in whether Littlefield's insurer would indemnify Littlefield, because coverage affected whether Hartman could collect any judgment she could obtain.

In *City of Vestavia Hills,* the City won a judgment in state court against Cameron. 676 F.3d at 1312. Under an Alabama statute, the City was entitled to sue Cameron and its insurer in a single action, and did so. *Id.* The insurer removed the case to federal court. Finding the Alabama statute irrelevant to the jurisdictional analysis, the court noted that "federal courts are required to realign the parties in an action to reflect their interests in the litigation." *Id.* at 1313 (emphasis added). Finding no dispute between the City and Cameron (both wanted the insurer to pay), the court realigned Cameron as a plaintiff, such that diversity jurisdiction existed.

After suggesting that these realignment cases should be recharacterized as nominal defendant cases, Petitioners state that nominal defendant cases do not support the Fifth Circuit's decision. Pet. 17. Agreed. This has never been a nominal defendant case; it has always been a realignment case. Petitioners cite no law equating nominal defendant jurisprudence and realignment jurisprudence, much less precedent prohibiting realignment where the non-diverse party is not a nominal defendant. The Petition should be denied.

C. Petitioners present no compelling reason for review because the Fifth Circuit's decision comports with the law.

1. The Fifth Circuit's decision neither dramatically expands realignment nor undermines its purpose.

The Fifth Circuit's decision is in line with not only the plain language of well-settled precedents but also with the policies underlying those precedents. "[T]he purpose of the diversity requirement…is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants." *Exxon Mobil Corp v. Allapattah Servs. Inc.,* 545 U.S. 546, 553-554 (2005). Where diversity does not appear on the face of the petition, there are tests to determine whether diversity jurisdiction in fact exists. For example, in determining whether diversity exists, the citizenship of a nominal defendant is ignored (*Navarro Sav. Ass'n,* 446 U.S. at 461); the citizenship of an improperly joined defendant is disregarded (*Williams v. Homeland Ins. Co. of New York*, 18 F. 4th 806, 812 (5th Cir. 2021)); and courts have an affirmative duty to look beyond the pleadings and arrange the parties according to their sides in the dispute. *City of Indianapolis,* 314 U.S. at 69. Each test serves to ensure that parties are not manufacturing diversity jurisdiction or intentionally destroying diversity jurisdiction, as in these cases.

Petitioners rely on *Jackson v. Home Depot U.S.A. Inc.,* 880 F.3d 165,172-73 (4th Cir. 2018), *aff'd* 587 U.S. 435 (2019), for the unremarkable proposition that where a case does not involve "an attempt to fraudulently manufacture diversity jurisdiction," there is no need to "delve too deeply into the issue of realignment." Pet. at 14. Agreed. But conversely, where there is

evidence of an attempt to fraudulently destroy diversity jurisdiction, there is a need to delve deeply into the issue of proper alignment. This Court does not condone tricky litigation tactics. "[W]hen the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed." *City of Dawson v. Columbia Ave. Saving Fund, Safe Deposit, Title & Tr. Co.*, 197 U.S. 178, 181 (1905); *see also United States v. Johnson*, 319 U.S. 302, 304-305 (1943) (ordering the district court to dismiss a lawsuit in which collusion between the defendant and the plaintiff caused there to be no "genuine adversary issue" and the lawsuit lacked the "'honest and actual antagonistic assertion of rights' to be adjudicated"(quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345(1892)).

Given the highly unusual facts of collusion from inception, the Petition's concern that the Fifth Circuit's decision in these consolidated cases will have the practical effect of encouraging additional removals, is unfounded. The Petition should be denied.

2. The Fifth Circuit's decision comports with removal jurisdiction.

The Fifth Circuit's decision does not conflict with this Court's removal decisions. Neither the requirement that a court must "strictly construe" the removal statute nor the presumption against removal prohibits realignment. Where diversity does not appear on the face of the pleadings and evidence exists that the parties should be realigned, dual interests are at play. On the one hand, removal raises federalism concerns such that removal statutes are strictly construed. *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002). On the other hand, federal courts are required

as a threshold matter to determine the proper alignment of the parties and where appropriate realign the parties in an action to reflect their interest in the litigation. *City of Indianapolis,* 314 U.S. at 69. Federal courts have been realigning parties for more than a century, so there is nothing expansive about the Fifth Circuit doing so.

Petitioners cite 28 U.S.C. § 1441(a), permitting removal only where there is original jurisdiction, to claim original jurisdiction is absent because there is no federal question and diversity is incomplete on the pleadings. But the propriety of removal is only considered after the court determines the proper alignment of the parties. *E.g., Peters*, 174 F.2d at 163. In these cases, after realignment, complete diversity existed in accord with § 1441(a).

Petitioners cite 28 U.S.C. §1441(b)(2), prohibiting removal where there is a forum defendant. But after realignment, Aeroframe was not a forum defendant. Petitioners' argument that the rule must be applied before reaching the question of realignment would make impossible a court's duty to "look beyond the pleadings, and arrange the parties according to their sides in a dispute." *City of Indianapolis,* 314 U.S. at 69 (quoting *City of Dawson*, 197 U.S. at 180). In these cases, after realignment, there is no forum defendant and there is complete diversity. Moreover, Petitioners did not raise §1441(b)(2) in their motions to remand and thereby waived any reliance on that section. *See* 16 J. Moore, D. Coquillette, G. Joseph, G. Vairo, & C. Varner, Moore's Federal Practice — Civil § 107.55[4] (2024) ("All circuits that have addressed the issue have now held that the ban on local defendants is procedural and nonjurisdictional."); *see, e.g., In re Shell Oil Co*., 932 F.2d 1518,1523 (5th Cir. 1991) (forum

defendant defect must be raised within 30-day time limit for remand motions or it is waived).

Petitioners suggest that the Fifth Circuit wrongly considered Plaintiffs' motives and Aeroframe's financial circumstances in its removal analysis. Pet. at 20 (citing *Chicago, Rock Island, & Pacific Railway Co. v. Schwyhart,* 227 U.S. 184 (1913)). But *Chicago* is an improper joinder case, and all agree these consolidated cases are not. Pet. 3. In realignment, courts look to the "realities of the record" and "attitude towards the actual and substantial controversy." *City of Indianapolis*, 314 U.S. at 69, 75 n. 4 (quoting *Sutton v. English*, 246 U.S. 199, 204 (1918)). In realigning the parties, the Fifth Circuit did precisely what the realignment doctrine provides for. It went beyond the pleadings, looked at the attitudes of the non-ATS Parties and their counsel, and recognized that after realigning the parties according to their true interest, original jurisdiction existed from inception, and the district court properly exercised subject matter jurisdiction pursuant to 28 U.S.C. 1332(a). Petitioners cite no authority for their contention that motives or financial wherewithal cannot be considered in the realignment context.

Finally, Petitioners suggest that the Fifth Circuit's decision risks a flood of removals and discovery into questions of strategy and motive, whenever a defendant perceives itself as a "target" or a "deep pocket." Pet. 21. A defendant is by definition a target, unless there is evidence like that presented here: Plaintiffs-Employees had no intention of pursuing the claims against the alleged non-diverse defendant because its sole member was cooperating with Plaintiffs-Employees' counsel, agreed to not defend against Plaintiffs-Employees' claims, stipulated to Plaintiffs-Employees' wages, penalties and attorney's fees, and agreed to pay

those claims if there was a recovery from ATS. The Fifth Circuit's decision is fact-specific and based on an unraveled scheme from inception to deprive the diverse defendant its right to removal. Given that post-removal realignment has existed for over a century, yet no other case presents facts like these, the Fifth Circuit's decision will not open the floodgates of new removals. Certiorari is not warranted.

3. Petitioners failed to raise the question presented here to the Fifth Circuit.

Petitioners failed to ask the Fifth Circuit to address the question presented in the Petition—whether the realignment doctrine applies in removed cases to determine the existence of diversity jurisdiction. Petitioners did not ask the Fifth Circuit sitting *en banc* to overrule its precedent set forth in *Peters,* 174 F.2d at 163 (applying the realignment doctrine post-removal and concluding diversity jurisdiction existed). Indeed, in the courts below, Petitioners relied on improper joinder jurisprudence. They argued that as long as a plaintiff states a claim against a non-diverse defendant, diversity can never exist. This Court has held that failure to raise an argument below waives or forfeits it, making the petition unfit for certiorari. *See, e.g., Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016) ("The Department failed to raise this argument … below, and we normally decline to entertain such forfeited arguments."); *OBB Personenverkehr AG v. Sachs,* 577 U.S. 27, 37-38 (2015) ("Absent unusual circumstances…we will not entertain arguments not made below."); *Rent-A-Center, W., Inc. v. Jackson,* 561 U.S. 63, 75-76 (2010) (argument "not mentioned below" is "too late, and we will not consider it"). The Petition should be denied.

D. Grant of writ of certiorari will not resolve these cases because alternative bases for diversity jurisdiction exist.

Because of its holding that the non-ATS parties' interests were aligned from the inception of litigation, the Fifth Circuit reasoned that it did not need to review the Magistrate's alternative recommendation, adopted by the district court, that there was a post-inception settlement between the Plaintiff-Employees and Aeroframe that rendered the cases removable. Pet. App. 136. The Fifth Circuit also did not reach ATS's evidence that shows Porter was always a citizen of Tennessee, such that Aeroframe was a citizen of Tennessee, and diversity exists irrespective of realignment or a settlement. Pet. App. 3. Because three bases for diversity jurisdiction existed, granting certiorari on Petitioners' realignment question will not terminate these consolidated cases but would require a remand to the Fifth Circuit to consider the two alternative grounds supporting diversity jurisdiction. This decade-long dispute over jurisdiction should be put to rest. The Petition should be denied.

CONCLUSION

There are no compelling reasons to grant certiorari; the Petition should be denied.

Respectfully submitted,

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November 21, 2024