No. 14-31169

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KALE FLAGG,

Plaintiff-Appellant,

v.

STRYKER CORPORATION; MEMOMETAL INCORPORATED, USA,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Louisiana
Civil Action No. 2:14-CV-852

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES, SUPPORTING AFFIRMANCE

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January 11, 2016

CERTIFICATE OF INTERESTED PERSONS

No. 14-31169

KALE FLAGG,

Plaintiff-Appellant,

v.

STRYKER CORPORATION; MEMOMETAL INCORPORATED, USA,

Defendants-Appellees,

The undersigned counsel of record certifies that all of the interested persons and entities described in the fourth sentence of Rule 28.2.1 who have an interest in the outcome of this case are listed in the Certificate of Interested Persons contained in the brief of Defendants-Appellees, except for the following listed persons and entities. These representations are made in order that the judges of this Court may evaluate possible disqualification.

1. The Washington Legal Foundation (WLF), a proposed *amicus curiae*. WLF is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

2. Richard A. Samp and Mark S. Chenoweth are counsel for WLF in this matter.

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

Page(s)

Miscellaneous:

INTERESTS OF *AMICUS CURIAE*

The interests of Washington Legal Foundation (WLF)[1] are set forth more fully in the accompanying motion for leave to file. In brief, WLF is a public-interest law firm and policy center with supporters in all 50 States, including many in Louisiana. WLF's primary mission is the defense and promotion of free enterprise, including by ensuring that economic liberty is not impeded by excessive litigation. WLF has regularly appeared in federal courts to support the right of defendants in a state-court action to remove the case to federal court. *See*, *e.g.*, *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005).

The Framers of the Constitution viewed the right of defendants to remove cases to federal court as an important safeguard against the tendency of some state courts to favor local plaintiffs over out-of-state defendants. Throughout our Nation's history, Congress has granted federal courts broad removal jurisdiction over such cases and has repeatedly adopted measures designed to counteract devices adopted by plaintiffs' attorneys intent on frustrating the exercise of removal rights.

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[1] Pursuant to Fed.R.App.P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

One commonly employed anti-removal device is the joinder of in-state defendants. A federal statute, 28 U.S.C. § 1441(b)(2), bars removal to federal court on the basis of diversity jurisdiction of any case in which any in-state defendant has been "properly" joined and served. The Supreme Court and *every* federal appeals court has recognized, under the "improper-joinder doctrine" (referred to outside the Fifth Circuit as the "fraudulent-joinder doctrine"), that the presence of an in-state defendant does not prevent removal if the plaintiff joined the defendant merely for the purpose of defeating removal. *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568 (5th Cir. 2004) (*en banc*), *cert. denied*, 544 U.S. 992 (2005). Except under limited circumstances not present here, joinder of an in-state (or otherwise non-diverse) defendant will be deemed improper if "there is no reasonable basis for the district court to predict" that the plaintiff could prevail against that defendant. *Id.* at 573.

WLF is concerned that the panel's rationale, if adopted by the *en banc* court, would seriously undermine the protection granted to defendants by the improper-joinder doctrine. The panel recognized that there was *no* possibility that Appellant could have prevailed on his claims against the non-diverse defendants—his claims were not yet ripe as a matter of Louisiana law because he had not pursued administrative remedies available to him under the Louisiana Medical Malpractice

Act (LMMA), LA. REV. STAT. ANN. § 40: 1231.8.[2] Panel Slip Op. at 4. The panel nonetheless held that the non-diverse defendants were *not* improperly joined because Flagg's claims against them would ripen at some unspecified future date and he might at that time be able to state a valid claim upon which relief could be granted. *Id.* at 11. WLF is concerned that the panel's refusal to apply the improper-joinder doctrine to concededly invalid claims significantly undercuts the right of out-of-state defendants to remove cases to federal court.

WLF is even more concerned that this new limitation on the improper-joinder doctrine is being considered in connection with a case in which the plaintiff raised no objections to removal in the court below and in which the issue arose for the first time only after the district court issued a final judgment on the merits in favor of the out-of-state defendants. Particularly given that *complete* diversity of citizenship existed among the parties at the time of the final judgment (the claims against the non-diverse defendants having previously been dismissed without prejudice), WLF views the panel's decision to overturn the final judgment on the basis of an issue not raised by the parties as an unwarranted waste of judicial resources.

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[2] Until June 2, 2015, the LMMA was codified at LA. REV. STAT. ANN. § 40:1399.47.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the briefs of Appellees. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

In December 2013, Appellant Kale Flagg (a citizen of Louisiana) filed a product-liability and medical-malpractice lawsuit in Louisiana state court to recover for injuries he allegedly suffered as a result of surgery to implant artificial toes in his foot. The defendants included the manufacturers of the implanted medical devices: Appellants Stryker Corp. and Memometal Incorporated, USA (collectively, "Stryker"). Although neither Stryker nor Memometal is a citizen of Louisiana, Flagg also named three defendants who *are* Louisiana citizens: Dr. Denise Elliot (the physician who performed the surgery), Foot and Ankle Center (an entity operated by Dr. Elliot), and West Jefferson Medical Center (which operates the facility at which Dr. Elliot performed the surgery).[3]

On April 11, 2014, within 30 days of being served with the complaint, Stryker removed the lawsuit to the U.S. District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. § 1441(a), citing diversity of citizenship among all

[3] The district court and the panel referred to these three defendants collectively as the "Medical Defendants." WLF adopts that same nomenclature.

properly joined parties. The petition asserted that the Medical Defendants were not properly joined as defendants because Flagg (in light of his failure to exhaust administrative remedies under the LMMA before filing suit) had not stated a plausible cause of action against them.

Flagg did not file a motion to remand the case to state court, nor did he *ever* raise an objection to removal with the district court. To the contrary, he asked the district court to continue to exercise jurisdiction over the Medical Defendants and to stay proceedings against them until after the medical review panel—appointed to review the administrative complaint he filed against those defendants pursuant to the LMMA—rendered a decision. Dist Ct. Dkt. #10 (May 27, 2014). In the interim, he urged the court to permit discovery to proceed against Stryker. *Ibid.*

In June 2014, the district court dismissed all claims against the Medical Defendants *without* prejudice, ruling that the claims were premature until after completion of the medical review panel process. Dist. Ct. Dkt. #24 (June 16, 2014). From that date forward, the Medical Defendants ceased to be parties to the district court proceedings. Flagg has not appealed from that dismissal order.

The district court also granted Stryker's Rule 12(b)(6) motion to dismiss for failure to state a claim, concluding that the complaint did not plead facts that would permit the court to infer that Stryker's medical device was defective. *Id.* at 12-14.

The court granted Flagg leave to amend his complaint "to cure his defective pleading." *Id.* at 15.

After Flagg filed an amended complaint, Stryker filed a second motion to dismiss for failure to state a claim. In an order dated September 10, 2014 ("Dist. Ct. Slip Op."), the district court again granted the motion to dismiss, finding that the amended complaint was insufficient to state claims for: (1) defective product design; (2) defective construction or composition; (3) failure to provide adequate warnings regarding product risks; or (4) breach of an express warranty. Dist. Ct. Slip Op. at 8-12. Noting that it had previously specified the deficiencies in Flagg's complaint and that Flagg had failed to avail himself of the opportunity to correct those deficiencies, the court held that the claims against Stryker and Memometal "are hereby dismissed with prejudice." *Id.* at 13. Flagg appealed from the order and judgment dismissing his claims against Stryker and Memometal, asserting that the district court should have provided him with an additional opportunity to amend his complaint. The appeal did not raise any issues regarding Stryker's removal of the case to federal court.

The panel did not address whether the amended complaint adequately stated a cause of action. Rather, it *sua sponte* raised the issue of whether the federal district court possessed jurisdiction to hear Flagg's claims. The panel majority

concluded that the district court lacked diversity jurisdiction over the suit because Flagg had not acted improperly in joining the Medical Defendants—and thus that several proper defendants shared Flagg's Louisiana citizenship. Panel Slip Op. 1-11. The panel vacated the district court's judgment and remanded with directions that the district court remand the case to state court. *Id.* at 11.

The panel majority conceded that Flagg's claims against the Medical Defendants were "premature" and that a Louisiana court, had it been asked to rule on a motion to dismiss, would have held that the LMMA's exhaustion-of-administrative-remedies provision required dismissal without prejudice. *Id.* at 4 (citing *Delcambre v. Blood Sys., Inc.*, 893 So. 2d 23, 27 (La. 2005)). The panel nonetheless held that the Medical Defendants were not improperly joined as defendants because the prematurity of Flagg's claims against them did not "negate any reasonable basis for predicting that plaintiffs might establish liability against the in-state defendants." *Id.* at 11. In other words, it is insufficient for a removing defendant asserting improper joinder to demonstrate that the claims filed against non-diverse defendants would surely be dismissed. Rather, the panel held, the removing defendant(s) must *also* demonstrate that the plaintiff could not possibly recover against the non-diverse defendants in any other lawsuit that it might file against them in the future. *Id.* at 11 n.10.

Judge Davis dissented. Panel Slip Op. at 12-16. He concluded that the Medical Defendants were improperly joined defendants whose citizenship should not have been taken into account when ascertaining the existence of jurisdiction based on diversity of citizenship. He cited two recent precedents—*Melder v. Allstate*, 404 F.3d 328, 331-32 (5th Cir. 2005), and *Holder v. Abbott Labs*, 444 F.3d 383, 388-89 (5th Cir. 2005)—for the proposition that the "determination of whether a cause of action exists is made at the time of removal." *Id.* at 13. Noting that "Louisiana courts consistently support the plain language of the LMMA and hold no suit is available on plaintiff's claim until it is exhausted by the medical review panel," he concluded that *at the time of removal* Flagg lacked any plausible basis for establishing a claim against the Medical Defendants and thus that they were improperly joined with his claims against Stryker. *Id.* at 12-13.

The Court subsequently granted Stryker's petition for rehearing *en banc*. On December 14, 2015, the Court directed the parties to file supplemental letter briefs responding to five questions posed by the Court regarding the improper-joinder doctrine, including whether the Court "is free to reconsider the foundations of a doctrine that may require federal courts to invade the jurisdiction of state courts" and whether the Court should overrule *Melder* and *Holder*.

SUMMARY OF ARGUMENT

Stryker properly removed Flagg's complaint to federal court under 28 U.S.C. § 1441 based on diversity of citizenship, and thus the district court properly exercised jurisdiction over the complaint. Stryker met its burden of demonstrating that the citizenship of the Medical Defendants should be disregarded under the well-established improper-joinder doctrine by demonstrating that there was "no reasonable basis for the district court to predict" that Flagg could state a valid claim against the Medical Defendants. *Smallwood*, 385 F.3d at 573.

The panel majority readily conceded that, under controlling Louisiana law, the claims against the Medical Defendants were "premature"—and thus not only that Flagg had not stated a claim upon which relief could be granted but also that Flagg could not remedy the defect by filing an amended complaint. Panel Slip Op. at 4. In light of those concessions, the panel's conclusion that the Medical Defendants were properly joined is untenable. On the date of removal in April 2014, it was no doubt true that the LMMA medical-review-panel proceedings would *eventually* run their course (thereby exhausting pre-suit administrative remedies mandated by the LMMA)[4] and that Flagg might thereafter be able to

[4] Indeed, the medical review panel issued its decision on September 17, 2015, finding that "[t]he evidence does not support the conclusion that the defendants . . . failed to meet the applicable standard of care as charged in the

state a valid tort claim against the Medical Defendants. But the improper-joinder doctrine measures the validity of a plaintiff's claim as of the date of removal, and as of that date there was "no reasonable basis for the district court to predict that [Flagg] might be able to recover against an in-state defendant." *Smallwood*, 385 F.3d at 573.

Under the panel's altered formulation of the "no reasonable basis" rule, joinder is proper even in the absence of any possibility that the plaintiff could amend his complaint to state a valid claim against the non-diverse defendants as of the date of removal—so long as it is possible that at some unspecified date in the future the plaintiff might be able to establish liability against the non-diverse defendants in a separate, later-filed lawsuit. Panel Slip Op. at 11 n.10. But that formulation is inconsistent with this Court's repeated admonitions that the validity of the claim against non-diverse defendants should be measured *as of the date of removal*. *Melder*, 404 F.3d at 331-32; *Holder*, 444 F.3d at 388-89. The Court's rule is consistent with decisions from the U.S. Supreme Court and numerous other federal appeals courts. *See*, *e.g.*, *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939).

Smallwood provides the benefit of the doubt to plaintiffs whose inartful claims against non-diverse defendants are subject to dismissal under Rule 12(b)(6)

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complaint."

for failure to state a claim upon which relief can be granted but whose deficiencies might be remedied through the filing of an amended complaint. *Smallwood*, 385 F.3d at 573. But when, as here, the removing defendant has "identif[ied] the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the in-state defendant," the citizenship of the non-diverse defendant should be disregarded, and the exercise of jurisdiction on the basis of diversity of citizenship is proper. *Id*. at 573-74.

The Court's December 14, 2015 order asks whether the Court is "free to reconsider the foundations of the [improper-joinder] doctrine." The answer is no. The Supreme Court has repeatedly endorsed the doctrine. Although the Supreme Court has not directly addressed the continued validity of the doctrine in recent decades, it has said nothing to suggest that its older decisions are no longer binding, and Congress's recent amendments to the removal statutes have done nothing to call into question the doctrine's continued validity.

The improper-joinder doctrine serves important federalism interests by ensuring that out-of-state defendants are afforded access to federal courts, access that the Framers of the Constitution intended to grant them. Even if the Court were free to reconsider the improper-joinder doctrine, it should not do so. *Stare decisis* counsels against such reconsideration in the absence of evidence that the Court's

current case law is causing serious problems. Given that federal courts routinely address state-law issues in diversity jurisdiction cases, they can hardly be accused of "invad[ing] the jurisdiction of state courts" by undertaking a cursory "assess[ment of] the merits of claims between in-state parties," December 14, 2015 order at 1, for the purpose of determining whether the plaintiff has improper joined a defendant against whom he cannot possibly state a valid claim. Every federal circuit has concluded that the improper-joinder doctrine properly effectuates removal statutes that seek to prevent plaintiffs' attorneys from frustrating defendants' rights to remove cases to federal courts. One anti-removal tactic commonly employed by plaintiffs' attorneys is the joinder of in-state defendants merely to facilitate an assertion that diversity of citizenship is lacking, even though the complaint quite plainly does not state a claim against those defendants. The improper-joinder doctrine prevents use of such tactics as a means of restricting federal court jurisdiction.

Finally, a remand to state court is particularly inappropriate in this case given that: (1) throughout the course of district-court proceedings, Flagg *never* objected to removal, and 28 U.S.C. § 1447(c) states that, in most instances, motions to remand must be made within 30 days of the notice of removal; and (2) following the district court's dismissal of claims against the Medical Defendants

without prejudice, diversity jurisdiction incontestably existed (because complete diversity of citizenship existed among the parties). The Supreme Court held in *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), that a merits-based judgment may not be challenged on the ground that the district court lacked diversity jurisdiction at the time of removal, if—by the time the case was decided on the merits—the district court has acquired subject-matter jurisdiction because the non-diverse defendant is no longer a party. *Caterpillar* is controlling here. The district court provided Flagg with a fair opportunity to press his claims and then ruled against him on the merits. Having failed to object to removal to a court whose subject-matter jurisdiction became incontestable before entry of a final judgment, Flagg is not entitled to a second bite at the apple.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED SUBJECT-MATTER JURISDICTION OVER THIS CASE UNDER THE IMPROPER-JOINDER DOCTRINE

Federal law permits any defendant in a state-court proceeding who is not a citizen of the forum state to remove the case to federal district court, provided that the proceeding is one over which the district courts have original jurisdiction. 28 U.S.C. § 1441(a). District court original jurisdiction extends to any civil action where the amount in controversy exceeds $75,000 and that is "between citizens of

different states." 28 U.S.C. § 1332(a)(1). Supreme Court case law has long interpreted the phrase "between citizens of different states" as encompassing two important rules. First, a suit is not deemed one "between citizens of different states" unless *no* plaintiff is a citizen of a State of which any defendant is a citizen. *Lincoln Property*, 546 U.S. at 89. Second, in ascertaining the existence of diversity of citizenship, courts should only take into account the citizenship of those parties properly joined in the action. *Wecker v. Nat'l Enameling and Stamping Co.*, 204 U.S. 176, 185-86 (1907); *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Smallwood*, 385 F.3d at 573 (federal removal statutes "entitle a defendant to remove to a federal forum unless an in-state defendant has been 'properly joined.'") (quoting 28 U.S.C. § 1441(b)(2)).

Stryker amply demonstrated that the Medical Defendants were *im*properly joined and thus that their citizenship should not be taken into account in determining the existence of diversity jurisdiction.[5] Because Flagg was a citizen of

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[5] The Court has variously phrased the standard for whether a defendant should be deemed improperly joined for purposes of determining the existence of diversity jurisdiction. The *en banc* Court explained the standard as follows in *Smallwood*:

> [W]e have recognized two ways to establish improper joinder: (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. Only the second way is before us today, and we explained

Louisiana and neither Stryker nor Memometal were citizens of Louisiana, the district court possessed diversity jurisdiction over the lawsuit, and Stryker's removal of the case to federal court complied with the requirements of 28 U.S.C. § 1441.

A. Louisiana Law Makes Clear that, on the Date of Removal, Appellant Flagg Lacked a Viable Cause of Action Against the Non-Diverse Defendants

Flagg's December 2013 complaint purported to state a claim under Louisiana law for medical malpractice against the three Medical Defendants. However, he had filed an administrative complaint against the Medical Defendants before a medical review panel only one week earlier. As the Fifth Circuit panel recognized, the LMMA provides that completion of the medical review process is a prerequisite to filing a civil action claiming medical malpractice based on Louisiana tort law. Because, in light of Flagg's noncompliance with the LMMA's

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> in *Travis v. Irby* [326 F.3d 644, 648 (5th Cir. 2003)] that the test for fraudulent joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant. To reduce the possibility of confusion, we adopt this phrasing of the required proof and reject all others, whether the others appear to describe the same standard or not.

385 F.3d at 573.

exhaustion requirement, there was "no reasonable basis for the district court to predict" (at the time of the April 2014 removal petition) that Flagg could recover against the Medical Defendants, they were improperly joined and their Louisiana citizenship did not destroy complete diversity of citizenship.

That the LMMA mandates exhaustion as a prerequisite to a medical malpractice action is demonstrated both by the statutory language and Louisiana case law. First, the LMMA states explicitly that "no action against a health care provider . . . may be commenced in any court before the claimant's proposed complaint has been presented to a medical review panel established pursuant to this section." LA R.S. § 40:1231.8(B)(1)(a)(i).[6] It authorizes suit against a health care provider prior to completion of the medical review process only "if an opinion is not rendered by the panel within twelve months after the date of notification of the selection of the attorney chairman" of the review panel. LA R.S. § 40:1231.8(B)(1)(b). *See also* LA R.S. § 40.1231.8(N)(1)(b)(i) ("If an opinion is not rendered by the panel within the twelve month period established by this

[6] As explained below, Flagg filed suit many months *before* his administrative complaint was "presented" to a medical review panel. Indeed, Flagg did not even arrange the appointment of an "attorney chairman"—the *first* step in creating a medical review panel—until June 2014.

Subsection, suit may be instituted against the health care provider.").[7]

The 12-month clock began running on Flagg's administrative complaint on June 5, 2014, the date on which an attorney chairman was selected for Flagg's medical review panel. On April 30, 2015, the parties received a six-month extension for completion of the panel's work. The panel rendered its opinion on September 17, 2015. Accordingly, at all times relevant to this appeal, Flagg was unable to assert a medical malpractice claim upon which relief could have been granted under Louisiana law, and the Louisiana courts would have granted a motion to dismiss any claim filed by Flagg against the Medical Defendants prior to September 17, 2015.

As the Fifth Circuit panel recognized, Louisiana case law confirms this understanding of the LMMA. *See, e.g.*, *Delcambre v. Blood Systems, Inc.*, 893 So. 2d 23, 27 (2005) ("[N]o action for malpractice against a qualified health care provider, or his insurer, may be commenced in any court prior to submission of the complaint to a medical review panel and the panel has rendered its expert opinion on the merits of the complaint, unless this requirement is waived by the parties'

[7] LMMA authorizes an extension of the 12-month review process for good cause. LA R.S. § 40:1231.8(B)(1)(b) ("Either party may petition a court of competent jurisdiction for an order extending the twelve month period provided in this Subsection for good cause shown.").

agreement."). Indeed, an action for malpractice is subject to dismissal even after the medical review panel has issued its opinion, if the action was filed before the opinion was issued. *Brister v. SW Louisiana Hosp. Ass'n*, 624 So. 2d 970, 971-72 (La. App. 1993).

Permitting medical malpractice suits against health care providers to proceed under Louisiana law prior to completion of the medical review process would undercut the purposes of the LMMA. The statute was designed "to reduce or stabilize medical malpractice insurance rates and to assure the availability of affordable medical services to the general public." *Delcambre*, 893 So. 2d at 26. Clearly, the LMMA's administrative-exhaustion requirements would do nothing to promote those statutory purposes if plaintiffs were permitted to bypass the exhaustion requirements and proceed directly to the filing of medical malpractice lawsuits.

B. The Improper-Joinder Doctrine Is Not Rendered Inapplicable Simply Because Appellant Flagg Might Recover Against the Non-Diverse Defendants in Future Litigation

The panel majority readily conceded that, under controlling Louisiana law, the claims against the Medical Defendants were "premature"—and thus not only that Flagg had not stated a claim upon which relief could be granted but also that Flagg could not remedy the defect by filing an amended complaint. Panel Slip Op.

at 4. In light of those concessions, the panel's conclusion that the Medical Defendants were properly joined was untenable and was based on a misreading of *Smallwood*'s standard for determining when a non-diverse defendant has been improperly joined.

Smallwood explained that "the test for fraudulent joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant." 385 F.3d at 573.[8] That standard does not mean—as the panel apparently believed, *see* Panel Slip Op. at 11 n.10—that joinder is permissible so long as it is possible that at some unspecified future date the plaintiff might be able to establish liability against the defendants in a separate, later-filed lawsuit. Rather, the Court has repeatedly explained that the validity of the claim against non-diverse defendants should be measured *as of the date of removal*. *Melder*, 404 F.3d at 331-32; *Holder*, 444 F.3d at 388-89.[9]

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[8] The Court stated that its improper-joinder standard could also be expressed as follows: "there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Ibid.*

[9] Other federal appeals courts that have addressed the issue unanimously agree with the Court that the propriety of joinder (and thus the propriety of diversity-based removal) should be judged as of the date of removal. *See, e.g.*, *In re Briscoe*, 448 F.3d 201, 217 (3d Cir. 2006); *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1380 (11th Cir. 1998). The U.S. Supreme Court also agrees. *Pullman Co. v. Jenkins*, 305 U.S. at 537 (1939) ("[T]he right to remove [is] to be determined according to the plaintiffs' pleading at the time of the petition for

Holder held that a non-diverse defendant—a doctor alleged to have acted negligently in administering a vaccine to the plaintiff—was improperly joined because, as of the date of removal, there was no possibility that the plaintiff could recover against the doctor. *Ibid*. The Court concluded that recovery was barred because the plaintiff had failed to exhaust remedies mandated by the Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-1 *et seq*., prior to filing suit. The Court reached that conclusion even though it recognized the possibility that the plaintiff could recover against the doctor in a new lawsuit filed after he had complied with the Vaccine Injury Act's procedural requirements. *Ibid*.

Similarly, *Melder* upheld removal despite the presence of a non-diverse defendant, finding that the plaintiffs lacked any possibility of recovery because they had failed to exhaust an administrative remedy mandated by Louisiana law "before seeking judicial review." 404 F.3d at 332. The Court concluded that the non-diverse defendant was improperly joined despite explicitly acknowledging the possibility that the plaintiffs might prevail in later litigation, stating, "Requiring Plaintiffs to [exhaust administrative remedies before seeking judicial review] allows the administrative agency statutorily authorized, and best equipped, to address Plaintiffs' claims to do so *before a court exercises jurisdiction*." *Ibid*

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removal.").

(emphasis added).

The panel majority sought to distinguish *Holder* and *Melder* by asserting that the pre-suit remedies at issue in those cases were more "comprehensive" than the administrative scheme mandated by the LMMA and "provided for adjudication of the plaintiffs' claim." Panel Slip Op. at 8. That assertion is inaccurate; under neither the Vaccine Injury Act nor the LMMA does an adverse finding in pre-suit proceedings have any bearing on a plaintiff's ability to recover damages in a subsequently filed lawsuit. More importantly, the comprehensiveness of the administrative scheme is a red herring. In neither *Holder* nor *Melder* did the Court's analysis focus on the comprehensiveness of administrative remedies. Rather, in each instance the Court based its improper-joinder finding solely upon a conclusion that, under the relevant statutory scheme, the plaintiffs' failure to exhaust remedies deprived them of valid causes of action at the time of removal.

The Court adopted its "no possibility of recovery" standard to ensure that district courts do not become entangled in what would amount to a premature trial-on-the-merits during the course of determining whether a non-diverse defendant has been improperly joined (and thus whether a removed case should be remanded to state court). When the adequacy of the complaint's factual allegations is reasonably in dispute, *Smallwood* directs district courts to provide the benefit of

the doubt to plaintiffs (and to reject the improper-joinder claim) rather than to dig too deeply into the facts of the case. 385 F.3d at 573. But the *Smallwood* standard provides no support for plaintiffs when there is no possibility that they could cure any pleading deficiencies by filing an amended complaint. *Smallwood* directs that when, as here, the removing defendant has "identif[ied] the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the in-state defendant," the citizenship of the non-diverse defendant should be disregarded, and the exercise of jurisdiction on the basis of diversity of citizenship is proper. *Id*. at 573-74.

II. THE IMPROPER-JOINDER DOCTRINE SERVES IMPORTANT FEDERALISM INTERESTS AND PREVENTS ATTORNEYS FROM IMPROPERLY MANIPULATING FEDERAL JURISDICTION

The Court's December 14, 2015 order asks whether the Court is "free to reconsider the foundations of the [improper-joinder] doctrine" and whether it should do so. The answers are no and no. Supreme Court precedent makes clear that the citizenship of improperly joined defendants is not to be taken into account in determining a federal court's diversity jurisdiction under 28 U.S.C. § 1332.

A. The Framers Viewed Removal Rights as an Important Aspect of Our Federal System of Government

Moreover, far from amounting to an "inva[sion] of the jurisdiction of state

courts" (December 14 order, Question #1), the improper-joinder doctrine serves important federalism interests by reinforcing the Framers' intent that a federal forum be available to out-of-state defendants. The Framers contemplated that diversity jurisdiction and removal jurisdiction would play a vital role in our federal system of government. The need to protect out-of-state litigants from the biases of state courts was widely discussed at the time the Constitution was being drafted. For example, James Madison argued that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them." 3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 486 (2d ed. 1836).

Similarly, Alexander Hamilton argued that federal courts should be granted jurisdiction over cases between citizens of different states, because such a court was "likely to be impartial between the different states and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded." THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982). As ratified, the Constitution explicitly included cases "between Citizens of different States" within the "judicial Power." U.S. Const., art. III, § 2, cl. 1.

The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. But those concerned about the problem of biased state courts realized that diversity jurisdiction could not by itself fully address the problem: it provided no protection to out-of-state defendants sued in state court. Section 12 of the Judiciary Act addressed that latter concern by authorizing an out-of-state defendant sued by a resident plaintiff in state court to remove the case to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. The right of removal "has been in constant use ever since." *Tennessee v. Davis*, 100 U.S. 257, 265 (1880). The Supreme Court has long recognized that the right of removal was intended to grant defendants the same protections from local prejudice in state court that diversity jurisdiction grants to plaintiffs. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 348 (1816).

Importantly, the Supreme Court has held that although it interprets 28 U.S.C. § 1332(a)(1) as requiring *complete* diversity of citizenship, the Constitution itself does not require complete diversity. *Lincoln Property*, 546 U.S. at 89. Thus, the Court has upheld Congress's decision, in adopting the Class Action Fairness Act (CAFA), Pub. L. No. 109-2, to permit removal of large class actions on the basis of *minimal* diversity (*i.e.*, requiring only that at least one defendant does not share state citizenship with all of the plaintiffs). *See, e.g., Dart Cherokee Basin*

Operating Co. v. Owens, 135 S. Ct. 547 (2014).[10] *Dart Cherokee* emphasized that removal jurisdiction is in no sense disfavored under the Constitution and that there is thus no generalized "presumption" against removal; rather, the existence of removal jurisdiction should be evaluated based on the terms of the jurisdictional statute at issue. *Id.* at 554.

B. The Improper-Joinder Doctrine Assists in Preventing Plaintiffs' Attorneys from Manipulating Jurisdiction to Deny Out-of-State Defendants Their Choice of a Federal Forum

When construing the jurisdictional statute at issue here, 28 U.S.C. § 1332(a)(1) (granting federal district courts jurisdiction over civil actions "between citizens of different states"), the Supreme Court has repeatedly held (*see, e.g.*, *Wecker* and *Wilson, supra* at 14) that courts determining the existence of diversity jurisdiction should only take into account the citizenship of those parties *properly* joined in the action.

The great frequency with which plaintiffs' attorneys join non-diverse defendants in state-court lawsuits for the sole purpose of frustrating removal

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[10] Congress adopted CAFA based on findings that state-court suits against out-of-state defendants were sometimes being improperly "[kept] out of Federal court," and that state courts were "sometimes acting in ways that demonstrate bias against out-of-State defendants" and otherwise "undermin[ing] . . . the concept of diversity jurisdiction as intended by the framers." CAFA, § 2(a)(4).

jurisdiction—despite lacking a valid basis for their claims—is well-documented. *See, e.g.*, Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 61 (2009) ("To avoid removal plaintiffs often join non-diverse defendants, such as local doctors, hospitals, pharmacies, employees and/or sales representatives, in an attempt to defeat diversity jurisdiction.") In the absence of the improper-joinder doctrine, federal courts would be ill-equipped to prevent plaintiffs' attorneys from manipulating federal court jurisdiction in this manner. Not surprisingly, therefore, *every* federal circuit has strongly endorsed the doctrine.[11]

Nor is it any answer to suggest that an out-of-state defendant faced with a lawsuit that includes an improperly joined non-diverse defendant should await state-court dismissal of the claims against the non-diverse defendant before filing a removal petition. Federal removal statutes impose strict deadlines on the filing of

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[11] *See, e.g., Universal Truck & Equip. Co. v. Southworth-Milton, Inc.*, 765 F.3d 103, 108 (1st Cir. 2014); *Bounds v. Pine Belt Mental Health Care Resources*, 593 F.3d 209, 217-18 (2d Cir. 2010) (recognizing that a non-diverse defendant has been improperly joined if state law bars claims against that defendant until after the plaintiff has exhausted not-yet-utilized administrative remedies). As the Seventh Circuit has explained, the fraudulent-joinder doctrine rests on an understanding that a claim against non-diverse defendants should not be considered in determining diversity jurisdiction when it is "utterly groundless," because "a groundless claim does not invoke federal jurisdiction." *Walton v. Bayer Corp.*, 643 F.3d 994, 999 (7th Cir. 2011) (Posner, J.).

removal petitions. *See* 28 U.S.C. § 1446(b). If a defendant is forced to await action by the state court before filing a removal petition, the deadline for filing the petition may well have passed before the defendant has an opportunity to file.

Perhaps recognizing that the panel decision starkly conflicts with *Holder* and *Melder*, the Court's December 14 order asked the parties to address whether *Holder* and *Melder* should be overruled. For all the reasons set forth above, the answer to that question is no. Those decisions are based on the commonsense understanding that federal jurisdiction should not be abrogated on the basis of a groundless claim, even when it is possible that the plaintiff might later prevail on the claim in subsequent litigation, after the claim has ripened.

C. Creating a "Waiver" Exception Would Undermine the Improper-Joinder Doctrine

The panel argued that joinder was not improper because a possibility existed that claims similar to Flagg's might have prevailed under other circumstances; for example, the panel noted, although the Medical Defendants did not in this instance waive any defenses, the LMMA permits waiver of the medical review process "by agreement of all parties." Panel Slip Op. at 9. But recognizing a waiver exception to the improper-joinder doctrine would completely swallow the rule. It is *always* possible that a non-diverse defendant will waive defenses to liability—for

example, by failing to answer the complaint and subjecting itself to a default judgment. Federal appeals courts have never declined to apply the improper-joinder doctrine to facially invalid claims against non-diverse defendants, based on the possibility that the plaintiff could prevail if the defendants were to waive defenses. *See, e.g.*, *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1319-20 (9th Cir. 1998) (finding that non-diverse defendants were improperly joined because claims against them were barred by the statute of limitations, even though they could have waived the defense and even though the statute of limitations is a procedural bar that "does not truly go to the merits of the plaintiff's claim in any sense.").

In sum, if the Court decides to re-examine the foundations of the improper-joinder doctrine, it should conclude that the doctrine should be retained because it serves important federalism interests—by reinforcing the Framers' intent that a federal forum be available to out-of-state defendants and by counteracting devices adopted by plaintiffs' attorneys intent on frustrating the exercise of removal rights.

III. JURISDICTION IS FURTHER SUPPORTED BY THE EXISTENCE OF COMPLETE DIVERSITY OF CITIZENSHIP AT THE TIME THE DISTRICT COURT ENTERED JUDGMENT

On June 16, 2014, the district court dismissed the claims against the Medical Defendants without prejudice, ruling that the claims were premature until after completion of the medical review panel process. Thereafter, the district court

unquestionably possessed subject-matter jurisdiction under § 1332(a)(1) based on complete diversity of citizenship: the only remaining defendants (Stryker and Memometal) were not citizens of the same State as Flagg, the sole plaintiff. Flagg never objected to removal of proceedings to federal court, and the district court dismissed his lawsuit against Stryker and Memometal with prejudice on September 10, 2014, finding that it failed to state a claim upon which relief could be granted. Given those facts, a remand to state court is particularly inappropriate in this case. *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), requires a finding that, even if the case was not initially removable under § 1441(a), the district court later acquired the requisite jurisdiction to enter a final judgment against Flagg.

Caterpillar involved a tort claim filed in Kentucky state court by a citizen of Kentucky injured while operating a bulldozer manufactured by a Delaware corporation headquartered in Illinois. The manufacturer removed the case to federal court. By the time the case reached the Supreme Court, all agreed that the district court had erred by denying the plaintiff's remand motion despite the absence of complete diversity—one of the defendants was a citizen of Kentucky. However, the claims against the non-diverse defendant were eventually dismissed (due to a settlement), and the case proceeded to trial with the Kentucky plaintiff and the Illinois manufacturer as the only parties. Even though the plaintiff

repeated his objections to removal at every opportunity, the Supreme Court unanimously upheld the district court's jurisdiction to conduct a trial and affirmed the judgment for the manufacturer—citing "considerations of finality, efficiency, and economy." *Caterpillar*, 519 U.S. at 75. The Court explained:

> [N]o jurisdictional defect lingered through judgment in the District Court. To wipe out the adjudication postjudgment, and return to state court a case now satisfying all jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

Id. at 77.

This is a *per se* case. Unlike the plaintiff in *Caterpillar*, Flagg never contested the federal courts' jurisdiction—until after the panel raised the jurisdictional issue *sua sponte*. The district court provided Flagg with a full and fair opportunity to present his claims before dismissing them with prejudice. Given the uncontested existence of complete diversity at the time that the district court entered judgment, Flagg is not entitled to a second bite at the apple.

Application of improper-joinder doctrine in cases of this sort may make it difficult for plaintiffs injured by a drug or device to obtain a joint trial of claims against both the manufacturer and the treating physician. But that difficulty is the result of Louisiana's decision to bar malpractice suits against health-care providers until after administrative remedies have been exhausted. In any event, the

exhaustion requirement will rarely delay the malpractice claim by more than 18 months. Once the claim has ripened, a plaintiff may file a motion to join the health-care providers to the pending suit against the manufacturer. At that point, the district court would have the option of granting the motion and then remanding the case to state court. 28 U.S.C. § 1447(e). But this Court need not decide how such a motion should be resolved, because Flagg filed no such motion.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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Dated: January 11, 2016

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation (WLF). Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X5), the word count of the brief is 6,979, not including the certificate of interested parties, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

Dated: January 11, 2016

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2016, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court of the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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