No. 23-677

*In the Supreme Court of the United States*

ROYAL CANIN U.S.A. INC. AND
NESTLÉ PURINA PETCARE COMPANY,

*Petitioners,*

v.

ANASTASIA WULLSCHLEGER AND GERLADINE BREWER,

*Respondents.*

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

# BRIEF FOR CENTER FOR LITIGATION & COURTS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

SCOTT DODSON
*Counsel of Record*
Center for Litigation & Courts
UC College of the Law – SF
200 McAllister St.
San Francisco, CA 94102
(925) 285-1445
dodsons@uclawsf.edu

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**RULES AND STATUTES**



**OTHER**

## INTEREST OF AMICUS CURIAE

The Center for Litigation and Courts ("Center") is a nonpartisan, academic research center at the University of California Law, San Francisco. Its mission includes sharing knowledge of civil litigation with courts. In furtherance of that mission, the Center has filed briefs in this Court and in the U.S. Courts of Appeals on issues relevant to its expertise in civil litigation.

The Center has a particular expertise in matters of jurisdiction and in the time-of-jurisdictional-assessment rule at issue in this case. Because neither the parties nor the courts below have focused on this crucial aspect of the case, the Center believes this brief will aid the Court's adjudication.

The Center is interested in the informed development and application of jurisdictional law. The Center has no interest in the ultimate outcome of this litigation. Rather, the Center's interest is that of a true friend of the court.[1]

---

[1] No person or entity other than the Center and its counsel authored this brief in whole or in part or contributed money intended to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

This case involves the timing of jurisdictional assessment. The Eighth Circuit held that, in removed cases, the time of jurisdictional assessment shifts, every time a complaint is amended, to the date of the most recent amendment.

That holding is incorrect. As a default, the removal statute fixes the time of jurisdictional assessment at the time of removal. Neither this Court's precedents nor policy considerations support a new judicial exception to that rule. Accordingly, this Court should vacate the Eighth Circuit's decision to the contrary.

The Court should do so without relying on "forum manipulation," "gamesmanship," or "right of removal," loaded terms repeatedly recited by Petitioners and other amici. None of those terms realistically applies here. Instead, the Court can and should resolve the case based solely on the time-of-removal rule.

## ARGUMENT

### A. The Eighth Circuit's Novel Exception to the Time-of-Removal Rule is Inconsistent with the Removal Statute and This Court's Precedents.

1. Although federal courts have a continuing obligation to assure that jurisdiction exists, that continuing obligation generally is to assure that jurisdiction existed at a fixed point in time. Otherwise, changing facts and case developments could upend the case on jurisdictional grounds years into the litigation, wasting the time and resources of the parties and the court. Fixing a time of jurisdictional assessment provides stability and certainty in a case.

2. For original actions, the time of jurisdictional assessment is governed primarily by federal common law. *See* Scott Dodson & Phillip A. Pucillo, *Joint and Several Jurisdiction*, 65 Duke L.J. 1323, 1349 (2016) (stating that the "rule is neither constitutionally mandated nor itself jurisdictional but rather a manifestation of judicial policy").

The longstanding common-law rule is that the time of jurisdictional assessment is fixed at the time of filing; postfiling changes in facts, parties, or pleadings neither create nor oust jurisdiction. *See, e.g.*, *Freeport-McMoRan, Inc. v. K H Ene., Inc.*, 498 U.S. 426, 428 (1991) (per curiam) ("Diversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action."); *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (stating that the existence of jurisdiction "depends upon the state of things at the time of the action brought"); *Morgan's Heirs v. Morgan*, 15 U.S. (2 Wheat.) 290, 297 (1817) ("We are all of opinion that the jurisdiction having once vested, was not devested by the change of residence of either of the parties."). *See also* 13E Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3608 (3d ed. 2024).

Congress can displace this common-law rule, as it has in rare circumstances. The citizenship of a CAFA class action, for example, is determined "as of the date of filing of the complaint *or amended complaint*." 28 U.S.C. § 1332(a)(7) (emphasis added). As another example, the False Claims Act confers federal jurisdiction over a false-claim action only when the person bringing the action is an "original source" of the information; whether the person is an "original source" depends upon whether the individual has

independent knowledge of the information "on which the allegations are based." 31 U.S.C. § 3730(e)(4). The statute thus requires courts to reassess the "original source" jurisdictional condition each time those allegations are amended in a pleading. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473 (2007). These rare statutory anomalies prove the default rule that jurisdiction usually is assessed at the time of filing.

This Court also can alter the common-law default rule. For example, the Court has recognized that federal courts exercising original diversity jurisdiction may cure defects in complete diversity by dropping a dispensable nondiverse party. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836 (1989); *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 579 (1873); *Connolly v. Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829). *See also* 13E Wright & Miller, *supra*, § 3608. This practice is best viewed as a shift of the time of jurisdictional assessment from the time of filing to the time of party dismissal. *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 572 (2004) ("That method of curing a jurisdictional defect had long been an exception to the time-of-filing rule.").

However, this Court has declined to endorse other exceptions to the time-of-filing rule. "The Court has long applied [the] time-of-filing rule categorically to postfiling changes that otherwise would destroy diversity jurisdiction." *Id.* at 583–84 (Ginsburg, J., dissenting) (emphasis omitted). The Court even has been reluctant to create new exceptions to the time-of-filing rule to *cure* a jurisdictional defect. *E.g.*, *id.* at 572 (refusing to shift the rule to the time of a change in an existing party's nondiverse citizenship).

The reluctance to create new exceptions to the time-of-filing rule stems from the need for clarity and consistency in matters of jurisdiction:

> The time-of-filing rule is what it is precisely because the facts determining jurisdiction are subject to change, and because constant litigation in response to that change would be wasteful. . . . [W]hether destruction or perfection of jurisdiction is at issue, the policy goal of minimizing litigation over jurisdiction is thwarted whenever a new exception to the time-of-filing rule is announced, arousing hopes of further new exceptions in the future.

*Id.* at 580–81. *Accord* 13E Wright & Miller, *supra*, § 3608 ("This approach provides maximum stability and certainty to the viability of the action and minimizes repeated challenges to the court's subject matter jurisdiction and the expenditure of resources that entails.").[2]

---

[2] In *Rockwell*, this Court stated that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction," 549 U.S. at 473–74, but that general statement was dictum, was supported only by citations to lower-court opinions, did not attempt to reconcile prior contrary decisions, and has never been relied upon by subsequent decisions of this Court. At most, *Rockwell*'s dictum refers only to a highly specific circumstance: when the original complaint asserted only jurisdiction-eligible claims and the amended complaint "withdraw[s]" all those claims and "replace[s]" them with only jurisdiction-ineligible claims. *Id.* at 473. In an

3. In removed cases, regardless of the basis for subject-matter jurisdiction, the time of jurisdictional assessment is not a common-law rule but rather is statutorily set at the time of removal. *Caterpillar v. Lewis*, 519 U.S. 61, 73 (1996) (noting "the § 1441(a) requirement that the case be fit for federal adjudication at the time the removal petition is filed"). Courts studiously follow the statutory time-of-removal rule even when subsequent events otherwise would destroy jurisdiction. *E.g.*, *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289–90 (1938).

Few exceptions exist. Because the time-of-removal rule is not itself jurisdictional, it can be waived. *Pegram v. Herdrich*, 530 U.S. 211, 215 n.2 (2000); *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 700 (1972). It also can be shifted to the time of a cure of incomplete diversity when "considerations of finality, efficiency, and economy become overwhelming." *Caterpillar*, 519 U.S. at 75. Neither exception applies in this case. Thus, the statutory time-of-removal rule applies, as does this Court's discouragement of new exceptions to it.

4. The Eighth Circuit created just such a new exception by relying on the broad and novel principle that the filing of an amended complaint automatically shifts the time of jurisdictional assessment from the time of removal to the time of the amended complaint. Pet. 7a ("[A]n amended complaint supersedes an original complaint and renders the original complaint

---

appropriate case, this Court should consider whether that specific circumstance warrants shifting the time-of-filing rule despite *Grupo*'s cautionary admonitions.

without legal effect."). That exception clashes with this Court's prior cases.

This Court rejected it in an analogous removal context nearly 90 years ago in *St. Paul Mercury*. There, the plaintiff sued in state court seeking in excess of the jurisdictional threshold for diversity jurisdiction but, after removal, amended the complaint to allege less than the jurisdictional threshold. *St. Paul Mercury*, 303 U.S. at 284. The Court held:

> [T]he status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal, since the defendant must file his petition before the time for answer or forever lose his right to remove. . . . And although, as here, the plaintiff after removal, by stipulation, by affidavit, *or by amendment of his pleadings*, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction. Thus events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached.

*Id.* at 292–93 (emphasis added).

More recently, in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), this Court implicitly rejected the Eighth Circuit's reasoning on strikingly similar facts. There, the plaintiffs filed a complaint in state court bringing a federal age-discrimination claim and several related but nondiverse state-law claims. *Id.* at 345. After the defendants removed the case to federal court, the plaintiffs "moved to amend their complaint to delete the allegations of age

discrimination" to "eliminate their sole federal-law claim" and moved, contingent on the amendment, to remand the remaining state-law claims to state court. *Id.* at 346.

The district court granted the motion to amend, eliminating the federal-law claim, and then granted the motion to remand—not for lack of subject-matter jurisdiction, as the Eighth Circuit's rule would instruct, but under circuit precedent authorizing discretionary remand of pendent claims. *Id.* at 346–47.

This Court affirmed. Although the Court focused on whether the district court had discretion to remand pendent claims in the absence of statutory authority (the case predated 28 U.S.C. § 1367), the Court never doubted that the district court had pendent jurisdiction over them based on the federal claim pleaded at the time of removal. *Id.* at 350–51. If the Eighth Circuit's vision of amended complaints were correct, then the Court was wrong to deem the state-law claims to be within the pendent jurisdiction of the district court.

5. In addition to creating conflicts with this Court's precedents, the Eighth Circuit's novel rule would make a mockery of the stability and economy of the time-of-removal rule. Amendments are freely given at every stage of a lawsuit. *See* Fed. R. Civ. P. 15(a)–(b) (stating that "the court should freely give leave" to amend, even allowing amendments during or after trial). During the time between a notice of removal and the date of the last amended complaint, a variety of facts and allegations that once established jurisdiction may have changed.

Consider, for example, a state-law case by a North Dakota plaintiff against a South Dakota defendant

filed in North Dakota state court, which the defendant removes to federal court on diversity jurisdiction. During the long pendency of the case, the South Dakota defendant moves permanently to North Dakota. A few days after, the plaintiff files an amended complaint to add allegations of additional damages. The Eighth Circuit's rule would require the district court to remand the case for lack of jurisdiction because the amendment supersedes the original complaint and forces a shift of the time of jurisdictional assessment to the time of the amended complaint—a time at which the parties are no longer diverse. And that remand might occur deep into the litigation, resulting in a waste of litigant and court resources. Alternatively, the litigants, fearing the Eighth Circuit's hammer, might resist amending the complaint after the move, distorting the litigation and frustrating the very purposes behind Rule 15's policy of liberal amendment. The Eighth Circuit's rule requiring courts to revisit jurisdiction anew for each amendment would create waste and instability.

For these reasons, the statutory time-of-removal rule applies, and the Eighth Circuit's contrary judgment should be vacated.

### B. This Court Should Avoid Issues of "Forum Manipulation" or the "Right of Removal."

Petitioners and other amici repeatedly refer to plaintiffs' "forum manipulation," "gamesmanship," and "judge shopping," in contrast to defendants' "right of removal." Br. 1, 3, 13, 35–36, 47–48; Brief of Amicus Curiae The Missouri Chamber of Commerce and Industry in Support of Petitioners 2, 5–9. This Court should avoid those loaded and unhelpful terms.

This case presents no evidence of "forum manipulation" by Respondents. They always preferred state court and consistently resisted federal court. Their attempt to return to state court by amending their complaint to eliminate a federal claim they never meant to assert in the first place is no more forum manipulation or judge shopping than Petitioners' election to remove the case from a state forum they disliked to a federal forum they preferred.

Petitioners insist that "a plaintiff could always file in state court and wait for defendants to remove," and then, if the plaintiff dislikes the federal judge assigned, or if the plaintiff fears an adverse ruling from the federal court, "amend the complaint to remove the federal question and force a remand." Br. 13. That kind of gamesmanship is wildly implausible.

For one, the scheme would entail intentionally asserting a federal claim that the plaintiffs do not really care about, on the hope that the defendants will remove the case, just so the plaintiffs can sacrifice the federal claim to return to state court. It is hard to imagine a scenario in which that kind of strategy is sensible, especially when an irritated federal judge may "require payment of just costs and any actual expenses, including attorney fees" in the remand order. 28 U.S.C. § 1447(c). After all, plaintiffs can always judge shop entirely in state court by filing a case *without* a basis for removal and then voluntarily dismissing and refiling anew in state court.

For another, the gambit would give the defendants a free choice between state and federal court. If the case is assigned a defense-friendly state-court judge, the defendant can choose to stay in state court. If not, the defendant can remove for a shot at a different

judge in federal court. Plaintiffs are unlikely to intentionally give the defendant that free choice. *Cf.* Scott Dodson, *Why Do In-State Plaintiffs Invoke Diversity Jurisdiction?*, L. & Soc. Inquiry (2023) (finding evidence that in-state plaintiffs often file diversity cases originally in federal court to preempt removal to avoid giving the defendant a forum choice).

If a plaintiff really wanted to maximize vertical forum-selection opportunities, the plaintiff would file in *federal* court first, and then, if dissatisfied with that forum, voluntarily dismiss the entire suit under Rule 41(a) and refile without the federal claim in state court. Starting instead in state court for a chance at vertical forum shopping makes little sense.

Meanwhile, the loaded phrase "right to remove" has little purchase in the context of removal of a federal-question case between private parties. The removal statute does not use the term "right." It merely states that the defendant "may" remove the case. 28 U.S.C. § 1441(a). It is an allowance, which Congress may grant for reasons having nothing to do with party interests or rights.

For federal-question cases, the allowance is not intended for the benefit of the defendant. Unlike diversity jurisdiction, which exists to provide a neutral federal forum for an out-of-state party who might fear state-court bias, *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945), federal-question jurisdiction exists to secure "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues," *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., Inc.*, 545 U.S. 308, 312 (2005). Those are system interests, not party interests. In other words, the defendant is allowed to remove a federal-question

case not because the removal statute protects some party-based forum "right" but rather because the system-based preference for federal-court adjudication of federal claims is strong enough to justify federal jurisdiction if *any* party invokes federal court.

For these reasons, terms such as "forum manipulation," "gamesmanship," and "right of removal" are all just skewed characterizations of the same thing: the forum choices litigants make within a system of concurrent jurisdiction. They ought not drive the result in this case, which instead can be decided based on neutral principles of the law of the time of jurisdictional assessment.

Because the Eighth Circuit transgressed those neutral principles, this Court can and should vacate that decision without relying on inapplicable and loaded terms such as "forum manipulation," "gamesmanship," or "right of removal."

## CONCLUSION

The Eighth Circuit's judgment should be vacated and the case remanded for further proceedings.

July 1, 2024

Respectfully submitted,

Scott Dodson
Counsel of Record
Center for Litigation & Courts
UC College of the Law – SF
200 McAllister St.
San Francisco, CA 94102
(925) 285-1445
dodsons@uclawsf.edu