No. 22-30526

IN THE
United States Court of Appeals for the Fifth Circuit

ERVIN JACK, JR.,

Plaintiff-Appellant,

v.

EVONIK CORPORATION, successor in interest to Evonik Materials Corporation and Tomah Reserve, Incorporated, formerly known as Air Products Performance Manufacturing, Incorporated, formerly known as Versum Materials Performance Manufacturing, Incorporated; SHELL OIL COMPANY,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana, No. 2:22-cv-01520, Hon. Carl J. Barbier

BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY IN SUPPORT OF AFFIRMANCE

ANDREW R. VARCOE
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

JONATHAN S. FRANKLIN
NORTON ROSE FULBRIGHT US LLP
799 9th Street N.W.
Washington, DC 20001
(202) 662-0466

CHARLOTTE KELLY
NORTON ROSE FULBRIGHT US LLP
111 W. Houston Street
Suite 1800
San Antonio, TX 78205
(210) 270-9329

Counsel for Amici Curiae

November 17, 2022

CERTIFICATE OF INTERESTED PERSONS

Jack v. Evonik Corporation, et al., No. 22-30526

The undersigned counsel of record certifies that, in addition to the persons and entities listed in Appellees' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

The Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. It has no parent company and has issued no stock.

The Louisiana Association of Business and Industry is a non-profit trade association. It has no parent corporation, and no publicly held corporation owns 10% or greater ownership interest in it.

November 17, 2022

/s/ Jonathan S. Franklin
Jonathan S. Franklin

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

CONSTITUTIONAL PROVISIONS AND STATUTES:

LEGISLATIVE MATERIALS:

OTHER AUTHORITIES:

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.[1]

The Louisiana Association of Business and Industry ("LABI") is a non-profit trade association representing over 2,500 business and industry members that, for over forty years, has worked to uphold its mission to foster economic growth by championing the principles of the free enterprise system and to represent the general interest of the business community through active involvement in the legislative, regulatory, and judicial process. Like the Chamber, LABI regularly files *amicus curiae* briefs in cases, such as this one, which hinder the state's ability to create a business-friendly climate.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

The Chamber and LABI (together, the "Chambers") have a particular interest in preventing plaintiffs from fraudulently or improperly joining local corporate employees or small businesses as defendants in order to defeat federal diversity jurisdiction. Such efforts not only deny out-of-state corporate defendants their statutory and constitutionally grounded right to an impartial federal forum, but also unnecessarily drag corporate employees and small companies into litigation when they would otherwise never have been sued. Thus, while the Chambers believe the district court also properly resolved the merits of this case, this brief is limited to explaining why the Court should uphold the district court's jurisdictional determination that plaintiffs improperly sued individual corporate employees in an illegitimate effort to defeat defendants' right to a federal forum guaranteed to them by statute and provided for in the Constitution.

SUMMARY OF ARGUMENT

This case implicates the viability of removal jurisdiction based on diversity of citizenship. At issue is whether a plaintiff may circumvent the jurisdiction constitutionally and congressionally conferred on federal courts to adjudicate claims against out-of-state defendants merely by pleading a state-law claim against in-state individual corporate employees, where the record conclusively establishes that there is no reasonable basis for suing such employees. The answer is no, as mandated by this Court's precedent as well as that of the Supreme Court.

The improper-joinder doctrine is necessary to preserve diversity jurisdiction, which the Constitution granted to provide a neutral forum for disputes between citizens of different states. While contemplating the scope of jurisdiction to confer upon the federal courts, the Framers recognized that the "prevalency of a local spirit" could affect state courts' analyses of "national causes." The Federalist No. 81 (Alexander Hamilton). Because of this, the Framers questioned whether state courts could remain impartial in suits between residents and non-residents. *See*, *e.g.*, *Guar. Tr. Co. v. York*, 326 U.S. 99, 111 (1945). Diversity jurisdiction was therefore created to provide "assurance to non-resident litigants of courts free from susceptibility to potential local bias." *Id.* Empirical evidence has borne out the Framers' concerns, as plaintiffs fare less well when out-of-state defendants exercise their right to have their cases heard by independent federal judges than when plaintiffs retain their "home court advantage" in state courts.

Accordingly, as the Supreme Court held more than a century ago, when a case satisfies the requirements of the diversity statute, a federal right of removal exists that "cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). Despite this longstanding rule, however, plaintiffs continue to tack on baseless claims against non-diverse individuals or small businesses as a tactic to defeat diversity removal. The improper-joinder doctrine is

the sole safeguard against such jurisdictional manipulation, and its continued, vigorous enforcement is essential to protect innocent individuals, businesses, and their employees from unwarranted litigation caused by jurisdictional gamesmanship, and to ensure that out-of-state corporate defendants retain their right to a neutral federal forum.

The district court also correctly applied the doctrine in this case. It properly determined that plaintiffs have no possibility of recovery on their claims against the employee defendants. Plaintiffs' negligence claims fail at the outset because they are based on the employee defendants' administrative responsibilities, which Louisiana law holds cannot establish liability. Plaintiffs likewise have no possibility of recovery on their civil-battery claims because, even assuming that the employee defendants knew of the allegedly harmful emissions at issue, such knowledge cannot establish intent. Therefore, because the district court correctly applied the improper-joinder doctrine, this Court should affirm the denial of plaintiffs' motion to remand.

ARGUMENT

I. A ROBUST IMPROPER-JOINDER DOCTRINE ENSURES THAT PLAINTIFFS WILL NOT UNDERMINE DIVERSITY JURISDICTION BY UNNECESSARILY FORCING INNOCENT PARTIES INTO LITIGATION.

A. Diversity Jurisdiction Exists To Protect Out-Of-State Defendants From Local Bias.

As the Framers recognized, "the prevalency of a local spirit" could affect state courts' decisions. The Federalist No. 81 (Alexander Hamilton). In particular, the Constitution's drafters were concerned that state courts' "local attachments" would hinder their ability to impartially decide disputes between citizens of different states. *See* The Federalist No. 80 (Alexander Hamilton); *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 87 (1809) (observing that the Constitution reflects "apprehensions" about state courts' impartiality).

Because federal courts had "no local attachments," the Framers understood that they were "likely to be impartial between the different states and their citizens." The Federalist No. 80 (Alexander Hamilton). Article III of the Constitution therefore allows for diversity jurisdiction to "prevent apprehended discrimination in state courts against those not citizens of the state." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938). Inherent in that provision for jurisdiction is the "presum[ption] . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, . . . the regular administration

of justice." *Martin v. Hunter's Lessee*, 14 U.S. 304, 347 (1816); *see also Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) (explaining that the purpose of diversity jurisdiction "was to secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides").

Accordingly, statutory diversity jurisdiction was likewise enacted with the purpose of "provid[ing] 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, 553-54 (2005); *see also* S. Rep. No. 85-1830 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3102 (explaining that diversity jurisdiction exists to "provide a separate forum for out-of-state citizens against the prejudices of local courts . . . by making available to them the benefits and safeguards of the federal courts"). For purposes of diversity jurisdiction, a corporation is considered a citizen of the state in which its principal place of business is located because "it will not be subject to local hostility [there] the way a foreign corporation might, and therefore need not seek the protection against local biases provided by the federal system." *Grand Union Supermarkets of the V.I., Inc. v. H.E. Lockhart Mgmt., Inc.*, 316 F.3d 408, 411 (3d Cir. 2003). But the converse is true where, as here, a corporation is sued outside its home venue. Out-of-state defendants, like appellees here, are entitled to a federal forum to protect against the possibility of local bias in the state-court system.

These same principles provide the foundation for diversity removal jurisdiction, which the Judiciary Act of 1789 first conferred. *See Martin*, 14 U.S. at 348-50; Michelle S. Simon, *Hogan v. Gawker II: A Statutory Solution to Fraudulent Joinder*, 70 Baylor L. Rev. 1, 8 (2018); Judiciary Act of 1789, ch. 20, sec. 12, 1. Stat. 73, 79-80. Like the Constitution's protections, which apply equally to all, the federal judicial power was designed "not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum." *Martin*, 14 U.S. at 348. As a result, where federal jurisdiction exists, the defendant has a "right of removal." *Wilson*, 257 U.S. at 97. Without it, a plaintiff's choice of state forum would always control, and the defendant would be "deprived of all the security which the [C]onstitution intended in aid of his rights." *Martin*, 14 U.S. at 348-49.

The doctrine of "fraudulent," or "improper" joinder, which the Supreme Court recognized long ago, is designed to prevent plaintiffs from easily circumventing the Framers' design. *See, e.g.*, *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152 (1914) ("[T]h[e] right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy."). In its first case on the doctrine, the Supreme Court explained that it prevents plaintiffs' "attempts to wrongfully deprive parties entitled to sue in the

Federal courts of the protection of their rights in those tribunals." *Ala. Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906). And even before the Court articulated this doctrine, it noted concerns about "sham defendants." *Plymouth Consol. Gold Mining Co. v. Amador & Sacramento Canal Co.*, 118 U.S. 264, 270 (1886).

As the Supreme Court recognized then, plaintiffs cannot, through the mere artifice of unnecessarily joining local parties, circumvent the constitutional and statutory safeguards for out-of-state defendants. *See Thompson*, 200 U.S. at 218. Yet that is what will happen if this Court upholds plaintiffs' tactics in this case, where they plainly sued individual employees for no reason other than to deprive defendants of their federal right of removal. If plaintiffs truly had viable claims against the appellee corporations (and the district court correctly held that they did not), plaintiffs could have obtained full and complete relief by suing those out-of-state companies alone. Other than for plaintiffs' transparent attempts to defeat federal jurisdiction, there is no reasonable likelihood that they would have sued individual corporate employees whose presence is unnecessary and against whom they have no reasonable likelihood of any recovery.

B. Plaintiffs Should Not Be Able To Hale Innocent Individuals Into Court Merely As A Tactical Weapon To Destroy Federal Jurisdiction.

Given these concerns, the Supreme Court and this Court have long been vigilant in protecting both out-of-state defendants' right to a federal forum, and

innocent parties' rights to be free from baseless litigation, against plaintiffs' attempts to secure a perceived advantage in home courts. As the Supreme Court held long ago, "[f]ederal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). But despite this longstanding rule, plaintiffs continue to sue resident defendants against whom they have no hope of recovery under the guise of their limited and ministerial employment for the defendant corporation, as this case shows. Joining "token nondiverse defendants to defeat removal" is "perhaps the most common vehicle for procedural manipulation of removal statutes." Scott R. Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609, 645 (2004). The improper-joinder doctrine is the only safeguard against such efforts to circumvent diversity jurisdiction, and the Court should not accept plaintiffs' invitation to water down that doctrine in this case.

1. Plaintiffs Have Strong Incentives To Improperly Sue Local Parties In Order To Avoid Federal Jurisdiction.

The Framers' concerns are neither theoretical nor antiquated. Rather, as demonstrated by this case and others like it, plaintiffs continually seek to improperly destroy out-of-state defendants' right to an impartial federal forum by joining in-state defendants who would not otherwise have been sued. "It is no

secret that plaintiffs often deliberately structure their state court lawsuits to prevent removal by defendants to federal court." Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 781 (2006). Plaintiffs do so to gain the precise tactical advantages that diversity jurisdiction was established to combat: a "home court advantage" in disputes between citizens of different states. Some state courts have developed a reputation for being particularly hostile to business or other out-of-state defendants.[2]

As a general matter, plaintiffs' success rates drop significantly in cases removed to federal court, with its independent, life-tenured judges who do not need to run for election. *See, e.g.*, Simon, *supra*, at 3 ("[E]mpirical studies have shown that plaintiffs suffer a drop in win rates after a case has been removed to federal court."); James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 Alb. L. Rev. 1013, 1014 (2006) (discussing the "low win-rate" in removed cases and noting that "a plaintiff's ability to avoid removal . . . could mean the difference between winning and losing" (quoting Allyson Singer

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2 *See* U.S. Chamber Inst. for Legal Reform, *2019 Lawsuit Climate Survey: Ranking the States* 27 (2019), *available at* https://instituteforlegalreform.com/wp-content/uploads/2020/10/2019-Lawsuit-Climate-Survey-Ranking-the-States.pdf (according to recent survey of corporate executives and in-house lawyers, Louisiana's court system ranks 49th among the 50 states in terms of fairness and reasonableness).

Breeden, *Federal Removal Jurisdiction and Its Effect on Plaintiff Win-Rates*, Res Gestae, Sept. 2002, at 26)). In the study discussed by Simon and Underwood, an examination of data from the Administrative Office of the United States Courts revealed that removed cases had a lower plaintiff "win rate"—the "fraction of plaintiff wins among judgments for either plaintiff or defendant"—than cases in which the plaintiff chose the forum, either by filing in state or federal court. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 Cornell L. Rev. 581, 593, 599 (1998). To put it more succinctly, "forum matters." *Id.* at 599.

Considerable research has shown that local juries have measurable bias against out-of-state defendants, who are more likely to get hit with large damages verdicts. *See, e.g.*, Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 Am. L. & Econs. Rev. 341, 367 (2002) (interpreting data to "suggest that awards are 21% to 28% higher in partisan states with out-of-state defendants than in other states"). Similarly, there are indications that state-court judges have some measure of bias—whether conscious or unconscious—toward out-of-state defendants. *See, e.g.*, Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 Tex. L. Rev. 855, 894-98 (2015). In a survey of 371 judges across three states, judges considered a fact pattern in which an in-state plaintiff sued an in-state or out-of-state defendant

for dumping toxic chemicals in the plaintiff's lake. *Id.* at 395. The judges were tasked with determining the amount of punitive damages, if any, that they would award to the plaintiff. *Id.* Concluding that "[t]he results suggest that in-group preferences are about as salient to judges as they are to jurors," the study found that the three jurisdictions, taken as a whole, "showed a notable bias against out-of-state defendants." *Id.* at 898.

Moreover, even without local bias, state and federal courts differ in other ways that affect their attractiveness to plaintiffs. For example, federal courts require unanimous jury verdicts, whereas some states require only "some level of super-majority." Robert L. Jones, *Finishing A Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. Rev. 997, 1091 n.442 (2007). Notably, Louisiana does not require unanimous jury verdicts absent an agreement between the parties. *See* La. Code Civ. Proc. art. 1797 (2021). Other procedural distinctions, such as differences in evidentiary rules and summary judgment practice, also affect the appeal of a particular forum. *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 418-20 (1992).

For these reasons, removal can often be "outcome-determinative." *Cf.* Jones, *supra*, at 1091. Precisely because plaintiffs' chances of success diminish

following removal to federal court, they generally have a strong incentive to resist it. *See* Simon, *supra*, at 9-10.

2. Without A Robust Improper-Joinder Doctrine, Innocent Individuals And Small Businesses Will Continually And Unnecessarily Be Dragged Into Court.

Because diversity removal is generally undesirable to plaintiffs, lawyers for some plaintiffs have long employed improper strategies to avoid it. *Cf.* Underwood, *supra*, at 1043 (noting that the Association of Trial Lawyers of America "has been quite candid in its publications concerning the strategy of using joinder to stay out of federal court").

One of the most popular tactics for avoiding removal is to add non-diverse individuals or small businesses as defendants. H.R. Rep. No. 114-422, at 2-3 (2016) ("House Report"). Perhaps the most common ploy is the one used here: joining local individual employees in cases that would otherwise have been brought only against their out-of-state employer. Indeed, "given the relative financial positions of most companies versus their employees, the only time an employee is going to be sued is when it serves a tactical legal purpose, like defeating diversity." *Ayoub v. Baggett*, 820 F. Supp. 298, 300 (S.D. Tex. 1993).

For example, in insurance cases, plaintiffs frequently join local adjusters to preclude insurers from removing the case. *Fraudulent Joinder Prevention Act of 2015: Hearing on H.R. 3624 Before the Subcomm. on the Const. & Civ. Just. of the*

H. Comm. on the Judiciary, 114th Cong. 42 (2015) (statement on behalf of the U.S. Chamber of Commerce) ("Chamber Testimony"), *available at* https://www.uschamber.com/assets/archived/images/documents/files/final_fraudulent_joinder_testimony_9.29.15.pdf.[3] These defendants are effectively used as pawns to secure plaintiffs' perceived jurisdictional advantages. Indeed, in some coverage cases, "policyholders routinely offer to dismiss the adjuster . . . at an early stage in exchange for the defendant insurer's agreement to refrain from removing the case to federal court." Jennifer L. Gibbs, *Don't Mess with Texas Adjusters in Hail Damage Claims*, Law360 (Feb. 6, 2015, 12:36 PM) (https://www.law360.com/articles/616560/ don-t-mess-with-texas-adjusters-in-hail-damage-claims).

Likewise, in products-liability suits against pharmaceutical manufacturers, plaintiffs' lawyers have a history of naming local pharmacies as defendants to avoid removal. Chamber Testimony at 43.[4] Plaintiffs also often name a local

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3 *See, e.g.*, *Ramirez v. State Farm Mut. Auto. Ins. Co.*, No. 2:15-CV-449-PRC, 2016 WL 204490, at *3 (N.D. Ind. Jan. 15, 2016) (insurance agent held fraudulently joined in suit against insurance company); *Neill v. State Farm Fire & Cas. Co.*, No. CIV-13-627-D, 2014 WL 223455, at *2-4 (W.D. Okla. Jan. 21, 2014) (insurance agent, with whom plaintiffs only met once, held fraudulently joined in suit against insurance company)

4 *See, e.g.*, *Salisbury v. Purdue Pharma, LP*, 166 F. Supp. 2d 546, 552 (E.D. Ky. 2001) (pharmacies held fraudulently joined in suit against nine drug companies); *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 279-86, 298

distributor or a sales representative to defeat diversity removal. *Id.* For example, "when an automaker is sued, the local dealership or repair shop that serviced the vehicle may be dragged into court." House Report at 4.[5] And like this case, in personal-injury suits against large retailers or hotels, a local store manager or employee will be included as a defendant. *Id.*[6]

Though these individuals and small businesses lack "deep pockets" from which a plaintiff may recover, their value to the plaintiff lies solely in their presence as a party. If the plaintiffs succeed in getting the case remanded, they will often dismiss their claims against the in-state businesses or individuals. *See*

(S.D.N.Y. 2001) (sales representatives held improperly joined in various actions against drug manufacturers); *Johnson v. Parke-Davis*, 114 F. Supp. 2d 522, 525-26 (S.D. Miss. 2000) (pharmaceutical sales representatives held fraudulently joined in suit against drug manufacturers).

5 *See, e.g.*, *Manley v. Ford Motor Co.*, 17 F. Supp. 3d 1375, 1385 (N.D. Ga. 2014) (brake inspector held fraudulently joined in action against car manufacturer and designer of tire); *Selexman v. Ford Motor Co.*, No. H-14-1874, 2014 WL 6610904, at *5 (S.D. Tex. Nov. 20, 2014) (car dealership held improperly joined in suit against car manufacturer); *Casas v. Tire Corral, Inc.*, No. M-04-123, 2005 WL 6773889, at *6 (S.D. Tex. Mar. 31, 2005) (local retailer held improperly joined in action against tire manufacturer).

6 *See, e.g.*, *Bejarano v. Autozone*, No. 2:12-CV-00598, 2012 WL 13080099, at *5 (D.N.M. July 24, 2012) (manager of store held fraudulently joined in suit against store); *Anderson v. Ga. Gulf Lake Charles, LLC*, 342 F. App'x 911, 919 (5th Cir. 2009) (per curiam) (affirming district court's determination that employees were improperly joined in personal injury suit against manufacturing company for chemical emissions); *Palmer v. Wal-Mart Stores, Inc.*, 65 F. Supp. 2d 564, 567 (S.D. Tex. 1999) (store manager held improperly joined in slip-and-fall action against retailer).

162 Cong. Rec. H907, 907 (daily ed. Feb. 25, 2016) (statement of Rep. Bob Goodlatte) (discussing various cases in which non-diverse defendants were dismissed after remand to state court). But to these parties, their eventual dismissal can be of little comfort. Rather, by the time their involvement in the litigation ends, many such defendants have already felt the "heavy emotional toll" caused by the suit and have "incur[red] substantial financial costs in defending their business." House Report at 4. It is no trivial matter for in-state individuals and small businesses to be named in lawsuits seeking substantial recovery—they could be denied credit, housing, or other opportunities simply based on their fraudulent inclusion in a lawsuit for which they bear no real responsibility. In many cases, including environmental cases like this one, the most qualified people for these positions will simply find employment elsewhere, rather than being used as pawns in plaintiffs' bid to avoid federal jurisdiction—to the detriment of businesses, and ultimately, the environment.

3. Strictly Policing Improper Joinder Is Essential To Ensuring The Fundamental Purposes Of Diversity Jurisdiction.

Not only are plaintiffs unnecessarily dragging innocent parties into litigation in their improper efforts to preserve a perceived home-court advantage, but the defendants against whom the plaintiffs genuinely seek to recover are precluded by such devices from exercising their statutory and constitutionally grounded right to remove the case. These tactics undermine the purpose of diversity jurisdiction,

which is to allow out-of-state defendants "to assert their rights in the federal rather than in the state courts." *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943).

In addition, failing to vigorously enforce the improper-joinder doctrine undermines the view—adopted by Congress and reflected in the Constitution—that neither party "possess[es] a superior right to select or avoid federal jurisdiction." Haiber, *supra*, at 658. If courts were to accede to plaintiffs' efforts to avoid diversity removal, the judicial power would no longer exist for the "common and equal benefit of all the people." *Martin*, 14 U.S. at 348. To uphold plaintiffs' tactics in this case would be to rubber-stamp the same kind of "forum manipulation" this Court has previously rejected. *See*, *e.g.*, *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 427 (5th Cir. 2003) (applying equitable exception to one-year limitation on removal because Congress "may have intended to limit diversity jurisdiction, but it did not intend to allow plaintiffs to circumvent it altogether"), *superseded by statute as recognized in Hoyt v. Lane Constr. Corp.*, 927 F.3d 287, 293-94 (5th Cir. 2019).

Continued enforcement of the improper-joinder doctrine is therefore essential to preserving diversity and removal jurisdiction. In this case, for example, plaintiffs joined four individual employees—thereby unnecessarily dragging them into the litigation—for no apparent reason other than to defeat

defendants' statutory removal right. The district court correctly determined that these individuals, against whom the plaintiffs have no possibility of recovery, were improperly joined. This Court should do the same.

II. THE DISTRICT COURT CORRECTLY FOUND IMPROPER JOINDER.

A. Removal Jurisdiction Exists Where A Summary Inquiry Proves That Joinder Of An In-State Party Was Improper.

To establish improper joinder, the party resisting remand must show: "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc) (quoting *Travis v. Irby*, 326 F.3d 644, 646-47 (5th Cir. 2003)). Where the plaintiffs' ability to establish a cause of action against the non-diverse defendants is challenged, there are two ways by which a court may determine whether the plaintiff has a reasonable basis for recovery. *Id.*

First, "[t]he court may conduct a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant." *Id.* If, however, the plaintiff has "misstated or omitted discrete facts that would determine the propriety of joinder," the court may "pierce the pleadings and conduct a summary inquiry." *Id.* Under this second inquiry, the court may consider "summary-judgment type

evidence." *Davidson v. Georgia-Pac., LLC*, 819 F.3d 758, 766 (5th Cir. 2016). This summary inquiry is "appropriate only to identify the presence of discrete and undisputed facts that would preclude [a] plaintiff's recovery against the in-state defendant." *Smallwood*, 385 F.3d at 573-74. But regardless of which analysis the court uses, the ultimate question is whether the party resisting remand "prov[ed] that the joinder of the in-state party was improper." *Id.* at 574.

B. Joinder Of A Resident Defendant Is Not Proper Merely Because A Plaintiff Has Pleaded A Valid Or Reasonably Arguable State Law Claim.

The burden of establishing improper joinder is not so substantial as to warrant remand where the plaintiff has only a "*mere theoretical possibility* of recovery," *see Badon v. RJR Nabisco Inc.*, 236 F.3d 282, 286 n.4 (5th Cir. 2000), or presents "no basis for entitlement to relief" from the resident defendant, *Mauldin v. Allstate Ins. Co.*, 757 F. App'x 304, 309 (5th Cir. 2018) (per curiam; emphasis in original). In addition, "[m]erely *pleading* a valid state law claim, or one whose validity is reasonably arguable, against the resident defendant does not mean that the joinder of the resident defendant is not fraudulent." *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 542 (5th Cir. 2004) (citation omitted; emphasis in original). Rather, as already noted, "fraudulent joinder claims can be resolved by 'piercing the pleadings' and considering summary judgment-type evidence such as affidavits and deposition testimony." *Cavallini v. State Farm Mut. Auto Ins.*

Co., 44 F.3d 256, 263 (5th Cir. 1995) (quoting *Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir. 1994)).

Accordingly, this Court has not hesitated to find improper joinder when a review of the entire record demonstrates that the plaintiff has no hope of recovery against the in-state defendant. *See*, *e.g.*, *Rolls ex rel. A.R. v. Packaging Corp. of Am. Inc.*, 34 F.4th 431, 438 (5th Cir. 2022) (applying Louisiana law to determine that supervisor was improperly joined where plaintiff merely made "conclusory allegations" regarding supervisor's responsibility for causing explosion); *Larroquette v. Cardinal Health 200, Inc.*, 466 F.3d 373, 377-78 (5th Cir. 2006) (concluding plaintiff had no possibility of recovery on battery claim against former employer where allegations were ones of "negligence, or at most . . . recklessness," rather than intent to cause harm); *Guillory v. PPG Indus., Inc.*, 434 F.3d 303, 312-13 (5th Cir. 2005) (holding officers and employees of chemical facility improperly joined where defendants asserted no responsibility for safety measures related to explosion at facility).

As next shown, the district court properly applied these settled standards to hold that plaintiffs improperly joined individual resident defendants solely to destroy federal jurisdiction. Such joinder is entirely unnecessary for plaintiffs to receive full recovery and clearly barred by Louisiana law.

C. The District Court Properly Held That Plaintiffs Improperly Joined Resident Employee Defendants In An Attempt To Destroy Federal Jurisdiction.

Plaintiffs asserted two claims against each of the four employee defendants: negligence and civil battery. ROA.107-113. The district court correctly found that, under *Canter v. Koehring Co.*, 283 So. 2d 716 (La. 1973), plaintiffs had no possibility of recovery on their negligence claims. ROA.798-799. Nor could plaintiffs recover on their civil battery claims, all of which were founded on "identical . . . allegations" against each employee defendant. ROA.800-804.

1. Plaintiffs Have No Possibility Of Recovery On Their Negligence Claims Against The Employee Defendants.

Louisiana law recognizes that, in certain circumstances, an employee who breaches an employment-imposed duty may be individually liable to a third party. *See Canter*, 283 So. 2d at 721. For this liability to arise, however, four factors must be satisfied: (1) the employer owed the third party a duty, the breach of which purportedly forms the basis for recovery; (2) the duty was delegated by the employer to the defendant-employee; (3) the defendant-employee breached the duty through his or her own personal fault; and (4) the defendant-employee's breach was of a duty owed personally to the plaintiff. *Id.* When this Court has previously addressed whether claims for *Canter* liability present a "reasonable basis for recovery" under the improper-joinder doctrine, it has strictly applied *Canter*'s requirements. *See, e.g.*, *Guillory*, 434 F.3d at 312-13.

As *Canter* makes clear, a defendant-employee cannot be held liable "simply because of his general administrative responsibility for performance of some function of employment." 283 So. 2d at 721. That an employee serves in a particular role, absent more, cannot subject that employee to liability. *See, e.g.*, *Rolls*, 34 F.4th at 438 (concluding, in wrongful-death action where welders' "hot work" ignited gas tank of gas and caused explosion, that improperly joined supervisor may have had "abstract responsibility for the tank," but not "*personal* blame" for decedent's demise under *Canter*); *Anderson v. Ga. Gulf Lake Charles, LLC*, 342 F. App'x 911, 916-18 (5th Cir. 2009) (per curiam) (affirming improper joinder determination in chemical-emissions suit because plaintiffs had merely "parsed employee job descriptions" in an attempt to "lay a veneer of specificity over . . . generalized claims that the [employee defendants] failed to prevent the incident"); *Brady v. Wal-Mart Stores, Inc.*, 907 F. Supp. 958, 960 (M.D. La. 1995) (holding store manager improperly joined where plaintiff, a customer on whom boxes fell while shopping, failed to allege that manager "stacked the boxes improperly or . . . personally caused the accident").

Like a supervisor or store manager, a "Responsible Official" cannot be held liable to third parties simply by virtue of his or her position. Accordingly, the employee defendants' "Responsible Official" roles—which were temporary and merely entailed submitting regulatory documents—cannot conceivably expose

them to personal liability for the plaintiffs' injuries. The Clean Air Act provides that certain sources of pollution cannot operate without a permit. *See* 42 U.S.C. § 7661a(a). Under that statute, responsible officials, such as the ones that were improperly sued here, are tasked with certifying permit applications, forms, or reports for "truth, accuracy, and completeness." La. Admin. Code tit. 33, § 517(B)(1) (2022). But aside from certifying that regulatory submissions are accurate, the responsible officials have no control over facility emissions. ROA.63-64, 792-795. Under Louisiana law, responsible officials have only limited, ministerial duties; they are merely authorized to sign and certify the accuracy of regulatory submissions. Yet, if plaintiffs have their way, every individual who has ever signed a regulatory document submitted to the Louisiana Department of Environmental Quality ("LDEQ") could be hauled into court for virtually any perceived grievance and used as mere token defendants inserted into this and any other case simply to destroy federal jurisdiction. Stated another way, if plaintiffs can defeat diversity jurisdiction simply by naming as defendants "responsible officials"—which every facility is required to have under LDEQ regulations, and who will naturally be domiciled in Louisiana—then diversity jurisdiction will be a dead letter here. And if such ministerial employees can be sued in this case for strategic purposes, that would open the door to plaintiffs to employ the same tactics in all manner of Clean Air Act cases.

2. Plaintiffs Have No Possibility Of Recovery On Their Civil-Battery Claims Against The Employee Defendants.

Plaintiffs' civil-battery claims, all of which are premised on a theory of battery by inaction, also present no possibility of recovery. "In a civil battery case, the burden of proof is on the plaintiff to establish that a battery was committed." *Frazer v. St. Tammany Par. Sch. Bd.*, 774 So. 2d 1227, 1234 (La. Ct. App. 2000). "[B]attery has been defined as intentional, offensive contact with another person." *Araujo v. Eitmann*, 762 So. 2d 223, 225 (La. Ct. App. 2000).

"Further, intent, in this context, has been held to mean that the actor either consciously desires the physical result of his act, or knows that the result is substantially certain to follow from his conduct." *Id.* (citing *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981)); *see also Bulot v. Intracoastal Tubular Servs., Inc.*, 730 So. 2d 1012, 1019 (La. Ct. App. 1999) ("Only where the actor entertains a desire to bring about the consequences that follow or where the actor believes they are substantially certain to follow, has the act been characterized as intentional."), *remanded on other grounds*, 749 So. 2d 659 (La. 1999).

In an attempt to establish intent, the plaintiffs allege that the individual defendants intended for the facility to release emissions of Ethylene Oxide ("EtO"); knew the EtO emissions would "make contact with and be inhaled by" those living nearby; and knew "to a substantial certainty" that inhalation of the emissions would expose those nearby to serious health risks, including a risk of

cancer. ROA.108-113. None of these allegations are sufficient to establish a possibility of recovery for battery against any of the employee defendants.

To begin, the allegation that the employee defendants intended for the facility to release EtO emissions is conclusory and, as such, insufficient. *Cf. Rolls*, 34 F.4th at 438. Even assuming for the sake of argument that the employee defendants knew about the risks of EtO as alleged and understood it would affect those in the surrounding area, such mere knowledge does not constitute intent in this context under Louisiana law. *See, e.g.*, *Bulot*, 730 So. 2d at 1019 (concluding that even if employer knew that employees were being exposed to toxic chemicals, that did not establish intent for employees' civil battery claim); *Acosta v. Denka Performance Elastomer, LLC*, No. 20-2323, 2021 WL 6062395, at *3 (E.D. La. Dec. 22, 2021) (dismissing civil battery claim against chemical company due to lack of intent); *Frank v. Shell Oil Co.*, 828 F. Supp. 2d 835, 850-51 (E.D. La. 2011) (determining that plaintiff failed to allege battery where she asserted that oil company knew that benzene exposure "could naturally, directly and probably result" in illness).

Knowing of a dangerous condition and failing to take action, absent more, is insufficient to establish the requisite intent for battery. In this case, plaintiffs made identical allegations of battery against each of the employee defendants. *See* ROA.800. And as the district court observed, these claims were premised "not on

the employee defendants' actions, but instead on their *inaction*." ROA.801. Plaintiffs could not—and still cannot—cite a case in which a viable claim for battery arose out of similar facts.

Accordingly, plaintiffs have no possibility of recovery on their claims for negligence and civil battery against the employee defendants. Because plaintiffs cannot recover against the employee defendants, the district court correctly determined that the employee defendants' improper joinder did not defeat diversity jurisdiction. Given that plaintiffs had no possibility of recovery against the individual defendants, whose presence was unnecessary to provide plaintiffs with the full recovery they (unsuccessfully) sought, plaintiffs sued these people for no reason other than to improperly destroy federal jurisdiction and deprive appellees of their entitlement to a federal forum. These are precisely the circumstances that the longstanding rule against fraudulent joinder were intended to prevent. Accordingly, this Court should affirm the district court's order denying plaintiffs' motion to remand.

CONCLUSION

For the foregoing reasons and those in the appellees' brief, the Court should affirm the district court's order denying remand.

Respectfully submitted,

/s/ Jonathan S. Franklin

Andrew R. Varcoe
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Jonathan S. Franklin
NORTON ROSE FULBRIGHT US LLP
799 9th Street N.W.
Washington, DC 20001
(202) 662-0466

Charlotte Kelly
NORTON ROSE FULBRIGHT US LLP
111 W. Houston Street
Suite 1800
San Antonio, TX 78205
(210) 270-9329

Counsel for Amici Curiae

November 17, 2022

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system.

November 17, 2022

/s/ Jonathan S. Franklin
Jonathan S. Franklin

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6049 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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November 17, 2022

/s/ Jonathan S. Franklin
Jonathan S. Franklin

Counsel for Amici Curiae