# BEND AND SNAP:

# A DUE PROCESS ARGUMENT EMBRACING THE SNAP REMOVAL LOOPHOLE

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## Abstract

Circuit courts are currently split on a key provision of the forum defendant rule that allows an in-forum defendant to remove to federal court, colloquially known as snap removal. When these in-forum defendants have not been properly served, they may be able to remove to federal court regardless of the limitation set forth in the forum defendant rule. As it stands, some circuits have adopted an interpretation that affirms the use of this procedural mechanism, and others have rejected it.

This fissure creates inequities and must be resolved to ensure that the courts are working together toward efficient justice. The courts must resolve this split in a manner that affirms the snap removal loophole as a valid procedural mechanism and ensures that removal is not limited where it otherwise would be allowed.

While many legal scholars question the prudence of snap removal, the majority of circuits thus far affirm the use. Under a statutory analysis, the rule allows for removal when a defendant has not been properly joined and served. Furthermore, there is a notable due process reason for allowing snap removal where applicable. The counter logical nature of the forum defendant rule illustrates that snap removal must remain intact to respect the original legislative purpose of removal and should be affirmed, resolving any circuit split as it stands.

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## I. INTRODUCTION

From the very first year of law school, jurisdiction is a topic drilled into the minds of students. The importance of where a lawsuit takes place cannot be overstated, despite many professors' attempts at doing so. Despite this focus, there is still a lively debate on where some cases are heard and if they can be removed to federal court.

Basic civil procedure outlines that a defendant who satisfies diversity jurisdiction can remove from state court to the federal court. Section 1441(b)(2), known as the forum defendant rule, limits this action stating a citizen of the state where legal action is brought may not remove.[1] However, as many law students learn, law is often not that straightforward. The exact

1. *See* SAMUEL ISSACHAROFF, CIVIL PROCEDURE 157 (Saul Levmore et al. eds, 5th ed. 2022).

language of this rule allows for a mechanism called "snap removal" to occur if the defendant in question has not been properly joined and served.[2]

Many oppose this use and find it to be the actions of tricky defense attorneys capitalizing on a loophole, but despite this, most courts addressing this topic have affirmed the use.[3] Furthermore, Congress has amended the forum defendant rule's statute within the past decade, and elected to leave the language as it stands.[4] From a legal standpoint, these responses point to upholding the allowance of removal in these cases.

However, there is a circuit split on the use of snap removal. The Second, Third, and Fifth Circuits affirm, and the Eleventh Circuit reject snap removal. A circuit split is like a bad break-up: it's messy and no one really knows where they stand. This split is problematic for many reasons, mainly because it leads to federal law applied differently across jurisdictions and creates uncertainty over what law will be applied circuits that have not heard the issue.[5]

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2. 28 U.S.C. § 1441(b)(2).

3. *See* Jeffrey Stempel et al., Comment, *Snap Removal: Concept; Cause; Cacophony; and Cure*, 72 BAYLOR L. REV. 423, 426 (2020).

4. *Id.* at 440.

5. *See* Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?,* 71 CAL. L. REV. 913, 930 (1983).

Criticism of snap removal supporters state that the statute's legislative intent is downplayed and ignores the primary purpose of removal.[6] In reality, the addition of the disputed language and the forum defendant rule as a whole is lacking legislative history and clarity.[7] That being said, there is clarity to be found. Through an examination of statutory construction cannons such as plain meaning, the threshold absurdity question, and the exceptional circumstances doctrine it becomes clear why the courts have elected to affirm snap removal.

While the forum defendant rule is outdated in its nature and ignores many aspects of modern litigation and legal technology, snap removal maintains some of the protections necessarily afforded to the defendants. Rejecting snap removal brings forth due process questions of proper notice and the right to be heard. To avoid these troubling issues and respect the statute's intent as it stands, snap removal must be affirmed.

## II. BACKGROUND

### A. *Proper removal and the desire for federal court jurisdiction*

Many cases can be filed either in federal or state court.[8] The question thus becomes whether there are any advantages to filing in one court rather

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6. *See supra* note 3, at 429.

7. *See* Sullivan v. Novartis Pharm. Corp., 575 F. Supp. 2d 640, 645 (D.N.J. 2008) (stating ". . .that the legislative history is all but silent on the issue. . ." of snap removal).

8. *See supra* note 1.

than the other. Or, from a defendant's standpoint, whether there are any advantages in removing a case pending in state court to federal court.

Cases can be removed to federal court only if there is subject matter jurisdiction, which occurs either through federal question jurisdiction or diversity jurisdiction.[9] Federal question jurisdiction stipulates that the case arises under a federal constitutional question or federal law.[10] Whereas with diversity jurisdiction, there is complete diversity in terms of citizenship[11] and an amount in controversy[12] of at least $75,000.[13]

There are many reasons a defendant may be interested in removing to federal court, including the belief that federal courts help eliminate the potential for bias or discrimination against citizens who are not residents of a certain state.[14] Federalist No. 80[15] noted the necessity of being "committed to

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9. *See* Jason Gordon, *Fed. Subject Matter Jurisdiction - Explained*, THE BUS. PROFESSOR (Sep. 23, 2021), https://bit.ly/3zir3xX.

10. 28 U.S.C. § 1331.

11. *See supra* note 1, at 143. Complete diversity means the plaintiff and defendant are residents of different states. *Id.* For example, plaintiff Elle is a resident of California and sues defendants Warner, who is a resident of Massachusetts, and Vivian, who is a resident of Connecticut.

12. *See id.* at 142. Amount in controversy is the amount the plaintiff is seeking in a claim and is accepted so long as the amount is reasonable given the claim. *Id.*

13. 28 U.S.C. § 1332.

14. Daniel Coquillette et al., *Moore's Fed. Practice- Civil* § 107.55 (2022).

15. *See generally* THE FEDERALIST NO. 80 (Alexander Hamilton) (A. McLean's ed., 1788). The Federalist Papers are considered to be extremely

that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens. . . [and] will never be likely to feel any bias inauspicious to the principles on which it is founded."[16] A defendant who is not a citizen of the state where the action is occurring is at risk of local influence and prejudice that would prevent him from getting justice.[17] Preventing this prejudice is one of the main drivers of allowing removal in diversity jurisdiction cases and why some defendants prefer a federal court.[18]

From a more strategic perspective, many defendants prefer to be in federal court because a potential jury would be pulled from a wider geographic area and also more consistent court precedent.[19] There also tends to be more consistency in terms of docketing and decisions, as many federal

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important contributions and are used to help interpret the original intent of the Constitution and in this case, the creation of the judiciary. Ken Drexler & Robert Brammer, FEDERALIST PAPERS: PRIMARY DOCUMENTS IN AMERICAN HISTORY, LAW LIBRARY OF CONGRESS (May 3, 2019), https://bit.ly/3Y1p7Ea. By examining the intent and goals of the creation of the judiciary, it can be used to understand how removal for diversity jurisdiction is allowed to help circumvent bias. *See Primary Documents in American History*, Library of Congress, https://bit.ly/3Y2Zkes (last visited Feb. 22, 2023).

16. *Id.* at ¶10.

17. Hawkins v. Cottrell, Inc., 785 F. Supp. 2d 1361, 1376 (N.D. Ga. 2011).

18. Kevin Lewis, CONG. RSCH. SERV., LSB10380, MAKE IT SNAPPY: CONG. DEBATES SNAP REMOVALS OF LAWSUITS TO FED. CT., at 2.

19. *See Requirements for Removing a Case from State Court to Fed. Ct.*, BONA LAW, https://bit.ly/3sq7Kz3 (last visited Oct. 23, 2022).

judges have lifetime appointments.[20] Also, federal juries require unanimous verdicts, whereas state courts do not.[21] Furthermore, many business defendants seem to prefer federal court because federal judges and juries are commonly assumed to be more friendly to corporations.[22]

These benefits make it understandable why the forum of a lawsuit is such an important legal matter for both parties in a suit.

1. The forum defendant rule as a limitation to removal

Despite the preference of defendants to remove to federal court, there are some limitations to this ability. The forum defendant rule under 28 U.S.C. § 1441(b)(2) states that in cases where a suit may otherwise be removable for diversity of citizenship if one of the defendants is a resident of

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20. *See id.*

21. *The Forum Defendant Rule & Discrepancies in Interpretation,* HENSLEY LEGAL GROUP, (Dec. 28, 2021), https://bit.ly/3GGfWC6. Requiring unanimous verdicts is attractive to defendants because it increases the burden of the plaintiffs as a whole to prove their case. *See generally* Janet Portman, *Jury Verdicts in Criminal Trials: Unanimous, or Not?*, Lawyers.com, (July 7, 2021) https://bit.ly/3XOTLjy.

22. *See supra* note 3, at 428-29. One of the reasons why federal courts are seen as generally more beneficial for defendants is because of the idea that suburban and rural jurors are more favorable to defendants. *Id.* When pulling from a larger jury pool, such as that in federal court, there is a higher percentage of those citizens. *Id.* Furthermore, federal judges are perceived to have previous business attorney backgrounds as opposed to those on the state court level, and therefore are assumed to be more friendly to corporations and businesses. *Id.*

the state where the action is brought, they may not remove to a federal district court.[23]

The forum defendant rule's reasoning is that removal is welcomed to prevent local court bias, and when the defendant is a citizen where action is brought, that potential for bias is eliminated.[24] Some argue the defendant is at no risk of prejudice from a state court that is in their resident state; therefore, there is no reason to allow them to remove to federal court for purposes of diversity jurisdiction.[25]

The original diversity of citizenship statute was in the Judiciary Act of 1789, which helps illustrate the purpose of the forum defendant rule and its origins.[26] Those using original intent as a way of interpretation point to the fact that in the Judiciary Act of 1789, removal was permitted only for out-of-state defendants.[27] The addition of the language requiring in-state defendants be properly joined and served prior to the limitation taking place was added later.[28]

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23. 16 James William Moore, *Moore's Fed. Practice*, Civil § 107.55 (2022).

24. *See supra* note 18, at 2.

25. *See id.*; Dresser Indus., Inc. v. Underwriters at Lloyd's of London, 106 F.3d 494, 499 (3d Cir. 1997).

26. Judiciary Act of 1789, Pub. L. No. 01-20, 1 Stat. 73 (1789).

27. *See id.* at 79.

28. *See* Cottrell, Inc., 785 F. Supp. 2d 1361, 1375 (N.D. Ga. 2011).

*B. The snap removal loophole*

Even with the above forum defendant's limitations, many in-state defendants have found a mechanism to still remove federal court.

28 U.S.C. § 1441(b)(2) states that "[a] civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[29] There is potential for circumvention of the forum defendant rule in this. Following the language of the statute, citizens who are a resident of the state in which the action is brought may remove to federal court if they do so before they are properly joined and served.[30] The phrase "properly joined and served" is subject to much debate in this interpretation. Under a plain meaning reading, that sentence means that before those requirements are satisfied, the limitation on removal does not apply to those defendants.[31]

To further illustrate how the history of the forum defendant rule shapes interpretation, the "joined and served" language was not added until 1948.[32] There is very little legislative history denoting why this change was

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29. 28 U.S.C. § 1441(b)(2).

30. *See* Joseph Meservy, Note, *A Fresh Look at Procedural Limitations to Diversity Jurisdiction Removal,* 28 NEV. LAW. 12, 12 (2020).

31. *Id.* at 13.

32. *See* Cottrell, Inc., 785 F. Supp. 2d 1361, 1375 (N.D. Ga. 2011).

made, which makes it difficult to have a robust discussion on the purposes and meaning behind this phrase under a legislative intent framing.[33]

Many opponents of the loophole—colloquially known as the snap removal loophole—argue that there is no difference between a served and unserved forum defendant.[34] Other courts follow the logic of the Supreme Court in *United States v. Gonzales*,[35] finding that "given the straightforward statutory command, there is no reason to resort to legislative history."[36] Those courts find there is no need to examine legislative history of removal when the plain meaning of the statute allows removal.[37]

As illustrated by the various methods approaching this loophole, the idea of snap removal is not a new legal concept. In fact, this question was first addressed over 20 years ago and is debated among courts today.[38]

*C. Common court considerations*

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33. *Id.*

34. *See id.* at 1372.

35. *See* United States v. Gonzales, 520 U.S. 1, 2 (1997). This case was addressing sentencing for use of firearms during drug crimes; however, it is relevant to snap removal as it illustrates some courts can use legislative history in a way that "muddies the water" when a statute is otherwise clear. *Id.*

36. *Id.*

37. *See id*; Harris v. Garner, 216 F.3d 970, 976 (11th Cir. 2000).

38. *See* Amber Barlow, *Oh, Snap! Let's Remove! Snap Removal and Diversity Jurisdiction*, FOR THE DEFENSE, 56 (June 2021), https://bit.ly/3V78SUw.

In the debate of how to best approach this loophole, courts have considered a few factors including some canons of statutory interpretation, the threshold absurdity question, and other exceptional circumstances.

1. Canons of statutory interpretation

When addressing statutes such as this one, courts approach them in a variety of ways to discern the text's meaning.[39] Courts will derive their understanding from a variety of sources and canons of statutory interpretation.[40] Regarding Section 1441(b)(2) and how the courts have commonly approached this question, the plain meaning reading rule has been applied, as has legislative intent analysis.[41] Furthermore, the stabilizing canon of presumption against change in common law seems to be a consideration the courts should note in their analysis.[42]

39. Daniel Gordon, Jeffrey Kolb & John Cremer, HENRY'S IND. PROB. LAW AND PRACTICE § 1.07 (2022).

40. *See id.*

41. *See*, *e.g.*, Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 705 (2d Cir. 2019); Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 152 (3d Cir. 2018); Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n, 955 F.3d 482, 486 (5th Cir. 2020); Goodwin v. Reynolds, 757 F.3d 1216, 1221 (11th Cir. 2014).

42. *See A Guide to Reading, Interpreting and Applying Statutes*, THE WRITING CTR. AT GULC, 6 (2017), https://bit.ly/3zuSnct.

a. Plain meaning

The plain meaning rule is an approach to statutory interpretation that simply relies on the ordinary meaning of a law or statutory text.[43] The courts must take the words in their plain, ordinary, and usual meaning to see what the language of the statute is implying.[44] When language is unambiguous, the rule states that the search for meaning is over and that the courts should interpret statutes as read.[45]

The logic behind the reading of plain meaning is that the best indication of legislative intent are the words of the statute itself, as those show the meaning of the statute.[46] The plain meaning rule recognizes that due process and administration of federal statutes demand that we hold language to a high standard.[47] Favoring the plain meaning of the text helps maintain the balance between the judicial and legislative branches.[48]

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43. Daniel Gordon, Jeffrey Kolb & John Cremer, *supra* note 39.

44. *Id.*

45. *Id.*

46. *Id.*

47. *See* Robin Craig, Note, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 960 (2005).

48. *Id.*

With the forum defendant rule, snap removal's allowance hinges on the plain reading of the statute.[49] The language stipulating that an in-state defendant must be properly "joined and served" is what makes the defendant's removal before service possible.[50] Courts must address the plain meaning of a statute in any proper statutory analysis, but especially involving the snap removal question. The clear language of Section 1441(b)(2) is why many of the circuit courts have affirmed the use and the most compelling argument in favor of snap removal.[51]

b. Legislative intent

Another canon of statutory interpretation that helps courts decide the meaning of a statute is legislative history.[52] Courts may look toward the intent of the legislature and historical background leading to enactment to see whether the statute is being properly considered.[53] Many courts believe

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49. *See* Spigner v. Apple Hosp. REIT, Inc., No. 3:21cv758 (DJN), 2022 U.S. Dist. LEXIS 86059, at *9 (E.D. Va. Mar. 1, 2022) ("The second path, upheld by the Second, Third and Fifth Circuits in recent years, instead allows snap removal. This approach does not depart from the plain meaning of § 1441(b)(2), because neither absurd result nor contravention of congressional intent justifies departure.").

50. *Id.* at *11.

51. *See* Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 707 (2d Cir. 2019).

52. *A Guide to Reading, Interpreting and Applying Statutes*, *supra* note 42, at 9.

53. Daniel Gordon, Jeffrey Kolb & John Cremer, *supra* note 39.

that the goals behind the creation of the statute matter in achieving the purpose of the statute.[54]

However, some Supreme Court justices have been skeptical of legislative intent as a canon of statutory interpretation.[55] They find that when there is a fair meaning of the words, that is the intent of the legislature and courts should not look beyond that transparent language.[56] However, when the meaning is not readily ascertainable, many courts will rely on legislative intent to help give meaning to a statute.[57]

With snap removal, the circuit courts have looked at the intention and goals behind the forum defendant rule and its subsequent amendments in hopes of explaining the purpose of the phrase "properly joined and served."[58]

In the case of the forum defendant rule, as previously addressed, there is very little illustrating what the intent of the legislature was in adding the

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54. *Id.*

55. *See* Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 213 (1994). Chief Justice John Marshall has indicated a reticence towards departing from the plain meaning of words and Justice Scalia has also stated that legislative intent should not be invoked. *Id.* at 218. Justice Scalia has explicitly stated that legislative history encourages distortion of the legislative record in order to influence and backup a certain judicial interpretation, and especially should not be used in the penal law context. *Id.* at 213.

56. *See id.*

57. *Id.* at 216.

58. *See* Goodwin, 757 F.3d at 1221.

debated language.[59] This vagueness means that the courts affirming or rejecting the use of snap removal can argue what limited knowledge is available to their benefit. Those in opposition may argue snap removal is beyond the original intent of the statute and those affirming may argue that the lack of change and additional amendments show that the intent was to affirm the use of snap removal.[60]

c. Presumption against change in common law

Lastly, there is the stabilizing cannon of presumption against changing common law. This is a cannon of interpretation that the court should consider when approaching the forum defendant rule's interpretation and snap removal as a whole.[61] The cannon states that a statute should only be construed to alter pre-established common law when it is clear that the statute was meant to be interpreted otherwise.[62] This cannon is an important consideration because of the principles of maintaining judicial stability and granting people due notice.[63] The court should favor pre-established common

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59. Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n, 955 F.3d 482, 486 (5th Cir. 2020).

60. *See* Goodwin, 757 F.3d at 1221; *but see Tex. Brine Co*., L.L.C, 955 F.3d at 486.

61. *See A Guide to Reading, Interpreting and Applying Statutes*, *supra* note 42, at 6.

62. *See id.*

63. *See id.*; Nunes v. Herschman, 310 So. 3d 79, 84 (Fla. Dist. Ct. App. 2021).

law that gives a right as opposed to limits a right, when affecting something as fundamental as removal.[64]

The snap removal mechanism has been upheld by the majority of courts. So, when analyzing the forum defendant statute to resolve the circuit split, the presumption against change in common law should be a factor. The desire for stability among courts and in the application of rights weighs in favor of the continued allowance of snap removal.[65] Otherwise, courts risk impacting a pre-existing right defendants utilize and depriving people of due notice, which flies in the face of this doctrine.[66]

2. Threshold absurdity question

The absurdity doctrine is derived from the idea that if an interpretation of a statute leads to results that would be against social values and create an absurd result, that statute is likely diverged from the legislature's true intent and therefore can be read to avoid absurdity.[67]

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64. It is the duty of courts to interpret laws so that people may have fair notice of their rights, and courts should be hesitant to take away rights in which people have gained reliance on. *See* White v. Bateman, 358 P.2d 712, 714 (1961). As the right of removal currently includes allowance of snap removal, courts should be hesitant against interpreting the forum defendant rule to disallow this. *See supra* note 41.

65. *See* Stefanie Lindquist & Frank Cross, *Stability, Predictability and The Rule of Law: Stare Decisis As Reciprocity Norm* 1-2, UNIVERSITY OF TEXAS SCHOOL OF LAW, https://bit.ly/41LCx9M, (last visited March 05, 2023).

66. *See* Bateman, 358 P.2d 712, 714 (1961).

67. *See* John F. Manning, Note, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2471 (1982).

The absurdity doctrine implies that some results and outcomes are so unthinkable that the courts can presume that was not the intention or foresight of the legislature and that the statute would have been reworked differently.[68]

The circuit courts, as addressed below, have addressed this threshold absurdity question in their analysis of the snap removal loophole.[69] As the statute's plain meaning may be clear but disputed in its nature, the courts examine whether that interpretation would lead to absurd results.[70] This is a high threshold reach to depart from the text of the forum defendant rule, which on its face allows for removal when an in-state forum defendant has yet to be properly joined and served.[71]

As the Fifth Circuit addressed in its analysis, to justify a departure from the plain meaning, the result of snap removal "must be preposterous"

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68. Courts have historically looked at the absurdity doctrine when asking whether the result would be so outrageous to the point of needing to divert from plain meaning. *See*, e.g., *id.* at 2410; Sturges v. Crowninshield, 17 U.S. 122, 203 (1819); United States v. Bright, 24 F. Cas. 1232, 1235 (Pa. D 1809).

69. *See, e.g.,* Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 705 (2d Cir. 2019); Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 152 (3d Cir. 2018); Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n, 955 F.3d 482, 486 (5th Cir. 2020).

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

71. *Id*. at 707.

and one that no reasonable person (or perhaps more accurately, legislature) could foresee or intend.[72]

The current circuit split is due to the courts' application of the absurdity doctrine to the forum defendant rule and snap removal mechanism. Most courts held that the application of snap removal as a procedural mechanism does not cross into an absurd result and therefore, the plain meaning should apply.[73] Whereas the Eleventh Circuit decided that deviation from the goal of preventing impermissible joinder on the part of plaintiffs and limiting local court bias occurs when applying snap removal, so the absurdity doctrine favors preventing that result.[74]

Some have questioned the absurdity doctrine as a valid tool of construction. The doctrine assumes courts and judges recognize exceptions that the legislature would have made (despite not having done so).[75] This allows the judicial branch to make assumptions that the separation-of-powers tradition condemns.[76] The doctrine allows courts to recognize and decide

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72. Tex. Brine Co., L.L.C., 955 F.3d 482 at 486 (explaining that preposterous means that "no reasonable person could intend" that outcome).

73. *See Gibbons*, 919 F.3d at 707 (2d Cir. 2019); Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 154 (3d Cir. 2018); Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n, 955 F.3d 482, 487 (5th Cir. 2020).

74. *See* Goodwin, 757 F.3d 1216, 1221 (11th Cir. 2014).

75. *See* Manning, *supra* note 67, at 2437.

76. *See* Manning, *supra* note 67, at 2437.

qualifications that Congress would or should have made but did not.[77] In doing so, the court undermines Congress's responsibility to create legislation that internalizes the consequences and knowledge of the law as it stands.[78] There is a fear that when the court hides behind the concept of absurdity' to change the meaning of laws, they are robbing the legislature of their own job to enact and write the laws.[79] Furthermore, the use of this doctrine in an affirmative manner shifts the power and responsibility from the legislature to the courts.[80]

Despite these concerns, analysis of the snap removal loophole examines the absurdity doctrine to see if the use of snap removal is so absurd to where the court can depart from the ordinary meaning.

3. Exceptional circumstances

Lastly, in the Eleventh Circuit's rejection of snap removal and in the Fifth Circuit's affirmation, there are "exceptional circumstances" that may warrant a departure from the ordinary application of the rule.[81] The Fifth Circuit offers as an example, bad faith on behalf of the plaintiff—such as the improper addition of the defendant for the sake of limiting removal, more

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See Tex. Brine Co., L.L.C.*, 955 F.3d at 487.

commonly known as fraudulent joinder—as support of the court's use of its equitable powers in allowing late filing of removal.[82] In the Eleventh Circuit, the bad faith of the defendants was also a relevant consideration.[83] When there is evidence of bad faith on behalf of the plaintiffs or defendants, case law has shown this behavior to be relevant considerations courts look at in terms of whether the intent of the forum defendant rule is accomplished.[84]

*D. Circuit split on allowance of pre-service removal*

Courts are split on whether the "properly joined and served" language constitutes an allowance of removal for diversity regardless of the presence of an in-state forum defendant. The Second, Third, and Fifth Circuits have affirmed snap removal as a valid procedural device, but the Eleventh Circuit rejected it.

1. Circuits affirming snap removal

a. The Second Circuit

The Second Circuit addressed the snap removal loophole and its validity in *Gibbons v. Bristol-Myers Squibb Co.*,[85] helping resolve a lower

82. *See id.*

83. The court points to the exploitation of the plaintiff's courtesy granting a pre-service copy of the complaint as an act of bad faith on the part of the defendants when used to remove. *See* 757 F.3d at 1221.

84. *Id.*

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

district court split.[86] The defendants, Bristol-Myers Squibb Co. ("BMS") and Pfizer Inc. ("Pfizer"), are pharmaceutical companies who were sued in Delaware, where they were considered residents.[87] The Second Circuit held that the removal to federal court was valid and the case should not be remanded back to state court as BMS and Pfizer removed before being served.[88]

According to the court, a statutory construction analysis begins with the text itself.[89] A plain meaning reading of 28 U.S.C. § 1441(b)(2) does not restrict removal in this instance, as the home-state defendant must be properly joined and served.[90] Otherwise the federal court system may still maintain jurisdiction.[91] The plaintiffs attempted to argue that allowing the snap removal loophole produces absurd results, and that a statute should be read to avoid such results.[92] The court stated that simply because a result is

86. *Id.* at 705.

87. *See Id.* at 702; Mitchell v. United States, 88 U.S. 350, 352 (1874). Home is where the domicile is. A citizen is a residence of a particular place when there is "an intention to remain there for an unlimited time." *Id.*

88. *Id.* at 707.

89. *Id.* at 705.

90. *Id.*

91. *Id.*

92. *Id.* at 706.

anomalous does not mean the result is absurd, and even so, absurdity cannot justify moving away from the plain text of the statute.[93]

b. The Third Circuit

The Third Circuit has also upheld snap removal for forum defendants and non-forum defendants.[94] Encompass brought action against Stone Mansion Restaurant Incorporated in Pennsylvania state court, where Stone Mansion then removed to the Third Circuit.[95] The Third Circuit then examined whether removal was proper in this case.[96] The court reasoned, similarly to the Second Circuit, that a statute should initially be approached by an examination of the text.[97]

In cases regarding Section 1441(b)(2), the Third Circuit held the plain meaning should be enforced unless there is "the most extraordinary" showing of legislative history acting contrary to that reading.[98] There is very little indication of what was the legislative intent in the addition of the "properly

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93. *See id.* at 705.

94. A non-forum defendant is a defendant from outside the state where the action was brought. *See* Superior Home Health Servs., LLC v. Phila. Indem. Ins. Co., 2017 U.S. Dist. LEXIS 229818, at *7 (S.D. Tex. Nov. 28, 2017).

95. Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 149 (3d Cir. 2018).

96. *Id.* at 151.

97. *Id.* at 152.

98. *Id.*

joined and served" phrase, and therefore there is not sufficient evidence to justify a departure from the language as interpreted.[99]

Furthermore, the court addressed that Congress' addition of the properly joined and served requirement does address the problem of fraudulent joinder by a plaintiff, which would protect the need for proper service before removal is limited.[100]

c. The Fifth Circuit

The Fifth Circuit is the final circuit thus far to uphold the use of snap removal. *Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n*[101] affirmed the lower court's decision that snap removal allows a forum defendant to remove to federal court when they have yet to be properly served.[102]

This 2020 case addressed the decisions of its sister courts, the Second and Third Circuits, in that the proper steps are to look at the plain meaning and whether that reading creates absurdity.[103] In the case, the two defendants had not been served when they removed to federal court.[104] Texas

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99. *See id.* at 153.

100. *Id.* The rules of hair care may be simple and finite, but civil procedure is not always; fraudulent joinder is when the plaintiff adds a forum-state defendant to prevent removal. *Id.*

101. Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n, 955 F.3d 482 (5th Cir. 2020).

102. *Id.* at 487.

103. *See id.* at 486.

104. *Id.* at 484.

Brine argued that the "properly joined and served" language was added for the same reason the Second Circuit notes, to prevent improper gamesmanship and joinder.[105]

Texas Brine argued that this legislative history shows the purpose of the forum defendant rule isn't served in this case because they did intend to pursue claims against the forum defendants.[106] American Arbitration Association ("AAA") argued there is a lack of any legislative history to properly point to make such an argument.[107] Furthermore, AAA noted that Congress did not revise the statute's language despite a recent 2011 amendment[108] and many snap removal cases, illustrating that any legislative intent indicates support of this as a procedural device.[109]

The court held that the forum defendant rule's plain meaning does not prevent nor prohibit a non-forum defendant from removing when a not-yet-

105. *See id.* at 486.

106. *Id.*

107. *Id.*

108. *See generally* Federal Courts Jurisdiction and Venue Clarification Act of 2011, H.R 394, 112th Cong. (2011). The Courts Jurisdiction and Venue Clarification Act of 2011 was passed and has no mention of clarifying the snap removal loophole, implying that Congress purposefully left it, which speaks to legislative intent affirming snap removal.

109. *See id.*

served defendant is a citizen of the forum state.[110] Until that forum defendant has been served, the suit is removable to federal court.[111]

2. Potential supporters of snap removal

a. The Sixth Circuit

While the Sixth Circuit has not directly dealt with a case regarding the snap removal loophole and its validity, there is a footnote that interprets Section 1441(b)(2) to allow snap removal.[112]

The case *McCall v. Scott,*[113] was a stockholder derivative action[114] looking at whether there was proper pleading and did not directly deal with snap removal.[115] However, the court briefly noted that the attempt to challenge the removal of the defendants is without merit.[116] The court stated that as there is complete diversity of citizenship and an unserved resident defendant, the forum defendant rule does not restrict removal.[117]

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110. *See id.* at 487.

111. *See id.* The court notes that this is so long as the other diversity jurisdiction requirements are met. *Id.*

112. McCall v. Scott, 239 F.3d 808, 813 n.2 (6th Cir. 2001).

113. *Id.* at 813 n.2.

114. Plaintiffs were stockholders challenging director action against Columbia/HCA Healthcare Corporation. See *id.* at 816.

115. *Id.* at 813.

116. *See id.* at 813 n.2

117. *See id.*

The court did not elaborate on its reasoning beyond that but did cite to the California Northern District Court, South Carolina District Court, and a Texas Eastern District court case where the courts further examined snap removal and what constitutes complete diversity.[118] The South Carolina District Court case cites *Wensil v. E. I. Du Pont de Nemours & Co*.[119], which recognizes that the result of the plaintiffs losing their preferred forum could have been prevented if they simply served the resident defendants first.[120] The court further acknowledges that complete diversity is still a requirement to remove and that there are simple steps plaintiffs can take to prevent snap removal. [121]

The above cases tend to favor snap removal. Which indicates that while the lack of clear reasoning and that this is dicta mean there is no binding decision from the Sixth Circuit on this matter, the court would likely adopt holdings similar to that of the Second, Third, and Fifth Circuits.

3. Circuits rejecting snap removal

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118. *See id.*

119. Wensil v. E. I. Du Pont de Nemours & Co., 792 F. Supp. 447 (D.S.C. 1992).

120. *Id.* at 449.

121. *Id.*

a. The Eleventh Circuit

Not every circuit court has affirmed the use of snap removal and the Eleventh Circuit Court has explicitly rejected it.[122] The Eleventh Circuit held that while a plain meaning interpretation of the statute does correctly state a forum defendant that has not been properly joined and served may remove, that is not the core of what the removal statute sought to protect.[123]

The court reasons that the defendants exploited the plaintiff's courtesy in sending them copies of the complaint before they were served by using that advanced knowledge to remove.[124] This behavior is akin to gamesmanship on the part of the defendants.[125] The circuit court acknowledges the lack of legislative history explaining the addition of the "properly joined and served" language to the statute back in 1948, and notes that multiple courts have reasoned it was likely an effort to prevent improper joinder by the plaintiffs.[126]

Overall, the Eleventh Circuit found that removal is not proper here as the goal of preventing improper joinder is not meant to allow defendants who

122. Goodwin v. Reynolds, 757 F.3d 1216, 1222 (11th Cir. 2014).

123. *Id.* at 1221.

124. *Id.*

125. *See id.*

126. *See id.*

acted in bad faith to remove.[127] Here, because the plaintiff did not engage in fraudulent joinder for the sole purpose of triggering the forum defendant rule and the defendant suffered no prejudice from the dismissal, the removal was rejected.[128]

## III. ANALYSIS

Many legal comments have taken an opposing standpoint to the Second, Third, and Fifth circuits' interpretation and rejected the snap removal loophole.[129] Despite the affirmation of the snap removal loophole as a valid procedural mechanism from most circuits, some legal scholars have found that the plain meaning interpretation goes far beyond the legislative intent of the forum defendant rule.[130]

Many legal scholars suggest Congress amend the removal statute to close the snap removal option or for the Supreme Court to resolve the current spilt by rejecting the use of removal when a valid in-state defendant has not

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127. *See id.*

128. *Id.* at 1222.

129. *See e.g.*, Valerie Nannery, Comment, *Closing the Snap Removal Loophole*, 86 U. CIN. L. REV. 541, 574 (2018); Adam Sopko, Swift Removal, 13 FED. CTS. L. REV. 1, 13 (2021).

130. *See e.g.*, Sopko, *supra* note 129, at 13; Stempel et al., *supra* note 3, at 429.

been served.[131] This analysis seeks to address those concerns and resolve the circuit split in a way that affirms the use of snap removal.

This Comment will outline how the plain reading of the statute as well as the limited legislative intent indicate a lack of desire to get rid of snap removal and that most circuits were correct in affirming the use. Furthermore, this Comment will make a procedural due process argument in favor of snap removal and address the fundamental unfairness of the forum defendant rule as it stands.

### A. *Occam's Razor: plain meaning as the determining factor*

To begin, the plain meaning interpretation of the forum defendant rule is clear on its face.[132] The statute, which determines proper removal based on diversity of citizenship, states that a citizen may not remove if any of the defendants served and joined is a citizen of the state where the action is brought.[133]

As addressed previously, looking at the words of the statute and what is the clear meaning is the first step the courts take when ascertaining

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131. *See* E. Farish Percy, Note, *It's Time for Cong. to Snap to It and Amend 28 U.S.C. Sec. 1441(1)(B)(2) to Prohibit Removals That Circumvent the Forum Defendant Rule*, 73 Rutgers U.L. REV. 579, 637 (2021).

132. Orange is not the new pink and sometimes, per Occam's razor, the simplest answer is the best one in taking the statute's meaning as written. *See* Occam's razor, MERRIAM-WEBSTER.COM, https://bit.ly/3F7B9oT (last visited Nov. 27, 2022); Bristol-Myers Squibb Co., 919 F.3d 699 (2d Cir. 2019).

133. 28 U.S.C. § 1441(b)(2).

meaning.[134] The Second, Third, Fifth, and Eleventh Circuit Courts were apt in their analysis that the forum defendant rule is clear that unless a defendant has been properly joined and served, there is no limitation on removal.[135]

While many of the courts addressing the snap removal issue examined whether this interpretation creates an absurd result, there is no need to go in-depth at that question as the plain meaning is explicit and not unreasonably absurd.[136] When the plain meaning interpretation is available and understood, the courts do not need to address other cannons of statutory interpretation and analysis.[137]

Just because the courts may question a statute does not mean its intent is not understood by the words of the text. Extending beyond the plain meaning in situations where the text is easily understood blurs the

134. Encompass Ins. Co., 902 F.3d 147, 154 (3d Cir. 2018).

135. *See*, *e.g.,* Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 705 (2d Cir. 2019); Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 152 (3d Cir. 2018); Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n, 955 F.3d 482, 486 (5th Cir. 2020); Goodwin v. Reynolds, 757 F.3d 1216, 1221 (11th Cir. 2014).

136. *See* Encompass Ins. Co., 902 F.3d 147, 154 (3d Cir. 2018).

137. *See* Commonwealth v. Headley, 242 A.3d 940, 942 (2020) (noting that "[w]hen the words of a statute are clear and unambiguous, the Court may not go beyond the plain meaning of the language of the statute under the pretext of pursuing its spirit.").

judiciary's role and the importance of a checks and balances system.[138] Nonetheless, the courts consider other factors in their analysis, all of which would arguably still favor the affirmation of snap removal.

1. The ever-ambiguous legislative intent

While the plain meaning of the statute would allow for the use of snap removal, some have argued that legislative intent should still be utilized in the analysis of snap removal. The Eleventh Circuit, as the only circuit to date to explicitly reject the snap removal use, reasoned that the application ran counter to the legislative intent of the forum defendant rule.[139]

The legislative intent of the forum defendant is very scarce, which leads to issues in the court's justifications for rejection. There is just as much of an argument affirming snap removal as there is rejecting it in terms of legislative intent, as everything is a matter of interpretation.

For example, the limited knowledge available on intent could be used to affirm snap removal. The original forum defendant made no mention of the requirement that the parties must be properly served and joined before the limitation on removal occurs.[140] That addition did not occur until 1948, and

138. *See* Hawkins v. Cottrell, Inc., 785 F. Supp. 2d 1361, 1365 (N.D. Ga. 2011).

139. Goodwin v. Reynolds, 757 F.3d 1216, 1221 (11th Cir. 2014).

140. *See* Cottrell, Inc., 785 F. Supp. 2d 1361, 1375.

there is very little on why this was added.[141] Nonetheless, the addition itself speaks toward legislative intent. Congress felt it was important to the statute that the requirement was added.

Furthermore, the Courts Jurisdiction and Venue Clarification Act of 2011 is another point that could be argued to show that legislative intent affirms the use of snap removal.[142] Despite multiple law review articles, cases, and complaints from the courts addressing snap removal, when Congress last amended the forum defendant rule, it did not touch the snap removal loophole.[143]

Utilizing legislative intent in this instance is just allowing the judiciary to impose their own limited understanding of the historical record of this statute to come to a personal decision they support.[144] The record is

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141. *See* Stempel et al., *supra* note 3, at 441.

142. Federal Courts Jurisdiction and Venue Clarification Act of 2011, H.R 394, 112th Cong. (2011).

143. *See* The Removal Jurisdiction Clarification Act of 2020, H.R. 5801, 116th Cong. (2020). The amendment addressed things such as citizenship of corporations and venue transfer improvements but there is no mention of removing the phrase "and served" to limit removal. *Id.* Furthermore, Congress proposed establishing a procedure for remand when a case has been removed before service on a forum defendant, but it did not pass, indicating this is still a highly debated topic the legislature is not comfortable limiting. *Id.*

144. *See* Newland, *supra* note 55, at 213; Hawkins v. Cottrell, Inc., 785 F. Supp. 2d 1361, 1365 (N.D. Ga. 2011). Skepticism surrounding the use of legislative history derives from the fact that allowing legislative materials to guide later statutory interpretation encourages distortion of the legislative record and also assumes that there was a coherent and articulated legislative

simply lacking enough context to accurately understand the desire for the addition of the phrase "properly joined and served."[145] That being said, the phrase was added and has not been removed despite many legal conversations pleading otherwise. And yet, courts are still attempting to discern meaning from the limited knowledge of the original intent of removal to interpret the forum defendant rule.

There should be trepidation around the use of legislative intent, as it can possibly allow the judiciary to go beyond the clear understanding of a statute. If the courts feel such a need to utilize the legislative intent, at least when it comes to snap removal, there is an argument in favor of snap removal. As the ambiguous and flexible nature of the historical record can just as easily be read in favor of the mechanism. If the courts are to pull any legislative intent, the addition and lack of change since is the fullest background available, which would indicate that there is some desire to keep the statute as it stands. This version of legislative history would allow for snap removal.

2. Maintaining judicial boundaries

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intent; overall legislative history is just terribly open to manipulation and misunderstanding. *Id.*

145. *See* Cottrell, Inc., 785 F. Supp. 2d 1361, 1377 ("[L]egislative history on the purpose behind the joined and served requirement is conspicuously lacking.").

The separation of powers concerns that come with interpreting a statute are considered in the approach to snap removal. When Congress passes a statute within its power under the Constitution, the judiciary is not positioned to overturn that law.[146] The circuit courts have noted concerns with the forum defendant rule as it stands and that it would allow for snap removal.[147] However, the courts also rightfully acknowledged that it is not their role to make the law, only to interpret it.[148] If there is going to be a change in the snap removal loophole, it is not in the courts' discretion to make this change but the legislature.[149]

With matters such as the absurdity doctrine and legislative intent, there are very few judicial guardrails in place limiting how far the application of these doctrines can extend.[150] This grants a wide birth of latitude to judges under the guise of statutory interpretation and pushes up

146. *See generally* U.S. CONST. art. VI, cl. 2. (Illustrating that the judiciary's responsibility is to interpret the Constitutionality of laws, and that it would be a separation of powers issue for a court to override a law that is not constitutionality invalid).

147. *See* Encompass Ins. Co., 902 F.3d 147, 154 (3d Cir. 2018).

148. *See id.*

149. *See id.* (explaining that "if such change is required, it is Congress — not the Judiciary — that must act.").

150. *See* Laura Dove, *Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of The Absurdity Doctrine*, 19 NEV. L.J. 741, 741-744 (2019).

against the boundaries in place to prevent the judiciary from extending into the legislative branch's capacity.[151]

By adopting the Second, Third, and Fifth Circuit's holding affirming snap removal, the courts would not extend beyond their necessary role as the distinct branch of the judiciary and maintain a right long established.[152]

3. Accounting for the current reliance on use

As snap removal is currently upheld and still a statutory mechanism in many courts, defendants would be severely impacted by this new limitation to the right of removal.[153] People have the right to be on due notice of what is and is not illegal, and what rights they have. Providing this adequate notice is a necessary part of the law.[154] Historically, people have been allowed to remove and with attempts to limit this pre-existing right, people would not be on adequate notice that removal is no longer an option

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151. *Id.* at 749.

152. *See* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1085 (2008). Judicial deference to the separate and distinct branches of governments ensures that the judiciary does not extend beyond their reach and attempt to legislate. Rejecting a valid piece of legislation simply because the judiciary is not thrilled with the result and thinks it is not prudent, goes beyond their power to say what is constitutional. *Id.*

153. *See* Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1587 (2005). The duty of fair notice is a limited and technical one, with most laws taking effect on the date of enactment; however, from a public policy standpoint the reliance of defendants on the ability of removal creates an unjust limitation when then rejected. *Id.*

154. *Id.* at 1537.

when they are an in-state defendant. Respecting this procedural mechanism is important in ensuring proper notice and awareness of rights.

In jurisprudence, courts grant a certain amount of judicial deference to pre-existing decisions and rights.[155] As the stabilizing cannon of presumption against changing common law notes, courts should be hesitant to make decisions that strip pre-established rights.[156] With the snap removal use, for some circuits it would be an issue of first impression and for others the use of the statutory mechanism has already been affirmed.[157] To reject the use of snap removal would depart from court tradition and deprive the use of a valid statute that has been on the books for over 70 years.[158]

*B. Due Process as a legal protection supporting snap removal*

In discussing how limiting snap removal would impede rights, there is a discussion on how the rejection of snap removal brings up potential due process rights issues.

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155. *See* Robert Lipkin, *The Quest for the Common Good: Neutrality and Deliberative Democracy on Sunstein's Conception of American Constitutionalism*, 26 CONN. L. REV. 1039, 1042 (1994) (desiring status quo neutrality means to avoid "interfering with existing distributions of rights and benefits. . .").

156. *See A Guide to Reading, Interpreting and Applying Statutes*, *supra* note 42, at 6.

157. An issue of first impression is when a new legal issue is before a court. See *First Impression*, LEGAL INFORMATION INSTITUTE, https://bit.ly/3ij2Sdh (last visited Nov. 27, 2022).

158. It has been 74 years since the addition of the properly "joined and served" language. *See* Stempel et al., *supra* note 3, at 441.

Due process as a right was established by the Fourteenth and Fifth Amendments.[159] Those provisions specify that no state shall "deprive any person of life, liberty, or property, without due process of law."[160] The concept of due process is that it helps balance the power of the state and federal government and protects individuals from an abuse of power.

The two types of due process mechanisms are substantive due process and procedural due process.[161] As established in *Lochner v. New York*[162], substantive due process looks at constitutional rights of people and if there has been a violation of fundamental principles of liberty and justice.[163] The basis for procedural due process is then derived from the legal and procedural steps a person is granted before states can take any action to deprive a person of a right.[164] That process includes ensuring persons the right to notice and an opportunity to be heard.[165] For the forum defendant rule and snap removal's use, procedural due process requirements are the most applicable in terms of analysis.

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159. *See* U.S. CONST. amend. V, § 1; U.S. CONST. amend. XIV, § 1.

160. U.S. CONST. amend. XIV, § 1.

161. *See* MAINE.GOV, *The Essential Elements of Due Process of Law* 1, 1 (March 23, 2012), https://bit.ly/3HErtDC.

162. Lochner v. New York, 198 U.S. 45 (1905).

163. *Id.* at 53; Hurtado v. California, 110 U.S. 516, 535, 120 (1884).

164. *See supra* note 144.

165. Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

1. Valid notice linked with requirement to be properly served

The true issue with limiting or rejecting snap removal is that it is a potential procedural due process violation. As snap removal is intrinsically linked with the defendant's right to be properly served and given notice, to limit snap removal is to stop requiring that all important notice.[166]

At the moment, courts are not arguing that once an in-state defendant has been properly joined they can still remove.[167] Not even the circuit courts affirming snap removal are asserting that the mechanism of removal be used haphazardly.[168] The only reason snap removal is so important as a valid procedural mechanism is because of the right of notice connected with it.[169] The very heart of the snap removal loophole is that a defendant has not been put on proper notice yet, and therefore as a legal right, is allowed to remove.[170]

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166. 28 U.S.C. § 1441(b)(2). As the language of the statute requires an in-state defendant to be properly "joined and served," service is a stated requirement of the forum defendant rule. *Id.* Snap removal is linked with this in that when an in-state defendant's right of service and notice has not been exercised, they retain the ability to remove. *Id*. Any rejection of snap removal removes that check Section 1441(b)(2) requires and furthermore, the idea of being restricted in the right to removal prior to having the need for service complete is a direct due process issue. *Id.*

167. *See* Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 705 (2d Cir. 2019).

168. *Id.* at 706.

169. *Id.*

170. 28 U.S.C. § 1441(b)(2).

Requiring a defendant to be properly joined and served was not an arbitrary decision made by the legislature but in fact, the codification of the established due process right to be put on notice so that a defendant may respond.[171] Despite the naysayers worries about gamesmanship on the part of the defendants, the rights of defendants and people to be on notice is in fact a fundamental protection granted to them.[172] Furthermore, removing to federal court does not limit a plaintiff's right to bring forth a claim or be heard, but to limit snap removal does indeed limit a defendant's right to receive proper notice.

There are two parts to procedural due process fundamentally: the right to notice, and also the opportunity to be heard.[173] While the impact on the right to notice is clear if snap removal was to be hindered, there is also an impact on the defendant's opportunity to be heard.

2. The opportunity to be heard in a legitimate manner

The right to be heard must be exercised and is a privilege granted explicitly through proper and legitimate manners of the court.[174] There is no

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171. *See* O.J. Distrib., Inc. v. Hornell Brewing Co., 340 F.3d 345, 353 (6th Cir. 2003) (explaining that "[due] process requires proper service of process for a court to have jurisdiction to adjudicate the rights of the parties.").

172. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 2 (2006).

173. *See supra* note 161.

174. *See* Leahy v. State, 13 S.W.2d 874, 881 (Tex. Crim. App. 1928).

argument a state court may have the legal right to hear a case and be considered a legitimate manner of operating and granting someone's right to be heard.[175]

However, this does not address the consideration of court bias and how that limits the right to be heard.[176] Removal to federal court allows defendants to be in, as evidenced by their removal, their desired jurisdiction. Logically, as the right to be heard allows someone to have their day in court, it follows that the right to be heard includes the right to be in front of an impartial tribunal.

When defendants remove to federal court they're doing so for a multitude of reasons.[177] One of which is that a state court may exhibit bias, which is the exact reason removal was allowed in its inception.[178] This local court bias does not disappear simply because there's a single in-state defendant.[179]

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175. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

176. Smith v. Phillips, 455 U.S. 209, 216 (1982) (noting the right to prove actual jury bias as part of a defendant's right to an impartial jury).

177. *See supra* text and accompanying notes 14-22.

178. *Supra* note 15.

179. *See infra* note 191.

As evidence of this pervasive and implicit bias, a study was conducted to test geographic favoritism in judges.[180] Over 100 Minnesota judges ruled on a hypothetical case involving a business that dumped hazardous chemicals into a lake on private land as a cost saving measure.[181] The judges were asked if they would award punitive damages and in what amount.[182] Half the judges had a defendant that was an in-state resident and for other half, the plaintiff was a Minnesotan, but the defendant was from Wisconsin.[183] The core finding was that judges expressed an enormous in-state bias.[184] With the out-of-state median being $750,000 higher against the defendant.[185] The sociological tendency to favor ingroups, that is a social group the person identifies as a member of, is an implicit bias that even judges are not immune to.[186] This favoritism still plays a role in judicial decision making, regardless of the presence of a single ingroup member (in-state) defendant.[187]

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180. Andrew Wistrich & Jeffrey Rachlinski, *Implicit Bias in Judicial Decision Making How It Affects Judgment and What Judges Can Do About It*, Chapter 5: AMERICAN BAR ASSOCIATION, ENHANCING JUSTICE, 99 (March 16, 2017).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 98.

187. *Id.*

The right to be heard is nonetheless impeded if a defect in the state court due to bias would prevent a defendant from having an impartial hearing. Both the right to notice and the right to be heard in front of an impartial tribunal are fundamental protections enshrined in due process that the rejection of snap removal would limit.[188]

*C. The forum defendant rule is inherently counter intuitive*

Aside from the major due process concerns that come with the limitation of snap removal, there are inherently issues with the very forum defendant rule snap removal is found in. Snap removal needs to be held as a valid procedural mechanism, in part, due to issues with the forum defendant rule itself. The restriction limiting removal based upon the defendant being a resident of the state in which the action is brought is outdated and does not seek to resolve the original concerns that brought forth the allowance of removal in the first place.

As previously stated, some of the only legislative history that we have record of behind the allowance of removal was its goal to help combat the local court prejudice that may occur when a defendant must appear in a court that is not their own.[189] While in theory, this problem is dissipated when the defendant is a resident of the state in which the action is brought, this belief

188. *See* supra note 161 at 2. (noting that the trial process "has to be fair, with clear-cut rules, within a consistent system that protects a person's rights"). *Id.*

189. *See* supra notes 14–18 and accompanying text.

is arguably naive and doesn't factor in the complex nature of litigation in the modern world.[190]

Realistically, there are gaps in logic that do not get addressed in regarding the forum defendant's operation practice. For example, the idea that just because one defendant comes from the forum state, the concept that no defendant has anything to be concerned about is deeply flawed:

> In actual practice, if you represent a defendant from out of State in a local State court elsewhere, it may be very, very cold comfort that a small, local business or a local individual happens to be a co-defendant. That will not give you any sense of comfort that your interests will be protected and respected in the same way as they would be in Federal court.[191]

Many cases involve multiple defendants, especially those involving corporations, which often utilize snap removal.[192] Simply because one of these possible tangentially related defendants is a resident defendant of the forum state does nothing to realistically protect all other defendants against local bias or prejudices.

Those rejecting snap removal are trying to have their cake and eat it too. They attempt to utilize the legislative intent that the initial fear of local

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190. Greg Reilly, Comment, *Aggregating Defendants*, 41 FLA. ST. U. L. REV. 1011, 1016 (2014) (discussing the rise in defendant aggregation, that is the litigation of multiple defendants at once).

191. *Examining the Use of "Snap'" Removals to Circumvent the Forum Defendant Rule Before the Subcomm. on Courts, Intell. Prop., and the Internet*, 116th Cong. 42 (2019) (statement of Kaspar Stoffelmayr, lawyers for civil justice).

192. Reilly, *supra* note 190, at 1020.

prejudice is no longer an issue when a defendant is a resident of the state in which the action is brought, while simultaneously ignoring the fact that local prejudice is still a prevalent issue due to the multi-defendant nature of many modern cases.[193]

As the forum defendant rule does not account for the problems and miscarriage of justice that may still occur with to multi-party defendants in suit, to ensure the original intent of removal is honored, snap removal needs to be upheld.

There's a notable concern about the circuit split on snap removals, and as noted, ensuring the public's access to justice is the top priority in a well-functioning federal court system.[194] A circuit split such as this goes against the concept of courts working in a fair and efficient manner.[195]

This split should be resolved in a manner that gives the most access to justice. While it is evident there are issues with the forum defendant rule that should be addressed, looking at the mechanisms offered as of date,

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193. *See supra* notes 14-18, 191 and accompanying text.

194. Jonathan Cohen & Daniel Cohen, Note, *Iron-ing out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CAL. L. REV. 989, 996 (2020).

195. *Id.* at 990 ("Circuit splits undermine the uniformity, consistency, and predictability of federal law. They result in situations where litigants obtain different outcomes under the same federal law merely because of the geographic location where their case is decided").

allowing a defendant to remove to federal court when they not been validly joined and served is the most viable option.

*D. Overinflated state sovereignty concerns*

Those rejecting snap removal often point to concerns over federalism and taking cases away from the state. In *Breitweiser v. Chesapeake Energy Corp.*[196], the Fifth Circuit's lower court addresses that removal raises significant federalism concerns. Some argue that the evasion of the forum defendant rule 'threatens' state sovereignty and violates the core principle of federalism by denying state courts the ability to shape state law.[197] This is a heavy accusation and something any affirmation of snap removal needs to qualify.

It is important to note that *removal* is not the same thing as *jurisdiction*. A federal court would still need the capacity and jurisdiction to hear a case. Making removal easier and more accessible does nothing to impact whether states are arbiters of state law.

As previously addressed, for a federal court to have proper jurisdiction over a matter there needs to be either diversity jurisdiction or federal

196. Breitweiser v. Chesapeake Energy Corp., No. 3:15-CV-2043-B, 2015 U.S. Dist. LEXIS 142083, at * 4 (N.D. Tex. Oct. 20, 2015).

197. *Supra* note 191, (statement of Jerry Nadler, Chairman for Subcomm. Hearing on "Examining the Use of "Snap" Removals to Circumvent the Forum Defendant Rule) ("This evasion of the well-established forum defendant rule also threatens State sovereignty and violates federalism principles by denying State courts the ability to shape State law").

question jurisdiction.[198] The idea that states are robbed of their sovereignty and right to hear a case simply because a defendant removed is misguided.[199] Snap removal only applies in situations where the federal court would otherwise have jurisdiction over the matter.[200]

In fact, snap removal is very limited, in part because its use only applies to cases in which there is a defendant that is a resident of the forum state. Snap removal is not a nationwide phenomenon and one empirical study found that the issue was relatively dormant in nearly half of all states.[201] Even in the noted six high-frequency states, timing is still a crucial element of a defendant's ability to snap remove.[202] Generally with tactics such as snap service being utilized by plaintiffs, it is not the mass exodus of cases being removed.[203] Because of the low tendency of snap removal cases and the fact that it only applies to cases that would otherwise be allowed in federal court

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198. *Supra* text and accompanying notes 9-13.

199. *Supra* text and accompanying notes 9-13.

200. *Supra* text and accompanying notes 9-13.

201. Thomas Main et al., Comment, *The Elastics of Snap Removal: An Empirical Case Study of Textualism*, 69 CLEV. ST. L. REV. 289, 307 (2021).

202. *Id*. Four out of those six high-frequency states were also located in circuits that now have binding precedent on the propriety of snap removal, implying the use may increase if more circuits affirmed snap removal. *Id*.

203. Rayna Kessler & Brendan Mcdonough, *Maintain a Foothold*, AMERICAN ASSOCIATION FOR JUSTICE, 21 (May 2021), https://bit.ly/3XvQw1a. Snap service is where plaintiffs prepare agents to serve the defendants as soon as a claim is filed, preventing any possibility for removal due to not being properly joined and served. *Id.*

regardless, the claim that snap removal is a major federalism problems rings untrue.

## IV. WHAT YOU WANT IS RIGHT IN FRONT OF YOU: RESOLVING THE CIRCUIT SPLIT AND EMBRACING SNAP REMOVAL

There is no dispute that with the changing nature of litigation, the new ability for eDocket monitoring, and more complex multi-party suits there are a lot of factors impacting snap removal's impact.[204] To create an equitable application of law and unity between the courts, the division over snap removal needs to be resolved.[205] As it stands, there appears to be two paths moving forward that respect the virtues of removal and the necessary due process implications surrounding the use of snap removal.

### 1. Get rid of forum defendant rule

The first option is that Congress could consider eliminating the forum defendant rule in its entirety. This is not currently something being considered, and it would be remiss to act as if suggesting departure of a statute utilized for over 70 years is not shocking in its nature.[206] However, the forum defendant rule and the principle behind removal are contradictory

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204. *Supra* note 191. eDocket monitoring is where defendants now have the ability to watch state court online dockets to find any case naming them as defendants and remove. *Id.*

205. *Supra* note 180.

206. *See* 28 U.S.C. § 1441. This statute was first enacted June 25, 1948. *Id.* To suggest Congress should overturn a statute as old and well known as this one… what, like it's hard?

in their nature. Even in the Federalist Papers, the need for an impartial court had been expressed.[207] The very principles of justice and equality are called into question by the idea of local court prejudice, which is why there is no dispute that removal was allowed to circumvent that very issue. Now, with the complex nature of many suits, the mere presence of a single resident defendant can create a circumstance where the other defendants are, in theory, still susceptible to the dangers of prejudice.[208]

While radical on face value, this move only opens removal up as a valid option to those who have federal court jurisdiction already, despite being residents of where the action is brought. Furthermore, removing this limitation resolves the circuit split in a way that addresses any issues of due process notice requirements that the current language creates.

2. Affirm snap removal

The second, and more reasonable suggestion, is to affirm snap removal as it stands. To quote a very wise person, "the bend and snap, works every time."[209] The majority of circuits affirm the use of snap removal as a

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207. *Supra* note 15 and accompanying text.

208. *Supra* note 180-187.

209. LEGALLY BLONDE (Metro-Goldwyn-Mayer, 20th Century Studios 2001). You did not think you would get through the entire Comment without a Legally Blonde reference in the main analysis, did you?

mechanism when an in-state defendant has not been properly joined and served.[210] There's a reason for this and we should aim to adopt this holding.

Under a statutory analysis, the plain meaning of the statute allows for this removal, and the result is not so absurd to rationalize a departure from this reading.[211] Furthermore, if the courts feel a pressing desire to utilize legislative history despite its issues, as evidenced by the lack of legislative changes to the law as it stands, there is some argument for an interpretation of intent that allows removal.[212] Lastly, interpreting the forum defendant rule in a manner that allows snap removal helps protect the due process right of notice and right to be heard.

Affirming snap removal resolves the circuit court split in a way that does not upset the majority's opinion and does not limit the defendant's right to avoid court prejudice. By accepting the forum defendant in its flawed beauty and understanding the role snap removal can play in helping combat some of that circular thinking, the courts can respect the majority and protect core rights.

## V. CONCLUSION

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210. *See generally,* Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699 (2d Cir. 2019); Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147 (3d Cir. 2018); Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n, 955 F.3d 482 (5th Cir. 2020).

211. *Id.*

212. *Supra* notes 108, 143 and accompanying text.

In summation, there is current circuit split between the Second, Third, and Fifth Circuits' affirmation of snap removal and the Eleventh Circuit's rejection of the use. Through statutory analysis, a look into the mysterious and malleable legislative intent, and questions of absurdity and judicial boundaries, the majority of circuits have fallen on the side of affirming the snap removal mechanism when applicable.

Despite the initial trepidation of federalism issues posed by many legal scholars, snap removal serves a valuable tool for in-state defendants. Not only does affirming snap removal respect the original intent of removal but acknowledges the unique nature of modern litigation. Furthermore, there is a due process requirement to give defendants the right to notice and the opportunity to be heard. Given the potential for geographical local court prejudice, the right of due process may otherwise be deprived if snap removal is limited.

The circuit split, as it stands, must be resolved to prevent inequitable application of the federal court's law and should be resolved in a nature that affirms snap removal. To quote Elle Woods (sort of), "remember that first impressions are not always correct. You must always have faith in people. And most importantly, you must always have faith in [snap removal]."[213]

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213. *Supra* note 209. The actual quote is "Remember that first impressions are not always correct. You must always have faith in people. And most importantly, you must always have faith in yourself." *Id.* If the rest of this Comment doesn't make sense, at least take that advice with you.