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SWIFT REMOVAL

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INTRODUCTION

In its landmark case, *Erie Railroad Co. v. Tompkins*,¹ the Supreme Court overruled its prior decision in *Swift v. Tyson*.² *Swift*'s holding was an imperfect judge-made solution designed in part to help encourage the growth of nascent national corporations.³ The *Swift* Court's reasoning was based upon

¹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

² *Swift v. Tyson*, 41 U.S. 1 (1842).

³ See EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 51-52 (2000); Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in *CIVIL PROCEDURE STORIES* 23-27 (Kevin M. Clermont ed., 2d ed. 2004).

neutral principles that purportedly compelled the Justices to decide the case as they did.⁴

The decision contributed to several socio-legal developments. It expanded the reach of the federal judiciary at the expense of the states and infringed on their jurisdiction. Some read *Swift* as providing authority to federal courts in cases that were previously squarely within state court jurisdiction.⁵ Further, *Swift* presaged the inequality of the Gilded Age; the decision at once elevated the rights of corporations over individual litigants, immunizing them from liability, and preserving their disproportionate power in society. How could such consequences result from an unbiased, plain meaning reading of a statute?⁶ And why, more than a century later, would the Supreme Court overrule itself in *Erie*?

Snap removal typifies the issues that animated the Court's about-face in *Erie*. Snap removal is a litigation device used to remove a case that names at least one forum defendant from state to federal court based on diversity.⁷ The device turns on a plain meaning construction of § 1441(b)(2)—the forum defendant rule—which bars a case founded entirely on diversity jurisdiction from removal if any defendant “properly joined and served” is a citizen of the forum state.⁸ Those in favor of the device argue Congress

⁴ See, e.g., Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379, 392-95 (2016); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 428-29 (1995) (discussing *Swift* as an exemplar of one of the leading formalist judicial modalities at the time).

⁵ See William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 909 n.17 (1988); Robert R. Gasaway & Ashley C. Parrish, *In Praise of Erie—And Its Eventual Demise*, 10 J.L. ECON. & POL'Y 225, 234 (2013); Green, *supra* note 4, at 394; Purcell, *The Story of Erie*, *supra* note 3, at 23-27.

⁶ See Gasaway & Parrish, *supra* note 5, at 246-47; Stephen J. McHugh, *The Integration of State Private Law in Federalized Fields of Law: The Case for Federal Common Law*, 74 DENV. U. L. REV. 207, 232 (1996).

⁷ Though some commentators draw a distinction between “pre-service” removal and snap removal, they are in the minority. See, e.g., Saurabh Vishnubhakat, *Pre-Service Removal in the Forum Defendant's Arsenal*, 47 GONZ. L. REV. 147, 148 (2011). This Article thus proceeds with the majority that there is no material distinction between pre-service removal and snap removal. Accordingly, unless otherwise noted, I use the terms interchangeably in reference to the same device.

⁸ 28 U.S.C. § 1441(b)(2); see Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 315 (2019). As will be discussed in more detail, the basis for the forum defendant rule is bias—i.e., the presence of a forum defendant in an action

meant for the forum defendant rule to bar removal only when a party has been served. Thus, if a party is named in a suit filed in state court, but they have not yet been served, § 1441(b)(2) does not bar removal.

While the tactic has arguably existed for several decades,⁹ recent scholarship suggests it has become more prevalent within the past eight-to-ten years.¹⁰ Its use has rightly prompted increased attention from scholars and policymakers. Among other things, the debate turns primarily on whether snap removal warrants Congress's limited attention. To the extent the conversation includes any empirical evidence, it typically cites data from a single study covering snap removals from nearly a decade ago. The data show a small number of cases in which primarily pharmaceutical companies removed products liabilities claims.¹¹ The study has largely been used to support the argument that snap removal is a niche litigation tactic that accounts for a relatively insignificant number of cases that do not necessitate congressional action.¹² Its findings were an important contribution, but without additional context it is difficult to determine how often and under what circumstances the tactic is being used today.

This Article seeks to provide that context and correct premises within the debate by providing an updated dataset. The findings suggest, among other things, that snap removal is used at least twice as often as the prior study found. Further, it shows that the device is used primarily by in-state defendants and

“should obviate the need for . . . defendants to invoke a federal forum’s protection from local bias.” *Id.*

⁹ See, e.g., *Pecherski v. Gen. Motors Corp.*, 487 F. Supp. 23, 25 (E.D. Mo. 1980), *vacated*, 636 F.2d 1156 (8th Cir. 1981); *Robertson v. Nye*, 275 F. Supp. 497, 497 n.1 (W.D. Okla. 1967) (considering the viability of snap removal in dicta).

¹⁰ See, e.g., Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U. CIN. L. REV. 541 (2018).

¹¹ See *id.* at 561-63.

¹² See, e.g., *Examining the Use of “Snap” Removals to Circumvent the Forum Defendant Rule: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet*, 115th Cong., 2, 8 (2019) (Testimony of Kaspar J. Stoffelmayr) (citing Nannery’s study and referring to snap removal as “uncommon” and “rare”). *But see Examining the Use of “Snap” Removals to Circumvent the Forum Defendant Rule: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet*, 115th Cong. 2 (2019) (Testimony of Ellen Relkin) (discussing opinion volume and stating that “snap removals are *surging*” (emphasis added)).

almost exclusively by corporations. Taken together, the findings suggest that snap removal is like a new age *Swift* doctrine. The device expands federal courts' reach and provides defendants with the means to "get away"¹³ from state courts by granting a federal forum where, but for the device, one would otherwise be unavailable.¹⁴ It is a practice that, like general law, creates substantial incentives for defendants to engage in the gamesmanship and forum manipulation that the Court rejected in *Erie*. Moreover, the practice increases existing asymmetries between litigants with economic resources and legal sophistication and those without. As the century following *Swift* showed, similar factors contributed to toxic feedback loops between consolidation of resources and social and political inequality.¹⁵ Ultimately, the disparity *Swift* fostered led to its rejection in *Erie* as bad policy.

This Article argues that *Swift* serves as a cautionary tale of how seemingly apolitical, neutral principles that guide a court to the seemingly correct result can nevertheless produce an asymmetrical, biased outcome. Further, it provides an empirical examination that updates the current understanding of snap removal by correcting existing premises. Finally, it advances a solution that accounts for the political economy surrounding legislative action, and shows that existing case law compels courts intervene, as they did in *Erie*. To that end, it proceeds in four parts. Part I examines how snap removal has evolved from a somewhat uncommon tactic, used in relatively narrow instances, to its current form, which I refer to as *Swift* removal. Part II discusses my empirical research and findings. Part III examines

¹³ *Serafini v. Sw. Airlines Co.*, No. 3:20-CV-00712-X, 2020 WL 5370472, at *1 (N.D. Tex. Sept. 8, 2020) (describing snap removal).

¹⁴ *See, e.g., Castro v. Colgate-Palmolive Co.*, No. 19-CV-279, 2020 WL 2059741, at *1 (W.D.N.Y. Apr. 29, 2020) ("[Defendant] filed this immediate, or 'snap' removal, to avoid what would have been a prohibition on removal had the[y] . . . been served."); Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 60 (2008) ("[W]ith respect to a limited national government, removal broadens the scope of federal authority at the expense of state courts of competent jurisdiction and the plaintiff's choice of forum.").

¹⁵ *See* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1809 (2020) ("[T]he defining character of structural inequality [is] that it persists independently of individually disparate treatment.").

the *Swift* doctrine, how the Court came to overrule it in *Erie*, and the lessons we can take from the cases to address snap removal. Part IV presents what a judicial intervention in snap removal could look like.

I. SNAP REMOVAL AND THE FORUM DEFENDANT RULE

On April 8, 1997, public relations and advertising firm Recognition Communications, Inc. (RCI) filed suit in Texas state court naming multiple defendants, including the American Automobile Association, Inc. (AAA), with whom RCI had contracted to provide advertising services.¹⁶ While RCI was a citizen of Nevada and Kansas, and AAA was a citizen of Connecticut and Florida, one of the other defendants was a citizen of Texas.¹⁷ Subsequent to filing suit—but before serving process—RCI provided defendants with courtesy copies of the complaint to spur “a quick and inexpensive resolution” to the parties’ disagreement.¹⁸ Just two weeks later, however, AAA filed a notice of removal, seeking a federal forum under diversity jurisdiction, and RCI moved to remand.¹⁹ In opposition, AAA argued principally that, because the only in-state defendant named in the suit was not yet *served*, its citizenship was irrelevant for the purposes of removal.²⁰ Consequently, because § 1441(b) was not implicated, there were no obstacles for AAA to remove. Although the court found the argument “interesting,” it was not ultimately persuaded.²¹

Recognition Communications has several features that help demonstrate how the tactic has evolved since 1997. First, the court granted RCI’s motion to remand, thus rejecting AAA’s snap removal.²² As already discussed, my findings suggest remand has become less common when a case is snap removed. Second, the parties were both corporations. Unlike in *Recognition*

¹⁶ *Recognition Commc’ns, Inc. v. Am. Auto. Ass’n, Inc.*, No. Civ.A. 3:97-CV-0945-P, 1998 WL 119528, at *4 (N.D. Tex. Mar. 5, 1998).

¹⁷ *Id.* at *1.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at *2.

²¹ *Id.*

²² *Id.* at *6.

Communications, my findings suggest snap removal is used almost entirely by corporations in suits brought by individuals. Third, removal was prompted by a courtesy copy.²³ My research suggests snap removals arise largely from electronic monitoring of state dockets, rather than from intentionally delivering the complaint before formal service. Finally, removal in *Recognition Communications* was initiated by an out-of-state defendant—AAA—whereas the in-state defendant was not part of the removal notice.²⁴ In contrast, my findings suggest the current use of snap removal is predominantly by in-state defendants.

A. Diversity Jurisdiction and the Forum Defendant Rule

Whereas state courts are courts of general jurisdiction, “[f]ederal courts are courts of limited jurisdiction.”²⁵ The Constitution provides for federal courts to hear “Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.”²⁶ Diversity jurisdiction is conferred on the courts primarily through 28 U.S.C. § 1332.²⁷ For a federal court to hear a case under § 1332, the parties must be completely diverse and the amount at issue must exceed \$75,000.²⁸

For cases originally filed in state courts, Congress provides a limited statutory right to remove the action to federal court.²⁹ The right is primarily codified in 28 U.S.C. § 1441.³⁰ Section 1441(a) permits a defendant to remove a case that could have originally

²³ *Id.* at *1.

²⁴ *Id.*

²⁵ *See, e.g.*, *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

²⁶ U.S. CONST. art. III, § 2.

²⁷ CHARLES A. WRIGHT & ARTHUR R. MILLER, 13E FEDERAL PRACTICE AND PROCEDURE § 3601 (3d ed.) (Westlaw) (last visited Nov. 24, 2020).

²⁸ 28 U.S.C. § 1332. “Complete diversity” for the purposes of subject matter jurisdiction means all plaintiffs are of diverse citizenship from all defendants. WRIGHT & MILLER, *supra* note 27, at § 3605.

²⁹ CHARLES A. WRIGHT, ARTHUR R. MILLER, JOAN E. STEINMAN, MARY KAY KANE & A. BENJAMIN SPENCER, 14C FEDERAL PRACTICE AND PROCEDURE § 3721 (Rev. 4th ed.) (Westlaw) (last visited Nov. 24, 2020). Though removal, unlike diversity jurisdiction, does not have a textual basis in the Constitution, the right has existed long enough that few question its validity. *See id.*

³⁰ 28 U.S.C. § 1441.

been brought in federal court.³¹ That is, all requirements for original jurisdiction apply in removal.³² Thus, to remove a case to a federal court sitting in diversity, the parties to the action must be completely diverse and the amount in controversy must exceed the statutory requirement.³³

However, the right of removal on the basis of diversity is not unlimited. Congress sought to balance access to a national forum with principles of comity and respect for the interests of a separate sovereign.³⁴ Indeed, there are several restrictions—created by both legislators and judges—that govern removal. Among them is a presumption that courts construe the removal statute narrowly, resolving ambiguity in favor of remand.³⁵ An additional limitation is found within the removal statute itself: § 1441(b)(2), otherwise known as the forum defendant rule.³⁶ The rule provides that diversity cases 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 the action is brought.”³⁷ While there are other limits on removing diversity actions,³⁸ snap removal turns primarily on how a court construes the forum defendant

³¹ See WRIGHT ET AL., *supra* note 29, at § 3721.1 (“In general, and of cardinal importance, an action is removable only if it originally might have been brought in a federal court.”). “[R]emoval is not a kind of jurisdiction[.]” *Id.* at § 3721. It is a procedural vehicle that serves as “a means of bringing cases within federal courts’ original jurisdiction into those courts.” *Id.*; see Dodson, *supra* note 14, at 61 n.38.

³² WRIGHT ET AL., *supra* note 29, at § 3721.1.

³³ *Id.* at § 3723.

³⁴ See, e.g., *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281 (5th Cir. 2007) (citations omitted); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).

³⁵ See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (“Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.”); see also *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (“A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears.”).

³⁶ 28 U.S.C. § 1441(b)(2).

³⁷ *Id.*; see WRIGHT ET AL., *supra* note 29, at § 3723 (discussing the forum defendant rule). The forum defendant bar is not applicable to the removal of federal-question cases nor to diversity cases plaintiffs originally filed in federal courts. See *id.*

³⁸ E.g., 28 U.S.C. § 1441(b)(1) (providing that the citizenship of defendants sued under fictitious names shall be disregarded in determining whether an action is removable).

rule. In particular, whether the “joined and served” clause should be strictly construed according to its plain meaning, or whether courts should consider other clauses within the statute, its context within the removal scheme, policy considerations, or other factors.

The plain language arguments typically go something like this. Courts must apply a statute’s plain meaning when its text is clear. Because § 1441(b)(2)’s text is not ambiguous, courts must apply its plain meaning. The forum defendant rule calls for limitations on removal when parties are “joined *and served*.”³⁹ Thus, if a defendant is *not served*, then the rule does not apply. The arguments against snap removal typically turn on intent and outcome. These arguments generally agree that, on its own, the language of § 1441(b)(2) supports snap removal, but the tactic produces a result that is absurd and contrary to Congress’s intent.

Congress’s intent in drafting § 1441 in general and the forum defendant rule in particular was to prevent bias. Specifically, judges and scholars argue the purpose was to prevent state court bias against out-of-state defendants by providing a means to access a neutral federal forum. The presence of a forum defendant obviates such a need.⁴⁰ While there is little disagreement on § 1441(b)(2)’s purpose as a general matter, the purpose behind its “properly joined *and served*” language is the topic of much debate.⁴¹ There is general agreement that the language was aimed at preventing gamesmanship by plaintiffs who name an in-state defendant purely to foreclose removal—a practice known as fraudulent joinder.⁴² But that consensus typically diverges on the

³⁹ *Id.* § 1441(b)(2).

⁴⁰ See *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 150 (1965) (discussing one of the rationales for diversity jurisdiction is to protect a “nonresident litigant from local prejudice”); *Shamrock Oil*, 313 U.S. at 109 (“Due regard for the rightful independence of state governments . . . requires . . . [federal courts to] scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”) (internal quotation marks omitted) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)); see also *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313, 319 (D. Mass. 2013) (“[T]he protection-from-bias rationale behind the removal power evaporates when the defendant seeking removal is a citizen of the forum state.”); *Dodson*, *supra* note 8, at 315.

⁴¹ § 1441(b)(2) (emphasis added).

⁴² See Arthur Hellman, Lonny Hoffman, Thomas D. Rowe, Jr., Joan Steinman, & Georgene Vairo, *Neutralizing the Strategem of “Snap Removal”: A Proposed Amendment to the Judicial Code*, 9 FED. CTS. L. REV. 103, 108 (2016) (noting that Congress intended “to prevent a plaintiff from blocking removal by joining as a

question of what Congress intended with the statute's joined and served clause.

On one side are those arguing that “joined and served” was meant as a bright-line rule—the defendant was either served or not served.⁴³ Congress meant for the forum defendant rule to serve as an easily administrable rule rather than “a fact-specific inquiry into a plaintiff's intent or opportunity to actually serve a home-state defendant.”⁴⁴ On the other side are those raising a purposivist argument: the clause's goal is to constrain plaintiff's gamesmanship but, by permitting snap removal, courts endorse a defendant's gamesmanship in the name of policing plaintiffs.⁴⁵ A strict text-based reading of § 1441(b)(2) places a thumb on the scale for defendants to engage in forum shopping,⁴⁶ rather than insulating them from gamesmanship, and effectively reads the provision out of § 1441.⁴⁷ The former argue they are giving effect

defendant a resident party against whom it does not intend to proceed, and whom it does not even serve”) (quoting *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 645 (D.N.J. 2008)); *see also* *Goodwin v. Reynolds*, 757 F.3d 1216, 1221 (11th Cir. 2014) (noting the same).

⁴³ *See* *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 153 (3d Cir. 2018).

⁴⁴ *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 706 (2d Cir. 2019).

⁴⁵ *See, e.g., Little v. Wyndham Worldwide Operations, Inc.*, 251 F. Supp. 3d 1215, 1222 (M.D. Tenn. 2017) (“If, however, the [forum defendant] rule is read to allow snap removals, this could encourage defendants to engage in a different gamesmanship—racing to remove before service of process is effected on the forum defendant.”) (internal quotation marks omitted); *Fields v. Organon USA Inc.*, No. 07-2922 (SRC), 2007 WL 4365312, at *5 (D.N.J. Dec. 12, 2007) (“[T]he result of blindly applying the plain ‘properly joined and served’ language of § 1441(b) is to eviscerate the purpose of the forum defendant rule. It creates a procedural anomaly whereby defendants can always avoid the imposition of the forum defendant rule so long as they monitor the state docket and remove the action to federal court before they are served by the plaintiff. In other words, a literal interpretation of the provision creates an opportunity for gamesmanship by defendants, which could not have been the intent of the legislature in drafting the ‘properly joined and served’ language.”).

⁴⁶ *See, e.g., Perez v. Forest Labs., Inc.*, 902 F. Supp. 2d 1238, 1243 (E.D. Mo. 2012) (“Pre-service removal by means of monitoring the electronic docket smacks more of forum shopping by a defendant, than it does of protecting the defendant from the improper joinder of a forum defendant that plaintiff has no intention of serving.”).

⁴⁷ *See, e.g., In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 67 F. Supp. 3d 952, 961 (N.D. Ill. 2014) (observing that permitting snap removal “would result in the elimination of the forum-defendant rule” in at least some jurisdictions); *Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855, 863 (N.D. Ohio 2008) (“[R]igidly applying the plain meaning of the forum defendant rule's text would be especially inequitable in states such as New Jersey which do not even allow for perfecting service until the

to Congress's will,⁴⁸ whereas the latter argue such a reading violates contextual canons of interpretation and leads to an absurd result.⁴⁹

B. From Snap Removal to Swift Removal

Initially, snap removal was rarely used and typically deployed between corporate entities in litigation surrounding commercial transactions, as in *Recognition Communications*. But corporations quickly discovered the tactic was a tool that could advance their interests, at the expense of individual litigants, by helping to immunize them from liability. It has since evolved both in scope and frequency of use. A similar story followed the evolution of general law after the Court's decision in *Swift*. However, before turning to *Swift*, it would be helpful to briefly trace the development of snap removal.

1. Finding clarity

Initially, the plain meaning argument was, by-and-large, a loser.⁵⁰ For example, in *Oxendine v. Merck & Co.*, nearly a dozen plaintiffs brought suit against Merck, a non-forum defendant, in Maryland state court alleging several state law claims.⁵¹ The pharmaceutical corporation learned of the impending suits and removed promptly after they were filed.⁵² Demonstrating a level of

clerk's office has processed the complaint and issued a TAN number (or its equivalent in states other than New Jersey).").

⁴⁸ *E.g.*, *Thomson v. Novartis Pharm. Corp.*, No. 06-6280, 2007 WL 1521138, at *4 (D.N.J. May 22, 2007).

⁴⁹ *E.g.*, *Little*, 251 F. Supp. 3d at 1223 ("Based upon the statutory scheme, the Court finds that permitting snap removals when a forum defendant is sued runs counter to the reasons underlying the forum defendant rule and is not a result that Congress could have envisioned, let alone countenanced, when it enacted the rule to protect out-of-state defendants from local juries."); *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 642-43 (D.N.J. 2008) (similar).

⁵⁰ *See, e.g.*, *Maple Leaf Bakery v. Raychem Corp.*, No. 99 C 6948, 1999 WL 1101326, at *1 (N.D. Ill. Nov. 29, 1999) (granting remand); *Mount Olivet Tabernacle Church v. Emerson Elec. Co.*, No. 96-8529, 1997 WL 89118, at *4 (E.D. Pa. Feb. 26, 1997) (same). *But see, e.g.*, *Wensil v. E.I. Dupont De Nemours & Co.*, 792 F. Supp. 447, 448-49 (D.S.C. 1992) (denying remand based upon textual reading); *Republic W. Ins. Co. v. Int'l Ins. Co.*, 765 F. Supp. 628, 629 (N.D. Cal. 1991) (same).

⁵¹ *See Oxendine v. Merck & Co.*, 236 F. Supp. 2d 517, 521 (D. Md. 2002).

⁵² *Id.* at 525.

“desperation not often seen,” defendants argued that § 1441(b)’s text does not bar removal by an out-of-state defendant when an in-state defendant is not yet served.⁵³ The court rejected the argument, finding a plain text construction of the forum defendant rule would lead to a result contrary to Congress’s intent and be inconsistent with its sister courts.⁵⁴ At the time, the reasoning in *Oxendine* was relatively common.⁵⁵

However, soon thereafter several courts found § 1441(b)(2)’s “joined and served” clause entirely unambiguous, and with it the text’s plain meaning controlled their construction of the statute. For example, in *Ripley v. Eon Labs, Inc.*, Cheryl Ripley, a California citizen, filed suit in New Jersey state court alleging that the defendants—the manufacturer and its parent companies—drug caused a severe, life threatening allergic reaction.⁵⁶ The defendants, New York and New Jersey citizens, removed the suit three days later—before Ripley could affect service on either of them.⁵⁷ The court ruled subject matter

⁵³ *Id.* at 523-24. In *Oxendine*, no defendants were served prior to removal. *Id.* at 522.

⁵⁴ *See id.* at 525 (citing *South Panola Consol. School Dist. v. O’Bryan*, 434 F. Supp. 750, 754 (N.D. Miss. 1977); *Sharp v. Elkins*, 616 F. Supp. 1561, 1565 (W.D. La. 1985); *Workman v. Nat’l Supafly Sys., Inc.*, 676 F. Supp. 690, 692 (D.S.C. 1987); *Katz v. Costa Armatori, S.P.A.*, 718 F. Supp. 1508, 1511 (S.D. Fla. 1989)).

⁵⁵ *See, e.g.*, *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 646 (D.N.J. 2008) (“[T]he court will look past the plain meaning of § 1441(b) in order to avoid an absurd and bizarre result which Congress could not have intended.”); *Fields v. Organon USA Inc.*, No. 07-2922 (SRC), 2007 WL 4365312, at *5 (D.N.J. Dec. 12, 2007) (“[A] literal interpretation of the [forum defendant rule] creates an opportunity for gamesmanship by defendants, which could not have been the intent of the legislature in drafting the ‘properly joined and served’ language.”).

Of course, some courts drew factual distinctions to guide their analysis. For example, some courts observed that § 1441(b) barred removal when *no defendants*—regardless of citizenship—had been served. In these courts, in a suit that named a non-forum and forum defendant, if the non-forum defendant was served before the forum defendant, they could snap remove. *See, e.g.*, *Holmstrom v. Harad*, No. 05 C 2714, 2005 WL 1950672, at *2 (N.D. Ill. Aug. 11, 2005) (reasoning removal is not proper until the non-forum defendant is served as, pre-service, both defendants are “equal[s]”); *Fields*, 2007 WL 4365312, at *5 (“[s]tated another way, an out-of-state defendant should not fear local bias before it is served, and therefore, has no basis for removal before it is served”).

⁵⁶ *Ripley v. Eon Labs Inc.*, 622 F. Supp. 2d 137, 139 (D.N.J. 2007).

⁵⁷ *Id.*

jurisdiction under 28 U.S.C. § 1331 was proper and that the forum defendant rule did not bar removal.⁵⁸

The court began its analysis by observing that, so long as the statute’s language is “plain,” the court’s “sole function . . . is to enforce it according to its terms.”⁵⁹ The only time a court may look beyond the plain meaning, is when “the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.”⁶⁰ Though the court stated its decision was based upon the clarity of § 1441(b)(2)’s text and lack of a result “demonstrably at odds with Congressional intent,” it provided a mere two sentences to support its conclusion.⁶¹ In contrast, it went on for almost three pages showing how its decision was in accord with sister courts.⁶² Several courts followed *Ripley*’s reasoning in denying remands.⁶³

⁵⁸ *Id.* at 140. Though defendants also alleged subject matter jurisdiction under § 1331, the court identified it had jurisdiction under § 1332 and thus it did not reach the federal question jurisdiction argument. *See id.* at 142.

⁵⁹ *Id.* at 140 (quoting *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 313 (3d Cir. 2001)).

⁶⁰ *Id.* (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)).

⁶¹ *Id.* at 140-41. Buried in a footnote, the court stated that it was “mindful of the various policy arguments” that counsel against a literal reading of § 1441(b). *Id.* at 140-41 n.1. Specifically, that providing courtesy copies of a lawsuit is a mode of professional decorum among potential litigants. *Id.* The court, however, did not want its decision to “be read as a judgement” on that act. *Id.* That is an odd statement, as federal courts have, time and again, noted their hesitation to take action that might increase the number of cases on its docket, let alone possibly “open the floodgates.” *See generally* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013); *Indianapolis v. Chase Nat’l Bank*, 314 U.S. 63, 76 (1941) (“The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of ‘business that intrinsically belongs to the state courts’ in order to keep them free for their distinctive federal business.”). But by permitting snap removal, courts spoil the incentive to engage in such behavior, therefore doing exactly that.

⁶² The *Ripley* Court positively noted reasoning in a similar case decided in the same district court, *Thomson v. Novartis Pharmaceutical Corp.*, No. 06-6280 (JBS), 2007 WL 1521138 (D.N.J. May 22, 2007). In particular it highlighted how, by not reading § 1441(b)(2) to permit pre-service removal, the court would actually not be honoring the statute’s language—specifically the “and served” phrase. *Ripley*, 622 F. Supp. 2d at 141. The basis was to preserve Congress’s intent that plaintiffs not be able to fraudulently join forum defendants. *Id.* The *Ripley* Court doubled down that § 1441(b)’s “plain language,” despite the “numerous policy arguments” counseling otherwise, compelled it deny the plaintiff’s motion to remand. *Id.* at 142.

⁶³ *See, e.g.*, *Valerio v. SmithKline Beecham Corp.*, No. 08-60522-CIV, 2008 WL 3286976, at *2 (S.D. Fla. Aug. 7, 2008) (finding removal by a forum defendant prior to

Corporations took notice as the plain meaning argument successfully spread among lower courts. They started implementing the tactic more and more in cases involving individual litigants, as opposed to just cases involving other large firms.⁶⁴ The basis for snap removal began to evolve, as well. Initially, pre-service removal was, in most instances, prompted by the plaintiff furnishing a courtesy copy of the complaint to defendants.⁶⁵ But that quickly changed. The increase in plain-text courts prompted a removal arms race, or “race to remove.”⁶⁶

2. Electronic docket monitoring

While snap removal is not an entirely modern invention, its use seems to have accelerated with the advent of electronic docket monitoring.⁶⁷ For example, in *Thomson v. Novartis*

service proper under plain language of 28 U.S.C. § 1441(b)); *Thomson*, 2007 WL 1521138, at *4 (same); *Jaeger v. Schering Corp.*, No. 07-3465 (DMC), 2007 WL 3170125, at *2-3 (D.N.J. Oct. 25, 2007) (same); *Massey v. Cassens & Sons, Inc.*, No. 05-CV-598-DRH, 2006 WL 381943, at *2-3 (S.D. Ill. Feb. 16, 2006) (finding the facts identical to a prior case where remand was granted, but denying remand because the language of § 1441(b)(2) was too clear and unambiguous to permit otherwise); *Clawson v. FedEx Ground Package Sys., Inc.*, 451 F. Supp. 2d 731, 736 (D. Md. 2006) (using plain language rule); *Ott v. Consol. Freightways Corp. of Del.*, 213 F. Supp. 2d 662, 665 & n.3 (S.D. Miss. 2002) (collecting cases).

⁶⁴ *See, e.g.*, *Vitaoe v. Mylan Pharm., Inc.*, No. 1:08CV85, 2008 WL 3540462, at *1 (N.D.W. Va. Aug. 13, 2008) (decident was user of defendant’s drugs); *Johnson v. Precision Airmotive, LLC*, No. 4:07CV1695 CDP, 2007 WL 4289656, at *1 (E.D. Mo. Dec. 4, 2007) (decidents were users of defendants’ aviation products); *Waldon v. Novartis Pharm. Corp.*, No. C07-01988 MJJ, 2007 WL 1747128, at *3 (N.D. Cal. June 18, 2007) (plaintiff was user of defendants’ drug); *see also* Nannery, *supra* note 10, at 564-65 (showing from 2012-2014 snap removal was used predominantly by corporate defendants in suits with individual plaintiffs); *infra* text accompanying notes 207-209 (showing use of snap removal by corporate defendants in suits with individual plaintiffs increased in 2018-2019 from Nannery’s findings).

⁶⁵ *See, e.g.*, *Smethers v. Bell Helicopter Textron Inc.*, No. 6:16-CV-58, 2017 WL 1277512, at *1-2 (S.D. Tex. Apr. 4, 2017); *Johnson v. Emerson Elec. Co.*, No. 4:13-CV-1240-JAR, 2013 WL 5442752, at *2 (E.D. Mo. Sept. 30, 2013); *Giacone v. Virtual Officeware, LLC*, No. 13CV1558, 2014 WL 7070205, at *14 (W.D. Pa. Dec. 12, 2014), *aff’d*, 642 F. App’x 137 (3d Cir. 2016); *Watanabe v. Lankford*, 684 F. Supp. 2d 1210, 1218 (D. Haw. 2010).

⁶⁶ *DeAngelo-Shuayto v. Organon USA Inc.*, No. 07-2923(SRC), 2007 WL 4365311, at *5 n.2 (D.N.J. Dec. 12, 2007); Nannery, *supra* note 10, at 545.

⁶⁷ *Serafini v. Sw. Airlines Co.*, No. 3:20-CV-00712-X, 2020 WL 5370472, at *2 (N.D. Tex. Sept. 8, 2020) (“Snap removal is a litigation tactic that owes its existence to automated docket-monitoring services (or, sometimes, litigants that serve press releases before process.”); Christopher M. Strongosky, Leeanne S. Mancari & E.

Pharmaceuticals, plaintiffs filed suit against the drug manufacturer in New Jersey state court alleging tort and contract claims.⁶⁸ But the plaintiffs ran into issues trying to serve the defendants—indeed, they tried, unsuccessfully, to serve process four times.⁶⁹ They had filed suit on December 19, but were unable to arrange for a process server until after the Christmas holiday.⁷⁰ However, by that time the defendants’ offices had closed for the holiday season, so the plaintiffs were unable to affect service.⁷¹ Fortunately for the defendants, though, neither their “private docketing service” nor their outside counsel took time off.⁷² Defendants learned of the filing from their monitoring service and quickly filed their removal notice.⁷³ The district court recognized these facts but nevertheless denied plaintiffs’ remand motion.⁷⁴ A federal forum was available only because of electronic monitoring services—a service that some courts have noted is not accessible to all litigants⁷⁵—and pure happenstance.⁷⁶ Other courts have made

Giovannie Mercado, *Pre-Service Removal Jurisdiction: Congressional Intent or Litigation Gamesmanship?*, IN-HOUSE DEF. Q., Winter 2015, at 12 (“Pre-service removal disputes became *en vogue* with the rise of state-of-the-art electronic docket monitoring systems and services.”); *Gibbons v. Bristol-Myers Squibb Co.*, HARV. L. REV. BLOG (Apr. 18, 2019), https://blog.harvardlawreview.org/recent-case_gibbons-v-bristol-myers-squibb-co_/ [<https://perma.cc/R4LU-2JWB>] (observing that use of snap removal “has grown with the ease of monitoring electronic dockets”); Paul A. Werner & Abraham J. Shanedling, *Second Circuit Affirms “Snap” Removal Practice*, NAT’L L. REV. (Mar. 30, 2019), <https://www.natlawreview.com/article/second-circuit-affirms-snap-removal-practice> [<https://perma.cc/QP79-ZHNN>] (pointing to the “advent of electronic docket monitoring” as the catalyst for snap removal); *see also* Hellman, et al., *supra* note 42, at 104 (“The practice of removing before forum defendants have been served has been called ‘snap removal,’ and it is largely a product of the Internet era.”).

⁶⁸ *Thomson*, 2007 WL 1521138, at *1.

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *Id.* at *2.

⁷³ *Id.*

⁷⁴ *See id.* at *2, *4-*5.

⁷⁵ *See, e.g.*, *Castro v. Colgate-Palmolive Co.*, No. 19-CV-279 (JLS), 2020 WL 2059741, at *2 (W.D.N.Y. Apr. 29, 2020) (noting that defendant only learned of the action because of a docket monitoring service that they had the “means” to pay for).

⁷⁶ *See id.* (recounting defendants’ testimony that their counsel was entirely unaware of plaintiffs’ service attempts and only became aware of the filing when the docketing service notified them); *see also* Steven J. Boranian, *Removed to Federal Court? Not So Fast, Unless You’re Faster!*, LEXOLOGY (Nov. 1, 2019), <https://www.lexology.com/>

similar observations about the role electronic docket monitoring plays.⁷⁷ And defendants have gotten faster, successfully removing cases, in some instances, in mere seconds.⁷⁸

3. Removal by forum defendants

Snap removal further evolved to permit removal by forum defendants in cases where they were the sole party plaintiffs named. Initially, the tactic was available to non-forum defendants, named in an action along with a forum defendant, where the non-forum party files the notice of removal before the forum defendant is served.⁷⁹ Section 1441(b)(2) did not bar removal when the non-forum defendant was served and attempted to remove before the forum defendant was served, as the forum defendant was not “served” at the time of removal. Courts reasoned the rule was not triggered in such instances. Further, the mere fact that a forum defendant was simply named is not sufficient to implicate the forum defendant rule, absent service.⁸⁰ This is arguably the instance of snap removal that is most supported by the statute’s text, context, and values. However, as I will show, the tactic has evolved well-beyond this usage.

library/detail.aspx?g=836e8d27-ef0c-4169-ad06-b0d207c42451 [https://perma.cc/PA5R-7FJW] (Reed Smith partner observing that “pre-service remov[al] has gained further support” but cautioning defendants to “move fast” since timing “could make a difference in some courts”).

⁷⁷ See, e.g., *Delaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372, 1377 (N.D. Ga. 2018) (“Now referred to as snap removals, this litigation tactic has become increasingly popular in recent years due in part to the increased ease of electronic docket monitoring.”); *Perez v. Forest Labs., Inc.*, 902 F. Supp. 2d 1238, 1243 (E.D. Mo. 2012) (“Pre-service removal by means of monitoring the electronic docket smacks more of forum shopping by a defendant, than it does of protecting the defendant from the improper joinder of a forum defendant that plaintiff has no intention of serving.”).

⁷⁸ See, e.g., *Dutton v. Ethicon, Inc.*, 423 F. Supp. 3d 81, 85 (D.N.J. 2019) (defendant filed for removal approximately sixty seconds before plaintiff effected service); *Brown v. Teva Pharm., Inc.*, 414 F. Supp. 3d 738, 739 (E.D. Pa. 2019) (20 minutes); Plaintiff’s Motion to Remand to Middlesex County, *Kerr v. Johnson & Johnson, Inc.*, No. 3:18-cv-17396 (D.N.J. Jan. 18, 2019) (24 minutes).

⁷⁹ See, e.g., *Frick v. Novartis Pharm. Corp.*, No. 05-5429 (DRD), 2006 WL 454360, at *1 (D.N.J. Feb. 23, 2006); *Ott v. Consol. Freightways Corp. of Del.*, 213 F. Supp. 2d 662, 663-64 (S.D. Miss. 2002).

⁸⁰ See, e.g., *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp. 2d 177, 180-81 (S.D.N.Y. 2003).

Section 1331's complete diversity requirement necessitates an inquiry into the named parties' citizenship—served or unserved. However, courts distinguish that inquiry from the citizenship analysis for removal. Thus, when a non-resident defendant snap removes a case that also includes an unserved resident defendant, the latter's citizenship is of no import for the purposes of § 1441(b)(2).⁸¹ However, to snap remove a case, these courts required the non-forum defendant be served.⁸² Their reasoning being that when no defendant was served, both the forum and non-forum defendants were on “equal footing.”⁸³

But courts' construction and application of § 1441(b)(2)'s plain meaning evolved further to permit removal before any defendant was served. This was largely a product of rejecting sister courts' prior reasoning that foreclosed such a result.⁸⁴ These courts typically reasoned that § 1441(b)(2)'s text is sufficiently pliable to permit a non-forum defendant to remove a case in which no defendant—in-state or out—has been served, and that permitting removal in such cases is not sufficiently absurd to ignore the text's plain meaning.⁸⁵

These interpretations construed § 1441(b) as placing few limits on removal on the basis of diversity jurisdiction, beyond the requirements that attend § 1332 generally. Initially, courts denied remand in cases where removal was initiated by a forum defendant. However, that limitation was also eventually read out of the statute.⁸⁶ Construing § 1441(b)(2) this way adopted a

⁸¹ See, e.g., *Ott*, 213 F. Supp. at 663-66.

⁸² See, e.g., *Allen v. GlaxoSmithKline PLC*, No. 07-5045, 2008 WL 2247067, at *5 (E.D. Pa. May 30, 2008); *DeAngelo-Shuayto v. Organon USA Inc.*, No. 07-2923 (SRC), 2007 WL 4365311, at *4 (D.N.J. Dec. 12, 2007); *Davis v. Cash*, No. 3:01-CV-1037-H, 2001 WL 1149355, at *2-3 (N.D. Tex. Sept. 27, 2001).

⁸³ *Holmstrom v. Harad*, No. 05 C 2714, 2005 WL 1950672, at *2 (N.D. Ill. Aug. 11, 2005).

⁸⁴ See, e.g., *Breitweiser v. Chesapeake Energy Corp.*, No. 3:15-CV-2043-B, 2015 WL 6322625, at *5 (N.D. Tex. Oct. 20, 2015); *Poznanovich v. AstraZeneca Pharm. LP*, No. 11-4001 (JAP), 2011 WL 6180026, at *4 (D.N.J. Dec. 12, 2011); *Robertson v. Iuliano*, No. RDB 10-1319, 2011 WL 453618, at *2-3 (D. Md. Feb. 4, 2011); *Oxendine v. Merck & Co.*, 236 F. Supp. 2d 517, 524 (D. Md. 2002); see also *Nannery*, *supra* note 10, at 552-53.

⁸⁵ See, e.g., *Robertson*, 2011 WL 453618, at *3; *Bivins v. Novartis Pharm. Corp.*, No. 09-1087 (RBK/KMW), 2009 WL 2496518, at *2 (D.N.J. Aug. 10, 2009); *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263, 1270 (M.D. Fla. 2009).

⁸⁶ See, e.g., *Munchel v. Wyeth LLC*, No. 12-906-LPS, 2012 WL 4050072, at *4 (D. Del. Sept. 11, 2012) (“[N]othing . . . turn[s] on whether the removing party was a forum

bright-line, binary conception of the forum defendant rule: service is a necessary pre-condition for its application.⁸⁷ From there it naturally followed, if a non-forum defendant can snap remove why should a forum defendant be precluded? A reading of § 1441(b) that is good for the goose is good for the gander.⁸⁸ Though courts recognized that a purely plain meaning construction of § 1441(b)(2) would “provide a vehicle for defendants to manipulate the operation of the removal statutes,” the clarity of the statute’s text nevertheless seemingly tied their hands, compelling them to deny plaintiffs’ motions to remand.⁸⁹

4. Swift removal

These parallel tracks eventually intersected. It is the confluence of their features that turned snap removal into something more—what I call *Swift* removal.⁹⁰ Since courts read § 1441(b)(2) as drawing no distinction, pre-service, between forum and non-forum defendants, and service as a necessary pre-condition for the rule to trigger, what is stopping a forum defendant from removing a suit in which they are the only named defendant? Initially, the argument was that the text precluded such action. Section 1441(b)(2) reads as being applicable to defendants “*joined and served*,” so some courts construed the clause as implying that it is implicated only in instances when

defendant or non-forum defendant.”); *Allison v. Apotex Corp.*, No. 08-60525-CIV-ZLOCH, 2008 WL 11331976, at *2 (S.D. Fla. May 23, 2008); *Ripley v. Eon Labs, Inc.*, 622 F. Supp. 2d 137, 140-41 (D.N.J. 2007).

⁸⁷ *See, e.g.*, *Young v. Bristol-Myers Squibb Co.*, No. 17-609-LPS, 2017 WL 2774735, at *2 (D. Del. June 27, 2017) (denying motion to remand in case where forum defendants removed case before any defendants were served); *Hwang v. Gladden*, No. 3:16-cv-502-SRW, 2016 WL 9334726, at *7 (M.D. Ala. Dec. 21, 2016) (agreeing that “a forum defendant can likewise remove a case to federal court, so long as that forum defendant has not yet been served”); *Munchel*, 2012 WL 4050072, at *3-4 (similar); *Jaeger v. Schering Corp.*, No. 07-3465 (DMC), 2007 WL 3170125, at *2 (D.N.J. Oct. 25, 2007) (similar); *Massey v. Cassens & Sons, Inc.*, No. 05-CV-598-DRH, 2006 WL 381943, at *2 (S.D. Ill. Feb. 16, 2006) (similar).

⁸⁸ *Cf. Barnes & Noble, Inc. v. LSI Corp.*, 849 F. Supp. 2d 925, 929 (N.D. Cal. 2012) (“What is good for the goose’s complaint should be good for the gander’s answer.”).

⁸⁹ *Hawkins v. Cottrell, Inc.*, 785 F. Supp. 2d 1361, 1366, 1368 (N.D. Ga. 2011) (citation omitted).

⁹⁰ *See infra* Part III.

there are sufficient defendants for joinder—i.e., more than one.⁹¹ Otherwise, courts reasoned, Congress would have said “named and served or simply served.”⁹² But this reasoning was jettisoned primarily by reading the statute’s text with what courts stated is the forum defendant rule’s purpose. The rule’s purpose, according to such courts, is to prevent fraudulent joinder.⁹³ While snap removal fails to further that purpose, it does not impair it.⁹⁴ And because “[f]ailing to further a purpose is not equivalent to the purpose’s impairment,” § 1441(b)(2)’s text can permit forum defendants to remove a case before being served.⁹⁵ This reasoning supported forum defendants’ ability to begin removing actions before they were served.⁹⁶ Dulling the previously hard-edged limitation on removal fostered incentives to manipulate the more flexible rule to advance defendants’ interests via *Swift* removal.

⁹¹ See e.g., *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313, 318 (D. Mass. 2013); *Allen v. GlaxoSmithKline PLC*, No. 07-5045, 2008 WL 2247067, at *5 (E.D. Pa. May 30, 2008); see also *Homstrom v. Harad*, No. 05 C 4716, 2006 WL 2587962, at *3 (N.D. Ill. Sept. 7, 2006) (holding that a non-forum defendant must wait until it is served to remove).

⁹² *Allen*, 2008 WL 2247067, at *5 (internal quotation marks omitted). Cf. Jeffrey W. Stempel, Thomas O. Main & David McClure, *Snap Removal: Concept; Cause; Cacophony; and Cure*, BAYLOR L. REV. (forthcoming 2021) (manuscript at 52) (proposing an amendment to § 1441(b)(2) that, among other things, strikes “and served” from the provision).

⁹³ See, e.g., *Glob. Indus. Inv. Ltd. v. Chung*, No. 19-CV-07670-LHK, 2020 WL 2027374, at *4 (N.D. Cal. Apr. 28, 2020); *Monfort v. Adomani, Inc.*, No. 18-CV-05211-LHK, 2019 WL 131842, at *4 (N.D. Cal. Jan. 8, 2019); see also *Nannery*, *supra* note 10, at 548.

⁹⁴ *Monfort*, 2019 WL 131842, at *4.

⁹⁵ *Id.*; see also *Yocham v. Novartis Pharm. Corp.*, No. 07-1810 (JBS), 2007 WL 2318493, at *3 (D.N.J. Aug. 13, 2007).

⁹⁶ See, e.g., *Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 153-54 (3d Cir. 2018); *D.C. by & through Cheatham v. Abbott Labs. Inc.*, 323 F. Supp. 3d 991, 997 (N.D. Ill. 2018) (denying remand in suit naming single defendant that was citizen of forum because they “filed a notice of removal before it became a forum defendant that was both properly joined and properly served”); *United Steel Supply, LLC v. Buller*, No. 3:13-CV-00362-H, 2013 WL 3790913, at *4 (W.D. Ky. July 19, 2013) (denying remand in suit naming single forum defendant that had not yet been served, because “[t]he plain language of § 1441(b) . . . requires proper service for application of the forum defendant rule”); *Terry v. J.D. Streett & Co.*, No. 4:09CV01471 FRB, 2010 WL 3829201, at *2 (E.D. Mo. Sept. 23, 2010) (similar facts and outcome because “defendant had not been served before it removed the case to this Court, and the forum defendant rule therefore fails to aid plaintiffs”); *Yocham*, 2007 WL 2318493, at *3 (similar).

For example, consider the facts in *Delaughder v. Colonial Pipeline, Co.*⁹⁷ In *Delaughder*, two plaintiffs brought suit in Georgia state court against the pipeline company and another contracting firm for allegedly failing to follow safety protocols. They claimed the firms' negligence caused an explosion that killed one of the plaintiffs and injured the other.⁹⁸ The parties were completely diverse. The two plaintiffs were citizens of Alabama and Mississippi, whereas both defendants were citizens of Georgia. The plaintiffs claimed over \$75,000 in damages. Thus, the requirements for subject matter jurisdiction under § 1332 were satisfied.⁹⁹

Defendants removed the case before service.¹⁰⁰ The court granted defendants' motion to dismiss without prejudice on September 19, 2018.¹⁰¹ That same day, Colonial changed its registered agent—i.e., the person who could accept service on the corporation's behalf—without notifying plaintiffs.¹⁰² Less than twenty-four hours later, plaintiffs refiled in state court.¹⁰³ Less than an hour after that, they attempted service on Colonial's old agent.¹⁰⁴ Less than an hour after that failed attempt, Colonial filed its removal notice.¹⁰⁵ Approximately ten minutes later the second defendant joined in removal.¹⁰⁶ Just three minutes after that the plaintiffs served the second defendant.¹⁰⁷ The defense bar considers serving an agent “the easiest thing in the world,” and snap removal made it impossible.¹⁰⁸

The plaintiffs asked the district court to remand the case, raising familiar arguments against snap removal. Defendants

⁹⁷ 360 F. Supp. 3d 1372, 1374-75 (N.D. Ga. 2018).

⁹⁸ *Id.*

⁹⁹ *See id.* at 1374 n.1.

¹⁰⁰ *Id.* at 1374-75.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1375.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ House Judiciary, *Examining the Use of “Snap” Removals to Circumvent the Forum Defendant Rule*, at 54:13, YOUTUBE (Nov. 14, 2019), https://www.youtube.com/watch?v=wAhu5o6Zbuw&feature=emb_logo (Stoffelmayr testifying that “it is the easiest thing in the world to serve a corporate defendant through a registered agent—it takes literally minutes”).

similarly made familiar arguments asserting that removal was proper. In its order, the court noted that the defendant’s gamesmanship—switching agents immediately after the court initially dismissed the suit—is the only reason the case was in federal court.¹⁰⁹ Indeed, “as soon as [p]laintiffs’s service to [Colonial] failed, [d]efendants removed to federal court, before service.”¹¹⁰ Adopting a plain meaning interpretation would, as with most instances of snap removal, “tie the [c]ourt’s hands in the face of such gamesmanship on the part of [d]efendants.”¹¹¹ The court would have none of that. It granted the plaintiffs’ motion to remand on the basis that, to do otherwise, would turn a statutory provision “included to prevent gamesmanship” into “an avenue for more gamesmanship[, which] is an ironic absurdity.”¹¹² The *DeLaughter* court arguably saw, despite the clarity of § 1441(b)(2)’s text, that *Swift* removal is antithetical to the values the statute embodies.

Consider also *Jackson v. Howmedica Osteonics Corp.*¹¹³ There, plaintiffs filed suit in New Jersey state court alleging products liability claims. Within forty minutes of filing, they

¹⁰⁹ *DeLaughter*, 360 F. Supp. 3d at 1380 (“The only reason this case is in federal court is that the same day the Court dismissed Plaintiffs’ complaint, Colonial changed its registered agent from CSC to Northwest, without notifying Plaintiffs.”).

¹¹⁰ *Id.*

¹¹¹ *Id.* (internal quotation marks omitted).

¹¹² *Id.* at 1380-81 (citing *Goodwin v. Reynolds*, 757 F.3d 1216, 1221 (11th Cir. 2014)). Notably, in its order, the *DeLaughter* Court observed that snap removal is an advantage because it exploits the asymmetry of resources and sophistication that is present in many snap removal cases. The tactic works because, generally speaking, corporate defendants have access to “electronic docket monitoring” and sophisticated attorneys. *See id.* at 1377, 1381. In contrast, in most instances, plaintiffs do not. This asymmetry presents a political economy problem similar to the one created by *Swift*. This exacerbates existing asymmetries by creating advantages for well-financed litigants in the name of neutral principles. This notion of procedural rules tailored for well-capitalized and legally sophisticated litigants is neither new nor exclusive to snap removal. *See* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1020-23 (2016). As I will discuss, there are incentives for some defendants to litigate in federal court and incentives for plaintiffs to litigate in state court. In one jurisdiction are rules and procedures that some perceive are more beneficial to plaintiffs or not beneficial to defendants, and in the other jurisdiction is the inverse. All litigants are pursuing their own best interests, but some are better positioned to realize the fruit of their efforts. In an adversarial system, a step ahead for one is a step back for the other.

¹¹³ Report and Recommendation, *Jackson v. Howmedica Osteonics Corp.*, No. 19-cv-18667-JMV-JBC (D.N.J. June 15, 2020), *adopted*, 2020 WL 4188165 (D.N.J. July 20, 2020).

served the defendant's agent. The process server entered the defendant's corporate headquarters minutes later and stated his purpose was to serve a lawsuit. A security guard at the entrance, allegedly on instructions from the defendant's legal department, delayed the server for nearly ninety minutes so that the defendant could file a removal notice before being served.¹¹⁴ Ruling on the plaintiff's motion to remand, the magistrate judge similarly rejected the corporate defendant's arguments that its removal was proper.¹¹⁵ Because of the incentives snap removal engenders, hide-and-seek tactics like those in *Howmedica Osteonics* are not uncommon.¹¹⁶

These are just two examples, but the parallels to *Swift* doctrine—and its subsequent cases, such as the infamous *Taxicab Case*¹¹⁷—are hard to miss. As with general law, what started as a device or doctrine available only in specific, narrow factual scenarios, evolved to something more. Purportedly neutral, apolitical statutory interpretation canons, plus a substantial asymmetry in resources between corporate and individual litigants, expanded snap removal to a litigation tactic ripe for manipulation. In the name of accuracy and objectivity, federal courts construed a statute as plainly permitting a tactic that exacerbates disparities in resources and legal sophistication between litigant classes and incentivizes gamesmanship.¹¹⁸ In

¹¹⁴ *Id.* at *4.

¹¹⁵ The corporate defendant in *Howmedica Osteonics* argued that removal was proper not only because *Encompass* was binding precedent on the district court, but because the plaintiffs had only served the defendant's parent company, not the defendant themselves. *Id.* at *6-7. And because the parent had not passed along the summons or complaint, they were not yet "served" as required by *Encompass*'s interpretation of § 1441(b)(2). *Id.* The magistrate judge rejected that argument. *Id.* at *11.

¹¹⁶ See Relkin Testimony, *supra* note 12, at 3-4.

¹¹⁷ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 523-24 (1928).

¹¹⁸ See EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA 1870-1958*, at 28-58 (1992) (discussing how the rules of federal jurisdiction and procedure exacerbated social and economic inequality during the nineteenth- and early twentieth-centuries by clearly favoring corporate litigants); Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 *BUFF. L. REV.* 1369, 1387-98 (2006).

doing so, these courts expanded their reach to include cases that would otherwise be the province of state courts.¹¹⁹

To be sure, not all courts embraced the tactic. Courts rejecting snap removal tended to do so on policy grounds or because it offends the statute's legislative purpose, based upon the out-of-state bias presumption.¹²⁰ Some courts were more nuanced in their analysis and rejected snap removal on the basis that “joined and served” applies only when there is more than one defendant in the suit. Pointing to Congress’s use of “any,” and “joined,” these courts reasoned that there must be more than one

¹¹⁹ *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 153-54 (3d Cir. 2018) (observing that snap removal allows defendants “to use pre-service machinations to remove a case *that it otherwise could not*”) (emphasis added); *Castro v. Colgate-Palmolive Co.*, 19-CV-279 (JLS), 2020 WL 2059741, at *1 (W.D.N.Y. Apr. 29, 2020) (“[Defendant] filed this immediate, or ‘snap’ removal, to avoid what would have been a prohibition on removal had the[y] . . . been served.”); *Dodson*, *supra* note 14, at 60 (“[W]ith respect to a limited national government, removal broadens the scope of federal authority at the expense of state courts of competent jurisdiction and the plaintiff’s choice of forum.”).

¹²⁰ Diversity jurisdiction is intended to prevent bias from a state court affecting the outcome for an out-of-state defendant. As discussed, § 1441 is the means for such a defendant to escape possible bias. *See supra* notes 40-41 and accompanying text; *see also* *Dodson*, *supra* note 8, at 282-84, 287. Section § 1441(b)(2) is an exception to that premise, based on the rationale that an in-state defendant will not be subjected to bias in their “home” court. Further, the “joined and served” clause is meant to prevent plaintiff chicanery in naming—but never serving—a forum defendant as a way of foreclosing a federal forum. *See, e.g.*, *Stefan v. Bristol-Myers Squibb Co.*, No. 13-1662-RGA, 2013 WL 6354588, at *2 (D. Del. Dec. 6, 2013) (granting remand because reading § 1441(b) according to its plain meaning “would bring about a nonsensical result that . . . would indisputably be at odds with the Congressional intent in enacting the forum defendant rule . . .”); *Perez v. Forest Labs., Inc.*, 902 F. Supp. 2d 1238, 1246 (E.D. Mo. 2012) (“Here, strict adherence to statutory language would run counter to legislative intent instead of furthering it. . . . The rationale of the forum defendant rule applies to the parties in this action as the presence of a local defendant, *Forest Pharmaceuticals, Inc.*, reduces the need for a neutral federal forum offering a respite from local bias. The tactical advantage offered to the defendant by the electronic docket is just as inconsistent with the concerns of diversity and removal jurisdiction as improper joinder by a plaintiff.”); *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 646 (D.N.J. 2008) (“[T]he court will look past the plain meaning of § 1441(b) in order to avoid an absurd and bizarre result which Congress could not have intended.”); *Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855, 862 (N.D. Ohio 2008) (“Given that Congress intended the ‘properly joined and served’ language to prevent litigant gamesmanship, ‘it would be especially absurd to interpret the same “joined and served” requirement to actually condone a similar kind of gamesmanship from defendants’ in instances such as the case at bar.”) (quoting *Allen v. GlaxoSmithKline PLC*, No. 07-5045, 2008 WL 2247067, at *4 (E.D. Pa. May 30, 2008)).

defendant named for snap removal to be available, and that the out-of-state defendant must be served first. These courts applied their construction to prohibit a single in-state defendant from snap removing.¹²¹ Others looked to the Supreme Court's analysis of the forum defendant rule in *Pullman Co. v. Jenkins*¹²² for assistance.¹²³ However, these arguments were not widely successful.

Snap removal has evolved beyond the forum defendant rule's original strictures to permit forum defendants to remove an action in which they are the lone defendant. As my data show, this use of snap removal has become the norm rather than the exception.¹²⁴

5. Courts of Appeals weigh in

Due to the lack of uniformity among district courts, Courts of Appeals needed to step in to provide an answer for the lower courts to the following questions: Does § 1441(b)(2) permit pre-service, "snap" removal? And, if so, is it available to non-forum defendants, forum defendants, or both?¹²⁵ Nevertheless, the relevant appellate decisions are few.¹²⁶ The likely reason is the

¹²¹ See, e.g., *Adams v. Beacon Hill Staffing Grp., LLC*, No. 15-cv-11827-ADB, 2015 WL 6182468, at *4 (D. Mass. Oct. 21, 2015) ("[R]emoval based on diversity is prohibited until at least one defendant has been served. If the non-forum defendant is served before the forum defendant, the non-forum defendant may remove."); *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313, 320-21 (D. Mass. 2013); *Vallejo v. Amgen, Inc.*, No. CV 13-03666 BRO (MANx), 2013 WL 12147584, at *2-4 (C.D. Cal. Aug. 30, 2013).

¹²² 305 U.S. 534 (1939).

¹²³ See, e.g., *Sullivan*, 575 F. Supp. 2d at 644-46; *Stan Winston Creatures, Inc. v. Toys "R" Us, Inc.*, 314 F. Supp. 2d 177, 180 (S.D.N.Y. 2003). But see *Ott v. Consol. Freightways Corp. of Del.*, 213 F. Supp. 2d 662, 665 (S.D. Miss. 2002) (reading *Pullman* as supporting a reading of § 1441(b)(2) that favors snap removal).

¹²⁴ See *infra* Section II.B; see also *infra* tbls. 2 & 4.

¹²⁵ Compare, e.g., *Regal Stone Ltd. v. Longs Drug Stores Cal., L.L.C.*, 881 F. Supp. 2d 1123, 1127-28 (N.D. Cal. 2012) (applying a plain meaning construction to § 1441(b)(2) and denying remand), and *City of Ann Arbor Emps.' Ret. Sys. v. Gecht*, No. C-06-7453 EMC, 2007 WL 760568, at *8 (N.D. Cal. Mar. 9, 2007) (same), with *Black v. Monster Beverage Corp.*, No. EDCV-15-02203-MWF-DTB, 2016 WL 81474, at *3 (C.D. Cal. Jan. 7, 2016) (rejecting the plain meaning construction and granting remand), and *Khashan v. Ghasemi*, No. CV 10-00543 MMM (CWx), 2010 WL 1444884, at *2 (C.D. Cal. Apr. 5, 2010) (same).

¹²⁶ As of January 2021, the Second, Third, Fifth, and Eleventh Circuits are the only federal appeals courts to have directly considered whether § 1441(b)(2) permits snap removal. The Sixth and Tenth Circuits have referenced the tactic in passing in dicta or in non-precedential opinions. See *Woods v. Ross Dress for Less, Inc.*, No. 19-5089, 2021

difficulty for Courts of Appeals to establish appellate jurisdiction over a pre-service removal decision.¹²⁷ When a federal district court remands a case—rejecting a defendant’s attempt to snap remove—the decision is not generally appealable.¹²⁸ And when a district court judge denies remand—permitting pre-service removal—the decision is not immediately appealable.¹²⁹ In many instances when a remand order is denied, plaintiffs have to wait for a final judgment to trigger appellate jurisdiction.¹³⁰ Thus, there are significant hurdles to overcome to establish review of a decision to permit or deny pre-service removal.

The first federal court of appeals¹³¹ to consider whether § 1441 permits snap removal was the Eleventh Circuit, in *Goodwin*

WL 161984, at *3 (10th Cir. Jan. 15, 2021) (failing to reach the snap removal question because the parties were not completely diverse at the time of removal); *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001) (dicta). There is an action pending in the Ninth Circuit where the snap removal question has been briefed. See *Nunn v. Mentor Worldwide, LLC*, No. 19-56391 (9th Cir. Nov. 27, 2019).

¹²⁷ See Matthew Curry, *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, 931-32 (2010); Hellman et al., *supra* note 42, at 106-07; Nannery, *supra* note 10, at 557-58; Tempe D. Smith, *Snap Removal: What Is It and What Do You Do If It Happens to You*, 39 ALA. ASS’N JUST. J. 55, 57 (2019).

¹²⁸ 28 U.S.C. § 1447(d). While § 1447(d) generally bars review, some courts have found an exception when remand is based on a violation of § 1441(b)(2), and the relevant court treats § 1441(b)(2) as nonjurisdictional. See, e.g., *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 936 (9th Cir. 2006).

¹²⁹ While a plaintiff can file for an interlocutory appeal under 28 U.S.C. § 1292(b), such review is at the appellate court’s discretion. This contributes to the dearth of appellate decisions on snap removal.

¹³⁰ *WRIGHT ET AL.*, *supra* note 29, at § 3740. This presents additional hurdles. Most cases will settle before a final judgment on the merits, significantly disincentivizing plaintiffs from appealing the denial of their remand motion. But even if a final judgment is reached, and particularly if it is in favor of the defendants, the plaintiffs must calculate the cost-benefit of pursuing an appeal of a procedural issue. These factors weigh particularly on plaintiffs who are limited in resources and legal sophistication and might not be able to effectively assess whether there is benefit to pursuing an appeal.

¹³¹ The Sixth Circuit briefly discussed the tactic in a 2001 opinion. However, the discussion was limited to a very brief mention in a footnote. See *McCall*, 239 F.3d at 813 n.2. While some have relied on *McCall* as standing for the proposition that snap removal is permissible within the Sixth Circuit, the weight of authority suggests otherwise. See, e.g., *Bergmann v. State Farm Mut. Auto. Ins. Co.*, No. 3:16cv549-RV/CJK, 2016 WL 9414108, at *2 (N.D. Fla. Dec. 28, 2016); *Adams v. Beacon Hill Staffing Grp., LLC*, No. 15-cv-11827-ADB, 2015 WL 6182468 at *2 (D. Mass. Oct. 21, 2015). There is consensus among district courts within the Sixth Circuit that *McCall*’s footnote impliedly endorsing snap removal is dicta and thus not binding on lower

v. Reynolds.¹³² The court rejected the propriety of the tactic. In *Goodwin*, the plaintiff brought suit in Alabama state court against a truck driver, his employer, and the company he was delivering to, alleging several tort claims based on the allegation that the driver hit and killed her husband.¹³³ The driver was a citizen of the forum and both corporate defendants were non-forum citizens.¹³⁴ On the same day the plaintiff filed suit, she also sent courtesy copies of the complaint to the defendants.¹³⁵ Three days later, but before any defendants were served, the two corporate defendants removed the action.¹³⁶ One defendant then immediately filed its answer, foreclosing the plaintiff's ability to voluntarily dismiss the suit.¹³⁷ The district court denied remand, construing the forum defendant rule according to its plain language.¹³⁸ The Eleventh Circuit reversed.¹³⁹

While its discussion of snap removal is arguably dicta, the court's opinion makes clear how little it thinks of snap removal and the attendant plain language argument. Its rejection relied on three bases. First, the court observed that the case was only before it because the corporations had clearly manipulated the plaintiff's efforts to maintain norms and prompt resolution of her lawsuit.¹⁴⁰ Specifically, the corporate defendants "exploit[ed] . . . [p]laintiff's courtesy in sending them copies of the complaint and . . . [her]

courts within the circuit. See, e.g., *Harrison v. Wright Med. Tech., Inc.*, No. 2:14-cv-02739-JPM-cgc, 2015 WL 2213373, at *6 (W.D. Tenn. May 11, 2015); *Recent Case: Gibbons v. Bristol-Myers Squibb Co.*, *supra* note 67 (labeling the snap removal reference in *McCall* dicta).

¹³² 757 F.3d 1216, 1218 (11th Cir. 2014). Specifically, the court was reviewing a lower court's decision to grant the plaintiff's motion to dismiss without prejudice—rather than a decision on a motion to remand. *Id.* However, the defendant had snap removed the case, so, while pre-service removal was not squarely presented, the court nevertheless examined the tactic. *Id.* at 1218-22.

¹³³ See *id.* at 1218.

¹³⁴ *Id.* at 1218 n.3.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 1218-19.

¹³⁸ *Id.* at 1219.

¹³⁹ *Id.* at 1222.

¹⁴⁰ *Id.* at 1221. Cf. Green, *supra* note 4, at 424 ("Holmes's . . . *Taxicab* dissent quickly became a rallying point for critiques of federal courts' abuse. The idea that corporate litigants could manipulate substantive contract law merely by shuffling papers, changing state citizenship, and removing their cases to federal court became increasingly unacceptable.").

diligent request for service.”¹⁴¹ Second, the court noted that construing the forum defendant rule according to its plain meaning required the panel to “tie the district court’s hands in the face of such” abject and brazen manipulation and jurisdiction hacking.¹⁴² Finally, the court found the plain meaning argument lacked merit because it “would turn the statute’s properly joined and served language on its head.”¹⁴³ Because snap removal is contrary to “the core of what the removal statute protects,” the court reversed and remanded the suit.¹⁴⁴

Four years later, the Third Circuit weighed in on the growing inter- and intra-court inconsistency between district courts in Delaware, New Jersey, and Pennsylvania. However, unlike the Eleventh Circuit in *Goodwin*, the Third Circuit in *Encompass Ins. Co. v. Stone Mansion Rest. Inc.* adopted the plain meaning construction to permit snap removal.¹⁴⁵ In *Encompass*, an out-of-state insurance company filed a subrogation action against a bar—a citizen of the forum—for overserving a patron who injured the claimant in a car crash.¹⁴⁶ Encompass, the insurer, filed suit in Pennsylvania state court alleging several tort claims.¹⁴⁷ It provided a courtesy copy of the complaint but did not affect service.¹⁴⁸ Instead, the parties agreed to waive service and transmit the summons via email.¹⁴⁹ However, before that transaction was completed, the restaurant went back on its word

¹⁴¹ *Goodwin*, 757 F.3d at 1221. The court also noted that the fact that defendants answered the complaint the same day that they removed the action suggested that their filing was indicia of gamesmanship rather than pure happenstance. *Id.* at 1221 n.14.

¹⁴² *Id.*

¹⁴³ *Id.* (quotation marks omitted). Specifically, the court observed that, while there is apparently no explanation for why Congress added the “properly joined and served” language to the removal statute, “[m]ultiple courts . . . have interpreted it as an effort to prevent gamesmanship by plaintiffs.” *Id.* (citing *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 643 (D.N.J. 2008)). That is, the forum defendant rule is intended “to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom [the plaintiff] does not intend to proceed, and whom [the plaintiff] does not even serve.” *Id.* (quotation marks omitted) (quoting *Sullivan*, 575 F. Supp. 2d at 645).

¹⁴⁴ *Id.* at 1222.

¹⁴⁵ 902 F.3d 147, 153-54 (3d Cir. 2018).

¹⁴⁶ *See id.* at 149.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 150.

¹⁴⁹ *Id.*

and removed the suit.¹⁵⁰ The district court denied remand and granted the restaurant's motion to dismiss.¹⁵¹

On appeal the Third Circuit observed that the removal question largely turned on whether it produced an absurd result.¹⁵² It answered in the negative. Though the statute's text was clear, according to the court, its purpose was less so. Citing no support for this conclusion, the court pointed at "fraudulent joinder by a plaintiff" as Congress's reason for inserting the "joined and served" language into the removal statute.¹⁵³ The court provided three bases for its decision: snap removal is justified by the plain meaning of § 1441(b)(2)'s text; the device is a minor occurrence in the context of all other removals under § 1332; and its interpretation used all of the words contained within the statute.¹⁵⁴

Though the court noted that certain "technological advances" may confer an unfair advantage in some cases, and could lead to a "race-to-the-courthouse removal scenario," its hands were tied by the clarity of the text.¹⁵⁵ Oddly, in dismissing out of hand the contention that snap removal unfairly favors corporate defendants, the court noted that it could not engage with the argument because the plaintiff did not "argue that the practice is widespread."¹⁵⁶ Yet, without the defendants making the argument themselves or the court citing any support, it felt free to characterize snap removal as a "narrow" slice of actions removed.¹⁵⁷ What is good for the goose is apparently not good for the gander.

Not long after, the Second Circuit followed suit, affirming that § 1441(b)(2) does not bar snap removal, in *Gibbons v. Bristol-*

¹⁵⁰ *See id.*

¹⁵¹ *Id.* at 150-51.

¹⁵² The court framed the remand question as whether permitting snap removal would lead to a "most extraordinary showing of contrary intentions and . . . whether this literal interpretation leads to absurd or bizarre results." *Id.* at 152 (quotation marks omitted).

¹⁵³ *Id.* at 153.

¹⁵⁴ *See id.* at 153-54.

¹⁵⁵ *Id.* at 153 n.4.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 153.

*Myers Squibb Co.*¹⁵⁸ *Gibbons* arose out of multiple products liability cases brought against Bristol-Myers Squibb alleging one of its medications had resulted in severe bleeding and death. Several were awaiting transfer to multidistrict litigation (MDL) in the Southern District of New York, but a federal judge dismissed them along a variety bases.¹⁵⁹ The *Gibbons* plaintiffs filed their new actions in Delaware state court. BMS snap removed the suits to federal court in Delaware, where the plaintiffs consented to MDL transfer, and subsequently asked the MDL judge to remand their actions.¹⁶⁰ The judge denied the motions and dismissed the actions on other grounds.¹⁶¹ On appeal, the plaintiffs asked the Second Circuit to reverse the denial of remand or dismissal. The court declined both requests.

The Second Circuit, noting that snap removal is in fact an unusual method of seeking a federal forum, nevertheless applied what it deemed the plain meaning of § 1441(b)(2)'s text. To start, it distinguished *Goodwin* on its facts—according to the court, the Third Circuit, then, was the only “Court of Appeals to address the propriety of pre-service removal by a defendant sued in its home state[.]”¹⁶² For the *Gibbons* court, as in *Encompass*, the question was not one of statutory construction, but whether snap removal offends congressional intent by producing an absurd result. The threshold for “absurdity,” the court observed, was not merely an

¹⁵⁸ 919 F.3d 699, 707 (2d Cir. 2019). Defendants’ counsel in *Gibbons* has represented other major corporations in several significant cases that resulted in greater protections for large corporations, both in the lower courts as well as the U.S. Supreme Court. *Id.* at 702; *see e.g.*, *Bristol-Myers Squibb Co. v. Superior Court of Calif.*, 137 S. Ct. 1773, 1777 (2017) (holding that specific jurisdiction exists only where the harms underlying the suit relate to or arise out of the defendant’s contacts with the forum) *Doe v. Nestle, S.A.*, 929 F.3d 623, 625 (9th Cir. 2019), *cert. granted sub nom. Cargill, Inc. v. Doe I*, 141 S. Ct. 184, 207 L. Ed. 2d 1114 (2020), and *cert. granted sub nom. Nestle USA, Inc. v. Doe I*, 141 S. Ct. 188, 207 L. Ed. 2d 1114 (2020) (asking whether a domestic corporation can be liable under the Alien Tort Statute for allegedly aiding and abetting child slavery). In the October 2020 Term, the same counsel represented Ford Motor Company in a specific-jurisdiction case that could potentially implicate snap removal and its role in making it harder for individuals to sue corporations. *See infra* note 202.

¹⁵⁹ *See Utts v. Bristol-Myers Squibb Co. (Utts II)*, 251 F. Supp. 3d 644, 684 (S.D.N.Y. 2017).

¹⁶⁰ *See, e.g.*, *Cheung v. Bristol-Myers Squibb Co.*, 282 F. Supp. 3d 638, 641 (S.D.N.Y. 2017).

¹⁶¹ *See id.* at 644.

¹⁶² *Gibbons*, 919 F.3d at 705.

“anomalous” result, but one that “is quite impossible that Congress could have intended . . . where the alleged absurdity is so clear as to be obvious to most anyone.”¹⁶³ Snap removal, the court held, is no more than the former. While “[r]emoval based on diversity jurisdiction is intended to protect out-of-state defendants from possible prejudices in state court,” Congress intended the “joined and served” language to “combat fraudulent joinder,” thus snap removal does not contravene Congress’s intent.¹⁶⁴ The court’s reasoning then shifted to the rule’s administrability. Congress must have intended a binary rule focused on service, as it would be much easier to determine whether an in-state defendant is fraudulent based upon whether the plaintiff served them, than whether a plaintiff *really* intended to serve the in-state defendant they named.¹⁶⁵ The court finally added that snap removal is not “fundamentally unfair,” a bold assertion that is as unsupported as it is unpersuasive.¹⁶⁶

Most recently, the Fifth Circuit adopted *Gibbons*’s holding in *Texas Brine Co. v. AAA, Inc.*¹⁶⁷ In *Texas Brine*, the plaintiff—a citizen of Texas—brought an arbitration suit in Louisiana state court, naming two in-state defendants and one out-of-state defendant.¹⁶⁸ The corporate defendant—the lone out-of-state party—removed the action before the in-state defendants were served, and subsequently answered Texas Brine’s complaint. The court characterized its analysis, based upon its observation that § 1441(b)’s text is “unambiguous,” as a search for “plain meaning

¹⁶³ *Id.* at 705-06 (quotation marks omitted) (quoting Catskill Mountains Chapter of Trout Unlimited, Inc. v. Evtl. Prot. Agency, 846 F.3d 492, 517 (2d Cir. 2017)).

¹⁶⁴ *Id.* at 706 (citing *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 940 (9th Cir. 2006); *Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 153 (3d Cir. 2018)). Many courts have interpreted Congress’s intent in adding the “properly joined and served” language to § 1441(b)(2) was to prevent plaintiff gamesmanship—referred to as fraudulent joinder—where they might name an in-state defendant merely for the purposes of foreclosing removal. *See, e.g.*, *Champion Chrysler Plymouth v. Dimension Serv. Corp.*, No. 2:17-cv-130, 2017 WL 726943, at *2-*6 (S.D. Ohio Feb 24, 2017), *adopting* Report & Recommendation, 2017 WL 1276727 (S.D. Ohio Apr. 6, 2017), *aff’d*, No. 17-3355 (6th Cir. June 12, 2017); *see also* WRIGHT ET AL., *supra* note 29, at § 3723.

¹⁶⁵ *See Gibbons*, 919 F.3d at 706.

¹⁶⁶ *Id.* at 707. *See* text accompanying notes 300-304 (discussing the asymmetry between litigants that snap removal fosters).

¹⁶⁷ 955 F.3d 482, 487 (5th Cir. 2020).

¹⁶⁸ *See id.* at 484-85.

and absurdity.”¹⁶⁹ Further, it relied on the fact that the forum defendant rule is procedural—not jurisdictional—and concluded that it does not trigger unless and until a forum defendant is served.¹⁷⁰

The court then explained—like the Second and Third Circuits—that snap removal does not produce absurd results, nor is it an abuse of the statute. Even if snap removal relies on a factor not fully appreciated by Congress at the time—i.e., electronic docket monitoring—that, in and of itself, is not absurd.¹⁷¹ The court also adopted the bright-line service justification, shared by the Second Circuit, as the purpose behind § 1441(b)(2)’s “joined and served” language.¹⁷² The court described snap removal as “rational,” well below “absurd.”¹⁷³ Thus, it concluded, “a reasonable person could intend the results of the plain language.”¹⁷⁴

¹⁶⁹ *Id.* at 486.

¹⁷⁰ *See id.* at 485-86 (citing *Gibbons*, 919 F.3d at 705). The Third Circuit premised its reasoning on a similar nonjurisdictional categorization. *See Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 152 (3d Cir. 2018) (categorizing the forum defendant rule as “procedural rather than jurisdictional[.]”) (citing *Korea Exch. Bank, N.Y. Branch v. Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1995)). Whereas jurisdiction is a court’s power or authority to issue binding orders, procedure is the regulation of that power or authority once it has been obtained. *See Dodson, supra* note 14, at 59. Procedure largely serves, among other things, to govern litigant fairness and, as a secondary effect, is intended to “promote broader societal values[.]” *Id.* at 60. Because procedural rules largely cannot be raised *sua sponte*—unlike jurisdictional rules—they are tightly bunched with the adversarial nature of our legal system. *See id.* This suggests that when a procedural rule favors one litigant, it disadvantages another. Another functional feature of procedural rules best demonstrated by snap removal is how strictly applying such rules can often frustrate the values the rule serves. *Id.* For example, plaintiff’s choice of forum. Therein lies a key distinction between jurisdictional and nonjurisdictional rules. “If the procedural rule in question is designed to promote fairness or equitable administration, then it is reasonable to allow courts to bend or break the procedural rules in certain cases when equity or fairness demands it.” *Id.*

¹⁷¹ *Tex. Brine Co.*, 955 F.3d at 485-86.

¹⁷² *Id.* at 486.

¹⁷³ *Id.*

¹⁷⁴ *Id.* Despite the fact that removal in *Texas Brine* was initiated by a non-forum defendant, several district courts within the circuit have begun interpreting the holding as exceeding its facts to reach forum defendants, too. *See, e.g., Latex Constr. Co. v. Nexus Gas Transmission, LLC*, No. 4:20-1788, 2020 WL 3962247, at *2 (S.D. Tex. July 13, 2020); *Serafini v. Sw. Airlines, Co.*, No. 3:20-CV-00712-X, 2020 WL 5370472, at *3 (N.D. Tex. Sept. 8, 2020). This is consistent with how courts in other

* * *

Snap removal, as it is currently used in most instances, did not show up overnight. Rather, the tactic was initially used primarily in relatively narrow, commercial contexts. But, through judicial engagement, the tactic's reach and availability expanded. In reaching this more expansive conception, courts felt compelled to apply objective, neutral principles to arrive at what they felt was the correct answer in cases questioning the tactic's permissibility.

II. MORE DATA ON SNAP REMOVAL CASES

Among the arguments for snap removal mentioned above are two important but unsubstantiated claims. One is that snap removal is not prevalent enough to warrant intervention.¹⁷⁵ The other is that snap removal is not sufficiently unfair to ignore what courts read as unambiguous text.¹⁷⁶ These claims appear in court opinions.¹⁷⁷ Advocates for the tactic have also read them into the congressional record.¹⁷⁸ These are largely empirical claims, yet courts and advocates assert them absent any support. As the foregoing discussion shows, at least some courts rely on snap removal's prevalence as a factor in deciding relevant cases. Without an understanding of its scope, courts are likely making uninformed decisions on the tactic's provenance.

In 2018, Valerie Nannery published a law review article that included empirical data showing, among other things, the use of

circuits have incorrectly construed § 1441(b)(2) to increase federal courts' authority to reach cases that likely belong in state court.

¹⁷⁵ See, e.g., *Encompass*, 902 F.3d at 153 (asserting without support that snap removals are a "narrow" portion of all removals); Stoffelmayr Testimony, *supra* note 12, at 1-2.

¹⁷⁶ See, e.g., *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705 (2d Cir. 2019); *Encompass*, 902 F.3d at 153.

¹⁷⁷ See, e.g., *Encompass*, 902 F.3d at 153. (asserting without support that snap removal are a "narrow" portion of all removals).

¹⁷⁸ See Stoffelmayr Testimony, *supra* note 12; Alison Frankel, *House Dems Introduce Bill to Combat Defense Tactic of 'Snap Removals'*, REUTERS (Feb 12, 2020, 4:15 PM), <https://www.reuters.com/article/us-otc-snapremoval/house-dems-introduce-bill-to-combat-defense-tactic-of-snap-removals-idUSKBN2062ZW> [<https://perma.cc/H3X6-LEZ2>] (corporate defense attorneys referring to snap removal as "uncommon" and "the exception rather than the rule").

snap removal from 2012-2014.¹⁷⁹ Nannery's work is a substantial contribution to understanding the tactic. It provided an initial empirical baseline to help determine how often cases are snap removed. However, the tactic is being used more often, so another data point is needed to complement Nannery's work and contextualize these claims.¹⁸⁰ This Article seeks to fill that gap.

My research followed a similar methodology¹⁸¹ and found the instances of snap removal have at least doubled since 2012–2014. This suggests, at minimum, that snap removal is not the rare or uncommon occurrence its defenders characterize it as. This Part will discuss my findings and how they update and reaffirm the current understanding.

A. Methodology

First, a brief discussion of my methodology. To ensure as much consistency across results as possible, I endeavored to recreate Valerie Nannery's methodology as faithfully as possible.¹⁸² However, for several reasons, the resulting dataset discussed in this Article is, if anything, under-inclusive.¹⁸³

¹⁷⁹ See generally Nannery, *supra* note 10.

¹⁸⁰ See, e.g., Carrington Mortg. Servs., LLC, v. Tigor Title of Nev., Inc., No. 2:20-CV-699 JCM (NJK), 2020 WL 3892786, at *2 n.3 (D. Nev. July 10, 2020) (observing that the tactic has become “increasingly popular in recent years”); Timbercreek Asset Mgmt., Inc. v. De Guardiola, No. 9:19-CV-80062-ROSENBERG/REINHART, 2019 WL 947279, at *1 (S.D. Fla. Feb. 27, 2019) (observing that relevant case law has “accelerated in recent years”); Bowman v. PHH Mortg. Corp., 423 F. Supp. 3d 1286, 1289 (N.D. Ala. 2019), *appeal dismissed*, No. 19-14041-HH, 2020 WL 1847512 (11th Cir. Feb. 26, 2020) (referring to the tactic as “increasingly common”).

¹⁸¹ Nannery searched for cases involving at least one forum defendant that were removed to federal court between January 1, 2012, and December 31, 2014, before service on any defendant. See Nannery, *supra* note 10, at 559-60. Cases were only included in her dataset if it could be ascertained that there was complete diversity between the parties and the plaintiffs could have originally invoked the diversity jurisdiction of the federal court. *Id.* at 559 n.113. She excluded cases in which an out-of-state defendant removed on the basis of diversity jurisdiction and improper or fraudulent joinder of a forum defendant. *Id.* She also excluded cases where the removing defendant was served prior to removal. *Id.* at 559 n.114.

¹⁸² I spoke to Valerie Nannery regarding her methodology and research design to maximize consistency between the results in our papers. See Telephone Interview with Valerie Nannery (Feb. 11, 2020) (on file with author).

¹⁸³ There are several reasons why my findings represent the floor and that the actual number is likely higher. Absent a plaintiff filing a motion to remand, it is incredibly difficult to identify cases that were snap removed. See Nannery, *supra* note

I relied upon four key searches, two via Westlaw¹⁸⁴ and two via Bloomberg Law.¹⁸⁵ The search covered a two-year period: January 1, 2018 through December 31, 2019. Because Westlaw only returns written opinions, I used the database to capture decisions handed down within the time period.¹⁸⁶ Since Bloomberg Law is able to access court dockets, I used the platform to search for cases filed within the time period that were snap removed. I looked only for dockets where a motion for remand had been filed within 2018-2019. The search resulted in 270 cases where snap removal was attempted by defendants or a plaintiff's motion to remand was ruled on by a court during the time period.

The cases were coded according to venue, identity of defense counsel, nature of the suit, number of defendants, party type for both plaintiff and removing defendant, the citizenship of the removing party, whether the case was pleaded as a class action,

10, at 560 n.115 (summarizing some of the difficulties). Further, district court judges are not required to write decisions and, as already discussed, rulings on motions to remand are not reviewable. Thus, there are likely at least some cases that were snap removed in my date range that were not captured. See Thomas O. Main, Jeffrey W. Stempel & David McClure, *The Elastics of Snap Removal: An Empirical Case Study of Textualism*, CLE. ST. L. REV. (forthcoming 2021) (manuscript at 21-25) (discussing the difficulty in finding unpublished opinions for snap removals). Additionally, whereas Nannery's study relied upon a three-year time frame (2012-2014), due to research limitations, this dataset encompasses a two-year time frame (2018-2019).

¹⁸⁴ I ran two searches on Westlaw. The first used the following Boolean: adv: (remov! NEAR4 serv!) AND remand AND divers! AND (#before OR snap OR pre-service). I then searched within those results with the following phrase: "joined and served." The second search used the following Boolean: adv: ("1441(b)" OR snap OR pre-service) AND "joined #and served") AND (remov! /5 serv!) AND (remov! /5 prior OR #before). Any duplicative results were only counted once.

¹⁸⁵ The two searches on Bloomberg Law focused on dockets. The first search looked at dockets where the leading firms that invoke snap removal, based upon my Westlaw searches, filed notices of removal. I then pulled each notice and read them. The second docket search used the following search terms: "joined AND served" OR "snap remove" OR "snap removal" OR "pre-service" OR "prior to being served." I then filtered according to two factors: filing and jurisdiction. I only looked at dockets that had removal notices in the leading jurisdictions, according to my Westlaw searches. Those jurisdictions were the District of New Jersey, Eastern District of Pennsylvania, Western District of Texas, Southern District of Texas, Eastern District Missouri, and Central District of California.

¹⁸⁶ See Nannery, *supra* note 10, at 559 n.112 (discussing how looking for written decisions likely undercounts the instances of snap removal). Additionally, Westlaw often backfills its records such that a written decision might not appear in the database for many months after it has been issued. Thus, the results on Westlaw are subject to change, particularly the results for 2019.

and whether remand was ultimately granted. This information was drawn from civil cover sheets. In some instances, the cover sheets were not accessible (or were illegible), in which case I referenced other docket filings or (where relevant) an opinion.

B. Assessment

While my complete findings can be referenced in the Appendix, this Section will briefly highlight the findings that address some of the unsupported claims within the snap removal conversation. Among the 270 cases, the annual breakdown is 179 cases in 2018 and 91 in 2019.¹⁸⁷ Nannery's search identified 227 cases over three years (January 1, 2012 to December 31, 2014).¹⁸⁸ Thus, my search revealed nearly twice as many snap removals on average over a comparable time period. Notably, my data cast doubt on the claims that snap removal is used "infrequent[ly]," occurs in only a "handful of cases,"¹⁸⁹ and is used primarily by out-of-state defendants to defeat fraudulent joinder. Rather, my data show not only that defendants are using the tactic more often, but it is *forum* defendants who are snap removing most often. Further, the tactic is used almost exclusively (approximately 97% of cases) by corporations. This is a significant departure from the picture the tactic's defenders paint.

1. Snap removal is succeeding more often

Defendants are succeeding more often in attempting to snap remove a case. The prior examination found snap removal was successful in less than 10% of cases. In contrast, of decided cases in my dataset, the tactic prevailed in approximately 87%. However, that number is likely discounted. The percentage of successful instances of snap removal is likely skewed lower by an

¹⁸⁷ That is the number of remand motions per year in cases that were snap removed. Some were ruled on, while others are still pending.

¹⁸⁸ Nannery, *supra* note 10, at 560.

¹⁸⁹ Stoffelmayer Testimony, *supra* note 12, at 8 (referencing Nannery's findings to support the claim that snap removal occurs infrequently because it occurs about fifty times a year). As discussed below, I found more than three times that number of cases per year. To the extent that fifty cases in a year is infrequent, my data show that snap removal is at least occurring more frequently than the defense bar lets on.

unusual practice of consensual remands I discovered.¹⁹⁰ Parties mutually agreed to remand the actions after they were snap removed in a total of 67 cases, thus the court never ruled on the motions to remand. Most of these consensually remanded actions—51 of the 67 cases—arose out of surgical mesh litigation in New Jersey, where *Encompass* is binding precedent. This suggests the court likely would have permitted snap removal and denied remand.¹⁹¹ Had it done so for those 51 motions to remand, snap removal would have prevailed in at least 90% of cases. This further supports the notion that my dataset is under-representative, particularly in the context of defendants' success snap removing cases.

2. Snap removal is used primarily by forum defendants

My data suggest a sharp increase in the use of snap removal by forum defendants. Nannery found, between 2012 and 2014, that less than half (46%) of snap removals were initiated by forum defendants.¹⁹² In contrast, between 2018-2019, I found that approximately 92% of cases were snap removed by forum defendants. Of the cases snap removed by forum defendants, 66% were successful. However, as already discussed, the consensual remands likely skew this rate, making it under-representative. Accounting for the consensual remands shows that in-state defendants succeeded in removing 90% of the actions.

This finding corrects a premise in at least one argument made by several of the tactic's defenders. In fall of 2019, Kaspar J. Stoffelmayr, a partner at corporate defense firm Bartlit Beck, testified before Congress that addressing snap removal is unnecessary. Stoffelmayr claimed that snap removal is too rare to warrant legislative intervention, and that an amendment could

¹⁹⁰ I cannot identify the reason for the consensual remands. The explanation must be that it is valuable for both parties, but that does not answer the more interesting question of why the defendant snap removed in the first place. Of course, one answer is that at least some corporate defendants have adopted a policy of snap removing cases as a matter of course. Once their docket monitoring service notifies them of a pending suit, the corporation's outside counsel immediately files a notice of removal, creating defendant's choice of forum.

¹⁹¹ The remaining 16 actions arose out of Roundup litigation in the Eastern District of Missouri.

¹⁹² Nannery, *supra* note 10, at 565.

lead to “further gamesmanship of a different kind.”¹⁹³ Further, he argued snap removal is justified because it is a tactic defendants use to foil “litigation tourists shopping for what they hope to be the most favorable state-court forum.”¹⁹⁴ That is, plaintiffs find the most advantageous forum and then name the corporate defendant and an in-state “straw man” to trigger the forum defendant rule.¹⁹⁵ My findings suggest that what the defense bar describes as the “typical” or “normal case”—out-of-state defendants using the tactic to defeat fraudulent joinder—is not in fact the most common.¹⁹⁶ The defense bar’s justification for the tactic is a straw man. My data show snap removal’s typical usage is in fact when an out-of-state *plaintiff* sues an in-state corporate *defendant*.

This represents a significant shift. My findings show snap removal is not being used as a shield for out-of-state defendants to block plaintiffs’ forum shopping and fraudulent joinder.¹⁹⁷ Rather, the typical snap removal case is when out-of-state plaintiffs file suit in a defendant’s home state. Snap removal is a device that gives forum *defendants* the choice to litigate in a state or federal forum.

Further, it is noteworthy that more than three-quarters of all cases in my dataset arose out of the District of New Jersey.¹⁹⁸ As discussed below, in both Nannery’s findings for 2012–2014 and my data for 2018–2019, snap removal was used most often in products liability actions. Both New Jersey and the Eastern District of Missouri are home to large products manufacturers that would potentially attract products liability litigation.¹⁹⁹ For example,

¹⁹³ Snap Removal Hearing, *supra* note 108, at 53:45-53:55, 54:40-54:50.

¹⁹⁴ Stoffelmayer Testimony, *supra* note 12, at 9.

¹⁹⁵ *Id.* at 6.

¹⁹⁶ Snap Removal Hearing, *supra* note 108, at 54:30.

¹⁹⁷ These data also suggest fraudulent joinder is not the problem many in the defense bar make it out to be. *See, e.g.*, Stoffelmayer Testimony, *supra* note 12, at 7 (referring to fraudulent joinder as “no less a problem today than it was when Congress added the ‘properly joined and served’ language” to § 1441(b)(2)).

¹⁹⁸ The jurisdiction that received the second highest number of snap removals was the Eastern District of Missouri, which saw approximately 8% of all snap removals in my dataset. For an interesting geographical analysis of where snap removals are being decided, see Main et al., *supra* note 183, at 16-19.

¹⁹⁹ The U.S. Supreme Court recently heard a pair of consolidated cases that present, among others, the question of whether the “arise out of or relate to” requirement for a

Bristol-Myers Squibb and Johnson & Johnson are citizens of New Jersey and Monsanto is based in the Eastern District of Missouri.²⁰⁰ It could be that those venues receive a higher volume of snap removals due to the fact that they are home to major products manufacturers that are often subject to high volumes of litigation.²⁰¹

state court to exercise specific personal jurisdiction over an out-of-state defendant under *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts. See *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, No. 19-368 (U.S. 2020). Some scholars and commentators argue a ruling for Ford could, among other things, require plaintiffs to sue a corporation in its home state. See, e.g., Martina Barash, *Where to Sue a Car Company for Defects? SCOTUS Might Weigh In*, BLOOMBERG LAW (Jan. 9, 2020, 3:55 AM), <https://news.bloomberglaw.com/product-liability-and-toxics-law/where-to-sue-a-car-company-for-defects-scotus-might-weigh-in> [<https://perma.cc/VSV8-P8ZE>]; Linda Chiem, *Ford Can't Duck State Defect Suits, Law Profs Tell Justices*, LAW360 (Apr. 2, 2020, 5:45 PM), <https://www.law360.com/articles/1259832/ford-can-t-duck-state-defect-suits-law-profs-tell-justices> [<https://perma.cc/FD4G-XW2A>]. With a ruling for Ford, along the lines of what some commentators have discussed, litigating such suits in state court could become really a choice for the defendant: Do they snap remove cases as they are filed or permit them to proceed in state court, where the corporation perhaps has more influence? See ALICIA BANNON, CATHLEEN LISK, & PETER HARDIN, BRENNAN CTR. JUST., WHO PAYS FOR JUDICIAL RACES? THE POLITICS OF JUDICIAL ELECTIONS 2015-16 (Dec. 14, 2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_New_Politics_of_Judicial_Elections_1516.pdf [<https://perma.cc/Z5NM-78EL>]; BILLY CORRIHER, CTR. FOR AM. PROGRESS, BIG BUSINESS TAKING OVER STATE SUPREME COURTS: HOW CAMPAIGN CONTRIBUTIONS TO JUDGES TIP THE SCALES AGAINST INDIVIDUALS (Aug. 2012), <https://www.americanprogress.org/wp-content/uploads/2012/08/StateCourtsReport.pdf> [<https://perma.cc/75QX-RF9L>]; Michael Scherer, *The Making of the Corporate Judiciary*, MOTHER JONES (Nov./Dec. 2003), <https://www.motherjones.com/politics/2003/11/making-corporate-judiciary/> [<https://perma.cc/F7U5-84C7>].

²⁰⁰ Relkin Testimony, *supra* note 12, at 3 (referring to New Jersey as the “medicine chest of the nation” due to its large number of resident pharmaceutical companies, including Johnson & Johnson, Merck, Bayer, and Novartis).

²⁰¹ Of course, in most instances defendants are attempting to snap remove cases in a jurisdiction—the Third Circuit—where they will almost definitely prevail due to *Encompass*, so perhaps major conclusions as to why the District of New Jersey accounts for a disproportionate share of case volume cannot be drawn from my data. However, *Gibbons* is on the books in the Second Circuit, and yet the number of snap removals arising out of that jurisdiction pale in comparison to the cases arising out of the Third Circuit. Further, even within the circuit, the District of New Jersey far outweighs the number of cases arising out of other lower courts within the circuit. Yet, one significant difference between New Jersey and states within the Second and Third Circuits is that it is home to numerous pharmaceutical manufacturers.

3. Snap removal is used almost exclusively by corporations

Consistent with Nannery's findings, snap removal is a tactic deployed almost exclusively by corporations. Ninety-five percent of Nannery's cases were removed by corporations, whereas corporate defendants removed 97% of the cases in my dataset.

Existing research suggests corporations by and large prefer to litigate in federal court.²⁰² A federal forum, typically, is more beneficial for corporate litigants.²⁰³ Snap removal is a uniquely beneficial means of increasing a corporate litigant's chances they will prevail in a lawsuit. Further, it could also be snap removal is

Another possible explanation is precedent. As discussed, more than three-quarters of the cases identified arise out of the Third Circuit, where lower courts within the jurisdiction must construe § 1441(b)(2) according to its plain meaning. But if that were the sole explanation then other districts within the Third Circuit should have more snap removals than they do. For example, I found only one case arising out of the District of Delaware and one from the Middle District of Pennsylvania. Similarly, I found only two snap removals arising out of the Second Circuit—nowhere close to the volume of cases arising out of the District of New Jersey.

An additional factor that could contribute to the high volume of cases arising out of New Jersey is its process service statute. Under N.J. CT. R. 4:5A-2, civil actions filed in state court are assigned a "track assignment," which provides for an automatically designated discovery period. Plaintiffs must "serve" a Notice of Track Assignment, which is typically generated several *days* after a complaint is filed. *Id.* Consequently, New Jersey plaintiffs often argue that a plaintiff is required to await receipt of the Notice of Track Assignment prior to service. This means service will almost always be delayed, granting defendants substantial time to snap remove if they wish. *See, e.g., Anderson v. Merck & Co.*, No. 3:18-cv-15844 (PGS), 2019 WL 161512, at *1 (D.N.J. Jan. 10, 2019) ("Plaintiff contends that the personal service was delayed because Plaintiff had not been assigned a Tracking Assignment Number ("TAN") from the Clerk of the Superior Court of New Jersey, which is necessary before personal service may occur."). However, Missouri does not have such a requirement, and yet it accounted for a consistent share of cases within the dataset (8%). Nor does the Eighth Circuit have precedent on point. The Eastern District of Missouri—where all of the Missouri actions arise out of—like the District of New Jersey, is home to an international firm often subject to products liability actions. Whereas in New Jersey it is typically pharmaceutical and medical device firms, in Missouri it is Monsanto. This suggests at least some support for the notion that snap removal is a tactic for corporations often subject to litigation to creatively exert more control over the litigation where they would otherwise not be able to.

²⁰² *See, e.g., Galanter, supra* note 118, at 1389-90; Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 413-22 (1992).

²⁰³ *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, 599-602 (1998) (finding win rates dropped from 71% in original forum to 34% in removal); Galanter, *supra* note 118, at 1389-92.

becoming best practice for many corporations, particularly those that are large, well-financed, and legally sophisticated. As the cases discussed above show, in at least some instances a corporation has snap removed an action only to later consent to remand. While the reason for the remand is not apparent, it makes little sense for a party to remove a case only to remand. Because one of the requirements for snap removal is time, corporations might be snap removing actions to create the option for a federal forum, then, once the dust settles, deciding whether a federal forum is in fact optimal for the particular action. This is, of course, the same calculus many plaintiffs navigate in deciding whether to bring suit in state or federal court. As discussed in more detail below, snap removal arguably creates two masters of a complaint—both plaintiff and defendant.²⁰⁴ In at least some instances, like perhaps with the cases that were consensually remanded, it enables defendants to engage in conduct that wastes precious judicial resources.

4. Snap removal is still used predominantly in products liability suits

Approximately 86% of cases that were snap removed between 2018 and 2019 were products liability cases.²⁰⁵ This is consistent with the findings from 2012-2014, where approximately 83% of cases were products liability actions.²⁰⁶ In 2018-2019, the next largest category of suits were personal injury claims, which represented approximately 6% of all cases. The remaining suits were distributed across other action types, such as securities actions and contract claims.

²⁰⁴ See, e.g., *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-32 (2002).

²⁰⁵ To code the nature of each suit I used Products Liability to refer to both pharmaceutical and non-pharmaceutical products-based injuries. Personal Injury refers to tort suits arising out of injuries from all other forms of harm (e.g., slander). Products liability suits are overrepresented in snap removal cases, compared to all filings in federal court, where they represent approximately half of all diversity cases. See U.S. District Courts—Civil Federal Judicial Caseload Statistics (March 31, 2019), <https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2019/03/31> (last visited July 14, 2020); U.S. District Courts—Civil Federal Judicial Caseload Statistics (March 31, 2018), <https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2018/03/31> (last visited July 14, 2020).

²⁰⁶ See Nannery, *supra* note 10, at 563.

* * *

The data show that snap removal succeeds much more often than in 2012-2014, and that the overwhelming majority of snap removed cases are products liability cases that are removed by in-state corporate litigants. As discussed, the jurisdictions that receive the most cases via snap removal are home to major corporations that produce various products, including pharmaceuticals, chemicals, and consumer goods. A reasonable conclusion from the data is that corporate litigants are using snap removal to put the action in a forum that is potentially more beneficial or less adverse to their interests. In other words, snap removal permits defendants to forum shop.²⁰⁷

But they are not alone. Plaintiffs similarly try to manipulate jurisdictional rules to place their action in the most beneficial or least adverse forum. Typically, that means state court. Indeed, generally speaking, plaintiffs—particularly when they are suing a corporation—perceive state court as a more beneficial forum, federal court to be adverse, or both.²⁰⁸ In fact, there is some evidence that suggests it was plaintiffs’ gamesmanship that perhaps prompted snap removal.²⁰⁹ However, arguably the most common tactic plaintiffs deploy in forum shopping is fraudulent joinder.²¹⁰ But, as with Nannery’s study, I excluded cases where the court determined the plaintiff had fraudulently joined a defendant.²¹¹ Plaintiffs are not simply victims of defendants’ chicanery and forum manipulation—they too engage in

²⁰⁷ See *Forum-Shopping*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The practice of choosing the most favorable jurisdiction or court in which a claim might be heard.”).

²⁰⁸ Miller, *supra* note 204, at 408-13.

²⁰⁹ Specifically, some parts of the plaintiffs’ bar previously attempted to limit a defendant’s ability to remove by providing them with a courtesy copy of a complaint, and then argued that that constituted service, thereby starting the thirty-day removal clock under § 1446(b). This incentivized defendants to remove before the complaint was filed, to ensure their notice was timely. However, the Court effectively took that plaintiffs’ tactic off the table in *Murphy Bros.* See *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

²¹⁰ See *supra* notes 42, 164 and accompanying text (discussing fraudulent joinder).

²¹¹ That is not to say that defendants in the cases included in my dataset did not raise fraudulent joinder arguments. Though the majority of cases in the dataset were removed by forum defendants, many of the briefs opposing remand asserted some form of a fraudulent joinder argument. However, the courts’ decisions either dismissed the arguments in their opinions or failed to engage with them entirely.

gamesmanship and deploy various tactics in pursuit of a litigation advantage—however, for the purposes of this Article, it does not change the analysis.

C. Analysis

The findings show that snap removal is a tactic that enables corporations to access a federal forum in cases that would otherwise not be removable. And it is being used predominantly by in-state defendants. The reasons corporate litigants typically seek federal jurisdiction under § 1332 are well-established: they perceive federal judges are more competent than their state counterparts, federal courts take a more favorable view to corporate litigants, and federal procedural and evidentiary rules are more advantageous.²¹² Whatever the reasons, there is some benefit for corporate defendants in federal versus state court. At least one study has shown that plaintiffs' win rates were approximately cut in half when their case was removed versus when it is litigated in its original forum.²¹³

Corporations typically view federal court as more favorable because they lack an anti-business bias and because they favor corporate interests. Empirical examinations of why corporations prefer federal over state court or perceive bias in the latter typically show a high correlation between perceptions of anti-business bias and a corporate defendant's status as a business.²¹⁴ Most businesses see federal courts as sympathetic to their interests. A 2005 empirical examination of attorneys' choice of forum by the Federal Judicial Center found nearly three-quarters of defense attorneys removed cases because they had "clear expectations" the federal judge was more likely to rule in their

²¹² See Jeffrey M. Beyer, *Removal to Federal Court and the 'Forum Defendant Rule': Congress Enters 'Snap' Removal Thicket*, LAW.COM (Mar. 5, 2020, 12:00 PM) <https://www.law.com/njlawjournal/2020/03/05/removal-to-federal-court-and-the-forum-defendant-rule-congress-enters-snap-removal-thicket/?LikelyCookieIssue=true> [<https://perma.cc/QM47-QH47>].

²¹³ See Clermont & Eisenberg, *supra* note 205, at 593, 599-602 (finding win rates dropped from 71% in original forum to 34% in removal).

²¹⁴ See Miller, *supra* note 204, at 412; see also Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961, 967-68 (1995).

favor.²¹⁵ This study found defense attorneys “were almost five times more likely than attorneys who filed originally in state court to report their impressions that federal judges were predisposed to rule in favor of interests like those of their clients.”²¹⁶

Another primary reason corporate defendants remove state court actions on the basis of diversity is perceived judicial competence.²¹⁷ One highly-cited study of attorney perceptions found defense counsel almost unanimously view federal judges as “superior” to state court judges.²¹⁸ Indeed, one scholar has referred to the corporate defense bar as “competency-obsessed.”²¹⁹ This perception is at least augmented by the Chamber of Commerce and other defense bar organizations.²²⁰ For example, the Chamber rates state judiciaries on “quality,” which includes, among other factors, their relative “competence.”²²¹ Similarly, the American Tort Reform Foundation issues an annual report entitled “Judicial Hellholes,” in which the organization assesses how pro-corporate a

²¹⁵ See THOMAS E. WILLGING & SHANNON R. WHEATMAN, AN EMPIRICAL EXAMINATION OF ATTORNEYS’ CHOICE OF FORUM IN CLASS ACTION LITIGATION 29 (2005), <https://www.uscourts.gov/sites/default/files/clact05.pdf> [<https://perma.cc/F998-NLUA>].

²¹⁶ *Id.* at 30.

²¹⁷ See Miller, *supra* note 204, at 414-15 (finding judicial competence was a “very strong” reason for removal amongst defense attorneys).

²¹⁸ See *id.* at 433.

²¹⁹ Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2176 (2019).

²²⁰ See Willy E. Rice, *Allegedly “Biased,” “Intimidating,” and “Incompetent” State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly “Impartial” and “Competent” Federal Courts—A Historical Analysis of Class Action Dispositions in Federal and State Courts, 1925–2011*, 3 WM. & MARY BUS. L. REV. 419, 425, 436 (2012); see also Brief of DRI-The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner, Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743 (2018), 2018 WL 6062446, at *20 (“State courts’ treatment of class actions, and state trial judges’ impartiality and competence, are among the key factors affecting how corporations view the fairness of a State’s litigation environment.”).

²²¹ See generally 2019 LAWSUIT CLIMATE SURVEY: RANKING THE STATES, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Sept. 2019), https://www.instituteforlegalreform.com/uploads/sites/1/2019_Lawsuit_Climate_Survey_-_Ranking_the_States.pdf; cf. Matthew Bloch, Hannah Fairfield, Jacob Harris, Josh Keller, & Derek Willis, *How the N.R.A. Rates Lawmakers*, N.Y. TIMES (Dec. 19, 2012), <https://archive.nytimes.com/www.nytimes.com/interactive/2012/12/19/us/politics/nra.html> [<https://perma.cc/QE9M-9JWM>] (rating state and federal politicians based upon their voting record regarding gun rights).

given state court system is.²²² Both the Chamber and corporate defendants often perceive federal judges as more competent than their state court peers.²²³ Corporate defendants generally conceive of a competent judge as one who limits the effect of a jury in the underlying case.²²⁴ Corporations typically view federal judges as exerting such control.²²⁵ In that way corporations generally conceive of federal courts as being more solicitous of their interests.

Corporate defendants also largely prefer removing actions to avail themselves of federal procedural rules. For example, many corporate defendants remove state court actions to avail themselves of the federal summary judgment standard, which they perceive as more advantageous and readily available.²²⁶ Venue transfer within the federal system is also often seen as an asset to corporate defendants.²²⁷ Additionally, defense attorneys often seek federal jurisdiction to get into MDL.²²⁸ Thus, corporate defendants perceive removal as a necessary tool to escape state court biases and avail themselves of more favorable judges, juries, and rules.

Snap removal facilitates the availability of these jurisdictional advantages to corporate defendants. In that way, snap removal is a boon to corporations—at least as compared to a world without snap removal. Indeed, at least some corporate defense firms' discussions of the tactic support this conclusion. For example, attorneys at the corporate defense firm SheppardMullin referred to snap removal as “a useful tool for vigilant and quick-acting defendants to secure a federal forum where one *may not*

²²² See, e.g., AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2017–2018, <http://www.judicialhellholes.org/wp-content/uploads/2017/12/judicial-hellholes-report-2017-2018.pdf> [<https://perma.cc/8RVQ-DX22>].

²²³ See Miller, *supra* note 204, at 414-15; see also Flango, *supra* note 216, at 973.

²²⁴ See Miller, *supra* note 204, at 433-34 (discussing defendants' perceptions that federal judges limit the effect of juries more than state court judges); Zambrano, *supra* note 221, at 2169; Flango, *supra* note 216, at 973-74.

²²⁵ See Miller, *supra* note 204, at 433-34.

²²⁶ See *id.* at 437-38.

²²⁷ See *id.* at 391.

²²⁸ See, e.g., Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251 (2018) (discussing some of the reasons defendants seek federal MDL, including aggregation to facilitate global settlement).

otherwise be available” on the firm’s blog, Class Action Defense Strategy, which discusses various tactics and best practices in corporate defense work.²²⁹ Similarly, the firm Butler Snow referred to the tactic as a “useful arrow[]” in a defendant’s “quiver.”²³⁰ These characterizations of the tactic by defense firms are typical.²³¹ In fact, James Beck, an attorney at ReedSmith,

²²⁹ See Paul Werner & Abraham Shanedling, *Second Circuit Affirms “Snap” Removal Practice*, CLASS ACTION DEFENSE STRATEGY BLOG (March 29, 2019), <https://www.classactiondefensestrategy.com/2019/03/articles/federal-class-action/snap-removal-mdl/> [<https://perma.cc/2L5V-NHGQ>] (discussing *Gibbons* and *Encompass*) (emphasis added); see also Kenneth Murphy & Molly Flynn, *OH SNAP! – Snap Removal Now Permitted in Third Circuit*, FAEGRE DRINKER ON PRODS. (Sep. 7, 2018), <https://www.lexology.com/library/detail.aspx?g=338b1871-200d-46b2-bace-aa48c5271a83#:~:text=%2D%20Snap%20Removal%20Now%20Permitted%20in%20Third%20Circuit,-Blog%20Faegre%20Drinker&text=The%20United%20States%20Court%20of,district%20split%20regarding%20its%20propriety> [<https://perma.cc/6G9L-5LER>] (summarizing *Encompass* and concluding that “parties anticipating litigation against them in state court should consider regular monitoring of state court dockets within the Third Circuit”).

²³⁰ Katie A. Fillmore, *An Update on Snap Removal*, BUTLER SNOW PROD. LINES BLOG (Dec. 12, 2019), <https://www.butlersnow.com/2019/12/an-update-on-snap-removal/> [<https://perma.cc/4S7J-5PXE>]; see also Brooke Killian Kim & Breanna Fields, *Snap to It: Avoiding Home State Jurisdiction With Pre-Service Removal*, DLA PIPER PUBS. (Oct. 2019), <https://www.dlapiper.com/en/netherlands/insights/publications/2019/10/disputes-issue-1/avoiding-home-state-jurisdiction-with-pre-service-removal/> [<https://perma.cc/D4KD-TYF6>] (referring to snap removal as a “key tool” to “overcome” the forum defendant rule); Brandon D. Cox & Courtenay Youngblood Jalics, *Navigating the Muddy Waters of an MDL: Strategies to Get (and Keep) Your Case in Federal Court*, DRI (Apr. 29, 2015), https://www.tuckerellis.com/userfiles/file/Navigating%20the%20Muddy%20Waters%20of%20an%20MDL_Cox-Jalics_April%202015.pdf [<https://perma.cc/8D7D-TJH3>] (observing that snap removal “can be an important tool in transferring cases into an MDL”).

²³¹ See, e.g., Kathleen A. Mullen, *‘Snap Removals’ Upheld by the Third Circuit*, TROUTMAN PEPPER (Sept. 11, 2018), <https://www.pepperlaw.com/publications/snap-removals-upheld-by-the-third-circuit-2018-09-11/> [<https://perma.cc/5L2V-YMP5>] (referring to snap removal as a “welcome development” that puts defendants in a “much better position”); Bennett Sooy & Arthur E. Schmalz, *“Snap” to It When Your Company Is Sued in State Court*, MONDAQ (Nov. 9, 2018), <https://www.mondaq.com/unitedstates/Litigation-Mediation-Arbitration/753102/Snap-To-It-When-Your-Company-Is-Sued-In-State-Court> [<https://perma.cc/2BMD-CDZU>] (referring to snap removal as a way for defendants to “take full advantage” of the judicial system); Angela R. Vicari, *Removal in a Snap: Third Circuit Endorses Pre-Service Removals*, ARNOLD & PORTER (Sept. 7, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/09/removal-in-a-snap> [<https://perma.cc/6MTQ-SAUC>] (referring to snap removal as an “ace” for in-state defendants); Sheppard, Mullin, Richter & Hampton LLP, *Second Circuit Affirms*

humbly tied snap removal's successful expansion to his blog, Drug & Device Law, where he aggregates recent snap removal cases for other defense attorneys.²³²

Snap removal is a “favored” means of forum manipulation for corporate defendants to gain an advantage over plaintiffs.²³³ Without the tactic, these cases would lack a federal venue.²³⁴ By availing a federal forum where it would otherwise be foreclosed, snap removal expands federal judicial authority at the expense of the states. Analogous to courts' decisions to adopt a plain meaning reading of § 1441(b)(2) is the Supreme Court's decision in *Swift v. Tyson*.²³⁵ The case serves as a cautionary tale and can provide lessons for examining snap removal.

“Snap” Removal Practice, MARTINDALE (Mar. 29, 2019), https://www.martindale.com/legal-news/article_sheppard-mullin-richter-hampton-llp_2516029.htm (last visited Jan. 30, 2021) (referring to snap removal as a “useful tool” for defendants to avail a “federal forum where one may not otherwise be available”); Joseph A. D’Avanzo & Brendan M. Walsh, *Snap Removals Come to New York*, PASHMANSTEINWALDERHAYDEN (Dec. 13, 2019), <https://www.pashmanstein.com/snap-removals-come-to-new-york> [<https://perma.cc/5E76-JR JW>] (referring to snap removal as a “clever mechanism” that permits defendants to “circumvent the well-known ‘forum defendant’ exception to removal so they can litigate in their preferred forum of federal court”); Lynsey Stewart, *Courts of Appeals Are Affirming Snap Removal*, CASSIDAY SCHADE (July 12, 2019), <http://cassidayblog.com/appellate/courts-of-appeals-are-affirming-snap-removal> [<https://perma.cc/G4D9-2Y7D>] (referring to snap removal as an “opportunity” for defendants who wish “to evade the forum-defendant rule”).

²³² James M. Beck, *What’s Up With Removal Before Service?*, DRUG & DEVICE L. BLOG (May 26, 2011), <https://www.druganddevicelawblog.com/2011/05/whats-up-with-removal-before-service.html> [<https://perma.cc/GM8M-SP28>] (observing in a Westlaw search of snap removal cases that “more than half of the cases . . . don’t involve drugs and devices,” which benefits corporate defendants since significant use of the tactic by corporations outside the pharmaceutical industry makes it “harder for the other side to characterize it as some sort of procedural gimmick that shouldn’t be allowed”).

²³³ Nannery, *supra* note 10, at 561; Beyer, *supra* note 214. Beyer is a partner at Riker Danzig, a firm responsible for a substantial portion of the snap removals in 2018 and 2019. *See infra* tbl 6. *But see* Main et al., *supra* note 92, (manuscript at 18-19) (“One senior partner at a major law firm in Boston told us, for example, that he would never try snap-removing a case there because such hijinks would infuriate the judge.”).

²³⁴ *See, e.g.*, *Castro v. Colgate-Palmolive Co.*, 19-CV-279 (JLS), 2020 WL 2059741 (W.D.N.Y. Apr. 29, 2020) (“[Defendant] filed this immediate, or ‘snap’ removal, to avoid what would have been a prohibition on removal had the[y] been served.”).

²³⁵ 41 U.S. (16 Pet.) 1 (1842).

III. WHEN PLAIN MEANING AND NEUTRAL PRINCIPLES WERE NOT THE ANSWER

As the empirical examination shows, snap removal is most often employed by corporations and most vigorously defended by the corporate defense bar and trade associations. This makes a great deal of sense as corporations are the largest consumers of the legal system, and thus typically stand the most to gain or lose from litigation outcomes.²³⁶ However, acceptance of the tactic is far from uniform across the United States Courts of Appeals. Further, relying purely on interpretive canons for help determining the tactic's legality is not entirely helpful, either.²³⁷ This Article argues that the Supreme Court's decisions in *Swift* and its progeny provide important lessons to help frame the question.

This Part will discuss how the foregoing empirical examination shows that the political economy surrounding snap removal, along with its jurisdictional effects, tell a familiar story. The *Swift* doctrine presented a similar question for courts in the nineteenth and early-twentieth centuries. In its landmark decision in *Erie*, the Court answered by holding that federal judges cannot create general common law for issues that fall within the province of state law, but should apply substantive state law and federal procedural law unless there is a conflict between state and federal substantive law.

To be sure, there is a literature itself that questions *Erie*, or outright claims the case was wrong the day it was decided.²³⁸ However, these critiques are directed primarily at the theory that drove the Court to overrule *Swift*, as well as the metaphysics of judging. In contrast, I rely on *Swift* and *Erie* in this Article for their social and cultural import. In particular, how the Court recognized that *Swift* increased the asymmetries between

²³⁶ See Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 L. & SOC. INQUIRY 497, 517 (1996); Galanter, *supra* note 118, at 1387.

²³⁷ See, e.g., Amir Shachmurove, *Making Sense of the Resident Defendant Rule*, 52 U.C. DAVIS L. REV. ONLINE 203, 224-31 (2019).

²³⁸ See, e.g., Suzanna Sherry, *Normalizing Erie*, 69 VAND. L. REV. 1161 (2016); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

corporations and individual litigants and incentivized forum shopping and jurisdiction manipulation. Indeed, *Erie* represented more than the legal question presented in the case. Outside of its doctrinal shift, the decision chilled the increasingly solicitous relationship *Swift* engendered—under the guise of neutral principles—between federal courts and large national corporations.²³⁹ The political economy *Swift* promoted, that necessitated *Erie*, can serve as a cautionary tale for snap removal.

A. From *Swift* to *Erie*

In 1824 the Court was asked to interpret the Rules of Decision Act to determine what law governed common law actions where neither federal statutes nor the Constitution were implicated. Speaking through Justice Story, the Court strictly construed the provision, focusing on the word “laws,” and held that federal courts in diversity may ignore state common law and instead exercise their own independent judgment in the case before them.²⁴⁰ The Court relied on “the ordinary use of language”—the statute’s plain meaning—to interpret the specific provision at issue.²⁴¹ In particular, Justice Story took the fact that the legislature used “laws”—plural—to mean the “positive statutes of the state,” rather than its common law.²⁴² Otherwise, he reasoned, the legislature would have drafted the statute differently. With no state law on point, the Court’s interpretation permitted it to “express [its] own opinion” on the underlying commercial dispute.²⁴³

The *Swift* Court interpreted a federal statute according to its plain language in a way that expanded the reach and authority of

²³⁹ See Purcell, *The Story of Erie*, *supra* note 3, at 22; see also George W. Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 362-64 (1933); Charles N. Campbell, *Is Swift v. Tyson an Argument for or Against Abolishing Diversity of Citizenship Jurisdiction?*, 18 A.B.A. J. 809, 810-11 (1932); Armistead M. Dobie, *Seven Implications of Swift v. Tyson*, 16 VA. L. REV. 225, 229-36 (1930); Jeff B. Fordham, *Swift v. Tyson and the Construction of State Statutes*, 41 W. VA. L.Q. 131, 134 (1935).

²⁴⁰ PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 51.

²⁴¹ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 5, 18 (1842) (referring to the “true interpretation” of the Act).

²⁴² *Id.* at 18.

²⁴³ *Id.* at 19.

federal courts.²⁴⁴ While *Swift* and general federal common law have their own rich literature, the case's upshot and attendant doctrine are clear: The Court's interpretation conferred a distinct advantage on large national corporations when they litigated against individual plaintiffs.²⁴⁵ *Swift* doctrine permitted federal judges to develop "their own extensive body of independent decisional rules that came to be called 'general law' or 'federal common law.'"²⁴⁶ This new body of law evolved over decades to grow federal law at the expense of state law. The doctrine was meant to promote national commerce via uniform principles.²⁴⁷ In some sense it was a success. The ruling was a boon to major corporations from the late nineteenth century until *Erie*.²⁴⁸ The federal judiciary quickly became synonymous with pro-corporate protections, disincentivizing and burdening individual litigants.²⁴⁹

This exacerbated litigants' preferences for particular forums. Individuals wanted to avoid federal court, whereas corporations preferred it.²⁵⁰ Corporations pursued federal jurisdiction for two main reasons: perceived anti-business bias in state court and,

²⁴⁴ *Id.* (observing that the task for the Court was to find the "true" rule to apply); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 29-31 (2006) (referring to this move as textualism); see PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 51 (similar); Green, *supra* note 4, at 392-95 (similar); see also Lessig, *supra* note 4, at 426-29 (discussing *Swift*'s "scientistic" or "declaratory" theory of law, one of the leading formalist judicial modalities at the time). However, some scholars argue Story did not quite believe the "declaratory" theory—that judges do not make law, they "find" it by applying self-evident rules and neutral principles in the cases before them, on a journey to working the law pure—even though he relied upon it in *Swift*, and that his decision in the case was a mistake. See, e.g., Purcell, *The Story of Erie*, *supra* note 3, at 24, 34.

²⁴⁵ See *id.* at 28-29.

²⁴⁶ PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 51-52.

²⁴⁷ See *id.* at 52.

²⁴⁸ Purcell, *The Story of Erie*, *supra* note 3, at 24-25.

²⁴⁹ See *id.* at 25; see also Editorial Notes, 37 AM. L. REV. 575, 576 (1903); C.P. Connolly, *Big Business and the Bench: The Federal Courts—Last Refuge for the "Interests,"* 26 EVERYBODY'S MAG. 827 (1912). See generally WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 (1994).

²⁵⁰ See William H. Taft, *Criticisms of the Federal Judiciary*, 29 AM. L. REV. 641, 652 (1895) (recognizing "[t]he constant struggle of most corporations to avoid State tribunals . . . and to secure a Federal forum . . . is chiefly the cause for the popular impression in those States that the Federal courts are the friends of corporations and protectors of their abuses").

thanks to *Swift*, more favorable law in federal court.²⁵¹ With *Swift* on the books, corporations designed litigation strategies that ensured their suits were litigated with the benefit of doctrine that was designed to be neutral in theory, but substantially benefitted corporate entities in practice. After *Swift*, it quickly became clear that the Court chose Goliath over David and structured the law accordingly.

Swift doctrine was designed as a neutral solution to a growing concern. During the nineteenth century, the United States experienced a tremendous increase in national corporations.²⁵² The unprecedented growth and expansion of the national firm exposed a dearth of corporate law doctrine among the states. *Swift* was the Court's solution.²⁵³ Story intended for it to generate a uniform body of law that would promote interstate commerce and increase the authority of the federal judiciary.²⁵⁴ Additionally, general common law was supposed to be based upon neutral principles. A so-called declaratory theory of law.²⁵⁵ Each case presented the judge with an opportunity to "find" the law and contribute to a shared pool of "legal principles that are neutral and apolitical, but nevertheless definite and non-arbitrary, for purposes of resolving real-world disputes."²⁵⁶

However, the Court quickly extended general law's neutral principles beyond commercial applications. By the early twentieth century, *Swift* doctrine had pulled most common law areas²⁵⁷—

²⁵¹ See Purcell, *The Story of Erie*, *supra* note 3, at 30; PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 66.

²⁵² See R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 332-43 (1985); GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 403-20 (1970); Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829, 839 (2001) (book review).

²⁵³ See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 250 (1977) (characterizing *Swift* as Story's "attempt to impose a procommercial national legal order on unwilling state courts").

²⁵⁴ See PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 51-52; David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1258 (2007).

²⁵⁵ See Purcell, *The Story of Erie*, *supra* note 3, at 24 (describing the theory as conceiving of the common law as growing from "from general principles of right and reason that exist[] independent of judicial decisions").

²⁵⁶ Gasaway & Parrish, *supra* note 5, at 241 (2013).

²⁵⁷ For example, policyholder suits against insurance companies were typically litigated in state court prior to 1902. See Purcell, *The Story of Erie*, *supra* note 3, at 27.

traditionally the province of the states—into the hands of the federal judiciary.²⁵⁸ Premised on unbiased principles that allegedly forced the judge’s hand, *Swift* uniformly “made it more difficult for individual plaintiffs to command adequate compensation when they had claims against national corporations.”²⁵⁹ Regardless of the Court’s intent, *Swift*’s effects were clear: the doctrine increased federal judicial authority at the expense of its state counterparts and conferred a substantial advantage on corporate litigants.²⁶⁰

The Court decided more than 250 cases under the *Swift* doctrine.²⁶¹ The lower federal courts decided hundreds more.²⁶² Some scholars suggest that, at the time, *Swift* was entirely uncontroversial.²⁶³ But that changed. As both the doctrine and the scope of federal jurisdiction grew, it became clear that *Swift*’s

However, in *Northern Assurance Co. v. Grand View Building Ass’n*, 183 U.S. 308 (1902), the Court extended its reach to such cases via the *Swift* doctrine. *Id.* at 27 (discussing *Northern Assurance*). Further, the case—and its progeny—created substantive rules that favored insurance companies over policyholders. This expansion of federal authority, along with the favorable substantive and procedural rules already discussed, created deep incentives for insurance companies to seek out federal jurisdiction. Indeed, *Northern Assurance* was no outlier. *See, e.g.*, *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 360 (1910) (property); *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 372 (1893) (tort).

²⁵⁸ *See* PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 51; Purcell, *The Story of Erie*, *supra* note 3, at 24, 26.

²⁵⁹ Purcell, *The Story of Erie*, *supra* note 3, at 27-28.

²⁶⁰ *See* J. S. Waterman, *The Nationalism of Swift v. Tyson*, 11 N.C. L. REV. 125, 132-33 (1933). Among other advantages, the *Swift* doctrine made litigation more expensive and less predictable. *See* PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 66. This placed substantial pressure on under-capitalized litigants—i.e., parties other than wealthy individuals and corporations. *Id.* Additionally, the substantive federal common law was highly favorable to corporate litigants. *Id.* For example, workplace injuries brought against employers in tort were decided with common law that was far more favorable to employers in the absolute and relative to many states. *Id.*; *see also, e.g., Baugh*, 149 U.S. at 368-411.

²⁶¹ *See* Marcus, *supra* note 256, at 1268.

²⁶² *See* PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 41-42; Purcell, *The Story of Erie*, *supra* note 3, at 26.

²⁶³ *See, e.g.*, TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM 93 (1981); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1788 (1997); Green, *supra* note 4, at 408.

apolitical principles were ripe for manipulation by corporate litigants.²⁶⁴

Like snap removal, the *Swift* doctrine relied upon diversity jurisdiction.²⁶⁵ For this and other reasons, many at the time viewed diversity jurisdiction as having a pro-corporation flavor to it.²⁶⁶ This was largely due to how easily manipulatable litigation was for corporate litigants as a result of *Swift* and diversity jurisdiction.²⁶⁷ That is, what many deemed a neutral, apolitical, judge-restraining doctrine led to a high-water mark for jurisdictional gamesmanship. Few cases show how significantly *Swift* incentivized machinations better than the *Taxicab Case*.²⁶⁸

In *Taxicab*, the litigation arose out of a contract dispute. The Brown & Yellow Taxicab & Transfer Company (B&Y), a citizen of Kentucky, contracted with the Louisville & Nashville Railroad Company, also a citizen of Kentucky, for exclusive rights to provide taxi service at the railroad's station in Bowling Green, Kentucky.²⁶⁹ Unfortunately for B&Y, however, Kentucky law held exclusive contracts unenforceable as a violation of public policy.²⁷⁰ This was no obstacle for B&Y's creative counsel. The company dissolved itself, reincorporated under the same name in Tennessee, and signed an identical contract with the railroad.²⁷¹

²⁶⁴ See Purcell, *The Story of Erie*, *supra* note 3, at 27; Tony A. Freyer, *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America*, 18 CONST. COMMENT. 267, 272 (2001); Marcus, *supra* note 256, at 1267-74.

²⁶⁵ See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 687-92 (1998) (discussing the role diversity played in *Swift* and the development of its doctrine); *supra* Section I.A; see also Waterman, *supra* note 262, at 135 n.64 (describing the purpose of diversity jurisdiction as to provide "security" for corporate interests).

²⁶⁶ See PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 64-65. For many, diversity jurisdiction symbolized "the de facto alliance between corporations and the national judiciary." *Id.* at 64. Federal jurisdiction conferred substantial advantages on corporate litigants that affirmatively supported their claims as well as served to deter individual claimants from bring suit in the first place. *Id.*

²⁶⁷ See Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 964-65 n.132 (2013).

²⁶⁸ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co. (Taxicab Case)*, 276 U.S. 518 (1928).

²⁶⁹ *Id.* at 522.

²⁷⁰ *Id.* at 523; see also PURCELL, *supra* note 118, at 224.

²⁷¹ See *Taxicab Case*, 276 U.S. at 523-24.

B&Y then sought to enjoin a rival taxi company, Black & White (B&W), also a citizen of Kentucky, from operating taxis at the Bowling Green station in violation of B&Y's contractually exclusive right.²⁷² B&Y sued in federal court based on diversity of citizenship, which—thanks to *Swift*—allowed it to avoid the unfavorable Kentucky law and enforce its otherwise illegal contract.²⁷³ The lower federal court found no issue with B&Y's tactics or the validity of its contract.²⁷⁴ Nor did the Supreme Court. Writing for a 6–3 majority, Justice Butler concluded that B&Y's reincorporation was a valid basis for diversity jurisdiction, that federal common law controlled the contract at issue, and that the agreement was valid.²⁷⁵ Because of *Swift*, B&Y was able to ignore and nullify the adverse Kentucky law and prevail against B&W.

Among other things, the *Taxicab Case* stands for the proposition that “the concept of neutral principles remains an article of faith in judicial opinions.”²⁷⁶ It is a paradigmatic example of how well-capitalized litigants will generally prevail over those who are not when substantive rules that incentivize gamesmanship co-exist with manipulatable jurisdiction doctrines.²⁷⁷ The extent to which *Swift* permitted manipulation was highlighted in the *Taxicab Case*. Indeed, after the Court handed down its decision in the *Taxicab Case*, most agreed manipulation was not a bug but a feature of *Swift* doctrine.²⁷⁸

²⁷² *Id.* at 522-23.

²⁷³ *See id.* at 518.

²⁷⁴ *Id.* at 524. At the time of the decision, there was no middle federal appellate court, so the litigants in the *Taxicab Case* appealed straight to the U.S. Supreme Court.

²⁷⁵ *Id.*

²⁷⁶ Bandes, *supra* note 254, at 832.

²⁷⁷ *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1406 (2006); PURCELL, *supra* note 118, at 18-19, 28, 251.

²⁷⁸ *See, e.g.*, Marcus, *supra* note 256, at 1260-61; Purcell, *The Story of Erie*, *supra* note 3, at 34-35; Fordham, *supra* note 241, at 134; Campbell, *supra* note 241, at 811; Dobie, *supra* note 241, at 227-28; *see also* J. B. Fordham, *The Federal Courts and the Construction of Uniform State Laws*, 7 N.C. L. REV. 423, 431 (1929) (describing the *Swift* doctrine as “evil”); Raymond T. Johnson, *State Law and the Federal Courts*, 17 KY. L.J. 355, 355 (1929) (stating that *Swift*'s flaws were never “more convincingly illustrated than in the decision of the [*Taxicab Case*] . . .”); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499, 527 (1928) (“Its extreme limit has just been reached.”).

Ultimately, this feature would prove too much. By the late nineteenth century—if not sooner—it became clear the doctrine was not living up to its grand promise.²⁷⁹ As Justice Field—originally one of federal common law’s ardent defenders—observed, the doctrine created a significant advantage for corporate litigants and incentivized gamesmanship.²⁸⁰ It is an axiom of our adversarial legal system that litigation is zero-sum. Thus, when an advantage is conferred on one litigant, it comes at the expense of the other.²⁸¹

Though a rule may be neutral because it is, in practice, applicable to everyone, economic, political, and racial factors can serve as foils.²⁸² That was the issue with general law.²⁸³ These social inequities animated the Court’s express rejection of *Swift*’s brand of general law in *Erie*.

Among the *Erie* Court’s central concerns was eliminating a rule that, coupled with diversity jurisdiction, created “injustice.”²⁸⁴ Specifically, the Court attempted to prevent further inequities in litigation between individuals and private corporations.²⁸⁵ Partway through the Court’s opinion, Justice Brandeis outlines why such a doctrine was untenable. The doctrine led to absurd results that reeked of manipulation and gamesmanship, as best demonstrated by the *Taxicab Case*.²⁸⁶ Further, the primary purported benefit—neutral rules—never materialized.²⁸⁷ There were several laudable justifications for general law, like uniformity and neutrality of the law.²⁸⁸ However, individual

²⁷⁹ See PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 197.

²⁸⁰ *Id.* at 52-54.

²⁸¹ See Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1687-89 (1990).

²⁸² See PURCELL, *supra* note 118, at 6; see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938).

²⁸³ See Purcell, *The Story of Erie*, *supra* note 3, at 35.

²⁸⁴ *Erie*, 304 U.S. at 77.

²⁸⁵ PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 159-60.

²⁸⁶ See *Erie*, 304 U.S. at 73-74 (referring to cases that relied on *Swift* and diversity jurisdiction as “mischievous”) (citing *Taxicab Case*, 276 U.S. 518 (1928)).

²⁸⁷ *Id.* at 74-75; Goldsmith & Walt, *supra* note 267, at 688 (referring to *Swift*’s purported benefits as “chimerical”).

²⁸⁸ See Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964); Purcell, *The Story of Erie*, *supra* note 3, at 24.

litigants lacked the financial resources to seek a federal forum to enjoy its potential advantages in the substantive law. And even if individuals had the resources to litigate in federal court, they had little to no incentive to engage in gamesmanship to get there.²⁸⁹ Though Brandeis relied on more neutral language to secure Justice Stone's requisite vote,²⁹⁰ his intent was clear: general law was a benefit only to corporations.²⁹¹

Erie attempted to correct *Swift's* asymmetry. Even as defendants, corporations already had the advantage due to their substantial resources, legal sophistication, and influence. They did not need a body of law tailor-made with their interests in mind. Eliminating this inequality was one of *Erie's* goals. Importantly, the Court framed its opinion at a relatively high level of abstraction, which suggests its thinking was more of a general explication of policy than ruling on the narrow choice of law question the case presented.²⁹² The Court's rejection of *Swift* was focused on diversity jurisdiction and depriving corporations of an inequitable advantage while eliminating discrimination against less-sophisticated litigants.²⁹³

²⁸⁹ Further animating the reasoning in *Erie*, though it was not cited, was an empirical study conducted by the American Law Institute and Yale Law School. See generally AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS (1934). Among other things, the study showed that diversity jurisdiction and removal were tools of the trade for corporations. See Julian S. Waterman, Book Review, 3 U. CHI. L. REV. 153, 166 (1935) (reviewing AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS (1934)). By contrast, very few individual litigants made use of removal. While the study was not cited by the Court, some scholars have argued it likely contributed to the Court's reasoning, as Brandeis would have been aware of the data. See, e.g., Purcell, *The Story of Erie*, supra note 3, at 58. These scholars suggest the omission was an intentional move, likely to ensure his opinion received a majority. See *id.*

²⁹⁰ See Purcell, *The Story of Erie*, supra note 3, at 50-54 (discussing *Erie's* realpolitik).

²⁹¹ See *Erie*, 304 U.S. at 76-77.

²⁹² See Daniel R. Ernst, *Thinking Like a Historian: Erie in the Dimension of Time*, 26 LAW & SOC. INQUIRY 719, 728-34 (2001) (book review).

²⁹³ See *id.* at 732-33; Marcus, supra note 256, at 1267-71, 1275; Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1468-78 (2008).

B. Lessons For Snap Removal

The Court's journey from *Swift* to *Erie* serves as a cautionary tale for us to think about snap removal. In particular, the cases show that plain text is not necessarily dispositive, nor is it necessarily preferable to construing statutes in context and in consideration of other factors. The cases also teach four lessons that can inform possible solutions to snap removal. First, the political economy in which snap removal is situated suggests a judicial solution might be needed. Second, a judicial intervention will address the rules that govern removal, not parties' proclivity to pursue their own interests. Third, an intervention will preserve underlying values that animate the American legal system. Finally, the solution I propose will not necessarily eliminate snap removal entirely, but cabin the tactic in a way that ensures consistency with the first three lessons.

1. Political economy.

In *Erie*, a key concern for the Court was that the legislature was unable or unwilling to intervene to correct the jurisdictional manipulation *Swift* promoted. Corporations saw in general law a way to gain an advantage and advance their interests at the expense of less sophisticated and less resourced individual litigants. Professor Edward Purcell has further shown how corporations used their significant resources and legal sophistication to help expand general law between *Swift* and *Erie*.²⁹⁴ While cases like the *Taxicab Case* were arguably creative lawyering, the Court in *Erie* saw it more as a defect in its prior ruling. General law was a mechanism that conferred an advantage on one class of litigants over another and expanded

²⁹⁴ See, e.g., PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 13-15; Purcell, *The Story of Erie*, *supra* note 3, at 25-32.

federal authority at the expense of the states.²⁹⁵ It promoted inequality.²⁹⁶

Snap removal falls into a similar category. In general, litigants with fewer resources are at a significant disadvantage suing a major national firm.²⁹⁷ Snap removal makes it worse. Recent scholarship has shown that, as with general law, corporate litigants still exert outsized influence in shaping and making procedural law that serves their interests within the civil justice system.²⁹⁸ While available to all in theory, my data suggest in practice the tactic is, like general law, reserved for corporations or other well-financed litigants only.²⁹⁹ The knowledge and resources needed to use electronic docket monitoring and near-instantaneous removal motion filing to affect snap removal, as well as research showing the asymmetrical incentives to litigate in federal versus state court, support this notion.

Additionally, as typified by the *Delaughder* and *Howermedica* cases, snap removal necessitates plaintiffs have a certain level of legal sophistication and resources to compete against the gamesmanship the tactic incentivizes defendants to engage in.³⁰⁰ For the standard plaintiff suing a pharmaceutical corporation in

²⁹⁵ See PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 149-50 (discussing some of the advantages *Swift* and general law conferred upon corporate litigants and why it incentivized manipulation). In fact, part of the railroad's strategy in *Erie* indicated that it prioritized preserving the availability of general law over winning the particular case against Mr. Tompkins. *Id.* at 100.

²⁹⁶ See PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 196. See also Britton-Purdy et al., *supra* note 15, at 1808-09 (discussing political economy methodology as one that encourages a focus on "policies that predictably and persistently reproduce[] underlying patterns of economic, racial, and gender inequality" even where such policies do "not intentionally treat individuals differently on the basis of a forbidden characteristic").

²⁹⁷ See Alexandra D. Lahav & Peter Siegelman, *The Curious Incident of the Falling Win Rate: Individual vs System-Level Justification and the Rule of Law*, 52 U.C. DAVIS L. REV. 1371, 1398-1406 (2019) (examining empirical data to interrogate a possible relationship between litigants' resources and win rate).

²⁹⁸ See, e.g., Coleman, *supra* note 112, at 1020-23; Galanter, *supra* note 118, at 1398-1404; see also *id.* at 1387-97.

²⁹⁹ See *supra* notes 204-206 (discussing the breakdown of litigants using snap removal); Nannery, *supra* note 10, at 565 (finding snap removal was used by corporations).

³⁰⁰ See *supra* text accompanying notes 97-118 (discussing the agent-switching and hide-and-peek conduct in *Delaughder* and *Howermedica*); Relkin Testimony, *supra* note 12, at 11-12.

the Second, Third, or Fifth Circuits, the choice of forum is likely up to the defendant. Corporations very much see snap removal as a means to gain an advantage and protect themselves from liability.³⁰¹ Incentives for the tactic to remain available align almost exclusively for the legal system's most sophisticated and well-resourced litigants. It also means that a legislative solution could be harder to come by, due to the substantial influence corporations—in particular pharmaceutical companies—have over the legislative process.

2. Rules versus litigant behavior.

Among other things, *Erie* recognized that individual litigants will make use of everything at their disposal to maximize pursuit of their own interests.³⁰² The Court did not seek to alter litigant behavior by creating punitive choice-of-law doctrines or other doctrinal choices. Rather, the Court adjusted the governing rules to be less asymmetrical in practice. A judicial intervention for snap removal could take a similar approach.³⁰³ As evidenced in cases like *Delaughder* and *Howermedica*, snap removal fosters gamesmanship. However, litigants should not be penalized for pursuing their own interests. Rather, the rules and procedures that govern litigation should be tailored in such a way that ensures fairness by minimizing its manipulability. Like Justice Story's reading of the Judiciary Act in *Swift*, the plain meaning construction of § 1441(b)(2) fails to account for that. A judicial intervention on snap removal should, like the *Erie* Court, read the removal statute to limit such behavior.³⁰⁴

³⁰¹ See *supra* notes 231-234 and accompanying text.

³⁰² See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 76-78 (1938).

³⁰³ See PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 149-50 (discussing the various tactics plaintiffs and defendants deployed that spurred the Court to intervene by changing the procedural rules that govern litigation).

³⁰⁴ Professor James Pfander testified at the November 2019 congressional hearing and, among other things, similarly advocated for solutions that incorporate litigant behavior in their construction. Snap Removal Hearing, *supra* note 108, at 1:01:55-1:02:20.

3. Procedural values.

The application of procedural, or nonjurisdictional, rules should be strict, but not so rigid that it undercuts the values the rules are meant to promote. Nonjurisdictional rules have some play in the joints in their application when fairness demands it.³⁰⁵ In *Erie*, the principles of comity and federalism were central to the Court's decision.³⁰⁶ The Court found that *Swift* and general law eroded the value of fairness that animates litigation and upsets the delicate balance in permitting the plaintiff to select the forum.³⁰⁷ There is a similar flaw in snap removal. The majority of courts construe the forum defendant rule as a nonjurisdictional rule. Its application, though strict, must be such that it upholds the values it stands for. An important value that the rule preserves is fairness. Fairness includes maintaining a plaintiff's choice of forum and protecting defendants against fraudulent joinder. As the device is currently deployed, courts apply the rule in a way that in fact erodes the former. A judicial solution must properly account for § 1441(b)(2)'s nonjurisdictional nature and apply the rule accordingly.

4. Cabin—not eliminate—snap removal.

There are some instances where snap removal might be okay, versus untenable. As already discussed, the forum defendant rule is meant to promote fairness. This applies to both plaintiffs and defendants. In instances where a plaintiff joins a defendant to preclude removal, snap removal arguably would not violate the rule's nonjurisdictional nature. A proper solution, then, would not eliminate snap removal but cabin it to certain instances. The Court took a similar approach in *Erie*. It did not eliminate general law, rather it cabined the doctrine to several discrete applications.

* * *

While these lessons are important in the abstract, their real value is in their application. It is essential that the *Swift–Erie*

³⁰⁵ See Dodson, *supra* note 14, at 60.

³⁰⁶ See *Erie*, 304 U.S. at 78-79.

³⁰⁷ *Id.* at 74-78.

teachings manifest in a way that can inform courts' work. The next Part will discuss how these lessons can be implemented by showing that existing authority aligns with these lessons and gives voice to their teachings, counseling against how snap removal is currently implemented.

IV. A JUDICIAL SOLUTION

Scholars and practitioners have proposed several creative solutions to close the snap removal loophole. For example, the removal statute could be amended to require service as a precondition to removal.³⁰⁸ One suggestion would preserve § 1441(b)(2)'s text but strike the "and served" phrase,³⁰⁹ whereas another would ban removal before service altogether.³¹⁰ Some propose courts should have to treat a defendant's use of electronic docket monitoring as a waiver of service in the relevant action—i.e., if a defendant receives a copy through such a service, they are "served" under § 1441(b)(2).³¹¹ Other scholars have proposed a "snapback" provision.³¹² This suggestion calls for an addition to § 1447 that permits remand so long as the forum defendant is served within the time limit prescribed by the Federal Rules of Civil Procedure.³¹³ Another suggests snap removal be permitted only for cases related to existing MDL litigation.³¹⁴ These proposals overwhelmingly share a common feature: they are all legislative fixes. Because of the political economy surrounding a legislative solution, it likely presents a more challenging path relative to others.³¹⁵ Instead, I argue the more viable pathway to fixing snap removal lies in the courts.³¹⁶

³⁰⁸ See, e.g., 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, 211-12 (2009).

³⁰⁹ See Nannery, *supra* note 10, at 581-82; Stempel et al., *supra* note 92, (manuscript at 52-53).

³¹⁰ See Nannery, *supra* note 10, at 580-81.

³¹¹ See, e.g., Bailey, *supra* note 310, at 211-12.

³¹² See Hellman et al., *supra* note 42, at 108-09.

³¹³ *Id.*

³¹⁴ See Nannery, *supra* note 10, at 577.

³¹⁵ See *infra* notes 321-325 and accompanying text. While the term "political economy" has multiple meanings, I define the term as an "investiga[ion of] politics to the economy, understanding that the economy is always already political in both its

My data suggest that snap removal—as with the *Swift* doctrine—is a tactical advantage only for corporations. This presents several challenges for those seeking to close the snap removal loophole via legislative fixes. In particular, corporations exert disproportionate influence over the legislative process. Further, Nannery’s data, as well as my own, show that pharmaceutical companies stand to gain the most from snap removal.³¹⁷ This notion was echoed by the defense bar in its recent congressional testimony.³¹⁸

While pharmaceutical corporations are not the sole users of snap removal, by some measures they have the most influence over legislative action.³¹⁹ For example, despite lobbying efforts on behalf of high-risk individuals,³²⁰ the pharmaceutical lobby successfully severed from the CARES Act—Congress’s coronavirus response package—a provision that would have authorized the

origins and its consequences.” Britton-Purdy et al., *supra* note 15, at 1792; see K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1332 (2016).

³¹⁶ I am not alone in arguing that juridical tools exist for courts to close the snap removal loophole. Professor Howard Wasserman makes an interesting proposal based upon Professor Sam Bray’s recent discussion of the mischief rule. See Howard M. Wasserman, *The Mischief Rule, Forum Defendants, and Snap Removal*, WM. & MARY L. REV. ONLINE (forthcoming); Howard M. Wasserman, *Mischief and Snap Removal*, JOTWELL (June 3, 2020), <https://courtslaw.jotwell.com/mischief-and-snap-removal/> [<https://perma.cc/DPQ4-8QVY>] (reviewing Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. (forthcoming 2021)).

³¹⁷ See Nannery, *supra* note 10, at 567-68.

³¹⁸ See Relkin Testimony, *supra* note 12, at 11-16; Stoffelmayr Testimony, *supra* note 12, at 7-10.

³¹⁹ See, e.g., CRAIG SANDLER, PUB. CITIZEN, THE \$660 MILLION HURDLE 4 (2018), <https://www.citizen.org/wp-content/uploads/migration/health-care-lobbying-report.pdf> [<https://perma.cc/QP76-WUQ7>] (showing 75% of all lobbyists in the healthcare industry represented the interests of pharmaceutical product manufacturers, such as drug companies, versus the general public); *Industries, OPEN SECRETS*, <https://www.opensecrets.org/federal-lobbying/industries> [<https://perma.cc/V82H-CH2G>] (last visited Nov. 8, 2020) (showing the pharmaceutical industry had the highest lobbying spending each year from 1999-2020).

³²⁰ See Caleb McCullough, *Iowa Lobbying Group Pushes for Coronavirus Drug Price Controls*, DAILY IOWAN (Apr. 29, 2020), <https://dailyiowan.com/2020/04/29/iowa-lobbying-group-pushes-for-coronavirus-drug-price-controls/>; Mary Ellen McIntire, *Drug Price Alliance Pushes Lawmakers to Ensure Virus Treatments are Affordable*, ROLL CALL (Apr. 22, 2020, 4:11 PM), <https://www.rollcall.com/2020/04/22/drug-price-alliance-pushes-lawmakers-to-ensure-virus-treatments-are-affordable/> [<https://perma.cc/4RUA-DKNM>].

Department of Health and Human Services to cap COVID-19 vaccine pricing.³²¹ That is, there were organized, resourced efforts fighting *against* the industry’s attempts to block life-saving legislation and the industry prevailed. This is just the pharmaceutical industry; the data show that the tactic may be a boon to most multinational firms.³²² Moreover, we have already seen corporate interests influence legislative action on seemingly wonky, mundane legislation like jurisdictional statutes. The Class Action Fairness Act (CAFA) is case in point. There is nearly unanimous agreement that CAFA was legislation that only benefits large corporations, serving as a means “to gain an advantage in achieving the results [they] want[] by forcing cases to the forum of [their] choice.”³²³ Snap removal presents identical incentives.

³²¹ See, e.g., Jason Mast, *Lobbying Campaign Killed Proposal to Set Price Limits on Future Coronavirus Drugs, Vaccines—Report*, ENDPOINTS NEWS (Mar. 6, 2020, 7:15 AM), <https://endpts.com/lobbying-campaign-killed-proposal-to-set-price-limits-on-future-coronavirus-drugs-vaccines-report/> [<https://perma.cc/FC7C-DYA6>]; Sharon Lerner, *Big Pharma Attacks Efforts to Guard Against Coronavirus Price Gouging*, INTERCEPT (June 2, 2020, 11:20 AM), <https://theintercept.com/2020/06/02/big-pharma-coronavirus-treatment-price-gouging/>; Sydney Lupkin, *Gilead Lobbying Rose as Interest in COVID-19 Treatment Climbed*, NPR (May 2, 2020, 9:00 AM), <https://www.npr.org/sections/health-shots/2020/05/02/849149873/gilead-lobbying-rose-as-interest-in-covid-19-treatment-climbed> [<https://perma.cc/9UNQ-7VXK>]; Sarah Karlin-Smith, *How the Drug Industry Got its Way on the Coronavirus*, POLITICO (Mar. 5, 2020, 5:28 PM), <https://www.politico.com/news/2020/03/05/coronavirus-drug-industry-prices-122412> [<https://perma.cc/EX37-9U4R>].

³²² See *supra* Section II.B.3.

³²³ Stephen N. Subrin, *Procedure, Politics, Prediction, and Professors: A Response to Professors Burbank and Purcell*, 156 U. PA. L. REV. 2151, 2155 (2008); see also Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1659-60 (2006) (discussing lobbying spending by pro-business trade associations and quoting legislative debate around the bill as evidence that it was largely drafted under the influence of multinational firms); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 320 (2013) (referring to CAFA as a mechanism that, among other things, “eliminates state courts as alternative fora,” which was the product of “Congress’s acquiescence to institutional lobbying” by major corporations); Alec Johnson, *Vioxx and Consumer Product Pain Relief: The Policy Implications of Limiting Courts’ Regulatory Influence over Mass Consumer Product Claims*, 41 LOY. L.A. L. REV. 1039, 1085-86 (2008) (observing that a discussion about CAFA without reference to the “millions of dollars” corporations spent in lobbying to get the law passed is “to hide from the political realities that fueled the legislation”); Debra Lyn Bassett, *The Defendant’s Obligation to Ensure Adequate*

Further, very few individual voters likely know what snap removal is. On the laundry list of legislative priorities that mobilize voters and form coalitions—e.g., healthcare, climate, gun control, etc.—to say snap removal is not a top priority for many voters is an understatement. While Congress’s hearing in November 2019 showed a glimmer of progress on the issue, closing the snap removal loophole via legislative intervention is likely an uphill battle. But here too, *Erie* can provide additional lessons. The *Swift* doctrine was, like snap removal, a doctrine created for corporations by judicial interpretation of a federal statute. It incentivized significant gamesmanship from corporate defendants that increased existing asymmetries between litigant classes. The Court perceived its decision in *Swift* (and its progeny) as mistakes, and *Erie* was its opportunity to correct them. I similarly propose a judicial intervention to address snap removal. In *Erie*, the Court overruled precedent that was based upon its prior plain meaning construction of a federal statute. A judicial solution to snap removal would face an identical challenge.

A. *Nonjurisdictional Rules Have Values*

A first step toward a judicial solution is recognizing that, despite § 1441(b)(2) governing removal *jurisdiction*, the provision is treated by most courts as *procedural*—or nonjurisdictional—in nature.³²⁴ The distinction matters because it can dictate the way a particular rule is interpreted and applied—strict and rigid or

Representation in Class Actions, 74 UMKC L. REV. 511, 529 & n.111 (2006) (observing that CAFA came “at the behest of the business community,” as it felt like federal courts were more favorable to their interests); Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 525 (2017) (describing CAFA as the result of political pressure from “establishment defendants” and “corporate and defense bar lobbying”) (citations omitted); *id.* at 522 (discussing the influence corporations have used to affect changes in procedural rules via accumulation of political power); Coleman, *supra* note 112, at 1013-41.

³²⁴ See *Tex. Brine Co. v. Am. Arbitration Ass’n*, 955 F.3d 482, 485 (5th Cir. 2020); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 152 (3d Cir. 2018); *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 939-40 (9th Cir. 2006); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 380 (7th Cir. 2000); *Farm Constr. Servs., Inc. v. Fudge*, 831 F.2d 18, 22 (1st Cir. 1987); *Am. Oil Co. v. McMullin*, 433 F.2d 1091, 1095 (10th Cir. 1970); *Handley-Mack Co. v. Godchaux Sugar Co.*, 2 F.2d 435, 437-38 (6th Cir. 1924).

flexible and more supple³²⁵—as well as a particular rule’s availability. For example, subject matter jurisdiction—a jurisdictional rule—can be raised at any time by litigants or the court.³²⁶ A defect can reverse an otherwise favorable judgment.³²⁷ In contrast, a statute of limitations—a nonjurisdictional rule—can be interpreted so as to avoid unfairness that would otherwise result from a rigid application.³²⁸ Legislatures seek to maintain systemic interests, like the state–federal balance, with jurisdictional rules.³²⁹ They cannot be waived in a litigation. In contrast, procedural rules generally speak to the rights and obligations of the parties and regulate the process or mode of the case, and govern litigants’ interests, like fairness and predictability.³³⁰ A party can waive or forfeit a nonjurisdictional rule by failing to assert it at the appropriate time.

Consider again statutes of limitations. They are designed to protect defendants and promote fairness.³³¹ But defendants can lose the protections limitations periods provide when they act in a way that is unfair to the plaintiff.³³² Even if the plain meaning of the text suggests otherwise. Nonjurisdictional rules grant courts discretion to prevent defendants from, “tak[ing] advantage of rules designed primarily to protect them if they choose instead to abuse

³²⁵ See Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 5 (1994).

³²⁶ See CHARLES A. WRIGHT, ARTHUR R. MILLER, RICHARD D. FREER & EDWARD H. COOPER, 13 FEDERAL PRACTICE AND PROCEDURE § 3522 (3d ed.) (Westlaw) (last visited Nov. 24, 2020).

³²⁷ See, e.g., *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 127 (1804).

³²⁸ See Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1474-77 (2006); see also *Teague v. Regional Comm’r of Customs*, 394 U.S. 977, 982-83 (1969) (Black, J., dissenting); *Shendock v. Dir., Office of Workers’ Comp. Programs*, 893 F.2d 1458, 1462 (3d Cir. 1990).

³²⁹ Cf. *Examining the Use of “Snap” Removals to Circumvent the Forum Defendant Rule: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet*, 115th Cong. 10-12 (2019) (Testimony of James E. Pfander) (proposing Congress revise § 1441(b)(2) to explicitly state that it is *jurisdictional* in nature).

³³⁰ See *Dodson*, *supra* note 14, at 60, 71-72.

³³¹ See Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) (citing *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944)).

³³² See David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 MO. L. REV. 1, 33-35 (2005).

them.”³³³ Flexibility is necessary to ensure rigid application does not lead to results contrary to the values the rule embodies.

An important distinction between jurisdictional and nonjurisdictional rules is, among others, how they are applied. Importantly, “the values served by the procedural rules . . . may be hindered in certain situations by their strict application.”³³⁴ It is thus reasonable for courts “to bend or break” the rules to ensure the values are preserved.³³⁵ Section 1441(b)(2) is a nonjurisdictional rule.³³⁶ But merely characterizing a rule as jurisdictional or nonjurisdictional does not settle the matter.³³⁷

There are subspecies of rules that share common traits but in fact have material differences that dictate how, by whom, and when they can be asserted. In particular, there are nonjurisdictional rules that share characteristics generally associated with jurisdictional rules.³³⁸ Professor Scott Dodson has referred to these as “mandatory rules.”³³⁹ A mandatory rule is nonjurisdictional, yet it is not subject to “equitable excuses for

³³³ Lees, *supra* note 330, at 1492.

³³⁴ Dodson, *supra* note 14, at 60.

³³⁵ *Id.*

³³⁶ See, e.g., *Tex. Brine Co., L.L.C. v. Am. Arbitration Ass’n, Inc.*, 955 F.3d 482, 485 (5th Cir. 2020); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 152 (3d Cir. 2018), *reh’g denied* (Sept. 17, 2018); *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 939-40 (9th Cir. 2006); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 380 (7th Cir. 2000); *Farm Constr. Servs., Inc. v. Fudge*, 831 F.2d 18, 22 (1st Cir. 1987); *Am. Oil Co. v. McMullin*, 433 F.2d 1091, 1093 (10th Cir. 1970); *Handley-Mack Co. v. Godchaux Sugar Co.*, 2 F.2d 435, 437-38 (6th Cir. 1924).

³³⁷ The jurisdictional–nonjurisdictional division is the subject of its own debate. See generally John F. Preis, *Jurisdictional Idealism and Positivism*, 59 WM. & MARY L. REV. 1413 (2018) (describing the debate and capturing the primary arguments for the competing idealist and positivist positions). Professor Scott Dodson has refuted the formalistic binary and has introduced a hybrid conception to the debate. See Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1 (2008); Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439 (2011). I take no position in the debate in this Article, nor do I take a position on whether the forum defendant rule is nonjurisdictional or jurisdictional. Rather, the discussion in this Part is based on a purely descriptive premise, which is that the lower courts overwhelmingly conceive of § 1441(b)(2) as nonjurisdictional and that the Second, Third, and Fifth Circuits have relied in part on that in reaching their holdings permitting snap removal.

³³⁸ See Dodson, *Mandatory Rules*, *supra* note 339, at 6 & nn.20-25.

³³⁹ *Id.* at 9.

noncompliance.”³⁴⁰ A non-mandatory rule, in contrast, is nonjurisdictional and is subject to equitable considerations.³⁴¹

As discussed, the forum defendant rule is generally considered nonjurisdictional,³⁴² and there are several reasons the forum defendant rule is further properly characterized as a non-mandatory rule. First, whereas the provision previously used language that arguably connoted a mandatory nature (i.e., “shall”), it has subsequently been amended to reflect a discretionary act (i.e., “may”).³⁴³ Second, we know that service in other contexts is subject to non-literal, more flexible interpretations that account for relevant equities.³⁴⁴ Third, courts are not required to raise the rule *sua sponte*.³⁴⁵ Fourth, and

³⁴⁰ *Id.* at 9.

³⁴¹ See Scott Glass, Note, *Is the False Claims Act’s First-to-File Rule Jurisdictional?*, 118 COLUM. L. REV. 2361, 2386 (2018) (citing Dodson, *Mandatory Rules*, *supra* note 339, at 9).

³⁴² See *supra* note 338 (citing cases). Professor Scott Dodson has devised a novel framework to determine whether a rule is jurisdictional or nonjurisdictional, which he applied to the forum defendant rule in a prior article. See Dodson, *supra* note 14, at 85-88. Under his framework, Professor Dodson concluded the rule does not fall neatly into either category, and is thus likely a hybrid. *Id.*

³⁴³ In 2011 the rule was amended, in relevant part, from an arguably more restrictive—“shall be removable only if none of the parties in interest properly joined and served . . .” —to its current construction, which uses arguably more permissive language: “may not be removed if any of the parties in interest properly joined and served . . .” Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat 758, 759 (codified as amendment at 28 U.S.C. § 1441 (2011)) (emphasis added).

³⁴⁴ For example, courts commonly construe Rule 4(e)(2)(B) to account for instances, such as when a defendant has no permanent residence, or is imprisoned. See 4A CHARLES A. WRIGHT, ARTHUR R. MILLER, & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE §§ 1083, 1096 (4th ed.) (Westlaw) (last visited Nov. 24, 2020). This is despite the otherwise plain meaning of the Rule’s “dwelling or usual place of abode” language. FED. R. CIV. P. 4(e)(2)(B).

³⁴⁵ See, e.g., *RFF Family Partnership, LP v. Wasserman*, 316 F. App’x 410, 411 (6th Cir. 2009) (finding the district court erred raising the forum defendant rule *sua sponte*); *Ayemou v. Amvac Chemical Corp.*, 312 F. App’x 24, 31 (9th Cir. 2008) (same); *General Cas. Co. v. Pro. Mfrs. Representatives*, No. 08 C 6650, 2008 WL 4968847, *1 (N.D. Ill. Nov. 24, 2008) (similar). To be sure, some circuits have held raising the rule is within a district court’s discretion; however, it remains that it is not required, as opposed to § 1332’s complete diversity limitation. See, e.g., *Ehteshami v. Lanigan*, No. 18-184-DLB-CJS, 2018 WL 5303321, at *1 (E.D. Ky. Oct. 25, 2018) (ruling that “the issue of remand may be addressed *sua sponte*”); *Capital One Bank v. Ponte*, No. 11-11072, 2011 WL 2433480, at *3 n.2 (E.D. Mich. May 26, 2011) (noting that there is ambiguity as to whether a court may raise the forum defendant rule *sua sponte*, but ruling it permissible to do so on the particular facts at issue).

arguably most importantly, the provision can be subjected to equitable discretion.³⁴⁶ Section 1441(b)(2) has all of the features typically ascribed to a non-mandatory rule.³⁴⁷ Thus, recognizing that the key language should be read flexibly, the next question is which values should motivate that supple reading.

1. Judging those values

Diversity jurisdiction is about bias. It exists to insulate out-of-state defendants from potential bias from state judges and juries.³⁴⁸ Congress crafted the removal statute to avail that protection to out-of-state defendants named in state court actions. It wanted to ensure a level of protection and control for out-of-state defendants over the litigation. But as my data show, snap removal is used overwhelmingly by in-state defendants. Couching whether the bias rationale is a vestige of the nineteenth century and no longer does any work, bias is not implicated by the way snap removal is usually deployed. Relying on § 1441(b)(2) to avail removal by a forum defendant is in tension with its nonjurisdictional characterization. It is inconsistent because nonjurisdictional rules reject rigid applications that are contrary to the values that they embody.

Further, § 1441(b)(2) embodies fairness. It generally manifests as plaintiff's choice and protection from bias and

³⁴⁶ For example, the filing deadlines that govern defendants' ability to file a removal notice under § 1446(b) and plaintiffs' ability to assert motion to remand under § 1447(c). See, e.g., *Van Tassel v. State Farm Lloyds*, No. 4:14-CV-2864, 2015 WL 4617241, at *2-4 (S.D. Tex. July 31, 2015) (extending defendant's window to file its removal notice because evidence suggested the plaintiff attempted to manipulate the forum); *Tallman v. HL Corp. (Shenzhen)*, No. 14-5550 (WHW)(CLW), 2015 WL 3556348, at *4 (D.N.J. May 27, 2015) (similar); *Bank of N.Y. Mellon Corp. v. Fischer*, No. 15-01465 (WHW)(CLW), 2015 WL 4569077, at *1 (D.N.J. July 28, 2015) (tolling the thirty-day time bar that governs plaintiffs' ability to assert the forum defendant rule); *Shkolnik v. Citimortgage, Inc.*, No. CV11-07828 DDP (SSx), 2011 WL 6001138, at *2 (C.D. Cal. Dec. 1, 2011) (same).

³⁴⁷ See Dodson, *Mandatory Rules*, *supra* note 339, at 13-14, 28-29.

³⁴⁸ Howard M. Wasserman, *A Jurisdictional Perspective on New York Times v. Sullivan*, 107 NW. U. L. REV. 901, 906 (2013) ("Diversity jurisdiction exists to counter bias against outsider litigants facing favored local parties in state court, where judges are often elected or subject to reelection, judges and juries are drawn locally, and everyone is potentially subject to local popular pressures and passions.").

fraudulent joinder.³⁴⁹ The plaintiff is the master of her complaint. She decides who is named, the particular remedy she seeks (and, if relevant, what amount), and the forum she is seeking it in.³⁵⁰ By controlling those factors accordingly, she can plead in a way to avoid federal jurisdiction.³⁵¹ Such calculus is within plaintiff's right; it is not gamesmanship.³⁵² Indeed, plaintiff's choice is a "fundamental feature of the American legal system"³⁵³ Additionally, the rule is a means to protect out-of-state defendants. It ensures a means of insulation against perceived state-court bias and from plaintiffs joining fraudulent defendants. These two features of fairness are two sides of the same coin: the plaintiff gets to choose where to bring suit as they will need to carry most of the litigation burdens (e.g., proof), and the defendant has the option to remove in the event the plaintiff abuses that right by joining fraudulent parties. In an adversarial system, preserving the balance between the two sides is essential. Snap removal throws it out of whack.

Outside of the snap removal context, federal courts have adopted a conception of the forum defendant rule that is consistent with this approach.³⁵⁴ For example, in *Lively v. Wild Oats*, the Ninth Circuit observed that § 1441(b) is

³⁴⁹ See Debra Lyn Bassett & Rex R. Perschbacher, *The Roots of Removal*, 77 BROOK. L. REV. 1, 18-21 (2011); see also Mark Moller, *The Checks and Balances of Forum Shopping*, 1 STAN. J. COMPLEX LITIG. 107, 132-39 (2012) (discussing how plaintiff's choice, fairness, and comity have governed removal since before Reconstruction).

³⁵⁰ See *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938).

³⁵¹ Subject, of course, to limitations on behavior that most indicate Congress deemed gamesmanship—e.g., "bad faith" amounts in controversy, or fraudulent joinder. See *In re Briscoe*, 448 F.3d 201, 215-16 (3d Cir. 2006); *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995).

³⁵² See *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700 (9th Cir. 2007); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 407 (6th Cir. 2007).

³⁵³ Matthew C. Monahan, *De-Frauding the System: Sham Plaintiffs and the Fraudulent Joinder Doctrine*, 110 MICH. L. REV. 1341, 1347 (2012) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). Inherent in the plaintiff's choice is the legitimacy for a plaintiff to, for example, intentionally plead damages of \$74,000 to avoid removal. See Linda S. Mullenix, *Class Actions Shrugged: Mass Actions and the Future of Aggregate Litigation*, 32 REV. LITIG. 591, 628 (2013).

³⁵⁴ See, e.g., *Tex. Brine Co. v. Am. Arbitration Ass'n*, 955 F.3d 482, 485 (5th Cir. 2020); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 152 (3d Cir. 2018), *reh'g denied* (Sept. 17, 2018).

nonjurisdictional.³⁵⁵ A plaintiff can waive the right to contest removal by a forum defendant by failing to comply with § 1447(c)'s 30-day time limitation. Essential to the court's conclusion that the rule is nonjurisdictional was its consideration of the values § 1441(b) embodies—notably, protecting out-of-state defendants from state court bias, and plaintiff's choice.³⁵⁶ Indeed, it noted that the rule is not necessary when the defendant is a forum citizen.³⁵⁷ It also observed that a jurisdictional characterization of the rule was incorrect because rigid application would allow the court to remand the case despite the plaintiff's desire to remain in federal court.³⁵⁸ That is, it would conflict with the plaintiff's choice value that the rule embodies.³⁵⁹

When courts permit snap removal, they are mechanically applying a nonjurisdictional rule. Mechanical application of such rules is inconsistent with its nonjurisdictional nature. The outcomes are typically antithetical to the values § 1441(b) embodies. As my data show, the tactic is used predominantly by in-state defendants. Applying the nonjurisdictional rule in this way does not further its values of fairness to out-of-state defendants, as its concerns with out-of-state bias are not implicated.³⁶⁰ Additionally, the justification that “[f]ailing to further a purpose is not equivalent to the purpose’s impairment” cannot be sustained in the snap removal context.³⁶¹ The removal

³⁵⁵ See *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 936 (9th Cir. 2006). Wild Oats appealed the district court's order to remand. *Id.* at 935. The lower court's reasoning was that it lacked subject matter jurisdiction due to Wild Oats' forum citizenship. *Id.* On appeal, Wild Oats argued that the court erred in sua sponte remanding the case based on a violation of the forum defendant rule, reasoning that the rule is nonjurisdictional and is thus waivable. *Id.* The Ninth Circuit agreed. *Id.* at 942.

³⁵⁶ *Id.* at 940.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.* (stating that a procedural characterization of the forum defendant rule “honors [its] purpose” by preserving plaintiff's choice—subsequent to removal, a plaintiff can remand it to state court or allow it to remain in federal court).

³⁶⁰ See, e.g., *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313, 319 (D. Mass. 2013) (“[T]he protection-from-bias rationale behind the removal power evaporates when the defendant seeking removal is a citizen of the forum state.”).

³⁶¹ *Monfort v. Adomani, Inc.*, No. 18-CV-05211-LHK, 2019 WL 131842, at *4 (N.D. Cal. Jan. 8, 2019); see also *Yocham v. Novartis Pharm. Corp.*, No. 07-1810 (JBS), 2007 WL 2318493, at *3 (D.N.J. Aug. 13, 2007).

statute must be construed in favor of remand.³⁶² So the idea that snap removal is permissible because it does not impair the provision's goal of preventing fraudulent joinder cannot be sustained without saying § 1441(b)(2) can be read in favor of removal. It cannot.

Snap removal is also inconsistent with plaintiff's choice and incentivizes actions that foil it. Some courts have observed that the rigid application of the forum defendant rule needed to justify snap removal "violate[s] the spirit of the law"³⁶³ Recall again the facts in *Delaughder v. Colonial Pipeline, Co.*, where the defendant changed agents to avoid service, and *Jackson v. Howmedica Osteonics Corp.*, where the defendant stalled the process server so it could file its removal notice.³⁶⁴ Both cases show how the rigid, mechanical application of the forum defendant rule manifests in a way that erodes the values that the rule embodies.

Courts may bend nonjurisdictional rules, and avoid a mechanical application, when fairness demands it.³⁶⁵ The Court took a similar approach in *Erie*. Though it was a choice of law case, *Erie* nevertheless conceived of diversity jurisdiction in a way that "maximize[d] the ability of litigants—particularly the weak, unsophisticated, and practically disadvantaged—to secure practical justice."³⁶⁶ Proper analysis in cases that are snap removed would take a similar approach. Specifically, in their remand analyses, courts must account for the notion of fairness, as well as the other values § 1441 embodies. For example, does

³⁶² *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1749-50 (2019) (discussing the narrow and limited right to remove under § 1441); *see also id.* at 1758 (Alito, J., dissenting) (referring to the presumption courts must read into § 1441 as "antiremoval").

³⁶³ *Graff v. Leslie Hindman Auctioneers, Inc.*, 299 F. Supp. 3d 928, 933, 937 n.7 (N.D. Ill. 2017) (citing *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 67 F. Supp. 3d 952, 961 (N.D. Ill. 2014)).

³⁶⁴ *See supra* text accompanying notes 97-118 (discussing both cases).

³⁶⁵ *See Grupo Dataflux v. Atlas Global Grp.*, 541 U.S. 567, 573-74 (2004) (holding that nonjurisdictional defect of failing to comply with relevant timing of removal procedures was overridden by concerns of economy, efficiency, and finality); *Dodson*, *supra* note 14, at 60.

³⁶⁶ PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 3, at 297; Purcell, *The Story of Erie*, *supra* note 3, at 58-59 ("Brandeis sought to overturn the [*Swift*] doctrine because he believed it caused systemic injustices in disputes between individuals and powerful national corporations.").

removal preserve the plaintiff's choice of forum, or does it strong-arm them into federal court? Are plaintiffs manipulating jurisdictional rules by joining an in-state party in bad faith? The analysis must be more supple, consistent with how courts apply other nonjurisdictional rules.

2. Construing those values

While the *Erie* Court overruled *Swift*, it did not eliminate federal common law entirely. Rather, it placed it on a short leash, availing it in cases where federal common law governs or in the rare instance that state law calls for general law. No Congressional action was needed; the courts were able to fashion a solution to the manifest problems of inequality and unfairness that *Swift* caused. This solution would follow a similar path. It would rely upon existing statutory authority and Supreme Court precedent for courts to reject the overly narrow and mechanical application snap removal requires.

a. Section 1441 cannot be construed according to its plain meaning.

The Supreme Court has provided guidance on how to interpret removal statutes in several cases.³⁶⁷ Its most recent removal case—*Home Depot U.S.A., Inc. v. Jackson*—is instructive.³⁶⁸ The facts in *Jackson* are complex. For the purposes of this Article, it is sufficient to know that Jackson was sued by a bank.³⁶⁹ In response, he filed a counterclaim against the bank and a third-party class action in state court naming Home Depot as a defendant.³⁷⁰ Home Depot removed the action, citing federal jurisdiction under CAFA.³⁷¹ The district court granted Jackson's motion to remand, ruling removal was not available to Home

³⁶⁷ See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

³⁶⁸ 139 S. Ct. 1743, 1746 (2019).

³⁶⁹ *Id.* at 1747.

³⁷⁰ *Id.*

³⁷¹ *Id.*

Depot because it was not a “defendant” under CAFA.³⁷² The Fourth Circuit affirmed.³⁷³

While the questions presented in *Jackson* related to counterclaim defendants, the Court nevertheless provided insight on how to properly construe removal statutes, and § 1441 in particular. Its guidance can provide lessons for the interpretive work required in snap removal cases. Notably, the Court held, among other things, that construing § 1441 according to its plain meaning, and applying it mechanically is not correct.³⁷⁴ Rather, discrete words or phrases must be read in the context of the entire statute.³⁷⁵ In *Jackson*, the Court rejected Home Depot’s argument that the plain meaning of “defendant” in § 1441(a) and CAFA includes third-party class action defendants. Section 1441(a) is likely nonjurisdictional.³⁷⁶ The requirement at issue in *Jackson* was *who* may remove an action under § 1441(a); specifically, whether Home Depot was a “defendant” as per the text of the

³⁷² *Id.* at 1747-48.

³⁷³ *Id.* at 1747.

³⁷⁴ *Id.* at 1748 & n.3; *id.* at 1755 (Alito, J., dissenting) (“[T]he majority has not one jot or tittle of analysis on the plain meaning of ‘defendant.’”).

³⁷⁵ *Id.* at 1748 (majority opinion) (quoting *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989)). Notably, the Court said that § 1441(b)(2) is a statutory limitation on removal that prevents “removal based on diversity jurisdiction where *any* defendant is a citizen of the State in which the action is brought.” *Id.* at 1749 (emphasis added). It failed to emphasize the “joined and served” phrase in the context of the forum defendant rule’s limitations. Of course, this is unsurprising in light of the Court’s holding that narrow readings, uncoupled from the context of the statute, are incorrect. *Id.*

³⁷⁶ Removal “jurisdiction” under § 1441 only exists if there is federal question or diversity jurisdiction—that is, it is derivative of existing authority, namely §§ 1331, 1332. *See Dodson, supra* note 14, at 61-62. Instead, the statute codifies a procedural means to remove a state court action to federal court, subject to certain requirements and limitations. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73 (1996) (referring to § 1441(a)’s procedural versus jurisdictional requirements); *Hollus v. Amtrak Ne. Corridor*, 937 F. Supp. 1110, 1113-14 (D.N.J. 1996), *aff’d*, 118 F.3d 1575 (3d Cir. 1997) (§ 1441(a) requirements are procedural); *Williams v. Birkeness*, No. 92-1041-CV-W-1, 1993 WL 760162, at *2 n.2 (W.D. Mo. Sept. 29, 1993), *aff’d*, 34 F.3d 695 (8th Cir. 1994) (same); *Alexander ex rel. Alexander v. Goldome Credit Corp.*, 772 F. Supp. 1217, 1221-22 (M.D. Ala. 1991) (same); *see also Peterson v. BMI Refractories*, 124 F.3d 1386, 1391 (11th Cir. 1997) (“The Supreme Court has long treated the technical requirements of the federal removal statutes as procedural, not jurisdictional.”); *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 782-83 (9th Cir. 1994), *cert. denied*, 513 U.S. 943 (1994) (no removal under § 1441(a) because of a procedural defect).

statute.³⁷⁷ The Court answered in the negative.³⁷⁸ The rigid, plain meaning reading needed to support Home Depot's argument eliminates the plaintiff's choice (via the well-pleaded complaint rule), expands removal jurisdiction, and is inconsistent with the Court's removal jurisprudence.³⁷⁹ The same inconsistencies attend § 1441(b)(2)'s plain meaning that purportedly justifies snap removal.

The Court also indicated that precedent is necessary to properly construe § 1441. In *Jackson*, it looked to its opinion in *Shamrock Oil & Gas Co. v. Sheets*³⁸⁰ to assist in construing CAFA's and § 1441(a)'s text. That is, sole reliance on § 1441's text was not sufficient to properly interpret the statute. Rather, a proper interpretation considers relevant precedent to account for the statute's context. Indeed, the Court stated, among the interpretive approaches available to construe § 1441, a plain meaning reading "is [not] the best one."³⁸¹

b. Proper application of § 1441 presumes the case will be remanded.

Further, the majority and dissent both clarified that § 1441 is to be interpreted as an "antiremoval" statute.³⁸² Whereas CAFA should arguably be read as expanding access to a federal forum, the Court in *Jackson* unanimously observed that § 1441 should be read as doing the opposite. *Jackson* rejected a plain meaning construction of "defendant" in § 1441(a) because it would have supported an expansion of removal jurisdiction.³⁸³ This demonstrates that § 1441 cannot sustain an expansion of removal jurisdiction—regardless of how plain the text's meaning is. Like the Ninth Circuit in *Wild Oats Market*, the *Jackson* Court considered the values the relevant rule embodies in its

³⁷⁷ *Jackson*, 139 S. Ct. at 1747-48.

³⁷⁸ *Id.* at 1750.

³⁷⁹ *Id.* at 1748-50.

³⁸⁰ *See id.* at 1747, 1749 (citing and discussing *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941)).

³⁸¹ *Id.* at 1748.

³⁸² *Id.* at 1749-50 (discussing the narrow and limited right to remove under § 1441); *see also id.* at 1758 (Alito, J., dissenting) (referring to the presumption courts must read into § 1441 as "antiremoval").

³⁸³ *Id.* at 1747-50. (majority opinion).

construction. Specifically, the *Jackson* Court observed that a plain meaning reading would cut against both its holding in *Shamrock Oil* and the values that inhere in § 1441.

The same flaws attend the plain meaning construction of § 1441(b)(2)'s "joined and served" language. It is true cases that are snap removed could originally have been filed in federal court. But that is not enough to support the plain meaning reading snap removal requires. The Court's analysis in *Jackson* suggests it should be rejected. The statute's "joined and served" language should be read with its "antiremoval" context and in a way that preserves the rules core values, like plaintiff's choice.³⁸⁴

c. Relevant authority counsels § 1441(b)(2) must be more supple.

Taking these strands together suggests how courts can analyze snap removals in a way that does not run afoul of Supreme Court precedent. When a defendant files a notice of removal in the district court before they have been served, the court has an analytical responsibility. Preserving the values § 1441 embodies—fairness and plaintiff's choice—means they must look beyond the simple binary of whether the forum defendant was served or not.³⁸⁵

Specifically, the analysis must examine the litigants' behavior. The court must determine whether the plaintiff joined the in-state defendant in bad faith, or whether the defendant's use of removal smells of forum shopping—inquiries that are familiar to them and often used when ruling on motions to remand.³⁸⁶

³⁸⁴ See *id.* at 1762 (Alito, J., dissenting) (criticizing the majority's holding that courts cannot read § 1441 to run afoul of well-pleaded complaint rule and plaintiff's choice).

³⁸⁵ The importance of fairness in removal analysis was germane to the Court's holding in *Shamrock Oil*, and was echoed in *Jackson*, as well. *Id.* at 1749-50 (majority opinion) (discussing *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 106-109 (1941)).

³⁸⁶ For example, when a court considers whether to construe the plain text of § 1446(b)'s one-year limit on removal in a way that accounts for relevant equities—i.e., whether to apply equitable tolling—it will consider, among other factors, whether the plaintiff was engaged in forum shopping. See, e.g., *Roane v. Everbank*, No. 2:13-cv-1819-CWH, 2013 WL 4505415, at *7 (D.S.C. Aug. 22, 2013) (demonstrating a typical analysis and collecting similar cases); *Negron v. PLIVA, Inc.*, No. 3:12-CV-0369-N, 2012 WL 13103536, at *3-6 (N.D. Tex. Aug. 24, 2012) (similar). Cf. *Aguayo v. AMCO Ins.*, 59 F. Supp. 3d 1225, 1263-86 (D.N.M. 2014) (providing a similar bad faith analysis that accounts for the presumption against removal and sensitive comity issues that attend construing removal statutes). Of course, assuming the jurisdictional

* * *

This Part aimed to show why snap removal is inconsistent with Supreme Court precedent, and to briefly sketch the proper analytical approach courts should take when defendants remove a case before service. The approach accounts for the rule's procedural nature and Supreme Court precedent that counsels against plain meaning construction. Further, the approach outlined here would not eliminate snap removal. Indeed, there are some instances of snap removal that are okay, like when a plaintiff joins a defendant with no intention to serve them, so as to preclude removal. Thus, the instances in which the defense bar and Chamber of Commerce wish to keep snap removal would still exist.³⁸⁷ Thus, courts could also cabin the tactic—like general law—to narrow instances. For example, when litigation is between two corporate entities, or in litigation between a corporation and government entity, where notions of fairness are arguably less at risk. This would return the tactic closer to where it began. It would also reduce some of the incentives that make snap removal such an attractive means to upset the legal system.

requirements are satisfied, plaintiffs can consent to the removal—that is also within their right.

Additionally, the Court has observed that excluding litigants' post-removal conduct from the analysis when ruling on a motion to remand is not necessarily correct. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 233-34 (2007). So, while courts generally view removal notices as voiding state court service, in instances of snap removal where actions are removed within seconds of filing in actions that name *both* forum and non-forum defendants, post-removal service under § 1448 and Federal Rule 4 could potentially provide authority to support remand when the non-forum defendant has been served and removed before service was perfected on the forum defendant. At least one court has already endorsed the likely viability of this tactic. *See Ellis v. Mississippi Farm Bureau Cas. Ins.*, No. 20-1012, 2020 WL 2466247, at *4 n.30 (E.D. La. May 13, 2020). Of course, as my data show, the overwhelming majority of snap removal cases are in fact actions with a sole forum defendant. Thus, to the extent some kind of “snapback” is possible under existing authority, it is likely cool comfort to most plaintiffs. A group of procedure scholars has also proposed an amendment to 28 U.S.C § 1447 that would more directly contemplate post-removal service as a means to close the snap removal loophole. *See Hellman et al.*, *supra* note 42, at 108-10.

³⁸⁷ *See, e.g.*, Stoffelmayr Testimony, *supra* note 12, at 6-7 (stating that snap removal is necessary to protect defendants from plaintiff gamesmanship that eliminates defendants' right to remove).

CONCLUSION

Snap removal incentivizes gamesmanship. Its use is increasing and evolving. Data show it is being employed most often by in-state defendants. That is a far cry from its originally intended use as a creative device for out-of-state defendants to foil plaintiff machinations. Its continued exploitation has further expanded economic and sophistication disparities between corporate defendants and individual plaintiffs. It has also placed substantial stress on values central to the American legal system, such as fairness. Several scholars and practitioners have proposed various solutions. But each relies on the premise that the legislature is willing to provide a fix. This Article has argued that is likely a dead end, due to the political economy that surrounds legislative change. Instead, I attempted to show why courts should intervene, and to sketch a path as to how.

APPENDIX

Table 1: The nature of the suits

Nature of the Suit	Raw	Percent
Products. Liability	233	86.30
Personal Injury	16	5.93
Contract	7	2.59
Employment	4	1.48
Property	4	1.48
Securities	3	1.11
Insurance	2	0.74
Other	1	0.37
Total	270	100.00

Table 2: The type of defendant employing snap removal

Defendant Type	Raw	Percent
Corporation	263	97.41
Individual	5	1.85
Government	1	0.37

Union	1	0.37
Total	270	100.00

Table 3: The type of plaintiff whose case was removed

Plaintiff Type	Raw	Percent
Individual	260	96.30
Corporation	9	3.33
Insurance	1	0.37
Total	270	100.00

Table 4: Citizenship of the removing party

Citizenship of Removing Party	Raw	Percent
Forum state	248	91.85
Non-forum state	21	7.78
Both	1	0.37
Total	270	100.00

Table 5: Venue where action was removed to

Venue	Raw	Percent
D.N.J.	207	76.67
E.D. Mo.	21	7.78
C.D. Cal.	7	2.59
E.D. Pa.	5	1.85
W.D. Tex.	4	1.48
E.D. Mich.	2	0.74
N.D. Ill.	2	0.74
S.D. Fla.	2	0.74
S.D. Tex.	2	0.74
S.D.N.Y	2	0.74
D. Del.	1	0.37

D. Md.	1	0.37
D. Or.	1	0.37
D.R.I.	1	0.37
E.D. Cal.	1	0.37
E.D. La.	1	0.37
M.D. La.	1	0.37
M.D. Pa.	1	0.37
N.D. Al.	1	0.37
N.D. Cal.	1	0.37
N.D. Ga.	1	0.37
N.D. Tx.	1	0.37
S.D. W.Va.	1	0.37
S.D. Cal.	1	0.37
S.D. Ga.	1	0.37
S.D. W.Va.	1	0.37
Total	270	100.00

Table 6: Firms employing snap removal

Defense Firm	Raw	Percent
Fox Rothschild	125	46.30
Riker Danzig	68	25.19
Husch Blackwell	20	7.41
McCarter & English	8	2.96
Sidley Austin	3	1.11
Tucker Ellis	3	1.11
K&L Gates	2	0.74
Kane Russell Coleman Logan	2	0.74
Ballard Spahr	1	0.37
Blakely Law Group	1	0.37
Bowman and Brooke LLP	1	0.37
Brach Eichler	1	0.37
Brobeck, Phleger, Brooks Wilkins Sharkey & Turco, PLLC	1	0.37

Brophy Edmundson Shelton & Weiss	1	0.37
Bryan Cave	1	0.37
Butler Snow LLP	1	0.37
Davis Wright Tramine LLP	1	0.37
Dechert LLP	1	0.37
Duane Morris LLP	1	0.37
Ferguson Braswell Fraser Kubasta PC		
Alston & Bird	1	0.37
Frasco Caponigro Wineman & Scheible, PLLC	1	0.37
Gibbons PC	1	0.37
Greenberg Traurig, LLP, Ulmer & Berne LLP	1	0.37
Gursky Wiens	1	0.37
Hissam Forman Donovan Ritchie Hunton Andrews Kurth	1	0.37
Hogan Lovells	1	0.37
Kramon and Graham	1	0.37
Lathrop Gage LLP	1	0.37
Liskow & Lewis	1	0.37
Littler Mendelson	1	0.37
Marrero, Chamizo, Marcer	1	0.37
Mayer LLP	1	0.37
McGlinchey Stafford	1	0.37
Meyner and Landis	1	0.37
Morgan Lewis & Bockius	1	0.37
Ogletree, Deakins, Nash, Smoak & Stewart	1	0.37
Patterson Belknap Webb & Tyler LLP	1	0.37
Pion, Nerone, Girman, Winslow & Smith	1	0.37
Pro Se	1	0.37
Quinn Emanuel Urquhart & Sullivan DuBois, Bryant & Campbell, L.L.P.,	1	0.37

Chaiken & Chaiken, P.C.		
Rawle & Henderson	1	0.37
Scandurro & Layrisson	1	0.37
Shalena Cook Jones	1	0.37
Shawd & Eaton	1	0.37
Thomas, Thomas & Hafer	1	0.37
Wilson Elser Moskowitz Edelman & Dicker	1	0.37
Wood Smith Henning & Berman	1	0.37
Total	270	100.00

Table 7: Defendants served before removal was filed

Remand granted or denied?	Raw	Percent
Denied	176	65.19
Granted	94	34.81
Total	270	100.00