No. 02-1689

IN THE
Supreme Court of the United States

GRUPO DATAFLUX,

Petitioner,

v.

ATLAS GLOBAL GROUP, L.P., OSCAR ROBLES-CANON, and FRANCISCO LLAMOSA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Should a new exception be created to the longstanding rule that diversity jurisdiction must be determined based on the citizenship of the parties and the circumstances that existed at the time suit was filed?

2. Should unilateral changes in a party's citizenship during the course of litigation be allowed to create diversity jurisdiction that did not exist at the time suit was filed?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below are:

Atlas Global Group, L.P. ("Atlas") (plaintiff/counter-defendant/respondent);

Oscar Robles-Canon ("Robles-Canon") (counter-defendant/respondent);

Francisco Llamosa ("Llamosa") (counter-defendant/respondent); and

Grupo Dataflux ("Dataflux") (defendant/counter-claimant/petitioner). Atlas filed suit against "Grupo Dataflux." Joint App. 18a, 34a; 7 R. 11.[1] The parties have stipulated for purposes of this case that Grupo Dataflux can be considered the same company as Dataflux, S.A. de C.V. 2 R. 1580-81.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of Dataflux, S.A. de C.V. is Grupo Dataflux, S.A. de C.V. Grupo Dataflux, S.A. de C.V. is a publicly traded company on the Bolsa Mexicana de Valores.

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1. The record on appeal consists of seven bound volumes of pleadings prepared and sequentially numbered by the district court clerk. The trial testimony was not transcribed and is not part of the record on appeal. The record is cited in this brief as "___ R. ___," citing first by volume and then by page. The appendix to Dataflux's petition for writ of certiorari is cited as "Pet. App." The parties' joint appendix is cited as "Joint App."

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OPINION BELOW

The trial court's dismissal order and order denying Atlas' motion to alter or amend are unpublished. The trial court's orders were entered in C.A. No. H-97-3779; *Atlas Global Group, L.P. v. Grupo Dataflux*; in the United States District Court for the Southern District of Texas, Houston Division. Pet. App. 20a-24a. The court of appeals' opinion is published as *Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168 (5th Cir. 2002). *Id*. at 1a-19a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 22, 2002. Dataflux timely filed a petition for rehearing en banc and petition for panel rehearing. The Fifth Circuit denied the petitions on February 17, 2003. Pet. App. 25a-26a. Dataflux timely filed a petition for writ of certiorari on May 14, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the federal diversity statute, 28 U.S.C. § 1332(a)(2), are reproduced in the appendix to the petition for writ of certiorari. Pet. App. 27a-29a. The portion of Article III of the United States Constitution relating to federal diversity jurisdiction between United States citizens and foreign citizens provides as follows:

> The judicial Power shall extend to . . . Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

STATEMENT OF THE CASE

Atlas sued Dataflux in the United States District Court for the Southern District of Texas on November 18, 1997, alleging claims for breach of contract and quantum meruit. Pet. App. 2a; 7 R. 11. Atlas predicated subject matter jurisdiction solely on 28 U.S.C. § 1332(a)(2), which provides for diversity jurisdiction in cases between "citizens of a State and citizens or subjects of a foreign state. . . ." 28 U.S.C. § 1332(a)(2); Joint App. 19a; Pet. App. 2a; 2 R. 1727; 3 R. 1362; 7 R. 11, 230. In its complaint, Atlas identified itself as a Texas limited partnership without identifying its individual partners. Joint App. 18a; 7 R. 11.

Dataflux is a Mexican corporation with its principal place of business in Mexico. Joint App. 18a; 2 R. 1676; 3 R. 1296, 1361; 7 R. 230. Atlas is a limited partnership created under Texas law. Joint App. 18a, 98a; Pet. App. 2a. A partnership such as Atlas is deemed to be a citizen of each jurisdiction in which its partners are citizens. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990). At the time Atlas filed suit, Atlas was a citizen of Mexico; at least two of its five partners – Llamosa and Robles-Canon – were Mexican citizens. Joint App. 98a; Pet. App. 2a; 2 R. 1716. Thus, diversity did not exist between Atlas, a Mexican citizen, and Dataflux, also a Mexican citizen. Pet. App. 3a.

Effective September 8, 2000, Atlas completed a business transaction in which three of its five partners – Llamosa, Robles-Canon, and Bahia Management, L.L.C. – withdrew from the partnership. Joint App. 98a, 126a-127a; 1 R. 1904, 1906; 2 R. 1715-16. Based on Atlas' change in citizenship, Atlas and Dataflux were diverse by the time the trial began on October 19, 2000. Pet. App. 3a.

The parties' citizenship at the time suit was filed and at the time of trial is summarized as follows:

Parties' Citizenship at Time Atlas Filed Suit	**Parties' Citizenship at Time of Trial**
Dataflux: Mexican corporation with principal place of business in Mexico.	***Dataflux***: Mexican corporation with principal place of business in Mexico.
Atlas: Texas limited partnership composed of: ***Llamosa***: Mexican citizen. ***Robles-Canon***: Mexican citizen. ***Bahia Management, L.L.C.***: A Texas limited liability company composed of: ***Llamosa*** and ***Robles-Canon***: Mexican citizens. ***Capital Financial Partner, Inc.*** ***HIL Financial Holdings, L.P.***	***Atlas***: Texas limited partnership composed of: ***Capital Financial Partner, Inc.***: Delaware corporation with principal place of business in Texas. ***HIL Financial Holdings, L.P.***: Texas limited partnership composed of: ***OFI Management Inc.***: Delaware corporation with principal place of business in Texas. ***OVH, Inc.***: Texas corporation with principal place of business in Texas.

Joint App. 18a, 67a, 73a, 98a, 126a-127a; 1 R. 1903-04; 2 R. 1672, 1676, 1715-16; 3 R. 1296, 1361; 7 R. 230.[2]

2. Dataflux asserted state-law claims against Llamosa and Robles-Canon, and against Atlas. 7 R. 124-29, 185-90. The addition of state-law claims by Dataflux against Llamosa and Robles-Canon individually does not affect whether jurisdiction existed between Atlas and Dataflux. If diversity had existed between Atlas and Dataflux at (Cont'd)

The parties consented to a jury trial before United States Magistrate Judge Frances H. Stacy. 2 R. 1548. On October 27, 2000, following a six-day trial, the jury returned a verdict in Atlas' favor and awarded damages. Pet. App. 2a; 2 R. 1601-46.

On November 8, 2000, after the verdict but before entry of judgment, Dataflux moved to dismiss the suit for lack of jurisdiction under Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3). Joint App. 42a-49a; 2 R. 1658-61, 1691-95.[3] Dataflux explained that diversity jurisdiction did not exist at the time Atlas filed suit because Dataflux and at least one of Atlas' partners were Mexican citizens. *Id*. The trial court granted Dataflux's motion to dismiss and denied Atlas' motion to alter or amend the order granting dismissal. Pet. App. 20a-24a. Atlas appealed.

A divided panel of the United States Court of Appeals for the Fifth Circuit reversed the trial court's dismissal and remanded the case "with instructions to the district court to enter judgment in favor of Atlas." *Id*. at 11a.

(Cont'd)

the time Atlas filed suit, then the claims against Llamosa and Robles-Canon individually would have fallen within the scope of supplemental jurisdiction. *See, e.g., Rogers v. Aetna Cas. & Sur. Co.*, 601 F.2d 840, 843 n.4 (5th Cir. 1979). Because it is undisputed that Atlas and Dataflux were not diverse when Atlas filed suit, however, there was no federal jurisdiction in existence at that time to be supplemented.

3. In its brief in opposition to Dataflux's petition for writ of certiorari, Atlas noted that it sought "in no way to suggest that Dataflux or its counsel engaged in . . . inappropriate behavior" in objecting to the trial court's subject-matter jurisdiction after verdict but before entry of judgment. Br. in Opp. to Pet. for Cert., p. 6 n.1.

The panel majority held that the trial court erred in dismissing Atlas' suit for lack of jurisdiction because: (1) the lack of diversity between Atlas and Dataflux at the time suit was filed was cured shortly before trial by Atlas' unilateral change in citizenship; and (2) neither the parties nor the trial court identified the absence of diversity jurisdiction before the verdict was returned. *Id*. Judge Emilio M. Garza dissented on the ground that the trial court properly dismissed the suit because diversity was lacking at the time Atlas filed suit in federal court. *Id*. at 12a-19a.

Dataflux filed a petition for rehearing en banc and petition for panel rehearing; the Fifth Circuit denied those petitions. *Id*. at 25a-26a.[4]

SUMMARY OF ARGUMENT

This Court should reject the Fifth Circuit's new exception to the longstanding rule requiring diversity jurisdiction to be determined based on the parties' citizenship at the time suit is filed.

The time-of-filing rule has been faithfully enforced for nearly 200 years, and for good reason. This bright-line rule confines federal courts to their constitutionally mandated territory. It also establishes an easy-to-apply standard so that threshold jurisdictional questions can be decided once, and decided consistently.

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4. In its petition for rehearing en banc, Dataflux asked the Fifth Circuit to review the merits of the panel majority's decision to reverse the trial court's dismissal order. In a separate motion for panel rehearing, Dataflux asked the panel majority to modify its instruction to "enter judgment in favor of Atlas" and to order, instead, that the case be remanded for further proceedings not inconsistent with the majority's holding. The latter instruction would have been consistent with the procedural history of the underlying proceeding in which the trial court's dismissal order was entered prior to the entry of judgment on the verdict.

The Fifth Circuit's ill-defined exception departs from the traditional rule by allowing a party to create diversity jurisdiction through a unilateral change of citizenship after suit is filed. This retroactive jurisdiction arises if: (1) the unilateral change occurs before a verdict is returned, or before "a dispositive ruling has been made by the court"; and (2) neither a litigant nor the trial court identifies the jurisdictional defect before a verdict is returned or a dispositive ruling is made. This exception threatens to swallow the time-of-filing rule. It also undermines the equally well-established presumption against federal jurisdiction and the principle that defects in subject matter jurisdiction cannot be waived.

The Fifth Circuit justified its departure from settled law in the name of judicial economy and looked for help from this Court's decisions in *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), and *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). The Fifth Circuit misplaced its reliance on *Caterpillar* and *Newman-Green* because those cases addressed removal and dismissal circumstances that are not present here. Removal and dismissal involve court participation and supervision – a crucial factor that serves as a brake on any potential jurisdictional manipulation, and one that disappears when a party is allowed to create retroactive diversity jurisdiction based on a unilateral change in its own citizenship. The D.C. Circuit properly has refused to extend the reach of *Caterpillar* and *Newman-Green* in this manner. This Court should endorse the D.C. Circuit's approach.

Judicial economy is not the measure of diversity jurisdiction. Citizenship at the time of filing is the benchmark. Moreover, considerations of judicial economy

cut against the Fifth Circuit's new exception. The uncertainty and manipulation likely to flow from the new exception will consume far more judicial resources than are saved.

The Fifth Circuit's judgment should be reversed, and the trial court's dismissal for lack of subject matter jurisdiction should be affirmed.

ARGUMENT

Until the Fifth Circuit issued its opinion in this case, the rule for determining whether Atlas established federal diversity jurisdiction was straightforward. Under longstanding precedent, the parties' citizenship is measured based on the facts and circumstances as they existed at the time suit was filed. This Court should reject the Fifth Circuit's departure from the time-of-filing rule because that departure is unwarranted, unworkable, and unwise.

I. Diversity Jurisdiction Is Narrowly Construed

A. Atlas Must Overcome the Presumption Against Jurisdiction

Atlas invoked diversity jurisdiction when it sued Dataflux in federal court. Joint App. 19a; Pet. App. 2a; 2 R. 1727; 3 R. 1362; 7 R. 11, 230. Article III of the Constitution provides that "[t]he judicial Power shall extend to . . . Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1. The diversity statute further circumscribes the scope of federal jurisdiction by providing that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of

$75,000 . . . and is between . . . citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. § 1332(a)(2).[5]

Diversity jurisdiction under 28 U.S.C. § 1332 is narrowly construed:

> The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of "business that intrinsically belongs to the state courts," in order to keep them free for their distinctive federal business.

City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76 (1941) (quoting Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928)); *see also Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978); *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

In keeping with this "jealous restriction" of diversity jurisdiction, federal courts presume that a suit lies outside their limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). The burden of overcoming this presumption and establishing the propriety

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5. "Although neither the Constitution nor the applicable statute utilizes the terms, these 'citizens or subjects of a foreign state' generally are referred to as aliens and the subject matter jurisdiction so conferred is referred to as alienage jurisdiction." 14A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3661 at 132 (3d ed. 1998) (hereinafter "14A WRIGHT, MILLER & COOPER").

of federal jurisdiction rests on the party asserting federal jurisdiction. *Id*.; *McNutt v. General Motors Acceptance Corp. of Indiana, Inc*., 298 U.S. 178, 189 (1936). Thus, Atlas bears the burden of establishing jurisdictional facts sufficient to support federal jurisdiction in this case. *Id*.

B. Lack of Diversity Cannot Be Waived

As a corollary to the strict limits on federal jurisdiction, litigants cannot waive or consent to subject matter jurisdiction when it does not exist and may challenge the existence of subject matter jurisdiction at any time during the litigation. As this Court stated in *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982):

> [N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.

Id. at 702 (citations omitted).[6]

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6. *See also Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 389 (1998) ("The presence of the nondiverse party automatically destroys original jurisdiction: No party need assert the defect. No party can waive the defect, or consent to jurisdiction") (citations omitted); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) ('"[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it'") (quoting *Bender v. Williamsport Area Sch. Dist*., 475 U.S. 534, 541 (1986)).

Any court may raise at any time the lack of subject-matter jurisdiction on its own motion. FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action").[7] Indeed, this Court itself has raised the lack of subject matter jurisdiction for the first time after lower court proceedings in which jurisdiction was not challenged and the jurisdictional defect was not identified. *E.g.*, *Jackson v. Allen*, 132 U.S. 27, 34 (1889); *Crehore v. Ohio & Miss. Ry. Co.*, 131 U.S. 240, 243 (1889); *Chapman v. Barney*, 129 U.S. 677, 681 (1889).

These considerations provide the backdrop against which the time-of-filing rule should be analyzed.

II. The Narrow Reach of Diversity Jurisdiction Is Reflected in the Time-of-Filing Rule, Which Establishes That Atlas and Dataflux Were Not Diverse

A. Diversity Depends on the Parties' Citizenship at the Time Suit Is Filed

The existence of subject matter jurisdiction under the diversity statute "turns on the facts existing at the time the suit commenced." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458,

7. *See also Wisconsin Dep't of Corrections*, 524 U.S. at 389 ("No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own"); *Bender*, 475 U.S. at 541 ("Every federal appellate court has a special obligation 'to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it") (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)); *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702 ("Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion").

459 n.1 (1980) (citing *Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552, 556 (1899)).

This rule traces its origins to at least 1824, when Chief Justice Marshall stated, "It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought. . . ." *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824). This Court repeatedly has reaffirmed this principle in the 180 years since Chief Justice Marshall's pronouncement in *Mollan*. *See, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. ___, 123 S. Ct. 1655, 1662 (2003) ("It is well settled . . . that federal-diversity jurisdiction depends on the citizenship of the parties at the time suit is filed"); *Navarro Sav. Ass'n*, 446 U.S. at 459 n.1; *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957); *Anderson v. Watt*, 138 U.S. 694, 702-03 (1891).[8]

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8. Subsequent court-supervised developments can affect the general time-of-filing rule under certain circumstances. If an amendment adds an indispensable party, jurisdiction must be reassessed at that time. *E.g.*, *Carlton v, BAWW, Inc.*, 751 F.2d 781, 785-86 (5th Cir. 1985). The existence of diversity also may be reassessed based on a court's realignment of the parties. *E.g.*, *City of Indianapolis*, 314 U.S. at 69, 74-75; *Standard Oil Co. v. Perkins*, 347 F.2d 379, 382 (9th Cir. 1965). Under Federal Rule of Civil Procedure 21, a court may preserve diversity jurisdiction by dismissing a non-diverse party who is not indispensable. *E.g.*, *Newman-Green, Inc.*, 490 U.S. at 833, 837. And in the removal context, a trial court's failure to remand an improperly removed case does not invalidate the ensuing judgment if dismissal of a non-diverse party means that federal jurisdictional requirements are met at the time judgment is entered. *E.g.*, *Caterpillar Inc.*, 519 U.S. at 64. The limits of *Caterpillar* and *Newman-Green* are discussed more fully below at pp. 20-30.

It follows from the time-of-filing rule that subsequent changes in citizenship do not change the threshold determination regarding the existence of diversity. Post-filing changes in citizenship or reductions in the amount recovered do not destroy diversity jurisdiction once it has been established at the commencement of litigation. *See, e.g.*, *Wisconsin Dep't of Corrections*, 524 U.S. at 391; *Freeport-McMoRan Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam); *Smith*, 354 U.S. at 93 n.1; *Wichita R.R. & Light Co. v. Public Util. Comm'n*, 260 U.S. 48, 54 (1922); *Smithers v. Smith*, 204 U.S. 632, 642-43 (1907); *Louisville, New Albany & Chicago Ry. Co.*, 174 U.S. at 563.

Similarly, if no diversity existed when the action was commenced, a litigant cannot manufacture diversity by unilaterally changing its citizenship after suit is filed. *Anderson*, 138 U.S. at 702-03.[9] Because this principle

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9. Numerous lower court decisions have recognized that a party's unilateral change in citizenship after suit is filed cannot create retroactive diversity jurisdiction. *See, e.g., Sarmiento v. Texas Bd. of Veterinary Med. Examiners*, 939 F.2d 1242, 1247 n.6 (5th Cir. 1991) (diversity jurisdiction did not exist based on plaintiff's domicile at time suit was filed despite plaintiff's subsequent change in domicile after suit was filed); *Goldsmith v. Mayor & City Council of Baltimore*, 845 F.2d 61, 62 n.1 (4th Cir. 1988) (affirming dismissal of claim where party sought to create retroactive diversity jurisdiction based on party's unilateral change in citizenship after suit was filed); *Field v. Volkswagenwerk AG*, 626 F.2d 293, 304 (3d Cir. 1980) ("Thus, if diversity of citizenship did not exist at the time the action was filed, it cannot be created retroactively by a subsequent change of domicile by one of the parties"); *DeBry v. Transamerica Corp.*, 601 F.2d 480, 486 (10th Cir. 1979) ("It is hornbook law that . . . if there was no diversity when the action was commenced, it is impossible to create

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controls the outcome of this case, a discussion of the facts and holding in *Anderson* is instructive.

In *Anderson*, the dual executors of a New York resident's estate alleged that they were citizens of New York and brought a diversity action against defendants alleged to be Florida residents. *Id*. at 695, 703-04. It was later determined that one of the defendants was a New York citizen. *Id*. at 704-06. The plaintiffs attempted to save diversity jurisdiction by

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(Cont'd)

it by a change of domicile by one of the parties or other subsequent event"); *Slaughter v. Toye Bros. Yellow Cab Co*., 359 F.2d 954, 956 (5th Cir. 1966) ("It seems to be without question that a change of citizenship occurring after the commencement of the action would not affect jurisdiction or the absence of it"); *Lyons v. Weltmer*, 174 F.2d 473, 473 (4th Cir. 1949) (per curiam) (affirming dismissal of claim where party sought to create retroactive diversity jurisdiction based on party's unilateral change in citizenship after suit was filed); *Oh v. Ford Motor Co.*, 79 F. Supp. 2d 1375, 1377-78 (N.D. Ga. 1999) (granting motion to remand where diversity jurisdiction was based on defendant's change in citizenship after suit was filed); *Gard v. Teletronics Pacing Sys., Inc.*, 859 F. Supp. 1349, 1354-55 (D. Colo. 1994) (rejecting diversity jurisdiction as alternative basis for jurisdiction over party's claims based on party's change in citizenship after suit was filed); *Russell v. Harrison*, 562 F. Supp. 467, 471 (N.D. Miss. 1983) (rejecting diversity jurisdiction as basis for bringing breach of contract claim in federal court based on parties' change in citizenship after suit was filed), *aff'd and rev'd on other grounds*, 736 F.2d 283 (5th Cir. 1984); *Lang v. Windsor Mount Joy Mut. Ins. Co*., 487 F. Supp. 1303, 1306-07 (E.D. Pa. 1980) (granting motion to dismiss where diversity jurisdiction was based on plaintiff's change in citizenship after suit was filed), *aff'd without opinion*, 636 F.2d 1209 (3d Cir. 1980); *Hagen v. Payne*, 222 F. Supp. 548, 553 (W.D. Ark. 1963) (granting motion to remand where diversity jurisdiction was based on defendant's change in citizenship after suit was filed).

applying to have the letters testamentary that had been issued to one of the executors revoked, seeking leave to drop that executor as a plaintiff, and alleging that the remaining executor was a resident of Great Britain. *Id*. at 708.

This Court rejected the plaintiffs' post-filing effort to salvage federal jurisdiction. *Id*. The Court reiterated that "the [jurisdictional] inquiry is determined by the condition of the parties at the commencement of the suit." *Id*. at 703. Applying that rule, the Court stated as follows: "[J]urisdiction could no more be given . . . by the amendment than if a citizen of Florida had sued another in that court and subsequently sought to give it jurisdiction by removing from the State." *Id*. at 708 (citing *Clarke v. Mathewson*, 37 U.S. (12 Pet.) 164 (1838), and *Morris v. Gilmer*, 129 U.S. 315 (1889)).

This statement in *Anderson* was hardly novel in 1891; the time-of-filing rule already was well-established by that time. *See Mollan*, 22 U.S. (9 Wheat.) at 539; *see also Conolly v. Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829) ("Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit").

B. Diversity Did Not Exist Between Atlas and Dataflux Under the Time-of-Filing Rule

Applying the traditional time-of-filing rule in this case leads to one inescapable conclusion: Atlas did not satisfy its burden to establish federal jurisdiction because diversity did not exist when Atlas sued Dataflux in federal court. Pet. App. 3a.

The Atlas limited partnership was a citizen of Mexico at the time suit was filed based on the Mexican citizenship of its partners Llamosa and Robles-Canon. Joint App. 98a; Pet. App. 2a; 2 R. 1716; *Carden*, 494 U.S. at 195. Dataflux is a Mexican corporation with its principal place of business in Mexico. Joint App. 98a; 2 R. 1676; 3 R. 1296, 1361; 7 R. 230. Diversity under 28 U.S.C. § 1332(a) must be complete so that the citizenship of all plaintiffs differs from the citizenship of all defendants. *E.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 580 n.2 (1999); *Carden*, 494 U.S. at 187; *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

The complete diversity requirement applies to alienage jurisdiction under 28 U.S.C. § 1332(a)(2). *E.g.*, *Ruhrgas AG*, 526 U.S. at 580 n.2 & 584; *Montalet v. Murray*, 8 U.S. (4 Cranch) 46, 46 (1807).[10] When, as in this case, both the plaintiff and the defendant are "citizens or subjects of a foreign state," alienage jurisdiction is lacking and 28 U.S.C. § 1332(a)(2) cannot serve as a basis for diversity jurisdiction. *See*, *e.g.*, *Ruhrgas AG*, 526 U.S. at 580 n.2; *Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136, 136 (1829); *Montalet*, 8 U.S. (4 Cranch) at 47.[11]

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10. *See also Singh v. AG Daimler-Benz*, 9 F.3d 303, 305 (3d Cir. 1993); *Faysound Ltd. v. United Coconut Chem., Inc.*, 878 F.2d 290, 294-95 (9th Cir. 1989); *Eze v. Yellow Cab Co. of Alexandria, Va., Inc.*, 782 F.2d 1064, 1065 (D.C. Cir. 1986) (per curiam); *Field*, 626 F.2d at 296; *Ed & Fred, Inc. v. Puritan Marine Ins. Underwriters Corp.*, 506 F.2d 757, 758 (5th Cir. 1975).

11. *See also Dresser Indus., Inc. v. Underwriters at Lloyd's of London*, 106 F.3d 494, 498-99 (3d Cir. 1997); *Nike, Inc. v. Comercial Ibercia de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 991 (9th Cir. 1994); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1298 (5th Cir. 1986) (per curiam); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975); *Doidge v. Cunard S.S. Co.*, 19 F.2d 500, 502 (1st Cir. 1927); 14A WRIGHT, MILLER & COOPER § 3661 at 134.

Applying the traditional time-of-filing rule, the trial court properly dismissed this suit and no unilateral, post-commencement reshuffling of Atlas' partnership should change that result. This result comports with the origins and purposes of alienage jurisdiction. The concern for bias toward an alien litigating against a citizen of a state is absent when aliens are present on both sides of the suit. "Congress presumably has never seen any federal interest in providing a federal forum for cases of this character, which can be litigated in a state court or in a court in another country." 14A WRIGHT, MILLER & COOPER § 3661 at 134-37; *see also Choo v. Exxon Corp.*, 764 F.2d 1148, 1153 (5th Cir. 1985) ("When . . . an alien plaintiff sues in state court another alien . . . the danger is remote that the alien plaintiff will benefit from local bias of state courts or juries"), *rev'd on other grounds*, 486 U.S. 140 (1988).

Under these circumstances, the trial court properly dismissed Atlas' suit for lack of subject matter jurisdiction. That dismissal not only comported with governing standards for diversity jurisdiction, but also with the policy goals underlying those standards.

C. Enforcing the Time-of-Filing Rule Serves Important Policy Interests and Provides Practical Benefits

This Court has stressed that the narrow limits on diversity jurisdiction are grounded in "the constitutional limitations upon the judicial power of the federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts." *City of Indianapolis*, 314 U.S. at 76.

The constitutional and statutory limits on diversity jurisdiction reflect a carefully calibrated allocation of power between federal and state courts:

> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

Healy, 292 U.S. at 270; *see also Ruhrgas AG*, 526 U.S. at 583; *City of Indianapolis*, 314 U.S. at 76-77.

Therefore, strict enforcement of the limits on federal jurisdiction "is not a sacrifice of justice to technicality." *City of Indianapolis*, 314 U.S. at 76. Rather, uniform and predictable application of threshold jurisdictional rules, such as the time-of-filing rule, ensures that "[s]ettled restrictions against bringing local disputes into the federal courts cannot . . . be circumvented." *Id*.

The rules governing the time at which diversity jurisdiction is determined also serve important practical purposes by providing "maximum stability and certainty to the viability of the action" and minimizing "repeated challenges to the court's subject matter jurisdiction." 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD

H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3608 at 452 (2d ed. 1984) (hereinafter "13B WRIGHT, MILLER & COOPER"); *see also Saadeh v. Farouki*, 107 F.3d 52, 57 (D.C. Cir. 1997) ("Were it necessary to track changes of citizenship throughout litigation, courts would face potentially difficult burdens of either holding cases in abeyance for the diversity requirements to be satisfied or, alternatively, repeatedly adjudicating challenges to previous determinations that diversity jurisdiction existed"); *Dery v. Wyer*, 265 F.2d 804, 808 (2d Cir. 1959) ("[T]he sufficiency of jurisdiction should be determined once and for all at the threshold").[12]

The bright-line rule also provides "a uniform test that is relatively easy to apply." *Saadeh*, 107 F.3d at 57 (quoting 13B WRIGHT, MILLER & COOPER § 3608 at 452); *see also American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 8 (1951) ("[P]rompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts"); *McNutt*, 298 U.S. at 188 ("[T]here should be a consistent practice in dealing with jurisdictional questions").

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12. If the time-of-filing rule is modified, it is unclear how a party would monitor an opponent's citizenship during the course of litigation to ensure not only that jurisdiction continues to exist after suit is filed, but also that the court's jurisdiction is promptly challenged if diversity disappears. While the party who invoked federal jurisdiction should bear the burden of informing the court and the other parties if the party's citizenship has changed, it certainly is possible that a party may fail to do so based on a good-faith belief that the change in citizenship does not affect diversity jurisdiction under the time-of-filing rule.

In light of these important policy and practical considerations, the Fifth Circuit's new exception to the time-of-filing rule merits close scrutiny. As explained more fully below, such an examination confirms the new exception should be rejected.

III. To Protect the Time-of-Filing Rule From Erosion, This Court Should Reject the Fifth Circuit's Extension of *Caterpillar* and *Newman-Green*

A. The Fifth Circuit Created a New Exception to the Time-of-Filing Rule

The Fifth Circuit held that a party's unilateral change of citizenship after suit is filed creates retroactive diversity jurisdiction if:

> (1) an action is filed or removed when constitutional and/or statutory jurisdictional requirements are not met;
>
> (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a "dispositive ruling" has been made by the court; and
>
> (3) before the verdict is rendered, or ruling is issued, the jurisdictional defect is cured.

Pet. App. 11a.

The Fifth Circuit acknowledged the general rule requiring diversity jurisdiction to be determined based on the parties' citizenship as it existed at the time suit is filed, but concluded that a departure from this rule was warranted.[13]

By unleashing a new exception to the time-of-filing rule, the Fifth Circuit's decision goes far beyond the two principal cases upon which the Fifth Circuit relied, *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), and *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). Neither *Caterpillar* nor *Newman-Green* supports the new exception created in this case.

B. *Caterpillar* Does Not Support The New Exception

Caterpillar does not abrogate the general rule that if diversity was lacking when suit was filed, it cannot be created by a party's post-filing, unilateral change in citizenship. This Court addressed only whether "the absence of complete diversity at the time of removal is fatal to federal-court adjudication." 519 U.S. at 64.

The plaintiff in *Caterpillar*, a Kentucky resident, sued Caterpillar and another defendant in state court. *Id*. at 64-65. Caterpillar was a Delaware corporation with its principal

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13. In creating its new exception, the Fifth Circuit did not identify any statute or rule authorizing a party to remedy defects in diversity jurisdiction by unilaterally changing its citizenship after suit is filed. Such authority does not derive from 28 U.S.C. § 1653, which merely authorizes the amendment of defective jurisdictional allegations, not jurisdictional facts. 28 U.S.C. § 1653; *Newman-Green, Inc.*, 490 U.S. at 831; *see also Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 775 (5th Cir. 1986) ("Section 1653 provides a method of curing defective allegations of jurisdiction. It is not to be used to create jurisdiction retroactively where it did not previously exist").

place of business in Illinois, while the other defendant was a Kentucky corporation with its principal place of business in Kentucky. *Id*. at 65. The plaintiff later entered into a settlement agreement with the non-diverse defendant. *Id*. After the settlement but before the defendant was dismissed, Caterpillar removed the case to federal court based on diversity jurisdiction. *Id*. The plaintiff moved to remand the case, arguing that the federal court lacked diversity jurisdiction because another intervening plaintiff in the case still maintained a subrogation claim against the non-diverse defendant. *Id*. at 65-66. The trial court refused to remand the case. *Id.* at 66.

Shortly before trial, the trial court dismissed the non-diverse defendant after the intervening plaintiff settled its subrogation claim against the defendant. *Id*. Judgment subsequently was entered in Caterpillar's favor. *Id.* at 67. The Sixth Circuit reversed and vacated the judgment, holding that the case was improperly removed. *Id*. This Court held that a trial court's error in failing to remand an improperly removed case over objection "is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Id.* at 64.

Caterpillar does not support the Fifth Circuit's new exception to the time-of-filing rule for determining citizenship. Unlike this case, the parties to the judgment in *Caterpillar* started out diverse and stayed diverse throughout the litigation. *Id*. at 64-67. The only jurisdictional defect at the time of removal was the initial presence of another defendant who was not diverse from the plaintiff, but who was dismissed before trial. *Id*. at 65-66. Thus, in upholding

the trial court's judgment despite the existence of a jurisdictional defect at the time of removal, this Court did not depart from the bright-line rule that a party's citizenship is determined at the time suit is filed. The parties who remained in the case and whose rights were adjudicated in the final judgment ***were diverse*** at the time suit was filed. In this case, in contrast, Atlas and Dataflux indisputably ***were not diverse*** at the time suit was filed and became diverse only when Atlas unilaterally changed its citizenship after suit was filed. Pet. App. 2a-3a.

Caterpillar therefore is inapposite because it addressed the dismissal of a party following removal. It did not address the effect that should be given to a party's unilateral change in citizenship after suit is underway when no party is dismissed.[14]

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14. The Fifth Circuit's creation of retroactive diversity jurisdiction also differs from the discretionary exercise of supplemental jurisdiction over state-law claims following the elimination of federal claims. *See* 28 U.S.C. § 1367(c); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 & n.7 (1988); *Rosado v. Wyman*, 397 U.S. 397, 403-05 (1970). The exercise of supplemental jurisdiction over related state-law claims flows from the proper invocation of federal jurisdiction at the outset of litigation; the power to adjudicate pendent claims remains even if the federal claims fail on the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). It is one thing to balance considerations of "judicial economy, convenience, fairness, and comity" in deciding the reach of supplemental jurisdiction over pendent state-law claims in a case properly filed in federal court. *See Cohill*, 484 U.S. at 350 & n.7. It is quite another to allow notions of judicial economy to justify the creation of retroactive subject matter jurisdiction in a case in which diversity did not exist at the time of filing.

Unlike a party's unilateral decision to change its citizenship, the procedure for removal and dismissal of parties is subject to significant judicial oversight. *Caterpillar Inc*., 519 U.S. at 77. The removal must be able to withstand the scrutiny prompted by a motion to remand, and the trial court must address any motions to dismiss a party. *Id*. Because the trial court determines whether the procedural requirements for removal have been met, the prospects for jurisdictional manipulation are diminished. *Id*.

In *Caterpillar*, this Court relied heavily on this point and concluded that the likelihood of manipulation would be diminished because the removing party would have to "gamble that any jurisdictional defect, for example, the absence of complete diversity, [would] first escape detection, then disappear prior to judgment." *Id*. In contrast, Atlas faced no such gamble. Pet. App. 15a (Garza, J., dissenting). Atlas had complete control over whether its two Mexican partners remained in the company. *Id*. "Atlas could – and did – single-handedly remove the parties whose presence spoiled diversity" without judicial oversight. *Id*.

The likelihood of jurisdictional manipulation is increased under the Fifth Circuit's new exception because the judicial supervision discussed in *Caterpillar* is absent when a party unilaterally changes its citizenship. The new exception would allow a plaintiff to file a complaint, knowing the federal court had no jurisdiction, and then move to a new state to create retroactive diversity. *Id*. "As long as the party acted before the opposing party or the district court noticed (and before a jury verdict or other dispositive decision), it could single-handedly confer jurisdiction on the federal courts" despite the longstanding rules barring such a maneuver. *Id*. at 16a.

Even taking as a given that Atlas was not attempting to manipulate jurisdiction, the Fifth Circuit's new exception nonetheless opens the door to stratagems of this nature in future cases.

More fundamentally, *Caterpillar*'s holding cannot be divorced from the removal context in which it arose because the jurisdictional issue in *Caterpillar* was viewed through the lens of the statutes and policies governing removal.

This Court found the result in *Caterpillar* to be "in harmony with a main theme of the removal scheme Congress devised," which the Court characterized as "expeditious superintendence by district courts" unburdened by extensive appellate second-guessing. *Caterpillar Inc.*, 519 U.S. at 76. The policy of deferring to a district court's resolution of removal issues is illustrated by such features as the short deadline for objecting to defects in removal procedure and Congress' decision to foreclose appellate review of orders granting remand in most circumstances. *Id*.; *see also* 28 U.S.C. §§ 1447(c)-(d); *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 705 (1972) ("'[T]he Act of Congress must be construed as setting up its own criteria . . . for determining in what instances suits are to be removed from the state to the federal courts'") (quoting *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100, 104 (1941)).

These considerations informed this Court's analysis of the statutory error at issue in *Caterpillar*. That statutory error was the "failure to comply with the [28 U.S.C.] § 1441(a) requirement that the case be fit for federal adjudication when the removal petition is filed." *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 43 (1998). As this Court observed in *Lexecon*, "[T]here was no continuing

defiance of the congressional condition in *Caterpillar*, but merely an untimely compliance" with Section 1441(a). *Id*. "It was on this understanding that we held that considerations of 'finality, efficiency and economy' trumped the error" under Section 1441(a). *Id*. (quoting *Caterpillar,* 519 U.S. at 75).[15]

In short, removal procedure is not at issue in this case, and it does not filter the jurisdictional inquiry here. What remains is the insurmountable fact that no diversity existed when Atlas sued Dataflux in federal court. In contrast to the deferential policy of "superintendence by district courts" that characterizes removal, this case involves an undisputed failure to satisfy 28 U.S.C. § 1332(a)(2) and the policy requiring courts at ***any*** level to confront defects in subject matter jurisdiction. *Bender*, 475 U.S. at 541; *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702. This situation falls squarely

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15. *Knop v. McMahan*, 872 F.2d 1132 (3d Cir. 1989), which was cited in *Caterpillar*'s discussion of judicial economy (519 U.S. at 76), also arose in the removal context. Like this Court in *Caterpillar*, the Third Circuit looked to longstanding rules governing removal in concluding that a limited partnership's change in citizenship could remedy "a brief lack of complete diversity at the beginning of the case." 872 F.2d at 1138-40. In so doing, the Third Circuit acknowledged its prior decision in *Field v. Volkswagenwerk AG*, in which the time-of-filing rule was applied. *Id*. at 1138 (citing *Field*, 626 F.2d at 305). The Third Circuit neither overruled nor questioned *Field.* Instead, the Third Circuit focused on the defects in removal procedure at issue in *Knop. Id*. at 1138-41. This focus confirms that *Field*'s endorsement of the time-of-filing rule to bar the creation of retroactive diversity jurisdiction based on a party's post-filing change in citizenship (626 F.2d at 304) remains a governing principle in the Third Circuit in cases outside the removal context. This Court in *Caterpillar* did not discuss the nature of the jurisdictional defect in *Knop* or the manner in which that jurisdictional defect was resolved. 519 U.S. at 76.

within the longstanding rule governing the time at which the citizenship of each party is determined. The policies underlying the time-of-filing rule are not disturbed by *Caterpillar*, and they are reaffirmed by one of the primary cases upon which *Caterpillar* relied. *See Finn*, 341 U.S. at 17-18 ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties").

C. *Newman-Green* Does Not Support the New Exception

The Fifth Circuit also misplaced its reliance on *Newman-Green.* That case addressed the narrow issue of whether an appellate court may dismiss a non-diverse dispensable party to cure a jurisdictional defect or, instead, must remand the case to the trial court to determine if dismissal is proper. 490 U.S. at 832-33. Citing Federal Rule of Civil Procedure 21, this Court held that a court of appeals may dismiss a dispensable non-diverse party to preserve federal jurisdiction but admonished that this authority "should be exercised sparingly." *Id.* at 836-37.

Newman-Green is inapposite because the only jurisdictional defect in that case was the presence of a defendant (one of six) at the time of filing who was not diverse from the plaintiff. *Id*. at 828. This Court did not depart from the bright-line rule that requires a party's citizenship to be determined at the time suit is filed, because the jurisdictional defect in *Newman-Green* was cured by the dismissal of the non-diverse defendant, not by a party's post-filing change in citizenship.

The context in which *Newman-Green* arose – the dismissal of a party – makes it ill-suited to serve as a supporting pillar for the Fifth Circuit's new exception. In contrast to *Newman-Green*, Atlas and Dataflux are indispensable parties. If Atlas had been dismissed, no plaintiff would have existed. Atlas' unilateral change in citizenship cannot properly be equated with a court of appeals' dismissal of a dispensable party. And in this case, unlike *Newman-Green*, the crucial element of judicial control and supervision once again is missing.

The limited reach of *Newman-Green* is confirmed by *Keene Corp. v. United States*, 508 U.S. 200 (1993). In *Keene*, the plaintiff relied on *Newman-Green* in asking this Court to create a new exception to the time-of-filing rule based on practical considerations. The Court declined to do so:

> We need not decide whether Keene's reading [of *Newman-Green*] is accurate, for Keene has not shown that we should [create an exception to the time-of-filing rule], even if we could. We do note, however, that *Newman-Green* reiterated the principle that "the existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."

Id. at 208 n.3 (quoting *Newman-Green, Inc.*, 490 U.S. at 830).

As it did in *Keene*, the Court should reject reliance on *Newman-Green* in this case as justification for creating a new exception to the time-of-filing rule.

D. This Court Should Endorse the D.C. Circuit's Refusal to Extend *Caterpillar* and *Newman-Green*

The Fifth Circuit's error is underscored by *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997), in which the United States Court of Appeals for the District of Columbia Circuit properly refused to expand *Caterpillar* and *Newman-Green*, and properly refused to recognize retroactive diversity jurisdiction based on a litigant's post-filing change in citizenship. The Fifth Circuit acknowledged the D.C. Circuit's conflicting holding in *Saadeh* but summarily rejected the D.C. Circuit's analysis as "unpersuasive." Pet. App. 9a.

In *Saadeh*, complete diversity did not exist when the plaintiff filed his complaint because the plaintiff, an alien, had sued a group of defendants which included several aliens and a domestic corporation. *Saadeh*, 107 F.3d at 55-56. Two of the three defendant aliens were dismissed prior to trial, leaving one defendant alien in the case. *Id*. at 56. Pointing to *Caterpillar* and *Newman-Green*, the plaintiff argued that the defendant alien became a United States citizen after suit was filed but before trial commenced, curing the jurisdictional defect. *Id*.

The D.C. Circuit rejected this argument. *Id*. at 56-57 ("[The defendant's] change in citizenship and possible change in domicile could not cure a defect in complete diversity if one existed at the time [the plaintiff] filed his complaint"); *id*. at 57 ("[The plaintiff] cites a number of cases involving removal for the proposition that the court may take account of [the defendant's] change in citizenship, but neither these cases nor the Supreme Court's recent decision in *Caterpillar* . . . support this view"). The D.C. Circuit observed that "[i]t is well

established that diversity of citizenship is determined at the time the complaint is filed" and that "[t]he corollary to this rule, that if diversity did not exist when the complaint was filed, it cannot be created by a change of domicile by one of the parties or some other event, appears equally sound and equally well settled." *Id*. (citations omitted).

The D.C. Circuit's holding not only comports with other courts' refusal to ***create*** retroactive diversity jurisdiction based on a party's post-filing change in citizenship (*see* discussion *supra*, pp. 12-14 & n.9), but also comports with other courts' refusal to ***divest*** a court of diversity jurisdiction under those circumstances. This Court consistently and unequivocally has applied the time-of-filing rule to preclude a party's post-filing change in citizenship from destroying diversity jurisdiction once that jurisdiction has been established at the commencement of litigation. *See*, *e.g.*, *Wisconsin Dep't of Corrections*, 524 U.S. at 391; *Freeport-McMoRan Inc.*, 498 U.S. at 428; *Smith*, 354 U.S. at 93 n.1; *Wichita R.R. & Light Co.*, 260 U.S. at 54; *Smithers*, 204 U.S. at 642-43; *Louisville, New Albany & Chicago Ry. Co.*, 174 U.S. at 563. Scrupulous adherence to the time-of-filing rule likewise should prevent a party's post-filing change in citizenship from creating retroactive diversity jurisdiction.

In refusing to create a new exception to the time-of-filing rule, the D.C. Circuit recognized that the rule must be applied consistently if it is to continue providing a workable mechanism for determining diversity jurisdiction. The D.C. Circuit declined to sacrifice consistency and coherence for potentially illusory gains in judicial economy:

> Although we are mindful of the "considerations of finality, efficiency and economy" that concerned the Supreme Court in *Caterpillar*, those concerns in the

> removal context are insufficient to warrant a departure here from the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed.

Saadeh, 107 F.3d at 57.

Saadeh cannot be distinguished from this case in any meaningful way, and the Fifth Circuit did not attempt to do so. Instead, the Fifth Circuit stated that the D.C. Circuit provided no "analytical justification for its conclusion that removal cases deserve differential treatment." Pet. App. 9a. This criticism is unwarranted because the D.C. Circuit's "analytical justification" is grounded on the longstanding policy considerations governing the strict rules for determining diversity jurisdiction when litigation commences. 107 F.3d at 57 ("Were it necessary to track changes of citizenship throughout litigation, courts would face potentially difficult burdens of either holding cases in abeyance for the diversity requirements to be satisfied or, alternatively, repeatedly adjudicating challenges to previous determinations that diversity jurisdiction existed").

This Court should endorse the D.C. Circuit's analysis in *Saadeh* and apply it in this case to hold that the trial court properly dismissed Atlas' suit for lack of jurisdiction.

IV. The Fifth Circuit's Unwarranted Extension of *Caterpillar* and *Newman-Green* Will Have Pernicious Effects

A. The Interest in Judicial Economy Does Not Justify Recognition of Retroactive Diversity Jurisdiction Predicated on a Party's Unilateral Change in Citizenship

The time-of-filing rule for determining diversity jurisdiction should be enforced in this case for practical and policy reasons. As Judge Garza observed in his dissent, "[W]e cannot fashion jurisdictional rules (or exceptions) solely out of a desire to conserve judicial resources." Pet. App. 18a-19a. The Second Circuit agrees:

> We are aware, in ordering the remand, that this has been an arduous and expensive lawsuit, but subject matter jurisdiction remains "an unwaivable *sine qua non* for the exercise of federal judicial power." We have recently observed that, "jurisdiction is not a game," and that, "as the Supreme Court has made abundantly clear, it is one of the fundamental tenets of our Constitution that only some cases may be brought in federal court." We cannot avoid addressing the threshold question of jurisdiction simply because our finding that federal jurisdiction does not exist threatens to prove burdensome and costly, or because it may undermine an expensive and substantially completed litigation.

Herrick Co. v. SCS Communications, Inc., 251 F.3d 315, 321-22 (2d Cir. 2001) (citations omitted); *see also Dery*, 265 F.2d at 808 ("A rule of procedure, of course, however convenient and salutary it may be, is without efficacy to extend the jurisdiction of a court").

The prospect of a rematch between Dataflux and the reconstituted Atlas partnership should not trump concerns about the difficulties and burdens of applying the Fifth Circuit's new exception. The efficiency concerns raised by the Fifth Circuit must be assessed in light of the circumstances of this case. Even with a retrial, the most expensive element of trial preparation – discovery – can be used again without reinventing the wheel. *Cf. Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 587-88 (5th Cir. 1992) (fact that discovery and legal research would not have to be repeated weighed in favor of dismissal of pendent state-law claims following dismissal of federal claims even after pendent claims had been tried to verdict in federal court). As discussed below, any concerns regarding the lack of efficiency in determining that jurisdiction is lacking after a trial has been conducted, or in conducting another trial, cannot outweigh the larger constitutional and practical considerations undergirding the time-of-filing rule for determining diversity jurisdiction.

B. Judicial Economy Is Threatened by the Fifth Circuit's Unworkable New Exception

The Fifth Circuit justified its new exception to the time-of-filing rule in the name of judicial economy. Pet. App. 11a. In fact, the Fifth Circuit's holding will undermine rather than promote judicial economy.

It is questionable to assume that creating new exceptions to bright-line jurisdictional rules will conserve judicial resources. *Id*. at 18a (Garza, J., dissenting). Carving out an exception in one case merely encourages future litigants to test the limits to that exception or to create new exceptions. *Id*. If courts are willing to create exceptions to the

jurisdictional rules, "parties will cease to believe that any limitations exist." *Id*. at 19a. "Parties will begin filing cases in federal court that would be more appropriately handled by the state judicial system." *Id*.[16] "The Supreme Court in *Caterpillar* did not intend such a result." *Id*.

The ill-defined nature of the Fifth Circuit's new exception makes future litigation over its scope all but inevitable. As Judge Garza stated, "There is no principled way to limit a holding based solely on 'considerations of finality, efficiency and economy.'" *Id*. at 18a. If a litigant can argue that judicial economy requires overlooking a jurisdictional defect identified one day ***after*** the jury returns a verdict, a litigant just as easily can argue that judicial economy also requires overlooking a jurisdictional defect identified ***while*** the jury deliberates – or, for that matter, one day before the jury begins deliberations, or one week before that. Such arguments are sure to follow because "there is no difference in efficiency terms between the jury verdict and, for example, the moment at which the jury retires." *Id*. at 17a. "Nor, for that matter, is there a large difference between the verdict and mid-way through the trial. . . . Indeed, in complicated cases requiring a great deal of discovery, the parties and the court often expend tremendous resources long before the case goes to trial." *Id*. at 17a-18a.

Judge Garza's observations demonstrate that the Fifth Circuit's new exception lacks internal consistency. If that exception becomes the law, it likely will foster exquisite distinctions of this nature as courts struggle to identify the

16. Commentators already have picked up on the Fifth Circuit's new exception. 18 No. 1 FED. LITIGATOR 6 at 7 (West Jan. 2003) ("This extension of the *Caterpillar* exception . . . opens the door to the creation of jurisdiction that did not initially exist").

tipping point at which federal court litigation has become too mature to worry about threshold defects in subject matter jurisdiction.

Additionally, it is unclear what would constitute a "dispositive ruling" under the Fifth Circuit's new exception. The facts of this case suggest the potential difficulties courts will face in applying that term. Prior to the trial in this case, the trial court granted Dataflux's motion for partial summary judgment on certain aspects of Atlas' breach of contract claim. 3 R. 1270-96. If judicial economy is the only consideration in determining when a defect in jurisdiction must be acknowledged and acted upon, then a trial court's investment of its energies in deciding a motion for partial summary judgment could turn an order on such a motion into a "dispositive ruling" for purposes of the Fifth Circuit's new exception.

In this case, the trial court's 27-page order granting Dataflux's motion for partial summary judgment was entered on August 2, 2000. *Id*. That order was "dispositive" of the claims resolved therein. Atlas' change in citizenship did not take effect until September 8, 2000. Joint App. 126a-127a; Pet. App. 2a; 1 R. 1904, 1906. Under an expansive view of "judicial economy," Atlas' change in its partnership still came too late to salvage jurisdiction because the trial court already had expended significant judicial resources on the case by that time.

The "dispositive ruling" criterion also is likely to create inconsistent and illogical results. Under the literal terms of the Fifth Circuit's new exception, a court of appeals (or even this Court) could not dismiss a case in which the parties initially lacked diversity if the jurisdictional defect was not

identified before a "dispositive ruling" under Federal Rule of Civil Procedure 12(b)(6) – even though minimal judicial resources may have been expended at that stage of the litigation. Yet a trial court would be required to dismiss a case under the new exception if the jurisdictional defect becomes apparent one day before jury deliberations began after a long trial preceded by years of discovery. The latter scenario would involve a far greater consumption of judicial resources.

These problems demonstrate that the underlying efficiency justification offered for the Fifth Circuit's new exception is crippled by the very limits the Fifth Circuit placed on that exception.

C. The Fifth Circuit's New Exception Undermines Other Fundamental Rules Governing Federal Jurisdiction

Close review of the Fifth Circuit's new exception to the time-of-filing rule reveals that the exception is not limited in principle or practice. As shown below, the Fifth Circuit's new exception would adversely impact other fundamental rules governing federal jurisdiction in addition to the time-of-filing rule.

Under existing law, a party opposing federal jurisdiction cannot waive its objections to jurisdiction and may assert those objections at any time. *Wisconsin Dep't of Corrections*, 524 U.S. at 389; *Arizonans for Official English*, 520 U.S. at 73; *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702. The Fifth Circuit's new exception, however, requires a party to object to the lack of jurisdiction before a verdict is returned or a dispositive ruling is made upon pain of being barred

from objecting to jurisdiction. In essence, the new exception puts litigants at risk of waiving what had been an unwaivable objection.

Judge Garza also correctly noted that "[t]he majority's holding is utterly out of step with the long-standing principle that the party who files a case in federal court is responsible for establishing jurisdiction." Pet. App. 15a n.2 (citation omitted); *see also Kokkonen*, 511 U.S. at 377; *McNutt*, 298 U.S. at 189. The Fifth Circuit's new exception significantly changes the burdens imposed on the litigants in at least two respects.

First, the party seeking to invoke federal jurisdiction is no longer required to request court approval to cure a jurisdictional defect by moving to dismiss a non-diverse party or requesting realignment of non-diverse parties. Instead, that party can cure an unnoticed jurisdictional defect simply by changing its citizenship any time before a verdict is returned or a dispositive ruling is made in the case. Second, a party opposing federal jurisdiction currently is required to demonstrate only that diversity jurisdiction did not exist at the time suit was filed. However, under the Fifth Circuit's new exception, that party must establish that there was no diversity jurisdiction at the time a verdict was returned or a dispositive ruling was made. Pet. App. at 11a.

Furthermore, the Fifth Circuit's new exception will allow the jurisdictional door to swing both ways. The Fifth Circuit's new exception was created to ***salvage*** jurisdiction. Once the efficacy of a post-suit change in citizenship is conceded, however, there is no logical or practical impediment to using this mechanism to ***destroy*** diversity jurisdiction after suit has been filed. A court plausibly could conclude that judicial

economy is served by recognizing a post-filing change in citizenship that destroys diversity. For example, a court could conclude that allowing federal jurisdiction to be divested would serve judicial economy by allowing the court to avoid confronting an unsettled question of state law, and thereby avoid the risk of wasting judicial resources by trying a case under the wrong legal standard if the court makes an erroneous *Erie* guess. While it could be decreed that post-filing changes in citizenship will be considered only when they create jurisdiction and not when they destroy jurisdiction, any such distinction would be purely arbitrary.

Even if the Fifth Circuit's new exception could be limited to allow only the creation of retroactive jurisdiction, such a distinction would encourage further manipulation by parties taking advantage of the new exception. For example, if post-filing changes in citizenship under the new exception could create but not destroy diversity, the party who changed its citizenship to manufacture retroactive diversity jurisdiction could restore its original citizenship after verdict without causing the trial court to lose jurisdiction over the case.

The Fifth Circuit's holding in this case does far more than create a new exception to the time-of-filing rule. By relying so heavily on malleable notions of judicial economy, the Fifth Circuit's new exception creates new opportunities for confusion and jurisdictional mischief. This aspect of the Fifth Circuit's new exception makes it an especially unwise departure from settled precedent.

D. The Fifth Circuit's Unwise Extension of Federal Jurisdiction Undermines Principles of Federalism

Even if some degree of wasted effort occasionally may result from strict adherence to the bright-line rules governing diversity jurisdiction, that is the price of policing the boundaries of federal jurisdiction in the service of federalism. Pet. App. 19a (Garza, J., dissenting) (citing *Coury v. Prot*, 85 F.3d 244, 249 (5th Cir. 1996), and *Herrick Co.*, 251 F.3d at 330-31).

This Court long has emphasized that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen*, 511 U.S. at 377; *see also Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 701 (same). Federal courts "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree," and "[i]t is to be presumed that a cause lies outside this limited jurisdiction." *Kokkonen*, 511 U.S. at 377 (citations omitted).

A narrow construction of the federal courts' jurisdiction protects fundamental principles of federalism. As this Court stated in *Ruhrgas AG*:

> Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level.

526 U.S. at 583; *see also Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702 ("Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign").

This Court should not encourage the creation of new methods of asserting jurisdiction over disputes that have been filed improperly in federal court. This argument holds particularly true in diversity cases such as the present one where the sole basis for the federal court's jurisdiction is the fortuitous citizenship of the parties, and where the substantive issues raised in the case are controlled by the application of state rather than federal law.

The Fifth Circuit's decision grants federal courts new authority to adjudicate cases that should have been filed in state court. It does so by creating an unworkable new exception to the time-of-filing rule that will lead to future jurisdictional headaches. This bold and problematic expansion of diversity jurisdiction warrants correction by the Supreme Court.

CONCLUSION

Petitioner Grupo Dataflux asks this Court to reverse the judgment of the court of appeals and to render judgment affirming the trial court's dismissal for lack of subject matter jurisdiction. In the alternative, Dataflux asks this Court to reverse the judgment of the court of appeals and remand the case to the Fifth Circuit for further proceedings consistent with this Court's opinion. Dataflux further requests all other relief to which it may be entitled.

Respectfully submitted,

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