No. 24-724

IN THE

Supreme Court of the United States

THE HAIN CELESTIAL GROUP, INC., *et al.*,

Petitioners,

v.

SARAH PALMQUIST, INDIVIDUALLY AND AS NEXT FRIEND OF E.P., A MINOR, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

Counsel for Amicus Curiae

120470

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

This case presents an important unresolved question fundamental to ALF's civil justice mission. The Fifth Circuit's holding that the district court's final judgment as to completely diverse parties must be vacated—and that this product liability suit must be remanded in its entirety for de novo adjudication in state court—not only is wrong as a matter of law, but

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[1] No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

also encourages post-judgment vertical (i.e., state court vs. federal court) forum shopping. Under the Fifth Circuit's ruling, a plaintiff now has more reason than ever to include a nondiverse defendant at the outset of her state-court suit: She now knows that if the suit is removed on diversity grounds, and the district court, after dismissing the nondiverse defendant (here, Petitioner Whole Foods Market) as improperly joined, enters final judgment for the diverse defendant (here, Petitioner Hain Celestial Group), the court of appeals might reverse the improper-joinder ruling and reward her with a total do-over in a more hospitable Texas, Louisiana, or Mississippi state trial court.

This state-court mulligan—a second chance to impose liability on a product manufacturer that already has endured the costs and burdens of district court litigation and won on the merits—is especially wasteful, troubling, and unfair where, as here, the district court, after hearing at trial the ambivalent testimony of the plaintiffs' experts, has concluded that the critical element of general causation is "simply not supported by the science." Pet.App. 30a.

As part of its civil justice mission, ALF long has advocated for leveling the playing field in product liability litigation. In addition to supporting trial judges' gatekeeping duty to identify and reject unreliable and/or irrelevant scientific testimony, ALF often has urged this Court to repudiate unfair plaintiff-side forum-shopping, which undermines defendants' due process rights. Such forum

manipulation includes improper joinder of a nondiverse defendant for the purpose of defeating removal jurisdiction.

The Court should hold that a federal district court's final judgment as to completely diverse parties need not be vacated even if a court of appeals later determines (here, based on non-jurisdictional allegations in a post-removal amended complaint) that dismissal of the nondiverse defendant was erroneous.

This brief discusses why the post-judgment vertical forum shopping that the Fifth Circuit's opinion enables and encourages plaintiffs to pursue undermines defendants' due process rights.

SUMMARY OF ARGUMENT

"[F]orum shopping in American courts [has] three dimensions: vertical shopping between federal and state court, horizontal shopping among states, and individual shopping for particular judges." Scott William Dodson, *The Culture of Forum Shopping in the United States*, 57 Int'l Law. 307 (2024). Some types of forum shopping are authorized by statute, *e.g.*, a plaintiff's timely and meritorious motion to remand to state court under 28 U.S.C. § 1447(c). But when plaintiff-side forum shopping places a defendant at an *unfair* disadvantage, it offends due process and undermines the nation's civil justice system.

This is the situation here. As the certiorari petition explained, the Fifth Circuit's opinion deepens an

existing split of authority regarding whether a district court's post-removal final judgment as to completely diverse parties must be vacated if a court of appeals later determines that a nondiverse party was erroneously dismissed on the ground of improper joinder. By answering this remedy-related question affirmatively, and ordering that the case be remanded to state trial court for a total do-over, the Fifth Circuit has given a green light to *post-judgment* vertical forum shopping. The circuit court's opinion provides plaintiffs and their counsel in product liability and other types of litigation a significant added incentive (i) for throwing a nondiverse party into the mix; (ii) amending the substantive allegations in their complaint after removal in a further effort to destroy diversity jurisdiction; and (iii) even if remand is denied, district court litigation proceeds through discovery and trial, and final judgment is rendered in favor of the remaining, diverse defendant, appealing the denial of remand with the hope and prospect of being able to start anew in state court.

There is no dispute that Respondents' product liability claims were adjudicated fully and fairly by the district court. In contrast, the post-judgment vertical forum shopping that the Fifth Circuit has authorized—tantamount to double jeopardy—is fundamentally unfair to Hain, which must relitigate in state court (or be forced to settle) a liability suit that it *already has won on the merits* in federal court. This unfair do-over of the district court's merits determination—which the Fifth Circuit did not

disturb—also would be a tremendous waste of judicial resources for *both* federal and state courts, whose dockets are chronically clogged.

The Fifth Circuit's precedential ruling is particularly troubling in product liability litigation where, as here, scientific and/or medical testimony is involved. As the record reflects, the district court, in granting judgment as a matter of law to product manufacturer Hain, carefully considered Respondents' expert and other trial testimony and concluded that it failed to address, much less demonstrate, the essential element of general causation. Although the court of appeals expressly declined to address the merits of the district court's conclusion, it has cleared the way for a state trial court (in a notoriously pro-plaintiff state-court system) to second guess the district court on the adequacy of the causation testimony.

ARGUMENT

A. The Fifth Circuit's opinion encourages post-judgment vertical forum shopping

1. "As a rule, counsel, judges, and academicians employ the term 'forum shopping' to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit." Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 Tul. L. Rev. 553 (1989); *see also* Richard Maloy, *Forum Shopping – What's Wrong With That?*, 24 Quinnipiac L. Rev. 25,

28 (2005) ("[F]orum shopping is the taking of an unfair advantage of a party in litigation.").

> Among the considerations that may motivate forum shopping are: the convenience or expense of litigating in the forum; the inconvenience and expense to one's adversary; the probable or expected sympathies of a potential jury pool; the nature and availability of appellate review; judicial calendars and backlogs; local rules . . . and virtually any other inter-jurisdictional difference.

Id. at 27. Forum shopping also can lead to "forum selling" since "some courts are likely to be biased in favor of plaintiffs in order to attract litigation and thus benefit themselves or their communities." Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 243 (2016).

There is no question that the nation's civil justice system continues to suffer from "blatant forum shopping by plaintiffs' attorneys, who prefer to litigate their cases in courts known for finding liability and returning big awards." ATR Found., Judicial Hellholes 2024-2025 10.[2] Plaintiffs who, through their counsel, forum shop for the purpose of gaining an unfair litigation advantage undermine the civil justice

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[2] Available at https://tinyurl.com/e63behx2.

system and deprive defendants of the due process to which they are entitled.

2. Forum shopping can be vertical, *i.e.*, *intra*state as well as interstate, since "the outcome of a lawsuit may depend on whether an action is brought in state or federal court." Juenger, *supra*, at 556; *see also* Dodson, *supra*, at 307.

This Court has endeavored to deter vertical forum shopping at least since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), where the Court held that "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). The Court explained in *Hanna v. Plumer*, 380 U.S. 460, 467 (1965) that *Erie* was "in part a reaction to the practice of 'forum-shopping'"; *see also id.* at 468 (one of the "twin aims of the *Erie* rule [is] discouragement of forum-shopping"); *Ferens v. John Deere Co.*, 494 U.S. 516, 534 (1990) (Scalia, J., dissenting) (the goal of *Erie* "was to prevent 'forum shopping' as between state and federal systems").

Although *Erie* was "an anti-forum-shopping decision . . . intrastate forum shopping between state and federal courts continues unabated." Juenger, *supra*, at 557, 560. "*Erie* notwithstanding, there remain good reasons for preferring one set of courts to another, and litigants keep jockeying for position by manufacturing or destroying diversity." *Id.* at 560.

The Court long has recognized that the statutory "right of removal cannot be defeated by a fraudulent

joinder of a resident defendant having no real connection with the controversy . . . . the joinder, although fair on its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent removal." *Wilson v. Republic Iron Co.*, 257 U.S. 92, 97 (1921); *see also Smallwood v. Ill. Cent. R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) ("[T]he Federal courts should not sanction devices intended to prevent the removal to a Federal court where one has that right . . . .") (internal quotation marks omitted); Baerett R. Nelson & Gavyn Roedel, *Acid Rain: Detoxifying Diversity Jurisdiction's Poisonous Cycle*, 36 BYU PreLaw Rev. 205, 227 (2022) ("Courts have long recognized plaintiff use of the fraudulent joinder as a scam to anchor their case to state court.").

In other words, "naming a defendant solely to prevent removal to federal court under diversity jurisdiction is forum shopping," Maloy, *supra*, at 47, and should be prohibited.

3. From the viewpoint of Texas-based product liability plaintiffs, there is ample reason to file suit in state court, and in a way that attempts to defeat diversity removal jurisdiction. As a general matter, state-court hostility toward out-of-state corporate defendants, especially in product liability litigation, infects the civil justice system. This includes, for example, actual or apparent bias against corporate defendants concerning threshold legal defenses, timing and scope of discovery, admission of expert testimony, jury instructions, and "nuclear" damages awards, coupled with inconsistent application of

procedural rules and limited opportunities for timely and meaningful appellate review. *Cf.* S. Rep. No. 109-14 (2005) (Class Action Fairness Act of 2005) at 10-27 (discussing a panoply of state-court class-action abuses).

The three States encompassed by the Fifth Circuit rank at or near the bottom in a U.S. Chamber Institute for Legal Reform ("ILR") survey on "how fair and reasonable the states' liability systems are perceived to be by U.S. businesses." U.S. Chamber Inst. for Legal Reform, 2019 Lawsuit Climate Survey: Ranking the States, A Survey of the Fairness and Reasonableness of State Liability Systems 3.[3] This survey of "how the state courts are perceived by the business community," *id.* at 7, ranks the overall fairness of the Texas judicial system at # 38, Louisiana at # 47, and Mississippi at # 49. *Id.* at 1. The ILR survey covers, and also breaks down, ten key elements of fairness. *Id.* at 10. For example, when "Trial Judges' Impartiality" is considered, Texas ranks # 44 in the nation, Mississippi # 47, and Louisiana dead last, at # 50. *Id.* at 12, 19. For "Trial Judges' Competence," Texas is # 41, Mississippi # 46, and Louisiana # 49. *Id.* at 12, 20. These States' civil justice systems fare no better in the "Scientific and Technical Evidence," "Juries' Fairness," and "Damages" categories. *Id.* at 11-12, 16, 18, 21. As to the "worst

[3] Available at https://tinyurl.com/yphbe3j9.

local jurisdictions" for judicial fairness to businesses, Jefferson County, Texas is in the nation's top five.

Along the same lines, ILR has analyzed the recent trend toward "nuclear verdicts—defined as verdicts of $10 million or more." U.S. Chamber Inst. for Legal Reform, Nuclear Verdicts, An Update on Trends, Causes, and Solutions (2024) 1.[4] The report explains that

> [p]ersonal injury lawyers have long preferred to try cases in state courts—which they often perceive as having more plaintiff-friendly judges, jurors, and court rules—than more neutral, federal courts with lifetime-appointed judges. The data supports that perception. *Nuclear verdicts were far more frequent in state courts than federal courts*.

Id. at 14 (emphasis added). In fact, Texas, along with Florida, California, and New York, "host[s] half of the nation's nuclear verdicts." *Id.* at 4. And Louisiana's growing notoriety for nuclear verdicts has helped that State earn a spot on the latest American Tort Reform Foundation list of "Judicial Hellholes." *See* ATR Found., *supra*, 2, 68.

4. The fact that this litigation was fully and fairly adjudicated by the federal district court—which granted judgment as a matter of law to Hain after

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[4] Available at https://tinyurl.com/334m6epe.

dismissing Whole Foods as improperly joined and hearing Respondents' case against Hain at trial—illustrates the fundamental unfairness of the *post-judgment* vertical forum shopping that the Fifth Circuit's opinion has enabled. Consider the following:

● The district court thoroughly vetted Respondents' attempt to sustain their diversity-destroying joinder of Whole Foods, a Texas-based non-manufacturer retailer of the Hain baby food products at issue. Noting that the new claims against Whole Foods in Respondents' post-removal amended complaint could not be considered, the court nonetheless carefully analyzed Respondents' allegations under the non-manufacturer seller exceptions to the Texas Products Liability Act, Tex. Civ. Prac. & Remedy Code, §§ 82.003(a)(1)-(7), and concluded that "there still is no reasonable basis to predict that they could recover against Whole Foods." Pet.App. 25a-26a. The court thus found that Whole Foods was improperly joined, denied Respondents' motion to remand, and dismissed their claims against Whole Foods with prejudice. *Id.* at 28a.

● The district court litigation proceeded through extensive discovery, motions practice, jury selection, and presentation of Respondents' expert witness and other trial testimony. As summarized in Petitioners' brief:

> With Whole Foods out of the case, Respondents and Hain conducted more than a year of discovery, took nearly twenty fact

> and expert depositions, filed cross-motions for summary judgment, litigated extensive motions *in limine*, and, in February 2023—21 months after the district court dismissed Whole Foods with prejudice—went to trial.
>
> After presenting seven days of witness testimony, Respondents rested.

Pet. Br. at 5. Following argument, the district court then granted Hain's Rule 50(a) motion for judgment as a matter of law based on Respondents' failure to prove causation. *Id.* at 5-6.

● Now the Fifth Circuit—based on Respondents' post-removal amended complaint—has reversed the district court's denial of Respondents' motion to remand, vacated the district court's Final Judgment, and sent the suit back to the Texas state trial court. Pet.App. 23a. As if the fulsome district court proceedings never had occurred, the state court has rebooted Respondents' suit against both Hain and Whole Foods, including by denying their motion for stay pending appeal, allowing discovery to commence, and setting a trial date. *See* Pet. at 10. To make matters worse, in accordance with 28 U.S.C. § 1446(c)(1), Hain will be stuck in state court even if Whole Foods is dismissed (again) under the Texas Products Liability Act, Tex. Civ. Prac. & Rem. Code § 82.003(a) (Liability of Nonmanufacturing Sellers). *See* Pet.App. 26a.

As a practical matter, the court of appeals not only has authorized, but also encouraged, post-judgment

vertical forum shopping. Within the Fifth Circuit (and the Eleventh Circuit too, *see* Pet. at 10-11), state-court plaintiffs who sue a nonresident corporation now have every reason to name, and try to allege a viable claim against, a nondiverse defendant: (i) Even if the suit is removed, the district court denies the plaintiffs' motion to remand based on a post-removal amended complaint, and the nondiverse party is dismissed as improperly joined; (ii) even if what follows in the district court are years of discovery, robust motions practice, juror selection, and trial testimony from the plaintiffs' expert and fact witnesses; and (iii) even if final judgment ultimately is rendered in favor of the remaining (diverse) defendant; the plaintiffs *still* can forum shop by appealing the denial of remand along with challenging the final judgment. Under the Fifth Circuit's rule, if the court of appeals reverses the district court's denial of remand, its final judgment between completely diverse parties will be vacated and the suit remanded to state court for a total do-over, as if the district court proceedings never occurred.

The Court's opinion in this case should ensure that this enormous waste of judicial resources—and unfair post-judgment vertical forum shopping—does not recur. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 (1996) ("Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming.").

B. Post-judgment vertical forum shopping is particularly unfair where, as here, it enables a state court to second guess a federal district court's case-dispositive assessment of scientific testimony

At least as far back as the *Daubert* trilogy, *amicus curiae* Atlantic Legal Foundation has been one of the nation's leading advocates for sound science in the courtroom, including in product liability litigation.[5] In granting Hain's motion for judgment as a matter of law, the district court recognized the importance of sound science. District Judge Brown, after hearing the expert and other testimony presented by plaintiffs, explained

> that still leaves us with no evidence of general causation. We heard no testimony from a qualified expert that the ingestion of heavy metals can cause the array of symptoms that [E.P.] suffers from, much less any evidence of at what level those metals would have to be ingested to bring

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[5] On behalf of esteemed scientists such as Nicholaas Bloembergen (a Nobel laureate in physics) and Bruce Ames (one of the world's most frequently cited biochemists), ALF submitted amicus briefs in each of the *Daubert* trilogy of cases—*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)—concerning admissibility of expert testimony under Federal Rule of Evidence 702. In *Daubert* the Court quoted a passage from ALF's brief concerning the meaning of scientific knowledge as used in Rule 702. *See* 509 U.S. at 590.

> about those symptoms. The law is clear that such testimony is necessary to show general causation.
>
> I do not believe the failure to present any expert evidence on general causation was a failure of lawyering, rather, such *general causation is simply not supported by the science*. [E.P.]'s lawyers have made a valiant effort to persuade the Court otherwise, but *the scientific facts are simply not there*.

Pet.App. 30a-31a (emphasis added).

Federal Rule of Civil Procedure 50(a) provides that "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . grant a motion for judgment as a matter of law." As the district court explained, "[a] failure to offer evidence of general causation is fatal to all of the plaintiffs' claims." *Id.* 31a. The court found this is the case here.

Hain's Rule 50(a) motion (Doc. No. 65) discussed the causation-related testimony presented by Respondents. "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *Knight v. Kirby Inland Marine*, 482 F.3d 347, 351 (5th Cir. 2007). None of Respondents' witnesses who testified at trial

"identified a harmful level, or even a range, at which exposure to heavy metals causes major neurocognitive disorder, severe intellectual disability, **or** autism spectrum disorder." Doc. No. 165 at 11. Indeed, one of Respondents' experts testified that the threshold level is "unknown." *Id.* Further, the Food and Drug Administration regulates and monitors Hain's and other companies' baby food products, and never has found Hain's products to be unsafe. *Id.* at 14-15.

In reversing the denial of Respondents' motion to remand, the Fifth Circuit did nothing to disturb the district court's unequivocal conclusion concerning Respondents' failure to prove general causation. *See* Pet.App. 23a. Nonetheless, although Respondents decisively lost on the science in district court, the post-judgment forum shopping authorized by the court of appeals now entitles them to try again in a Texas state trial court, where the judge presumably can ignore the district court's science-based findings and allow the case to proceed to a jury verdict.

In addition to ranking poorly overall in civil justice fairness, in part because they comprise one of the nation's top "nuclear verdict" court systems, Texas state courts are far down the list at # 35 when it comes to fairness in evaluating scientific evidence. *See* ILR, 2019 Lawsuit Climate Survey, *supra*, at 18. Although Respondents' product liability claims are "simply not supported by the science," Pet.App. 30a, there is a significant risk of a Texas state-court outcome radically different from the carefully considered, plaintiffs-take-nothing victory that Hain achieved in

federal district court. Coupled with the fact that this case is one of a number of similar product liability suits alleging heavy metal contamination of baby food products, *see* Pet. at iv, there is a compelling need for this Court to reverse the Fifth Circuit's decision.

CONCLUSION

The Fifth Circuit's judgment should be vacated and the case remanded.

Respectfully submitted,

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

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