

SNAP REMOVAL: CONCEPT; CAUSE; CACOPHONY; AND CURE

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So-called “snap removal”—removal of a case from state to federal court prior to service on a forum state defendant—has divided federal trial courts for 20 years. Recently, panels of the Second, Third and Fifth Circuits have sided with those supporting the tactic even though it conflicts with the general prohibition on removal when the case includes a forum state defendant, a situation historically viewed as eliminating the need to protect the outsider defendant from possible state court hostility.

Consistent with the public policy underlying diversity jurisdiction—availability of a federal forum to protect against defending claims in an inconvenient or hostile forum—such removals are barred so long as a resident defendant is properly joined “and served.” Defendants preferring the federal forum have invested significant resources monitoring state trial dockets in order to race to remove before service on forum defendants can be effectuated.

Where such snap removal is permitted, defendants, both in-state and outsiders, are allowed to select their preferred forum—an outcome in derogation of the history, purpose, and logic of permitting removal. This clever strategy of defense counsel is facilitated and accelerated by electronic docket monitoring and sometimes (as in the Third Circuit case) attorney trickery amounting to deceit.

The recent federal appellate decisions are regrettable both in taking the wrong fork of the metaphorical road regarding snap removal and in shifting

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the trial court landscape from one of resistance to snap removal to one of toleration.

Disturbingly, the appellate decisions (without recorded dissent) analyzed the issue through the simplistic lens of textual literalism with nary a nod to the history, purpose, and public policy of federal removal law. In doing so, the circuit panels not only reached a problematic result but also displayed an impoverished interpretative methodology.

Corrective action by Congress can put a stop to these mistaken results in a manner that vindicates the intent and purpose of the 1948 Congress that added the service requirement and that adequately protects the interests of both plaintiffs and defendants. We outline and assess the most prominent suggestions for fixing the snap removal problem, including our own preferred solution.

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INTRODUCTION

Imagine teaching removal to law students in a first-year civil procedure class. The students already know basic subject matter jurisdiction, including diversity jurisdiction, which provides for federal judicial power over suits involving citizens of different states.¹ Generally speaking, a New Yorker may sue a Philadelphian in the Eastern District of Pennsylvania in a dispute involving more than \$75,000.² There must, however be “complete diversity”: In a multi-party case, all of the plaintiffs and all of the defendants must be from different states.³ The students also know that this same suit can also be

¹ See generally 28 U.S.C. §§ 1331, 1332; BROOKE D. COLEMAN ET AL., *LEARNING CIVIL PROCEDURE* ch. 1 (3d ed. 2018) (outlining federal subject matter jurisdiction, including diversity).

² See 28 U.S.C. § 1332 (setting forth diversity of citizenship requirements, including required amount in controversy as \$75,000, exclusive of costs and interest).

³ See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

brought in the federal court in New York or the state courts of Pennsylvania or New York if standards for personal jurisdiction and venue are met.⁴

Now the students shift their study to the concept of removal to federal court as provided by 28 U.S.C. § 1441, et seq., the general federal removal statute.⁵ Although generally permitting a state court defendant to remove the matter to federal court, the case “may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”⁶

Students generally grasp this aspect of removal without difficulty.⁷ Because diversity jurisdiction exists to protect a defendant from being sued in an inconvenient or hostile state court, federal court is available.⁸ But where the matter is commenced in a defendant’s home state, the rationale of protecting that defendant from a plaintiff’s “home court advantage” evaporates.⁹ The resident defendant is at home. It therefore makes complete sense that he/she/it should not be permitted to remove the matter from their home state’s courts. If there are other defendants from outside the forum state, this limitation on removal makes less intuitive sense, but because of the longstanding “forum defendant” rule, the presence of a single forum state defendant historically has barred removal despite the presence of foreign defendants.

Few if any students would have thought that the bar to forum defendant removal could be circumvented by seizing upon the arguable glitch in the language of its prohibition. Specifically, 28 U.S.C. § 1441(b)(2) prevents removal so long as any of the defendants properly joined “and served” is not a forum state resident. From this tidbit of language, clever defense lawyers seeking removal have, with considerable but not unanimous success, argued

⁴ See COLEMAN ET AL., *supra* note 1, at 6, 13 (explaining and illustrating concurrent jurisdiction as well as noting that certain claims (e.g., federal antitrust claims) are subject to exclusive federal court jurisdiction).

⁵ See generally 28 U.S.C. §§ 1441–1449.

⁶ *Id.* § 1441(b)(2).

⁷ Another author critical of snap removal would agree that this is “an easy civil procedure hypothetical.” See Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U. CIN. L. REV. 541, 543 (2018) (using example of a car crash with diversity but a forum defendant to illustrate restrictions on removal in cases involving a forum defendant but potential to evade this longstanding norm through snap removal).

⁸ *Id.* at 547.

⁹ *Id.*

that resident removal is proper so long as any defendant moves swiftly and effects removal prior to service upon a forum defendant.¹⁰

When told of this potential loophole, students squint a bit in disbelief that the purpose of Section 1441(b)(2) could be so easily circumvented by outracing service of process. To them, it is obvious that the availability of resident-defendant removal should not turn on the happenstance of docket monitoring and the precise timing of service. The intent and rationale of the restriction is clear: a home state defendant eliminates (or at least substantially dilutes) the danger of state court prejudice against outsiders. Further, in such cases all plaintiffs are outsiders as the presence of even a single forum state plaintiff would destroy complete diversity and preclude removal.

While taking advantage of a technicality to gain advantage over an opponent¹¹ may all be in a tricky day's work for company counsel (individual defendants make relatively little use of snap removal), we find the development disturbing on both substantive and jurisprudential grounds.

Substantively, snap removal is problematic because it unduly restricts a historically recognized right of forum selection (so long as the forum satisfies a range of requirements)¹² and shifts the balance of litigation prerogatives

¹⁰*Id.* at 544–45.

¹¹Regrettably, the U.S. Court of Appeals for the Third Circuit in *Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 154 (3d Cir. 2018) (involving Pennsylvania substantive law), discussed *infra* text and accompanying notes 104–124, appears to have embraced a model of litigation as gamesmanship as well as a strikingly stiff application of textualism when interpreting statutes. In the process, the Third Circuit panel lost sight of more valid indicia of statutory meaning while simultaneously blessing problematic litigation conduct in the course of unduly expanding removal jurisdiction.

¹²Defendants routinely decry “forum shopping” by plaintiffs. To be sure, one can find examples of some grimace-inducing tactics for seeking a favorable forum. *See, e.g.*, *Piper Aircraft v. Reyno*, 454 U.S. 235, 239–40 (1981) (finding that plaintiff lawyer’s secretary became administrator of decedent’s estate in attempt to site lawsuit in California in connection with airplane crash in Scotland; court ultimately applies forum non conveniens to dismiss U.S. action); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (finding that plaintiffs successfully sue in Minnesota and obtained application of Minnesota law for auto accident that took place in Wisconsin involving Wisconsin citizens); *see also* Thomas O. Main, *On Teaching Conflicts and Why I Dislike Allstate Insurance Co. v. Hague*, 12 NEV. L.J. 600, 600 (2012) (analyzing *Hague* as part of a symposium on “worst” Supreme Court decision).

Advocates of expanded removal to federal court or expansion of federal jurisdiction through minimal diversity tend to overlook the substantial hurdles a plaintiff must clear to prevail against a defendant in state court, impediments that provide quite a good deal of protection to defendants and refute the argument that state courts are hostile to defendants. Plaintiff must establish subject matter jurisdiction (although not a big hurdle in state court), personal jurisdiction, apt venue sufficient to

rather significantly in the direction of business defendants who prefer federal court because federal judges and juries are viewed as generally more hospitable to corporate defendants or perhaps even hostile to particular plaintiffs or types of cases.¹³ Correspondingly, this has the effect of shifting

withstand a *forum non conveniens* challenge, standing, and (to state the oft-forgotten obvious) a right to relief on the merits, which normally entails surviving a dismissal motion, a summary judgment motion, two or more motions for judgment as a matter of law, and perhaps motions for a new trial or reduced award as well. In light of this gauntlet faced by plaintiffs, defendant complaints of unfairness being held to account for alleged wrongdoing in state court are not particularly heart-rending.

And, of course, one can also find extreme examples of defendants successfully forum shopping by commencing pre-emptive strikes in preferred jurisdictions when anticipating a plaintiff action (declaratory judgment actions by insurers seeking to deny coverage are a common example) or by including forum choice provisions in lengthy, boilerplate contract documents. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418–19 (2019) (enforcing arbitration clause and holding that even if clause is silent on the topic class treatment of common or aggregated claims impermissible; decision elevates Court’s (by 5–4 vote) concept of arbitration over state contract law). *See* Linda S. Mullinax, *Carnival Cruise Lines, Inc. v. Shute: The Titanic of Worst Decisions*, 12 NEV. L.J. 549, 550–51 (2012) (identifying *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), which enforced a Florida forum selection clause against passengers from Washington State alleging injuries, as one of the “worst” Supreme Court decisions); Charles Knapp, *Contract Law Walks the Plank: Carnival Cruise Lines v. Shute*, 12 NEV. L.J. 553, 553 (2012) (also identifying *Shute* as one of the Court’s worst decisions).

¹³This conventional wisdom is reflected in the frequency with which defendants sued in state court seek removal—with snap removal representing an extreme example. The defendants seeking snap removal are doing so as a matter of company policy (reflected by the expense incurred to monitor dockets) with essentially no time to make a case-specific assessment of the relative strengths or weaknesses of state and federal court.

Accompanying the rise in snap removal has been a curtailment of personal jurisdiction, particularly general jurisdiction that might have been invoked wherever a defendant has “continuous and systematic” presence (the verbal standard prevailing prior to 2011). *See* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924, 929 (2011) (concluding general jurisdiction is normally available only where corporate defendant is “at home” by virtue of incorporation or location of principal place of business); *Daimler AG v. Bauman*, 571 U.S. 117, 137–38 (2014) (same); *see also* *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877–78 (2011) (taking narrow view of specific personal jurisdiction in 5–4 decision); *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (same). One arguable effect of this jurisdictional shift is to prompt more plaintiffs to sue in the home state court of a defendant.

The conventional wisdom is that urban jurors are generally sympathetic to plaintiffs while suburban and rural jurors are more favorable to defendants. Federal court districts are almost always geographically larger than state court districts and therefore include a higher percentage of suburban and rural citizens (as well as older, whiter, more affluent citizens) in the jury pool. Federal judges are perceived as more sympathetic to corporate defendants and the needs of commerce by virtue of the federal bench’s more frequent background as business attorneys as compared to a state court

outcomes in favor of non-liability or lower settlements by business defendants and reduced recovery for injured individuals or small businesses.¹⁴

Perhaps even more disturbingly, support for snap removal depends upon an excessively literal textualist approach to application of civil litigation statutes and rules that downplays or even ignores legislative intent, statutory purpose, and the structure of federal litigation underlying two centuries of law regarding subject matter jurisdiction and removal.¹⁵

Courts embracing snap removal unduly embrace textual formalism without sufficient consideration of whether congressional drafters intended such literal reading of their words. Functional aspects of law are given insufficient consideration.¹⁶ These elevate form over substance and reward trickery, opportunism, and economic advantage while devaluing not only plaintiff rights but also the structure of American legal federalism.¹⁷

Rigid reading of civil procedure statutes and rules is problematic. The sound basic idea of treating the language of a statute as the exclusive indicator of meaning can become an instrument for missing that meaning. The words of a statute, rule, or document are of course important. But reading them in rigid isolation can easily lead to misinterpretation in derogation of intent, purpose, and meaning of the statute, rule or document containing the words.

bench with proportionally more judges who are former plaintiff and legal aid attorneys. *See* ROGER S. HAYDOCK ET AL., *FUNDAMENTALS OF PRETRIAL LITIG.* § 4.5.8 184 (10th ed. 2016) (“Defendants who are sued in state court should consider whether the controversy may be removed to federal court and whether they are likely to benefit from the federal forum. Conversely, plaintiffs who have chosen the state court will want to seek the remand of cases improperly removed to federal court.”).

¹⁴We are not suggesting that removal to federal court inevitably means the defeat of meritorious claims. But we do contend that even meritorious claims will be more difficult to successfully prosecute in federal court and that lawyers recognize this (as reflected in the manner in which defense lawyers seek removal and plaintiff counsel seeks remand), which in turn logically translates to lower settlement value of cases removed to federal court.

¹⁵*See infra* text and accompanying notes 138–160 (criticizing narrow textualism and in particular its use in adjudicating snap removal remand motions).

¹⁶*See infra* text and accompanying notes 138–160 (criticizing formalist jurisprudence in contrast to more functional legal analysis).

¹⁷Although it is perhaps a bit melodramatic to invoke the Founders for a debate about removal, which we concede lacks the greater stakes of unfair search and seizure, cruel or unusual punishment, or rights of free expression, we nonetheless maintain that in establishing the federal bench and the parameters of its relation to state courts as well as diversity jurisdiction, those who designed the U.S. legal system were interested in avoiding unfair local prejudice and did not endorse technical evasion of state court based on the timing of service of process.

Reading the words “and served” in Section 1441(b)(2) to permit snap approval reaches an incorrect application of the statute that reflects the limits of the textualist approach. We agree with those who favor a more functional approach that incorporates the legislative intent, history, function, purpose, public policy, and court system structure underlying diversity jurisdiction and removal.

Nonetheless, this literal textualist approach permitting snap removal has enjoyed strong support among the trial bench and has the so-far unanimous support of the three federal appellate courts assessing the issue. Absent Supreme Court resolution of the issue against snap removal, it appears that only legislation can correct the problem.

I. HISTORY AND BACKGROUND

A. *The Rationale of Diversity Jurisdiction*

Diversity jurisdiction has roots in the Constitution itself. Article III provides that the judicial power extends to all “controversies . . . between Citizens of different States.”¹⁸ Diversity jurisdiction is codified in 28 U.S.C. § 1332, which gives trial courts “original jurisdiction of all civil actions” involving claims greater than \$75,000 that are “between . . . citizens of different States.”¹⁹

Although the drafting history of this portion of Article III and the Judiciary Act of 1789 is relatively thin, it is generally accepted that the purpose of diversity jurisdiction was to provide a forum where litigants disputing with those of other states could theoretically avoid prejudice against outsiders.²⁰ Thus, diversity jurisdiction provides a means by which an

¹⁸U.S. CONST. art. III, § 2.

¹⁹28 U.S.C. § 1332(a)(1).

²⁰See 15A JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 102.02 (3d ed. 2020) (addressing historical basis of diversity jurisdiction); *Id.* § 102App.01 (reviewing constitutional basis and background of diversity jurisdiction); *Id.* § 102App.03[1] (reviewing historical reason for diversity jurisdiction) (sections authored by Martin H. Redish); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 L. & CONTEMP. PROBS., Dec. 1948, at 22–23; see also John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 410 (1979) (contending that state court prejudice against non-citizens remains a danger); John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 10–12 (1963) (same). Judicial opinions have historically expressed this view. See, e.g., *Burgess v. Seligman*, 107 U.S. 20, 34 (1883); *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 67–68 (1809); *Stifel v. Hopkins*, 477 F.2d 1116, 1125–26 (6th Cir.

out-of-state plaintiff can avoid the metaphorical lion's den of a state court arena inclined to impose liability on an outsider for the benefit of a local resident or to protect an insider from the claims of an outsider.²¹

The legal system gives plaintiffs, both resident and non-resident, a choice of where to commence litigation.²² Always somewhat controversial,²³ diversity jurisdiction has at several junctures been under particular attack that included calls for its abolition or curtailment.²⁴ However, as commentators have also noted, there remain solid arguments for retaining diversity

1973); *China Basin Props., Ltd. v. Allendale Mut. Ins. Co.*, 818 F. Supp. 1301, 1304 (N.D. Cal. 1992).

²¹This view of and rationale for diversity jurisdiction would appear to hold even if the traditional justification for diversity—a general concern over state system prejudice toward outsiders—is replaced with the more nuanced and perhaps legal realist-cum-cynical view that diversity jurisdiction was established primarily to assuage the concerns of past creditors and future investors who feared that state courts would not enforce contracts and debt collection efforts. *See* MOORE ET AL., *supra* note 20, §§ 102.03, 102App.03[1] (showing the benefit of diversity jurisdiction to out-of-state defendants in class actions); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495–98 (1928). Even if the framers were particularly focused on state court prejudice toward creditors, this is but a refinement of the traditional understanding of the rationale for diversity jurisdiction rather than a rejection. *See also* MOORE ET AL., *supra* note 20, § 102App.03[2] & n.11 (crediting diversity jurisdiction and general federal common law of *Swift v. Tyson*, 41 U.S. 1 (1842) with substantial contribution to U.S. economic growth through increasing investor confidence).

²²Giving forum state citizens the option of state or federal court is, however, not particularly consistent with the protection-against-prejudice rationale of diversity jurisdiction.

²³*See* MOORE ET AL., *supra* note 20, § 102App.03[1] (“Diversity jurisdiction is and always has been controversial.”).

²⁴*See id.* §§ 102.04, 102App.03[1]–[2]; FEDERAL COURTS STUDY COMMITTEE, REP. OF THE FED. CTS. STUDY COMM. (1990) (recommending substantial reduction in availability of diversity jurisdiction limited to complex multistate litigation, interpleader, and suits involving aliens); CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* 127–37 (4th ed. 1983) (favoring substantial curtailment or even elimination of diversity jurisdiction); HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 139–52 (COLOM. UNIV. PRESS 1973); AM. L. INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS*, (1969); ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 37 (Harper & Row, Harper Torchbook ed. 1963) (1955); Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 99 (reporter of Federal Courts Study Committee supports diversity curtailment recommendations); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979); William Bratton, *Diversity Jurisdiction – An Idea Whose Time Has Passed*, 51 IND. L.J. 347 (1976); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928).

jurisdiction²⁵ and lawyers have consistently endorsed diversity jurisdiction through both vocal support and use, including use via removal.²⁶

But despite its long history and continued support by major segments of the bar, diversity jurisdiction remains constricted to a degree. Although it is not inexorably required by the language of the statute or the rationale of diversity jurisdiction, courts have for more than 200 years required that there be “complete” diversity: all of the plaintiffs and all of the defendants must be citizens of different states²⁷—at least as regards the jurisdictional statute.²⁸

The assumption underlying this requirement is that the presence of one or more in-state defendants sufficiently suppresses any state temptation to find for plaintiff on the basis of home state prejudice.²⁹ Although the validity of this assumption can be questioned,³⁰ it has been essentially unchallenged over

²⁵ See MOORE ET AL., *supra* note 20, § 102App.03[2] (collecting arguments justifying continued availability of diversity jurisdiction including continued presence of local bias; existence of urban-rural bias within same state; permitting attorneys option to litigate more often in familiar court; and arguably better quality of federal courts due to credentials of judges, independence afforded by life tenure, well-crafted rules; and relatively greater concentration of resources per case).

²⁶ *Id.*; Charles Bricant, *Diversity Jurisdiction: Why Does the Bar Talk One Way but Vote the Other Way with Its Feet*, 61 N.Y. ST. B.J. 20, 20 (1989); John J. Parker, *The Federal Jurisdiction and Recent Attacks upon It*, 18 A.B.A.J. 433, 437 (1932).

²⁷ See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

²⁸ See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967). Article III of the Constitution requires only minimal diversity of citizenship. Hence, a statute may confer subject matter jurisdiction on the basis of minimal diversity, as does the federal interpleader statute, 28 U.S.C. § 1335. Pursuant to *Strawbridge* and its progeny, 28 U.S.C. § 1332(1) has been viewed as stopping short of the full breadth of Article III diversity jurisdiction.

²⁹ See MOORE ET AL., *supra* note 20, § 102App.04[2] (discussing *Strawbridge* and its rationale for the complete diversity requirement).

³⁰ For example, consider a case in which Local Plaintiff A, the victim of a defective product, sues Local Defendant A (the retailer), Local Defendant B (the wholesaler), and Foreign Defendant C (the manufacturer) on a theory of defective product design. The obvious deep pocket here is the manufacturer, who also may be seen as most culpable in a design defect case. The wholesaler and retailer are proper defendants by law per *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) and its progeny but may have done nothing more than participate in the chain of distribution. Although there are two local defendants in the state court lawsuit, they are not the “target” defendants.

If state court prejudice against outsiders is a reality (an assumption that may be outdated in the more homogenized modern world), common sense strongly suggests that when jurors are deciding who to blame for Local Plaintiff’s serious injuries, the Foreign Defendant Manufacturer is likely to be seen as the culprit.

the years³¹ and forms the basis for limitations on removal when one or more defendant is a citizen of the forum state. And even if the rationale of the forum defendant limitation on removal is suspect, it nonetheless has long been “baked in” to the civil litigation system, nested with legal doctrine that sometimes favors plaintiffs and sometimes favors defendants. If the forum defendant rule is substantially weakened (via snap removal or any other litigation innovation), the equilibrium of the system is disturbed absent a countervailing development favorable to plaintiffs.

In addition to the amount-in-controversy requirement that limits diversity jurisdiction (and removal as well), there are other aspects of the diversity jurisdiction statute that effectively contract the availability of diversity jurisdiction and consequently restrict removal.

For example, corporations are deemed citizens of their states of incorporation and principal places of business,³² which case law has defined as the managerial headquarters of the corporation.³³ This means that there are, for most corporations, two “home” states rather than one, which provides plaintiffs with twice as many opportunities to defeat complete diversity and limit removal due to the presence of an in-state defendant.

Consequently, the rationale of complete diversity as well as the rationale of the “forum defendant” limitation on removal may be flawed to the point of being completely wrong, at least in cases where the foreign defendant is the target defendant. But it is nonetheless the agreed rule that should be sufficiently respected that it is not thwarted through snap removal.

³¹ At least by Congress or other policymakers. There has never to our knowledge been a legislative effort to amend 28 U.S.C. § 1332 to provide for minimal diversity that has threatened to succeed. *But see* MOORE ET AL., *supra* note 20, § 102App.04[2] (discussing modest congressional expansion of diversity jurisdiction in reaction to *Strawbridge*); Press Release, *Sen. Lee Introduces Constitutionally Sound Tort Reform* (July 20, 2018), <https://www.lee.senate.gov/public/index.cfm/2018/7/sen-lee-introduces-constitutionally-sound-tort-reform> (last visited Sept. 24, 2020) (stating that current U.S. Senator Mike Lee (R-Utah) sponsors legislation to establish minimal diversity jurisdiction; and stating that proposed legislation would allow “access to federal court for any case where at least one defendant is from out of state”). There has, however, been scholarly commentary arguing for change to the complete diversity requirement. *See, e.g.*, ERWIN CHEMERINSKY, *FEDERAL JURISDICTION*, 288 (3d ed. 1999); Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. UNIV. L.Q. 119, 147–50 (2003); *see also* James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 180 (2005) (noting continuing resilience and even expansion of diversity jurisdiction despite criticisms).

³² 28 U.S.C. § 1332(c)(1).

³³ *See* *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010).

Unincorporated associations are considered citizens of any state in which there is a member.³⁴ This limits diversity jurisdiction significantly if not eliminating it entirely for cases involving certain defendants.³⁵ Although there are other provisions of the statute contracting multiple citizenship (e.g., equating estate representative citizenship with that of the decedent;³⁶ deeming an insurer a citizen of the policyholder's state³⁷), there are also doctrinal exceptions to diversity jurisdiction for domestic relations matters,³⁸ probate matters,³⁹ and real property disputes.⁴⁰

In addition, there are other congressionally mandated exceptions to diversity jurisdiction,⁴¹ including a specific limitation on diversity jurisdiction in cases where:

[a] district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under [Section 1332(d)(2)]⁴² over a class action

³⁴ See *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005); *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189 (1990).

³⁵ For example, consider a creditor suing the Democratic Party or the Republican Party for an unpaid debt. Even in a world where there are distinctly “red” and “blue” states, there are no states with no Democrats or Republicans in the population. Even less vast organizations will have members in many states. But the importance of this aspect of diversity jurisdiction may be considerably lessened to the extent that unincorporated organizations operate through any sufficiently separate entities that have a distinct citizenship.

³⁶ See 28 U.S.C. § 1332(c)(2).

³⁷ See *id.* § 1332(c)(1).

³⁸ See *Ankenbrandt v. Richards*, 504 U.S. 689, 694–95 (1992).

³⁹ See *Marshall v. Marshall*, 547 U.S. 293, 311–12 (2006); *In re Broderick's Will*, 88 U.S. 503, 517–18 (1874).

⁴⁰ See DAVID F. HERR ET AL., *MOTION PRACTICE* § 10.03[F][4] (7th ed. 2016) (noting federal courts have “long been loath” to adjudicate local property disputes even if there is jurisdiction based on text of Section 1332); Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 *YALE L.J.* 1134, 1134–35 (1980).

⁴¹ See COLEMAN ET AL., *supra* note 1, at 55 (discussing restrictions on diversity jurisdiction involving “some relatively large class actions, interpleader actions in which the holder of a common fund brings a lawsuit against all rival claimants to its own fund, and multi-party, multi-forum cases involving multiple victims of a disaster”).

⁴² 28 U.S.C. § 1332(d)(2) results from the Class Action Fairness Act of 2005 (CAFA), which provides expanded federal jurisdiction over class actions on the basis of minimal where the matter in controversy exceeds \$5 million so long as any member of the plaintiff class is citizen of a state outside the forum state. CAFA was enacted in response to concerns that many state court class actions were resulting in quick “sweetheart” settlements for counsel and lacked sufficient adversary posture and development of the facts. See COLEMAN ET AL., *supra* note 1, at 404–05.

greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based upon [five enumerated considerations].⁴³

Thus, even expansions of federal diversity jurisdiction remain subject to the tradition of a constrained view of such jurisdiction. It has long been the rule that federal courts are courts of limited jurisdiction⁴⁴ and that federal jurisdiction is to be strictly rather than expansively construed,⁴⁵ with doubts resolved against finding jurisdiction⁴⁶ and in favor of remand⁴⁷ of removed

⁴³ See 28 U.S.C. § 1332(d)(3). The six enumerated considerations are:

(A) whether the claims asserted involve matters of national or interstate interest; (B) whether the claims asserted will be governed by the 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 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.

See *id.* at (A)–(F).

⁴⁴ See COLEMAN, ET AL., *supra* note 1, at 6 (“The federal courts are courts of limited jurisdiction.”). By contrast, state courts are courts of general jurisdiction that are open to hearing all justiciable disputes without regard to the law involved or the identity or citizenship of the parties or the amount in controversy. *Id.* at 5–7. That said, state courts doors may be effectively closed to certain claims that are exclusively federal in nature (e.g., federal antitrust law) and for which there is not concurrent jurisdiction. In general, however, a federal claim for relief may be prosecuted in state court. See, e.g., *Yellow Freight System v. Donnelly*, 494 U.S. 820, 823–26 (1990) (holding claims arising pursuant to Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e–200e-17, may be heard by state courts).

⁴⁵ See *City of Indianapolis v. Chase Nat’l Bank*, 314 U.S. 63, 76–77 (1941); *Detres v. Lions Bldg. Corp.*, 234 F.2d 596, 597 (7th Cir. 1956); MOORE ET AL., *supra* note 20, § 102.13.

⁴⁶ See MOORE ET AL., *supra* note 20, § 102.13.

⁴⁷ See *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111–13 (3d Cir. 1990); *Freeman v. Nw. Acceptance Corp.*, 754 F.2d 553, 560 (5th Cir. 1985); MOORE ET AL., *supra* note 20, § 102.13.

cases if the party asserting jurisdiction cannot successfully shoulder the burden of persuasion.⁴⁸

B. The Rationale and Evolution of Removal

Diversity jurisdiction remains firmly ensconced in American law—but its niche has generally been closely cabined. Removal enjoys or is burdened by a similar status. It has existed for many decades and remains popular but is constrained by some of the same concerns surrounding diversity jurisdiction generally. A foreign defendant sued in state court may—provided certain conditions are met—remove the case to federal court. Thus, forum shopping by opportunistic plaintiffs hoping to trade upon home court advantage can be constrained, at least in part.⁴⁹

⁴⁸ See *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182 (1936); MOORE ET AL., *supra* note 20, § 102.14. Similarly, the defendant removing a case typically bears the burden of proof regarding the propriety of removal. See *Americold Realty Tr. v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 1017 (2016) (removing defendant failed to meet its burden of demonstrating existence of diversity jurisdiction); *Conagra Foods, Inc. v. Americold Logistics, LLC*, 776 F.3d 1175, 1182 (10th Cir. 2015), *aff'd on other grounds*, 136 S. Ct. 1012 (2016); *Huffman v. Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1079 (10th Cir. 1999) (finding that defendant's burden to establish jurisdiction varies depending on whether amount claimed exceeds limit); *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904, 907 (6th Cir. 1999); MOORE ET AL., *supra* note 20, § 102.21[3][a].

⁴⁹ Removal alone does not, as discussed below, permit the foreign defendant to avoid plaintiff's chosen state entirely. The case is removed from the judicial system of State X to the federal judiciary of State X but remains in State X, the federal trial bench of which is likely to contain almost exclusively lawyers who practiced in State X prior to appointment and who have longstanding ties to State X. In addition, the jurors hearing disputes in federal court, like the jurors called to duty in state court, are all residents of State X. Consequently, a move to federal court does not necessarily eliminate whatever jingoism may exist in the bench, bar, venire, media, or general population of State X. And unless there is something intrinsically more neutral about federal judges relative to state judges, litigating in federal court, the removal may not eliminate local prejudice so much as it confers other tactical advantages.

For defendants, the tactical advantages of federal court are considered significant by practicing lawyers. Although federal trial judges may not be morally superior to state judges, they have life tenure that state judges lack and are thought to be less subject to ruling based on concern for job preservation. Although federal jurors and state jurors both come from the same state, unless a state claim is filed in a very rural area, the state jurors will tend to come from a more urban environment that is more economically, socially, racially, ethnically, and religiously diverse while federal jurors will be disproportionately older, whiter, and more suburban or rural.

According to longstanding conventional wisdom, the rural jury will be more supportive of business and more economically and socially conservative as well. Hence, the federal jury will be less likely to render a large compensatory or punitive damages award.

Removal, described by one court as a “judicial curiosity incidental to our dual system of government,”⁵⁰ is not expressly mentioned in Article III but was established in the Judiciary Act of 1789.⁵¹ Removal has consistently been among the more bedeviling aspects of civil litigation. According to one court, “[t]here is no other phase of American jurisprudence with so many

Current federal civil procedure tends to be more favorable to defendants than corresponding state procedure. For example, the U.S. Supreme Court in 1986 decided a series of cases (the so-called summary judgment “trilogy”) that made summary judgment easier for defendants to obtain. See COLEMAN ET AL., *supra* note 1, at 598–603. But many states have failed to embrace the trilogy or did so only belatedly. See *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1030–31 (Nev. 2005). And according to conventional wisdom of litigators in states like Nevada, state judges remain less likely to grant summary judgment than their federal counterparts even if the doctrine is congruent. See generally NATIONAL CENTER FOR THE STUDY OF STATE COURTS AND STATE JUSTICE INSTITUTE, CIVIL JUSTICE INITIATIVE, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 22 (2015) (finding summary judgment granted in only four percent of state court cases during 1992); ARTHUR R. MILLER, THE ASCENT OF SUMMARY JUDGMENT AND ITS CONSEQUENCES FOR STATE COURTS AND STATE LAW 16–20 (2008) (Paper presented at Pound Civil Justice Institute 2008 Forum for State Appellate Court Judges) (on file with authors) (stating that majority of states have adopted rationale of U.S. Supreme Court 1986 summary judgment trilogy but application varies by state and judge); COLEMAN ET AL., *supra* note 1, at 811; COLEMAN ET AL., *supra* note 1, at Comprehensive Study Guide (available on line for purchase) (on file with authors).

Treatment of motions to dismiss also differentiates state and federal courts. Both authorize use of a motion to dismiss plaintiff cases for “failure to state a claim.” See FED. R. CIV. P. 12(b)(6) (state numbering may differ). But since 2007 and particularly 2009, federal courts have used a more muscular form of the motion, one which permits the judge to ask not only whether the plaintiffs have made allegations that if true would justify legal relief, but also whether the allegations and claim are sufficiently “plausible.” See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 560–66 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); see also COLEMAN ET AL., *supra* note 1, at 609–10.

In addition, the availability of discovery in federal court has been curtailed somewhat by 1993 Amendments limiting discovery to matters relevant to a “claim” rather than the “subject matter” of a lawsuit and requiring that discovery be “proportional” to the need for information and stakes of the cases. See FED. R. CIV. P. 26(b)(1); COLEMAN ET AL., *supra* note 1, at 470.

These and other factors combine to make federal court generally viewed as more hospitable to defendants generally and to manufacturers, pharmaceutical companies, retailers, banks, and insurers in particular. These types of defendants routinely seek to remove litigation from state to federal court.

⁵⁰ *Tinney v. McClain*, 76 F. Supp. 694, 698 (N.D. Tex. 1948).

⁵¹ See MOORE ET AL., *supra* note 20, § 107.03.

refinements and subtleties.”⁵² A leading commentator describes the history of removal as “filled with confusion and incoherence.”⁵³

Removal, like federal jurisdiction generally and diversity jurisdiction in particular, has a number of narrowing aspects. It must be sought within a certain, strict time limit (30 days) following specific presentation and filing requirements.⁵⁴ Perhaps most important, even if complete diversity exists between all plaintiffs and all defendants, removal has historically not been permitted if any of the defendants is a citizen of the forum state. This is the “forum defendant” or “resident defendant” rule.⁵⁵

For example, a New Jersey citizen plaintiff alleging ingestion of tainted food while on a guitar shopping trip in Nazareth, Pennsylvania may sue in Pennsylvania state court the diner (a Pennsylvania citizen), its beef distributor (a New York citizen), and the Wichita-based manufacturer/processor of the beef patties used in the tainted burger (a Kansas citizen).

There is complete diversity, but the case may not be removed because one of the defendants (the diner) is a citizen of the forum state. “The rule applies to removal by any of the defendants, not just the forum defendant.”⁵⁶ This forum defendant limitation on removal has existed since the relative dawn of removal. Its rationale is that the presence of the local defendant effectively discourages state court bias.

The purpose of diversity jurisdiction is to provide litigants with an unbiased forum by protecting out-of-state litigants from local prejudices. Therefore, it makes no sense to allow an in-state defendant to take advantage of removal on the basis of diversity jurisdiction. Out-of-state defendants, on the other hand, will be cloaked, at least theoretically, with the “home court” advantage because they are being sued along with an in-state defendant by an out-of-state plaintiff [otherwise there would be no diversity jurisdiction]. Of course, this argument fails to take account of the possible finger-pointing that could occur among the defendants,

⁵² *Hagerla v. Mississippi River Power Co.*, 202 F. 771, 773 (S.D. Iowa 1912).

⁵³ MOORE ET AL., *supra* note 20, § 107.03; *see also* Nannery, *supra* note 7, at 546–49 (describing history of removal and forum defendant rule).

⁵⁴ *See* 28 U.S.C. §§ 1446–1447; MOORE ET AL., *supra* note 20, §§ 107.91[4][a], 107.140.

⁵⁵ 28 U.S.C. § 1441(b)(2); *see* MOORE ET AL., *supra* note 20, § 107.55.

⁵⁶ MOORE ET AL., *supra* note 20, § 107.55[1].

which would put the out-of-state defendant very much at a disadvantage in terms of the local-bias perspective. Nonetheless, the general removal statute clearly precludes removal if any of the defendants is a citizen of the state in which the action was brought.⁵⁷

In the above example, the rationale would seem unassailable in that the plaintiff (New Jersey citizen) is if anything at a bias/prejudice disadvantage relative to the home state (Pennsylvania citizen). But if we modify the hypothetical to make the plaintiff a Pennsylvanian suing the famous Tick Tock diner in Northern New Jersey⁵⁸ (and the distributor and manufacturer) in New Jersey state court, one has less confidence in the rationale of the forum defendant rule. To be sure, jurors in Essex County New Jersey may have a soft spot for a venerable local establishment. But that hardly equates to similar attitudes toward the diner's New York wholesaler or Kansas manufacturer. They are still outsiders that may be tempting deeper pocket targets for jurors concerned about the financial consequences of a judgment against a local business. Finger-pointing is almost sure to ensue.

But however undertheorized and overdone, the forum defendant rule has been the law of removal for more than 200 years.⁵⁹ Rightly or wrongly, it represents a long-standing public policy judgment by a legal system that posits that state court hostility toward outsiders is sufficiently reduced by the presence of a single in-state defendant to bar removal.⁶⁰

⁵⁷ *Id.*

⁵⁸ Clifton, New Jersey, to be more precise. The diner, which sits on a major thoroughfare outside New York City has become something of an iconic symbol of this genre of restaurants, sufficiently so that it attracts celebrity visits. *See, e.g., Mick Jagger Tests New Heart Valve with Artery-Clogging Meal*, N.Y. POST (Aug. 5, 2019), <https://nypost.com/2019/08/05/mick-jagger-tests-new-heart-valve-with-artery-clogging-meal/> (last visited Sept. 25, 2020) (“Jagger was en route to Met Life Stadium for a Thursday night Stones performance when . . . [h]e made a pit stop at Clifton, NJ’s trucker-friendly 24-hour Tick Tock Diner” where “[H]e had Taylor ham, eggs and cheese! With disco fries and sloppy Joe to go!”).

⁵⁹ *Lee v. Am. Nat’l Ins. Co.*, 260 F.3d 997, 1004 (9th Cir. 2001).

⁶⁰ Although concern over local bias remains, there are also signs that policymakers have, since the mid-20th Century, regarded the problem as waning over time, a view that supports arguments in favor of further curtailment or even elimination of diversity jurisdiction and related removal. Regarding one aspect of the 1948 revisions:

[a]ll the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, have been discarded. These provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a

The removal statute has been amended on multiple occasions,⁶¹ perhaps most significantly in 1948, when the “properly joined and served” language, discussed in more detail below, was added.⁶² Most of the revisions over the years are what might be termed housekeeping or organizational and linguistic clarifications.⁶³

The 2011 amendments were more significant but did not substantively address the properly-joined-and-served language,⁶⁴ a fact that has been used by both proponents and opponents of snap removal in their arguments about the practice.⁶⁵ Proponents of snap removal argue that the lack of any change in the service requirement language reflects tacit congressional approval or at least acceptance of decisions applying the literal meaning of the requirement. Opponents argue that the absence of any substantive discussion of the service requirement language in 2011 indicates that Congress has not focused on the issue and is most likely unaware that half or more of the snap removal decisions have taken a literalist approach to the statutory language that undermines the larger statutory objective of the forum defendant rule.

nation since united by three wars against foreign powers. Indeed, the practice of removal for prejudice or local influence has not been employed much in recent years.

See Committee Note to 1948 Amendments; Federal Courts Jurisdiction and Venue Clarification Act, reprinted in MOORE ET AL., *supra* note 20, § 107App.01[2]. Subsequent developments suggest that congressional staff spoke too soon. Although modern removal may not be based on genuine concerns about local prejudice, its use has grown over the years based on the alternative motivation of defendants to seek the more pro-defendant confines of federal court.

⁶¹ *See generally* MOORE ET AL., *supra* note 20, §§ 107App.01–107App.113.

⁶² *Id.*

⁶³ *See, e.g.*, Committee Note to 2011 Amendments; Federal Courts Jurisdiction and Venue Clarification Act, reprinted in MOORE ET AL., *supra* note 20, § 107App13[2] at 107App.-34.13 (“[Revisions of the statute place] the provisions that apply to diversity actions under one subsection. This change is intended to make it easier for litigants to locate the provisions that apply uniquely to diversity removal.”); *see generally* MOORE ET AL., *supra* note 20, §§ 107App.01–107App.113.

⁶⁴ *See* Committee Note to 2011 Amendments; Federal Courts Jurisdiction and Venue Clarification Act, reprinted in MOORE ET AL., *supra* note 20, § 107App13[2] at 107App.-34.14 (“Proposed paragraph 1441(b)(2) restates the substance of the last sentence of current subsection 1441(b), which relates only to diversity.”).

⁶⁵ *See, e.g.*, *DeLaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372, 1381 n.6 (N.D. Ga. 2018); Reply Brief, *DeLaughder*, 369 F. Supp. 1372 (No. 1:18-cv-04414-RWS).

C. The “Properly Joined and Served” Language

The original removal provision did not include the “properly joined and served” limitation, which Congress made a part of Title 28 in 1948.⁶⁶ As noted above, the statutory removal provisions (28 U.S.C. §§ 1441–1450) were significantly revised in 1948, at which time 28 U.S.C. § 1441(b)(2) was amended to include its current language stating that cases qualifying for diversity jurisdiction (and hence meeting the statutory requirement that original jurisdiction exist) “may not be removed *if any of the parties in interest properly joined and served* as defendants is a citizen of the State in which such action is brought.”⁶⁷

There appears to be consensus that the “properly joined and served” language of 28 U.S.C. § 1441(b)(2) was added to prevent the abuse of the forum defendant rule⁶⁸ by improper or “fraudulent” joinder of a forum citizen

⁶⁶ See 1 Stat. 72, 79–80 (codified at 28 U.S.C. § 114 (1940)); 28 U.S.C. § 1441(b) (1948).

⁶⁷ See 28 U.S.C. § 1441(b)(2) (emphasis added).

⁶⁸ Arthur Hellman, et al., *Neutralizing the Stratagem of “Snap Removal”: A Proposed Amendment to the Judicial Code*, 9 FED. CTS. L. REV. 103, 108 (2016). The basic purpose of the 1948 “and served” language is agreed upon by commentators although they may differ in their views of the propriety of snap removal. See, e.g., Saurabh Vishnubhakat, *Pre-Service Removal in the Forum Defendant’s Arsenal*, 47 GONZ. L. REV. 147, 155, 161 (2011–2012) (finding snap removal appropriate because of plain language of “and served” requirement despite tension with purpose of the language); Matthew Curry, Note, *Plaintiff’s Motion to Remand Denied: Arguing for Pre-Service Removal under the Plain Language of the Forum-Defendant Rule*, 58 CLEV. ST. L. REV. 907, 931 (2010) (same); Jordan Bailey, Comment, *Giving State Courts the Ol’ Slip: Should a Defendant be Allowed to Remove an Otherwise Irremovable Case to Federal Court Solely Because Removal was Made Before Any Defendant is Served?*, 42 TEX. TECH L. REV. 181, 209–10 (2009) (criticizing snap removal as inconsistent with overall structure of removal and diversity jurisdiction).

This appears to be the judicial consensus as well, even for judges permitting snap removal. See, e.g., *Brown v. Organon USA Inc.*, No. 07-3092, 2008 WL 2625355, at *7 (D.N.J. June 27, 2008); *Allen v. GlaxoSmithKline PLC*, No. 07-5045, 2008 WL 2247067, at *6 (E.D. Pa. May 30, 2008); *Brown v. Organon Int’l Inc.*, No. 07-3092, 2008 WL 2833294, at *4–5 (D.N.J. July 21, 2008); *DeAngelo-Shuayto v. Organon USA Inc.*, No. 07-3923, 2007 WL 4365311, at *3 (D.N.J., Dec. 12, 2007); *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp. 2d 177, 181 (S.D.N.Y.); *Holmstrom v. Harad*, No. 05-2714, 2005 WL 1950672, at *2 (N.D.Ill. Aug. 11, 2005); *Aredia and Zometa Prods. Liab. Litig.*, No. 07-0779, 2007 WL 2905247, at *2 (M.D. Tenn., Oct. 3, 2007); see also John P. Lavelle, Jr. & Erin E. Kepplinger, *Removal Prior to Service: A New Wrinkle or a Dead End?*, 75 DEF. COUNS. J. 177, 179 (2008) (noting defense lawyer attracted to snap removal as a tactic recognizes split in opinion and tension between “and served” text and its purpose of preventing plaintiff gamesmanship without vitiating forum defendant rule resulting in divided trial court decisions).

defendant that was not seriously being pursued by the plaintiff but was only named in the suit to thwart removal.⁶⁹

However, the published legislative history regarding the 1948 changes is inconclusive. For example, there is neither a specific statement from Congress nor from the Advisory Committee on Revision of the Judicial Code (the “Committee”), regarding the addition of the “properly joined and served” language.⁷⁰ In addition, appellate court guidance regarding snap removal, discussed below, has been slow in coming because of the limited reviewability of remand motions.⁷¹

Despite the lack of guidance, it seems clear that the “properly joined and served” requirement of Section 1441(b) was not intended to vitiate the forum defendant rule but rather was designed to prevent the naming of non-legitimate defendants from preventing removal. Though the legislative history behind Section 1441(b) is cloudy, the generally accepted view is that Congress added the “properly joined and served” limitation to prevent plaintiffs from blocking removal by joining forum defendants they don’t

⁶⁹ See Nannery, *supra* note 7, at 548:

[H]istorical context makes [the service language’s] purpose evident: ‘The purpose behind the addition of that language seems fairly clear – to bring into the statute the ‘fraudulent joinder’ doctrine and to restrict other tactics, like failing to serve a properly joined in-state defendant, which might otherwise be used to prevent removals which Congress had authorized.’

(quoting *Champion Chrysler Plymouth v. Dimension Service Corp.*, 2017 WL 726943, at *2 (S.D. Ohio Feb. 24, 2017)).

The fraudulent joinder doctrine holds that defendants against whom the plaintiff has no plausible claim will be ignored in determining whether there exists complete diversity and corresponding federal diversity jurisdiction pursuant to 28 U.S.C. § 1332. See *In re Briscoe*, 448 F.3d 201, 216 (3d Cir. 2006). *But see* *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 32 (3d Cir. 1985) (stating plaintiff’s motive of joining forum defendant to defeat diversity jurisdiction is not fraudulent joinder unless plaintiff lacks legitimate basis for claim against forum defendant). See generally James E. Pfander, *States as Laboratories for Federal Change*, 17 TEMP. POL. & CIV. RTS. L. REV. 355, 365–66 (2008) (defending forum shopping against common criticisms and noting that practice may enhance federalism and relative importance of state judicial systems).

⁷⁰ See 28 U.S.C. § 1441 (1948) reviser’s notes; H.R. REP. NO. 80-308 (1947), as reprinted in 1948 U.S.C.C.S., Special Pamphlet: Title 28 at 1692; S. REP. NO. 80-1559 (1948), as reprinted in 1948 U.S.C.C.S. Special Pamphlet: Title 28, 1675; Letter from Hon. Albert B. Maris, Circuit Judge, U.S. Court of Appeals for the Third Circuit, and Chair of the Committee, to Mildrim Thompson, Jr., Esq. (May 10, 1946).

⁷¹ *Cook v. Wikler*, 320 F.3d 431, 438–39 (3d Cir. 2003) (orders denying or permitting remand generally not reviewable).

intend to serve or pursue.⁷² Whatever the rationale for the 1948 Amendment to the removal statute, it seems clear that Congress did not intend to constrict the forum defendant rule, to make it more easily evaded, or to elevate the significance of the timing of service.

In *Pullman Co. v. Jenkins*,⁷³ which remanded a case removed by an initially unserved “Doe” defendant who was later identified as a citizen of the forum state (California), the Court invalidated the removal, stating that, “the non-resident defendant should not be permitted to seize an opportunity to remove the cause before service upon the resident co-defendant is effected.”⁷⁴ But the unserved forum defendant in that case also destroyed complete diversity, making the precedential impact of the case unclear.

Despite this, one extensive and influential trial court opinion read *Pullman Co. v. Jenkins* as probative of a judicial understanding of legislative intent that implicitly disapproved of snap removal.⁷⁵ Although this approach creates the possibility that a defendant will be joined solely to defeat removal without any genuine plaintiff intent to seek relief from the forum defendant, the *Pullman Co. v. Jenkins* Court seemed untroubled by risk, reasoning that a “the resident defendant [that] has not been joined in good faith” could be disregarded for purposes of determining the availability of removal.⁷⁶

Although this seems the right approach, it obviously holds the door ajar to improper naming of sham defendants by plaintiffs solely to defeat removal rather than to actually pursue claims against a forum state defendant. Although such improper or “fraudulent” joinder allows a court to disregard

⁷² See *Sullivan v. Novartis Pharms. Corp.*, 575 F. Supp. 2d 640, 645 (D.N.J. 2008) (“Congress added the ‘properly joined and served’ requirement in order to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve.”); *Stan Winston Creatures*, 314 F. Supp. 2d at 181 (“The purpose of the ‘joined and served’ requirement is to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve.”); *Plymouth v. Dimension Service Corp.*, No. 17-CV-130, 2017 WL 726943, at *5 (S.D. Ohio Feb. 24, 2017) (“The use of the phrase ‘properly joined’ in § 1441(b)(2) stems directly from the judicial development of the doctrine of fraudulent joinder. Why Congress chose to add the words ‘and served’ to ‘properly joined’ is less clear, although it probably was designed to prevent a plaintiff from defeating removal by joining (even properly) an in-state defendant against whom the plaintiff did not intend to proceed.”).

⁷³ 305 U.S. 534 (1939).

⁷⁴ *Id.*

⁷⁵ *Sullivan*, 575 F. Supp. 2d at 644–45.

⁷⁶ *Pullman*, 305 U.S. at 541.

the naming of the forum defendant,⁷⁷ proving improper or sham joinder can be difficult in practice. The same plaintiff who is willing to name a sham defendant will probably be equally willing to contend that it really intends to pursue the defendant, making it hard as a practical matter for courts to police improper/fraudulent joinder in that the process implicitly involves a judge concluding that plaintiff's counsel lacks candor.⁷⁸

⁷⁷ See *id.*; *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067–68 (9th Cir. 2001) (deeming non-diverse defendant fraudulently joined when complaint failed to state a viable claim against that defendant and other portions of record made clear that joinder was solely attempt to defeat federal jurisdiction); *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 460–61 (2d Cir. 1998) (concluding plaintiff cannot defeat removal by naming defendants with no genuine connection to dispute); *MOORE ET AL.*, *supra* note 20, § 107.52[4] (noting that improperly joined parties are generally disregarded in assessing diversity jurisdiction and removal).

⁷⁸ In many cases, of course, the problem is not so stark. For example, a plaintiff may legitimately sue a forum state defendant seeking to hold that defendant liable for its role as an agent of a foreign target defendant, but the court may rule that for the given cause of action (e.g., bad faith or unfair claims adjusting by an insurer) that agents for a disclosed principal are not liable in such cases. The court can dismiss the claim against the forum state defendant as a matter of law without casting aspersions upon the motive of plaintiff's counsel.

In this sense, many of the tactics that defendants decry as “fraudulent joinder” are perfectly reasonable attempts by plaintiffs to pursue a culpable individual or entity in the face of adverse doctrine. Such efforts, even if arguments for changes in the law rather than based on current law, should be countenanced by courts. The liability of insurance intermediaries is such an issue. See Jeffrey W. Stempel, *The “Other” Intermediaries: The Increasingly Anachronistic Immunity of Managing General Agents and Independent Claims Adjusters*, 15 CONN. INS. L.J. 600, 625 (2008–2009). Eventually, such efforts may meet with success. See *id.* at 625–30 (noting that minority of jurisdictions permit actions against insurer agents); see, e.g., *De Dios v. Indemnity Ins. Co. of No. Am.*, 927 N.W.2d 611, 623–25 (Iowa May 10, 2019) (majority rejects liability for workers compensation intermediary but strong dissent reflects judicial division and possible future success of argument); *Halliday v. Great Lakes Ins.*, SE, No. 18-CV-00072, WL 3500913, at *32–38 (D.V.I. Aug. 1, 2019) (federal magistrate judge influenced by Iowa dissent and scholarly commentary adopts modified version of agent potential liability sufficient to permit further discovery).

One person's fraudulent joinder may thus be another's argument for law reform or willingness to fight an uphill doctrinal battle arguing that the instant case is sufficiently different from past precedent to permit liability against the forum state defendant. Although a preference for state court is not lost on plaintiff's counsel, this does not automatically mean that suing a forum state defendant is inevitably a mere tactic for avoiding federal court. But reading defense bar literature, as might many judges, one could certainly be given that impression. See, e.g., Steven Boranian, *No “Real Intention to Prosecute” Equals Fraudulent Joinder*, DRUG AND DEVICE L. BLOG, <http://www.druganddevicelawblog.com/> (last visited June 8, 2017) (discussing large firm defense attorney who recaps recent federal district court decision “that is worth highlighting because it applies a fraudulent joinder standard that we think should apply more broadly. It has always puzzled us why courts are hesitant to find non-diverse or local defendants fraudulently joined. . . . [P]laintiffs will frequently name a bogus defendant from . . . the forum state to defeat

By 1948, “it was clear that the troublesome issue of improper joinder required a less muddled solution than merely examining a plaintiff’s good faith in naming various forum defendants.”⁷⁹ Congress added the “properly joined and served” requirement in order to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve.⁸⁰

There appears to be no legislative history or other contemporaneous evidence suggesting that by adding the service requirement Congress intended to reverse the *Jenkins* approach of barring a defendant from seizing an opportunity to remove a matter by racing to the courthouse before service could be made upon a forum defendant. As one trial court in a particularly detailed and reflective opinion concluded, “Congress appears to have added the language only to prevent the then-concrete and pervasive problem of improper joinder.”⁸¹ The court elaborated:

Indeed, it is inconceivable that Congress, in adding the “properly joined and served” language, intended to create an arbitrary means for a forum defendant to avoid the forum defendant rule simply by filing a notice of removal before the plaintiff is able to effect process.

Defendants argue, unavailingly, that the addition of the language signaled an intention by Congress to “narrow this exception to the statutory right of removal.” There is nothing in the history of the removal doctrine, legislative or otherwise, which even suggests why Congress would have

the defendant’s right to remove”); Jessica Davidson Miller & Milli Kanani Hansen, *Fighting Back Fraudulent Joinder in Pharmaceutical Drug and Device Cases*, RX FOR THE DEF., Vol. 20, Issue 1 (April 13, 2012), <https://www.venable.com/-/media/files/publications/2012/04/fda-regulations-and-the-regulation-of-constitution/files/fda-regulations-and-the-regulation-of-constitution/fileattachment/2012drugand-medicaldevicexforthedefensevol20issue.pdf> (article by large law firm attorneys in newsletter of Drug and Medical Device Committee of the Defense Research Institute suggests fraudulent joinder occurs with some frequency and outlines techniques for challenge); see also James M. Beck, *Third Circuit Green Lights Pre-Service Removal*, THE VOICE, Vol. 17, Issue 34 (Sept. 5, 2018) (large firm defense attorney reviews *Encompass Ins. v. Stone Mansion*, discussed at *infra* text and accompanying notes 114–124, and suggests—misleadingly in our view—that pre-service removal has value as a means of fighting fraudulent joinder and “litigation tourism”).

⁷⁹ *Sullivan*, 575 F. Supp. 2d at 645.

⁸⁰ *Id.*; *Stan Winston Creatures*, 314 F. Supp. 2d at 181.

⁸¹ See *Sullivan*, 575 F. Supp. 2d at 645.

intended to limit the forum defendant rule. In fact, Congress has never deviated from the “fundamental precept of the American court system” that federal jurisdiction is very limited.

Instead, the fact that the legislative history is all but silent on the issue suggests that Congress did not intend to address a novel concern of, fundamentally change the nature of, or narrow the scope of the rule. Indeed, the very lack of discussion in the legislative history strongly suggests that Congress intended nothing more than to bolster the already existing efforts of lower federal courts to prevent improper joinder.

Congress could not possibly have anticipated the tremendous loophole that would one day manifest from technology enabling forum defendants to circumvent the forum defendant rule by, *inter alia*, electronically monitoring state court dockets. Thus, Congress would have had no thought to wording the statute with this modern problem in mind.⁸²

D. The Mechanics and Machinations of Snap Removal

The typical snap removal scenarios tend to divide into two basic types. Some are the type of race-to-the-courthouse, *Flash Boys* scenario,⁸³ where a

⁸² *Id.*

⁸³ As one court has observed, snap removal is reminiscent of the practice of ultra-rapid stock trading reflected in Michael Lewis, *FLASH BOYS: A WALL STREET REVOLT* (2014) (discussing use of faster communication by better-resourced traders that enables “front running” of orders placed by investors, which author sees as making U.S. equity markets less transparent and democratic and slanted in favor of well-placed insiders). See *Fiskus v. Bristol-Myers Squibb Co.*, No. 14-CV-3931, 2014 WL 4953610, at *5 (S.D.N.Y. Oct. 1, 2014) (“While several courts have adhered literally to the statute and allowed pre-service removal by a forum defendant, the Court believes that such an interpretation leads to an unintended result, allowing a ‘Flash Boys’ approach to speedy removal to override the rule’s purpose.”).

Flash Boys examines the practice of traders using their superior technology to buy and sell in mere seconds or portions of a seconds faster than others in order to reap market gains that although individually small are collectively large—large enough to justify the high cost of fiber optic ultra-fast pipelines for conducting trades.

defendant with substantial resources (such as a pharmaceutical company) or its counsel is regularly monitoring state court dockets. When a lawsuit against it is discovered—something that happens almost instantly—the defendant contacts counsel and seeks to remove as soon as possible. Removal is sometimes accomplished in matter of hours or perhaps even minutes.⁸⁴ In the meantime, plaintiff may be making what would be regarded as reasonable service efforts that are no match for the speed of this archetypal snap removal.

A second common scenario is that the defendant, although not monitoring state court dockets, is inclined to remove most all cases against it. Defendant becomes aware of the litigation when plaintiff's counsel requests waiver (or acceptance) of service under state rules or after service upon a non-forum defendant.

Here, either a forum or foreign defendant can seek what might be termed “snappish” removal by acting quickly but not because of instantaneous docket monitoring. The non-forum defendant knows it is served and from reading the complaint knows that plaintiff has also sued a forum state defendant. A quick check with the co-defendant confirms that plaintiff has yet to effect service on it, permitting the non-forum defendant to “stroll” to

As author Lewis and others have concluded, the practice has rather limited socio-economic utility and perhaps even more socio-economic cost. The profits made on flash trading are not really investments in solid companies and do not foster long-term growth or wealth of companies, investors, consumers, or society generally.

Similarly, a snap removal defendant's success in minimizing liability may add only modestly to the wealth of the defendant or its shareholders while causing socio-economic harm to victims of defective products, negligent acts or breach of contract due to the reduced levels of success and compensation in federal court. Alternatively, of course, it may be that state courts overcompensate both deserving and undeserving victims, which also damages society.

Answering or even significantly exploring this question is beyond the scope of this article but should prompt policymakers to at least be concerned about the variance in preference for forums. A major rationale of the *Erie* Doctrine was that cases should not be subject to different outcomes depending on whether they are litigated in state or federal courts. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938). But if despite uniform law cases are coming out sufficiently differently in state and federal court as to prompt snap removal and similar tactics, it may be time to address and perhaps correct the discrepancy.

⁸⁴In *Delaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372, 1375 (N.D. Ga. 2018), the plaintiffs filed their complaint at 11:50 a.m., plaintiffs unsuccessfully attempted service at 12:26 p.m., and defendants filed their notice of removal in the federal district court at 1:15 p.m. Defendants knew this case was coming because an earlier action—which had also been snap-removed—was voluntarily dismissed without prejudice (on permission of the federal court). Although the trial court later remanded this “Flash Boys”-style snap removal, other plaintiffs in similar situations have been less fortunate.

the courthouse rather than race and remove prior to plaintiff's service upon the forum state defendant, even though plaintiff has not been slothful in seeking service.

In these cases, where removal is not as rapid as in the *Flash Boys* scenario, the plaintiffs are of course a bit less sympathetic. They could perhaps have made more diligent efforts at service contemporaneous to filing or have structured service of process to ensure that forum defendants are the first defendants served. Though a trap for the unwary, one can criticize plaintiffs' counsel for falling into it.⁸⁵ But even if plaintiffs are not as conscientious (and adversarial-cum-paranoid) about service matters as they should be, snap removal of a case that should never have been in federal court seems an inordinate price to pay.

Plaintiff may also have telegraphed its punch by alerting defendants to the coming suit or they have been constructively warned because of settlement overtures. Here, we think there should be some sympathy for plaintiffs beaten to the removal "punch." Although fans of tricky, cloak-and-dagger lawyering may prefer quick strike lawsuits that prevent or at least discourage snap removal, the public policy favoring informal dispute resolution and its attendant consensual nature and conservation of resources would presumably auger in favor of talking settlement before suit even at the risk of forewarning an opponent and losing the element of surprise in litigation. At the very least, it would seem inapt for plaintiffs seeking informal settlement prior to litigation to be punished via snap removal.

In addition to the perhaps expected capacity of sophisticated litigants to race to the courthouse, the particular service protocols of some states delay service and expand defendant removal opportunities. Some states, perhaps most prominently New York and New Jersey, require a plaintiff commencing a civil action by court filing to obtain a civil action number prior to serving the defendants.⁸⁶ This often requires several days, particularly if a complaint

⁸⁵ After having become familiar with the problem through our research, we would advise plaintiff's counsel to give the same attention to the structure, means, and ordering of service of process as is devoted to higher profile endeavors such as initial case evaluation, complaint drafting, and motion practice.

⁸⁶ See, e.g., N.J. R. CIV. P. 4:5A-2 (requiring issuance of a "Track Assignment Notice" by the clerk of court before plaintiff may serve a filed complaint upon a defendant; clerk has ten-day deadline for issuing notice); N.Y. C.P.L.R. 304, 306-a (providing that after filing of summons and complaint and payment of filing fee, clerk of court must issue an "index number" to plaintiff before process may be served); PA. R. CIV. P. 400(a) (providing that "original process shall be served within the Commonwealth only by the sheriff" who has 30 days in which to effect service).

is filed on a Thursday or Friday because the clerks' offices will not be assigning numbers over a weekend.

In these situations, even the most diligent plaintiff wishing to remain in state court and ready to do so with expeditious service on a forum state defendant is effectively precluded from winning the race to the courthouse. Although one might advise plaintiff counsel in these states to file on a Monday, this would hardly permit plaintiffs to have a reasonable chance of effecting service prior to removal. Even a half-day wait for assignment of a case number from the clerk's office leaves plaintiffs in the dust of snap removers.⁸⁷

Conversely, states that commence litigation with service rather than court filing (e.g., Minnesota)⁸⁸ effectively eliminate the practice of snap removal so long as the plaintiff makes sure to serve the forum defendant first or contemporaneously with service upon non-forum defendants.⁸⁹ In addition, state protocols for service, including "long-arm" jurisdictional service, may decrease plaintiff's odds of resisting snap removal.⁹⁰

Procedurally, decisions about the propriety of snap removal emerge when the trial court rules on a motion to remand after the defendant has already accomplished the removal, which does not require court consent.⁹¹ Remand, however, requires a court order and thus becomes the first (and often the only) reflective judicial evaluation of the snap removal maneuver.⁹²

⁸⁷This might be a good time to ask why in the world a clerk's office operating in the 21st Century is not able to provide plaintiffs with a case tracking number immediately upon filing of the complaint. Government bureaucracy already has a bad enough name without becoming an instrument whereby one class of litigants takes advantage of another group of litigants. But even this mythical well-run clerk's office instantaneously assigning case numbers would probably not be fast enough to thwart the best equipped snap removers.

⁸⁸See MINN. R. CIV. P. 3.01, 4.04 (action commenced by service on defendant).

⁸⁹Here again is an area where some of the problem may well be of plaintiff's counsel's own making. In a state like Minnesota, attorneys seeking to sue in state court and stay in state court would presumably have a standing rule that its process servers will always serve a forum defendant first. But failure to adopt these or similar practices should not in our view justify permitting removal of a case that, according to the purpose of diversity jurisdiction and removal, should not be tried in federal court.

⁹⁰For example, a long-arm statute may provide for service via mailing sent through the secretary of state or similar officer. If a state requires filing prior to service as well, there regularly will be a several-day gap between the time of filing and the time of service—more than enough time to effect pre-service snap removal.

⁹¹See *Tex. Brine Co., v. Am. Arb. Ass'n.*, 955 F.3d 482, 485 (5th Cir. 2020).

⁹²See *MOORE ET AL.*, *supra* note 20, § 107.151; *COLEMAN ET AL.*, *supra* note 1, at 76–77.

E. The Strange Career of Snap Removal

As discussed above, the 1948 Amendment to the removal statute added the “properly joined and served” language. But it took roughly three decades before forum state defendants found that they could potentially exploit the language, in large part by exploiting electronic docket monitoring that gave defendants with sufficient resources (and fear of being sued in state court)⁹³ the ability to run to the courthouse with a removal petition faster than even a diligent plaintiff could effect service after filing a complaint in state court.⁹⁴

Because the “forum defendant rule applies only at the time the notice of removal is filed”⁹⁵ the language of 28 U.S.C. § 1441(b)(2) can be read to

⁹³We do not want to be indifferent to the practical problems faced by American businesses. Even a well-run organization providing valuable, even lifesaving, goods and services is going to be sued. The entire industry of commercial general liability insurance is premised on this reality. *See generally* Randy Maniloff & Jeffrey Stempel, *GEN. LIABILITY INS. COVERAGE: KEY ISSUES IN EVERY ST.* Ch. 1 (4th ed. 2018); Jeffrey W. Stempel & Erik S. Knutsen, *STEMPEL & KNUTSEN ON INS. COVERAGE* Ch. 14 (4th ed. 2016).

And as entities seeking to maximize shareholder value, we understand that businesses (or their liability insurers that will eventually defend claims and pay settlements and judgments) would rather pay less than more. Consequently, moving from state courts viewed as pro-plaintiff to federal courts viewed as pro-defendant is understandable.

Nonetheless, if one moves beyond a narrow legal, tactical analysis, one might ask what it means that some companies are such magnets for lawsuits that it is worth the expense of docket monitoring and having lawyers on retainer for seeking removal with a speed normally reserved for Jimmy John’s sandwich delivery. Unless in-house counsel is hiring the docket-monitoring company as a favor for a friend or getting kickbacks, this means the company is getting sued often enough to establish a snap removal infrastructure. Although this might provide support for pro-defendant critics of a “litigation explosion,” it could also mean that the defendant has become a lawsuit magnet by frequently doing things wrong. Perhaps federal court adjudication is not providing sufficient deterrence and should not be fostered by judicial friendliness to snap removal.

⁹⁴As discussed further in our data analysis, some snap removals do not have to be particularly snappy to succeed because plaintiffs are not always swiftly effecting service. In some cases, for reasons that bewilder us, plaintiffs are downright slow in effecting service—something that should never happen if a plaintiff is serious about remaining in state court. In this subset of snap removal cases, we acknowledge plaintiffs are far less sympathetic than in cases where docket monitoring and removal within an hour beats a diligent plaintiff’s service later in the day or within the same week that the complaint was filed. In slow service cases, snap removal does not have the same degree of tricky gamesmanship in which a defendant with substantial resources takes advantage of plaintiff’s fewer resources. However, snap removal is equally inappropriate in these cases so long as the sloth of slow service does not reflect improper, unjustified suit against the forum defendant merely for procedural advantages. Yet, rather than permitting snap removal, we would prefer that such cases be addressed pursuant to improper joinder doctrine.

⁹⁵MOORE ET AL., *supra* note 20, § 107.55[2] at 107–108.

permit removal prior to joinder and service of the forum state defendant. As noted in a leading treatise, “[t]he actual language of the forum defendant rule would seem to permit such removal” but “that literal interpretation would enable gamesmanship by defendants who, by monitoring the state docket and removing actions to federal court before the plaintiff has a chance to serve the forum defendant, could always avoid the rule.”⁹⁶ Consequently, the conventional wisdom prior to the traction snap removal has gained in recent years was “to apply the forum defendant rule even when the forum defendant has not yet been served.”⁹⁷

Prior to 1990, defendant efforts to remove prior to service were rare.⁹⁸ The tactic was first touched upon in passing by an appellate court in 2001.⁹⁹ Beginning in 2007, snap removal efforts began to increase, undoubtedly in significant part because of the increased availability of real time electronic docket monitoring that permitted defendants in many states to realize they had been sued prior to being served.

Snap removal was initially met with resistance by many trial courts that took the position that the “and served” requirement did not change the basic rule that the presence of a forum state defendant destroyed complete diversity and prevented removal.¹⁰⁰ As noted above, one leading treatise describes

⁹⁶ *Id.*

⁹⁷ *See id.* at 108 n.12 (citing as an exemplar and accurate collection of precedent); *Ethington v. General Electric Co.*, 575 F. Supp. 2d 855, 860–64 (N.D. Ohio 2008) (collecting cases and following Treatise’s perceived trend of “prohibiting removal by unserved forum defendant”).

⁹⁸ *See* Nannery, *supra* note 7; *Recognition Commc’ns, Inc. v. Am. Auto. Ass’n*, No. 3:97CV0945, 1998 WL 119528, at *2–3 (N.D. Tex. Mar. 5, 1998) (mem. op., not designated for publication).

⁹⁹ *See* *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001); *see also* *Tex. Brine Co., v. Am. Arb. Ass’n*, 955 F.3d 482, 485 (5th Cir. 2020) (citing *McCall* as implicitly earliest federal circuit court discussion in which “[t]he Sixth Circuit in a footnote also interpreted Section 1441(b)(2) to allow snap removal”). Because the *McCall* footnote is so cursory, we are reluctant to treat it as a considered discussion of the topic. In our view, snap removal did not receive serious appellate court examination until 2018. *See infra* text and accompanying notes 114–38 (discussing three federal appeals court decisions that have assessed permissibility of snap removal).

¹⁰⁰ *See, e.g.*, *Little v. Wyndham Worldwide Operations, Inc.*, 251 F. Supp. 3d 1215, 1218–23 (M.D. Tenn. 2017) (remanding after analysis concluding that snap removal is contrary to congressional intent and larger purpose of forum defendant rule); *Confer v. Bristol-Myers Squibb Co.*, 61 F. Supp. 3d 305, 306 (S.D.N.Y. 2014) (remanding after removal by non-forum defendant prior to service on forum defendant); *Lone Mountain Ranch, LLC v. Santa Fe Gold Corp.*, 988 F. Supp. 2d 1263, 1266–67 (D. N.M. 2013) (noting division of authority but remanding, finding that forum defendant rule cannot be circumvented by snap removal unless there is fraudulent joinder of forum defendant or plaintiff was “dilatory” in failing to accomplish service); *Perez v. Forest Labs.*,

remand of snap removals to be the majority rule and trend.¹⁰¹ However, a substantial number of trial courts have taken a “plain language” approach to the service requirement and ruled that removal was proper if effected before service upon forum state defendants.¹⁰²

In a forthcoming article we describe the evolution of the case law from 1991 forward. Although there are no dramatic trends or spikes over this thirty-year period, the removal rate for snap removals was consistently above 50% nationwide for the years through 2013. The nationwide removal rate then stayed below 50% through 2018. And it has since returned to rates above 50% again. Although the district courts were roughly evenly divided on the issue, district courts in the Second, Third and Fifth Circuits are now bound by precedent.¹⁰³

It was not until fall 2018 that an appellate court discussed the propriety of snap removal at any length.¹⁰⁴ This was followed by a spring 2019 appellate decision,¹⁰⁵ and a spring 2020 panel decision.¹⁰⁶ These three decisions took a highly textualist approach supporting snap removal,¹⁰⁷ arguably shifting the tide—regrettably in our view (on both substantive and jurisprudential grounds)—in favor of snap removal. In the absence of countervailing appellate precedent in the near future, this shift may become established doctrine. However, the circumstances, rationale and outcome of

Inc., 902 F. Supp. 2d 1238, 1242–46 (E.D. Mo. 2012) (finding snap removal inconsistent with basic purposes of removal and forum defendant rule); *Ethington*, 575 F. Supp. 2d at 860–64 (finding snap removal to frustrate congressional intent); *Vivas v. Boeing Co.*, 486 F. Supp. 2d 726, 734 (N.D. Ill. 2007) (stating that snap removal “frustrates the consistent efforts of both Congress and the courts to determine diversity jurisdiction based on the genuine interest of the parties to the controversy”).

¹⁰¹ See MOORE ET AL., *supra* note 20, § 107.55[2].

¹⁰² See, e.g., *Graff v. Leslie Hindman Auctioneers, Inc.*, 299 F. Supp. 3d 928, 934–38 (N.D. Ill. 2017); *Regal Stone Ltd. v. Longs Drug Stores Cal.*, 881 F. Supp. 2d 1123, 1127–29 (N.D. Cal. 2012); *Watanabe v. Lankford*, 684 F. Supp. 2d 1210, 1219 (D. Haw. 2010); *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263, 1270 (M.D. Fla. 2009).

¹⁰³ See Thomas O. Main et. al., *The Elastics of Snap Removal: An Empirical Cases Study of Textualism*, 69 CLEVE. ST. L. REV. (2021) (forthcoming) (manuscript on file with authors and available on SSRN).

¹⁰⁴ See *Stone Mansion*, 902 F.3d 147, 152–54 (3d Cir. 2018).

¹⁰⁵ See *Gibbons v. Bristol-Myers Co.*, 919 F.3d 699, 704 (2d Cir. 2019) (involving drug product liability claims; underlying substantive law issues unclear) (decided in March 2019).

¹⁰⁶ See *Tex. Brine Co., v. Am. Arb. Ass’n.*, 955 F.3d 482, 487 (5th Cir. 2020).

¹⁰⁷ See *infra* text and accompanying notes 114–24 (discussing *Encompass Ins.*); *infra* text and accompanying notes 125–28 (discussing *Gibbons*); *infra* text and accompanying notes 129–38 (discussing *Tex. Brine Co.*).

the circuit court decisions to date provide a weak read for supporting snap removal.

II. UNFORTUNATE APPELLATE APPROVAL OF A TAINTED TACTIC

A. *The Stone Mansion Litigation: Following Text; Permitting Trickery; Soft-Pedaling History and Legislative Intent*

In *Encompass Insurance v. Stone Mansion Restaurant, Inc.*,¹⁰⁸ the Third Circuit became the first appellate court to gain wide attention ruling on the propriety of snap removal. The case arose out of a single vehicle rollover that killed the intoxicated driver and seriously injured his sole passenger as they were leaving an event at Stone Mansion, a Pittsburgh restaurant.¹⁰⁹ The decedent driver (Brian Viviani) was intoxicated, having consumed substantial amounts of alcohol at the event.¹¹⁰ The passenger (Helen Hoey) sued the driver's estate, which tendered defense of the matter to Encompass, the insurer of the vehicle, which paid \$600,000 for a settlement that included a release of "her claims against all possible defendants."¹¹¹

Encompass, an Illinois citizen, then sought recovery in Pennsylvania state court against Stone Mansion, a Pennsylvania corporation asserting a variety of claims based on Pennsylvania law, most prominently a dram shop action,¹¹² and one for contribution by a joint tortfeasor pursuant to Pennsylvania's version of the Uniform Contribution Among Tortfeasors Act ("UCATA").¹¹³

This is a classic example of a case that does not belong in federal court because of the forum defendant rule, the action was nonetheless successfully removed when Stone Mansion took advantage of a miscue by Encompass's

¹⁰⁸902 F.3d 147 (3d Cir. 2018) (applying Pennsylvania substantive law).

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹*Id.* at 149.

¹¹²Dram shop laws, found in more than 40 states, make commercial servers of alcohol (and sometimes social hosts as well) liable for serving excessive amounts of alcohol to impaired patrons who subsequently cause injury. Some states, like Pennsylvania, permit an action only by victims of the intoxicated driver. The bulk of states, however, permit actions by the patron as well. *See generally* Jeffrey W. Stempel, *Making Liquor Immunity Worse: Nevada's Undue Protection of Commercial Hosts Evicting Vulnerable and Dangerous Patrons*, 14 NEV. L. J. 866, 871 (2014).

¹¹³UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4 (AM. LAW REPS. 2020). UCATA generally provides, as does Pennsylvania's adoption of the model law, a methodology for apportioning the respective liability of tortfeasors.

counsel, which notified the restaurant of its intent to sue. “In email correspondence between counsel for Encompass and for Stone Mansion, counsel for Stone Mansion agreed to accept electronic service of process instead of requiring formal service.”¹¹⁴ This form of service was routine under Pennsylvania state practice and procedure. After receipt of the complaint, Stone Mansion counsel then refrained from accepting service and instead sought removal.¹¹⁵ Thus, according to both the district and circuit courts “Stone Mansion timely removed the matter” prior to service.¹¹⁶

Although it had not exactly raced to the courthouse after constant monitoring of the docket in the manner of a pharmaceutical company, Stone Mansion had achieved a slow-rolling snap removal (a “sag” removal?) by essentially conning plaintiff counsel into letting down its guard and forgoing immediate personal service.¹¹⁷ The trial court denied the Encompass motion for remand and ruled for Stone Mansion on the merits via a Rule 12(b)(6) motion.¹¹⁸ Although the case was reversed and remanded on other grounds,

¹¹⁴*Stone Mansion*, 902 F.3d at 150.

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷See FED. R. CIV. P. 4(c) (describing process for waiver of service of process to “avoid unnecessary expenses of serving the summons” and providing that plaintiff may notify a defendant “that an action has been commenced and requires that the defendant waive service of as summons”). In addition to being a good litigation citizen, the waiving defendant need not answer for sixty days as compared to the twenty-day deadline for answering a complaint served via summons. In addition, the defendant is provided “a reasonable time of at least [thirty] days after the request was sent . . . to return the waiver.” See *id.* at 4(d)(1)(F).

The waiver of service provisions in Rule 4 were promulgated in 1993 and reflect not only the modern legal system’s encouragement of cooperation and efficiency but also strongly suggest that snap removal is inconsistent with modern service of process rules. If the federal rule makers involved in the creation of Rule 4(d)—the Civil Rules Advisory Committee, a Standing Committee on Practice and Procedure, the Judicial Conference of the United States, and the U.S. Supreme Court—had been aware of the prospect of pre-service removal by a forum defendant, it is unlikely they would have issued a service of process rule that could so easily be exploited to achieve such removal and evade the forum defendant rule. This makes the *Stone Mansion* panel’s lack of outrage at the conduct of defense counsel all the more puzzling.

¹¹⁸*Stone Mansion*, 902 F.3d at 150; *Encompass Ins. v. Stone Mansion Rest., Inc.*, No. 17CV0125, 2017 WL 664318, at *5–6 (W.D. Pa. Feb. 16, 2017), *rev’d*, 902 F.3d 147 (3d Cir. 2018). The trial court found as a matter of law that Encompass, standing in the shoes of the intoxicated patron driver, could not recover under the Pennsylvania Dram Shop law, which recognized only claims by those injured by an intoxicated patron and not the patrons themselves:

The plain, unambiguous reading of [the dram shop law] indicates that a licensee, such as Stone Mansion, is liable only to third persons (Hoey in this case), for damages inflicted

the district court's allowance of snap removal was affirmed by the Third Circuit.¹¹⁹

Regarding the propriety of snap removal, the Third Circuit affirmed the trial court view – and followed the trial court's heavily textualist approach in spite of defense counsel's clever-cum-deceitful lulling of plaintiff counsel into complacency regarding prompt service of process. The panel was “unconvinced that Stone Mansion's conduct – even if unsavory – precludes it from arguing that incomplete service permits removal.”¹²⁰

upon the third person - off the licensee's premises - by a customer of the licensee ([intoxicated driver] Viviani in this case), but only when the licensee furnishes that customer (Viviani) with alcohol when he was visibly intoxicated. [The law], with its limited scope, indicates that Stone Mansion may have been liable to Hoey—depending upon whether Stone Mansion served Viviani alcohol while he was visibly intoxicated. Encompass's Complaint establishes that Encompass is acting as if it were Viviani in order to recover under Pennsylvania's Uniform Contribution Among Tortfeasors Act. Because [there] is no potential cognizable claim under [the law] as between Viviani/Encompass and Stone Mansion, there is likewise no claim for contribution, and thus, Stone Mansion's Motion to Dismiss will be granted.

See id. at *15–16.

¹¹⁹*Stone Mansion*, 902 F.3d at 151. The appellate court reversed and remanded the case on the issue of tortfeasor contribution. *Id.* at 154–56. But that is not relevant here.

¹²⁰*Id.* at 154. The trial court characterized Encompass as arguing that Stone Mansion was “precluded” from seeking snap removal because of its conduct regarding promised voluntary acceptance of service. *Id.*

The use of preclusion terminology, which can cause confusion regarding exactly what is meant (e.g., claim preclusion; issue preclusion; some kindred doctrine; a layperson's understanding that certain conduct or statements logically should preclude one from taking inconsistent positions or saying inconsistent things) and may reflect problematic lawyering by Encompass counsel more than mischaracterization by the trial court. It clearly appears to us that Encompass was asserting equitable estoppel based on purportedly reasonable detrimental reliance on Stone Mansion's assurances as well as a type of unclean hands argument based on purported misconduct by Stone Mansion counsel.

Had this issue been properly recognized by the four judges hearing the case (presumably with some help by plaintiff's counsel), a more enlightened discussion may have ensued. Instead, the Third Circuit, while stating it was “mindful” of professional conduct rules prohibiting lawyers from “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation” (quoting PA. R. PROF. CONDUCT R. 8.4 that is modeled on ABA R. PROF. CONDUCT R. 8.4), the court rather cavalierly declared that it “need not pass judgment on whether Stone Mansion violated this rule, because Encompass has failed to provide any support for the proposition that Stone Mansion's conduct carried preclusive effect,” introducing uncertainty as to whether the Court (with some misleading “help” from Encompass) was applying the rather strict standards of collateral estoppel to the issue rather than the more apt and more easily satisfied elements of equitable estoppel (a misleading statement or conduct inducing reasonable detrimental reliance). *See id.*

With Stone Mansion deemed incompletely served/unserved, the appellate panel applied the literal language of 28 U.S.C. § 1441(b)(2):

Where federal jurisdiction is premised only on diversity of the parties, the forum defendant rule applies. That rule provides that “[a] civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” [citing the statute].

When interpreting a statute, we “must begin with the statutory text” [as] “[i]t is well-established that ‘[w]here the text of a statute is unambiguous, the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from the language.’ Nevertheless, it is also a “basic tenet of statutory construction . . . that courts should interpret a law to avoid absurd or bizarre results.” An absurd interpretation is one that “defies rationality or renders the statute nonsensical and superfluous.”

Starting with the text, we conclude that the language of the forum defendant rule in [S]ection 1441(b)(2) is unambiguous. Its plain meaning precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served. Thus, it remains for us to determine whether there has been a “most extraordinary showing of contrary intentions” and consider whether this literal interpretation leads to “absurd or bizarre results.”¹²¹

The Third Circuit panel did examine the legislative history of the “properly joined and served” statutory language but did so in relatively cursory fashion:

Section 1441 exists in part to prevent favoritism for in-state litigants and discrimination against out-of-state litigants. The specific purpose of the “properly joined and served” language in the forum defendant rule is less obvious. The legislative history provides no guidance; however, courts

¹²¹*Id.* at 152 (citations omitted).

and commentators have determined that Congress enacted the rule “to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve.”¹²²

Rejecting Encompass’s argument that plaintiff gamesmanship in naming what might be termed sham or “Potemkin”¹²³ defendants is best addressed as a matter of fraudulent joinder doctrine, the Circuit panel found that Congress’ inclusion of the phrase “properly joined and served” addresses the problem of fraudulent joinder “with a bright-line rule” that deserved literal enforcement:

Permitting removal on the facts of this case does not contravene the apparent purpose to prohibit that particular tactic. Our interpretation does not defy rationality or render the statute nonsensical or superfluous, because: (1) it abides by the plain meaning of the text; (2) it envisions a broader right of removal only in the narrow circumstances where a defendant is aware of an action prior to service of process with sufficient time to initiate removal; and (3) it protects the statute’s goal without rendering any of the language unnecessary. [While] this result may be peculiar in that it

¹²²*Id.* at 153 (citations omitted). See Hellman et al., *supra* note 68, at 108 (viewing history of removal statute and joinder and service requirement in this manner). Despite agreeing with the article’s legislative history assessment, which was also shared by a notable trial court decision within the Circuit that rejected snap removal, see *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp.2d 640, 645 (D.N.J. 2008), the *Stone Mansion* court did not consider the interpretative principle positing that where Congress amends a statute without express discussion of a change in the law—as took place with the 1948 and 2011 amendments of the removal statutes—courts should be reluctant to read new statutory verbiage too broadly and thereby alter a status quo that Congress did not intend to change.

¹²³The term “Potemkin Village,” is so named for Grigory Potemkin, a Russian minister who purportedly used the tactic of false building facades designed to convince Catherine the Great that her newly acquired lands were settled and prosperous rather than barren or war-ravaged. Today, the term is used to mean a deception designed to make a situation look better or more genuine than its reality. See *Potemkin Village*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/Potemkin%20village> (last visited Sept. 12, 2020) (“[A]n impressive façade or show designed to hide an undesirable fact or condition.”); NORMAN DAVIES, *EUROPE: A HISTORY* 658 (2010); see also *United States v. Massachusetts*, 781 F. Supp. 2d 1, 23 n.25 (D. Mass. 2011) (“The affidavit is the Potemkin Village of today’s litigation landscape. Purported adjudication by affidavit is like walking down a street between two movie sets, all lawyer-painted façade and no interior architecture.”).

allows Stone Mansion to use pre-service machinations to remove a case that it otherwise could not . . . the outcome is not so outlandish as to constitute an absurd or bizarre result.¹²⁴

B. Gibbons v. Bristol-Myers Squibb: Similar Refusal to Recognize the Flaws of Snap Removal

Less than six months after *Stone Mansion*, defendants seeking snap removal gained another supportive appellate decision in *Gibbons v. Bristol-Myers Squibb Co.*¹²⁵ Plaintiff Catherine Gibbons sued drug makers Bristol-

¹²⁴*Stone Mansion*, 902 F.3d at 153–154 (footnote omitted) (citations omitted). For the reasons set forth at TAN 203–203, *infra*, we find this analysis sorely lacking.

Although absent in the Third Circuit opinion, the trial court’s textualism considered Pennsylvania’s Statutory Construction Act regarding the state’s dram shop law. See *Encompass Ins. v. Stone Mansion Rest., Inc.*, No. 17CV0125, 2017 WL 664318, at *4 (W.D. Pa. Feb. 16, 2017), *rev’d*, 902 F.3d 147 (3d Cir. 2018), which provides that:

- (a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.
- (b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.
- (c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:
 - (1) The occasion and necessity for the statute.
 - (2) The circumstances under which it was enacted.
 - (3) The mischief to be remedied.
 - (4) The object to be attained.
 - (5) The former law, if any, including other statutes upon the same or similar subjects.
 - (6) The consequences of a particular interpretation.
 - (7) The contemporaneous legislative history.
 - (8) Legislative and administrative interpretations of such statute.

The trial court did not apply this state Act in its Section 1441(b)(2) analysis, presumably because it believed it inept to use state law in construing a federal statute. Even though there is not a general federal law of statutory construction, there is ample precedent, albeit in our view contradictory precedent with often incorrect analysis.

¹²⁵919 F.3d 699 (2d Cir. 2019).

Myers and Pfizer over alleged defects and dangers posed by Eliquis (apixaban), a “blood-thinning medication used to reduce the risk of stroke in patients with atrial fibrillation.”¹²⁶

Oversimplifying the involved procedural history of the claims, we note that Defendants Bristol-Myers and Pfizer are both citizens of Delaware by virtue of their incorporation. After some initial lack of success, counsel with new plaintiffs filed in Delaware state court, where the matters were quickly removed by defendants prior to service and transferred to an MDL action in the Southern District of New York where plaintiffs sought remand to Delaware state court. The trial court denied the motion in what the circuit court described as a pattern of “exemplar” work by the trial judge.¹²⁷

Addressing the snap removal question, the Second Circuit panel observed that:

¹²⁶The appellate panel betrayed perhaps a more than a little skepticism about the merits of the claims, which may have affected its snap removal analysis, one largely consistent with *Stone Mansion* but perhaps more conclusory or cursory (or “streamlined” for those who approve of the result):

As might be expected, Eliquis increases patients’ risk of bleeding. To that end, the drug, which was approved by the Food and Drug Administration in 2012, carries warnings about the risk of serious, and possibly fatal, bleeding events.

Gibbons, 919 F.3d at 702.

A discussion of the adequacy of prescription drug testing, regulatory approval, adequacy of warnings, and direct-to-the-consumer advertising (not permitted in other industrial nations) is of course beyond the scope of this paper and a topic on which reasonable persons can disagree. But we find it a bit disconcerting that the appellate panel seems so immediately adverse to the merits of this drug product liability claim when merely tasked with deciding the procedural issue of removal.

That said, large scale complex litigation subject to MDL consolidation may present the most sympathetic case for snap removal to the extent it represents defendant desire to remove (by whatever means necessary) in order to seek consolidation and case administration efficiency rather than merely a more favorable forum in spite of the lack of risk of prejudice against the forum state defendant.

¹²⁷*Id.* at 703–04. And to be fair to the four judges who embraced snap removal in *Gibbons* and its related cases, one can easily describe the tactics of plaintiff counsel as rivalling or surpassing any gamesmanship performed by defendants seeking snap removal. In addition, as stated in the previous note, the Eliquis claims appeared to face substantive problems of preemption by federal regulation and general weakness under the substantive law in which useful pharmaceutical products are generally subject to RESTATEMENT (SECOND) OF TORTS § 402(a) cmt. k (AM. LAW INST. 1975), which provides both a “learned intermediary” defense (prescription by a physician notwithstanding that company advertising may have prompted the initial patient inquiry) and a cost-benefit defense because with the benefits of most drugs inevitably come side effects for some portion of the patients. See DAN B. DOBBS ET AL., THE LAW OF TORTS § 456 (2d ed. 2015).

[g]enerally, any civil suit initiated in state court over which a district court would have had original jurisdiction “may be removed by . . . the defendants, to the district court of the United States for the district . . . embracing the place where such action is pending.” . . . But where, as here, the only basis for federal subject-matter jurisdiction is diversity of citizenship under 28 U.S.C. § 1332, “the forum defendant rule applies.” [citing *Stone Mansion*]. Under that rule, which is set out at 28 U.S.C. § 1441(b)(2), a suit that is “otherwise removable solely on the basis of . . . [diversity of citizenship] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”

In the usual case, application of the forum defendant rule is straightforward: a defendant is sued in a diversity action in the state courts of its home state, is served in accordance with state law, attempts to remove the case, and is rebuffed by a district court applying *Section 1441(b)(2)*. Here, however, Defendants removed each of the Transferred Actions to federal court after the suit was filed in state court but *before* any Defendant was served. The district court, reasoning from the text of the statute, concluded that such removal was proper. Other district courts in this Circuit have reached the opposite conclusion. Nevertheless, in resolving this split among district courts, we agree with the district court here that 28 U.S.C. § 1441(b)(2) is no barrier to the removal of the Transferred Actions.

“Every exercise in statutory construction must begin with the words of the text.” As the Third Circuit—the only other Court of Appeals to address the propriety of pre-service removal by a defendant sued in its home state—recognized in [*Stone Mansion*], “the language of the forum defendant rule in *Section 1441(b)(2)* is unambiguous.” The statute plainly provides that an action may not be removed to federal court on the basis of diversity of citizenship once a home-state defendant has been “*properly joined and served*.” By its text, then, *Section 1441(b)(2)* is inapplicable until a home-state defendant has been served in accordance with state law; until then, a state court lawsuit is removable

under *Section 1441(a)* so long as a federal district court can assume jurisdiction over the action.

In fact, Plaintiffs do not even attempt to argue that the text of *Section 1441(b)(2)* supports their position. Instead, Plaintiffs argue that the Court should depart from the plain meaning of *Section 1441(b)(2)* because applying the text of the statute (1) produces an absurd result and (2) will lead to non-uniform application of the removal statute depending on the provisions of state law. Neither argument is persuasive.

“It is, to be sure, well-established that ‘[a] statute should be interpreted in a way that avoids absurd results.’” That being said, a statute is not “absurd” merely because it produces results that a court or litigant finds anomalous or perhaps unwise. To the contrary, courts should look beyond a statute’s text under the canon against absurdity “only ‘where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result and where the alleged absurdity is so clear as to be obvious to most anyone.’”

Plaintiffs argue that applying the plain text of *Section 1441(b)(2)* produces an absurd result in light of the overarching purpose of the removal statute, which is to allow an out-of-state defendant to escape prejudice in the state courts of the plaintiff’s home state by ensuring that a fair federal tribunal is available. In light of this broad purpose, Plaintiffs frame the forum defendant rule as a carve-out, premised on the understanding that defendants are unlikely to be “home-towned” in their home state’s courts. Plaintiffs then explain the inclusion of the phrase “properly joined and served” as Congress’s further recognition that crafty plaintiffs might take advantage of the forum defendant rule to secure a state-court trial by naming an unnecessary home-state defendant against which they did not intend to proceed. Thus, Plaintiffs assert that it is absurd to allow a home-state defendant to use an exception meant to protect defendants from unfair bias (in the courts of a plaintiff’s home state) and language designed to shield them from gamesmanship (in

the form of fraudulent joinder) to remove a lawsuit to federal court.

Plaintiffs are, of course, correct about the general purposes of the removal statute. But while it might seem anomalous to permit a defendant sued in its home state to remove a diversity action, the language of the statute cannot be simply brushed aside. Allowing a defendant that has not been served to remove a lawsuit to federal court “does not contravene” Congress’s intent to combat fraudulent joinder. In fact, Congress may well have adopted the “properly joined and served” requirement in an attempt to both limit gamesmanship and provide a bright-line rule keyed on service, which is clearly more easily administered than a fact-specific inquiry into a plaintiff’s intent or opportunity to actually serve a home-state defendant. Absurdity, then, cannot justify a departure from the plain text of the statute.

Plaintiffs also urge us to look past the language of *Section 1441(b)(2)* to avoid “non-uniform application” of the forum defendant rule based on the vagaries of state law service requirements. Plaintiffs are correct that allowing home-state defendants to remove on the basis of diversity before they are served might mean that defendants sued in some states—those that require a delay between filing and service, like Delaware—will be able to remove diversity actions to federal court while defendants sued in others—those that permit a plaintiff to serve an action as soon as it is filed—will not. But state-by-state variation is not uncommon in federal litigation, including in the removal context, and it does not follow from the existence of variation that we must look beyond the plain text of *Section 1441(b)(2)*.

Put simply, the result here — that a home-state defendant may in limited circumstances remove actions filed in state court on the basis of diversity of citizenship — is authorized by the text of *Section 1441(b)(2)* and is neither absurd nor fundamentally unfair. We therefore have no reason to depart

from the statute's express language and must affirm the district court's denial of Plaintiffs' motions to remand.¹²⁸

C. Texas Brine: *More Textual Literalism and A Tolerance for the Absurd*

In April 2020, the Fifth Circuit joined the Second and Third Circuits in permitting snap removal. Like *Stone Mansion* and *Gibbons, Tex. Brine Co., v. Am. Arb. Ass'n*,¹²⁹ took a strongly literal and textualist approach to the “joined and served” language of 28 U.S.C. § 1441(b)(2). Plaintiff's substantive legal case was not particularly compelling,¹³⁰ and it had (to us) inexplicably elected to serve the AAA (a New York citizen) prior to serving either of the two forum defendants in its Louisiana state court action.¹³¹

¹²⁸ *Gibbons*, 919 F.3d at 704–07 (citations omitted).

¹²⁹ 955 F.3d 482 (5th Cir. 2020).

¹³⁰ At least not under the prevailing law of immunity for arbitrators, although the underlying facts appear sympathetic to Texas Brine. It commenced AAA arbitration proceedings in a contract dispute with one of its suppliers. Two of the arbitrators were later discovered to have what Texas Brine regarded as conflicts of interest that should have been disclosed prior to their selection. Although AAA initially refused to replace the arbitrators, one of the arbitrators was later removed for cause and the remainder of the panel resigned in the face of continued protest by Texas Brine. See *Tex. Brine Co.*, 955 F.3d at 484.

The arbitration proceedings were subsequently vacated, with Texas Brine then seeking reimbursement – from AAA and the two allegedly conflicted non-disclosing arbitrators – for its arbitration expenses in a Louisiana state court action involving Louisiana plaintiff Texas Brine, New York-based defendant AAA, and the two Louisiana arbitrators.

In addition to losing its battle to keep the case in state court, discussed in text, Texas Brine lost on the merits when the trial and appellate courts ruled that the Federal Arbitration Act, 9 U.S.C. §§ 1–16, provided the exclusive remedy for complaints regarding arbitration proceedings and that the Act did not permit claims for damages against individual arbitrators or the AAA tribunal. The Fifth Circuit tribunal viewed the litigation as an impermissible collateral attack on the arbitration in that it alleged grounds that would if proven also justify vacatur. See *Tex. Brine Co.*, 955 F.3d at 490; see also *Hall St. Assocs., v. Mattel, Inc.*, 552 U.S. 576, 583 (2008). The trial court also found that the two allegedly conflicted arbitrators enjoyed immunity similar to that of a judge, but the Fifth Circuit declined to address this issue. See *Tex. Brine Co.*, 955 F.3d at 490.

¹³¹ See *id.* at 484. In retrospect, this can only be viewed as a serious mistake. Although hindsight is predictably 20-20, the error is difficult to understand and dilutes sympathy one might otherwise have for a company allegedly wronged by a defective arbitral proceeding. Although *Texas Brine's* Louisiana state court action was filed in July 2018 – prior to the Third Circuit's *Stone Mansion* decision and the Second Circuit's *Gibbons* decision – Louisiana federal district courts had by 2018 already consistently permitted snap removal. See Thomas O. Main et al., *The Elastics of Snap Removal: Empirically Assessing a Troublesome Judicial Divide* (2019) (manuscript Oct. 2019) (empirical examination of decisions regarding snap removal and remand; finding more than a dozen

Consequently, AAA's removal was not the *Flash Boys* scenario seen in cases like the Second Circuit's *Gibbons* and cases involving drugmakers and other product liability defendants. AAA did not dash to the courthouse. Texas Brine allowed it to stroll in removing the case to federal court.¹³²

Texas Brine then sought remand but was rebuffed by both the trial court and a unanimous Fifth Circuit panel, which took a strong textualist approach that, like other decisions permitting snap removal, did not find the results sufficiently odd or incompatible with the forum defendant rule to qualify as sufficiently absurd to overcome the literal language of the statute. The panel noted that the issue was one of first impression in that circuit¹³³ but that:

Two other circuits have recently interpreted Section 1441(b)(2) as allowing snap removal [citing *Gibbons* and *Stone Mansion*]. *** [Further,]

“[W]hen the plain language of a statute is unambiguous and does not lead to an absurd result, our inquiry begins and ends with the plain meaning of that language.” We look for both plain meaning and absurdity. By *Section 1441(b)(2)*'s terms, this case would not have been removable had the forum defendants been “properly joined and served” at the time of removal. [Allegedly conflicted arbitrator Defendants] and forum state citizens] Minyard and DiLeo

Louisiana federal trial court cases permitting snap removal). *See, e.g.,* *Leech v. 3M Co.*, 278 F. Supp. 3d 933, 941 (E.D. La. 2017) (taking plain language approach to 28 U.S.C. § 1441(b)(2) similar to that of *Texas Brine* panel).

¹³²Although the facts of *Texas Brine* can be distinguished from snap removal stemming from high-tech docket monitoring and high-speed removal petitions, the decision nonetheless gives a green light to such efforts and has attracted the attention of defense counsel ready to take advantage of the new precedent. *See* Brittany Wakim, *5th Cir. Attys Should Be Ready to File for Removal in A Snap*, LAW360, <https://www.law360.com/articles/1263519/5th-circ-attys-should-be-ready-to-file-for-removal-in-a-snap> (April 14, 2020) (“What does this mean for practitioners? In terms of best practice, defendants should continue to monitor state court dockets and quickly file notices of removal in cases prior to service of a forum defendant. Where litigation is anticipated, it may be beneficial for a defendant to have removal papers, or at least advanced shell removal papers, prepared for anticipated jurisdictions that are read to be filed . . . a few hours could make the difference in whether the [snap] removal” is successful”).

¹³³The panel also took the view, as have most courts, that “the forum-defendant rule is a procedural rule and not a jurisdictional one”. *See Tex. Brine Co.*, 955 F.3d at 485 (citing *In re* 1994 Exxon Chem. Fire, 558 F.3d 378, 392–93 (5th Cir. 2009)). *See* TAN 239, *infra* (discussing treatment of the forum defendant rule as a jurisdictional requirement akin to complete diversity as solution to snap removal problem).

had not been served, though. When the AAA filed its notice of removal, the case was “otherwise removable” — as required by *Section 1441(b)* — because the district court has original jurisdiction of a case initially filed in Louisiana state court in which the parties are diverse. § *1441(a)*; § *1332(a)*. The forum-defendant rule’s procedural barrier to removal was irrelevant because the only defendant “properly joined and served,” the AAA, was not a citizen of Louisiana, the forum state. *See* § *1441(b)(2)*. We agree with a comment made by the Second Circuit: “By its text, then, *Section 1441(b)(2)* is inapplicable until a home-state defendant has been served in accordance with state law; until then, a state court lawsuit is removable under *Section 1441(a)* so long as a federal district court can assume jurisdiction over the action.”

Texas Brine accepts that the statute’s plain language allows snap removal. It argues, though, that such a result is absurd and defeats Congress’s intent. *Texas Brine* asserts that Congress added the “properly joined and served” language to *Section 1441(b)(2)* to prevent plaintiffs from naming forum defendants merely for the purpose of destroying diversity. That purpose is not served here because *Texas Brine* intended to pursue its claims against the forum defendants. The AAA counters that there is no meaningful legislative history of the “properly joined and served” language, even if we were inclined to consider such history. Further, Congress did not revise that language when it amended *Section 1441(b)(2)* in 2011 even after some snap removals had occurred.

In statutory interpretation, an absurdity is not mere oddity. The absurdity bar is high, as it should be. The result must be preposterous, one that “no reasonable person could intend.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 237 (2012). In our view of reasonableness, snap removal is at least rational. Even if we believed that there was a “drafter’s failure to appreciate the effect of certain provisions,” such a flaw by itself does not constitute an absurdity. SCALIA & GARNER, *supra*, at 238. We are not

the final editors of statutes, modifying language when we perceive some oversight. The Second and Third Circuits rejected the same absurdity argument in upholding snap removal. The Second Circuit believed there was more than one sensible reason for the language “properly joined and served”:

Congress may well have adopted the “properly joined and served” requirement in an attempt to both limit gamesmanship and provide a bright-line rule keyed on service, which is clearly more easily administered than a fact-specific inquiry into a plaintiff’s intent or opportunity to actually serve a home-state defendant.

Gibbons, 919 F.3d at 706. In other words, a reasonable person could intend the results of the plain language. The Third Circuit also found that the result was not absurd because the interpretation gives meaning to each word and abides by the plain language. *Encompass*, 902 F.3d at 153. Of some importance, the removing party is not a forum defendant. Diversity jurisdiction and removal exist to protect out-of-state defendants from in-state prejudices. The plain-language reading of the forum-defendant rule as applied in this case does not justify a court’s attempt to revise the statute.¹³⁴

III. THE INDEFENSIBILITY OF SNAP REMOVAL

Although snap removal has its judicial¹³⁵ and academic¹³⁶ defenders, we join those critical of the practice.¹³⁷ Longstanding norms in American law

¹³⁴ See *Tex. Brine Co.*, 955 F.3d at 486–87 (citations other than to *Gibbons* and *Stone Mansion* removed; capitalization in original; emphasis added).

¹³⁵ See TAN 88–101, *supra* (discussing trial court decisions permitting snap removal) and 102–125, *supra* (discussing Second, Third and Fifth Circuit decisions permitting snap removal).

¹³⁶ See, e.g., Zach Hughes, *A New Argument Supporting Removal of Diversity Cases Prior to Service*, 79 DEF. COUNS. J. 205 (2012); Saurabh Bishnubhakat, *Pre-Service Removal in the Forum Defendant’s Arsenal*, 47 GONZ. L. REV. 147 (2011).

¹³⁷ See, e.g., *Fiskus v. Bristol-Myers Squibb Co.*, No. 14 Civ. 3931, 2014 WL 4953610, at *5 (S.D.N.Y. Oct. 1, 2014); *Sullivan v. Novartis Pharms. Corp.*, 575 F. Supp. 2d 640, 645 (D.N.J. 2008); Nannery, *supra* note 7; Jordan Bailey, Comment, *Giving State Courts the Ol’ Slip: Should a*

have posited that (a) federal jurisdiction is limited and should be strictly construed; (b) diversity jurisdiction creates tension for the nation's federalist ideals and should be particularly narrowly construed as reflected in the complete diversity requirement; (c) removal poses an even greater threat to federalism because it divests a state court of jurisdiction, and therefore requires an even narrower construction accompanied by strict and particular technical requirements if removal is to be effected; (d) the presence of even a single forum state defendant sufficiently negates the local prejudice rationale for diversity jurisdiction to prevent removal; (e) procedure should advance substantive law and policy objectives rather than undermining them through gamesmanship; and (f) litigation outcomes should not vary according to the respective wealth, resources, or status of the parties. Absent undue plaintiff sloth in effecting service or a showing that a non-culpable or immune defendant has been named solely for defeating federal jurisdiction, removal should not be permitted in cases involving a forum state defendant simply because a removal petition preceded service on that defendant.

A. Slouching Toward Absurdity: Excessive Textualist Literalism and the Advantages of Interpretative Pluralism and Purposivism

To be sure, the literal language of 28 U.S.C. § 1441(b)(2) supports snap removal by restricting removal only “if none of the defendants properly joined and served” is a forum defendant. We argue, as others have, that the language produces an “absurd” result. But decisions allowing snap removal are all the more galling when issued under the valence of textualism's virtue, which is deference to Congress. To be clear, courts permitting snap removal have actually (if not also deliberately) undermined Congressional understanding of a well-established structure of relations between federal and state courts. Although the term “served” has a seemingly clear technical meaning in the law, it also seems clear that Congress in 1948 was using the word to convey a concept (non-sham joinder) rather than an inflexible requirement of the forum defendant rule.

Defendant be Allowed to Remove an Otherwise Irremovable Case to Federal Court Solely Because Removal was Made Before Any Defendant is Served?, 42 TEX. TECH. L. REV. 181 (2009). Although not as appalled as we and some others are by snap removal, Arthur Hellman, et al., *supra* note 68, is sufficiently concerned about snap removal as to propose a statutory amendment negating snap removal if a forum state defendant is served within 30 days of the removal. *See also* Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006).

In construing and applying a rule or statute, courts should attempt to implement the intent of the rulemakers or legislators and the purpose of the positive law in question.¹³⁸ Unfortunately, the good common sense of that venerable approach sometimes gives way to an overly blinkered, formalist textualism that emphasizes particular verbiage at the expense of the objectives of lawmakers. Even strongly textualist courts implicitly concede that a literal application of the language of statute, rule, or contract can sometimes lead to error in that all have an “absurd result” exception to applying “plain language.”

Absurdity, of course, is in the eye of the beholder. Case reports and law review articles reflect profound differences of opinion on the topic. Conceptually, some regard an “absurd” result only as something horrific or utterly devoid of rational basis while others find something absurd when it is sufficiently unwise, strained, or inconsistent with the overall objective of a statute, rule, contract, custom or practice.

We have a moderate working definition of absurdity. An interpretation or application of law brings an “absurd” result when it is blatantly inconsistent with the overall objective of the law. Unlike the courts that have rejected “absurd result” analysis in permitting snap removal, we do not think the outcome of literal application of text needs to be ludicrously dysfunctional in order to qualify as sufficiently absurd to permit consideration of drafting history, drafter intent, statutory purpose, and the structure and function of the law in question.

Indeed, we believe all these factors should routinely be considered by courts as they read the language of a statute or rule rather than reading the text in isolation and then considering these other powerful indicia of meaning only when the text is regarded as either facially ambiguous or producing a result so ridiculous that it can be regarded as absurd without any consideration of context.

Courts permitting snap removal, including the three circuit courts to approve the practice, have argued with some sophistication that snap removal is not flat-out absurd because it can be defended as a clear but perhaps crude means of enforcing a policy against improper joinder motivated only by attempts to sue in state court.

Although this argument is more defensible than snap removal itself, it in our view sets the absurdity bar too high as means of construing problematic

¹³⁸Little v. Wyndham Worldwide Operations, Inc., 251 F. Supp. 3d 1215, 1221–23 (M.D. Tenn. 2017).

statutory language. One can articulate reasons literal enforcement of the service requirement is helpful in discouraging gamesmanship by plaintiffs – but this does not negate that literal enforcement of the service requirement in turn encourages gamesmanship by defendants as well as creating a large exception to the forum defendant rule even though there is not a shred of evidence that Congress has ever sought to alter that long-standing feature of American litigation. If the “one” who is articulating the reasons to justify the literal reading of a statute is not Congress nor even someone Congress-adjacent, then there is reason at least for pause. Indeed, if one finds oneself doing a somersault, one should ask for whom they are performing.

Although we remain functionalist and contextualist rather than textualist, a page of textualism supports our position. Textualists, in their quest for determining the “plain meaning” of statutory language, frequently rely on dictionaries. A popular definition of “absurd” is “ridiculously unreasonable, unsound, or incongruous.”¹³⁹ Synonyms for “absurd” include: “foolish,” “silly,” and “no showing of good sense.”¹⁴⁰ Further, the term absurd is used “when something is not in keeping with common sense, good reasoning, or accepted ideas,” with the term foolish used “when something is not thought of by others as wise or sensible.”¹⁴¹

Use of the word absurd “stresses a lack of logical sense or harmonious agreement, of parts (such as a premise and a conclusion) not fitting together.”¹⁴² Thus, by one definitional concept of absurdity, a construction of

¹³⁹*Absurd*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/absurd#synonyms> (visited Sept. 2, 2019).

¹⁴⁰*Id.*

¹⁴¹*Id.*

¹⁴²*Id.* Other sources provide definitions of “absurd” that are more extreme and thus supportive of those arguing that snap removal, though admittedly odd and at odds with the history of federal jurisdiction, is not flat-out absurd. See, e.g., *Absurd*, VOCABULARY.COM, <https://www.vocabulary.com/dictionary/absurd> (visited Sept. 12, 2020) (“[s]omething absurd is really silly, absolutely ridiculous, or total nonsense. Thinking you can wear flip flops and a bikini to the North Pole is an absurd idea.”); *Absurd*, DICTIONARY.COM, <https://www.dictionary.com/browse/absurd?s=t> (visited Sept. 12, 2020) (something is absurd if it is “utterly or obviously senseless, illogical, or untrue; contrary to all reason or common sense; laughably foolish or false”).

While these more extreme concepts of what it means to be absurd provide to very limited use of the absurd result exception to plain language statutory construction, they also illustrate a major problem with textualism (or at least the type of acontextual textualism that requires an absurd result as a pre-condition to departing from literalism). There are many dictionaries and usually multiple accepted definitions of a term, synonyms for a term, and connotative values of a term. In addition,

statutory language that is inconsistent with the intent of the legislature, the purpose of the statute, or the overall structure of the area of law in question could be deemed “absurd.” Using this or related concepts of absurdity, a sizeable number of trial courts have found snap removal to be absurd.¹⁴³

But, at the risk of a bad anti-textualist pun, where is it “written” that statutory language must be applied literally unless the result is absurd? Why is it not sufficient that literal application of the text be at odds with factors such as legislative intent, statutory purpose, statutory function, role of the statute in the legal fabric, or other structural aspects of the legal system? Our view is that something considerably less than absurdity should counsel against a literalist application of problematic statutory language.

Textualist courts, however, set their rhetorical table by citing precedent stating that the “plain” or “clear” language of a statute controls unless the result is absurd, citing cases stressing statutory text or declaring that if text is facially clear, no further inquiry or resort to extrinsic sources is permitted.¹⁴⁴ A milder form of this textualist approach posits that “[w]here the text of a statute is unambiguous, the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.”¹⁴⁵

This approach makes it hard – too hard in our view – to displace even unintended or unwise application of statutory language. First, it begs the question of when documentary text is “unambiguous.” While courts taking this view undoubtedly mean the text is plain on its two-dimensional, paper and ink face, this very determination requires some imbedded assumptions about the nature of the statute and the usage of words. “Chair” means one thing when furniture shopping, another when holding a meeting, another

dictionaries change over time but textualists appear not to have coalesced around norm for use of different dictionary editions and time period. One can make a strong case that the relevant dictionaries regarding the meaning of a word in a statute are only those dictionaries contemporaneous with the legislation. Does this also mean that the definition of what is an “absurd” result should also be based on the understanding of the time when a statute was enacted or amended?

¹⁴³ See, e.g., *Fiskus v. Bristol-Myers Squibb Co.*, No. 14 Civ. 3931, 2014 WL 4953610, at *2 (S.D.N.Y. Oct. 1, 2014); *Sullivan v. Novartis Pharms. Corp.*, 575 F. Supp. 2d 640, 645 (D.N.J. 2008).

¹⁴⁴ See, e.g., *Sears, Roebuck & Co. v. Poling*, 81 N.W.2d 462, 466 (Iowa 1957) (“resort may be had to rules of construction only where the language of an instrument is of doubtful meaning”); *Mautner v. Peralta*, 215 Cal. App. 3d 796, 804 (Cal. Ct. App. 1989) (“ambiguity ordinarily is a condition precedent to statutory interpretation.”).

¹⁴⁵ *McMaster v. E. Armored Servs., Inc.*, 780 F.3d 167, 170 (3d Cir. 2015) (citations omitted), cited in *Encompass Ins., v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 152 (3d Cir. 2018).

when making academic appointments, and another when discussing capital punishment.

Textualist judges seldom make explicit the context and perspective from which they are determining whether a word is clear or unclear. Sometimes the context is obvious from the situation but not always. The judge's conscious or unconscious associations with a word, enterprise, or government activity are almost never apparent to the outside world. This makes a case for less judicial jumping to conclusions about linguistic meaning and more express examination of factors other than text that inform the meaning of the text.

Second, it is not clear what constitutes an “extraordinary” showing of contrary legislative intent. Is context enough? Individual legislator floor statements? Committee reports? Hearing testimony? Contemporaneous news accounts of the problem to be “solved” by the legislation in question?

Third, the focus on legislative history alone needlessly limits the amount of information that courts may use in statutory construction. The background of the legislation might shed more light on the goals of the act than more official legislative history. But “moderate” textualists willing to allow powerful legislative history to impact construction of statutory verbiage want to limit the inquiry to only formal legislative history, which seems to us unduly narrow.

Fourth, this approach also begs the question – examined more fully below – as to why text is given such disproportionate weight relative to legislative intent and statutory purpose. Strong textualism has been enjoying a roughly 40-year reign that roughly coincides with Antonin Scalia's ascension to the Supreme Court.¹⁴⁶ But this is a relatively recent development. For many decades, legislative intent was the touchstone of statutory construction.¹⁴⁷

¹⁴⁶No doubt owing not only to his prominence and power as a U.S. Supreme Court Justice but also his extensive intellectual entrepreneurship. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) (promoting textualism and use of canons of construction, both textual and substantive, as preferred to examination of legislative history); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1176 (1989) (promoting formalist methodology as well as textualism).

¹⁴⁷*See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 621 (1990) (describing U.S. Supreme Court's “traditional approach” prior to the Scalia Era as willingness “to consider virtually any contextual evidence, especially the statute's legislative history, even though the statutory text has an apparent ‘plain meaning.’”); A. Michael Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process*, 66 TEX. L. REV. 1071 (1988) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1st. ed. 1988) (noting variant approaches to statutory interpretation);

And in centuries past, purposivism held sway, with a leading precedent instructing courts to “suppress the mischief and advance the remedy” in construing statutes.¹⁴⁸ Using this venerable approach would almost certainly lead the majority of courts to disapprove snap removal.

While there is no shortage of cases making textualist pronouncements, this approach ignores the many cases¹⁴⁹ – and extensive scholarly commentary¹⁵⁰ – that stress the importance of legislative intent, statutory purpose, system functionality, and public policy.

Courts favoring snap removal have to some degree “cherry-picked” precedents in order to embrace rather muscular textualism when they would

William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 801–02 (1985) (finding that prevailing views regarding proper approach to statutory interpretation vary by era and that, for example, 19th Century emphasized legislative intent while first half of 20th Century gave greater emphasis to statutory purpose of the “equity of the statute”). See also Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 NW. U.L. REV. 111, 130 (1997) (describing modern Supreme Court interpretation only a few years after Eskridge’s *New Textualism* article as reflecting “fetish for textualism”).

¹⁴⁸Heydon’s Case, 76 Eng. Rep. 637 (1584) (describing judiciary’s task of statutory interpretation as to “suppress the mischief” that prompted the statute and “advance the remedy” sought by the legislature).

¹⁴⁹See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 383 (1991) (focusing on central purpose of statute as much or more than text, an approach described as backwards by Justice Scalia in *ANTONIN SCALIA & BRYAN GARNER, READING LAW* 16–17 (2012); *Public Citizen v. U.S. Dep’t of Just.*, 491 U.S. 440, 454 (1989) (reflecting concern over legislative intent and purpose); *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892) (stressing that “spirit” or purpose of the statute may be at odds with literal language and deciding case based on purpose). Holy Trinity Church has in some quarters acquired a bad name because of its nativist “Christian Nation” rhetoric used in the course of ruling that a New York City Episcopal church’s importation of an English minister did not violate labor and immigration laws. But the opinion’s commitment to purposivism strikes us as perfectly politically correct. See generally Carol Chomsky, *Unlocking the Mysteries of Holy Trinity Church: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000) (extensive examination of decision and its background generally approving of its methodology despite arguable reflected animus toward laborers lacking Anglican pedigree).

¹⁵⁰See, e.g., WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* (2016); WILLIAM D. POPKIN, *THE JUDICIAL ROLE: STATUTORY INTERPRETATION AND THE PRAGMATIC JUDICIAL PARTNER* (2013); WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* (1999); WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1142 (1992); William N. Eskridge & Philip Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 326 (1990).

be equally free to focus on less textualist precedents. Although there may be some situations when adherence to a particularly textualist literalism is compelled by precedent, we think these comparatively rare.

For example, U.S. Supreme Court decisions of course stress the importance of statutory language – but they also stress the importance of other interpretative factors.¹⁵¹ The modern Court’s interpretative continuum ranges from the late Justice Scalia (who at times deemed all legislative history irrelevant)¹⁵² to Justice Breyer (who views legislative history as important and highly indicative/determinative of statutory meaning).¹⁵³

A full critique of textualism, of which there are many,¹⁵⁴ is beyond the scope of this article. The problem of snap removal is to a large degree a jurisprudential problem concerning the apt approach to statutory language. Courts permitting snap removal take a highly textualist approach and are unmoved by results that are “merely” inconsistent with legislative intent, history, statutory purpose, or the larger policy objectives of the law.¹⁵⁵

Courts remanding snap removal cases take a more contextual and functional approach, assessing multiple interpretative factors and concluding that it is unlikely that Congress, when adding the service language to the removal statute in 1948 intended to abolish the forum defendant rule in cases where defendants were clever enough and well-staffed enough to win races to the courthouse.¹⁵⁶

Courts that follow the textualist route to snap removal pay a high price for the mechanical simplicity of that approach. The casualties—seldom if ever recognized—are the history of diversity jurisdiction and removal, the

¹⁵¹ See, e.g., WILLIAM N. ESKRIDGE ET AL., *CASES AND MATERIAL ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* Ch. 5 (6th ed. 2020) (reviewing historical and current theories of statutory interpretation, citing cases and secondary authority).

¹⁵² See, e.g., SCALIA & GARNER, *supra* note 136; ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997); Scalia, *The Rule of Law as a Law of Rules*, *supra* note 136.

¹⁵³ See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). See also Kenneth R. Dortschbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin Supreme Courts*, 80 MARQ. L. REV. 161 (1995).

¹⁵⁴ See, e.g., William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist But Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998); Eskridge, *The New Textualism*, *supra* note 147.

¹⁵⁵ See, e.g., *Regal Stone Ltd. v. Longs Drug Stores Cal.*, 881 F. Supp. 2d 1123, 1127–29 (N.D. Cal. 2012); *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263, 1268 (M.D. Fla. 2009).

¹⁵⁶ See, e.g., *Little v. Wyndham Worldwide Operations, Inc.*, 251 F. Supp. 3d 1215, 1218–23 (M.D. Tenn. 2017); *Vivas v. Boeing Co.*, 486 F.Supp.2d 726, 734 (N.D. Ill. 2007).

purpose of diversity jurisdiction and removal, the longstanding adherence to the forum defendant rule, and the public policy consensus that the removal route to federal court should be strictly construed and generally not open in cases where one of the defendants is a forum state citizen.

In denying remand in *Flash Boys* style snap removal cases, courts unnecessarily privilege textualism and formalism (arriving at the courthouse prior to removal) over fairness and regard for substantive policy (the forum defendant rule) in favor of form. Worse yet, some courts, including one of the three circuit court panels addressing snap removal, have denied remand even where adversarial cleverness spilled over into outright deception.¹⁵⁷

At a minimum, opinions permitting snap removal suffer from an overarching failure to think about the purpose of not only isolated language but an entire statutory scheme and the judicial system as well as the public policy and history underlying the forum defendant rule and the structure of federal jurisdiction.

The basic interpretative error in cases permitting snap removal cases is a brittle and formal brand of textualism that masquerades as neutral and simple. Courts permitting snap removal are doing something considerably more than simply giving words their seeming natural meaning. They are reading the language not just literally but out of context and without regard for other legitimate interpretative factors.

The root of this interpretative error is a radical form of textualism that regards only the text of a statute as “law.” The philosophical and jurisprudential underpinnings of this view have never been particularly clearly articulated, much less (in our view) persuasively articulated. The argument, so far as we can discern, is that only the statutory text is actually enacted by Congress in a bill signed by the President. Consequently, surrounding information – the context of the legislation – is not “the law” and should not be considered.

The proposition is incorrect. Language has meaning only in context – not only the context of surrounding language in the same document but also the context giving rise to a document or law: the status quo; the perceived problems or opportunities that prompted legislation; the facts known to the drafters; the goals of the drafters and the purpose of the legislation; their understanding of the likely application of the language and the place of the legislation in the overall fabric of the law.

¹⁵⁷ See TAN 108–124, *supra* (discussing Third Circuit’s *Stone Mansion* decision).

Staring incessantly at a few words of the statute (e.g., “and served”) without using this other information to determine the proper application of the particular words and the statute as a whole strikes us as folly. And from this folly flows the error of allowing wording that was unproblematic in 1948 to morph into a purported plain meaning edict allowing litigation maneuvering completely at odds with the statute in question as well as the larger federal court system.¹⁵⁸

If important extra-textual public policies are considered, the costs of the narrow textualism permitting snap removal becomes apparent. When snap removal is permitted, the history, rationale, structure and function of federalism, diversity jurisdiction and removal is given short shrift. While one can reasonably question the rationale of the forum defendant rule (i.e., that a single in-state defendant removes risk of local bias or prejudice), it has, whatever shortcomings of its rationale, long been the accepted rule. Circumvention of the rule cannot be justified by the weak read of the words “and served” added to Section 1441(b)(2) seventy years ago when no one but perhaps science fiction authors could have imagined current technology.

In addition, permitting snap removal undermines public policy favoring federalism and plaintiff forum choice is severely undermined and inequality of resources is exacerbated. Comparatively wealthy defendants are provided another procedural weapon while comparatively impoverished plaintiffs are partially disarmed. The consequences of this implicit favoritism toward defendants is exacerbated by the current composition of the federal bench,

¹⁵⁸ Snap removal, despite its tension with or destruction of the forum defendant rule, could be defended as sufficiently beneficial because of efficiency concerns. Snap removal – which can be done in ultimate *Flash Boys* style by large pharmaceutical or chemical companies subject to frequent and related litigation – may foster consolidation. Once in federal court, such litigation is more easily subject to MDL (multi-district litigation; *see* 28 U.S.C. § 1407) or related consolidation that is more difficult where similar cases are strewn through 50 state court systems as well as 94 federal district courts.

Or at least this is one possible defense of snap removal, albeit one that we have not seen in the defense bar literature, which seems to regard it as a given that federal courts are more favorable to defendants and should be reached whenever possible by whatever means necessary.

This justification, though not absurd, is not in our view persuasive. More important, it appears not to account for much snap removal practice by defendants. *See* Thomas O. Main et al., *supra* note 103 (finding comparatively few instances of snap removal in cases subject to MDL proceedings). To be sure, drugmakers, manufacturers, and insurers have pursued snap removal. But it appears they have done so primarily in individual cases and have made no overt effort to promote snap removal as a means of placing more cases in federal court in order to foster consolidation, streamlined pretrial procedure, effective case management, or global settlement.

which has become significantly more pro-defendant than most of its state court counterparts.

Further, there appears to be no social gain from snap removal – unless one believes that state courts are overly generous to plaintiffs or unfair to defendants. That’s possible of course. But available evidence regarding win/loss rates and damage awards suggests that state-federal divergence is not one of excessive state court largess but rather considerably more pro-defendant federal court outcomes that have created a conventional wisdom in the defense bar counseling escape from state courts whenever possible.¹⁵⁹ Snap removal thus adds more time and expense to litigation (with the convenient effect for defendants in that it imposes burdens on plaintiff counsel who is probably not getting hourly compensation in return) without discernible social benefit.¹⁶⁰

In addition, snap removal based on textual literalism cannot be justified on the assumption that Congress will take corrective action if it disagrees. A crowded legislative agenda, partisan infighting, interest group influence, and an array of diversions of the calendar (e.g., elections, pandemics, impeachment) all combine to produce legislative gridlock and reduce the realistic chance of swift congressional correction of decisions regarded as erroneous, particularly if the issue is not salient to layperson voters. Regarding snap removal, the most influential observers (plaintiff counsel, defense counsel, and commercial clients) are divided, making swift legislative correction unlikely.

B. Legislative History Augurs Against Snap Removal

Although there is not much documentation of congressional intent underlying the 1948 language change that introduced the service requirement to the forum defendant rule, there is certainly nothing to suggest that Congress intended to eliminate or significantly curtail the rule.

On the contrary, available evidence suggests that Congress was perfectly happy with the forum defendant rule.¹⁶¹ Congress did not wish in 1948 to change the rule but rather only to prevent it from being misused by plaintiffs

¹⁵⁹ See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) (noting overall plaintiff win rate of 58 percent for cases initially filed in federal court compared to win rate of only 37 percent for removed cases).

¹⁶⁰ See Nannery, *supra* note 7, at 568–70.

¹⁶¹ *Griffin v. Oceanic Contractors*, 458 U.S. 564, 577, 588 (1982).

naming sham forum state defendants in their complaints as a means of defeating removal.

Under these circumstances, it seems inappropriate to interpret the language added in 1948 as an expansion of removal. For similar reasons, it seems inappropriate to construe lack of revision of the removal statute by Congress – in the 2011 amendments or in any congressional session – as congressional endorsement of snap removal or even acquiescence to it.

One school of statutory interpretation commonly associated with the late Justice John Paul Stevens treats congressional silence or inaction as an indication that Congress intends no significant change in the law.¹⁶² If it had, it would have made more noise. Sometimes, perhaps even often, it is significant that the “dog didn’t bark”: a reference to a Sherlock Holmes story in which a prize horse is stolen without the family dog barking at the thief. Holmes correctly deduces that the dog failed to bark because the thief was someone known to the animal.¹⁶³

This common sense maxim augurs in favor of limiting the “joined and served” language of Section 1441(b)(2) to situations where a forum defendant is named but not seriously pursued by plaintiff or clearly cannot

¹⁶² See, e.g., *Martinez v. Ct. of Appeal*, 528 U.S. 152, 159 (2000) (“negative historical evidence” or absence of evidence of intent to effect significant change, is relevant to issues of legislative intent in manner similar to relevance of dog failing to bark during theft); *Griffin*, 458 U.S. at 577, 588 (1982) (Stevens, J. dissenting) (joined by Blackman, J.) (“unremarkable” type of revision to statute without commentary in legislative history suggests absence of congressional intent to effect significant change in the law; “the fact that the dog did not bark can itself be significant”) (citing *Harrison v. PPG Indust., Inc.*, 446 U.S. 578, 602 (1980)) (opinion of Justice Rehnquist using this analogy but declining to follow it in that case); *but see* *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) (joined by Rehnquist, C.J. and Kennedy, J.) (assuming that dogs will bark when something important is happening is “questionable wisdom” and arguing that the Court has “forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past.”).

Perhaps Justice Scalia is right about the Court’s overall attitude toward this tool for assessing legislative activity. There are only a few Supreme Court cases expressly referring to the barking dog metaphor and this article is not an attempt to ascertain the precise views of individual justices on the question. But we are sure that Justice Scalia is wrong and that Justice Stevens is correct in positing that when legislatures are making significant changes in the law by altering language, there is normally a rather well-developed historical trail in addition to the language change itself. Justice Scalia’s error, in substantial part, stems from his ultra-textualist views that lead him to be relatively uninterested in congressional intent and purpose and in the legislative process itself since the late Justice thought these irrelevant or even illegitimate as interpretative tools.

¹⁶³ See A. CONAN DOYLE, *SILVER BLAZE IN THE COMPLETE SHERLOCK HOLMES* 383 (1938) (cited by Justice Stevens in *Martinez*, 528 U.S. at 159 (2000) and in *Griffin*, 458 U.S. at 577 (1982) (Stevens, J. dissenting)).

be liable as a matter of law. So long as defendant's joinder is not clearly futile or a sham, the "and served" language should not be a tail that wags the larger dog of the forum defendant limitation on removal.

If Congress had wanted the "and served" language to have such a large impact on removal practice by creating an entirely new genre of snap removal, it likely would have made this clear somewhere in the hearing testimony, committee reports, floor statements, or contemporaneous accounts of the legislation. Congresspersons regularly promote their activities to the press and reporters regularly seek information about the intent, purpose, goals, and planned impact of legislation. If there was any congressional desire to have 1948's new service provisions overturn the basic forum defendant rule, one would expect to find at least some "barking" to that effect. But there appears to be no – not a shred – of such evidence supporting snap removal.

For that reason, courts err if they treat the 1948 addition of the service language too literally and in derogation of the basic forum defendant limitation on removal. Congress's failure to correct the error in the 2011 amendments to the removal statute arguably presents a closer question but on balance it appears the 2011 revision has no bearing on the snap removal issue. As one commentator concluded:

The "properly joined and served" language remains in [Section] 1441(b)(2) even after the statute was amended in 2011. The removal statute now states that a diversity case "may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought. The amended statute simply restates the forum defendant rule in positive rather than negative terms. There is no evidence in the legislative history of the 2011 amendment that Congress was concerned with the interpretation of the word "none," or that Congress intended to preserve or override any practice under or interpretation of the forum defendant rule by leaving the remainder of the provision intact.¹⁶⁴

¹⁶⁴ See Nannery, *supra* note 7, at 549 (citations omitted); see also H.R. REP. NO. 112-10, at 12 (2011), reprinted in 2011 U.S.C.A.N. 576 (stating that revision to § 1441(b) merely "restates the substance of the . . . current subsection.").

But by 2011, there was a substantial group of snap removal decisions, many of them giving literal reading to the “and served” language and permitting snap removal.¹⁶⁵ One could argue that Congress was presumptively aware of those decisions and that Congress would amend Section 1441(b)(2) to legislatively overrule them if it disagreed. But Congress did not change the service language even though it was already addressing removal. Proponents of snap removal construe this as tacit approval of a literalist construction of Section 1441(b)(2) and of snap removal.¹⁶⁶

This interpretation of the 2011 Amendment is at least problematic and probably erroneous for a several reasons. First, Congress may not have been aware of snap removal and almost certainly was not keenly aware of snap removal. Although scholarly analysis suggests that Congress is surprisingly well informed about judicial decisions¹⁶⁷ (and thus presumably capable of responding to them), these studies concentrate on Supreme Court and circuit court decisions that are logically more visible to congressional staff.

Trial court decisions that tend to evade appellate review, as is the case with most removal and remand matters, were less likely to register with Congress during the roughly five years that snap removal opinions were being rendered in significant number prior to the 2011 Amendments. Congress may not, in fact, have known about snap removal at all. It was only in 2019, after two circuit court decisions approving the practice, that the House of Representatives held hearings on the matter.¹⁶⁸ There is nothing in

¹⁶⁵ *E.g.*, *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp. 2d 177, 180 (S.D.N.Y. 2003); *Ott v. Consol. Freightways Corp. of Del.*, 213 F. Supp. 2d 662, 665 (S.D. Miss. 2002); *In re Bridgestone/Firestone, Inc.*, 184 F. Supp. 2d 826, 828 (S.D. Ind. 2002); *Maple Leaf Bakery v. Raychem Corp.*, No. 99 C 6948, 1999 WL 1101326, at *2 (N.D. Ill. Nov. 29, 1999).

¹⁶⁶ See TAN 104–127, *supra* (discussing *Stone Mansion*, *Gibbons*, and *Texas Brine* decisions).

¹⁶⁷ See, *e.g.*, Abbe R. Gluck & Lisa Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901, 929 (2013); Abbe R. Gluck & Lisa Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation and the Canons: Part II*, 66 STAN. L. REV. 725, 732 (2014); William N. Eskridge, Jr. & Matthew R. Christiansen, *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1446 (2014); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 343 (1991) (examination of congressional override legislation during 1967-1990 time period suggests fairly close monitoring of Supreme Court opinions by congressional staff and particularly interested members).

¹⁶⁸ See *Examining the Use of “Snap” Removals to Circumvent the Forum Defendant Rule, Hearing Before the Subcomm. On Cts., Intell. Prop., and the Internet of the H. Comm. on the*

the 2011 legislative history to suggest that Congress consciously decided to retain the “joined and served” statutory language because it approved or even tolerated snap removal.

Second, congressional awareness does not equal congressional ability to address a problem at the juncture in question. The press of other business and a looming election year might well have prompted the 2011 Congress to maintain the service language status quo even if it had misgivings about application of the language in snap removal cases.

Third, Congress may have, in fact, been aware of decisions permitting snap removal. If so, it was also undoubtedly aware of decisions remanding such cases and making a less textualist construction of § 1441(b)(2)’s service language. As of the time of the 2011 Amendment to the removal statute, there was relatively even division of the trial court cases, and the absence of appellate precedent.

Under these circumstances, Congress may have preferred to leave the service language unchanged to give the judicial process time to resolve the issue. This is an especially likely scenario even if Congress in 2011 was aware of the issue and concerned about snap removal but not particularly sure of how to constrain it. Or the 2011 Congress may have been relatively confident that judicial doctrine would eventually prohibit snap removal. Although cases like *Stone Mansion*,¹⁶⁹ *Gibbons*,¹⁷⁰ and *Texas Brine*¹⁷¹ show any such confidence was misplaced, a rational Congress might very well have expected a common law evolution against snap removal.

Fourth, there are serious questions about the legitimacy of using the inaction of a subsequent Congress to shape judicial interpretation of a law enacted decades before the inactive Congress, just as there would be serious

Judiciary, 116th Cong. (2019); see also Jerry Nadler, *Chairman Nadler Statement for Subcomm. Hearing on “Examining the Use of “Snap” Removals to Circumvent the Forum Defendant Rule* (Nov. 14, 2019), <https://nadler.house.gov/documentsingle.aspx?DocumentID=394143> (“Unfortunately, a combination of modern technology, a desire by some corporations to avoid state courts seemingly at any cost, and a supposed loophole in the removal statute has engendered a *new* tactic [by defendants] . . . [T]his sort of gamesmanship is clearly contrary to the spirit and the intent of the federal removal statute. This evasion of the well-established forum defendant rule also threatens state sovereignty and violates federalism principles by denying state courts the ability to shape state law. State courts should be the final arbiters of state law, but snap removals are increasingly putting *new* state-law questions into federal court. This issue may seem *obscure*, but it is a *growing* problem.”) (emphasis added).

¹⁶⁹902 F.3d 147 (3d Cir. 2018).

¹⁷⁰919 F.2d 699 (2d Cir. 2019).

¹⁷¹955 F.3d 482 (5th Cir. 2020).

concern if a court relied on a 2011 congressional floor statement as if it were contemporaneous legislative history for a 1948 statute. If a subsequent Congress is to “speak” with authority to the meaning of a statute, it must actually amend the statute.¹⁷² Although there are circumstances where “subsequent legislative history” may be relevant, the 2011 amendments to removal law appear not to be such an instance.

Relatedly, changes in circumstances and changes in the political, socioeconomic, and ideological composition of Congress may make it particularly dangerous to use the inaction or statements of a later Congress as guides to understanding the intent and purpose of a much earlier legislating Congress. The composition of Congress may well have changed dramatically. A later Congress of course has the right to change the legislation of an earlier Congress with which it has come to disagree. But the later Congress has no authority to change the work of a prior Congress merely through inaction or criticism of that prior work.

The 1948 Congress that amended the removal statute included a House of Representatives with 246 Republicans and 188 Democrats (as well as one Labor Party member) with a Senate of 51 Republicans and 45 Democrats.¹⁷³ The 2011 Congress had 242 Republicans and 193 Democrats in the House, with 47 Republicans and 51 Democrats in the Senate.¹⁷⁴ Although this is relatively consistent partisan alignment of the respective chambers, it of course fails to account for changes in party ideology and composition as well as the ideological, public policy and jurisprudential orientation of members as well as the relative presence or absence of attorneys in Congress.

Although a painstaking examination of the educational background of the legislators is beyond the scope of this article, our exploratory examination suggests that the 1948 Congress had proportionately more attorneys (58

¹⁷²John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into “Speculative Unrealities”*, 64 B.U. L. REV. 737, 746, 749–750 (1984).

¹⁷³See *Vital Statistics on Congress*, BROOKINGS INSTITUTION, <https://www.brookings.edu/wp-content/uploads/2019/03/1-20-Full.pdf> (last visited Sept. 23, 2020); Office of Art & Archives, *Congress Profiles*, U.S. H.R. (last visited Sept. 22, 2020), <https://history.house.gov/Congressional-Overview/Profiles/80th/>; U.S.S., PARTY DIVISION, <https://www.senate.gov/history/partydiv.htm> (last visited Sept. 23, 2020).

¹⁷⁴See BROOKINGS INSTITUTION, *Vital Statistics on Congress*, <https://www.brookings.edu/wp-content/uploads/2019/03/1-20-Full.pdf> (last visited Sept. 23, 2020).

percent)¹⁷⁵ than Congress in 2011 (42 percent),¹⁷⁶ a comparison that reflects a long-term trend.¹⁷⁷ It stands to reason that a more lawyer-laden legislative body could be seen as unlikely to undermine the long-standing forum defendant rule through a two-word provision aimed at sham defendants. Further, the 2011 Congress, which was nearly half attorneys, was unlikely to have silently approved of dilution of the forum defendant rule even if its membership was not as lawyer-laden as its predecessors.

Fifth, treating the 1948 removal amendments as static while attributing meaning to the absence of change in the 2011 amendments arguably transposes sound statutory construction theory. Even a traditionalist should permit some degree of dynamic statutory interpretation in assessing the service language added in 1948.

At the time of amendment, there were no electronic dockets (and certainly no electronic docket monitoring software), no internet, no personal computers, no wi-fi, no mobile phones, and only relatively slow electronic connections. Even the most prescient of the enactors of the “and served” language could never have imagined that the language would permit super-speedy snap removal that was fast enough to leapfrog service of process.

One might thus ask what the authors of the 1948 language would have thought, done, and legislated if they could see into the future.¹⁷⁸ Most likely, a group that did not like joinder of sham defendants but wished to continue the venerable forum defendant rule would be appalled at the prospect of its

¹⁷⁵ *Composite Picture of the Current Congress*, 26 CONG. DIG. 183, 184 (1947). This included 244 Representatives and 62 Senators who listed their occupation or training as law divided by the 535-member Congress.

¹⁷⁶ A figure derived by dividing the 168 Representatives and 57 Senators who listed their occupation or training as law (according to Jennifer E. Manning, CONGRESSIONAL RESEARCH SERVICE, *Membership of the 112th Congress: A Profile* (Nov. 26, 2012) available at <https://fas.org/sgp/crs/misc/R41647.pdf> (last visited at Sept. 23, 2020) by the 535-member Congress).

¹⁷⁷ See Debra Cassens Weiss, *Lawyers No Longer Dominate Congress; Is Commercialization to Blame?*, A.B.A.J. (last visited at Sept. 23, 2020, https://www.abajournal.com/news/article/lawyers_no_longer_dominate_congress_is_commercialization_of_profession_to_b (“In the mid-19th century, nearly 80 percent of members of Congress were lawyers . . . The percentage fell to less than 60 percent in the 1960s and less than 40 percent in 2015.”); see also Nick Robinson, *The Decline of the Lawyer Politician*, 65 BUFF. L. REV. 657, 659 (2017).

¹⁷⁸ See Richard A. Posner, *Statutory Interpretation: In the Classroom and In the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (advocating judicial use of “imaginative reconstruction” of congressional intent and understanding of impact of legislation were it aware of modern developments).

evasion through new technology. Although this approach to statutory construction is controversial and opposed by originalists, it is at least as logically legitimate and informative as treating the silence of the 2011 amendments – which said nothing about snap removal – as an endorsement of snap removal.

C. Permitting Snap Removal Rewards Problematic Behavior by Defendants and Counsel

Decisions supporting snap removal also err in that they implicitly approve of what most people (indeed, most lawyers not on the payroll of a snap-removing defendant) would regard as undue trickiness.¹⁷⁹ The idea that a defendant can evade the long-standing forum defendant limitation on removal through use of faster computers and on-call lawyers should strike reasonable people as too clever by half. The adversarial system of American litigation envisions vigorous advocacy but should not enshrine sneaky tricks. As further discussed below, U.S. Supreme Court precedent regarding removal made a strong statement to this effect prior to the advent of the snap removal era.¹⁸⁰

The facilitation of trickery and gaming the system through a literal application of the service language is also ironic in light of and contradicted by the history of the service language, which “was intended to prevent gamesmanship by plaintiffs, who might otherwise name an in-state defendant against whom there is no valid claim merely to prevent removal by the other defendants.”¹⁸¹ Consequently, “[a]llowing defendants to rush to remove newly filed state court cases before the plaintiff has a chance to serve the forum defendant would turn Congressional intent to prevent litigant gamesmanship on its head.”¹⁸²

Relatively recent Supreme Court precedent is also a brief against attorney trickery, technicality and sharp practices. In *Murphy Brothers v. Michetti*

¹⁷⁹ See MOORE ET AL., *supra* note 20, § 107.55 (literal application of “and served” language would enable “gamesmanship by defendants, who, by monitoring the state docket and removing actions to federal court before the plaintiff has a chance to serve the forum defendant, could always avoid the rule.”).

¹⁸⁰ See *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344 (1999), discussed at TAN 183–194, *infra*.

¹⁸¹ See MOORE ET AL., *supra* note 20 § 107.55.

¹⁸² See MOORE ET AL., *supra* note 20 § 107.55, citing cases.

Pipe Stringing,¹⁸³ plaintiff Michetti's clever lawyers faxed a "courtesy" copy of a breach of contract complaint to a Murphy executive as a prelude to settlement discussion. Negotiations proved unsuccessful and Michetti then sued. Murphy removed the case to federal court 30 days later, which was 44 days after receipt of the faxed courtesy copy. Michetti argued that removal was untimely pursuant to 28 U.S.C. § 1441(b), which provides that "notice of removal . . . shall be filed within thirty days after the receipt by the defendant, thought service or otherwise, of a copy of the initial pleading."¹⁸⁴

The trial court denied Michetti's remand motion, reasoning that the faxed courtesy copy did not start the 30-day removal clock.¹⁸⁵ The Eleventh Circuit reversed¹⁸⁶ but the Supreme Court found Murphy's removal timely, holding that informal delivery of a complaint did not qualify as the type of "or otherwise" delivery that would trigger the removal deadline.¹⁸⁷

D. Supreme Court Removal Precedent Casts Doubt on Snap Removal and the Textual Literalism that Facilitates Snap Removal

The *Murphy Brothers* court held that a defendant ordinarily was not obligated to take any action in a lawsuit that had yet to commence.¹⁸⁸ In so ruling, the Court implicitly rejected the type of textualist literalism used by today's courts permitting snap removal and took a more functionalist approach sensitive to the overall purpose, structure and function of the court system – an approach similar to that of today's courts rejecting snap removal.

The *Murphy Brothers* Court also looked closely at the 1948 Amendments to the removal statute that introduced the 30-day deadline¹⁸⁹ – the same 1948 legislation that added the "and served" language even though one could argue that the words "by service or otherwise" had a plain meaning that eliminated any need to examine legislative history. This was the interpretative methodology used by the Eleventh Circuit that the Court rejected.¹⁹⁰

¹⁸³ 526 U.S. 344, 344 (1999).

¹⁸⁴ *Id.* at 348.

¹⁸⁵ *Id.* at 349.

¹⁸⁶ See *Michetti Pipe Stringing v. Murphy Bros.*, 125 F.3d 1396, 1399 (11th Cir. 1997), *rev'd*, 526 U.S. 344 (1999).

¹⁸⁷ See *Murphy Bros.*, 526 U.S. at 347–348 (1999).

¹⁸⁸ See *id.* at 349–350 ("In the absence of service of process . . . a court ordinarily may not exercise power over a party the complaint names as defendant.").

¹⁸⁹ See *id.* at 351–53.

¹⁹⁰ See *id.* at 353; see also *id.* at 346 (noting that courts have given "receipt through service or otherwise" language in Fed. R. Civ. P. 81(c) functionalist rather than literalist interpretation).

In words that should inform today's courts addressing snap removal, the Court approvingly cited a trial court's observation that "If in fact the words 'service or otherwise' had a plain meaning, the cases would not be so hopelessly split over their proper interpretation."¹⁹¹ The Court further approved a circuit court opinion taking the position that "nothing . . . would justify our concluding that the drafters, in their quest for evenhandedness and promptness in the removal process, intended to abrogate the necessity for something as fundamental as service of process."¹⁹²

Murphy Brothers was also functionalist and pragmatic rather than textualist in that the Court noted that a literalist approach to the term "or otherwise" and its attendant starting of the clock upon fax transmission (or today's even faster and more extensive electronic means) could "operate with notable unfairness to individuals and entities in foreign nations" because of the longer time required for service abroad.¹⁹³

While one must not make too much over a 20-year-old precedent that is not entirely on all fours with a snap removal case (as well as reflecting a 6-3 split in the Court),¹⁹⁴ the parallels are sufficient to place the *Murphy Brothers*

¹⁹¹*Id.* at 353–54 (citing *Apache Nitrogen Prods., Inc. v. Harbor Ins. Co.*, 145 F.R.D., 674, 679 (D. Ariz. 1993)); *see also id.* at 354 (reviewing alternative means that defendant might otherwise receive a complaint that would be consistent with litigation having already been commenced).

¹⁹²*Id.* at 355 (quoting *Silva v. Madison*, 69 F.3d 1368, 1376 (7th Cir. 1995)).

¹⁹³*Id.* at 356. In addition, *Murphy Brothers* implicitly disapproved of attorney trickery, or at least was reluctant to reward it. Undoubtedly, Michetti would argue, as it did before the Supreme Court, that faxing the courtesy copy was not an attempt to start the 30-day clock while lulling Murphy into complacency. Perhaps, but we have personal experience with attorneys in the pre-Murphy Brothers era doing exactly that – or at least attempting to – but being thwarted by equally clever defense counsel recognizing the maneuver or trial courts that, like the Supreme Court in *Murphy Brothers*, rejected textual literalism.

¹⁹⁴Dissenting Justices Rehnquist, Scalia and Thomas argued that "the Court does little to explain why the plain language of the statute should not control, opting instead to superimpose a judicially created service of process requirement . . ." For these reasons set forth herein we are not persuaded. *See id.* at 357 (1999) (Rehnquist, C.J., dissenting, jointed by Scalia & Thomas, JJ.).

In addition, Justice Rehnquist accused the majority of departing "from this Court's practice of strictly construing removal and similar jurisdictional statutes." *Id.* To us, this sounds like the 13th chime of the clock and correspondingly breeds a lack of confidence in the dissent's analysis. "Strict" construction of the removal statute or other jurisdictional provisions does not mean literal – and certainly not broadly literal – interpretation of the words of the statute. When cases, treatise, judges and lawyers speak of strict construction of subject matter jurisdiction and removal, they normally mean narrow construction because of the norm that federal courts are courts of limited jurisdiction, which correspondingly requires caution in ripping a matter away from a state's judicial system. The *Murphy Brothers* dissent represents in microcosm a significant problem with a purported "plain

precedent on the side of those remanding snap removals. This modern removal precedent takes an approach like the courts barring snap removal and rejects the textual literalism of the courts permitting snap removal.¹⁹⁵ It is clear from the dissent, which argued for a textually literalist approach to the issue, that the Court majority did not merely overlook the “plain meaning” tact taken by pro-snap removal courts.¹⁹⁶ Rather, *Murphy Brothers* consciously rejected this approach, jurisprudential history that has been unduly overlooked by the three circuit courts permitting snap removal.

At a minimum, *Murphy Brothers* demands at least some attention from courts addressing snap removal. But astonishingly, neither the Third Circuit’s *Stone Mansion* decision¹⁹⁷ nor the Fifth Circuit’s *Texas Brine*¹⁹⁸ decisions approving snap removal cited *Murphy Brothers*, much less discussed it or reflected on its implications. The Second Circuit’s *Gibbons* decision¹⁹⁹ favoring snap removal cited *Murphy Brothers* but only regarding the issue of the existence of state variance in service of process. *Gibbons* made no attempt to assess the Supreme Court’s statutory construction methodology.²⁰⁰

We find it more than a bit shocking that a relevant Supreme Court precedent regarding removal was essentially ignored by three circuit courts dealing for the first time (in their respective courts) with a removal issue that has divided district courts. Instead, these circuit court panels relied on their own perceived linguistic competence to the exclusion of other interpretative factors, including relevant precedent.

meaning” approach. Too often courts professing to be taking this route are unclear or even wrongheaded about what the degree of breadth and scope to be accorded the allegedly plain text.

¹⁹⁵ See also *Recognition Commc’ns, Inc. v. Am. Auto. Ass’n, Inc.*, 3:97-CV-0945-P, 1998 WL 119528, at *2 (N.D. Tex. Mar. 5, 1998); Nannery, *supra* note 7, at 550 (describing Recognition Communications as the “first reported instance of the use of the snap removal device”); Robert P. Faulkner, *The Courtesy Copy Trap: Untimely Removal From State to Federal Court*, 52 MD. L. REV. 374, 386 (1993).

¹⁹⁶ See *Murphy Bros.*, 526 U.S. at 357 (1999) (Rehnquist, C.J., dissenting, joined by Scalia & Thomas, JJ.).

¹⁹⁷ 902 F.3d 147 (3d Cir. 2018), discussed at TAN 114–126, *supra*.

¹⁹⁸ 955 F.3d 482 (5th Cir. 2020), discussed at TAN 129–134, *supra*.

¹⁹⁹ 919 F.3d 699, 706 (2d Cir. 2019), discussed at TAN 125–128, *supra*.

²⁰⁰ See *id.* at 707.

E. A Formalist Shortcoming of a Formalist Tactic: How Can an Unserved Defendant Have Standing to Remove?

Also surprising to us is that the three appellate panels that have considered the propriety of snap removal as well as most of the trial courts addressing the issue have overlooked an arguable elephant in the room – whether an unserved defendant even has standing to remove prior to service. At the risk of continued repetition, we again reproduce relevant statutory language.

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction *may be removed by the defendant or the defendants*, to the district court of the United States for the district and division embracing the place where such action is pending.²⁰¹

In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of *defendants* sued under *fictitious names* shall be *disregarded*.²⁰²

A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) [diversity jurisdiction] may not be removed if any of the parties in interest *properly joined and served as defendants* is a citizen of the state in which such action is brought.²⁰³

Although there is ample case law providing that a defendant need not be served in order to pursue removal,²⁰⁴ it is not at all clear that this result is compelled by the language of the statute. To be sure, the first statutory reference is only to “defendants” without any requirement of service. But this oblique reference is not much proof that Congress affirmatively approved of unserved defendants pursuing removal.

²⁰¹ 28 U.S.C. § 1441(a) (emphasis added).

²⁰² 28 U.S.C. § 1441(b)(1) (emphasis added).

²⁰³ 28 U.S.C. § 1441(b)(2) (emphasis added).

²⁰⁴ See, e.g., *Novak v. Bank of N.Y. Mellon Trust Co., N.A.*, 783 F.3d 910, 911 (1st Cir. 2015) (defendant may remove before service); *Delgado v. Shell Oil Co.*, 231 F.3d 165, 177 (5th Cir. 2000) (service of process not absolute prerequisite to removal). See MOORE ET AL., *supra* note 20 § 107.40 (“Nothing in the statutes requires the defendant to have been served or to have appeared in state court before such defendant may remove a case. All the circuits to have decided the issue have held that the removing defendant need not have been served.”) (footnotes omitted).

One can make an equally compelling argument that one is not really a defendant until one has been served. If that were not the case, lawyers would lack of the lengthy list of process serving anecdotes that accompany potential defendants (or actual defendants depending on one's reading of the rules) working so hard to duck service. Certainly, an unserved defendant is not at risk of an adverse judgment and owes nothing to the plaintiff. For example, a large body of default judgment jurisprudence clearly establishes that unserved or improperly served defendants are entitled to vacate such judgments.²⁰⁵ A reasonable attorney could logically conclude that until a client has been served, the client not only has no obligation to respond in any way (by answer, motion, or removal) but may even be precluded from responding until served.

The same removal statute that uses the unadorned term “defendant” in 28 U.S.C. § 1441(a) also provides in 28 U.S.C. § 1441(b)(1) that the fictitiously named “Doe” and “Roe” defendants – who are by definition unserved – shall not be considered in determining the existence of diversity jurisdiction and eligibility for removal. While one may read the existence of this special provision as proving that a general reference to a “defendant” does not mean a served defendant, one may also read this provision as treating unserved, unidentified parties not yet brought to the litigation as disqualified from participation in the litigation.

Further, the problematic “joined and served” language of 28 U.S.C. § 1441(b)(2), whatever mischief it has caused plaintiffs regarding snap removal, can be fairly read as suggesting that until a defendant is served, it is not part of the litigation and that an unserved defendant has nothing from which to seek removal.²⁰⁶

²⁰⁵ See 2 Stephen Genster, *Federal Rules of Civil Procedure, Rules and Commentary* R. 55 (2020) (reviewing jurisprudence of FED. R. CIV. P. 55 regarding default judgments and vacating default judgments); HAYDOCK ET AL., *supra* note 13 § 13.7 (same); COLEMAN ET AL., *supra* note 1 at 726–28 (same).

²⁰⁶ In a similar vein, some trial courts have imposed similar technical requirements on snap removal efforts, even in circuits that have approved snap removal generally. See, e.g., *Brown v. Teva Pharm., Inc.*, 414 F. Supp. 3d 738, 741 (E.D. Pa. 2019) (case is “removed” only after notice of the removal is filed and served in state court); *Dutton v. Ethicon, Inc.*, 423 F.Supp.3d 81, 87 (D.N.J. 2019) (same); see also John L. Schweder II & Brian H. Callaway, *Winning the Removal Race: District Courts Put Limits on ‘Snap Removal’*, PEPPER HAMILTON LLP (last visited Sept. 22, 2020), <https://www.pepperlaw.com/publications/winning-the-removal-race-district-courts-put-limits-on-snap-removal-2019-12-18>; Steve Boranian, *Removed to Federal Court? Not So Fast, Unless You're Faster!*, DRUG & DEVICE LAW BLOG (Sept. 24, 7:00AM), <https://www.druganddevicelawblog.com/2019/11/removed-to-federal-court-not-so-fast.html>.

It should not be forgotten that removal begins, of course, with a state court action. And many states provide that, unlike federal lawsuits commenced by filing,²⁰⁷ an action is commenced only by effectuated service of process upon a defendant.²⁰⁸ Where this is the case, the U.S. Supreme Court has been extremely solicitous of state requirements mandating service before an action can proceed.

In the famous *Ragan v. Merchant's Transfer & Warehouse Co.*²⁰⁹ case, the court found that the *Erie* Doctrine²¹⁰ compelled obedience to the state service requirement and found plaintiff's claim untimely even though plaintiff had commenced the action (for federal court purposes) by filing his complaint prior to the expiration of the relevant statute of limitations. Even after *Hanna v. Plumer*²¹¹ modified *Erie* to provide greater deference to on-point Federal Civil Rules, the Court in *Walker v. Armco Steel*²¹² found that Fed. R. Civ. P. 3 was not sufficiently on point and reaffirmed that state service requirements controlled, ejecting from court another plaintiff who had "beaten" the statute of limitations under Rule 3 but not according to state service requirements.

The practical takeaway from these decisions is that an unserved party is not really a defendant as the term is normally understood and is certainly not a defendant at risk of an adverse judgment anytime soon. Consequently, in cases where the party seeking snap removal is unserved, that party arguably lacks standing to seek snap removal. If this construction of the removal statute held sway, docket-lurking *Flash Boys* removal would be precluded even if permitted in cases where plaintiff (perhaps foolishly) makes actual volitional service upon a non-forum defendant prior to serving a forum defendant.

Notwithstanding that our analysis of the removal statute runs counter to a significant body of case law and commentary, there is recent precedent supporting our analysis. In *Felders v. Bairrett*, the court ruled that a defendant's Rule 68 offer of judgment was ineffective because it was made

²⁰⁷ See FED. R. CIV. P. 3.

²⁰⁸ See, e.g., MINN. R. CIV. P. 3.01. In this type of jurisdiction, snap removal is comparatively rare but not impossible. For example, a plaintiff might effect service on a non-forum defendant, who then seeks removal before service is effect upon the one or more forum defendants in the litigation.

²⁰⁹ 337 U.S. 530, 533–34 (1949).

²¹⁰ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); see COLEMAN ET AL., *supra* note 205 at 193–229 (discussing *Erie* and implications).

²¹¹ 380 U.S. 460, 470–74 (1965).

²¹² 446 U.S. 740, 752 (1980).

prior to becoming a party in the litigation.²¹³ As the court described the chronology:

Plaintiffs . . . initiated this litigation by filing their complaint on December 29, 2008 . . . Plaintiffs asserted 42 U.S.C. § 1983 claims alleging, among other things, that Defendant Bairett and other law enforcement officers violated Plaintiffs' Fourth Amendment rights during a traffic stop. In February 2009, before Plaintiffs served Bairett (or any other defendant) with a summons and the complaint, Bairett offered to settle the case by paying the driver, Felders, \$20,000 and passengers Madyun and Hansend \$2,500 each. Bairett's offer, entitled "Defendant's Rule 68 Offer of Judgment," stated, among other things, that

[i]n accordance with Rule 68, if Plaintiffs do not accept this offer in writing within ten (10) days after service [of the offer], the offer shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If Plaintiffs subsequently obtain a judgment against these Defendants that is not more favorable than this offer, Plaintiffs must pay the costs and fees that the Defendants incur after making of the offer.

Plaintiffs did not accept Bairett's offer. Two months later, in April 2009, Plaintiffs timely sent Bairett's counsel a request to waive service of the summons and complaint, which Bairett's attorney executed

Six years later, a jury found Defendant Bairett liable for unlawfully searching Plaintiffs' car and awarded the driver, Felders, \$15,000, and her two passengers, Madyun and Hansend, nominal damages of \$1 each. After the jury's verdict, Plaintiffs moved "To Strike and/or Deem Ineffective Bairett's Alleged 'Offer of Judgment.'" The district court granted that motion, ruling that Bairett's February 2009 offer to settle the case did not qualify as a Rule 68 offer to allow judgment against Bairett because he made that settlement

²¹³885 F.3d 646, 649 (10th Cir. 2018).

offer before he became a party to this litigation. Bairett appeals that decision.²¹⁴

Rule 68 provides that a “party defending against a claim” may serve an offer of judgment upon an “opposing party.” Officer Bairett was obviously defending against plaintiff’s claim but his offer of judgment was deemed ineffective because he had not been served. According to the *Bairett* Court:

[t]o be effective, a Rule 68 offer of judgment must be made after the plaintiff (1) files the complaint with the court and (2) obtains jurisdiction over the defendant in that litigation by service of the complaint on that defendant or obtaining his waiver of service.²¹⁵

The court found that eligibility to make a Rule 68 offer required more than merely being named a defendant in a complaint.²¹⁶ Quoting the Supreme Court’s *Murphy Brothers* opinion, *Bairett* took the view that “one becomes a party officially . . . only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend.”²¹⁷ “Until an entity has been served and is brought into an action formally, he can do nothing in the action – let alone “defend[] against a claim.”²¹⁸ “We conclude, then, that the language of Rule 68 dictates that a defendant must be made a party to the litigation, by service of a summons and the complaint, or waiver of service, before that defendant can make a

²¹⁴*Id.* at 649–50 (citations to record removed).

²¹⁵*Id.* at 652 (boldface removed).

²¹⁶*See id.*

²¹⁷*Id.* (quoting *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999)). *Accord*, *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1175 (10th Cir. 2009) (finding that defendants who were never served “were never made parties” to the action); *E.E.O.C. v. Am. Fed’n of State, Cnty., & Mun. Emps.*, No. 94–CV–1022, 1996 U.S. Dist. LEXIS 17536, at *5 (N.D.N.Y. Nov. 12, 1996) (settlement made before entity became party to case not considered a settlement pursuant to Rule 68 offer of judgment); *see also* *Andrews v. Joyce*, No. 2:19–CV–833–TS, 2019 U.S. Dist. LEXIS 212396, at *2 (D. Utah Dec. 9, 2019) (following *Felders v. Bairett* and holding service a requirement for exercise of judicial power over a defendant).

²¹⁸*Bairett*, 885 F.3d at 653 (brackets the court’s); *see also* 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1093 at 676 (2015) (defendant not required to answer and defendant until service of process has been made on defendant); Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 116 (1986); 13 MOORE ET AL., § 68.03 (citing *Bairett* majority and dissent but no other authority on the issue of whether an unserved defendant may make Rule 68 effective offer).

valid Rule 68 offer to allow judgment against him [and potentially shift post-offer costs to the opposing party].²¹⁹

The Tenth Circuit's view – that a named defendant in a filed case must be served before availing itself of procedural options established by the Federal Rules of Civil Procedure logically applies to procedural options (such as removal) established by statute.²²⁰ Although one may reasonably debate the decision in *Bairrett* (as did the dissent²²¹), its rationale logically requires defendants to be made a party to a case via service of process before it may seek removal. If applied to snap removal, the logic of *Bairrett* would forbid the practice.

We favor the *Bairrett* majority's approach, albeit with acknowledgment that service may not be required as a condition of eligibility for use of all procedural devices. Some procedural options may be unduly devalued if they are only permitted to be used after service. But Rule 68 is not one of them. When invoking the Rule and making an offer of judgment, the defending offeror is establishing a framework whereby the coercive power of the court may later be used to impose penalties on an opposing party that rejected the Rule 68 settlement offer. In order to enlist the court's coercive power, the party seeking its benefit should itself be subject to that coercive power.

Removal provides a similar situation in which the right to remove is not unduly undermined by limiting the right only to those defendants that have been served. By filing a petition of removal, the removing entity is invoking the coercive power of the national judicial system to literally rip a case away from a state court. Although the practice is long standing, it is at least in tension with traditional American federalism in that it triggers federal court power over a co-ordinate judicial system. Such power should be subject to invocation only by a party that has been served and become subject to the judicial power of the state system that is to be stripped of a case on its docket.

²¹⁹*Bairrett*, 885 F.3d at 656. A dissenting judge argued that the majority's construction of Rule 68 was inconsistent with the concept of a "party" to litigation in other contexts such as Fed. R. Civ. P. 12 where defendants argue that a court lacks subject matter or personal jurisdiction over the dispute or the defendant. The dissent further contended that Officer Bairrett was as a practical matter a defendant party once the complaint was filed. *See* 885 F.3d at 656–59. (Tymkovich, C.J., dissenting) ("I would thus hold a named defendant has the power to offer judgment under Rule 68 from the moment the complaint is filed"). Although Judge Tymkovich's position is consistent with permitting pre-service snap removal it is, of course, a dissenting view.

²²⁰*Bairrett*, 885 F.3d at 652 (10th Cir. 2018).

²²¹*Id.* at 656 (Tymkovich, C.J., dissenting).

At the very least, cases like *Bairrett* suggest that courts permitting snap removal have been remiss in not at least examining the question of how an entity that is not even officially part of a case can eject that case from a state judicial system. Becoming part of the case through service should be the “price of admission” for seeking removal. Such a requirement would drastically reduce opportunities for snap removal – a result that emphasizes the degree to which snap removal is a fissure in the system occasioned by unintended consequences of drafting and insufficient judicial scrutiny more than it is an unambiguous command from a Congress that adjourned 70 years ago.

A “short way” with snap removal²²² that would ameliorate some of its worst excesses would be to simply prohibit its use by an unserved defendant. Although there would remain some cases where a plaintiff seeking to sue in state court errs by serving non-forum defendants ahead of forum defendants, construction of the removal statute akin to the *Felders v. Bairrett* limit on use of Rule 68 would prevent the most egregious instances of snap removal gamesmanship.

IV. RESTORING CONGRESSIONAL INTENT AND LITIGANT BALANCE THROUGH MODEST REVISION OF THE REMOVAL STATUTE

A. *Our Proposal*

Apt use of removal could be restored through a relatively simple amendment to 28 U.S.C. § 1441(b)(2) that merely deletes the “and served” language from the statute, thereby eliminating the opportunity for opportunism by forum state defendants and co-defendants who can file removal petitions prior to service.

Although there currently exists precedent permitting dismissal of a “sham” defendant, including sanctions for parties using the tactic, defendants contend the practice is not sufficiently policed.²²³ To accommodate this

²²² See Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 388 (1942). We use the phrase with irony as Professor Radin was a pronounced textualist suspicious of reliance on legislative history. We disagree. In addition, the case for considering legislative history and context has gotten stronger over the years as legislatures have become subject to increasing scrutiny, with their work and its background and context increasingly memorialized in a variety of official and secondary sources.

²²³ See TAN 77–78, *supra* (discussing fraudulent joinder doctrine).

legitimate concern of defendants, we propose that § 1441(b)(2) be amended as follows:

A civil action otherwise removable solely on the basis of the jurisdiction under Section 1332(a) of this title may not be removed if any of the parties in interest properly joined ~~and served~~ as defendants is a citizen of the state in which such action is brought. If no defendant who is a citizen of the forum state is served within 120 days of commencement of the action, removal may be sought within the time period provided by Section 1446.

This relatively straightforward change would eliminate *Flash Boys* or race-to-the-courthouse snap removals as well as forum defendant removal based on trickery (e.g., refusing to accept service by mail as in *Stone Mansion*) or opportunistically taking advantage of insufficiently industrious plaintiff counsel.

The logical intuition that a defendant unserved after four months is probably not an important defendant (and certainly not a target defendant) is made a controlling presumption through use of a hard-and-fast 120-day time limit for service on the forum state defendant. This time period is long enough to comfortably account for service delays occasioned by state rules or custom, the vast bulk of logistical problems that may delay service, and the practical abilities of defendants to duck service of process.

Critics may be concerned that this fix could potentially allow a partial return to the status quo that prompted the 1948 Congress to add the service language to the statute – the risk that a plaintiff would name a forum state citizen as a defendant solely to defeat removal with no intent of actually pursuing relief against that defendant. We think this risk is effectively eliminated by the additional language we propose adding to Section 1441(b)(2), which requires service on a forum defendant within 120 days if removal is to remain barred for the defendants. In this manner, opportunities for gamesmanship or sharp practices by either plaintiffs or defendants is minimized.

B. Other Proposals of Note

1. The Hellman, et al. Correction by Addition

Other proposals for eliminating snap removal have been advanced. The most publicized, although capable of alleviating the problem, comes with

some cost of added complexity and required litigation activity for those seeking to avoid snap removal.

In a 2016 article noting the problems posed by snap removal, a group of prominent law professors critical of the tactic proposed amendment to the removal statute that would (in their words) “neutralize” the tactic of snap removal²²⁴ by arming plaintiffs with the following countermeasure that would be enacted as a new subsection to 28 U.S.C. § 1447²²⁵:

(f) Removal before service on forum defendant

If—

- (1) a civil action was removed solely on the basis of the jurisdiction under section 1332(a) of this title, and*
- (2) at the time of removal, one or more parties in interest properly joined as defendants were citizens of the state in which such action was brought but had not been served, but*
- (3) after removal was effected, any such defendant was properly served within the time for service of process allowed by the Federal Rules of Civil Procedure, the court, upon motion filed within 30 days after such service, shall remand the action to the state court from which it was removed.²²⁶*

Professor Hellman, when subsequently testifying at a congressional subcommittee hearing, presented a modified version of this “snapback” proposal that reads as follows:

²²⁴See Arthur Hellman et. al., *supra* note 68.

²²⁵Professor Hellman has advocated the group’s proposal in testimony before the House Judiciary Committee subcommittee on courts, intellectual property, and the Internet. *See Examining the Use of “Snap” Removals to Circumvent the Forum Defendant Rule: Hearing Before the Subcomm. On Cts., Intell. Prop., and the Internet*, 116th Cong. 2 (2019) (statement of Arthur D. Hellman, Professor of Law Emeritus, University of Pittsburgh School of Law). Coincidentally, Professor Hellman, an obvious critic of snap removal in seeking to legislatively curtail it, was significantly involved in the 2011 Amendments to the removal statute (*see id.* at 2–3) something we regard as further evidence that the 2011 changes should not be read as an implicit ratification of snap removal.

²²⁶Hellman et al., *supra* note 68, at 110.

(f) Removal before service on forum defendant

(1) This subsection shall apply to any case in which

(A) a civil action was removed solely on the basis of the jurisdiction under section 1332(a) of this title, and

(B) at the time of removal, one or more parties in interest properly joined as defendants were citizens of the state in which such action was brought, but no such defendant had been properly served.

(2) The court shall remand the civil action described in paragraph (1) to the state court from which it was removed if –

(A) Within 30 days after the filing of the notice of removal under section 1446(a) or within the time specified by state law for service of process, whichever is shorter, a defendant described in subparagraph (1)(B) is properly served in the manner prescribed by state law, and

(B) A motion to remand is made in accordance with, and within the time specified by, the first sentence of subsection (c).²²⁷

According to Professor Hellman and his co-authors, enactment of their proposal will create a situation where “the incidence of snap removal can be expected to diminish sharply, as defendants come to recognize that the strategy will no longer enable them to circumvent the forum-defendant

²²⁷ See Arthur D. Hellman, *Snapback, Version 2.0: The Best Solution to the Problem of Snap Removal*, Hearing Before the House Committee on the Judiciary Subcommittee on Courts, Intellectual Property and the Internet (Nov. 14, 2019, Univ. of Pittsburgh School of Law Legal Studies Research Paper Series, Working Paper No. 2020-01 (Jan. 2020)).

rule.”²²⁸ In addition, the proposal offers a side benefit in that the “upon motion” requirement clarifies and confirms that the forum defendant rule is not jurisdictional, and is therefore waivable and not to be raised by the court *sua sponte*.²²⁹ Finally, by leaving the existing text of the relevant removal statutes unchanged, their solution-by-addition likely minimizes the risk of unintended consequences.

We see the Hellman et al. proposal as having several problems. First, one might worry that the proposal could have the undesired effect of entrenching snap removal into the removal scheme. The very presence of proposed Section 1447(f) might be seen as strengthening the case for the plain-language interpretation of Section 1441(b)(2) that gives rise to snap removal in the first place.

Second, there could be problems in cases where the plaintiff is unable to serve the forum defendant within the period set by Fed. R. Civ. P. 4(m) (including as extended by the court). It is not immediately clear what would happen then. Presumably the federal court would dismiss the unserved defendant without prejudice.²³⁰ But that would not seem to trigger the snapback countermeasure. Nor would the snapback countermeasure appear to be triggered if the plaintiff were to re-file against the forum defendant back in state court. In that event, the scheme would result in the original action being split between the state and federal courts.

Third, one might wonder whether defendants will behave as predicted and stop attempting to invoke snap removal. The tactic will remain effective whenever the snapback countermeasure is not deployed. Might defendants just continue to give it a try? Not all plaintiffs’ attorneys will know of the countermeasure, and some might fail to deploy it properly and on time. There would seem to be little downside for the defendant. Even if the case is “snapped back” to state court, the defendant loses nothing and may gain in some way from the added delay.

Also, because the proposal does not disallow snap removal (and in some ways may be seen as enshrining it), it would seem that defendants could claim an objectively reasonable basis for snap removal and thereby stay clear of any fee-shifting consequences under Section 1447(c).²³¹ If defendants adopt

²²⁸Hellman et al., *supra* note 68 at 108–110.

²²⁹Hellman et al., *supra* note 68 at 108–110.

²³⁰FED. R. CIV. P. 4(m) (any dismissal for failure to timely serve must be without prejudice).

²³¹*See* Martin v. Franklin Cap. Corp., 546 U.S. 132, 132 (2005) (fee-shifting available under Section 1447(c) only if the defendant lacked an objectively reasonable basis for removing).

a “might as well try it” attitude, then plaintiffs and courts will still need to divert resources to achieve the proposal’s intended goal.

Fourth, the snapback countermeasure makes the already long and complicated statutory scheme for removal even longer and more complicated. This reflects a longstanding trend. The removal statutes are filled with complicated moving parts added over the years in reaction to games and strategies developed by enterprising lawyers. Adding yet one more moving part can potentially correct the problems presented by snap removal but does so at the accompanying cost of still more length and complexity in the removal statute.

2. The AAJ Proposed Change to Rule 4 and Service of Process

The American Association for Justice (AAJ) (formerly ATLA – the American Trial Lawyers Association)²³² has suggested eliminating snap removal not through an amendment to the removal statutes but to Fed. R. Civ. P. 4. In particular the AAJ proposal would add a new subsection (6) to Rule 4(d) that reads:

(6) Constructive Waiver. When any defendant has actual notice that a lawsuit has been filed against it, all defendants to the lawsuit will be deemed to have waived service of the summons, provided that formal service takes place within thirty (30) days of any action taken by any defendant so that all defendants have formal notice of the lawsuit and it shall be deemed that such service will relate back to the date of actional notice to any defendant.²³³

The AAJ proposal would in essence substitute knowledge of a lawsuit for formal service, at least as regards removal so long as service is effectuated within 30 days. Although aimed at snap removal, this constructive date of service-via-notice/knowledge would presumably affect other deadlines in civil litigation – which is one reason it is not our favored solution. Altering the effective date of service may have unintended consequences that are too difficult to calculate in advance. Even if the ripple effects of the AAJ change

²³² As is generally known, the AAJ is “the world’s largest plaintiff trial bar” with members that “primarily represented plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions.” See Letter from AAJ Pres. Bruce Stern to Rebecca A. Womeldorf, Sec., Comm. on Rules of Pract. and Proc., Admin. Office of the U.S. Cts. at 1 (August 30, 2019).

²³³ *Id.* at 3.

could be calculated with precision, we are reluctant to support a change in procedural law (either rule or statute)²³⁴ that goes beyond what is needed to address the perceived problem of snap removal. The AAJ nonetheless argues that:

[t]he addition of a constructive waiver Section to Rule 4 would simply provide that when any one defendant has actual notice that a lawsuit against it has been filed, all defendants will be deemed to have waived service of the summons so that service will relate back to the date of actual notice. Thus, defendants have actual notice who are trolling state filings would no longer be allowed to snap remove the case to federal court under § 1441(b)(2), and removal proceedings would instead be carried out as intended by [the forum defendant rule, so long as service takes place within 30 days of commencement of the action].²³⁵

Section 1441(b)(2) was enacted so that plaintiffs do not name, and then never serve, an in-state defendant in order to

²³⁴There are, of course, technical and practical differences between amending a Rule of Civil Procedure and amending a statute. The latter requires passage by the House and Senate with Presidential signature or congressional override of a veto. With the strong anticipated opposition of the defense bar and commercial defendants such as drug companies, passage of anti-snap removal legislation appears a hard lift in the current political climate.

Amendment of a civil rule avoids some but not all of the legislative concerns, which may be part of its attraction to the AAJ. Pursuant to the 28 U.S.C. § 2072 (The Rules Enabling Act), an amendment is respectively promulgated by the Civil Rules Committee, the Standing Committee on Rules of Practice and Procedure, and the U.S. Supreme Court, whereupon the new or revised rule becomes effective in roughly six months unless Congress intervenes.

In practice, however, this path may be only slightly less daunting than amending the removal statute. Many judges, at least half the practicing legal profession (the portion representing plaintiffs) and, insofar as we can determine, all law professors with an opinion oppose snap removal. But conversely, defense lawyers and roughly half the judges addressing the issue, including all nine federal circuit judges that have weighed in, have “approved” snap removal.

We used the work approved advisedly in that judges sustaining snap removal have done so due to a professed compulsion commanded by the “and served” language of Section 1441(b)(2). While these judges have not found literal application of the language to create an “absurd” result, this is not the same as approval of snap removal. So far as we can determine, no current Supreme Court Justice has expressed an opinion regarding snap removal.

It thus seems to us that the political barriers to change regarding snap removal are nearly as high when pursuing a rule change as if pursuing statutory amendment.

²³⁵Stern, *supra* note 229, at 3.

avoid removal, and the proposed rule's requirement of formal service within 30 days would satisfy this concern. If services does not occur within 30 days, then § 1441(b)(2) can take effect.²³⁶

Perhaps unsurprisingly, the AAJ proposal was specifically opposed by Lawyers for Civil Justice ("LCJ"), a group representing defendant interests.²³⁷ In addition to defending snap removal on the merits based on the language of Section 1441(b)(2) and in light of the Second and Third Circuit decisions approving the tactic, LCJ argued that using a revision to Fed. R. Civ. P. 4 to negate a statute was improper and violated the Enabling Act requirement that Rules changes not "abridge, enlarge or modify any substantive right" of litigants.²³⁸

3. Treating the Forum Defendant Rule as Jurisdictional

Also suggested is amendment to the Judicial Code that makes clear that the forum defendant rule is jurisdictional and therefore cannot be circumvented based on lack of service on the forum defendant or the relevant timing of removal vs. service. Prior to the 1948 Amendment the removal statute, the Judiciary Act of 1789

²³⁶*Id.* at 3–4 (footnote omitted).

²³⁷Although the LCJ letter, unlike the AAJ letter, does not specifically identify the organization's ideological and jurisprudential orientation, the LCJ letterhead gives more than a little clue as to the group's orientation in that it reflects a Board of Directors with representatives of Ford Motor Co., Boston Scientific, Merck & Co., Pfizer, GlaxoSmithKline, Johnson & Johnson, Eli Lilly & Co., Medtronic, Microsoft, Shell Oil, Exxon Mobil, State Farm, and several prominent defense firms such as Bowman and Brooke, Gordon & Rees, and Goldberg Segalla. *See* Letter from LCJ President Mike Weston to Rebecca A. Womeldorf at 1 (October 15, 2019). Similarly, the organization's website describes LCJ members as "preeminent corporate and defense counsel" that are concerned about "[t]he soaring cost of litigation." *See* LAWS. FOR CIV. JUST., <https://www.lfcj.com/about-us.html> (last visited at Sept. 25, 2020). A closer look at the Group's substantive concerns reflects concern that Multidistrict Litigation proceedings "have become one-sided forums for settlement pressure that lack the protections of the" Federal Civil Rules, that Fed. R. Civ. P. 30(b)(6) imposes undue burdens on corporate defendants and their representatives, that discovery directed at defendants is unduly burdensome, and that courts are lax in admitting expert testimony proffered by plaintiffs. *Id.*

²³⁸*See* Weston, *supra* note 237, at 2. In addition, LCJ argued that an imposed waiver of service effective retroactively violated the due process rights of defendants and argued that removal was not particularly disadvantageous to plaintiffs because the substantive law to be applied would not change based on the forum.

achieved its preferred result by declining to extend removal jurisdiction to suits initiated against forum defendants in state court. Current law, by contrast, has been interpreted as a non-jurisdictional barrier to the removal of suits naming forum defendants. By framing the barrier to removal of cases involving forum defendants in jurisdictional terms, Congress could presumably end the practice of snap removal. The forum defendant rule would thus resemble the jurisdictional rule of complete diversity, which operates as a barrier to removal that snap removal cannot overcome.²³⁹

To date, however, we have not seen this assessment set forth in proposed legislation or suggested language amending the removal statute.

4. The Clermont-Pfander Fix

In testimony before a U.S. House Judiciary Subcommittee, Professor James Pfander outlined a proposal he deemed the “Clermont Fix” as it arose out of correspondence between the two scholars.²⁴⁰ Under this proposal, which accords with our view that a defendant does not have standing to remove until it has actually been brought into the action via service of process, 28 U.S.C. § 1446 would be amended to make removal available only to a “properly served defendant” rather than merely a “defendant,” as the current statute reads. The revised Section 1446(a) would state:

- (a) **Generally** – a properly served defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending

²³⁹See *Examining the Use of “Snap” Removals to Circumvent the Forum Defendant Rule: Hearing Before the Subcomm. On Cts., Intell. Prop., and the Internet*, 116th Cong. 2 (2019) (statement of James E. Pfander, Owen L. Coon Professor of Law, Northwestern University Pritzker School of Law) (footnote omitted) (further noting that “[m]ost courts take the position that the forum defendant rule “is a mandatory, but non-jurisdictional, case processing rule.”) *Id.* at 10, n. 18, citing *Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 152 (3d Cir. 2018); *Morris v. Nuzzo*, 718 F.3d 660, 665 (7th Cir. 2015); *In re 1994 Exxon Chem. Fire*, 558 F.3d 378 (5th Cir. 2009) and also noting, however, that “[s]ome courts have viewed the forum-defendant rule as jurisdictional for some purposes” (citing *Horton v. Conklin*, 431 F.3d 602 (8th Cir. 2006), which found the forum defendant rule jurisdictional in that appellate review of a remand order was precluded).

²⁴⁰See Pfander, *supra* note 239, at 11.

a notice of removal . . . containing a short and plain statement of the grounds for removal, together with a copy of the process, pleadings, and orders served upon such defendant or defendants in such action.

Professor Clermont notes that prior to the advent of the snap removal tactic, it was “pretty much accepted law” that if Plaintiff served a non-forum Defendant first, this Defendant “could remove despite” the naming of a forum defendant in the complaint but that Plaintiff had “the protective ability” to serve the forum Defendant first in order to block removal.²⁴¹ He characterizes such an amendment as one that

[w]ould hardly be radical. The removal statutes seem to assume that the removing defendant is already in the action. It is pre-service removal that makes snap removal so controversial. Pre-service removal also enables defendants to avoid the all-defendants-must-consent rule in [28 U.S.C. § 1446(b)(2)(a)].²⁴²

In his testimony before a House Judiciary Committee Subcommittee, Professor Pfander endorsed this approach, implicitly agreeing with this article’s view that decisions permitting snap removal are inconsistent with U.S. Supreme Court precedent.²⁴³ He noted that:

[m]any aspects of the Clermont fix fit well with current law. For starters, removal law tends to assume that the parties effecting removal have been served; indeed, the Supreme Court made this assumption explicit, holding that the 30-day removal clock begins when defendants have been formally served with the complaint. The holding rejected the removal-defeating strategies of plaintiffs who were acting to shorten the time for removal by providing defendants with pre-service courtesy copies of the complaint. The Clermont fix would accomplish something similar, deferring removal until after the removing defendant has been served.

²⁴¹Memorandum from Professor Clermont to Professor Pfander, quoted in Pfander, *supra* note 239, at 11.

²⁴²*Id.*

²⁴³*See* TAN 183–193, *supra* (discussing *Murphy Bros., Inc. v. Michetti Pipe Stringing*, 526 U.S. 344 (1999)).

In addition, the Clermont fix would preserve much of current law while allowing the plaintiff to exercise control of the timing of service and thereby preterm snap removal by serving the forum defendant first. If no removal can be had until service on at least one defendant has been perfected, then the plaintiff can make a strategic choice. Current law already incorporates such choices on the part of plaintiffs, giving all defendants a full 30 days to remove after service, but enabling plaintiffs to shorten the total time for removal by serving all defendants at roughly the same time. See 28 U.S.C. § 1446(b)(2)(B)–(C). While further study may be warranted, it appears to me at present that the Clermont fix provides the cleanest solution to the problem of snap removal.²⁴⁴

C. A Preference for Simplicity and Prevention in Restoring Fairness and Congressional Intent and Purpose

The Hellman et al. proposal discussed above has been characterized as a curative or corrective approach to the snap removal problem in that it does not bar snap removal but provides a means by which a removed case involving a forum defendant may be snapped back to federal court.

By contrast, the other proposed means of addressing snap removal are preventive in that they would all stop removal in cases involving a forum defendant. The AAJ Rule 4 proposal deems service effective upon and retroactive to the date of notice. The jurisdictional proposal makes removal of a case involving a forum defendant a nullity. The Clermont/Pfander proposal precludes removal unless the defendant has been served, which in turn effectively precludes snap removal unless the plaintiff provides defendants with the opportunity by initially serving a non-forum defendant.²⁴⁵ Our proposed correction-by-subtraction that excises the “and served” language from the statute also prevents snap removal from taking place unless plaintiff does not effect service within 120 days.

²⁴⁴Pfander, *supra* note 239, at 11–12, n.21, citing *Murphy Bros.*, 526 U.S. at 356 (1999) and summarizing it as “dating the time for removal from the date of service of process, rather than from the earlier date on which the plaintiff sent the defendant a courtesy copy of the complaint.”

²⁴⁵And to perhaps point out the obvious, snap removal is precluded in any case where there is only one defendant that is a citizen of the forum.

All of the anti-snap removal proposals have merit and would improve upon the current doleful situation that seems to grow increasingly worse at the appellate level. But like Professor Pfander, we think that in the context of snap removal, “an ounce of prevention is worth a pound of cure.”²⁴⁶ Consequently, we have concerns that the Hellman et al. proposal is not optimal in that it at least partially institutionalizes and validates snap removal, something we find conceptually troubling in that the practice should have been uniformly rejected had all courts adopted the correct characterization and analysis of the practice.

To be sure, the Hellman et al. proposal provides a ready means of undoing snap removal that, if effectively implemented by plaintiffs, would probably lead to the withering away of the tactic or at least make it inconsequential. But even this best-case outcome has the effect of not only making the removal process more complex and logistically cumbersome but also lengthening an already long and complex removal law.

It also creates a new opportunity for gamesmanship. A defendant may, pursuant to the Helman et al. revision, effect snap removal and then seek to evade service of process long enough to prevent plaintiff’s restoration of the case to federal court. In addition, the prospect of the service-dodging defendant could result in trial courts:

[T]empted to proceed with the parties then before the court as the plaintiff seeks to serve the forum defendant. Or district courts might put the matter on hold pending some resolution of the service question. Either way, the plaintiff’s ability to secure an adjudication of the merits in state court will have been thwarted or delayed.

What’s more, the proposed statute could be read to establish a mid-course switch from state to federal rules for the determination of the timing and legality of service of process on forum defendants.²⁴⁷

²⁴⁶ See Pfander, *supra* note 239, at 7.

²⁴⁷ See Pfander, *supra* note 239, at 8. Elaborating, Professor Pfander explained that:

[u]nder current law, plaintiffs filing in state court effect service of process on defendants in accordance with state law. If some properly served (or docket-monitoring) defendants agree to remove, federal law specifies the rule that governs post-removal service of process on unserved defendants. Section 1448 provides that in cases in which service has not been perfected prior to removal, service may be “completed” (as specified in state

The AAJ “notice-deemed-service” amendment to Rule 4 has the virtue of preventing snap removal but does so through the indirect means of amending a Civil Rule rather than the removal statute containing the problematic language that is the source of the problem. In addition, as discussed above, it has the potential to lead to unintended consequences and make for an overbroad solution to the snap removal problem that could needlessly create additional problems.

Treating the forum defendant rule as jurisdictional in the manner of the complete diversity rule would work if it could be aptly operationalized. But this method of preventing snap removal would, absent additional provisions, re-open the door to plaintiffs naming forum state defendants merely to thwart removal rather than for the process or prosecuting legitimate claims against the forum defendant. The 1948 Congress sought to close that door, a sentiment likely shared by modern legislators.

The Clermont-Pfander proposal holds promise and like our preferred correction of the snap removal problem, is relatively modest and easy to effectuate. Clermont & Pfander seek only to add two words to 28 U.S.C. § 1446, while our prime objective is deleting two words from Section 1441(b)(2). Our proposal then has the extra textual burden of adding language that would require service of the forum state defendant within 120 days in order to prevent delayed removal. No similar provision appears to be part of the Clermont-Pfander approach.

In this case, however, we think the added verbiage and service requirement is worth the modest increase in burdens and complexity in that it increases the likelihood that a forum state defendant is genuinely joined to face claims on the merits rather than for procedural maneuvering. While Clermont-Pfander does not encourage such maneuvering and does require service of the forum state defendant in order to thwart snap removal, it holds open more prospect than we would like for snap removal facilitated by ministerial error. For example, a less skilled attorney may bungle into serving a non-forum defendant ahead of service on the forum defendant. Or the

rules) or new process “issued in the same manner as in case originally filed” in federal court. 28 U.S.C. § 1448. The proposed statute might be read to eliminate the state law “completion” option and compel new process to issue in compliance with federal rules. In any case, uncertainty as to the operation of new Section 1447(f) and current Section 1448 might occasion further litigation.

process servers retained by counsel may mistakenly fail to serve the forum defendant first.

Alternatively, the burdens of service on a forum defendant may be sufficiently vexing (perhaps because of intentional misconduct by the forum defendant) that easier and more immediate service on a non-forum defendant gets effected, inadvertently stripping the plaintiff of the protections of the forum defendant rule. By contrast, under our proposal, snap removal is precluded for 120 days, which should be ample time for plaintiffs to deal with service difficulties surrounding forum and non-forum defendants.

V. CONCLUSION

Treatment of snap removal tactics has been something less than the judiciary's finest hour, particularly at the appellate level. Too many judges have permitted use of this problematic procedural loophole. Congress can and should correct this emerging wrong turn in the law.