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Making Sense of the Resident Defendant Rule

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TABLE OF CONTENTS

INTRODUCTION	205
I. BACKGROUND	208
A. <i>A Quick-and-Dirty History of Diversity Jurisdiction</i>	208
B. <i>Modern Removal Statute</i>	209
II. JURIDICAL DIVIDE	214
A. <i>Minority's Technical Reading</i>	215
B. <i>Majority's Two Approaches</i>	217
III. WHO WINS?	224
A. <i>Relevant Interpretive Paradigm</i>	224
B. <i>Application</i>	228
CONCLUSION.....	231

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*The land was ours before we were the land's.
She was our land more than a hundred years
Before we were her people. She was ours
In Massachusetts, in Virginia.*¹

INTRODUCTION

In the law's patois, the term "removal jurisdiction" refers to the right of a defendant to move a lawsuit filed in state court to the federal district court within whose geographic borders the former lies.² Such jurisdiction's existence, however, is not itself enough to support this right's invocation, for with the Supreme Court alone excepted, lower federal courts³ may exercise only the authority affirmatively bequeathed by Congress⁴ in accordance with Section 2 of the Constitution's third Article, their so-called "original jurisdiction."⁵ Consequently, any defendant wishing to remove a state court matter has always needed to establish both these types of jurisdiction, as today set forth in Chapters Eighty-Five and Eighty-Nine of the United States Code's twenty-eighth title.⁶ The latter governs the bases and procedure for removal,⁷ and the former circumscribes these tribunals'

¹ Robert Frost, *The Gift Outright*, in *THE POETRY OF ROBERT FROST: THE COLLECTED POEMS, COMPLETE AND UNABRIDGED* 348 (Macmillan Publishers 1979).

² *Removal*, BLACK'S LAW DICTIONARY (10th ed. 2014).

³ In this Article, any reference to "court" or "courts" is to one or more federal courts, whether created under Article I or Article III of the United States Constitution. Additionally, the term "district court" refers to one of the ninety-four United States District Courts created by Congress unless otherwise noted.

⁴ See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-815*, at 408 (2009) (detailing the reasons behind the support for a strengthened judiciary exhibited by a decisive majority of the United States' founding generation).

⁵ U.S. CONST. art. III, § 2, cl. 1. Congress retains the exclusive and seemingly unfettered constitutional power to create federal courts. U.S. CONST. art. I, § 1. Due to this freedom, Section 1 has been understood to imply a congressional power to create courts vested with less power than the maximum granted in Article III. RICHARD H. FALLON, JR., ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 331, 337-47 (5th ed. 2003). Bankruptcy courts constitute one such example. See *Process - Bankruptcy Basics*, U.S. CTS. (last accessed Sept. 26, 2018), <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics>.

⁶ See *Muenich v. United States*, 410 F. Supp. 944, 946 (N.D. Ind. 1976) ("In the 1948 recodification of Title 28, a new chapter 85 was created to contain the jurisdictional grants to the district courts, . . . § 1331 *et seq.*").

⁷ 28 U.S.C. §§ 1441-55 (2018). In addition to this general provision, other statutes provide the right to remove in special situations, such as cases involving federal officers, civil rights, and bankruptcy. 28 U.S.C. §§ 1442, 1443, 1452 (2018). Some substantive statutes contain their own specialized removal provisions. 12 U.S.C.

original quantum of authority.⁸ Practically speaking, therefore, removal and original jurisdiction amount to almost purely statutory constructs.⁹

Whenever two or more contending sides boast different state citizenship, one such form of initial jurisdiction — that of diversity — exists, and a court may readily hear such a case, assuming any of the relevant defendants have complied with the law’s sundry removal restrictions. Going under any number of common labels, including the “Home Defendant Rule,” “Forum Defendant Rule,” “Resident Defendant Rule,” “Forum Home Defendant Rule,” or “Home-State Defendant Rule,”¹⁰ one such limitation appears in § 1441(b)(2): “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.”¹¹ Fashioned in the Cold War’s infancy, this subsection’s “properly joined and served” language predated the emergence of electronic filing¹² and, with it, nearly

§§ 632, 1441a(a)(11), 1819(b)(2)(B) (2018); 22 U.S.C. § 286g (2018); *see also* Jennifer O’Hare, *Preemption Under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim*, 56 ALA. L. REV. 325, 347 (2004) (citing some of these specialized statutes).

⁸ 28 U.S.C. § 1331 (2018); *see also* *Fine v. Philip Morris, Inc.*, 239 F. Supp. 361, 368 (S.D.N.Y. 1964) (classifying the latter as containing the United States’ “basic jurisdictional statutes”).

⁹ *M. Nahas & Co. v. First Nat’l Bank of Hot Springs*, 930 F.2d 608, 611 (8th Cir. 1991); *Gregoire v. Enter. Marine Servs., LLC*, 38 F. Supp. 3d 749, 761 (E.D. La. 2014); *Farmers Co-op. Elevator v. Doden*, 946 F. Supp. 718, 725 (N.D. Iowa 1996); *Louisville & N.R. Co. v. Western Union Tel. Co.*, 218 F. 91, 96-97 (E.D. Ky. 1914).

¹⁰ This Article uses these phrases interchangeably. *See, e.g.*, *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 221 (5th Cir. 2013) (using a variation of the first appellation “home-state defendant rule”); *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 941 (9th Cir. 2006) (using the second, “forum defendant rule”); *Guddeck ex rel. Guddeck v. SmithKline Beecham Corp.*, 34 F. Supp. 3d 990, 992 (D. Minn. 2014) (using the third, “resident-defendant rule”); *Harris v. Bristol-Myers Squibb Co.*, No. CIV.A 11-6004 FLW, 2012 U.S. Dist. LEXIS 51896 (D.N.J. Apr. 12, 2012) (using the fourth, “forum home defendant rule”).

¹¹ 28 U.S.C. § 1441(b)(2) (emphasis added); *Green Tree Servicing LLC v. Cargille*, 662 F. App’x 118, 119-20 (3d Cir. 2016) (emphasis added in quote above).

¹² The adoption of e-filing began with the United States Bankruptcy Courts in 2001; today, all federal courts require e-filing. *FAQs: Case Management/Electronic Case Files (CM/ECF)*, U.S. CTS., <http://www.uscourts.gov/courtrecords/electronic-filing-cmecf/faqs-case-management-electronic-case-files-cmecf> (last visited Dec. 16, 2018).

instantaneous notice of a document's docketing by any lawyer with an intermittent internet connection and a valid email address.¹³

In recent years, this language has induced much juridical angst, as courts have battled over whether removal by defendants prior to a complaint's effective service¹⁴ violates this codified tenet, with plain language and purpose ever clashing. At present, an apparent majority prohibits this pre-service removal tactic in the face of tenacious protests by a passionate minority. Between these hostile camps lies a trifling faction striving to conform text to purpose and vice versa. Unfortunately, little appellate guidance can be found, and the extant opinions often exhibit a strange tentativeness. At the same time, as plaintiffs' wariness of federal courts has swelled, attempts at defeating the diversity required for removal have multiplied. Inevitably, beyond consuming unfathomable dollars and incalculable hours, these bids have brought § 1441(b)(2)'s dated language into prominence. Considering the Resident Defendant Rule encoded therein constitutes one of the most effective tools for preventing a state court action's removal,¹⁵ few practicing attorneys can now afford ignorance of this codified tenet's common juridical exegeses.¹⁶

In three substantive parts, this Article strives to illuminate and harmonize this divided jurisprudence with the goal of dispelling this

¹³ Most extant e-filing systems actually compel an attorney to provide an email address so as to electronically file even the most mundane documents. *See, e.g.*, IND. R. TRIAL P. 86(O)(2)(b) (2018) (“[a]cknowledgment that orders, opinions, and notices, and all documents served under Trial Rule 86(G) will be sent to the attorney at the email address(es) on the Roll of Attorneys regardless of other contact information supplied by the attorney”); TEX. R. CIV. P. 21(f)(2) (2018) (“The email address of an attorney or unrepresented party who electronically files a document must be included on the document.”).

¹⁴ Scholars and practitioners term this maneuver “snap removal.” Arthur Hellman et al., *Neutralizing the Stratagem of “Snap Removal”: A Proposed Amendment to the Judicial Code*, 9 FED. CTS. L. REV. 103, 104 (2016). Other observers label it “the unserved defendant exception.” René D. Harrod, *A Primer on Removal*, 53 FED. LAW., Oct. 2006, at 21.

¹⁵ *See, e.g.*, *Ayoub v. Baggett*, 820 F. Supp. 298, 300 (S.D. Tex. 1993) (“[G]iven the relative financial positions of most companies versus their employees, the only time an employee is going to be sued is when it serves a tactical legal purpose, like defeating diversity.”); E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J.L. & PUB. POL’Y 569, 571 (2006) (discussing plaintiffs’ preference for state court); Jason Harmon, Comment, *Procedural Misjoinder: The Quest for a Uniform Standard*, 62 U. KAN. L. REV. 1429, 1429 (2014) (same); *cf.* *Reed v. Am. Med. Sec. Grp., Inc.*, 324 F. Supp. 2d 798, 805 (S.D. Miss. 2004) (adopting the fraudulent misjoinder doctrine because “diverse defendants ought not be deprived of their right to a federal forum by such a contrivance as this”).

¹⁶ As the author has himself observed, some still do.

persistent ignorance. Part I provides a short snapshot of diversity jurisdiction's history and a careful adumbration of the relevant removal strictures. Part II delineates the extant approaches, limning not just their reasoning but also their ambiguities. Finally, albeit only tentatively, Part III sets forth a textualist case for the majority's approach never before cogently made. Sometimes, especially in an endeavor as "holistic" as statutory interpretation,¹⁷ context makes all the difference in the world,¹⁸ simultaneously exposing the hollowness of the plainest meaning — and the appositeness of an only slightly plainer one.¹⁹

I. BACKGROUND

A. *A Quick-and-Dirty History of Diversity Jurisdiction*

As much of this nation's revolutionary elite believed, the lack of an organized national judiciary constituted one of the major defects of the young union formed by the Articles of Confederation towards the American Revolution's tail end.²⁰ Naturally, therefore, a decisive majority of the convention that drafted the Constitution of 1787 committed itself to the creation of an independent and effective federal judiciary.²¹ Yet, at the inception of the federal court system, the propriety of diversity jurisdiction provoked vigorous debate in and outside of Congress.²² To its supporters, various rationales justified

¹⁷ *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

¹⁸ *Cf.* *United States v. Parker*, No. 5:15-cr-00055-MHH-HGD, 2016 U.S. Dist. LEXIS 48681, at *2-3 (N.D. Ala. Apr. 12, 2016) (emphasizing the importance of context in clarifying the meaning of an otherwise damning statement); *Stryker Corp. v. Zimmer, Inc.*, No. 1:10-cv-1223, 2012 U.S. Dist. LEXIS 12329, at *17 (W.D. Mich. Feb. 1, 2012) (“[W]hat constitutes ‘close’ in horseshoes is markedly different than when dealing with hand grenades. Context makes all the difference.”).

¹⁹ *Cf.* Amir Shachmurove, *Eligibility for Attorneys’ Fees under the Post-2007 Freedom of Information Act: A Onetime Test’s Restoration and an Overlooked Touchstone’s Adoption*, 85 TENN. L. REV. 571, 634-36 (2018) (distinguishing between unambiguity and plainness).

²⁰ James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 1 (1964). The Articles of Confederation were approved by the Second Continental Congress on November 15, 1777, and came into force on March 1, 1781, two years before the Treaty of Paris formally ended the Revolution. Andrew Glass, *Articles of Confederation Adopted, Nov. 15, 1777*, POLITICO (Nov. 11, 2010), <https://www.politico.com/story/2010/11/articles-of-confederation-adopted-nov-15-1777-045100>.

²¹ WOOD, *supra* note 4, at 408.

²² James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L.

this particular writ, including the protection of out-of-state litigants from the presumed bias of state court judges and juries, and the defense of business and creditor interests from the same possible malice.²³ Unsurprisingly, Chief Justice John Marshall sketched the most defensible and enduring reasoning for diversity's perpetration — alleviating the fear of partiality²⁴ — one woven into the constitutional fabric over more than two centuries of judicial interpretation.²⁵ In fact, this strain of thought still endures despite repeated efforts to abolish this arguably anachronistic judicial function.²⁶ In the eyes of many, diversity jurisdiction may have lost its utility at the advent of the twenty-first century,²⁷ its once august justifications now devoid of cogency,²⁸ yet it has stayed mostly untouched, Congress even expanding its ambit in 2005.²⁹

B. Modern Removal Statute

Section 1441 outlines different criteria for the removal of a case to a federal court based on the nature of the civil action originally filed in

REV. 179, 181 (2006).

²³ See Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 123 (2003) (discussing history). According to some, however, “[t]he reasons why the Framers chose to include diversity jurisdiction, and why the First Congress jumped at the chance to breathe life into it, are less clear.” Diane P. Wood, *The Changing Face of Diversity Jurisdiction*, 82 TEMPLE L. REV. 593, 593 (2009) (emphasis added).

²⁴ *Bank of U.S. v. Deveaux*, 9 U.S. (8 Cranch) 61, 87 (1809), *overruled in part by Louisville, C. & C.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844) (“[T]he tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.”).

²⁵ Howard C. Bratton, *Diversity Jurisdiction — An Idea Whose Time Has Passed*, 51 IND. L.J. 347, 347 (1976).

²⁶ See Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 98; see also William Sternberg, *Diversity Jurisdiction*, 10 NOTRE DAME L. REV. 219 (1935) (discussing the perception that corporations abuse diversity jurisdiction).

²⁷ David Crump, *The Case for Restricting Diversity Jurisdiction: The Undeveloped Arguments, from the Race to the Bottom to the Substitute Effect*, 62 ME. L. REV. 1, 34 (2010).

²⁸ Nima Mohebbi et al., *A Dynamic Formula for the Amount in Controversy*, 7 FED. CTS. L. REV. 96, 100-04 (2013).

²⁹ 28 U.S.C. §§ 1332(d)(2), 1332(d)(5)(B) (2008); see also *MG Bldg. Materials, Ltd. v. Paychex, Inc.*, 841 F. Supp. 2d 740, 746 (W.D.N.Y. 2012) (noting that this section's addition in 2005 “expanded the scope of diversity jurisdiction in certain class actions”).

state court.³⁰ Distilled, the language in § 1441(a) authorizes removal only from a “state court” if the district court has “original jurisdiction” over the case,³¹ and gives rise to “both the rule that all defendants must unanimously consent to removal” and “the rule that only original defendants can remove.”³² If the district court could have exercised original federal-question jurisdiction — jurisdiction founded on a claim or right “arising under the Constitution, laws or treaties of the United States”³³ — then removal can proceed regardless of the citizenship or residence of the parties per § 1441(a).³⁴ In contrast, as to those cases in which the district court could have adjudicated the parties’ dispute based solely on their dissimilar states of citizenship and the amount of controversy,³⁵ not even the existence of complete diversity will allow for removal in cases featuring a home-state defendant. To wit, per this current codification of the Resident Defendant Rule, removal is always barred “if any of the parties in interest properly joined and served as defendants is a citizen of the [s]tate in which such action is brought” in accordance with § 1441(b)(2).³⁶ Crucially, in any such analysis, “the citizenship of defendants sued under fictitious names” is subject to judicial “disregard.”³⁷ For cases removed pursuant to § 1441, this statute imposes a temporal limitation: a one-year deadline for any such action “unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.”³⁸ Since

³⁰ 28 U.S.C. § 1441(a) (2018); *see also* *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (“Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.”).

³¹ *Or. Bureau of Labor & Indus. ex rel. Richardson v. U.S. W. Commc’ns, Inc.*, 288 F.3d 414, 417 n.14 (9th Cir. 2002).

³² *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 338 (4th Cir. 2006).

³³ 28 U.S.C. § 1331 (2018); *Jan’s Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1305-06 (Fed. Cir. 2008) (“[Federal question] jurisdiction was founded on the ‘arising under’ language of Article III; U.S. Const. art. III, § 2, cl. 1, which, in turn, is reflected in the ‘arising under’ language of 28 U.S.C. § 1331.”).

³⁴ 28 U.S.C. § 1441(a); *Cal. Pub. Emps. Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 92 (2d Cir. 2004).

³⁵ 28 U.S.C. § 1332(a) (2018); *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 199 (2d Cir. 2001).

³⁶ 28 U.S.C. § 1441(b)(2); *City of Vestavia Hills v. Gen. Fid. Ins. Co.*, 676 F.3d 1310, 1313 n.1 (11th Cir. 2012). Understandably, “[t]he parties themselves cannot confer diversity jurisdiction upon the federal courts by their own designation of plaintiffs and defendants.” *Id.* at 1313.

³⁷ 28 U.S.C. § 1441(b)(1); *McPhail v. Deere & Co.*, 529 F.3d 947, 951 (10th Cir. 2008); *see also* *Kruso v. Int’l Tel. & Tel. Corp.*, 872 F.2d 1416, 1424 (9th Cir. 1989).

³⁸ 28 U.S.C. § 1446(c)(1) (2018). This subsection contains further nuanced rules

1990, these basics of federal law's general removal jurisdiction, as granted and constricted by § 1441, have remained substantially unchanged.³⁹

In essence, while § 1441(b)(1) abrogated one circuit's practice of permitting claims against so-called "[d]oe defendant[s]"⁴⁰ to obscure diversity's reality and thereby stymie defendants eager to remove,⁴¹ that same subsection's second subparagraph sets forth the modern Resident Defendant Rule. In the latter part's application, federal courts customarily (1) realign the parties in an action to reflect their interests in the litigation prior to its utilization⁴² and (2) treat the presence of an in-state defendant as a procedural defect waived unless raised within thirty days of removal.⁴³ Where the Resident Defendant Rule governs by virtue of a plaintiff's naming of a resident defendant in the state case, a removing defendant may avoid remand only by invoking the fraudulent joinder doctrine⁴⁴ or, its more controversial kin, the fraudulent misjoinder one.⁴⁵

as to pegging the amount in controversy. *Id.*

³⁹ Saurabh Vishnubhakat, *Pre-Service Removal in the Forum Defendant's Arsenal*, 47 GONZ. L. REV. 147, 151 (2011). It should be noted that Congress did make two changes to the removal process in the first decade of the twenty-first century. In 2005, Congress enacted the Class Action Fairness Act, which gave federal courts jurisdiction over certain class actions. 28 U.S.C. § 1453 (2018). Second, in 2011, it passed the Federal Courts Jurisdiction and Venue Clarification Act of 2011, which, among others changes, codified § 1446(c)(1)'s bad-faith exception. 28 U.S.C. § 1446.

⁴⁰ A "doe defendant" is a person whose correct name or identity is unknown but against whom a plaintiff wishes to make a claim. James E. Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger Than Truth*, 30 STAN. L. REV. 51, 51 (1977).

⁴¹ *Singh v. Daimler-Benz AG*, 9 F.3d 303, 309 (3d Cir. 1993); *see also* *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1234-35 (10th Cir. 2006) ("[C]ourts have held that 'John Does' are disregarded for purposes of removal on the basis of diversity of citizenship.").

⁴² *City of Vestavia Hills v. Gen. Fid. Ins. Co.*, 676 F.3d 1310, 1313 (11th Cir. 2012).

⁴³ *Schexnayder v. Entergy La., Inc.*, 394 F.3d 280, 284 (5th Cir. 2004); *Denman* by *Denman v. Snapper Div.*, 131 F.3d 546, 548 (5th Cir. 1998).

⁴⁴ *Filla v. Norfolk S. Ry. Co.*, 336 F.3d 806, 809 (8th Cir. 2003); *see also, e.g.,* *Boyd v. Kilpatrick Townsend & Stockton, LLP*, 79 F. Supp. 3d 153, 157-58 (D.D.C. 2015) (explicating the fraudulent joinder doctrine); *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993) (same).

⁴⁵ *See, e.g.,* *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 532 (5th Cir. 2006) (applying exception); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) (originating this specific of fraudulent joinder), *aff'd* by 77 F.3d 1353 (11th Cir. 1996), *abrogated on other grounds*, *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000).

Treated as exceptions to the “voluntary-involuntary rule”⁴⁶ and periodically depicted as the reason behind the Home-State Defendant Rule,⁴⁷ confusion still enshrouds these two concepts, beginning, fittingly enough, with their deceptive monikers. Specifically, neither doctrine actually mandates a finding of fraud.⁴⁸ As the Court delineated the former,⁴⁹ “fraudulent joinder” arises whenever the joinder of a resident defendant without a “real connection with the controversy” is “without any reasonable basis.”⁵⁰ Superficially, then, “fraudulent joinder — the filing of a frivolous or otherwise illegitimate claim against a non-diverse defendant solely to prevent removal — is rather easily defined.”⁵¹ Instead, analytical confusion reigns right below this placid surface. True, most courts deem actual fraud in the pleading of jurisdictional facts to be sufficient to establish this misdeed.⁵² But aside from this consensus, various circuits have mined discrete tests to employ in less unambiguously tainted situations. Occasionally, even within the same opinion,⁵³ to the consternation of countless commentators.⁵⁴ In some, “joinder is fraudulent when there exists *no reasonable basis in fact and law* supporting a claim against the resident defendant.”⁵⁵ Others require the removing defendant to prove

⁴⁶ This judicially-created rule allows for “an action nonremovable when commenced . . . [to] become removable thereafter only by the voluntary act of the plaintiff.” *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 547 (5th Cir. 1967).

⁴⁷ *Goodwin v. Reynolds*, 757 F.3d 1216, 1221 (11th Cir. 2014); *Sullivan v. Novartis Pharms. Corp.*, 575 F. Supp. 2d 640, 645 (D.N.J. 2009).

⁴⁸ *Mays v. Rapoport*, 198 F.3d 457, 461 n.8 (4th Cir. 1999).

⁴⁹ *See Kan. City Suburban Belt Ry. v. Herman*, 187 U.S. 63 (1902) (holding that “merely because the evidence was insufficient to sustain a verdict against one defendant was not conclusive of bad faith . . . the case was tried on the merits and in invitum, the issues of fact raised in the petition for removal were properly disposed of, and it was absurd to send the case back to be removed for the purpose of being remanded”).

⁵⁰ *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152-53 (1914).

⁵¹ *Filla v. Norfolk & S. Ry.*, 336 F.3d 806, 809 (8th Cir. 2003).

⁵² *Travis v. Irby*, 326 F.3d 644, 646-47 (5th Cir. 2003); *see also Hartley v. CSX Transp.*, 187 F.3d 422, 424 (4th Cir. 1999) (citing *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993)).

⁵³ *See Travis*, 326 F.3d at 647 (“Neither our circuit nor other circuits have been clear in describing the fraudulent joinder standard. The test has been stated by this court in various terms, even within the same opinion.”).

⁵⁴ *See Michelle S. Simon, Hogan v. Gawker II: A Statutory Solution to Fraudulent Joinder*, 70 BAYLOR L. REV. 1, 16-17 (2018) (summarizing critiques).

⁵⁵ *Filla*, 336 F.3d at 810 (emphasis added); *see also, e.g., Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) (“[J]oinder is fraudulent ‘where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the

the utter absence of any possibility of recovery from the spoiler.⁵⁶ Stated differently, “there can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law as they exist when the petition to remand is heard.”⁵⁷ Yet other courts demand a dearth of any “reasonable possibility of recovery”; because this test requires a removing defendant to prove plaintiff’s lack of any colorable probability for relief from the spoiler, a mere theoretical possibility will not defeat removal jurisdiction.⁵⁸

Though unambiguously recognized in only two circuits, fraudulent misjoinder is a “recent development that is related to fraudulent joinder, but distinct from it.”⁵⁹ In the words of one panel, “[a]

defendant or seek a joint judgment.”); *Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1983) (“Fraudulent joinder exists if, on the face of plaintiff’s state court pleadings, no cause of action lies against the resident defendant.”); *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir. 1979) (“If there is no arguably reasonable basis for predicting that state law might impose liability on the resident defendants under the facts alleged, then the claim is deemed fraudulent and lack of diversity will not prevent removal.”).

⁵⁶ *Hartley*, 187 F.3d at 424; *Mayes v. Rapoport*, 198 F.3d 457, 464 (4th Cir. 1999); *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998); *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1987); see also *Cobb v. Delta Exports, Inc.*, 186 F.3d 675, 677 (5th Cir. 1999) (“Under th[is] doctrine, a federal court may assert diversity jurisdiction when a non-diverse defendant has been fraudulently joined — i.e., when ‘either . . . there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or . . . there has been outright fraud in the plaintiff’s pleading of jurisdictional facts.’”); *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998) (noting that “fraudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity”).

⁵⁷ *Parks v. N.Y. Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962). According to some, this formulation constitutes the “general ‘fraudulent joinder’ test.” J. Thompson Thornton & Aurora A. Ares, *The Foreign Sovereign Immunities Act of 1976: Misjoinder, Nonjoinder, and Collusive Joinder*, 58 J. AIR L. & COM. 703, 737 (1993).

⁵⁸ *Gray ex rel. Rudd v. Beverly Enterprises-Miss., Inc.*, 390 F.3d 400, 405-06 (5th Cir. 2004); *Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286 n.4. (5th Cir. 2000); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992). Practically speaking, this third test is the most generous to the removing defendant. *Simon*, *supra* note 54, at 18 (“[D]efendant has to demonstrate that the possibility of the plaintiff ultimately recovering is not reasonable, rather than having to show that there is no possibility of recovery.”).

⁵⁹ *Flores-Duenas v. Briones*, No. CIV 13-0660 JB/CG, 2013 U.S. Dist. LEXIS 173620, at *71 (D.N.M. Dec. 1, 2013); see also *Walter E. Campbell Co. v. Hartford Fin. Servs. Grp., Inc.* 48 F. Supp. 3d 53, 56-57 (D.D.C. 2014) (“Fraudulent joinder, however, is not equivalent to improper joinder.”); *Wyatt v. Charleston Area Med. Ctr., Inc.*, 651 F. Supp. 2d 492, 496 (S.D. W. Va. 2009) (explaining the difference between fraudulent joinder and fraudulent misjoinder and noting the latter is “relatively new

party . . . [can] be improperly joined without being fraudulently joined. . . [i]f [the requirements of Fed. R. Civ. P. 20 and analogous state rules] are not met . . . even if there is no fraud in the pleadings and the plaintiff does have the ability to recover against each of the defendants.”⁶⁰ Just as importantly, “a finding of mere misjoinder does not itself warrant a finding of fraudulent misjoinder.”⁶¹ If proved, either of these related exceptions effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain non-diverse defendants, to assume jurisdiction over a case, and to dismiss the nondiverse defendants and thereby retain jurisdiction.⁶²

II. JURIDICAL DIVIDE

But the second acrimonious controversy engendered by § 1441’s semblant plainness, a split amongst the federal district courts regarding the proper interpretation of the language “joined and served” in § 1441(b)(2), has long raged.⁶³ Seemingly, forum defendants’ increasing use of pre-service removal, i.e., “Snap Removal,”⁶⁴ triggered this divide.⁶⁵ On one side lumber the strict constructionists. For them, the statutory text leaves open only one route. Until a defendant has been “properly joined and served,”

and not clearly defined”).

⁶⁰ *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006).

⁶¹ *Chaney v. Gate Pharms.* (*In re Diet Drugs Prods. Liab. Litig.*), Nos. 1203, 98-20478, 1999 U.S. Dist. LEXIS 11414, at *15, (E.D. Pa., July 16, 1999) (deriving this axiom from *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996)); *see also, e.g., Pa. Emps. Benefit Trust Fund v. Eli Lilly & Co.*, No. 07-2057, 2007 U.S. Dist. LEXIS 74579, at *32 n.12 (E.D. Pa. Oct. 5, 2007) (quoting this language); *Turnage v. Ford Motor Co.* (*In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*), 260 F. Supp. 2d 722, 728 (S.D. Ind. 2003) (“Under *Tapscott*, something more than ‘mere misjoinder’ of parties may be required to find fraudulent misjoinder. Precisely what the ‘something more’ is was not clearly established in *Tapscott* and has not been established since.”).

⁶² *See Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999) (as to fraudulent joinder only); *cf. Cobb v. Delta Exps., Inc.*, 186 F.3d 675, 677 (5th Cir. 1999) (“The fraudulent joinder doctrine does not apply to joinders that occur *after* an action is removed.”).

⁶³ *See Gentile v. BioGen IDEC, Inc.*, 934 F. Supp. 2d 313, 316-20 (D. Mass. 2013) (collecting cases).

⁶⁴ As noted previously, “snap removal” is where defendants remove cases to federal court even before they have been served with original process. *See, e.g., Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855, 863 (N.D. Ohio 2008) (noting the existence of this trend); *Hellman et al.*, *supra* note 14, at 10407 (summarizing approaches).

⁶⁵ *Vishnubhakat*, *supra* note 39, at 148.

removal may take place; afterward, it may never transpire, absent proof of a pertinent exception. Imbued with a majority's certainty, their more purposive brethren oppose this literal construal as inconsistent with the purpose of diversity and removal jurisdiction. Whether removal may be proper, they insist, cannot depend on just a pleading's physical receipt. Meanwhile, a few pleas for harmony, for some explication sufficiently compelling to pacify these combatants, recurrently pierce the resulting din.⁶⁶ Over their "essentially identical"⁶⁷ battlefield loom the shadows of the rule laid out in *Pullman Company v. Jenkins*⁶⁸ — that diversity is required both when an action is commenced and at time of removal, as determined by the allegations — and the "congressional intent" often ascribed to Congress' various amendments to § 1441⁶⁹ — that removal jurisdiction remain tightly circumscribed and carefully monitored.

A. Minority's Technical Reading

A minority of jurisdictions allow a defendant to remove a case with complete diversity regardless of the presence of an un-served resident defendant. To them, pursuant to "the plain meaning" of § 1441(b), a non-forum defendant may freely remove prior to service on a forum one,⁷⁰ and the latter may freely remove prior to receiving service,

⁶⁶ See Matthew Curry, Note, *Plaintiff's Motion to Remand Denied: Arguing for Pre-Service Removal under the Plain Language of the Forum-Defendant Rule*, 58 CLEV. ST. L. REV. 907, 918-26 (2010) (precising the relevant arguments).

⁶⁷ *Ethington*, 575 F. Supp. 2d at 861 ("The procedural and factual circumstances in most, if not all, of the cases cited by both sides are essentially identical . . . removal of a state court case by a forum defendant, before service on the forum defendant and/or a non-forum defendant.").

⁶⁸ 305 U.S. 534, 541 (1939). The core principle predated *Pullman*. See *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 49-50 (1895) (stating the "circuit or district court . . . [have] jurisdiction under the laws of the United States, had it existed at the time of the commencement of the action . . . [t]he reference in the clause in controversy to the time of the commencement of the action may well have been inserted to prevent a case in which there was at that time no diversity of citizenship from being transferred . . .").

⁶⁹ *Sharp v. Elkins*, 616 F. Supp. 1561, 1563 (W.D. La. 1985).

⁷⁰ See, e.g., *Spencer v. U.S. Dist. Court for N. Dist. of Cal.*, 393 F.3d 867, 871 (9th Cir. 2004) ("We conclude that the post-removal joinder of . . . a "forum defendant," did not oust the district court of subject-matter jurisdiction. The forum defendant rule of 28 U.S.C. § 1441(b) is only applicable at the time a notice of removal is filed. Because no local defendant was a party to the action at that time, and given the preservation of complete diversity of the parties thereafter, the district court did not err in denying the . . . motion to remand."); *Valido-Shade v. Wyeth, LLC*, 875 F. Supp. 2d 474, 477-78 (E.D. Pa. 2012) (holding that out-of-state defendant could remove

assuming no *other* resident defendant has been served.⁷¹ “[T]he manner in which . . . [§ 1441(b)(2)] is drafted” may “earn[] no grammatical approbation,”⁷² but its language is glaringly unambiguous.⁷³ As all courts must “give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.”⁷⁴ The fact that “to conclude that removal is barred before *any* defendant has been served necessarily requires . . . [a] court to ignore the words ‘properly joined and served’ or to read them completely out of the text of the statute” forecloses any further debate.⁷⁵ Otherwise, a court would be effectively indulging that very dreaded penchant for statutory rewriting.⁷⁶ Section 1441(b)(2)’s “specific purpose” may be “less

case prior to service on in-state defendants); *Carrs v. AVCO Corp.*, No. 3:11-CV-3423-L, 2012 U.S. Dist. LEXIS 74562, at *5 (N.D. Tex. May 30, 2012) (“[To] conclude that removal is barred before any defendant has been . . . ‘properly joined and served’ . . . [is to] disregard the literal language of the statute.”); *Regal Stone Ltd. v. Longs Drug Stores Cal., LLC*, 881 F. Supp. 2d 1123, 1126 (N.D. Cal. 2012) (sake, and that “courts construe the removal statute strictly, resolving any doubts about removal in favor of remand”); *Watanabe v. Lankford*, 684 F. Supp. 2d 1210, 1219 (D. Haw. 2010) (likewise asserting this based on plain language of the statute); *Ripley v. Eon Labs, Inc.*, 622 F. Supp. 2d 137, 141-42 (D.N.J. 2007) (same, stating “the Court recognized the ‘colorable policy arguments’ against permitting removal, including the potential for docket monitoring and in state defendant forum shopping. Nonetheless, the Court stated that ‘these arguments alone are insufficient to overcome the requirement that this Court give meaning to the plain language of the statute.’” (citation omitted)).

⁷¹ *Munchel v. Wyeth LLC*, No. 12-906-LPS, 2012 U.S. Dist. LEXIS 128971, at *12 (D. Del. Sept. 11, 2012) (reviewing the plain meaning of the text in § 1441(b)); *Thomson v. Novartis Pharm. Corp.*, No. 06-6280 (JBS), 2007 U.S. Dist. LEXIS 37990, at *11-15 (D.N.J. May 22, 2007) (same).

⁷² *Carrs*, 2012 U.S. Dist. LEXIS 74562, at *5 (referring to the poor diction and syntax of 28 U.S.C. § 1441(b)).

⁷³ *Frick v. Novartis Pharms. Corp.*, No. 05-5429 (DRD), 2006 U.S. Dist. LEXIS 9178, at *7 (D.N.J. Feb. 22, 2006).

⁷⁴ *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 313 (3d Cir. 2001) (citations omitted) (internal quotations omitted).

⁷⁵ *Carrs*, 2012 U.S. Dist. LEXIS 74562, at *7 (emphasis added); *see also, e.g.*, *Harvey v. Shelter Ins. Co.*, No. 13-392, 2013 U.S. Dist. LEXIS 60840, at *6-7 (E.D. La. Apr. 24, 2013) (holding that the plain language of the statute prevails over the policy arguments of alleged forum shopping); *Chace v. Bryant*, No. 10 C 85, 2010 U.S. Dist. LEXIS 116417, at *3 (E.D.N.C. Nov. 1, 2010) (“The plain language of Section 1441(b) ‘implies that a diverse but resident defendant who has not been served may be ignored in determining removability.’”); *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Relevant Prods. Liab. Litig.*, MDL No. 2100, 2010 U.S. Dist. LEXIS 105532, at *35-36 (S.D. Ill. Oct. 4, 2010) (discussing how “[§]1441(b) limits removal jurisdiction in diversity cases”).

⁷⁶ *Carrs*, 2012 U.S. Dist. LEXIS 74562, at *7; *see also Terry v. J.D. Streett & Co.*, No. 09 C 01471, 2010 U.S. Dist. LEXIS 100251, at *5 (E.D. Mo. Sept. 23, 2010) (“The

[than] obvious,” even if the section within which it is housed was crafted “to prevent favoritism for in-state litigants . . . and discrimination against out-of-state litigants.”⁷⁷ Regardless of what its drafters specifically intended in 1948, however, no ambiguity encumbers its singularly pertinent sentence, “[i]ts plain meaning preclud[ing] removal on the basis of in-state citizenship *only* when the defendant has been properly joined and served.”⁷⁸

B. Majority’s Two Approaches

Within the mainstream, two “related but slightly different line of cases” can be spotted. Fixating on the text, the first adopts an almost rigid temporal approach; forsaking such literalism, the second refuses to treat the Resident Defendant Rule as subject to such facile contravention.⁷⁹ Though these approaches differ, the result is the same: the effective expansion of a party’s right of removal based partly, if not completely, on the presumed purpose of this encoded maxim and those widely parroted ratiocinations for diversity jurisdiction’s creation and continuation.

Opting for a purely textual construction, a handful of courts deem § 1441(b)(2)’s “properly joined and served” requirement to be irrelevant when a plaintiff has yet to serve *any* defendant, whether local or not.⁸⁰ As one such tribunal explained, “[t]he ‘joined and served’ requirement makes sense, then, when one defendant has been served but the named forum defendant has not,” but “[w]hen no defendant has been served, . . . the nonforum defendant stands on equal footing as the forum defendant.”⁸¹ In other words, until service has been effectuated on any party, the two categories of defendants are

text of § 1441(b), however, is clear, and this Court must apply the statute as it is written. Cases in this Court have held that the ‘Court must apply the statute as it is written, and not as plaintiffs maintain it is intended.’”); *cf. In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 67 F. Supp. 3d 952, 959 (discussing this minority approach of using the underlying purpose of the law).

⁷⁷ *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 153 (3d Cir. 2018); *cf. Swindell-Filiaggi v. CSX Corp.*, 922 F. Supp. 2d 514, 518 (E.D. Pa. 2013) (stressing that “there is no legislative history on the ‘joined and served’ requirement”).

⁷⁸ *Encompass Ins. Co.*, 902 F.3d at 152 (emphasis added). This paradigm allows for removal even if a forum defendant is served the day after the requisite notice of removal is filed. *Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855, 857 (N.D. Ohio 2008).

⁷⁹ *Ethington*, 575 F. Supp. 2d at 864 n.4.

⁸⁰ *Curry*, *supra* note 66, at 918.

⁸¹ *Holmstrom v. Harad*, No. 05 C 2714, 2005 U.S. Dist. LEXIS 16694, at *6 (N.D. Ill. Aug. 11, 2005).

indistinguishable as a matter of fact and law, neither encompassed by the enacted language of § 1441, and neither obligated to appear in court.⁸² Thus, a once-served non-resident defendant may immediately remove an otherwise removable case without regard to the *unserved* forum defendant without contravening a single syllable in § 1441.⁸³ At the same time, in accordance with that same pregnant sentence, the “*unserved* non-forum defendant” need not fear the Resident Defendant Rule, and a plaintiff can make no use of it, precisely because § 1441 predicates its application on proper joinder and service of the operative documents on “any of the parties in interest.”⁸⁴ So understood, the protection afforded by the Forum Defendant Rule “for an *unserved* non-forum defendant” appears “wholly unnecessary.”⁸⁵

As a grammatical matter, this result seems eminently reasonable, even unremarkable. In accordance with the denotation likely to be found in any authoritative dictionary,⁸⁶ the use of “any” in § 1441(b)(2) implies the existence of at least one defendant that is a party in interest and that has been properly joined and served;⁸⁷ this adjective’s predecessor — the pronoun “none” — insinuated the same.

⁸² *Mohammed v. Watson Pharms. Inc.*, No. SA CV09-0079 DOC(ANx), 2009 U.S. Dist. LEXIS 31094, at *78 (C.D. Cal. Mar. 26, 2009) (“Section 1441(b) is not implicated where the non-forum defendant (or forum defendant) seeks to remove the action prior to the service of any defendant.”). Indeed, for this very reason, courts do not generally consider “the citizenship of unserved defendants” when “determining which defendants must join in a removal notice.” *Recognition Commc’ns v. AAA*, No. 3:97-CV-0945-P, 1998 U.S. Dist. LEXIS 3010, at *7 (N.D. Tex. Mar. 4, 1998); *see also*, e.g., *Salveson v. W. States Bankcard Ass’n*, 731 F.2d 1423, 1429 (9th Cir. 1984) *superseded in part by statute*, 28 U.S.C. § 1441(e) (1986), *as stated in* *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1392 (9th Cir. 1988) (“Our circuit rule is that a party not served need not be joined; the defendants summonsed can remove by themselves.”).

⁸³ *Republic W. Ins. Co. v. Int’l Ins. Co.*, 765 F. Supp. 628, 629 (N.D. Cal. 1991); *Windac Corp. v. Clarke*, 530 F. Supp. 812, 813 (D. Neb. 1982).

⁸⁴ 28 U.S.C. § 1441(b)(2) (2018).

⁸⁵ *Holmstrom*, 2005 U.S. Dist. LEXIS 16694, at *7 (emphasis added); *see also*, e.g., *Recognition Commc’ns*, 1998 U.S. Dist. LEXIS 3010, at *710 (agreeing with district courts that have found § 1441(b) is not implicated where the non-forum defendant (or forum defendant) seeks to remove the action prior to the service of any defendant).

⁸⁶ *Any*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2010).

⁸⁷ *Hawkins v. Cottrell, Inc.*, 785 F. Supp. 2d 1361, 1369-73 (N.D. Ga. 2011); *see also*, e.g., *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003) (remanding case that out-of-state defendant had sought to remove based on diversity because forum defendant had already been served at the time of removal); *Ott v. Consol. Freightways Corp. of Del.*, 213 F. Supp. 2d 662, 665-67 (S.D. Miss. 2002) (allowing out-of-state defendant to remove action because forum defendant had not been served at the time of removal).

Logically, “[w]ithout this precondition for removal,” the utilization of either “any” or “none” would be “superfluous.”⁸⁸ Textually, therefore, § 1441 suspends operation of the Home State Defendant Rule until appropriate joinder and service on at least one resident defendant has taken place by virtue of its reliance on the indefinite pronoun “any.”⁸⁹ Until that explicitly designated action’s first consummation, however, § 1441(b)’s unadorned text “allows removal by a non-forum defendant prior to service on a forum defendant,”⁹⁰ and cannot proscribe “removal even by a forum defendant prior to service.”⁹¹ Accordingly, so long as no defendant has been served at the time of removal, the Resident Defendant Rule is irrelevant — or so some within the majority asseverate.⁹²

For its supporters, this position has the added advantage of harmonizing the text of § 1441 with this axiom’s apparent aims. By their reckoning, a defendant who is a citizen of the state in which a case is brought faces no risk of local bias, thus “[t]he need for such

⁸⁸ *Gentile v. BioGen IDEC, Inc.*, 934 F. Supp. 2d 313, 317 (D. Mass. 2013).

⁸⁹ *See, e.g., Valido-Shade v. Wyeth, LLC (In re Diet Drugs)*, 875 F. Supp. 2d 474, 477-78 (E.D. Pa. 2012) (observing that this language “was designed to allow removal where a plaintiff simply named an in-state defendant to preclude removal and had no intention of serving or pursuing that defendant in the lawsuit”); *Carrs v. AVCO Corp.*, No. 3:11-CV-3423-L, 2012 U.S. Dist. LEXIS 74562, at *5-6 (N.D. Tex. May 30, 2012) (“[T]he provision simply means that a case cannot be removed to federal court if any party in interest is properly joined and served as a defendant, and that defendant is a citizen of the state in which the lawsuit is brought.”); *Regal Stone Ltd. v. Longs Drug Stores Cal., LLC*, 881 F. Supp. 2d 1123, 1126 (N.D. Cal. 2012) (“[T]he clear and unambiguous language of the statute only prohibits removal after a properly joined forum defendant has been served.”); *Watanabe v. Lankford*, 684 F. Supp. 2d 1210, 1219 (D. Haw. 2010) (rejecting application of rule in a case in which an out-of-state defendant removed an action filed by a plaintiff who could have served the properly joined in-state defendant immediately after filing the complaint, but chose not to do so).

⁹⁰ *Gentile*, 934 F. Supp. 2d at 317; *see also Ripley v. Eon Labs, Inc.*, 622 F. Supp. 2d 137, 141-42 (D.N.J. 2007) (finding that the plain language of § 1441(b) did not bar the defendants’ removal in this case because, at the time that the action was removed, they had not yet been “properly joined and served”).

⁹¹ *Gentile*, 934 F. Supp. 2d at 317; *see also, e.g., Munchel v. Wyeth LLC*, No. 12-906-LPS, 2012 U.S. Dist. LEXIS 128971, at *9-14 (D. Del. Sept. 11, 2012) (setting forth the reasons for favoring this reading); *Khashan v. Ghasemi*, CV10-00543MMM(CWX), 2010 U.S. Dist. LEXIS 35772, at *7-14 (C.D. Cal. Apr. 5, 2010) (concluding that § 1441(b) is not implicated where the non-forum defendant (or forum defendant) seeks to remove the action prior to the service of any defendant).

⁹² *Oxendine v. Merck & Co.*, 236 F. Supp. 2d 517, 524 (D. Md. 2002) (citing, as examples, *Wensil v. E.I. Du Pont De Nemours & Co.*, 792 F. Supp. 447, 448 (D.S.C. 1992); *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001); *In re Bridgestone/Firestone, Inc.*, 184 F. Supp. 2d 826, 828 (S.D. Ind. 2002)).

protection is absent,”⁹³ while an out-of-state defendant has no credible reason to be wary of local bias — or even a ground for removal — before service’s completion.⁹⁴ Conversely, “in a case involving multiple defendants where at least one is a citizen of the forum state, . . . the likelihood of local bias against all defendants” strikes this juridical multitude as “too remote to warrant removal.”⁹⁵ In sum, to the vast majority who subscribe to this analytical paradigm, “[w]here there is complete diversity of citizenship . . . the inclusion of an unserved resident defendant in the action does not defeat removal under . . . § 1441(b)(2).”⁹⁶ But remand must follow if either none of the defendants had been served prior to removal or plaintiffs had been deprived of a meaningful opportunity to provide service before defendants’ filing.⁹⁷

Regarding the foregoing as more a convoluted form of linguistic prestidigitation than anything else, most of the courts favoring remand invoke congressional intent and that old canon cautioning against absurdity rather than § 1441(b)(2)’s text. Axiomatically, a court must “give [a statute’s] words their plain meaning unless doing so would frustrate the overall purpose of the statutory scheme, lead to absurd results, or contravene clearly expressed legislative intent.”⁹⁸ More debatably,⁹⁹ “[e]ven when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole,” some courts “follow[] that

⁹³ *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 941 (9th Cir. 2006).

⁹⁴ *Fields v. Organon USA Inc.*, No. 07 C 2922, 2007 U.S. Dist. LEXIS 92555, at *14 (D.N.J. Dec. 12, 2007); *see also, e.g., Holmstrom v. Harad*, No. 05 C 2714, 2005 U.S. Dist. LEXIS 16694, at *6 (N.D. Ill. Aug. 11, 2005) (noting that “a plaintiff should not be able to prevent a served defendant from removing simply by naming, but not serving, a forum citizen as a defendant”).

⁹⁵ *Fields*, 2007 U.S. Dist. LEXIS 92555, at *8; *see also, e.g., Dresser Indus., Inc. v. Underwriters at Lloyd’s of London*, 106 F.3d 494, 499 (3d Cir. 1997) (stating that insofar as “diversity jurisdiction exists because of a fear that the state tribunal would be prejudiced towards the out-of-state plaintiff or defendant, that concern is understandably allayed when that party is joined with a citizen from the forum-state”).

⁹⁶ *McCall*, 239 F.3d at 813 n.2.

⁹⁷ *May v. Haas*, No. 12-01791-MCE, 2012 U.S. Dist. LEXIS 148972, at *6 (E.D. Cal. Oct. 16, 2012); *Khashan v. Ghasemi*, No. CV 10-00543 MMM (CWx), 2010 U.S. Dist. LEXIS 35772, at *412 (C.D. Cal. Apr. 5, 2010) (holding that removal prior to service is “procedurally defective”).

⁹⁸ *Jefferson v. United States*, 546 F.3d 477, 483 (7th Cir. 2008).

⁹⁹ *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 234-39 (2012) (proposing and endorsing a narrow version of the absurdity canon).

purpose, rather than the literal words.”¹⁰⁰ Viewed through this contextual prism, adherence to the plain language of § 1441(b) “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.”¹⁰¹ If a plaintiff names, but elects not to “properly join[] and serve[],” at least one resident defendant, the Home-State Defendant Rule can pose no obstacle to this local party, with the doctrines of fraudulent joinder and misjoinder alone left to deter any such machinations.¹⁰² At its most extreme, this construal would allow a resident defendant to circumvent this venerated precept’s operation simply by evading service in spite of their knowledge, in this era of instant docket notifications, of a suit’s filing and thus essentially encourages the crafty to “manipulate the operation of the removal statutes.”¹⁰³

In contrast, the strict exposition of the Home-State Defendant Rule followed by so many invites defendants to “rush[] to remove a newly filed state court case before the plaintiff can perfect service on anyone” and thereby engage in another form of “litigant gamesmanship” — the very type of malediction targeted by this statutory dogma — with almost unfettered abandon.¹⁰⁴ Because any interpretation that yields such consequences would “eviscerate the purpose of the [F]orum [D]efendant [R]ule,”¹⁰⁵ such “a bizarre result cannot possibly have

¹⁰⁰ *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940).

¹⁰¹ *Fields v. Organon USA Inc.*, No. 07 C 2922, 2007 U.S. Dist. LEXIS 92555, at *14 (D.N.J. Dec. 12, 2007).

¹⁰² *See, e.g., Allen v. GlaxoSmithKline PLC*, No. 07-5045, 2008 U.S. Dist. LEXIS 42491, at *12 (E.D. Pa. May 30, 2008) (“[T]he intent behind the ‘joined and served’ requirement is to avoid gamesmanship by preventing plaintiffs from joining forum defendants merely to preclude federal jurisdiction.”); *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003) (“The purpose of the ‘joined and served’ requirement is to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve.”). So convinced, even while recognizing that “[t]he forum defendant rule . . . creates an opportunity for procedural gamesmanship on behalf of plaintiffs trying to keep an action in state court,” courts within this majority tend not to bar a non-forum defendant from attempting removal where it has been joined, but not served. *Fields*, 2007 U.S. Dist. LEXIS 92555, at *9-10.

¹⁰³ *Vivas v. Boeing Co.*, 486 F. Supp. 2d 726, 734 (N.D. Ill. 2007).

¹⁰⁴ *Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855, 862 (N.D. Ohio 2008).

¹⁰⁵ *Sullivan v. Novartis Pharms. Corp.*, 575 F. Supp. 2d 640, 646-47 (D.N.J. 2008); *see also DeAngelo-Shuayto v. Organon USA, Inc.*, No. 07-2923 (SRC), 2007 U.S. Dist. LEXIS 92557, at *5, 12 (D.N.J. Dec. 12, 2007) (deriding “a literal interpretation” of § 1441(b)(2) as likely to “create[] an opportunity for gamesmanship by defendants, which could not have been the intent of the legislature in drafting the ‘properly joined

been . . . [Congress'] intent" in inputting the "properly served and joined" language into § 1441(b)(2).¹⁰⁶ Already consistent with § 1441(b)(2)'s presumed target, this construction honors Congress' consistent attempts to restrict federal removal jurisdiction¹⁰⁷ and its hoary determination, one zealously shared by the federal judiciary, to found diversity jurisdiction "on the genuine interests of the parties to the controversy,"¹⁰⁸ as succinctly exemplified by § 1441(b)(1).¹⁰⁹ In short, unwilling to assume that Congress passed § 1441(b) so as "to create an arbitrary means for a forum defendant to avoid the forum defendant rule simply by filing a notice of removal before the plaintiff is able to effect process,"¹¹⁰ these animated courts can see no mesmerizing logic, only verboten irrationality, in the strictest and most literal reading of § 1441(b)(2). As a concept almost sanctified by the ivied moss of old age, removability cannot "rationally turn on the timing or sequence of service of process,"¹¹¹ these proponents proclaim, and § 1441(b)(2) must therefore be interpreted so as to prevent chicanery by defendants as well as plaintiffs.

For the jurists within this regnant cohort, other suppositions buttress this conclusion. For instance, the presumption that "[t]he removal statute should be construed narrowly and any doubts about the propriety of removing a particular action should be resolved

and served' language").

¹⁰⁶ *Fields*, 2007 U.S. Dist. LEXIS 92555, at *10.

¹⁰⁷ *Sharp v. Elkins*, 616 F. Supp. 1561, 1563 (W.D. La. 1985) ("It is well settled that the right to remove a civil action upon the basis of diversity jurisdiction cannot be defeated by the improper joinder of a resident defendant having no real connection with the controversy . . . this doctrine must be applied narrowly in recognition of the express congressional intent to restrict the jurisdiction of federal courts on removal."); cf. *S. Panola Consol. Sch. Dist. v. O'Bryan*, 434 F. Supp. 750, 754 (N.D. Miss. 1977) ("All statutes *in pari materia* must be construed together and a determination reached that will comport with the evident intent of Congress. The court does not believe that Congress intended to create jurisdiction by the enactment of 28 U.S.C. § 1441(b).").

¹⁰⁸ *Vivas v. Boeing Co.*, 486 F. Supp. 2d 726, 734 (N.D. Ill. 2007).

¹⁰⁹ 28 U.S.C. § 1441(b)(1) (2018).

¹¹⁰ *Sullivan*, 575 F. Supp. 2d at 645; see also, e.g., *Ibarra v. Protective Life Ins. Co.*, No. CV-09-049-TUC-CKJ, 2009 U.S. Dist. LEXIS 126624, at *7 (D. Ariz. June 12, 2009) (concluding that the Forum Defendant Rule was intended "to prevent gamesmanship by plaintiffs, [such that] it is difficult to comprehend why it should be allowed to promote gamesmanship by defendants").

¹¹¹ *Oxendine v. Merck & Co., Inc.*, 236 F. Supp. 2d 517, 526 (D. Md. 2002); see also, e.g., *Sullivan*, 575 F. Supp. 2d at 646 (quoting *Oxendine*, 236 F. Supp. 2d at 526); *Laugelle v. Bell Helicopter Textron, Inc.*, No. 10-1080 (GMS), 2012 U.S. Dist. LEXIS 12907, at *12-1 (D. Del. Feb. 2, 2012) ("Congress could not have intended removability to hinge on the timing of service." (citing *Oxendine*, 236 F. Supp. 2d at 526))).

against allowing removal¹¹² only bolsters their case against a constrictive perusal of § 1441's "properly joined and served" touchstone.¹¹³ And the fact removability should not "rationally turn on the timing or sequence of service of process,"¹¹⁴ original diversity jurisdiction having long been decided that it must be based on the face of the complaint rather than by which defendants have been served, only reinforces their conviction.¹¹⁵ After all, as the Court stated in *Pullman*, prior to passage of § 1441(b)(2), "the fact that the resident defendant has not been served with process does not justify removal by the non-resident defendant."¹¹⁶ That holding remains valid far and wide more than seventy-five years later,¹¹⁷ and cannot coexist with a strictly utilized § 1441(b)(2). As courts must always presume that Congress "legislated consistently with existing law and 'with the knowledge of the interpretation that courts have given to the existing statute,'"¹¹⁸ this jurisprudential fact too cuts against the minority's astringency.

In view of their reliance on § 1441's specific and general context, diversity jurisdiction's presumptive purpose plays a valuable supporting role in these pro-remand opinions. Based upon today's historically dubious, yet essentially unquestioned, consensus,

¹¹² *Wirtz Corp. v. United Distillers & Vintners N. Am., Inc.*, 224 F.3d 708, 715 (7th Cir. 2000).

¹¹³ *Vivas*, 486 F. Supp. 2d at 734-35 (declining to apply § 1441(b) to allow a resident defendant to remove a case before a plaintiff even has a chance to serve him based on both congressional intent and this rule of thumb).

¹¹⁴ *Oxendine*, 236 F. Supp. 2d at 526.

¹¹⁵ *Hunter Douglas Inc. v. Sheet Metal Workers Int'l Ass'n Local 159*, 714 F.2d 342, 345 (4th Cir. 1983) (citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936)). According to at least one court, a case may be remanded under this principle upon the timely motion of a plaintiff who did not have sufficient opportunity to effect service on a forum defendant before removal. *Hoskinson v. Alza Corp.*, No. 2:09-cv-03449-GEB-GGH, 2010 U.S. Dist. LEXIS 80839, at *4 (E.D. Cal. June 30, 2010).

¹¹⁶ 305 U.S. 534, 541 (1939).

¹¹⁷ See, e.g., *Pecherski v. General Motors Corp.*, 636 F.2d 1156, 1160-61 (8th Cir. 1981) ("[S]ection 1441(b) did not change the removal requirement set forth in *Pullman* that a court, in determining the propriety of removal based on diversity of citizenship, must consider all named defendants, regardless of service."); *Katz v. Costa Armatori, S.P.A.*, 718 F. Supp. 1508, 1512 (S.D. Fla. 1989) ("[T]he Supreme Court reaffirmed the need to determine removability from the complaint."); *Workman v. Nat'l Supafllu Sys., Inc.*, 676 F. Supp. 690, 692 (D.S.C. 1987) (pointing out that, in spite of the 1948 amendments to § 1441(b), "numerous courts continue to adhere to the rule in *Pullman*").

¹¹⁸ *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 297 (4th Cir. 2008) (quoting *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995)) (internal modification omitted).

“[r]emoval based on diversity jurisdiction is intended to protect out-of-state defendants from possible prejudices in state court,”¹¹⁹ a view reaffirmed by this nation’s highest court in 2005.¹²⁰ Logically, the imperative for this kind of protection evaporates “in cases where the defendant is a citizen of the state in which the case is brought,”¹²¹ the sole situation targeted by the Home-State Defendant Rule. So depicted, invocation of this creed to bar removal by any resident defendant, whether served or unserved, coheres with the aims ascribed to the individuals, including that famously charming justice,¹²² who wove the myth and constructed the reality of diversity jurisdiction in Antebellum America.¹²³

III. WHO WINS?

A. *Relevant Interpretive Paradigm*

According to “well-established principles of statutory construction,”¹²⁴ the dissection of a statutory section commences with the relevant provision’s explicit terms.¹²⁵ With due obedience accorded to the old rules of English grammar,¹²⁶ the familiar semantic

¹¹⁹ *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 940 (9th Cir. 2006).

¹²⁰ *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553-54 (2005) (“The complete diversity requirement is not mandated by the Constitution, or by the plain text of § 1332(a). The Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants.”) (citation omitted).

¹²¹ *Lively*, 456 F.3d at 940.

¹²² See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 3-4 (1996) (describing John Marshall’s personality).

¹²³ *Hoskinson v. Alza Corp.*, No. 2:09-cv-03449-GEB-GGH, 2010 U.S. Dist. LEXIS 80839, at *45 (E.D. Cal. June 30, 2010) (canvassing the jurisprudence dissected throughout this piece). The term “Antebellum America” refers to the United States prior to the Civil War. *Antebellum Period: Facts, Information and Articles About the Antebellum Period, Before the Civil War*, HISTORYNET, <http://www.historynet.com/antebellum-period> (last visited Oct. 2, 2018).

¹²⁴ *Gozlon-Peretz v. United States*, 498 U.S. 395, 410 (1991).

¹²⁵ See, e.g., *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 235, 243, 245-46 (2010) (discussing the statutory context of 11 U.S.C. § 526 (2010)); *Holloway v. United States*, 526 U.S. 1, 6 (1999) (providing a “commonsense reading of the carjacking statute”); *United States v. Turkette*, 452 U.S. 576, 593 (1981) (reviewing the legislative history of Title IX); *In re Blixseth*, 684 F.3d 865, 870 (9th Cir. 2012) (same); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009) (reviewing 47 U.S.C. § 227(b)(2)).

¹²⁶ Cf. *United States v. Ron Pair Enters.*, 489 U.S. 235, 235, 241-42 (1989) (finding

rules¹²⁷ and the common syntactic canons¹²⁸ are first utilized, the language of the relevant provision and the terms and the structure of the pertinent section and statute parsed. Unsurprisingly, these canons' utility invariably vacillates; each one's pertinence subject to a series of related contextual tenets,¹²⁹ most especially the whole text canon.¹³⁰ In

support for a particular reading in the statute's "grammatical structure"); *DiFiore v. Am. Airlines, Inc.*, 561 F. Supp. 2d 131, 135 (D. Mass. 2008) (applying basic rules of grammar and syntax to interpret of the statutory term "service charge").

¹²⁷ See, e.g., *State v. C.M.*, 154 So. 3d 1177, 1180 (Fl. Ct. App. 2015) (defining the "Omitted-Case Canon" as "meaning 'nothing is to be added to what the text states or reasonably implies'"); *Int'l Bhd. of Elec. Workers, Local #111 v. Pub. Serv. Co. of Colorado*, 773 F.3d 1100, 1108 (10th Cir. 2014) ("Under . . . [the ordinary-meaning] canon, if context indicates that words bear a technical legal meaning, they are to be understood in that sense."); *United States v. Porter*, 745 F.3d 1035 (10th Cir. 2014) (referring to "the so-called 'general-terms canon' that holds that [g]eneral terms are to be given their general meaning").

¹²⁸ See, e.g., *City of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 262 (1992) ("[A] proviso can only operate within the reach of the principal provision it modifies," encapsulating the proviso canon); *Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1105-06 (11th Cir. 2015) ("Ordinarily, the scope of a subpart is limited to that subpart."); *United States v. Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012) (defining the "last-antecedent" canon as "say[ing] that a qualification in the last term of a series should be confined to that term" and the "series modifier canon" as "provid[ing] that a modifier at the beginning or end of a series of terms modifies all the terms"); *In re Sanders*, 551 F.3d 397, 399 (6th Cir. 2008) (describing the nearest reasonable referent canon, closely related to the last antecedent canon, as requiring that "[w]hen a word such as a pronoun points back to an antecedent or some other referent, the true referent should generally be the closest appropriate word").

¹²⁹ *United States v. Cattleman*, 134 S. Ct. 1405, 1417 (2014) (Scalia, J., concurring in part and concurring in judgment) ("[Per] the presumption of consistent usage . . . a term generally means the same thing each time it is used."); *RadLax Gateway Hotel LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 2071 (2012) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 230 (2008) ("The ejusdem generis canon provides that, where a seemingly broad clause constitutes a residual phrase, it must be controlled by, and defined with reference to, the 'enumerated categories . . . which are recited just before it,' so that the clause encompasses only objects similar in nature."); *D.C. v. Heller*, 554 U.S. 570, 577 (2008) ("[A] prefatory clause [may be used] to resolve an ambiguity in the operative clause."); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute.'"); *Sachs v. Republic of Argentina*, 737 F.3d 584, 598 n.13 (9th Cir. 2013) (citing for support to "the harmonious reading canon," "the provisions of a text should be interpreted in a way that renders them compatible, not contradictory," and "the associated words canon," "associated words bear on one another's meaning"); *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 733 (D.C. Cir. 2005); *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1204 (10th Cir. 2015) ("[C]ourts should consider statutory and regulatory text as a whole.").

this first stage of a most “holistic endeavor,”¹³¹ ambiguity and plainness are divined via these varied tools, reference perpetually made “to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”¹³² In other words, even in the most stringent forms of textual interpretation, statutory milieu matters, for “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”¹³³ Overall, reflecting an interpretive ethic anchored to philological concords,¹³⁴ this schematic relies on such contextual and textual evidence¹³⁵ and looks to the statute’s overarching architecture for clarification and circumstantial reference.¹³⁶

If this process yields a single denotation and connotation,¹³⁷ the provision in question is unambiguous and plain,¹³⁸ usually controlling

¹³⁰ SCALIA & GARNER, *supra* note 99, at 167.

¹³¹ *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

¹³² *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also, e.g., L.S. Starrett Co. v. FERC*, 650 F.3d 19, 25-26 (1st Cir. 2011) (“If we conclude that the ‘plain language of the statute, standing alone, is ambiguous,’ the next step is to ‘ask whether this ambiguity can be resolved by looking to the specific context in which [the] language is used, and the broader context of the statute as a whole.’”).

¹³³ *United Sav. Ass’n of Tex.*, 484 U.S. at 371 (citation omitted); *see also, e.g., Roberts v. Sea-Land Servs. Inc.*, 566 U.S. 93, 101 (2012) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”).

¹³⁴ *See, e.g., United States v. Schurtz*, 510 F.3d 1242, 1244 (10th Cir. 2007) (favoring “straightforward interpretation of the provision [that] makes sense of the language” despite the fact that “the linguistic conventions of the regulation are not entirely consistent”); *United States v. Jackson*, 480 F.3d 1014, 1019 (9th Cir. 2007) (relying on more than “our linguistic conventions to understand Congress’s intentions”).

¹³⁵ *United States v. Campbell*, 798 F. Supp. 2d 293, 302 (D.D.C. 2011).

¹³⁶ *United States v. McLemore*, 28 F.3d 1160, 1162 (11th Cir. 1994); *see also, e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”).

¹³⁷ *See In re Asher*, 488 B.R. 58, 64 (Bankr. E.D.N.Y. 2013) (“[A]mbiguity only exists so long as several plausible interpretations of the same statutory text, specific and different in substance, can be advanced.”).

¹³⁸ *Yates v. United States*, 135 S. Ct. 1074, 1081, 1097 (2015).

unless one of five exceptions applies.¹³⁹ Practically speaking, therefore, the Court's purportedly (and inconsistent)¹⁴⁰ textualist approach to federal statutes has often incorporated more than "the recitation of plain meaning mantras and conclusory canons of interpretation,"¹⁴¹ and found reason to moderate syntax's otherwise acerbic formalism.¹⁴² In the interpretive exercise subject to these tenets, plain and unambiguous meaning arises from more than just the enacted text contextually illuminated,¹⁴³ courts relying on "ordinary, contemporary, common meaning[s],"¹⁴⁴ "obvious and dominating general purpose[s],"¹⁴⁵ and crucial terms' "placement[s]."¹⁴⁶

¹³⁹ See Amir Shachmurove, *Purchasing Claims and Changing Votes: Establishing "Cause" under Rule 3018(a)*, 89 AM. BANKR. L.J. 514, 530-31 (2015) (thusly encapsulating this quintet: "(1) 'an absurd result' would follow; (2) 'there is clear evidence of contrary intent' in reliable extrinsic sources; (3) no plausible purpose would be attained; (4) an unanticipated clerical or typographical error is at fault; 14 or (5) a conflict with a constitutional provision would result").

¹⁴⁰ Compare *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 365-66 (2007) (employing both traditional textualism and a form of purposivism), with *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 444 (2007) (opting for a more stringent textualism).

¹⁴¹ The Honorable Thomas F. Waldron & Neil M. Berman, *Principles of Statutory Interpretation: A Judicial Perspective After Two years of BAPCPA*, 81 AM. BANKR. L.J. 195, 210 (2007).

¹⁴² See, e.g., *Limited, Inc. v. Comm'r*, 286 F.3d 324, 334 (6th Cir. 2002) (contrasting "a plain language interpretation" with a disfavored "hypertechnical analysis"); *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999) ("We do not look at one word or term in isolation, but instead we look to the entire statutory context.").

¹⁴³ See, e.g., *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1867) ("The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. . . . [T]he words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."); *New Castle Cty. v. Hartford Accounting & Indem. Co.*, 970 F.2d 1267, 1270 (3d Cir. 1992) ("The question is not whether there is an ambiguity in the metaphysical sense, but whether the language has only one reasonable meaning when construed, not in a hypertechnical fashion, but in an ordinary, common sense manner.").

¹⁴⁴ *Perrin v. United States*, 444 U.S. 37, 42 (1979); see also, e.g., *United States v. Haun*, 494 F.3d 1006, 1009 (11th Cir. 2007) (quoting *Perrin*, 444 U.S. at 42).

¹⁴⁵ *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 350 (5th Cir. 1968); see also *United States v. DuBose*, 598 F.3d 726, 731 (11th Cir. 2010) (citing *Miller*, 394 F.2d at 350).

¹⁴⁶ *Bailey v. United States*, 516 U.S. 137, 145 (1995), *superseded by statute, unrelated purpose of citation, as stated in Welch v. United States*, 136 S. Ct. 1257, 1267 (2016).

B. Application

As noted above, when construing any statute, a court must begin with the actually ratified text,¹⁴⁷ empowered to depart from its written meaning only where “the most extraordinary showing of contrary intentions in the legislative history” can be found.¹⁴⁸ Thusly bound, “courts must presume that a legislature says in a statute what it means and means in a statute what it says there,”¹⁴⁹ and so long as the statutory language “is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of . . . [any] court[] is to enforce it according to its term.”¹⁵⁰ In the course of this lexicographical exercise, “[a] fundamental canon of statutory construction directs . . . [courts] to interpret [the pertinent] words according to their ordinary meaning.”¹⁵¹

At first blush, § 1441(b)(2) almost beguiles with its lucidity. In the law’s cumbersome patter, it states: “A civil action otherwise removable solely on the basis of . . . [diversity] jurisdiction . . . may not be removed if any of the parties in interest *properly joined and served* as defendants is a citizen of the State in which such action is brought.”¹⁵² By application of the last-antecedent canon,¹⁵³ the language proscribes removal only by (1) parties in interest, (2) who have been “properly joined and served” (3) as “defendants” and (4) claim citizenship in “the State in which . . . [the state court] action [had been] brought.” Thusly read, precisely as the United States Court of Appeals for the Third Circuit concluded in *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, in the summer of 2018,¹⁵⁴ § 1441(b)(2) “precludes removal on the basis of in-state citizenship only when” any resident defendant has been “properly joined and served.”¹⁵⁵ By virtue of its utilization of “any” — “[A]ll words and provisions of statutes are intended to have

¹⁴⁷ *United States v. Moreno*, 727 F.3d 255, 259 (3d Cir. 2013) (“In any case involving statutory interpretation, we must begin with the statutory text. ‘[W]hen the statute’s language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms. An interpretation is absurd when it defies rationality or renders the statute nonsensical and superfluous’” (citations omitted)).

¹⁴⁸ *McMaster v. E. Armored Servs., Inc.*, 780 F.3d 167, 170 (3d Cir. 2015).

¹⁴⁹ *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62 (2002).

¹⁵⁰ *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

¹⁵¹ *Hawthorne v. Mac Adjustments, Inc.*, 140 F.3d 1367, 1371 (11th Cir. 1998).

¹⁵² 28 U.S.C. § 1441(b)(2) (2018).

¹⁵³ SCALIA & GARNER, *supra* note 99, at 144-46.

¹⁵⁴ 902 F.3d 147 (3d Cir. 2018).

¹⁵⁵ *Id.* at 152.

meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous¹⁵⁶ — the statute assumes at least one party has been served, barring removal only if no party in interest had been served prior to a case’s attempted removal.¹⁵⁷

So often ignored, this clause forms the key to bridging the judiciary’s seemingly intractable divide over the Home-State Defendant Rule’s proper construction. This language entered the U.S. Code in 1948, at a time in which Congress, one court astutely noted, “could not possibly have foreseen the development of electronic docket monitoring.”¹⁵⁸ Guided by no Nostradamus,¹⁵⁹ a Congress, at best, only familiar with telephones and telegraphs lacked any inkling that future technology would enable forum defendants to electronically monitor state court dockets and thereby learn of a pleading’s filing long before formal service and joinder took place.¹⁶⁰ In the pre-internet era, but for such formal notice, countless defendants would have remained unaware of their potential legal exposure, “proper[] join[der] and serv[ice]” practically indistinguishable from actual knowledge. In contrast, “under modern procedural regimes and with modern technology, defendants — particularly repeat defendants with the resources to monitor dockets throughout the country — now can win such a race because they can obtain notice of litigation before service is executed.”¹⁶¹ In this newly digitized world, “the core function of service” of process — “to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objection”¹⁶² — can now be achieved before any actual service has taken place. As such, to the extent that a resident defendant has obtained notice of a pending lawsuit prior to formal service, that party

¹⁵⁶ *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985).

¹⁵⁷ *Howard v. Genentech, Inc.*, No. 12-11153-DPW, 2013 U.S. Dist. LEXIS 185810, at *1617 (D. Mass. Feb. 21, 2013).

¹⁵⁸ *Sullivan v. Novartis Pharms. Corp.*, 575 F. Supp. 2d 640, 646 (D.N.J. 2008).

¹⁵⁹ Nostradamus was a “French astrologer and physician [who] published collections of prophecies that earned him fame and a loyal following during his lifetime.” *Nostradamus*, HISTORY (Nov. 9, 2009), <https://www.history.com/topics/paranormal/nostradamus>.

¹⁶⁰ *Sullivan*, 575 F. Supp. 2d at 645.

¹⁶¹ *Howard*, 2013 U.S. Dist. LEXIS 185810, at *26.

¹⁶² *Henderson v. United States*, 517 U.S. 654, 671-72 (1996); *see also, e.g.*, *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 353 (1999) (characterizing the historic function of service of process as the official trigger for responsive action by an individual or entity named defendant).

is functionally indistinguishable from the resident defendant, “properly joined and served,” of 1948.¹⁶³ In light of this congruence, nothing but a hyper-literal construction that modern case law disfavors can justify a formalistic dissection of § 1441’s crabbed text. That a resident defendant has gained full cognizance of a pending lawsuit should suffice, a state of knowledge once only indisputably provided by formal service of process. For a legislature focused on meaningful notice, the very minimum that due process commands, only formal process promised likely success in a pre-digital world. Today, such procedure is invariably cumbersome and likely unnecessary, emitting but the stale odor of historicity.

Significantly, despite the want of any illuminating legislative history,¹⁶⁴ this result accords with the general juridical understanding of removal jurisdiction at the time of § 1441(b)(2)’s adoption. In *Pullman*’s telling dicta, the Court mused, “the fact that the resident defendant has not been served with process does not justify removal by the non-resident defendant” but also recognized “that the non-resident defendant may be prejudiced because his co-defendant may not be served.”¹⁶⁵ “It is always open to the non-resident defendant,” the Court added, “to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove.”¹⁶⁶ Based on these admittedly unbinding asides, the Court’s focus at the time of the Home-State Defendant Rule’s codification was upon “gamesmanship by plaintiffs in the joinder of forum defendants whom plaintiffs ultimately did not intend to pursue.”¹⁶⁷

If so, “the purpose of the ‘properly joined and served’ language” appears clear: to avert plaintiffs from defeating removal through improper joinder of a forum defendant.¹⁶⁸ By opting to leave the

¹⁶³ *Sullivan*, 575 F. Supp. 2d at 645.

¹⁶⁴ *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 153 (3d Cir. 2018) (“The legislative history provides no guidance.”); *Sullivan*, 575 F. Supp. 2d at 644 (discussing how the original removal statute did not include the “properly joined and served” limitation).

¹⁶⁵ *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939).

¹⁶⁶ *Id.*

¹⁶⁷ *Howard*, 2013 U.S. Dist. LEXIS 185810, at *21.

¹⁶⁸ *See Sullivan*, 575 F. Supp. 2d at 645 (“Congress appears to have added the language only to prevent the then concrete and pervasive problem of improper joinder.”); *see also Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003) (“The purpose of the ‘joined and served’ requirement is to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve.”).

relevant text of § 1441 largely consistent since 1948, despite repeated amendments to the U.S. Code's removal regime, Congress must be said to have endorsed this understanding of the Home-State Defendant Rule as designed "to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve."¹⁶⁹ To read § 1441(b)(2) as empowering defendants to "damage the plaintiff's rightful position as 'master of his or her complaint,'" in spite of such parties' knowledge of a local suit's existence, both expands this rule beyond these explicitly circumscribed bounds and encourages defendants to engage in the same exploitative conduct damned in *Pullman* and its progeny. And it does so all for the sake of augmenting federal jurisdiction in defiance of another equally venerable precept: "[T]hat federal jurisdiction is very limited."¹⁷⁰ After all, "[t]he policy" embedded in "the successive acts of Congress regulating the jurisdiction of federal courts" has always "call[ed] for . . . [their] strict construction."¹⁷¹

CONCLUSION

As dramatists and comedians often quip, lawyers specialize in mining ambiguity from the quotidian. Few glancing at § 1441(b)(2) would discern an abstruse quiddity behind its plain reference to "properly joined and served" defendants. Many would, one suspects, guffaw at the possibility. Nevertheless, perhaps because one word's denotation and connotation rarely perfectly cohere in any language,¹⁷²

¹⁶⁹ *Sullivan*, 575 F. Supp. 2d at 645.

¹⁷⁰ *Id.* at 647; *see also* *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) (limiting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966), to pendent jurisdiction for this reason); *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 77 (1941) (identifying "[d]ue regard for the rightful independence of state governments" as "the guiding Congressional policy" that courts must honor "[i]n defining the boundaries of diversity jurisdiction").

¹⁷¹ *Healy v. Ratta*, 292 U.S. 263, 268-70 (1934); *see also, e.g., Indianapolis*, 314 U.S. at 76 ("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."); *cf. Henry Friendly, The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 483-84 (1928) (questioning the modern utility of diversity jurisdiction).

¹⁷² *Cf. DANIEL KAHNEMAN, THINKING, FAST AND SLOW* 82 (2011) (describing the concept of suppressed ambiguity thusly: "like the word *bank*, the adjective *stubborn* is ambiguous and will be interpreted in a way that makes it coherent with the context"); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three*

a judicial majority has refused to endorse what seemingly plain meaning compels, and a minority has retorted with mingled consternation and disbelief. While all three extant approaches possess distinct benefits, the textualist one, as refined in this piece, most perfectly coheres with the law's modern interpretive schematic. More than any other route, it not only aligns with the text's essential thrust but also its specific and general context in the manner most faithful to the customs of both lexicographers and legislators. Regardless of these advantages, however, until the Court edifies or Congress amends, this row will linger, a tempting invitation for the devious and the dilatory alike.

Objections and Responses, 82 NW. U. L. REV. 226, 230 (1988) ("Words are only meaningless marks on paper or random sounds in the air until we posit an intelligence which selected and arranged them.").