

CLASS ACTION WATER CRISIS: RESOLVING FLINT'S NEW SPLIT OVER CAFA'S LOCAL CONTROVERSY EXCEPTION

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INTRODUCTION

It was late in the summer of 2014 when city officials in Flint, Michigan, issued what appeared to be a relatively innocuous warning to its residents.¹ The city informed the public that water in a segment of Flint had tested positive for high levels of total coliform bacteria, an indication that other pathogens may be present in the water supply.² Officials advised that residents should boil or use bottled water for drinking, bathing, and preparing meals.³ Little did they know; this local advisory was only the beginning of an ongoing crisis.

Nearly a decade before Flint made headlines, the Class Action Fairness Act (hereinafter "CAFA") was passed with relative ease as part of the greater "tort reform" movement.⁴ The general purpose of CAFA was to expand

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¹Rina Miller, *Boil-Water Warning for Flint Neighborhoods After Contamination Found*, MICHIGAN RADIO (Sep. 7, 2014), <http://michiganradio.org/post/boil-water-warning-flint-neighborhoods-after-contamination-found-0>.

²*Id.*; *Revised Total Coliform Rule and Total Coliform Rule*, ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/dwreginfo/revised-total-coliform-rule-and-total-coliform-rule> (last visited Dec. 1, 2017).

³Miller, *supra* note 1.

⁴William Branigin, *Congress Changes Class Action Rules*, WASHINGTON POST (Feb. 17, 2005), www.washingtonpost.com/wp-dyn/articles/A32674-2005Feb17.html; 151 CONG. REC. 2065, 2096 (2005) (the bill passed in the Senate by a vote of 72-26); 151 CONG. REC. 2631, 2666 (2005) (the bill passed in the House of Representatives by a vote of 279-149).

federal subject-matter jurisdiction over large class action lawsuits, in response to the perceived abuse of class action procedure in state courts.⁵

One exception to this expansion of federal subject-matter jurisdiction under CAFA is the Local Controversy Exception.⁶ At its most basic level, this exception requires the federal court to decline to exercise its CAFA-created jurisdiction if, in addition to other requirements discussed below, two-thirds of the proposed class are citizens of the state in which the action is filed.⁷

For over a decade after CAFA's inception, citizenship for the purposes of the Local Controversy Exception was treated the same as it is for diversity jurisdiction under 28 U.S.C. § 1332.⁸ However, in November 2016, the Sixth Circuit broke from the pack in holding that, for the purposes of the Local Controversy Exception, citizenship can be presumed from residence.⁹

This newly created circuit split over the Local Controversy Exception's citizenship requirement represents a classic tension between doctrine and policy. While the Sixth Circuit may have betrayed classic doctrinal notions of citizenship for the purposes of diversity jurisdiction, its holding may better serve the general purposes of CAFA and may represent better policy than the majority view.

I. CAFA AND THE PREVIOUS CONSENSUS

A. Tort Reform, CAFA, & Local Controversies

The term "tort reform" is believed to have spawned in 1974 in a student article published by the UCLA Law Review.¹⁰ In the decade following, the concept of tort reform actually referred to the polar opposite of its contemporary meaning. While modern tort reform is undoubtedly the friend

⁵ See Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1593 & n.2 (2008).

⁶ See 28 U.S.C. § 1332(d)(4) (2012); *Local Controversy Exception*, PRACTICAL LAW, us.practicallaw.com/2-518-1235 (last visited Dec. 1, 2017).

⁷ 28 U.S.C. § 1332(d)(4)(A)(i)(I).

⁸ See *infra* Part I.B.

⁹ See *infra* Part II.B.

¹⁰ Carl T. Bogus, *Introduction: Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 1, 1 (2008); Dian Dickson Ogilvie, Comment, *Judicial Activism in Tort Reform: The Guest Statute Exemplar and a Proposal for Comparative Negligence*, 21 UCLA L. REV. 1566, 1566 (1974).

of the defense bar, its original meaning was antithetical.¹¹ In the late 1970s, tort reform was the sword of trial lawyers desiring to make it easier for plaintiffs to recover against tortfeasors.¹² Over time, however, the term has come to represent broad efforts to curtail the perceived frivolousness of civil litigation, reduce judgments, and increase the predictability of outcomes.¹³

One major nationwide victory for the tort reform movement was the passage of the Class Action Fairness Act in 2005, which expanded federal subject-matter jurisdiction over class-action lawsuits.¹⁴ There were two overarching goals behind CAFA—curbing forum shopping and increasing federal oversight over abusive class-action settlements.¹⁵ Under CAFA, federal courts are granted subject-matter jurisdiction over class-action lawsuits in which: (1) the aggregate amount in controversy exceeds five million dollars; (2) the class comprises at least one hundred plaintiffs; and (3) there is at least “minimal” diversity among the parties.¹⁶

Meeting the three requirements does not end the jurisdictional inquiry. CAFA contains three exceptions—a discretionary exception and two mandatory exceptions.¹⁷ The discretionary exception allows a federal court to, in the interests of justice, decline to exercise the granted jurisdiction under § 1332(d)(2) if greater than one-third, but less than two-thirds, of the proposed classes and primary defendants are citizens of the state in which the action was filed.¹⁸ The statute then enumerates factors that the district court

¹¹Bogus, *supra* note 10, at 1.

¹²*Id.*; see, e.g., Mark D. Seltzer, *Personal Injury Hazardous Waste Litigation: A Proposal for Tort Reform*, 10 B.C. ENVTL. AFF. L. REV. 797, 797 (1983) (a pro-plaintiff proposal, described as “tort reform”).

¹³Bogus, *supra* note 10, at 3–5 (discussing state-enacted caps on non-economic and punitive damages); see, e.g., Michael D. Morrison & Marianne M. Auld, *Tort Reform: An Overview*, 51 TEX. B.J. 1108, 1108 (1988) (discussion of defense-friendly initiatives in Texas, described as “tort reform”).

¹⁴Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

¹⁵Erichson, *supra* note 5, at 1601, 1607; S. Rep. No. 109-14, at 4 (2005).

¹⁶28 U.S.C. §§ 1332(d)(2), (d)(5)(B) (2012). Of note is the fact that the statute only requires “minimal diversity,” in contrast to § 1332(a)’s complete diversity requirement for ordinary diversity jurisdiction. The minimal diversity requirement mirrors the constitutional limits placed on federal diversity jurisdiction. Without the minimal diversity requirement, CAFA would be unconstitutional. See U.S. CONST. art. III, § 2; see also *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967).

¹⁷28 U.S.C. §§ 1332(d)(3)–(4); Thomas J. Sullivan & Kristin M. Hadgis, *Exceptions to Federal Jurisdiction Under CAFA*, 21 CLASS ACTIONS & DERIVATIVE SUITS 9, 9 (2010).

¹⁸28 U.S.C. § 1332(d)(3).

should consider in determining whether to exercise its discretion to decline jurisdiction.¹⁹

The two mandatory exceptions are the Home State Exception and the Local Controversy Exception.²⁰ If the requirements of either of these exceptions are met, the federal court must decline jurisdiction.²¹ Under the Local Controversy Exception, the federal court must decline jurisdiction if: (1) greater than two-thirds of all proposed plaintiff classes in the aggregate are *citizens* of the state in which the class action was originally filed; (2) at least one defendant is a defendant from whom significant relief is sought, whose alleged conduct forms a significant basis for the claims asserted, and who is a citizen of the state in which the class action was originally filed; (3) the principal injuries were incurred in the state in which the class action was filed; and (4) during the three-year period preceding the filing of the class action, no other class action has been filed asserting the same or similar allegations on behalf of the same persons.²²

This new circuit split is focused on the two-thirds aggregate citizenship element.

¹⁹*Id.* § 1332(d)(3)(A)–(F). The factors are as follows:

- (A) whether the claims asserted involve matters of national or interstate interest;
- (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
- (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
- (D) whether the class action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
- (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

Id.

²⁰Sullivan & Hadgis, *supra* note 17, at 11–12.

²¹28 U.S.C. § 1332(d)(4).

²²*Id.* § 1332(d)(4)(A) (emphasis added). The Home State Exception contains only one requirement—that two-thirds of both the aggregate proposed plaintiff classes *and* the primary defendants are citizens of the State in which the action was filed. *Id.* § 1332(d)(4)(B).

B. The Consensus on Citizenship

For a decade after the passage of CAFA, courts that were faced with motions to remand based on the Local Controversy Exception dealt with the citizenship element in the same way that citizenship is treated under diversity jurisdiction. Under diversity jurisdiction, an individual is deemed a citizen of the state in which she is domiciled.²³ Domicile consists of two distinct components—residence and the intent to remain indefinitely.²⁴ Residence alone does not constitute domicile.²⁵ An individual's domicile does not change until a new domicile is established.²⁶ The party invoking the diversity jurisdiction of the court has the burden of proving domicile.²⁷

The Eleventh Circuit was the first to address the burden of proof in a Local Controversy Exception-based motion to remand in *Evans v. Walter Industries*.²⁸ In *Evans*, plaintiffs brought a class action against several named defendants, alleging that the release of hazardous waste had caused property damage and personal injury.²⁹ Because the amount in controversy exceeded five million dollars and there was minimal diversity, Walter Industries removed the action to federal court pursuant to CAFA.³⁰ The sole issue on appeal was whether the district court properly remanded the action back to state court under the Local Controversy Exception.³¹

Of first impression to the *Evans* court was the question of who bears the burden of proving the Local Controversy Exception once the removing defendants have proved the amount in controversy and the minimal diversity requirement, and have thus established jurisdiction under CAFA.³² Here, the court made relatively quick work of this question. It first began by citing the general rule that once the defendant removes an action under 28 U.S.C. § 1441(a), the burden shifts to the plaintiff to find an exception to removal.³³ The court then analogized CAFA to removal of actions involving the Federal

²³ *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991).

²⁴ *Texas v. Florida*, 306 U.S. 398, 424 (1939).

²⁵ *Coury v. Prot*, 85 F.3d 244, 250 (5th Cir. 1996) (“[M]ere presence in a . . . location does not [constitute] . . . domicile; it must be accompanied with the requisite intent.”).

²⁶ *Id.*

²⁷ *Padilla-Mangual v. Pavia Hosp.*, 516 F.3d 29, 31 (1st Cir. 2008).

²⁸ 449 F.3d 1159, 1165 (11th Cir. 2006).

²⁹ *Id.* at 1161.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1165.

³³ *Id.* at 1164 (citing *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697–98 (2003)).

Deposit Insurance Company (FDIC) under 12 U.S.C. § 1819(b)(2)(B).³⁴ Under the Eleventh Circuit's § 1819(b)(2)(B) jurisprudence, the removing party bears the initial burden of establishing federal jurisdiction, but the objecting party bears the burden of proving an express statutory exception once federal jurisdiction has been established under the main provisions of the statute.³⁵ Therefore, according to the *Evans* court, the plaintiff seeking remand under CAFA's Local Controversy Exception has the burden of proving the applicability of the exception.³⁶ With this established, the court turned to the question of whether plaintiffs had carried this burden.³⁷

To establish the citizenship of the proposed class, the *Evans* plaintiffs produced an affidavit demonstrating that 93.8 percent of the 10,118 known plaintiffs were *residents* of Alabama, the state in which the action was filed.³⁸ The court was unsatisfied for two main reasons. First, the court was not convinced that the 10,118 known plaintiffs adequately represented the entirety of the proposed class, which consisted of all property owners and individuals who had experienced harm from the hazardous waste over the past eighty-five years.³⁹ Second, and most pertinent to the circuit split, the court was quite clear that evidence of residence, without more, was not evidence of citizenship for the purposes of the Local Controversy Exception.⁴⁰

Shortly after *Evans*, the Fifth Circuit also addressed the issue.⁴¹ In *Preston*, the plaintiff brought a class action on behalf of her deceased mother and all others similarly situated against multiple medical facilities for alleged injuries and deaths caused by unreasonably dangerous conditions at the facilities during Hurricane Katrina.⁴² Here, the court assumed, without expressly stating, that citizenship for the purposes of CAFA simply means the same thing as it does for diversity jurisdiction.⁴³ With this assumption in place, the *Preston* court restated the fundamental rules under diversity

³⁴ *Id.*; 12 U.S.C. § 1819(b)(2)(B) (2012).

³⁵ *Evans*, 449 F.3d at 1164; *see also* Castleberry v. Goldome Credit Corp., 408 F.3d 773, 785 (11th Cir. 2005); Lazuka v. FDIC, 931 F.2d 1530, 1538 (11th Cir. 1991).

³⁶ *Evans*, 449 F.3d at 1165.

³⁷ *Id.*

³⁸ *Id.* at 1166 (emphasis added).

³⁹ *Id.*

⁴⁰ *See id.*

⁴¹ *Preston v. Tenet Healthsystem Mem'l Med. Ctr.*, 485 F.3d 793, 797–98 (5th Cir. 2007).

⁴² *Id.* at 795–96.

⁴³ *Id.* at 797–98.

jurisdiction that an individual is a citizen of the state in which she is domiciled, that domicile consists of residence with the intent to remain indefinitely, and that, when challenged, the plaintiff bears the burden of proving both domiciliary components.⁴⁴ Ultimately, the court held that the medical records that were produced as evidence of citizenship only demonstrated that the patients had resided in Louisiana; the records did not, however, establish that the patients were domiciled in Louisiana at the time of Hurricane Katrina.⁴⁵

The Seventh, Ninth, and Tenth Circuits have also addressed the question, holding that the party seeking remand under the Local Controversy Exception must introduce evidence of both domiciliary components to establish citizenship.⁴⁶ Not all courts that have considered the issue have agreed on exactly how high the burden of proof is for the plaintiff in establishing these domiciliary components.⁴⁷ Most have required plaintiffs to establish the elements by a preponderance of the evidence.⁴⁸ Some have required less proof, embracing a reasonable probability standard or something similar.⁴⁹ Regardless, all of the courts on the majority side of the circuit split (hereinafter referred to as the “Domicile Bloc”) have required some evidence of both domiciliary components in order to successfully demonstrate citizenship for purposes of the Local Controversy Exception.⁵⁰

The Tenth Circuit may have left the door open for the Sixth Circuit’s departure when it cited the pre-CAFA general proposition that residency may

⁴⁴ *Id.* at 798; *see also* *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974) (“[C]itizenship means domicile; mere residence in the State is not sufficient.”).

⁴⁵ *Preston*, 485 F.3d at 798.

⁴⁶ *In re Sprint Nextel Corp.*, 593 F.3d 669, 673 (7th Cir. 2010); *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 884 (9th Cir. 2013); *Reece v. AES Corp.*, 638 F. App’x 755, 769 (10th Cir. 2016).

⁴⁷ *Reece*, 638 F. App’x at 768.

⁴⁸ *See, e.g.*, *Vodenichar v. Halcón Energy Props., Inc.*, 733 F.3d 497, 503 (3d Cir. 2013); *Mondragon*, 736 F.3d at 884; *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 570 (5th Cir. 2011); *Sprint*, 593 F.3d at 673.

⁴⁹ *Reece*, 638 F. App’x at 768; *see also* *Dunham v. Coffeyville Res., LLC*, No. 07-1186-JTM, 2007 WL 3283774, at *3 (D. Kan. Nov. 6, 2007) (applying a “reasonable probability” standard); *Mattera v. Clear Channel Commc’ns, Inc.*, 239 F.R.D. 70, 80 (S.D.N.Y. 2006) (applying a “reasonably likely” standard).

⁵⁰ *See, e.g.*, *Preston*, 485 F.3d at 802 (plaintiff must “make some minimal showing of citizenship . . . at the time that suit was filed.”).

indeed represent *prima facie* evidence of domicile.⁵¹ However, this was dicta, as the court ultimately relied on the pre-CAFA *Whitelock* requirement that some evidence of domicile must be introduced aside from mere statements of residence.⁵²

What is consistent amongst the Domicile Bloc is the root idea that the word “citizen” in CAFA bears the same meaning as it does in diversity jurisdiction. This makes quite a bit of sense, given the fact that the main provisions of CAFA were codified in the same section of the United States Code as diversity jurisdiction.⁵³

II. ENTER *MASON*

A. *The Flint Water Crisis*

As Thanksgiving of 2016 rolled around, residents of Flint, Michigan had to stock up on the essentials—turkey, potatoes, stuffing, and dozens of packs of bottled water.⁵⁴ One Flint resident had to use 144 bottles of water to thaw the turkey, cook mashed potatoes, wash fruits and vegetables, make Kool-Aid and tea, and wash dishes.⁵⁵ Indeed, over two years after receiving a seemingly innocuous boil-water advisory from the city, the residents of Flint remained without safe water.⁵⁶ The obvious questions were: What happened, and why did the problem continue to persist?

The crisis began as a result of the city of Flint’s decision to build its own pipeline to connect with the Karegnondi Water Authority (KWA).⁵⁷ This was

⁵¹ *Reece*, 638 F. App’x at 769 (citing *State Farm Mut. Auto. Ins. Co. v. Dyer*, 19 F.3d 514, 520 (10th Cir. 1994)).

⁵² *Id.* (citing *Whitelock v. Leatherman*, 460 F.2d 507, 514 (10th Cir. 1972)).

⁵³ CAFA’s general jurisdictional requirements and exceptions are codified at 28 U.S.C. § 1332(d), while diversity jurisdiction is contained in 28 U.S.C. § 1332(a)–(c). It is a fundamental canon of statutory construction that the same or similar terms should be interpreted in the same way. *See, e.g.*, *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

⁵⁴ Meredith Rutland Bauer, *Thanksgiving in Flint: Turkey, Stuffing, and Hundreds of Water Bottles*, MOTHERBOARD (Nov. 28, 2016), https://motherboard.vice.com/en_us/article/flint-families-celebrated-thanksgiving-with-turkey-stuffing-and-hundreds-of-wat.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Merrit Kennedy, *Lead-Laced Water in Flint: A Step-by-Step Look at the Makings of a Crisis*, NPR (Apr. 20, 2016), <http://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis>.

a cost-saving measure, estimated to save the struggling city \$200 million over twenty-five years.⁵⁸ In the interim, Flint began drawing its water from the Flint River.⁵⁹ The city turned to Texas-based civil engineering firm Lockwood, Andrews, & Newnam, Inc. (Lockwood Texas), to rehabilitate the Flint Water Treatment Plant and provide quality control services.⁶⁰ On April 25, 2014, the city officially switched its water source to the Flint River.⁶¹

The residents of Flint could immediately tell that something was wrong.⁶² Within days, residents complained of foul smelling and tasting water.⁶³ Within weeks, some residents' hair began to fall out and their skin developed rashes.⁶⁴ In later summer of 2014, the water supply in Flint began testing positive for *E. coli* and total coliform bacteria.⁶⁵ In response, Flint officials issued a boil-water advisory for portions of the city.⁶⁶ A month later, General Motors discontinued use of the city's water, fearing it would corrode its machinery.⁶⁷

In January 2015, the city of Detroit offered to reconnect Flint to its water supply, even offering to waive the four-million-dollar reconnection fee; Flint declined this offer.⁶⁸ A month later, tests revealed alarmingly high lead content in the water—104 parts per billion, almost seven times more than the Environmental Protection Agency's allowable limit.⁶⁹ In the summer of 2015, a group of doctors urged the city to stop using the Flint River for water after finding high levels of lead in the blood of children.⁷⁰ Shortly thereafter, it was revealed that the Michigan Department of Environmental Quality had not been following proper corrosion control protocols.⁷¹

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Mason v. Lockwood, Andrews, & Newnam, P.C.*, 842 F.3d 383, 387 (6th Cir. 2016).

⁶¹ *Id.*

⁶² *See id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Kennedy, *supra* note 57.

⁶⁶ Jeremy C.F. Lin, et al., *Events That Led to Flint's Water Crisis*, N.Y. TIMES (Jan. 21, 2016), https://www.nytimes.com/interactive/2016/01/21/us/flint-lead-water-timeline.html?_r=1.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Kennedy, *supra* note 57.

⁷⁰ *Id.*

⁷¹ Lin et al., *supra* note 66.

Ultimately, experts who studied the crisis found that the water from the Flint River was nineteen times more corrosive than Flint's original water supply, and that without corrosion control treatment, lead was leaching out of the lead-based service lines at alarming rates and finding its way to the homes of Flint's residents.⁷² Per the same experts, this entire crisis was both predictable and preventable.⁷³

After numerous reports of detrimental health effects in residents and multiple state of emergency declarations, a class-action lawsuit was filed on behalf of the residents and property owners of Flint, alleging professional negligence against Lockwood Texas and its Michigan affiliate, Lockwood, Andrews, & Newnam, P.C. (Lockwood Michigan).⁷⁴ Plaintiffs alleged that Lockwood knew that the water treatment facility required upgrades for lead contamination treatment, yet failed to ensure that the proper safeguards were in place—a failure, they alleged, that caused widespread personal injuries and property damage due to the contaminated water supply.⁷⁵

B. Redefining Citizenship: A Clear Departure

After filing the class-action lawsuit in Michigan state court, defendants removed the case to federal court pursuant to CAFA.⁷⁶ Because the amount in controversy exceeded five million dollars, there were at least one hundred members of the proposed class, and there was minimal diversity amongst the parties (as defendant Lockwood Texas was a citizen of Texas), jurisdiction was proper under 28 U.S.C. § 1332(d)(2).⁷⁷ Plaintiffs sought remand; they did not contest that the basic requirements for jurisdiction under CAFA were met.⁷⁸ Rather, plaintiffs asserted that the district court was obligated to decline jurisdiction under the Local Controversy Exception.⁷⁹ The district court granted the motion to remand and the Sixth Circuit allowed an

⁷² Mason v. Lockwood, Andrews, & Newnam, P.C., 842 F.3d 383, 387 (6th Cir. 2016).

⁷³ *Id.*

⁷⁴ *Id.* at 388.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

interlocutory appeal.⁸⁰ The only issue before the court in *Mason* was whether the Local Controversy Exception was properly applied.⁸¹

Defendants specifically alleged that two of the Local Controversy Exception's requirements had not been met: (1) that Lockwood Michigan was not a defendant whose conduct formed a significant basis for the claims alleged by the plaintiffs; and (2) that plaintiffs had not produced evidence establishing that greater than two-thirds of the proposed class were citizens of Michigan.⁸² The latter contention is the focus of this article's attention.

In establishing the citizenship requirement of the Local Controversy Exception, plaintiffs had only provided that the class was defined as "residents and property owners in the City of Flint"—there was no evidence introduced establishing the domicile of the class.⁸³

The Sixth Circuit began by citing with approval the previous holdings of the Domicile Bloc regarding the plaintiff's burden of proving eligibility for the Local Controversy Exception.⁸⁴ The court agreed with "every circuit to have addressed the issue" that the party seeking remand under an exception to CAFA bears the burden of establishing each element of the exception by a preponderance of the evidence.⁸⁵ This assertion is based on the pre-CAFA *Breuer* rule that, once an action has been properly removed, it is the burden of the plaintiff to find an exception.⁸⁶

The court then cited with approval what had been universally accepted by the Domicile Bloc—that the word "citizen" in the Local Controversy Exception bears the same meaning as it does in diversity jurisdiction.⁸⁷ Therefore, the court reiterated, the plaintiff should ordinarily bear the burden of proving domicile in order to establish citizenship for the purposes of CAFA.⁸⁸

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *Id.*

⁸³ *Id.* at 389.

⁸⁴ *Id.* at 388–89.

⁸⁵ *Id.*

⁸⁶ *Id.* at 389 (citing *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003)).

⁸⁷ *Id.* ("Citizen" and its variant "citizenship" have acquired a particular meaning in our law as being equivalent to "domicile." (citing *Von Dunser v. Aronoff*, 915 F.2d 1071, 1072 (6th Cir. 1990))).

⁸⁸ *Id.* ("Thus, although the statute speaks in terms of citizenship, a party invoking the local controversy exception is effectively tasked with establishing the domicile of the proposed class members.")

Despite these formal requirements, the court posited that the law of domicile has always been about presumptions.⁸⁹ Citing Joseph Story, the court highlighted the historical notion that residence is presumptively equated with domicile, unless it is established to the contrary.⁹⁰ According to the court, Story's residency-domicile presumption was simply drawn from established legal tradition.⁹¹ Indeed, the residency-domicile presumption finds its origins in Eighteenth Century England and was cited with approval by the United States Supreme Court in 1852.⁹²

On the other hand, defendants pointed to a competing line of case law holding that "naked averment of . . . residence . . . is insufficient to show . . . citizenship."⁹³ Indeed, in the context of diversity jurisdiction in general, modern jurisprudence clearly supports this position.⁹⁴ The court also acknowledged that every circuit in the Domicile Bloc had explicitly rejected the residency-domicile presumption in the context of the Local Controversy

⁸⁹*Id.* at 390.

⁹⁰*Id.* ("In his Commentaries on the Conflict of Laws, for example, Joseph Story listed over a dozen such presumptions, including: a person's place of birth is presumptively their domicile; a child's domicile is presumptively that of their parents; and, most important for our purposes, '*prima facie*, the place, where a person lives, is taken to be his domicile, until other facts establish the contrary.'" (citing JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 46 (5th ed. 1857)).

⁹¹*Id.*

⁹²The *Mason* court explained that offering a domiciliary presumption is nothing new to the common law:

As early as 1790, England's House of Lords declared that "[a] person's being at a place is *prima facie* evidence that he is domiciled at that place, and it lies on those who say otherwise to rebut that evidence." Not long after, the presumption made its way into American law. In 1852, the United States Supreme Court announced that "[w]here a person lives, is taken *prima facie* to be his domicile, until other facts establish the contrary." And in the 150 years since, the rule of thumb on residency and domicile has remained fixed: "The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary."

Id. (internal citations omitted).

⁹³*Id.* at 391 (citing *Robertson v. Cease*, 97 U.S. 646, 648 (1878)); *see also* *Steigleder v. McQuesten*, 198 U.S. 141, 143 (1905) ("[I]t has long been settled . . . that a mere averment of residence in a particular state is not an averment of citizenship in that state for the purposes of jurisdiction.").

⁹⁴*See, e.g.*, *Johnson v. Advance Am.*, 549 F.3d 932, 937 n.2 (4th Cir. 2008) ("For purposes of diversity jurisdiction, residency is not sufficient to establish citizenship."). *But see* *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 571 (5th Cir. 2011) ("Evidence of a person's place of residence, however, is *prima facie* proof of his domicile.").

Exception.⁹⁵ Despite the consensus against presuming domicile from residency in the CAFA context, the *Mason* court ultimately departed from precedent for two key reasons: (1) The Local Controversy Exception is not, according to the court, jurisdictional; and (2) The residency-domicile presumption should be applied because of the difficulty of proving the domicile of “a mass of individuals.”⁹⁶

With the Sixth Circuit having revived the residency-domicile presumption, the *Mason* plaintiffs prevailed.⁹⁷ According to the court, plaintiffs had successfully proven residency by defining the class as “residents and property owners in the city of Flint” and by proving residency, domicile was then presumed.⁹⁸ As a result of this presumption, the burden of production had shifted to the defendants, who submitted no evidence to rebut the presumption that the proposed class members were citizens of Michigan.⁹⁹

As an interesting aside, the court made the astute observation that defendants had themselves performed a residency-domicile presumption of their own.¹⁰⁰ In their notice of removal, defendants alleged that minimal diversity existed because “[p]laintiffs were citizens of the State of Michigan.”¹⁰¹ In support of this statement, defendants cited the amended complaint, which merely alleged residency.¹⁰² As the court pointed out, were the court to take defendants’ and the dissent’s argument about the inapplicability of the residency-domicile presumption to its logical end point, it would actually be compelled to conclude that the defendants themselves had, in their notice of removal, failed to establish the citizenship requirement of CAFA’s jurisdiction-granting component.¹⁰³

The court concluded by urging other courts not to lose sight of the forest for the trees.¹⁰⁴ The majority provided a reminder of the main, overarching purpose of CAFA—to ensure that local controversies are litigated in a local

⁹⁵ *Mason*, 842 F.3d at 391; *see, e.g.*, *Reece v. AES Corp.*, 638 F. App’x 755, 769 (10th Cir. 2016); *see also infra* Part I.B.

⁹⁶ *Mason*, 842 F.3d at 392.

⁹⁷ *Id.* at 397.

⁹⁸ *See id.* at 388, 395.

⁹⁹ *Id.* at 392, 395.

¹⁰⁰ *Id.* at 395.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 397.

forum, while matters of national scope are litigated in federal court.¹⁰⁵ The court aptly concluded that “it defies common sense to say a suit by Flint residents against those purportedly responsible for injuring them through their municipal water service is not a ‘local controversy.’”¹⁰⁶

The dissent, authored by Circuit Judge Raymond Kethledge, begins with a simple premise—a party cannot be said to have carried their burden of proof if they have not produced any evidence.¹⁰⁷ Judge Kethledge was not convinced that the Local Controversy Exception is not jurisdictional, and, as a result, did not believe that the residency-domicile presumption should be applied in this scenario.¹⁰⁸ He then pointed out that the majority departed from the general consensus and cited the Domicile Bloc in arguing that there have always been two requirements for showing citizenship—residence and the intent to remain indefinitely.¹⁰⁹ Furthermore, Judge Kethledge took issue with the majority’s application of the residency-domicile presumption, given the plaintiffs’ class definition of “residents and property owners of Flint.”¹¹⁰ Overarching the dissent is the principle that abstention is a narrow doctrine and that federal courts are obligated to exercise the jurisdiction that is granted to them.¹¹¹ Without the “clearest of justifications,” the dissent argued, federal courts should not abstain from exercising the jurisdiction granted under CAFA.¹¹²

¹⁰⁵ *See id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (Kethledge, J., dissenting) (“To meet a burden of proof, a party usually must provide some . . . The plaintiffs have not met this burden, or even tried.”).

¹⁰⁸ *See id.* at 399.

¹⁰⁹ *Id.* at 397–98 (“[E]very circuit to have considered the issue—five so far—has held that ‘there must ordinarily be at least some facts in evidence from which the district court may make findings regarding the class members’ citizenship for purposes of CAFA’s local-controversy exception.’” (citing *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 884 (9th Cir. 2013))).

¹¹⁰ *Id.* at 398 (“The factual mistake is the assertion that the plaintiffs have alleged that all the class members are Flint residents, since—per the statement of plaintiffs’ counsel at oral argument—the class includes Flint ‘property owners’ who need not be residents of Flint (or Michigan) to be members of the class. Thus, the majority’s presumption of citizenship does not apply to ‘property owners’—whose numbers are anyone’s guess. Even the majority’s presumption, therefore, does not provide us with anything near what the law would regard as a proper basis to conclude that two-thirds—as opposed to one-third, or one-half, or three-quarters—of the putative class-members are Michigan citizens.”).

¹¹¹ *Id.* at 397 (citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)).

¹¹² *See id.* (citing *Rouse v. DaimlerChrysler Corp.*, 300 F.3d 711, 715 (6th Cir. 2002)).

As the dissent made clear, *Mason* was a clear departure from the previous consensus and, as a result, created a circuit split.¹¹³ Now the question remains—who got it right?

III. RESOLVING THE SPLIT

A. *Don't Lose Sight of the Forest: The Purpose of CAFA*

When engaging in statutory construction regarding matters of procedure, facilitating the overall purpose of the statute should be kept in mind.¹¹⁴ The purpose of CAFA is best understood from within its context in the greater tort reform movement. The larger tort reform agenda was, and continues to be, focused on curtailing the perceived abuses of the court system in civil litigation.¹¹⁵ This same policy goal was the stated jurisdictional policy of CAFA.¹¹⁶ Although some doubt its authenticity, the stated jurisdictional policy of CAFA was to ensure that national controversies are litigated in a national forum with federal oversight.¹¹⁷

CAFA's broader purpose is also the proper context for specifically understanding the role of its exceptions. With CAFA based upon the premise that some controversies are truly national in scope, both the Home State Exception and the Local Controversy Exception are premised on the inverse—that some controversies are only local in nature.¹¹⁸ Analyzing 28

¹¹³*Id.* at 399 (“The majority thus splits with five other circuits . . .”).

¹¹⁴*See, e.g.,* *Reves v. Ernst & Young*, 494 U.S. 56, 60–61 (1990) (interpreting a statute in a fashion that best carries out its overall purpose).

¹¹⁵*Morrison & Auld, supra* note 13, at 1108.

¹¹⁶S. Rep. No. 109-14, at 5 (2005); *see also* *Erichson, supra* note 5, at 1593 (“CAFA, like every other major class action development of recent years, was born amidst snide remarks about lawyers’ inventing lawsuits and manipulating the system to enrich themselves at others’ expense.”).

¹¹⁷Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1766 (2008) (“Congress said that the Act was designed to redress overreaching by state courts handling multistate class actions, to ensure that these cases involving nationally important issues could be brought in federal court, and to provide protections for class members. It is, of course, easy to denounce these justifications for CAFA as window dressing, and to regard the Act as a naked power grab.” (footnote omitted)); *see also* Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1523 (2005) (“But no one should be fooled by such talk. These proposals are unabashed efforts at forum shopping because defendants believe they will improve their chances of success markedly in class actions if they are in federal courts.”).

¹¹⁸*See Mason*, 842 F.3d at 386; *see also* S. Rep. No. 109-14, at 27 (2005) (“Such cases will remain in state courts under the terms of S. 5, since virtually all of the parties in such cases (both

U.S.C. § 1332(d)(3), the discretionary exception, also reveals a similar broad policy ideal.¹¹⁹ Under the discretionary exception, district courts may, in the interests of justice, decline to exercise jurisdiction granted under CAFA if at least one-third of the class are citizens of the state in which the action was filed.¹²⁰ Congress then lists six factors that courts should use when determining the felicitousness of exercising this discretionary abstention.¹²¹ The first of these factors is “whether the claims asserted involve matters of national or interstate interest,” while the fifth factor asks “whether the number of citizens of the State in which the action was originally filed . . . is substantially larger than the number of citizens from any other State.”¹²² Taken together, the theme is clear—if CAFA is about litigating national controversies on a national scale, its exceptions are about keeping local actions in a local forum.¹²³

This larger policy end goal should be kept in mind when deciding the suitability of the residency-domicile presumption in CAFA Local Controversy Exception cases. Unlike diversity jurisdiction in general, which exists primarily to avoid local prejudice against out-of-state defendants, the Local Controversy Exception is focused on the character of the action as a whole.¹²⁴

Under this line of reasoning, the residency-domicile presumption surely makes practical sense. Take, for example, the *Mason* court’s observations about the nature of the controversy.¹²⁵ Regardless of any one individual’s

plaintiffs and defendants) would be local, and local interests therefore presumably would predominate.”).

¹¹⁹28 U.S.C. § 1332(d)(3) (2012).

¹²⁰*Id.*

¹²¹*Id.* § 1332(d)(3)(A)–(F).

¹²²*Id.* § 1332(d)(3)(A), (F).

¹²³See Justin D. Forlenza, Comment, *CAFA and Erie: Unconstitutional Consequences?*, 75 FORDHAM L. REV. 1065, 1077 (2006) (“These requirements are intended to ensure that if a controversy is truly local in nature, state courts will retain the authority to adjudicate it.”).

¹²⁴See *Dresser Indus. v. Underwriters at Lloyd’s of London*, 106 F.3d 494, 499 (3d Cir. 1997); *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 87 (1807) (“However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.”).

¹²⁵*Mason v. Lockwood, Andrews, & Newnam, P.C.*, 842 F.3d 383, 397 (6th Cir. 2016); cf. *In re Sprint Nextel Corp.*, 593 F.3d 669, 673–74 (7th Cir. 2010) (despite the court finding insufficient

intention to remain in the State of Michigan indefinitely, the action, as a whole, was undoubtedly local in nature.¹²⁶ Despite the fact that Flint's water crisis has been the focus of national headlines for quite some time, the legal conflict in *Mason* was nothing more than one city's residents seeking redress against those purportedly responsible for injuring them through their municipal water service.¹²⁷ In certain factual scenarios, the presumption may not be as strong.¹²⁸ In others, a matter may be so clearly of national scope as to render the presumption incongruous with the statute's purpose.¹²⁹ However, in cases like *Mason*, presuming domicile from residence may further CAFA's purpose in a way that holding to traditional doctrines may not.¹³⁰

B. Jurisdictional Doctrine Need Not Apply

The first critical premise the *Mason* court relied on in establishing the applicability of the residency-domicile presumption is that the Local Controversy Exception is not truly jurisdictional in nature.¹³¹ This is a critical and necessary premise, for it allows courts to apply the presumption, despite the fact that modern diversity jurisdiction jurisprudence disfavors said presumption.¹³² The reasons for this disfavor in the context of diversity jurisdiction are constitutional in nature.¹³³

In *Robertson*, the Supreme Court observed the danger in allowing the presumption of domicile to establish a party's citizenship when the court's

evidence to establish citizenship, the definition of the class as only those with Kansas phone numbers and Kansas mailing addresses presents a factual scenario which seems to be indicative of a truly local controversy).

¹²⁶ See *Mason*, 842 F.3d at 390, 395.

¹²⁷ See *id.* at 397.

¹²⁸ See, e.g., *Preston v. Tenet Healthsystem Mem. Med. Ctr.*, 485 F.3d 793, 799 (5th Cir. 2007) (“Weems and Touro ask this court to presume, despite the forced mass relocation of Orleans Parish citizens after Hurricane Katrina, that the patients’ primary billing addresses listed in the medical records accurately reflect their domicile at the time of the filing of this action, August 4, 2006, nearly a year after the hurricane.”).

¹²⁹ See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996) (class defined as “all nicotine-dependent persons in the United States”).

¹³⁰ See *Mason*, 842 F.3d at 394.

¹³¹ *Id.* at 392.

¹³² See *id.* (“Though the residency-domicile presumption did not prevail against the unrelenting headwinds of limited federal jurisdiction, there is no reason it should suffer a similar fate under the local controversy exception.”).

¹³³ *Id.* (citing *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

jurisdiction depends on that party's citizenship.¹³⁴ The Court began with the fundamental principle that federal courts are without jurisdiction until it is conferred to them.¹³⁵ As a result, it should be presumed that a federal court does not have jurisdiction over an action unless it is affirmatively proven otherwise.¹³⁶ In this context, it is clear why presuming domicile (and thus, citizenship) from residence presents constitutional concerns.¹³⁷ If a federal court's diversity jurisdiction must be affirmatively proven, and if demonstrating citizenship is a necessary component of said jurisdiction, and if citizenship requires the establishment of both domiciliary components, it follows logically that each domiciliary component must be affirmatively proven.¹³⁸

These constitutional concerns are not present with the Local Controversy Exception, however, because it is simply not jurisdictional.¹³⁹ To understand this principle, it is helpful to step back and track a class action through CAFA. Take, for example, the procedural history of *Mason*.¹⁴⁰ Here, the action was filed in state court.¹⁴¹ Defendants removed the action to federal court on the basis of 28 U.S.C. § 1332(d)(D)(2).¹⁴² Because the jurisdictional requirements were satisfied under CAFA, it is at this moment that the federal court obtained jurisdiction.¹⁴³

¹³⁴ See *Robertson v. Cease*, 97 U.S. 646, 649 (1878).

¹³⁵ *Id.*

¹³⁶ *Id.* ("As the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, the presumption . . . is[] that a cause is without its jurisdiction unless the contrary affirmatively appears.")

¹³⁷ See *Mason*, 842 F.3d at 392 (citing *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

¹³⁸ *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) (domicile requires residence with the intent to remain indefinitely); *Robertson*, 97 U.S. at 649 (a federal court's jurisdiction must be affirmatively proven); *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006) (a party invoking diversity jurisdiction has the burden of proving citizenship); *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974) (for diversity purposes, citizenship means domicile).

¹³⁹ *Mason*, 842 F.3d at 392. See also *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510–16 (2006), for a general discussion on the difference between jurisdictional and non-jurisdictional statutory requirements.

¹⁴⁰ *Mason*, 842 F.3d at 388.

¹⁴¹ *Id.*

¹⁴² *Id.*; 28 U.S.C. § 1332(d)(D)(2) (2012).

¹⁴³ *Mason*, 842 F.3d at 389. But see *supra* text accompanying note 103 for the court's observation on why defendants' logic regarding presumptions would have divested the court of jurisdiction altogether had it been followed.

Following this point in time, the court's remand of the action due to the applicability of the Local Controversy Exception did not work as an act of jurisdictional divestment (unlike, for example, a remand that is granted after a defendant's unsuccessful claim of fraudulent joinder); rather, the Local Controversy Exception simply requires the court, which has already been granted jurisdiction, to decline to *exercise* that jurisdiction.¹⁴⁴ As the Sixth Circuit has aptly described it, the language of CAFA "clearly indicates that the exceptions do not deprive the court of jurisdiction it otherwise possesses because a court could not 'decline' jurisdiction that it never had in the first place."¹⁴⁵ Rather, the Local Controversy Exception acts as an abstention by federal courts of jurisdiction that CAFA has already granted.¹⁴⁶

Because abstention is at play, the *Mason* dissent raises important questions about the doctrine's historically limited scope.¹⁴⁷ It is a fundamental principle that federal courts "have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."¹⁴⁸ It is also true that abstention is a narrow doctrine that should only be used with clear justification.¹⁴⁹ For example, in the context of interjurisdictional duplicative litigation involving both a state and federal proceeding, federal courts may only abstain under extraordinarily rare circumstances, even if the state proceeding precedes the federal filing.¹⁵⁰

¹⁴⁴ *Clark v. Lender Processing Servs.*, 562 F. App'x 460, 465 (6th Cir. 2014) ("However, the local-controversy and home-state exceptions do not deprive a court of jurisdiction. The statute speaks only of a district court's *declining* jurisdiction if the exceptions apply." (citation omitted) (emphasis in original)). If a non-diverse defendant is found to be fraudulently joined, that defendant's citizenship is ignored for the purposes of determining the presence of diversity jurisdiction. *E.g.*, *Commercial Sav. Bank v. Commercial Fed. Bank*, 939 F. Supp. 674, 680 (N.D. Iowa 1996). If complete diversity then no longer exists, the federal court has been deprived of subject-matter jurisdiction under § 1332(a). *See, e.g.*, *Archuleta v. Taos Living Ctr., LLC*, 791 F. Supp. 2d 1066, 1081 (D.N.M. 2011).

¹⁴⁵ *Clark*, 562 F. App'x at 465.

¹⁴⁶ *Mason*, 842 F.3d at 397 (Kethledge, J., dissenting) ("Instead the question here, broadly stated, is whether we may abstain from exercising that jurisdiction per the Act's so-called 'local-controversy exception.'").

¹⁴⁷ *Id.*

¹⁴⁸ *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

¹⁴⁹ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976); *Rouse v. DaimlerChrysler Corp.*, 300 F.3d 711, 715 (6th Cir. 2002).

¹⁵⁰ *Colo. River*, 424 U.S. at 817 ("[There is a] virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."); *see also* *Life-Link Int'l, Inc. v. Lalla*, 902 F.2d 1493, 1494, 1496 (10th Cir. 1990) (reversing a district court's dismissal of a duplicative proceeding, despite the state action being filed four months prior to the federal action).

However, courts need not fear historical restrictions on abstention when it comes to CAFA because Congress has expressly directed courts to decline jurisdiction over local controversies.¹⁵¹ Unlike the discretionary exception in § 1332(d)(D)(3), which provides for permissive abstention, the Local Controversy Exception in § 1332(d)(D)(4) states that the district court “shall” abstain if the exception’s requirements are met.¹⁵² It is a fundamental canon of statutory construction that the word “shall” creates an obligation impervious to judicial discretion.¹⁵³ Therefore, the Local Controversy Exception not only provides justification for abstention—it requires courts to abstain.¹⁵⁴

Because the Local Controversy Exception is not jurisdictional, the residency-domicile presumption can be used without violating modern jurisdictional aversion to said presumption.¹⁵⁵

C. Residency Defines Locality: The Prudential Departure

One final question remains—even if courts can apply the residency-domicile presumption, should they?

The second critical premise the *Mason* court relied on is prudential in nature—that it is impractical to require the plaintiff to demonstrate a fact-centered proposition about a “mass of individuals.”¹⁵⁶ Long before the *Mason* court recognized the practical benefits of the residency-domicile presumption, others had advocated for its use in determining the applicability of the Local Controversy Exception.¹⁵⁷ In fact, even courts in the Domicile

¹⁵¹ *Mason*, 842 F.3d at 394 (“Congress has expressly directed courts to decline jurisdiction over local controversies.”).

¹⁵² Compare 28 U.S.C. § 1332(d)(D)(3) (2012) (“A district court *may* . . . decline to exercise jurisdiction” (emphasis added)), with 28 U.S.C. § 1332(d)(D)(4) (2012) (“A district court *shall* decline to exercise jurisdiction” (emphasis added)).

¹⁵³ See *Lexecon Inc. v. Milberg*, 523 U.S. 26, 35 (1998).

¹⁵⁴ *Mason*, 842 F.3d at 394.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 392 (“Indeed, the residency-domicile presumption fits particularly well in the CAFA exception context, where the moving party is tasked with demonstrating a fact-centered proposition about a mass of individuals, many of whom may be unknown at the time the complaint is filed and the case removed to federal court.”).

¹⁵⁷ See Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 135 (2007) (“If courts assign plaintiffs the burden of proving that the exceptions apply, then they should be given the benefit of a rebuttable presumption that at least two-thirds of a class of residents . . . in a particular state are, in fact, state citizens.”); see also Nicole Ochi, Comment, *Are Consumer Class*

Bloc have bemoaned the practical difficulties that the plaintiff faces in establishing both domiciliary components.¹⁵⁸ Herein lies the practical attractiveness of the Sixth Circuit's approach.

It must first be noted that CAFA will only be triggered if the proposed aggregate class contains greater than one hundred members.¹⁵⁹ Therefore, a practical difficulty arises in requiring the plaintiff to prove, or even to provide a modicum of evidence supporting, the fact that at least two-thirds of the proposed aggregate class intend to remain indefinitely in the state in which the action was filed.¹⁶⁰ On the other hand, affording the plaintiff a rebuttable presumption of citizenship based on residency avoids that practical difficulty, especially when a proposed class is discrete in nature (such as, for example, "the residents and property owners of Flint, Michigan").¹⁶¹

Like most presumptions, the residency-domicile presumption is certainly not immune from rebuttal.¹⁶² If a factual scenario arises in which the residency of the class is truly not indicative of domicile, defendants may produce evidence rebutting the presumption.¹⁶³ And as with any factual inquiry, the finder of fact may then be free to make the ultimate determination.¹⁶⁴ This will act to ensure that federal courts are not handcuffed by the oft-bemoaned practical difficulties of the majority approach.¹⁶⁵

and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA, 41 LOY. L.A. L. REV. 965, 1030 (2008) ("To achieve the objective of these [CAFA] exceptions, courts should grant plaintiffs a presumption of citizenship when they define their classes according to state residency.").

¹⁵⁸ See, e.g., *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 886 (9th Cir. 2013) ("The burden of proof placed on a plaintiff should not be exceptionally difficult to bear."); see also *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 572 (5th Cir. 2011) ("The evidentiary standard for establishing citizenship and domicile at this preliminary stage must be practical and reasonable . . .").

¹⁵⁹ *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 558, 592 (2013) (quoting 28 U.S.C. § 1332(d)(D)(5)(B) (2012)).

¹⁶⁰ See *Mason*, 842 F.3d at 392–93.

¹⁶¹ *Id.* at 392–93, 395.

¹⁶² See FED. R. EVID. 301; see also *Bell v. Batesville White Lime Co.*, 230 S.W.2d 643, 644 (Ark. 1950) ("Most presumptions are rebuttable . . .").

¹⁶³ See *Mason*, 842 F.3d at 392.

¹⁶⁴ *Id.*

¹⁶⁵ See *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 886 (9th Cir. 2013); *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 572 (5th Cir. 2011); see also text accompanying note 158.

It is important to remember that procedure has always been the vehicle in which justice is delivered.¹⁶⁶ Therefore, procedure that requires a plaintiff to carry such a practically enormous burden is simply not good policy, especially when we consider the overarching purposes of CAFA and its exceptions.¹⁶⁷

IV. CONCLUSION

When the residents of Flint, Michigan, first received the boil-water advisory from city officials in the summer of 2014, surely they could not have foreseen the length and intensity of the water crisis that was to follow. Even more certain is the fact that none of these residents could have foreseen, nor would they likely even care to have known, that the contamination of their water supply would lead to a circuit split over the meaning of the word “citizen.”

It is just as unlikely that the Louisville & Nashville Railroad Company could have foreseen that giving an injured couple a lifetime of free passes would result in the well-pleaded complaint rule or that Helen Palsgraff could have expected her trip to the train station to lead to the doctrine of proximate cause.¹⁶⁸ Such is the story of the progression of the common law—statutes lie motionless until facts bring them to life. While the Flint water crisis remains a humanitarian nightmare, its ensuing litigation may lessen the burden on class action plaintiffs moving forward.

While the Sixth Circuit may have departed from the clear consensus, its departure is both legally permissible and practically commendable. A local controversy is a local controversy, and wooden doctrine should not obscure that basic premise.

¹⁶⁶ See Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1980 (2014) (“[P]erhaps the most important goal of all good procedure [is] securing substantial justice.”); see also Samuel H. Pillsbury, *On Corruption and Possibility in L.A.*, 34 LOY. L.A. L. REV. 657, 659 (2001) (“That’s what they teach in law school, isn’t it: that justice is just the product of good procedure?”).

¹⁶⁷ See *supra* Part III.A.

¹⁶⁸ See generally *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).