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 APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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ATS minimizes and fails to acknowledge distinctions between this case and the realignment cases it cites. First, unlike in ATS's cited cases, the Louisiana plaintiffs here asserted valid unpaid wage claims against their former, nondiverse Louisiana employer. Second, after treating the employer as if it were a plaintiff in order to exercise diversity jurisdiction, the district court actually adjudicated the claims between the nondiverse, ostensibly aligned parties, reducing them to money judgments that the Fifth Circuit affirmed.

Petitioners agree that this Court addressed realignment principles in the context of removed cases over 100 years ago, but ATS cites no case in which this Court has condoned removal where, as here, a plaintiff has a valid, unresolved claim against a nondiverse defendant requiring relief. In *Removal Cases*, 100 U.S. 457, 469 (1879), for example, the Court found the claims against the nondiverse defendant were resolved before removal, so that even if the defendant "still continued a party to the suit, it was a nominal party only." *Removal Cases* is consistent with the realignment opinions from appellate courts discussed in the petition, none of which involve a legitimate case and controversy between nondiverse parties.

As ATS acknowledges, the Fifth Circuit went beyond objective jurisdictional facts to explore the "attitudes" and "motives" of the plaintiffs and the "financial wherewithal" of nondiverse Aeroframe. ATS Br. at 29. The court did not determine that the plaintiffs' claims against Aeroframe were invalid or not actionable, just that the

plaintiffs allegedly were "not interested" in pursuing them.[1] Pet. App. 23a. Focusing the jurisdictional analysis on subjective factors like motivation is a marked departure from established removal jurisprudence, which hinges on objective facts, *e.g.*, whether there is a viable claim against a nondiverse defendant. *See*, *e.g.*, *Chicago, Rock Island, & Pac. Ry. Co. v. Schwyhart*, 227 U.S. 184, 193 (1913) ("[T]he motive of the plaintiff, taken by itself, does not affect the right to remove."); *Williams v. Homeland Ins. Co. of New York*, 18 F.4th 806, 815 (5th Cir. 2021) (improper joinder jurisprudence "emphasizes substantive viability" and directs that "*any* viable cause of action against a diversity-destroying party" requires the case to be remanded) (emphasis in original). The new approach taken here encourages removal in cases where complete diversity is absent, and it will result in expensive, time-consuming jurisdictional discovery into party motivation and strategy.

The Court should grant the petition and reverse the Fifth Circuit.

I. Plaintiffs Always had Valid Claims Against Nondiverse Aeroframe, Including at Inception of this Litigation.

Striving to convince the Court not to take this case, ATS muddles the relevant background in a way that

1. The unpaid wage claims cannot be asserted against anyone other than the plaintiffs' employer Aeroframe. While ATS and the lower courts have characterized the assertion of claims against Aeroframe as "collusion," it was merely a legal strategy revolving around the assertion of viable claims against multiple defendants in one lawsuit. That the strategy prevents diverse ATS from removing should not factor into the jurisdictional analysis.

implies the plaintiffs did not have valid claims against Aeroframe when they filed suit. For example, in arguing there was collusion "from inception to deprive diverse ATS of its right to litigate in federal court," ATS seemingly suggests that even before suit was filed Aeroframe had "stipulate[d] to the amount owed" to plaintiffs, as though the claims between nondiverse parties were wholly resolved pre-suit.[2] ATS Br. at 1. That is wrong. As ATS acknowledges elsewhere, the supposed stipulation (a mere subordination agreement regarding the order in which parties would be paid) was proposed and signed in 2014, *after* suit was filed, and it therefore has no bearing on the realignment analysis.[3] *Id.* at 7-10.

In any event, the Fifth Circuit did not conclude that plaintiffs' claims against Aeroframe lacked merit, were settled, or were otherwise resolved pre-suit.[4] The court instead engaged in extensive analysis of background facts in order to determine what *motivated* plaintiffs and their counsel to assert the valid claims against their

2. To be clear, neither Aeroframe nor Porter ever "stipulate[d] to the amount owed" to the plaintiffs, but the import of the document Porter signed is irrelevant at this stage. The absence of any stipulation or settlement before suit was filed is beyond dispute.

3. As the Fifth Circuit held in *Ashford I*, "federal diversity-of-citizenship jurisdiction 'depends upon the state of things at the time of the action brought.'" *Ashford v. Aeroframe Servs., L.L.C.*, 907 F.3d 385, 386 (5th Cir. 2018) (quoting *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570–71 (2004)); Pet. App. at 151a-152a. Thus, the realignment analysis focuses on the facts existing as of October 2013, when this litigation commenced.

4. If the Fifth Circuit had reached any such conclusion, this would be an improper joinder case, not a realignment case.

former employer. Pet. App. 19a-23a. The court's ultimate holding—which will undoubtedly drive other litigants to remove cases where complete diversity is absent—is that the non-ATS parties' "interests were aligned from the inception of this litigation" because (i) plaintiffs were not really interested in pursuing their claim against Aeroframe, which lacked assets to satisfy a judgment; and (ii) plaintiffs' counsel were attempting to pursue "deep-pocketed ATS in a friendly state court forum" on behalf of Aeroframe and Porter. *Id.* at 23a. Permitting removal because of the plaintiffs' perceived motivation for suing a nondiverse defendant is not supported by any precedent cited by ATS or the Fifth Circuit.

II. Prior Removal Jurisprudence does not support ATS's Position.

ATS declares: "In arguing that realignment is not available in removed cases, Petitioners fail in their duty to inform of controlling authority against their position." ATS Br. at 20. This misapprehends Petitioners' position, and it reflects ATS's simplistic approach to the issue presented. Yes, courts have used the term "realignment" or referred generally to realignment principles in removed cases. In fact, examples of such cases were discussed in the petition. Pet. at 15-16. But Petitioners have not found a case—and neither, apparently, has ATS—in which realignment was used to create diversity jurisdiction *despite the presence of a valid claim between nondiverse parties.*[5]

5. To the contrary, until now courts have indicated that "Parties defendant will not be realigned if there remains in the case any issue as to which plaintiff needs some relief against such parties." *Texas Pac. Coal & Oil Co. v. Mayfield*, 152 F.2d 956, 957 (1946).

The absence of jurisprudence supporting the Fifth Circuit's opinion is highlighted by the supposed "controlling authority" on which ATS relies. As noted at the outset of this reply, this Court found in *Removal Cases*, 100 U.S. 457, 469 (1879), that removal was proper because the nondiverse defendant was, at best, "a nominal party only." The Court similarly found in *Pac. R. Co. v. Ketchum*, 101 U.S. 289, 298 (1880), that the nondiverse defendants were "but nominal parties," against whom "[n]o relief was asked." *Evers v. Watson*, 156 U.S. 527 (1895), involved a collateral attack on a federal court judgment entered in an earlier case, including an assertion that the earlier case had been improperly removed. This Court described the jurisdictional allegations related to removal as "very meager." *Id.* at 531. In rejecting the collateral attack, this Court stated the general proposition that a party's position in a case as defendant is not "conclusive as to his actual interest in the litigation," as a defendant might have interests that are identical to those of the plaintiff. *Id.* at 532. The *Evers* opinion does not suggest that a removal was permitted despite the existence of a valid claim between nondiverse parties, and it does not support the exercise of diversity jurisdiction in this case.

ATS quibbles about whether realignment opinions discussed in the petition involve truly nominal defendants or, instead, nondiverse parties with real interests in litigation removed from state court. ATS Br. at 22-25. Semantics aside, ATS does not identify a single removal-realignment case that involved the assertion of a valid claim between nondiverse parties, let alone a case where such a claim was adjudicated to money judgments in

federal court after removal.[6] This case, therefore, is one of first impression worthy of this Court's review.

III. The Lower Courts' Focus on Party Motivation Conflicts with Established Removal Jurisprudence.

Because the plaintiffs had a viable claim against Aeroframe when this lawsuit was filed, the lower courts could not disregard Aeroframe's citizenship. Rather, removal based on complete diversity was possible only if Aeroframe was deemed to be a plaintiff, which required consideration of plaintiffs' (or their counsels') subjective motivation for suing Aeroframe. The courts concluded that removal was appropriate because (i) the plaintiffs had no real intention of pursuing their claim against Aeroframe, which was in financial trouble, and (ii) the claim was asserted by plaintiffs' counsel to benefit Porter—a non-party at inception—by forcing ATS to litigate with Porter in state court. Pet. App. 23a. This was legally erroneous. Taking party (and counsel) motivation into account is contrary to the Court's removal jurisprudence, which has long recognized that a plaintiff 's motive in suing a nondiverse defendant "does not affect the right to remove." *Chicago, Rock Island & Pac. Ry. Co. v. Schwyhart*, 227 U.S. 184, 193 (1913).

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6. For example, ATS asserts the nondiverse defendant in *Peters v. Standard Oil Co. of Texas*, 174 F.2d 162 (5th Cir. 1949), was not a nominal party because he had an interest in a disputed lease. Regardless, that defendant was only added to the suit because the plaintiff considered him to be an indispensable party, and there is no indication that the plaintiff asserted any claim against him.

ATS attempts to minimize this Court's decision in *Chicago* by characterizing it as an improper joinder case, ATS Br. at 29, but *Chicago* is a *removal* case. And ATS cites no authority supporting consideration of party motive or financial wherewithal in the *removal* context. ATS's party-motivation argument instead hinges on a general statement from a footnote in *City of Indianapolis v. Chase Nat'l Bank of New York*, 314 U.S. 63, 75 n. 4 (1941), that parties "must be aligned according to their 'attitude towards the actual and substantial controversy.'" (quoting *Sutton v. English*, 246 U.S. 199, 204 (1918)). ATS's reliance on this statement is misplaced. *City of Indianapolis* (like *Sutton*, the case *City of Indianapolis* quotes) was not a removed case; it was filed in federal court. Party alignment was thus considered in *City of Indianapolis* to ensure that there was actual complete diversity, *i.e.*, that federal jurisdiction was not improperly exercised. *City of Indianapolis* did not hold that it is appropriate to consider party motivation in a removed case or that realignment is a means of bypassing the strict complete diversity requirements set forth in the removal statutes. *See generally* 28 U.S.C. § 1332; 28 U.S.C. § 1441.

Relatedly, ATS suggests federal courts have a duty to prevent parties from "intentionally destroying diversity jurisdiction," equivalent to their duty to prevent its manufacture. *See*, *e.g.*, ATS Br. at 26. That suggestion is wrong. Federal courts strive to prevent outright jurisdictional fraud through mechanisms such as the improper joinder doctrine. But they do not ignore objective facts and base jurisdictional decisions on perceived intent.

This Court's decision in *Provident Sav. Life Assur. Soc. v. Ford*, 114 U.S. 635 (1885), demonstrates the

unsoundness of ATS's position. *Provident* involved a suit filed in New York state court to enforce a federal court judgment. The individual who obtained the judgment (Cochran) was diverse from the defendant, but before the enforcement lawsuit was filed he assigned the judgment to Ford, who like the defendant was a New York citizen. *Id.* at 636-38. Although complete diversity was absent when Ford filed suit in state court, the defendant sought to remove, contending Cochran (the assignor) was the "real party in interest" and that the assignment to Ford was "merely colorable" and made for the purpose of collecting the judgment for Cochran's benefit and preventing removal. *Id.* at 638.

This Court reviewed and affirmed the decision to deny removal. In rejecting the defendant's argument that it should not be "deprived" of its right to remove by a "fraudulent assignment," the Court explained that "the action was nevertheless Ford's [the nondiverse assignee's], and as against him there was no right of removal." *Id.* at 640. The Court further explained that while want of consideration for the assignment might be a valid defense in state court, it does not impact the removal analysis. *Id.* at 641. And finally, the Court distinguished efforts to *manufacture* federal jurisdiction through assignment (which federal law still empowers courts to consider)[7] from efforts to defeat jurisdiction (which federal law does not address). *Id.* Courts cite *Provident* to this day for the principle that jurisdictional inquiries depend on objective facts, not motives. *See*, *e.g.*, *Molina Healthcare, Inc. v. Celgene Corp.*, 2022 WL 161894, at *16 (N.D. Cal. Jan. 18, 2022) ("*Provident* compels remand regardless

7. *See* 28 U.S.C. § 1359.

of the motive behind the assignment"); *Nepveux, Inc. v. Mobil Exploration & Producing North America*, 2018 WL 4523953, at *3 (W.D. La. Aug. 16, 2018) (finding motive behind transfer "not relevant to the matter of the jurisdictional inquiry").

The Fifth Circuit's opinion expands the availability of removal based on diversity jurisdiction because, contrary to *Chicago* and *Provident*, it permits consideration of a party's motivation for asserting viable claims against a nondiverse defendant. The opinion is also inconsistent with the well settled rule that removal statutes must be strictly construed against removal and in favor of remand. *See*, *e.g.*, *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002).

IV. Petitioners have not Waived the Right to Raise Lack of Subject Matter Jurisdiction in this Court.

ATS asserts that Petitioners "failed to ask the Fifth Circuit to address the question presented in the Petition," resulting in waiver. ATS Br. at 30. ATS is incorrect.

First, Porter presented the following issue for review by the Fifth Circuit: "Did the District Court err in denying remand despite a Louisiana plaintiff 's viable claim against a Louisiana defendant, the existence of which is evidenced by the District Court's summary judgment on that claim in favor of the plaintiff ?"[8] Further, in arguing below that the district court erred by "using the realignment doctrine to create diversity jurisdiction in this removed case," Porter

8. *See* Porter's Original Appeal Brief, filed in Fifth Circuit Case No. 22-30288 on September 16, 2022, at p. 3.

stated, *inter alia*, that the doctrine "has no place in this Court's removal jurisprudence. If a Plaintiff does not have a viable claim against a non-diverse defendant, there is no need to realign because the improper joinder doctrine applies."[9] This and other arguments below contradict ATS's waiver argument.

And second, the waiver cases cited by ATS are inapposite because they do not involve jurisdictional issues. ATS Br. at 30 (citing, *inter alia*, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 75-76 (2010) (declining to consider challenge to delegation provision of an arbitration agreement not made below)). Where, as here, federal courts lack subject matter jurisdiction, the jurisdictional issue may be raised at any time, including for the first time in this Court. *See*, *e.g.*, *Wilkins v. United States*, 598 U.S. 152, 157 (2023) ("Jurisdictional bars, however, 'may be raised at any time' and courts have a duty to consider them *sua sponte*.") (citation omitted); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance.") (citing *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884); *Capron v. Van Noorden*, 2 L.Ed. 229 (1804) (lack of diversity jurisdiction successfully raised for the first time in this Court); Fed. Rule Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.")). ATS's waiver argument should be summarily rejected.

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9. *Id*. at p. 36.

V. The Important Issue Presented Here should be Addressed Despite ATS's Assertion that Other Bases for Diversity Jurisdiction Exist.

Finally, ATS argues that the petition should be denied because ATS made alternative arguments in support of jurisdiction that were not addressed by the Fifth Circuit. ATS Br. at 31. This argument betrays the weakness of ATS's position on realignment and should have no bearing on the Court's analysis of the important issue presented for review.[10] Even if jurisdiction may be properly exercised on another ground, this Court should review and reverse the Fifth Circuit's opinion before it is relied upon by removing parties in other cases. The opinion confuses settled removal jurisprudence that, until now, did not take into account party motivation or financial wherewithal, and it risks a flood of removals in cases where complete diversity is absent.

V. Conclusion

This case presents a fundamental jurisdictional issue that has not been resolved: whether realignment can be used to create diversity jurisdiction in a removed case notwithstanding the presence of an actual, unresolved case and controversy between a plaintiff and a nondiverse defendant. This issue and its impact on established removal jurisprudence warrants review by this Court.

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10. Petitioners do not agree that any other valid ground for federal jurisdiction exists. But because ATS's alternative jurisdictional arguments are not relevant to the issue presented for this Court's review, those arguments are not addressed here. If this Court reverses the Fifth Circuit, ATS's alternative arguments are subject to consideration by the Fifth Circuit on remand.

Accordingly, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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