No. 02-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court of appeals err by creating a new exception to the longstanding rule that diversity jurisdiction must be determined based on a party's citizenship and circumstances as they existed at the time suit was filed?

2. Did the court of appeals err by allowing a unilateral change in a party's citizenship during the course of litigation 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 incorrectly sued Dataflux, S.A. de C.V. as Grupo Dataflux. The parties have stipulated for the purposes of this case only that Grupo Dataflux can be considered the same company as Dataflux, S.A. de C.V.

CORPORATE DISCLOSURE STATEMENT

Dataflux is a Mexican corporation with its principal place of business in Mexico. Dataflux's parent corporation is Grupo Dataflux, S.A. de C.V. Grupo Dataflux, S.A. de C.V. is not the same entity as Grupo Dataflux. Grupo Dataflux, S.A. de C.V. is a publicly traded company on the Bolsa Mexicana deValores.

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Dataflux files this petition for writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The trial court's order of dismissal and order denying Atlas' motion to alter or amend the judgment are unpublished. The trial court's orders were entered in Civil Action 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. *See* App. B & C. The court of appeals' opinion is published at 312 F.3d 168 (5th Cir. 2002). *See* App. A.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on November 22, 2002. A petition for rehearing en banc and petition for panel rehearing were timely filed. The petitions were denied on February 17, 2003. *See* App. D. This Court has jurisdiction under 28 U.S.C. § 1254(1). On March 25, 2003, the Fifth Circuit stayed issuance of its mandate pending the filing of this petition pursuant to Federal Rule of Appellate Procedure 41(d)(2).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the federal diversity statute, 28 U.S.C. § 1332, are reproduced in the appendix to this petition. *See* App. E.

STATEMENT OF THE CASE

Atlas sued Dataflux in the United States District Court for the Southern District of Texas, alleging claims for breach of contract and quantum meruit. *Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168, 169-70 (5th Cir. 2002). Jurisdiction was predicated solely on diversity under 28 U.S.C. § 1332. *Id.* at 170. Neither constitutional minimum diversity nor statutory complete diversity existed at the time Atlas filed its complaint. *Id.* Atlas is a limited partnership created under Texas law, and Dataflux is a Mexican corporation. *Id.* at 169.

At the time Atlas filed its complaint, its partnership was comprised of five members: (1) Bahia Management, L.L.C. (a Texas limited liability company); (2) Capital Financial Partner, Inc. (a Delaware corporation); (3) HIL Financial Holdings, L.P. (a Texas limited partnership); (4) Francisco Llamosa (a Mexican citizen); and (5) Oscar Robles-Canon (a Mexican citizen). *Id.* at 170. Under *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990), Atlas is deemed to be a citizen of each jurisdiction in which its partners reside. Thus, at the time the complaint was filed, diversity did not exist between Atlas (which was deemed to be a citizen of Mexico) and Dataflux (a Mexican corporation). *Atlas Global Group, L.P.*, 312 F.3d at 170; *see also Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1298 (5th Cir. 1986) ("Diversity does not exist where aliens are on both sides of the litigation.").

Shortly before trial, Atlas completed a business transaction in which Llamosa and Robles-Canon (the two Mexican citizens) were removed as partners. 312 F.3d at 170. Based on that change, the parties were diverse by the time of trial. *Id.*

The parties consented to try the case before United States Magistrate Judge Frances H. Stacy pursuant to 28 U.S.C.

§ 636(c). After a six-day jury trial, the jury found that Dataflux breached a contract with Atlas and awarded damages. *Id.* After the jury's verdict but prior to the trial court's entry of judgment, Dataflux moved to dismiss the suit for lack of jurisdiction. *Id.* Dataflux argued that diversity jurisdiction did not exist at the time Atlas' complaint was filed because Dataflux and two of Atlas' partners (Llamosa and Robles-Canon) were Mexican citizens. *Id.* The United States Magistrate Judge granted Dataflux's motion to dismiss and denied Atlas' motion to alter or amend the judgment. *Id.* Atlas appealed. *Id.*

In a 2-1 decision, the United States Court of Appeals for the Fifth Circuit reversed the trial court's dismissal order and remanded the case "with instructions to the district court to enter judgment in favor of Atlas." *Id.* at 174. The panel majority (Judges Carl E. Stewart and Fortunato P. Benavides) held that the trial court erred in dismissing Atlas' suit for lack of jurisdiction because the lack of diversity between the parties at the time suit was filed was subsequently cured by Atlas' unilateral change of citizenship prior to trial, and neither the parties nor the trial court identified the absence of diversity jurisdiction before the verdict was returned. *Id.* Judge Emilio M. Garza dissented. *Id.* at 174-78. Dataflux filed a petition for rehearing en banc and petition for panel rehearing, and those petitions were denied.[1]

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1. In its petition for rehearing en banc, Dataflux asked the court of appeals to review en banc 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 be 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 jury's verdict.

REASONS FOR GRANTING THE PETITION

Dataflux's petition for writ of certiorari should be granted because the Fifth Circuit panel majority's creation of a new exception to the general rule governing the determination of diversity jurisdiction: (1) conflicts with longstanding precedent of this Court; (2) constitutes an unwarranted expansion of this Court's decisions in *Caterpillar, Inc. v. Lewis* and *Newman-Green, Inc. v. Alfonzo-Larrain*; (3) creates a circuit split with the D.C. Circuit; and (4) undermines fundamental public policy interests and principles of federalism.

I. The Fifth Circuit's Decision Conflicts With This Court's Longstanding Limits on Diversity Jurisdiction

Federal diversity jurisdiction is determined based on the parties' citizenship and circumstances as they exist at the time suit is filed. *Dole Food Co. v. Patrickson*, 538 U.S. __, 155 L. Ed. 2d 643, 654 (2003) ("It is well settled . . . that federal-diversity jurisdiction depends on the citizenship of the parties at the time suit is filed"); *Anderson v. Watt*, 138 U.S. 694, 702-03 (1891) ("[T]he [jurisdictional] inquiry is determined by the condition of the parties at the commencement of the suit"). Consistent with this rule, this Court has never held that unilateral changes in a party's citizenship after suit is filed can retroactively create diversity jurisdiction.

In this case, the panel majority created a new exception to these longstanding limits on diversity jurisdiction that directly conflicts with this Court's precedents. The panel majority held that a party's unilateral change of citizenship after suit is filed retroactively creates 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.

Atlas Global Group, L.P., 312 F.3d at 174.

This new exception directly conflicts with this Court's decisions in *Anderson* and *Dole Food Company*, in which this Court established and reaffirmed its bright-line rule requiring diversity jurisdiction to be determined based on circumstances as they existed at the time suit was filed. The Fifth Circuit's decision replaces that rule with a new, ill-defined standard allowing a party to unilaterally create diversity jurisdiction at any time before a verdict is rendered, or before "a dispositive ruling has been made by the court," if the opposing party or trial court does not identify the jurisdictional defect at the outset of litigation.

By unleashing a new, broader exception to the general rule requiring diversity jurisdiction to be determined based on the party's citizenship and circumstances as they existed at the time suit was filed, the Fifth Circuit's decision also conflicts with 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). As shown below, this Court upheld the application of the general rule governing the determination of diversity jurisdiction in *Caterpillar* and *Newman-Green* except under narrow circumstances which do not apply under the facts of this case.

In addition to violating these longstanding limits on diversity jurisdiction, the panel majority's decision also conflicts with other well-established rules governing subject matter jurisdiction. First, it is black-letter law that parties cannot waive or consent to subject matter jurisdiction when it does not exist and may even challenge the existence of subject matter jurisdiction for the first time on appeal. As stated in *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (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. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion.

(citations omitted). Second, by allowing a plaintiff to file suit first and establish jurisdiction later, the court of appeals' decision conflicts with the rule that a party asserting federal jurisdiction bears the burden of overcoming the presumption that a claim lies outside the federal courts' limited jurisdiction. *See, e.g., Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

Individually and in concert, these conflicts demonstrate that the panel majority's new rule is a dramatic departure from established law.

II. The Fifth Circuit's New Exception to the Longstanding Limits on Diversity Jurisdiction Goes Well Beyond Any Exception Previously Recognized By This Court

Review of the panel majority's decision is necessary because it creates a new exception to the longstanding limits on diversity jurisdiction that goes well beyond any exception previously recognized by this Court. The panel majority acknowledged the general rule requiring diversity jurisdiction to be determined based on the parties' citizenship and circumstances as they existed at the time suit is filed, but concluded that a departure from this rule was warranted. The panel majority erroneously relied upon this Court's decisions in *Caterpillar* and *Newman-Green* as support for such a departure. As shown below, neither *Caterpillar* nor *Newman-Green* supports the new exception adopted in this case.

A. *Caterpillar* Does Not Authorize the Fifth Circuit's New Exception

Caterpillar does not abrogate the general rule that if diversity did not exist at the time suit was filed, it cannot be created by a party's later change of citizenship. This Court merely considered whether "the absence of complete diversity at the time of removal is fatal to federal court adjudication." *Caterpillar, Inc.*, 519 U.S. at 64.

The suit at issue in *Caterpillar* was filed in state court and then removed to federal court based on diversity jurisdiction. *Id.* at 64-65. The plaintiff moved to remand, arguing that the federal district court lacked jurisdiction because a non-diverse defendant who had substantially settled the claims against it had not yet been dismissed. *Id.* The trial

court refused to remand the case. *Id.* at 66. Shortly before trial, the court dismissed the non-diverse defendant. *Id.* Judgment was entered in favor of the remaining defendant. *Id.* at 67. The Sixth Circuit reversed and vacated the judgment, holding that the case was improvidently removed. *Id.* at 68. This Court held that a trial court's error in failing to remand an improperly removed case is not fatal to the ensuing final judgment if federal jurisdictional requirements are met when judgment is entered. *Id.* at 64.

Caterpillar does not support the new exception created by the panel majority. *Caterpillar* merely addressed the dismissal of a party following removal; it did not address the effect that should be afforded a party's unilateral change in citizenship after suit is underway. *Id.* Neither the principal parties in *Caterpillar* nor their citizenship changed. Here, in contrast, Atlas unilaterally altered its citizenship long after suit was filed by removing its non-diverse partners. *Atlas Global Group, L.P.*, 312 F.3d at 170.

The removal context in which *Caterpillar* arose involves rules and policy considerations that differ from those at issue when a litigant invokes diversity jurisdiction in a case originally filed in federal court. 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.* *Caterpillar* relied on this point and concluded that the likelihood of manipulation would be lessened 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. *Atlas Global Group, L.P.*, 312 F.3d at 176 (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 prospect of jurisdictional manipulation is greatly enhanced under the panel majority's new exception because the judicial supervision discussed in *Caterpillar* is absent when a party unilaterally changes its citizenship. The panel majority's new exception allows a plaintiff to file its complaint, knowing the federal court has no jurisdiction, and then move to a new state (or, in the case of a limited partnership, remove a few partners) 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 long-standing rules precluding such a maneuver. *Id.*

B. *Newman-Green* Does Not Authorize the Fifth Circuit's New Exception

The panel majority's reliance on *Newman-Green* as support for its new exception is similarly misplaced. *Newman-Green* addressed the narrow question of whether a court of appeals may dismiss a non-diverse dispensable party to cure a jurisdictional defect, or whether the appellate court

must remand the case to the trial court to determine if dismissal is proper. *Newman-Green, Inc.*, 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. *Id.* at 836-37. This Court emphasized that this authority "should be exercised sparingly." *Id.* at 837.

In contrast to *Newman-Green*, Atlas and Dataflux are obviously 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 appeal's dismissal of a dispensable party. And, again, unlike *Newman-Green*, the crucial element of judicial control and supervision is missing when a litigant's unilateral change in citizenship is at issue.

III. The Fifth Circuit's Decision Creates a Split With the D.C. Circuit

In *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997), the D.C. Circuit expressly refused to expand *Caterpillar* and *Newman-Green* beyond their contexts to allow a party to retroactively create diversity jurisdiction by unilaterally changing its citizenship after suit is filed. *Saadeh*, 107 F.3d at 56-57. The panel majority in this case acknowledged the D.C. Circuit's conflicting holding in *Saadeh* and did not attempt to distinguish it. The panel majority declined to follow *Saadeh*, summarily rejecting the D.C. Circuit's holding as "unpersuasive." *Atlas Global Group, L.P.*, 312 F.3d at 173. Therefore, the Fifth Circuit's decision directly conflicts with the D.C. Circuit's decision in *Saadeh* and creates a circuit split on the issue of whether a party may retroactively create diversity jurisdiction by unilaterally changing its citizenship after suit is filed.

In *Saadeh*, the plaintiff and defendant were not diverse when the plaintiff filed his complaint. 107 F.3d at 53-54. Pointing to *Caterpillar* and *Newman-Green*, the plaintiff argued that the trial court could rely upon the defendant's subsequent change in citizenship to cure any jurisdictional defect. *Id.* at 57. 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"). The court noted 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.* at 57 (citations omitted).

The D.C. Circuit expressly declined to expand this Court's ruling in *Caterpillar* to allow the defendant's unilateral change in citizenship to remedy the jurisdictional defect that existed at the time suit was filed. *Id.* ("[T]he 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 [the plaintiff's] view"). The court explained:

> 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.

Id.

Saadeh cannot be distinguished from this case in any meaningful way, and the panel majority did not attempt to do so. Instead, the panel majority merely stated that *Saadeh* provided no "analytical justification for its conclusion that removal cases deserve different treatment." *Atlas Global Group, L.P.*, 312 F.3d at 173. 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. *Saadeh*, 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").[2]

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2. Unlike the panel majority's decision in this case, the D.C. Circuit's decision in *Saadeh* is consistent with longstanding precedent holding that a party's unilateral change in citizenship after litigation has commenced cannot retroactively create diversity jurisdiction that did not exist at the time suit was filed. *See 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 retroactively create diversity jurisdiction based on party's unilateral change in citizenship after suit was filed); *Lyons v. Weltmer*, 174 F.2d 473, 473 (4th Cir. 1949) (per curiam) (same); *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 subject matter 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) (same); *Lang v. Windsor Mount Joy Mut. Ins. Co.*, 487 F. Supp. 1303,

(Cont'd)

IV. The Fifth Circuit's Unworkable New Exception to the Longstanding Limits on Diversity Jurisdiction Undermines Fundamental Public Policy Interests and Principles of Federalism

A. The Strict Rules Governing Diversity Jurisdiction Should Not Be Sacrificed in the Name of Judicial Economy

The bright-line rule for determining diversity jurisdiction should be enforced for practical and policy reasons without consideration of subsequent changes in citizenship or domicile. As Judge Garza observed in his dissent in this case, "we cannot fashion jurisdictional rules (or exceptions) solely out of a desire to conserve judicial resources." *Atlas Global Group, L.P.*, 312 F.3d at 177 (Garza, J., dissenting). The bright-line rule is required to provide "maximum stability and certainty to the viability of the action" and to prevent jurisdiction from continually being decided and re-decided throughout the life of a case. *Saadeh*, 107 F.3d at 57 (quoting

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(Cont'd)

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); *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); *see also 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"); *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") (citation omitted).

and citing 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3608 at 452 (1984)); *see also Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 264 (5th Cir. 1995). Otherwise, jurisdiction would be subject to change every time any party altered its citizenship, a problem that is particularly acute in cases involving numerous parties.

The Fifth Circuit's new exception raises additional concerns. As a practical matter, it is unclear how a party opposed to federal jurisdiction would monitor the other side's citizenship during the course of litigation to ensure not only that diversity jurisdiction continues to exist after suit is filed, but also that it timely challenges the court's jurisdiction if diversity disappears.[3]

Furthermore, relaxing longstanding limits on diversity jurisdiction does not promote judicial economy. The efficiency concerns raised by the court of appeals are overstated given the circumstances of this case. The parties participated in a six-day trial. Even with a retrial, the most expensive element of trial preparation — discovery — can be used again without reinventing the wheel. *Compare Parker & Parsley Petr. Co. v. Lancaster*, 972 F.2d 580, 587-88 (5th Cir. 1992) (fact that discovery would not have to be repeated weighed in favor of dismissal even after case had been tried to verdict in federal court); *see also Waste Sys. v. Clean Land Air Water Corp.*, 683 F.2d 927, 931 (5th Cir. 1982). Any concerns regarding the efficiency of determining that jurisdiction is lacking after a trial has been conducted cannot outweigh the larger policy considerations undergirding the bright-line rule.

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3. While one may argue that the party who invoked federal jurisdiction should inform the court and the parties if the party's citizenship has changed, it is certainly possible that the party may fail to do so based on a good-faith belief that the change in citizenship does not affect diversity jurisdiction.

B. The Fifth Circuit's Decision Will Undermine Judicial Economy

The ostensible basis for the panel majority's decision in this case is that the exception it crafted is necessary to promote judicial economy. Closer review of the panel majority's holding, however, reveals that the exception will undermine rather than promote judicial economy and that the panel majority's ill-defined attempt to limit the scope of the exception provides little protection from either future jurisdictional litigation or waste.

As a threshold matter, no logical or practical reason justifies limiting the new exception only to circumstances in which the threshold jurisdictional defect is identified after "a jury verdict has been rendered, or a dispositive ruling has been made by the court." *Atlas Global Group, L.P.*, 312 F.3d at 174. The panel majority offers no principled basis for this arbitrary cutoff date. Why should a jurisdictional defect be overlooked if the defect is identified one day ***after*** the jury returns a verdict, but not overlooked if the defect is identified ***while*** the jury deliberates? It will not take long before the panel majority's new exception creates new hair-splitting exercises of this nature as it percolates through the case law.

Consider too the difficulty of determining exactly what constitutes a "dispositive ruling" for purposes of the panel majority's new exception. The "dispositive ruling" criterion is likely to create inconsistent and illogical results. Under the literal terms of the panel majority's exception, a court of appeals could not dismiss a case in which the parties initially lacked diversity if this defect is not identified until an appeal following a "dispositive ruling" under Federal Rule of Civil Procedure 12(b)(6) even though the consumption of judicial

resources presumably would be relatively modest up to that point for a case adjudicated on the pleadings. Yet, a trial court would be allowed to dismiss a case under the new exception if the jurisdictional defect is identified one day before jury deliberations begin after a long trial preceded by years of extensive discovery — a scenario that would involve a far greater consumption of judicial (and litigant) resources.

In short, the underlying efficiency justification offered for the Fifth Circuit's new exception is severely compromised by the very limits the panel majority placed on that rule. As Judge Garza stated, "there is no difference in efficiency terms between the jury verdict and, for example, the moment at which the jury retires." *Id.* at 177 (Garza, J., dissenting). "Nor, for that matter, is there a large difference between the verdict and mid-way through the trial. . . . Indeed, in complicated cases requiring years of discovery, the parties and the court often expend tremendous resources long before the case goes to trial." *Id.* What is clear is that "[t]here exists no principled way to limit a holding based solely on 'considerations of finality, efficiency and economy.'" *Id.*

It is questionable to assume that creating new exceptions to threshold jurisdictional rules will conserve judicial resources. *Id.* 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 178. "Parties will begin filing cases in federal court that would be more appropriately handled by the state judicial system." *Id.* "The Supreme Court in *Caterpillar* did not intend such a result." *Id.*

C. The Fifth Circuit's Decision Violates Principles of Federalism

As Judge Garza noted in his dissent, even if some degree of wasted effort occasionally may result from strict adherence to the bright-line rules governing diversity jurisdiction, that is a price that must be paid if the boundaries of federal jurisdiction are to be policed effectively in the service of federalism. *Id.* (citing *Coury v. Prot*, 85 F.3d 244, 249 (5th Cir. 1996) and *Herrick Co. v. SCS Commun., Inc.*, 251 F.3d 315, 330-31 (2d Cir. 2001)).

This Court has long emphasized that "[f]ederal courts are courts of limited jurisdiction." *Kokkonnen*, 511 U.S. at 377; *see also Ins. Co. 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 v. Marathon Oil Company*, 526 U.S. 574 (1999):

> Most essentially, federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design.

Id. at 586; *see also id.* at 583 ("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") (citations omitted); *Ins. 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").

Federal courts should not be encouraged to devise new and ingenious methods of asserting jurisdiction over disputes that belong in state court. This argument holds particularly true in diversity cases such as the present case, 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 will be decided 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 by allowing a litigant to unilaterally create retroactive diversity jurisdiction. This bold and problematic expansion of diversity jurisdiction warrants intervention and correction by the Supreme Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted. The judgment of the court of appeals should be reversed, and judgment should be rendered dismissing this case for lack of subject matter jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED NOVEMBER 22, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01-20245

ATLAS GLOBAL GROUP, L.P.,

Plaintiff-Counter Defendant-Appellant,

and

OSCAR ROBLES-CANON,
officer with Atlas Global Group,

FRANCISCO LLAMOSA,
officer with Atlas Global Group,

Counter Defendants-Appellants,

versus

GRUPO DATAFLUX,

Defendant-Counter Claimant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Appendix A

Before EMILIO M. GARZA, BENAVIDES, and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

Atlas Global Group, L.P. ("Atlas") appeals from the district court's grant of Grupo Dataflux's ("Dataflux") motion to dismiss for lack of subject matter jurisdiction. For the reasons stated herein, we REVERSE and REMAND for the entry of judgment in favor of Atlas.

FACTUAL AND PROCEDURAL HISTORY

Atlas is a limited partnership created under Texas law. Dataflux is a Mexican corporation. On November 18, 1997, Atlas brought suit in the Southern District of Texas against Dataflux alleging breach of contract and quantum meruit. Jurisdiction was predicated solely upon the grounds of diversity pursuant to 28 U.S.C. § 1332(a) (1993). At the time the complaint was filed, Atlas's partnership was comprised of five members: (1) Bahia Management, L.L.C., a Texas limited liability company; (2) Capital Financial Partner, Inc., a Delaware corporation; (3) HIL Financial Holdings, L.P., a Texas limited partnership; (4) Francisco Llamosa, a Mexican citizen; and (5) Oscar Robles-Canon, a Mexican citizen. Shortly before trial, however, Atlas completed a business transaction which removed the two Mexican citizens as partners. After a six-day jury trial, the jury awarded $750,000 in damages to Atlas, finding that Dataflux breached its contract with Atlas. Subsequently, Dataflux moved to dismiss, arguing that the district court lacked subject matter jurisdiction because at the time the complaint was filed, two

of Atlas's partners, like Dataflux, were Mexican citizens. The motion was granted. Atlas filed a motion to alter or amend the judgment, which was denied. Atlas appealed.

STANDARD OF REVIEW

We review dismissals for lack of subject matter jurisdiction *de novo*. *Whatley v. Resolution Trust Corp.*, 32 F.3d 905, 907 (5th Cir. 1994).

DISCUSSION

The parties do not challenge the rule that, for purposes of determining diversity jurisdiction, a partnership is a citizen of each jurisdiction in which its individual partners are citizens. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990) ("We adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all the members.' "). Likewise, the parties do not dispute that there was complete diversity when the trial of this matter commenced. Instead, Dataflux asserts that because the parties were not diverse at the time the complaint was filed, the case was properly dismissed for lack of subject matter jurisdiction. Atlas counters that this initial lack of diversity is not determinative. It maintains that the lack of diversity was remedied prior to trial and, therefore, the district court had jurisdiction.

"The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). However, the Supreme Court has recognized that, as

with most general principles, there are exceptions. *Id.* In *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), and *Newman-Green*, the Supreme Court carved out two such exceptions. Both of these cases are heavily relied upon by Atlas.

A. *Newman-Green*

In *Newman-Green*, the question presented was whether the court of appeals had the authority, pursuant to Federal Rule of Civil Procedure 21, to dismiss a dispensable non-diverse party whose presence spoiled statutory diversity jurisdiction. 490 U.S. at 827. Newman-Green, an Illinois corporation, brought a contract action in federal court against a Venezuelan corporation, four Venezuelan citizens, and William L. Bettison, a United States citizen domiciled in Venezuela. *Id.* at 828. The district court granted partial summary judgment against Newman-Green and an appeal followed. *Id.* On appeal, the Seventh Circuit *sua sponte* raised the issue of statutory jurisdiction, i.e., that jurisdiction did not exist under 28 U.S.C. § 1332(a)(2) or (3) because Bettison was a citizen of the United States, but not of any state, and therefore the suit was not either solely against aliens or against aliens and diverse citizens. *Id.* The panel concluded, however, that Bettison was a dispensable party, and could be dismissed to perfect statutory jurisdiction. *Id.* at 829. The Supreme Court agreed. While recognizing the rule that "[t]he existence of federal jurisdiction ordinarily depends on facts as they exist when the complaint is filed," the Court held that, "[l]ike most general principles . . . this one is susceptible to exceptions." *Id.* at 830. The court concluded that a circuit

court's power to dismiss a party pursuant to Rule 21 was one such exception. *Id.* at 837.

Although *Newman-Green* is distinguishable because Rule 21 is not at issue in the case before us, we find its underlying policy theme instructive. The Court in *Newman-Green* stressed that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Id.* at 836. It is this rationale that persuaded the Court in *Newman-Green* and again in *Caterpillar.*

B. *Caterpillar*

In *Caterpillar*, James David Lewis commenced a civil action in state court against Caterpillar and Whayne Supply. 519 U.S. at 64-65. Lewis and Whayne Supply were both citizens of Kentucky. *Id.* Subsequently, Liberty Mutual intervened as a plaintiff, asserting subrogation claims against both Caterpillar and Whayne Supply. *Id.* at 65. After Lewis settled with Whayne Supply, Caterpillar removed the action, asserting diversity jurisdiction. *Id.* Lewis moved for remand, contending correctly that there was not complete diversity because Liberty Mutual's claims against Whayne Supply kept it in the suit. *Id.* at 65-66. The district court erroneously denied the motion. Prior to trial, Liberty Mutual settled with Whayne Supply. *Id.* at 66. The action proceeded to trial, resulting in a judgment for Caterpillar. *Id.* at 66-67. The Sixth Circuit reversed, concluding that the error of the court in failing to remand made it necessary to vacate the district court judgment. *Id.* at 67.

Appendix A

The Supreme Court reversed the Sixth Circuit, effectively reinstating the jury verdict. *Id.* at 78. The Court held that a "district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdiction requirements are met at the time judgment is entered." *Id.* at 64; *see also Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 & n.5 (5th Cir. 2001) (citing *Caterpillar* for this proposition); *H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 328 (5th Cir. 2000) (same). Addressing the jurisdictional problem specifically, the Court provided that any "*jurisdictional* defect was cured, *i.e.*, complete diversity was established before the trial commenced. Therefore the Sixth Circuit erred in resting its decision on the absence of subject-matter jurisdiction." *Caterpillar*, 519 U.S. at 73; *accord Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 700 (1972) (holding that an erroneous removal need not cause destruction of final judgment if requirements of subject matter jurisdiction are satisfied when judgment is entered).

The Supreme Court then addressed the still-existing statutory problem—the fact that when the action was removed, it was not removable pursuant to 28 U.S.C. § 1441(a) (1994). The question remaining was whether this error, which lurked "in the unerasable history of the case," required reversal of the district court. *Caterpillar*, 519 U.S. at 73. The Court concluded that although arguments could be made for reversal on this ground, these arguments failed because they "run up against an overriding consideration. Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 . . . (1938),

considerations of finality, efficiency, and economy become overwhelming." *Id.* at 75, 77 ("To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice."); *see also Knop v. McMahan*, 872 F.2d 1132, 1139 n.16 (3d Cir. 1989) ("To permit a case in which there is complete diversity throughout trial to proceed to judgment and then cancel the effect of that judgment and relegate the parties to a new trial in a state court because of a brief lack of complete diversity at the beginning of the case would be a waste of judicial resources. It would also encourage litigants to speculate on the jurisdiction issue by saving it for use in the event of a loss.").

While considerations of finality and judicial economy come into play "[o]nce a diversity case has been tried in federal court," the Court's holding in *Caterpillar* references the fact that judgment had already been entered. 519 U.S. at 64, 75. Although Dataflux moved for dismissal before the trial court entered judgment, the analysis in *Caterpillar* compels a conclusion that its exception covers the facts of this case. *Caterpillar* does not hold that there must always be entry of judgment for an exception to the rule to apply. It merely holds that judgment is sufficient. *See In re AT&T Fiber Optic Cable Installation Litig.*, No. IP 99-9313-C H/K, 2001 WL 1397295, at *5-7 (S.D. Ind. Nov. 5, 2001) (concluding that *Caterpillar* does not make judgment a prerequisite and stating that "the reasoning of [*Caterpillar*] extends to district courts even before the formal entry of final judgment. Suppose, for example, that [the] plaintiff [in *Caterpillar*] first

raised the issue after an adverse verdict at trial, but before the judge had actually entered final judgment. Surely the result would be the same—no remand"). Here, the only thing left for the district court to do was enter judgment. It is difficult to distinguish a case where judgment has been entered from a case where nothing is left for the court to do other than enter judgment.

Dataflux's attempts to distinguish *Caterpillar* are not persuasive. First, Dataflux asserts that unlike in *Caterpillar*, jurisdiction was not cured through a dismissal of a party—it was cured through a unilateral change in citizenship effectuated through a reorganization. Second, it contends that this case was not removed but instead was originally filed in federal court. Finally, it asserts that *Newman-Green* is distinguishable because it dealt with Rule 21.

1. Method of Perfecting Jurisdiction

As to the first ground, Dataflux argues that *Caterpillar* does not apply in a case where a party has not been dismissed, but instead statutory diversity jurisdiction is perfected by a "unilateral change" in citizenship. While a party was dismissed in *Caterpillar*, and this is perhaps technically a distinguishing factor, this factor was not at the heart of the Supreme Court's analysis in *Caterpillar* and Dataflux does not persuasively explain its import. Dataflux opines that extending the exception to cases where jurisdiction was perfected through a unilateral change of domicile would defeat the purpose of the general rule. According to Dataflux, such a rule would require the district court to reevaluate the existence of diversity jurisdiction in each instance in which

a party changed its domicile. We recognize that the rule that diversity jurisdiction is determined solely at the outset of the litigation exists precisely to prevent the district court from having to make such determinations. 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3608 (2d ed. 1984). However, our holding today has only a slightly greater effect on the general rule than would the strictest construction of *Caterpillar.* As in the *Caterpillar* case, a district judge would only have to reevaluate jurisdiction when it is challenged after a verdict or dispositive ruling. If a party re-organized before this point and jurisdiction were challenged, the general rule would be applied and the re-organization would be of no effect.

2. Removed Cases vs. Original Federal Forum Cases

Dataflux also focuses on the fact that *Caterpillar* dealt with a removed case and that this action was originally filed in federal court. The only authority cited by Dataflux in support of its position that the fact that *Caterpillar* involved a removal action is a controlling distinguishing factor is *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997). In *Saadeh*, the D.C. Circuit distinguished its case from *Caterpillar* on the remand ground, concluding that "[a]lthough 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." *Id.* at 57. Because *Saadeh* does not provide any analytical justification for its conclusion that removal cases deserve differential treatment, we find it unpersuasive.

Appendix A

Dataflux opines that removal cases are different because removal is subject to judicial control, which decreases the likelihood of jurisdictional manipulation. However, district courts always have a duty to examine jurisdiction regardless of whether a case is removed or was originally filed in the district court. *Save The Bay, Inc. v. U.S. Army*, 639 F.2d 1100, 1102 (5th Cir. 1981) ("[I]t is incumbent upon federal courts[,] trial and appellate[,] to constantly examine the basis of jurisdiction, doing so on our own motion if necessary."). Furthermore, we find it difficult to imagine that plaintiffs who cannot establish federal jurisdiction will intentionally file an action in federal court in the hope that neither the judge nor the defendant raises the issue, knowing that at any point before a verdict or dispositive ruling, the court or defendants could raise the issue and the case would be dismissed.

We conclude that the exception carved out in *Caterpillar* applies under the circumstances of this case. The decision in *Caterpillar* was not limited to removal cases. Undoubtedly, if the Supreme Court had found this to be a dispositive factor, it would have spoken to the issue. The same is true of Dataflux's argument that *Newman-Green*'s rationale is limited to dismissals pursuant to Rule 21. While it is accurate to describe these cases as removal and Rule 21 cases, respectively, there is nothing that persuades us that the principle of these cases is limited to only the exact same procedural scenarios. *See C.L. Ritter Lumber Co., Inc. v. Consolidation Coal Co.*, 283 F.3d 226, 229-230 (4th Cir. 2002) (holding that the district court could, post-trial, split a suit into two separate cases to cure a jurisdictional defect and stating that "[t]he specific nature of the remedy implicates the discretion of the court, not its power to act").

Appendix A

In the instant case, this dispute has been completely adjudicated by a federal district court, which had jurisdiction over the parties throughout the trial and at the time the jury rendered its verdict of $750,000 in favor of Atlas. The parties and the court have committed ample resources to its adjudication. They have had the benefit of a full assessment of the evidence by an impartial jury during a six-day trial. To erase the result of that process by requiring them to re-litigate their claims in state court, or likely in federal court, is not necessary under *Caterpillar.* In so concluding, we remain aware of the limited nature of the district court's jurisdiction and the Supreme Court's caveat against improper expansion of federal jurisdiction. However, this narrow exception applies only where (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. If at any point prior to the verdict or ruling, the issue is raised, the court must apply the general rule and dismiss regardless of subsequent changes in citizenship.

CONCLUSION

For the reasons stated herein, we REVERSE and REMAND with instructions to the district court to enter judgment in favor of Atlas.

REVERSED and REMANDED.

Appendix A

EMILIO M. GARZA, Circuit Judge, dissenting:

This case should be easy. Imagine that a plaintiff from State X filed suit in federal court against a defendant from State X. The plaintiff incorrectly contended in the complaint that the federal court had diversity jurisdiction. Nearly three years passed. Then the plaintiff moved to State Y, creating diversity. Imagine that, after the jury rendered a verdict for the plaintiff, the district court discovered that, at the time the complaint was filed, the parties were not completely diverse—indeed, there was *no* diversity between the parties. The district court would recognize the longstanding rule that diversity jurisdiction is determined at the time the complaint is filed. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). The plaintiff's recent move would make no difference. The district court would dismiss the case for lack of jurisdiction. *See Sarmiento v. Texas Bd. of Veterinary Med. Examiners By and Through Avery*, 939 F.2d 1242, 1246 n.6 (5th Cir. 1991) ("Although Sarmiento is currently domiciled in Florida, at the time he filed suit he was domiciled in Texas, as he also was when his third amended complaint was filed. Therefore, and neither party contests this, the jurisdiction of the district court could not be based on diversity of citizenship pursuant to 28 U.S.C. § 1332.").

The dispute between Atlas Global and Dataflux is precisely the above scenario. Atlas Global is a limited partnership, whose citizenship is determined by the citizenship of all its partners. *Carden v. Arkoma Associates*, 494 U.S. 185, 195-96 (1990). At the time Atlas Global filed its complaint, two of its partners were Mexican citizens. Thus, Atlas was a "citizen" of Mexico. Dataflux was a Mexican

corporation. Therefore, the parties were not completely diverse. Indeed, there was *no* diversity between the parties. Nearly three years after filing its complaint, Atlas conducted a business transaction that removed its two Mexican partners, and effectively "moved out of" Mexico. The case went to trial; the jury returned a verdict for Atlas. Then, once the district court discovered the jurisdictional flaw, it dismissed the case.

The majority opinion, however, complicates this simple scenario by creating a new exception to the rule that diversity jurisdiction depends on the citizenship of the parties at the time the complaint is filed. The majority opinion crafts the following "narrow exception": A case will not be dismissed for lack of subject matter jurisdiction where "(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." The majority's exception threatens to swallow the rule.

The majority opinion asserts that this new rule is only a "slight" extension of the Supreme Court's decision in *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996). The facts of *Caterpillar* make clear, however, that it has no applicability to a case where a party unilaterally creates diversity jurisdiction.

In *Caterpillar*, Lewis, a citizen of Kentucky, filed state law tort claims in Kentucky state court against Caterpillar

(a Delaware corporation with its principle place of business in Illinois) and Whayne Supply, a Kentucky corporation. 519 U.S. at 64-65. Liberty Mutual, Lewis' insurance carrier, intervened in the lawsuit, asserting claims against both Caterpillar and Whayne Supply. *Id.* at 65. Lewis later settled his claims with Whayne Supply. *Id.* Caterpillar then tried to remove the case to federal court, asserting diversity jurisdiction. *Id.* Lewis requested remand, claiming that the district court lacked jurisdiction. *Id.* Lewis correctly pointed out that Liberty Mutual's claim against Whayne Supply kept it in the lawsuit, and, as a result, the parties were not completely diverse. *Id.* at 65-66. The district court erroneously denied his motion to remand. *Id.* at 66. Three years later, and several months prior to trial, Liberty Mutual settled its claims with Whayne Supply, and the district court dismissed Whayne Supply from the lawsuit. *Id.* The Supreme Court held that, because the "jurisdictional defect" (the presence of Whayne Supply) was cured prior to judgment, it was unnecessary to dismiss the case. *Id.* at 76-78.

The majority opinion acknowledges that, in *Caterpillar*, there was no "unilateral change" in citizenship, yet asserts that "this factor was not at the heart of the Supreme Court's analysis in *Caterpillar*[.]" The majority opinion apparently overlooks the Supreme Court's response to Lewis' prediction that creating an exception in his case would "encourag[e] state court defendants to remove cases improperly[.]" *Caterpillar*, 519 U.S. at 77 (internal quotation marks omitted). The Supreme Court rejected this possibility, because it "assume[d] [a party's] readiness to gamble that any jurisdictional defect, for example, the absence of complete diversity, [would] first escape detection, then disappear prior to judgment." *Id.* Under the facts of *Caterpillar*, the party that brought the case to federal court

(Caterpillar) would have had to gamble. Caterpillar had to hope that neither the district court nor any appellate court would detect the jurisdictional defect.[1] More significantly for present purposes, Caterpillar had to gamble that Whayne Supply (the party whose presence destroyed diversity) would somehow disappear from the lawsuit. Caterpillar had no control over whether Whayne Supply remained in the case. It just had to sit back and keep its fingers crossed.

Atlas, by contrast, faced no such "gamble." As the facts of this case illustrate, Atlas had complete control over whether its two Mexican citizens remained in the company as partners. Atlas could—and did—single-handedly remove the parties whose presence spoiled diversity. It is irrelevant that, in this case, Atlas may have filed its complaint in good faith, genuinely failing to recognize the jurisdictional defect. Under the rule crafted by the majority, a less scrupulous party could deliberately file suit in federal court when diversity was lacking. Such a plaintiff might choose to file quickly because, for example, the statute of limitations on its claim was about to run out. The majority's rule would allow that plaintiff to file its complaint in federal court, knowing that the federal courts did not have jurisdiction, and then move to a new state (or, in the case of a limited partnership, remove a few partners) and create diversity.[2]

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1. In *Caterpillar*, it was particularly unlikely that the courts would remain unaware of the jurisdictional flaw, since Lewis had pointed it out in his motion to remand.

2. The 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. *See Howery*,

(Cont'd)

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.[3]

The majority opinion creates a new exception to the long-standing rule that diversity jurisdiction is determined at the time the complaint is filed, apparently out of a concern about judicial economy. The majority stresses that "'[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law . . . considerations of finality, efficiency and economy become overwhelming.'" There is no question that the conservation of judicial resources is an important value. *Caterpillar*, 519 U.S. at 76 ("'[R]equiring dismissal after years of litigation . . . would impose

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(Cont'd)

243 F.3d at 916 ("[T]he burden of establishing federal jurisdiction rests on the party seeking the federal forum."); *Texas Beef Group v. Winfrey*, 201 F.3d 680, 686 (5th Cir. 2000) (same); *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991) (same). This rule exists because the federal courts are courts of limited jurisdiction. Accordingly, "[w]e must presume that a suit lies outside this limited jurisdiction," until the party seeking the federal forum has proven that his suit belongs in federal court. *Howery*, 243 F.3d at 916.

3. We have repeatedly declared that parties may not by agreement confer subject matter jurisdiction on the federal judiciary. *Howery v. Allstate Ins. Co.*, 243 F.3d at 912, 919 (5th Cir. 2001) ("[S]ubject-matter jurisdiction cannot be created by waiver or consent."); *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996) ("The parties can never consent to federal subject matter jurisdiction[.]"). Yet the majority has fashioned a rule that allows *a single party* to confer jurisdiction on the federal courts.

unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention.'") (quoting *Newman-Green*, 490 U.S. at 836).

The problem with the majority's holding is that efficiency appears to be its *only* concern. If that is the case, then the majority's exception cannot be confined to the "narrow" boundaries it has prescribed. After all, parties "commit[] ample resources" to a case long before a jury verdict or a dispositive ruling from the court. The majority opinion states that, under its rule, if one of the parties or the district court discovers a jurisdictional defect prior to the jury verdict, the court should dismiss the case. Yet there is no difference in efficiency terms between the jury verdict and, for example, the moment at which the jury retires. Nor, for that matter, is there a large difference between the verdict and mid-way through the trial. (The trial in this case lasted six days.)[4]

4. The only difference is that after a verdict or dispositive ruling, the parties know the result. Atlas focuses on this fact, suggesting that this Court should not allow the "loser" in the case to have it dismissed on jurisdictional grounds. *See* Brief of Appellants at x (characterizing the issue in this case as whether the magistrate erred "in dismissing the case after a jury trial when the *loser* . . . moved to dismiss for lack of jurisdiction") (emphasis added). The majority, correctly enough, does not focus on this factor, apparently recognizing that parties cannot waive the right to challenge the subject matter jurisdiction of the federal courts. Parties may raise that jurisdictional defense at any point, even after judgment is entered. *Coury*, 85 F.3d at 248 ("[L]ack of [federal subject matter] jurisdiction is a defense which cannot be waived."). Indeed, the only party that has an incentive to correct a jurisdictional defect (including one that still exists at judgment) is the party that lost the case. In order for our courts to remain courts of limited jurisdiction, we must, in some cases, rely on the "loser" to catch a jurisdictional defect that should have been caught much sooner.

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. There is no principled way to limit a holding based solely on "considerations of finality, efficiency and economy."

Nor is it clear that creating exceptions to our jurisdictional rules would even lead to the conservation of judicial resources. Instead, carving out an exception in one case merely encourages future parties to file more appeals, urging this Court to create more exceptions. *See Saadeh v. Farouki*, 107 F.3d 52, 57 (D.C. Cir. 1997) (refusing to create an exception to "the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed," and noting that "the instant case demonstrates the value of a bright-line rule; even on appeal the parties continue to develop new theories and proffer new evidence on citizenship and domicile"). We should enforce our procedural rules as strictly as possible, even if that means a waste of judicial resources in a single case. Otherwise, in the long run, we may waste many more judicial resources litigating all the potential exceptions to our previously "clear" jurisdictional rules.[5]

However, regardless how these concerns about judicial economy play out, we cannot fashion jurisdictional rules

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5. Indeed, we might even waste the time of the parties in an individual case, if the Supreme Court ultimately rejected the exception we carved out. *See E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 930 (2d Cir. 1998) ("Nobody's interest would be served if we by stretching the law found jurisdiction to exist, only to have that position ultimately rejected by the High Court.").

(or exceptions) solely out of a desire to conserve judicial resources. For we must always keep in mind this central principle: "It is axiomatic that the federal courts have limited subject matter jurisdiction and cannot entertain cases unless authorized by the Constitution and legislation." *Coury*, 85 F.3d at 248. "Obviously, [this] principle[ ] can result in a tremendous waste of judicial and private resources." *Id.* at 249. But the so-called "waste" of judicial resources that occurs when we dismiss a case for lack of jurisdiction is the price that we pay for federalism. *Id.*; *see also Herrick Co., Inc. v. SCS Communications, Inc.*, 251 F.3d 315, 330-31 (2nd Cir. 2001) ("As the Supreme Court has remarked, '[o]nce a diversity case has been tried in federal court with rules of decision supplied by state law . . . considerations of finality, efficiency, and economy become overwhelming.' . . . At the same time, however, the problems of defective jurisdiction . . . are themselves weighty, being tied to the fundamental constitutional idea that federal courts have only limited jurisdiction[.]") (quoting *Caterpillar*, 519 U.S. at 75). If we make too many exceptions to our jurisdictional rules, parties will cease to believe that any limitations exist. Parties will begin filing cases in federal court that would be more appropriately handled by the state judicial system. The Supreme Court in *Caterpillar* did not intend such a result.

I respectfully dissent.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AND ENTERED DECEMBER 6, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

V.

GRUPO DATAFLUX,

Defendant.

MEMORANDUM AND ORDER

Before the Court as a post-trial motion is Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Document No. 123). In that motion, Defendant argues for the first time that this Court does not have diversity jurisdiction over this case because Defendant is a citizen of Mexico as are two of Plaintiff's limited partners. Given that the citizenship of Plaintiff Atlas Global Group, L.P. must be considered in determining diversity jurisdiction, Defendant maintains that this case must be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction. Plaintiff opposes the motion to dismiss, but does not contest the governing legal proposition that a limited partnership's citizenship is determined by the citizenship of its partners.

Appendix B

Jurisdiction in this case has always been predicated on diversity, 28 U.S.C. § 1332. In determining diversity jurisdiction, the citizenship of the limited and general partners of a limited partnership are to be considered. *Carden v. Arkoma Associates*, 494 U.S. 185 (1990). In addition, jurisdiction is to be determined as of the date the case was filed. *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 776 (5th Cir. 1986) ("The citizenship of a party at the commencement of the action is controlling for purposes of determining diversity jurisdiction and subsequent actions do not affect the court's jurisdiction. . . . Jurisdiction cannot be created retroactively by substituting a diverse claimant for a nondiverse party.")

Here, as of the date this case was filed, Defendant Grupo Dataflux was Mexican corporation. Plaintiff Atlas Global Group, L.P., a Texas limited partnership, was comprised of Bahia Management L.L.C., a Texas limited liability company, Capital Financial Partner, Inc., a Delaware corporation, HIL Financial Holdings, L.P., a Texas limited partnership, Francisco Llamosa, a Mexican citizen, and Oscar Robles, a Mexican citizen. Given that two of Plaintiff Atlas Global Group, L.P.'s limited partners were Mexican citizens at the time this case was filed, there was not complete diversity of parties under 28 U.S.C. § 1332, and the Court lacked diversity jurisdiction over this case. *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1298 (5th Cir. 1986) ("Diversity does not exist where aliens are on both sides of the litigation."). Accordingly, it is

ORDERED that Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Document No. 123) is GRANTED and this case is DISMISSED WITHOUT PREJUDICE. It is further

Appendix B

ORDERED that the statute of limitations for the claims alleged in this case is STAYED from November 18, 1997, the date this case was filed, until ten days after the entry of this Order, to allow Plaintiff to refile this case in the appropriate forum.

Signed at Houston, Texas, this 6th day of December, 2000.

s/ Frances H. Stacy
FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AND ENTERED JANUARY 5, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

V.

GRUPO DATAFLUX,

Defendant.

ORDER

Before the Court is Plaintiff Atlas Global Group, L.P.'s Motion to Alter or Amend Judgment (Document No. 130), in which Plaintiff seeks reconsideration of the post-trial Memorandum and Order dismissing this case for lack of jurisdiction. As set forth in the Memorandum and Order dismissing this action for want of jurisdiction, it is this Court's opinion that at the time this action was filed complete diversity did not exist. If an exception to the well established rule set forth in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990) is to be made in this case, it must be made by a higher court than this one. Accordingly, it is

Appendix C

ORDERED that Plaintiff Atlas Global Group, L.P.'s Motion to Alter or Amend Judgment (Document No. 130) is DENIED.

Signed at Houston, Texas, this 5th day of January, 200[1].

s/ Frances H. Stacy
FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED AND FILED FEBRUARY 17, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20245

ATLAS GLOBAL GROUP, LP

Plaintiff - Counter Defendant - Appellant

and

OSCAR ROBLES-CANON, officer with Atlas Global Group; FRANCISCO LLAMOSA, officer with Atlas Global Group

Counter Defendants - Appellants

v.

GRUPO DATAFLUX

Defendant - Counter Claimant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING AND
REHEARING EN BANC

Appendix D

(Opinion 11/22/02, 5 Cir., __, __ F.3d __)

Before EMILIO M. GARZA, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Carl E. Stewart
United States Circuit Judge

Emilio M. Garza, Circuit Judge, dissenting, for the same reasons as stated in the opinion.

APPENDIX E — STATUTE INVOLVED

28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

> **(1)** a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.