

ABSURD OVERLAP: SNAP REMOVAL AND THE RULE OF
UNANIMITY

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INTRODUCTION

American media and pop culture are filled with depictions of crafty lawyers using strained loopholes to escape the consequences of a rule.¹ Despite this cultural fixation on narrowly avoiding liability, real courts all across the judicial system rule against parties who attempt to manufacture favorable results in this way.² These rulings stand for the principle that, during the administration of justice, the purpose and end result of a law are often equally as important as its bare terms in writing.³ However, recent decisions at the federal appellate level concerning “snap removal”⁴ have elevated form over function.⁵

Snap removal employs “a literalist approach” to the statute governing the procedural mechanism for removing cases from state court to federal court.⁶ In a typical removal scenario, defendants sued in state court would have the option to be heard in federal court instead, given that certain conditions are satisfied.⁷ As discussed below, snap removal essentially allows the defendants to forego a condition that would bar removal if they can file before the plaintiff formally notifies them of the lawsuit.⁸ This practice of

1. As an example in contemporary fiction, a side character in NBC's *The Good Place* tries to use his legal expertise to argue his way into a better afterlife using an “obscure precedent” from an old, forgotten rulebook. See *The Good Place: Michael's Gambit* (NBC television broadcast Jan. 19, 2017).

2. See, e.g., *United States v. Fontaine*, 697 F.3d 221, 228 (3d Cir. 2012) (first quoting *Landstar Express Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009); then quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)) (“An interpretation is absurd when it ‘defies rationality,’ or renders the statute ‘nonsensical and superfluous.’”); *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 338 (3d Cir. 2006) (“A basic tenet of statutory construction is that courts should interpret a law to avoid absurd or bizarre results.”).

3. See *Fontaine*, 697 F.3d at 228.

4. Here, snap removal is in quotes because the term is neither universal nor official. Some courts refer to it by name, while others refer to it in the abstract. Compare *Tex. Brine Co. v. Am. Arb. Ass'n*, 955 F.3d 482, 485 (5th Cir. 2020) (referring to snap removal directly), with *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705 (2d Cir. 2019) (approving of snap removal without naming it). Hereinafter, snap removal is referred to without quotations.

5. See discussion *infra* Part I.C.

6. See Jeffrey W. Stempel, Thomas O. Main & David McClure, *Snap Removal: Concept; Cause; Cacophony; and Cure*, 72 BAYLOR L. REV. 423, 440 (2020).

7. See, e.g., *id.* at 436.

8. See discussion *infra* Part I.B.

removing a case before being served with formal process—essentially an act of gamesmanship of the civil procedure system—has gained appellate support over the past two years, making its application valid and uniform across three circuits.⁹ Now that the practice has garnered traction, federal courts moving forward will not only have to adopt it as a valid rule, but also grapple with its application when it inevitably collides with other laws and procedures.¹⁰ In particular, the rule of unanimity, requiring that all codefendants consent to a removal,¹¹ could present a unique challenge in snap removal cases.¹²

This Note argues that, when applied in conjunction with the rule of unanimity, the reasoning underlying snap removal's approval will present a contradictory and ultimately absurd result in certain factual scenarios. Therefore, the potential future applications of snap removal lend credence to its disapproval in the present. Part I discusses the function and rationale of snap removal, and Part II does the same for the unanimity rule. Part III analyzes the effects of these two concepts colliding in the same case using hypothetical examples and analogous case law. It further argues that simultaneous application of both snap removal and the rule of unanimity can give sole discretion over removal to the forum defendant, standing in stark contrast to the relevant statutory scheme. Finally, Part IV argues that courts should rely on this contradiction to dismiss snap removal as an absurd interpretation of the removal statutes. Lastly, it compares the merits of this approach to proposed legislative solutions.

I. SNAP REMOVAL: FUNCTION, ORIGIN, AND TREATMENT

Analyzing snap removal and the rule of unanimity together would not be possible without a robust discussion of each individually. This Part sets the foundation for analyzing snap removal by first

9. See *Tex. Brine Co.*, 955 F.3d at 485; *Gibbons*, 919 F.3d at 705; *Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 153-54 (3d Cir. 2018).

10. See *infra* Part III.A-C.

11. 28 U.S.C. § 1446(b)(2)(A).

12. See *infra* Part III.A-C.

looking at regular removal and then moving on to snap removal's function, history, and relevant scholarship.

A. Removal Generally

Understanding the rights and limitations of removal itself is necessary to understand snap removal. The defendant's ability to remove to federal court a case that originated in state court comes from statutory authority.¹³ Section 1441 of Title 28 of the United States Code provides that the defendant in a civil action may remove the case if the federal court would have "original jurisdiction," meaning the plaintiff could have brought the suit in federal court initially.¹⁴ Therefore, removal overrides the plaintiff's choice of forum.¹⁵

Section 1441 places limitations on this ability to override, categorized by the type of subject matter jurisdiction the case would have in federal court.¹⁶ Most notably, § 1441(b)(2) sets a key limitation on removing cases brought under diversity of citizenship: the forum-defendant rule.¹⁷ District courts have the authority to hear cases involving parties that are citizens of two different states under 28 U.S.C. § 1332(a), otherwise known as diversity cases.¹⁸ The rationale for providing diversity jurisdiction is that the out-of-state party may be subject to prejudice from the decision makers native to the state simply for being a foreign person or entity.¹⁹ The forum-defendant rule restricts removal of diversity cases by barring defendants from going to federal court when any of the defendants are citizens of the state in which the action is brought.²⁰ This rule

13. See § 1441(a).

14. See *id.*; see also 14C JOAN E. STEINMAN, MARY KAY KANE & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE § 3721 (4th ed. 2020).

15. See STEINMAN ET AL., *supra* note 14, § 3721.

16. See 28 U.S.C. § 1441(b)-(f). Federal courts are courts of limited subject matter jurisdiction, and only certain categories of cases will be heard. See *id.* §§ 1331, 1332. Most notably, these categories include cases centered around questions of federal law and diversity of citizenship cases. See *id.*

17. See *id.* § 1441(b)(2); see also STEINMAN ET AL., *supra* note 14, § 3723.

18. 28 U.S.C. § 1332(a). A minimum amount in controversy of more than \$75,000 is also required under this statute, but this requirement is not germane to any of the concepts discussed in this Note. See *id.*

19. 13E ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3601 (3d ed. 2020).

20. 28 U.S.C. § 1441(b)(2).

emphasizes diversity citizenship's purpose of avoiding bias; if the defendants are from the state where the action is brought, they need not fear bias against them based on citizenship.²¹

B. Snap Removal Functionally

Defendants using snap removal hone in on a particular phrase in § 1441(b)(2) to avoid the effects of the forum-defendant rule.²² The rule states that actions “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.”²³ Crafty forum defendants have taken this to mean that the forum-defendant rule does not apply to them when they have not been formally served with notice of the suit by the plaintiff, as required by the Federal Rules of Civil Procedure.²⁴ Now referred to as snap removal, removing a case before being served is the subject of considerable litigation and scholarly review.²⁵

While not immediately intuitive, in practice, snap removal falls into a few factually distinct categories. The first scenario, referred to as a “race-to-the-courthouse” by leading scholars, requires the defendant to have ample resources.²⁶ Defendants with the ability to do so, especially larger corporations, can monitor public court dockets for suits filed against them and attempt to file for removal before the plaintiff has a chance to serve them.²⁷ The second scenario arises when the plaintiff reaches out to the defendant with a prenotice request, such as a request for waiver of the notice requirement.²⁸ This gives the defendant an opportunity to remove before the formal notice can be effectuated.²⁹ The last scenario occurs when the plaintiff serves codefendants at different times.³⁰

21. See Stempel et al., *supra* note 6, at 432-33.

22. See *id.* at 441.

23. § 1441(b)(2) (emphasis added).

24. FED. R. CIV. P. 4(c).

25. See, e.g., *Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 153-54 (3d Cir. 2018); Stempel et al., *supra* note 6, at 452-53.

26. Stempel et al., *supra* note 6, at 446-47.

27. *Id.*

28. See *id.* at 447-48.

29. See *id.*

30. See *id.*

If the plaintiff serves a nonforum defendant, that nonforum defendant can alert a forum codefendant of the lawsuit, allowing the forum codefendant to remove the case before being served.³¹ In all of these circumstances, the essential factor is that the forum defendant receives some kind of informal notice before being served.³²

C. *The Snap Removal Movement*

The relevant language in § 1441(b)(2) has been in place since 1948, but the practice of snap removal did not proliferate until the mid-2000s.³³ The ability to monitor dockets efficiently and communicate instantly, two key ingredients in the snap removal recipe, were not feasible until the age of the internet.³⁴ Snap removal received a push toward widespread acceptance in 2001, when the Sixth Circuit Court of Appeals gave it passing approval in a footnote, though this was dicta.³⁵ It gained popularity around 2007, creating a split between district courts about whether to accept or reject the practice as a statutory interpretation question.³⁶

Coming down on the rejection side of the split, *Vivas v. Boeing Co.* led the charge against snap removal when it began to gain steam around 2007.³⁷ Following the defendant's attempt at snap removal, the plaintiffs moved to remand back to Illinois state court.³⁸ Holding in favor of the plaintiffs' motion to remand, the district court reasoned that snap removal runs counter to the legislative intent of the forum-defendant rule.³⁹ As the court specified, the language intends to curb fraudulent joinder of codefendants, "prevent[ing] 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

31. *See id.*

32. *See id.*

33. *Id.* at 451.

34. *See id.* at 482.

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

36. *Compare* Ethington v. Gen. Elec. Co., 575 F. Supp. 2d 855, 864 (N.D. Ohio 2008) (rejecting snap removal), *with* Watanabe v. Lankford, 684 F. Supp. 2d 1210, 1219 (D. Haw. 2010) (holding in favor of snap removal).

37. 486 F. Supp. 2d 726, 734-35 (N.D. Ill. 2007).

38. *Id.* at 728.

39. *See id.* at 734-35.

even serve.”⁴⁰ Therefore, the defendant’s snap removal, and the practice more generally, frustrated Congress’s intent and defeated a plain meaning interpretation.⁴¹ Other district courts rejecting the practice have taken up similar lines of reasoning.⁴²

Standing in opposition to the *Vivas* approach, *North v. Precision Airmotive Corp.* is indicative of the rulings in favor of snap removal.⁴³ *North* presents the typical “race-to-the-courthouse” case, in which the defendant receives notice by monitoring state dockets.⁴⁴ While ruling in favor of the snap-removing defendants, the court reasoned that the contrary result created by snap removal does not lead to an “absurd” outcome and thus should not defeat the statute’s plain meaning.⁴⁵ Further, the court recognized that Congress likely did not anticipate this result, but nonetheless put the onus on the legislature to fix it.⁴⁶

This district-level split remained unsettled until well over a decade later, when the Third Circuit Court of Appeals took up the plain meaning approach in 2018.⁴⁷ As the first appellate court to formally uphold snap removal,⁴⁸ the Third Circuit reiterated lower court authority in *Encompass Insurance Co. v. Stone Mansion Restaurant, Inc.*⁴⁹ On review of the district court’s decision, the circuit court denied a motion to remand that turned on the propriety of snap removal, citing the “unambiguous” wording of the operative statute to approve the practice.⁵⁰ After *Encompass Insurance Co.*’s emphasis on a lack of “an absurd or bizarre result,”⁵¹ the Second

40. *Id.* at 734 (quoting *Holmstrom v. Harad*, No. 05C2714, 2005 WL 1950672, at *2 (N.D. Ill. Aug. 11, 2005)).

41. *See id.*

42. *See, e.g., Lone Mountain Ranch, LLC v. Santa Fe Gold Corp.*, 988 F. Supp. 2d 1263, 1267 (D.N.M. 2013); *Perez v. Forest Lab’ys, Inc.*, 902 F. Supp. 2d 1238, 1246 (E.D. Mo. 2012).

43. *Compare Vivas*, at 734-35, with 600 F. Supp. 2d 1263, 1269-70 (M.D. Fla. 2009).

44. *See North*, 600 F. Supp. 2d at 1270.

45. *See id.* at 1269-70.

46. *See id.* at 1270.

47. *See Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 153-54 (3d Cir. 2018).

48. This is notwithstanding the *McCall v. Scott* footnote dicta. *See* 239 F.3d 808, 813 n.2 (6th Cir. 2001).

49. *See* 902 F.3d at 153-54 (“[T]his result may be peculiar in that it allows [the defendant] to use preservice machinations to remove a case that it otherwise could not; however, the outcome is not so outlandish as to constitute an absurd or bizarre result.”).

50. *Id.* at 152.

51. *Id.* at 153-54.

Circuit followed suit a year later in 2019, citing *Encompass Insurance Co.* and its reasoning while deciding *Gibbons v. Bristol-Myers Squibb Co.*⁵² Similarly, in 2020 the Fifth Circuit became the latest court of appeals to assent to snap removal, incorporating the previous two decisions into its own opinion in *Texas Brine Co. v. American Arbitration Ass'n.*⁵³ With three appellate circuits creating the same precedent and none deciding the opposite, the judiciary has been trending overwhelmingly in the direction of approving snap removal under a textualist approach.⁵⁴

D. Scholarly Critique

Although the judicial trend has shifted considerably towards approval, academics have taken a much more critical approach to snap removal.⁵⁵ In fact, the discourse surrounding the practice focuses on who should get rid of it and how, not whether it *should* be done away with in the first place.⁵⁶ This may be unsurprising, given that the judicial opinions giving force to snap removal often contain a call to action for Congress to nullify it.⁵⁷

Accordingly, a prevailing argument outside the judiciary is that snap removal should be cut off by legislation.⁵⁸ Arthur Hellman and his colleagues identify why this approach could be the most effective option.⁵⁹ At the time of their writing, the appellate circuits had not yet ruled on snap removal, and they reasoned that a solution was

52. 919 F.3d 699, 706 (2d Cir. 2019) (“[W]hile it might seem anomalous to permit a defendant sued in its home state to remove a diversity action, the language of the statute cannot be simply brushed aside.”).

53. 955 F.3d 482, 487 (5th Cir. 2020) (“The plain-language reading of the forum-defendant rule as applied in this case does not justify a court’s attempt to revise the statute.”).

54. *See id.* at 485; *Gibbons*, 919 F.3d at 705; *Encompass Ins. Co.*, 902 F.3d at 153-54; *McCall*, 239 F.3d at 813 n.2.

55. *See, e.g.*, Stempel et al., *supra* note 6, at 423-24; Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 CIN. L. REV. 541, 541-42 (2018); Arthur Hellman, Lonny Hoffman, Thomas D. Rowe, Jr., Joan Steinman & Georgene Vairo, *Neutralizing the Stratagem of “Snap Removal”: A Proposed Amendment to the Judicial Code*, 9 FED. CTS. L. REV. 103, 103-04 (2016).

56. *See, e.g.*, Nannery, *supra* note 55, at 541-42; Hellman et al., *supra* note 55, at 103-04.

57. *See* North v. Precision Airmotive Corp., 600 F. Supp. 2d 1263, 1270 (M.D. Fla. 2009) (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 565 (2005)) (“[I]f Congress intends a different result, ‘it is up to Congress rather than the courts to fix it.’”).

58. *See, e.g.*, Hellman et al., *supra* note 55, at 108.

59. *See id.* at 108-09.

unlikely to come from the Supreme Court because no circuit split existed.⁶⁰ Although the case law has changed in the years following, this remains true because the circuits are uniformly in agreement so far.⁶¹ If anything, this unanimity would further emphasize their call for the legislature to intervene. Additionally, Hellman and his colleagues propose a legislative fix designed to block snap removal and change nothing else.⁶² This is important because, as the case law points out, the “properly joined and served” language serves a valid function that Congress intended to carry out.⁶³ Hellman and his colleagues propose an amendment that adds a specific prohibition on snap removal, leaving the rest of the operative statutes untouched.⁶⁴ Jeffrey Stempel and his colleagues propose a solution with similar intentions by simply deleting the “and served” portion of the statute.⁶⁵

In addition to legislative fixes, Valerie Nannery proposes options at the state level to curb instances of snap removal until a more definitive end can be achieved.⁶⁶ Specifically, Nannery lauds New Jersey’s state court approach of reducing the lag time between when a plaintiff can file suit and serve the defendant.⁶⁷ However, this puts the burden on plaintiffs to avoid snap removal more than it resolves the underlying controversy,⁶⁸ as it merely minimizes the effects while waiting for the ultimate solution. Therefore, it appears widely accepted in the academic sphere that the legislature should intervene, but how that intervention should take form remains debated.⁶⁹

60. *See id.* at 106-07.

61. *See supra* note 54 and accompanying text.

62. *See* Hellman et al., *supra* note 55, at 108-10.

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

64. *See* Hellman et al., *supra* note 55, at 110.

65. *See* Stempel et al., *supra* note 6, at 493.

66. *See* Nannery, *supra* note 55, at 583-84.

67. *Id.*

68. *See id.*

69. *See, e.g., id.* at 575-85; Stempel et al., *supra* note 6, at 492-93; Hellman et al., *supra* note 55, at 108-10.

II. THE RULE OF UNANIMITY

Before evaluating snap removal and the unanimity rule in conjunction, a primer on the latter is necessary. This Part gives a brief summary of the function and purpose of the statutory rule.

A. *Unanimity in Practice*

In a typical removal situation, all defendants in the case must consent to the removal for it to be effective, otherwise known as the rule of unanimity.⁷⁰ When the decision to remove is not unanimous, a motion to remand the case back to state court is appropriate.⁷¹ Deriving from 28 U.S.C. § 1446, this principle appears simple on its face.⁷² However, multiple factors can potentially complicate its application, requiring a more robust understanding of its purpose and judicial treatment.⁷³

As a practical note in the backdrop of removal more generally, defendants favor federal courts to state courts in most cases.⁷⁴ Plaintiffs tend to sue corporations on account of their deeper pockets, and corporate defendants tend to want the uniformity and consistency offered by federal courts.⁷⁵ Further, this is no mere preference; federal courts are consistently more favorable to defendants than state courts.⁷⁶ Therefore, removal can be pivotal to the outcome of a case.⁷⁷ However, this reality also means that

70. 28 U.S.C. § 1446(b)(2)(A); see also STEINMAN ET AL., *supra* note 14, § 3730.

71. See STEINMAN ET AL., *supra* note 14, § 3730.

72. See 28 U.S.C. § 1446(b)(2)(A).

73. See Jayne S. Ressler, *Removing Removal's Unanimity Rule*, 50 HOUS. L. REV. 1391, 1396-98 (2013) (highlighting some of the difficulties of unanimity while ultimately arguing for its repeal).

74. See *id.* at 1398-400.

75. See *id.*

76. See *id.* at 1398 (“[T]here is a widespread perception among attorneys, litigants, and policymakers’ alike that federal court provides defendants with a more favorable forum than it does plaintiffs.” (quoting Thomas H. Cohen, *Do Federal and State Courts Differ in How They Handle Civil Trial Litigation: A Portrait of Civil Trials in State and Federal District Courts* 2-3 (2d Ann. Conf. on Empirical Legal Stud. Paper, 2006), <http://ssrn.com/abstract=912691> [<https://perma.cc/DBZ7-6QHW>])).

77. The American Tort Reform Foundation regularly publishes an incredibly biased report of “judicial hellholes,” ranking the top ten court systems that tend to rule for plaintiffs over

usually all codefendants want to remove and will be in agreement on that issue.⁷⁸ This is not to say that defendants never have a reason to refuse removal; rather, defendants are simply more likely to gain from removal.⁷⁹ Accordingly, in many cases the *plaintiff* is trying to enforce the unanimity rule in order to defeat removal (usually in conjunction with a timing requirement) rather than a nonconsenting defendant moving to remand.⁸⁰

Likely owing in some part to the fact that plaintiffs often seek to enforce the rule, federal courts have created exceptions in favor of retaining jurisdiction when codefendants have not been served prior to the filing of removal.⁸¹ *Cachet Residential Builders v. Gemini Insurance Co.* illustrates this point well.⁸² In that case, Cachet filed suit against codefendants Gemini and Cromwell.⁸³ Cachet improperly served the defendants by sending notice via private carrier rather than through the post office, and Gemini subsequently removed without the consent of Cromwell.⁸⁴ The court approved this removal, reasoning that the rule of unanimity only requires formally served defendants to consent.⁸⁵ Thus, the plaintiff's own neglect—or under a more cynical view, their crafty attempt at gamesmanship—could not prevent the defendants from removing.⁸⁶ However, as Wright and Miller's treatise, *Federal Practice and Procedure*, makes clear, this principle is subject to caveats.⁸⁷

defendants. See AM. TORT REFORM FOUND., *Judicial Hellholes: 2019/2020*, 1 (2019), https://www.judicialhellholes.org/wp-content/uploads/2019/12/ATRA_JH19_layout_FINAL.pdf [<https://perma.cc/SRZ7-VXEZ>]. The listing is consistently filled with state courts. See *id.*

78. See Ressler, *supra* note 73, at 1398-400.

79. See *id.*

80. See, e.g., *Cachet Residential Builders, Inc. v. Gemini Ins. Co.*, 547 F. Supp. 2d 1028, 1029 (D. Ariz. 2007).

81. See *id.* at 1032; see also STEINMAN ET AL., *supra* note 14, § 3730.

82. See *Cachet Residential Builders*, 547 F. Supp. 2d at 1032.

83. *Id.* at 1029.

84. *Id.* at 1029-31.

85. See *id.* at 1031-32.

86. See *id.*

87. See STEINMAN ET AL., *supra* note 14, § 3730. Prior to 1948, the presence of a resident defendant blocked removal regardless of whether the resident defendant was served. See *id.* (“[T]he presence in the action of a resident defendant was a bar to removal when jurisdiction was based on diversity of citizenship, and that defect was not avoided or cured simply by a failure to complete service of process on the resident defendant.”).

Federal courts created two important boundaries while allowing removal in a case like *Cachet*.⁸⁸ The first requires an explanation of why any codefendants failed to consent to the otherwise unanimous removal,⁸⁹ and this has been widely adopted across the circuits because it applies in all cases that implicate the rule of unanimity.⁹⁰ A notice of removal requires, in all cases, “a short and plain statement of the grounds for removal” generally,⁹¹ and the courts have extended this idea to include an explanation for why removal is valid in the absence of unanimous consent.⁹² A notice of removal is facially deficient without these explanations, and there must be convincing reasons to pass muster.⁹³ Therefore, the absence of a defendant’s consent would need to be explained by invoking a permitted exception.⁹⁴ Some district courts have implemented a second boundary specific to unserved defendants like the ones in *Cachet*.⁹⁵ Specifically, these courts require the unserved defendants to consent to the removal if they received actual notice of the lawsuit despite not receiving formal service of process.⁹⁶ This barrier to non-unanimous removal could have been critical for snap removal cases, but the 2011 amendments to the removal statute (as discussed below) and a Supreme Court ruling likely eroded the basis for its application.⁹⁷

88. *See id.*; *Cachet Residential Builders*, 547 F. Supp. 2d at 1029-32.

89. *See* STEINMAN ET AL., *supra* note 14, § 3730.

90. *See, e.g.*, *Lewis v. Rego Co.*, 757 F.2d 66, 68-69 (3d Cir. 1985); *N. Ill. Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 272-73 (7th Cir. 1982).

91. 28 U.S.C. § 1446(a).

92. *See N. Ill. Gas Co.*, 676 F.2d at 272-73.

93. *See Lewis*, 757 F.2d at 68-69.

94. *See id.*

95. *See* STEINMAN ET AL., *supra* note 14, § 3730; *Teitelbaum v. Soloski*, 843 F. Supp. 614, 615 (C.D. Cal. 1994) (creating an actual notice standard, where defendants are required to join in the notice for removal if they receive any copy of the complaint); *Schwartz v. FHP Int'l Corp.*, 947 F. Supp. 1354, 1363-64 (D. Ariz. 1996) (implementing the framework established in *Teitelbaum*).

96. *See Teitelbaum*, 843 F. Supp. at 615.

97. *See* *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 356 (1999) (implicitly overruling *Schwartz* and *Teitelbaum* by ruling on the service and timing requirements that formed the basis of both cases); *Ressler*, *supra* note 73, at 1405-06.

B. Purpose and Origin

The rule of unanimity began as a Supreme Court ruling in 1900 rather than a statutory provision.⁹⁸ In *Chicago, Rock Island & Pacific Railway v. Martin*, the Supreme Court held that all parties must join in the petition for removal.⁹⁹ Interestingly, the Court rooted its decision to enforce this requirement in the plaintiff's ability to choose how to litigate its case, the fear being that non-consenting defendants would manage to split the case across forums.¹⁰⁰ The Court reasoned that the plaintiff's choice to join the defendants was vital,¹⁰¹ and the Court's decision cemented the unanimity rule in this precedential form for over a century.¹⁰² Congress codified certain parts of the unanimity rule in 2011 through an amendment to 28 U.S.C. § 1446, largely in response to split authority on the timing requirements for removal as they relate to unanimity.¹⁰³ Importantly, this amendment included the language of § 1441, aligning the statute with previous interpretations of the rule as well as paralleling it with the basis for snap removal.¹⁰⁴

III. UNANIMITY AND SNAP REMOVAL

This Part argues that, in cases in which both issues arise, the rule of unanimity and snap removal should be considered as concurrent, rather than separate, issues. Under this approach, using the same line of reasoning for both issues will produce a result that is antithetical to the purpose of the forum-defendant rule.

98. *Chi., Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 247-48 (1900).

99. *Id.* at 248.

100. *See id.*

101. *See id.*

102. *See* Ressler, *supra* note 73, at 1405-06.

103. *See id.*

104. *See* *Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 153-54 (3d Cir. 2018); *Cachet Residential Builders, Inc. v. Gemini Ins. Co.*, 547 F. Supp. 2d 1028, 1029 (D. Ariz. 2007). *Compare* 28 U.S.C. § 1446(b)(2)(A), *with* § 1441(b)(2).

A. *Logical Consistency*

Insight into the purpose behind the language in § 1446 shows why the statute should be interpreted similarly to § 1441.¹⁰⁵ Even before the 2011 amendment regarding the unanimity rule, an accepted principle of the rule's application was—and still is—that fraudulently joined or “nominal” defendants need not consent to the removal for it to be effective.¹⁰⁶ Allowing the unanimity rule to control in these situations would facilitate gamesmanship on the plaintiff's part; tangentially related defendants with no reason to consent or participate could be joined for the sole purpose of keeping the action in state court.¹⁰⁷ When moving the rule from precedential to statutory authority, Congress drafted the legislation in a way that would keep this consideration and other contours of the unanimity rule in place, seeking to change only the discrepancies in timing requirements.¹⁰⁸ As mentioned in the above discussion of § 1441, Congress previously used the language of “properly joined and served” to curtail the exact same problem for diversity removal generally.¹⁰⁹ Taking all of this together, the purpose must be the same for including the language in both statutes, especially given that the relevant portions of § 1446 mainly formalize what existed prior to its adoption.¹¹⁰

With this similarity in mind, the only intellectually consistent approach would be to apply the same interpretation to both §§ 1441 and 1446. In fact, now that some appellate circuits have weighed in on snap removal, the courts have taken to doing so to each statute independently.¹¹¹ With respect to § 1446, the Tenth Circuit adopted

105. Compare § 1446(b)(2)(A), and *Sheldon v. Khanal*, 502 F. App'x 765, 770 (10th Cir. 2012), with § 1441(b)(2), and *Encompass Ins. Co.*, 902 F.3d at 153-54.

106. See *Brady v. Lovelace Health Plan*, 504 F. Supp. 2d 1170, 1173 (D.N.M. 2007) (“First, a nominal or formal party is not required to join in the petition for removal.... Second, a defendant who has not yet been served with process is not required to join.” (citations omitted)).

107. See *C.L.B. v. Frye*, 469 F. Supp. 2d 1115, 1116 n.5 (M.D. Fla. 2006) (“Prior to service, a defendant has no obligation to respond to a complaint or make a decision regarding removal.”).

108. See *Ressler*, *supra* note 73, at 1402-06.

109. See discussion *supra* Part II.B.

110. See *Ressler*, *supra* note 73, at 1402-06.

111. Compare *Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 153-54 (3d Cir. 2018), with *Sheldon v. Khanal*, 502 F. App'x 765, 770 (10th Cir. 2012).

the textualist approach in a case that did not involve the forum-defendant rule, citing “the clear statutory language requiring only *served* defendants to consent to removal.”¹¹² As discussed above, this is essentially the same argument that the Second, Third, and Fifth Circuits used to hold in favor of snap removal.¹¹³

Therefore, courts condoning snap removal tactics would have little to no leeway to give the unanimity rule different treatment than the forum-defendant rule under the same factual scenario. Facially, this appears simple and uncontroversial, but the potential applications of this line of reasoning could have unintuitive and contradictory results, as shown by the hypotheticals discussed below.¹¹⁴

It is important to recognize that the 2011 amendments to the removal statutes and the subsequent textualist interpretations of those statutes have created significant overlap between snap removal and the rule of unanimity.¹¹⁵ Interpreting the rule of unanimity to apply only to served defendants allows nonforum defendants to evade the forum-defendant rule through their own initiative by removing the case before service can be made on the forum defendant.¹¹⁶ In practice, this is fundamentally no different from snap removal, when the forum defendant itself can initiate the removal process before being served.¹¹⁷ Therefore, any distinction between the two scenarios is merely formalistic. The Wright and Miller treatise refers to the practice as snap removal when initiated by the forum defendant, and it refers to the rule of unanimity when removal is initiated by the nonforum defendant.¹¹⁸ For the sake of clarity, this Note takes the same approach of referring to the practices separately.

112. See *Sheldon*, 502 F. App'x at 770.

113. See discussion *supra* Part I.C.

114. See discussion *infra* Part III.B.

115. Compare 28 U.S.C. § 1446(b)(2)(A), and *Sheldon*, 502 F. App'x at 770, with § 1441(b)(2), and *Encompass Ins. Co.*, 902 F.3d at 153-54.

116. See STEINMAN ET AL., *supra* note 14, § 3723.

117. Compare *id.*, with Stempel et al., *supra* note 6, at 439-42.

118. Compare STEINMAN ET AL., *supra* note 14, § 3730, with *id.* § 3723.

B. Textualist Applications of Unanimity to Snap Removal Cases

Simple hypotheticals best illustrate the interaction between snap removal and the rule of unanimity, but a few assumptions should be noted first. When using the textualist reasoning supplied by appellate courts for interpreting §§ 1441 and 1446,¹¹⁹ the logical result in a case involving nonconsenting defendants and snap removal should vary based on the configuration of the parties. Inherent to the factual situation that would give rise to these issues simultaneously, there must be at least two defendants,¹²⁰ and at least one of those defendants must be an unserved forum defendant.¹²¹ For the sake of argument, the number of codefendants in each of the following examples is limited to two, as adding more would unnecessarily complicate the analysis without creating additional insight. Further, assume in each example that the defendant who does not remove the case also does not consent to removal.

In the first configuration (Scenario 1), the plaintiff files suit in Virginia state court and does not serve Defendant A or Defendant B with formal service of process before one of the defendants files for removal to federal court. This would most likely result from a “race-to-the-courthouse” scenario with docket monitoring.¹²² Regardless of the citizenship of the defendants, both Defendant A and Defendant B can remove the case without consent from the other party, as neither one has been served.¹²³ Likewise, the forum-defendant rule could not be invoked because neither defendant has been served.¹²⁴

In the second configuration (Scenario 2), the plaintiff again files suit in Virginia state court. The plaintiff serves Defendant A, a citizen of Maryland, but does not yet serve Defendant B, a citizen of Virginia. Defendant A then removes the case to federal court before Defendant B is served. In this situation, Defendant B would be unable to effectively voice its lack of consent or assert the forum-

119. See *Encompass Ins. Co.*, 902 F.3d at 153-54; *Sheldon*, 502 F. App'x at 770.

120. See § 1446(b)(2)(A); see also STEINMAN ET AL., *supra* note 14, § 3730.

121. See Stempel et al., *supra* note 6, at 441-43.

122. See *id.* at 446-47.

123. See *id.* at 447-49.

124. See *supra* text accompanying notes 23-24.

defendant rule because it remains unserved as the forum defendant.¹²⁵

In a third and final configuration (Scenario 3), the plaintiff once again files suit in Virginia state court. The plaintiff similarly serves Defendant A, a citizen of Maryland, but does not yet serve Defendant B, a citizen of Virginia. Defendant B then removes the case to federal court before being served. The major distinction here from Scenario 2 is that the forum defendant is the one removing the case to federal court. This situation is particularly likely because one of the ways snap removal occurs is when the served defendant informs the unserved defendant of the impending lawsuit.¹²⁶ As in Scenarios 1 and 2, the forum-defendant rule cannot be invoked because the Virginia citizen has not been served.¹²⁷ Unlike Scenarios 1 and 2, Defendant A would be able to block Defendant B's removal by not consenting, as Defendant A has already been served.¹²⁸

C. *Evaluation of Textualist Outcomes*

The necessity of consent or lack thereof in the above examples largely illustrates the impact of the unanimity rule on served and unserved defendants. However, emphasizing the ability of one defendant to cause a procedural defect in each of these situations begins to highlight the contradictory outcomes that these interpretations could create in tandem.

Compare Scenario 1 with Scenario 3. Further, assume in both situations that the nonforum defendant has a reason to want to keep the case in state court. In Scenario 3, in which consent is required, the nonforum defendant is free to exercise its ability to deny removal, giving effect to its own litigation strategy as well as the plaintiff's choice of forum. In Scenario 1, the nonforum defendant is at the whim of the forum defendant. The forum defendant can remove at its sole discretion, so long as it acts before service can be made. The particularly puzzling component here is that the

125. For an example of a similar scenario, see *Watanabe v. Lankford*, 684 F. Supp. 2d 1210, 1212-14 (D. Haw. 2010).

126. See Stempel et al., *supra* note 6, at 447-48.

127. See *supra* text accompanying notes 23-24.

128. See Stempel et al., *supra* note 6, at 443.

forum-defendant rule exists to exempt the forum defendant from the ability to choose,¹²⁹ and yet, the overlap between snap removal and the rule of unanimity can create a factual situation where the forum defendant is the *only* party with the ability to choose between federal and state court.¹³⁰ Therefore, the current state of the snap removal and rule of unanimity doctrines could give rise to outcomes that create the exact opposite effect of the operative statutes' purpose and overall scheme.¹³¹

This outcome conflicts not only with the thrust of the forum-defendant rule, but with the purpose of the individual phrase being interpreted in these cases as well. As previously noted, the "properly joined and served" language attempts to exempt from both statutes any attempt at nominal or fraudulent joinder designed to defeat removal.¹³² For the rule of unanimity specifically, this was mainly to codify the federal judiciary's history of relaxing the rule where necessary.¹³³ In the examples described above, a relaxation of the rule of unanimity is neither necessary nor helpful to limit the application of nominal or fraudulent joinder.¹³⁴ In fact, a nominally or fraudulently joined codefendant would have little reason to oppose removal in any circumstance, as the defendant has no good faith basis to believe it will be held liable and, therefore, no reason to be engaged in the litigation at all.¹³⁵

Admittedly, this contradiction between practice and purpose would require the perfect storm of inputs to be brought directly before a federal court: (1) diversity jurisdiction; (2) a snap-removing forum defendant; and most importantly, (3) a nonconsenting, non-forum defendant. However, the fact that this anomaly impacts a smaller number of defendants presents no reason to view it as any less important of a consideration; the impact on an individual or entity is not diminished by the fact that there are only a small

129. See 28 U.S.C. § 1441(b)(2); STEINMAN ET AL., *supra* note 14, § 3723.

130. See *supra* Part III.B.

131. See 28 U.S.C. §§ 1441(b)(2), 1446(b)(2)(A); STEINMAN ET AL., *supra* note 14, §§ 3723, 3730.

132. 28 U.S.C. §§ 1441(b)(2), 1446(b)(2)(A); see discussion *supra* Part I.C.

133. See Ressler, *supra* note 73, at 1402-05.

134. Recall that both defendants in the given scenario are joined in good faith, neither nominally nor fraudulently. See discussion *supra* Part III.B.

135. See *C.L.B. v. Frye*, 469 F. Supp. 2d 1115, 1116 n.5 (M.D. Fla. 2006).

number of those individuals or entities. Additionally, the snap removal and rule of unanimity doctrines are ultimately questions of statutory interpretation.¹³⁶ In that context, it is possible, beneficial, and arguably necessary to look beyond the instant case and determine what the intended interpretation could mean for future cases under different facts.¹³⁷

Although the aforementioned case may be narrow in scope, a similar case has been decided: *Watanabe v. Lankford*.¹³⁸ The plaintiff in *Watanabe* was a citizen of Japan, and codefendants Lankford and Terminix were citizens of Hawaii and Delaware, respectively.¹³⁹ *Watanabe* brought the claim on the basis of diversity jurisdiction in Hawaii state court, where the case would have remained if the forum-defendant rule was observed, due to Lankford's citizenship.¹⁴⁰ Instead, defendant Terminix snap-removed the case to the District of Hawaii before Lankford could be served.¹⁴¹ Applying the rule of unanimity's judicially created apathy toward unserved defendants, the court held that Terminix could unilaterally remove the case without Lankford's consent and without implicating the forum-defendant rule.¹⁴² Notice that these facts mimic Scenario 2 of the examples discussed in Part III.B, clearly falling on the side of not requiring consent to removal through either the pre-2011 judge-made doctrine or the post-2011 statutory provisions.¹⁴³ The potential perfect storm of inputs seems incredibly plausible based on the facts of *Watanabe*.¹⁴⁴ In fact, *Watanabe* would have been the exact aforementioned case had the plaintiff brought the claim in Delaware's state courts instead of Hawaii's—that is, ignoring the other potential problems with doing so, such as venue and personal jurisdiction.¹⁴⁵ Now that snap removal has received broader

136. See, e.g., *Tex. Brine Co. v. Am. Arb. Ass'n*, 955 F.3d 482, 485 (5th Cir. 2020); *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705 (2d Cir. 2019).

137. See *Watanabe v. Lankford*, 684 F. Supp. 2d 1210, 1216 (D. Haw. 2010).

138. See *id.* at 1212-14.

139. *Id.* at 1214.

140. See *id.* at 1215-16.

141. *Id.* at 1214-15.

142. See *id.* at 1215-20.

143. See *id.*; see also discussion *supra* Part III.B.

144. See 684 F. Supp. 2d at 1211-14.

145. See *id.*; discussion *supra* Part III.C.

approval from multiple appellate circuits,¹⁴⁶ a lawsuit generating the inconsistency noted here could be on the near horizon.

IV. A NONLEGISLATIVE SOLUTION

Commentators predominantly call for legislative reform of the operative statutes to resolve the “snap removal loophole.”¹⁴⁷ This Part argues that the potential for a case outcome such as the one identified in the preceding Part III.C could increase the likelihood of a judicial fix rather than a legislative one.

A. Proposed Judicial Approach

Highlighting an inconsistency between practice and purpose resolves nothing in isolation; a change in the current snap removal doctrine can be achieved only if that inconsistency can be given meaning through the courts’ interpretative framework.¹⁴⁸ Given that snap removal and the rule of unanimity must both be analyzed through the same “properly joined and served” language,¹⁴⁹ the general rules of statutory interpretation should be noted. As the snap removal cases themselves make clear, federal courts must first attempt a “plain meaning” approach when interpreting legislation, giving effect to the natural meaning of the words of the individual statute while keeping in mind the overall statutory scheme.¹⁵⁰

However, the courts depart from the plain meaning approach if it creates a result that is absurd.¹⁵¹ Absurd results tend to fall into a handful of categories: (1) creating conflict between provisions of the same statute, (2) rendering a law unenforceable, (3) opposing clear legislative history, or (4) defeating the purpose of a general statutory scheme.¹⁵² The district court split on snap removal illustrates how different jurisdictions produce varying answers to the

146. *See supra* note 54 and accompanying text.

147. *See, e.g.,* Nannery, *supra* note 55, at 575.

148. *See id.* at 570-71.

149. *See* Encompass Ins. Co. v. Stone Mansion Rest., Inc., 902 F.3d 147, 153-54 (3d Cir. 2018); Sheldon v. Khanal, 502 F. App’x 765, 770 (10th Cir. 2012).

150. *See* Watanabe v. Lankford, 684 F. Supp. 2d 1210, 1216 (D. Haw. 2010).

151. *See, e.g., id.*

152. *Id.*

same question: whether or not evading the forum-defendant rule through lack of service is an absurd result.¹⁵³ Although a number of courts have determined that snap removal is absurd on its own,¹⁵⁴ the previously noted inconsistency created through the overlap with the rule of unanimity further tips the scales in favor of snap removal being an absurd result.

Allowing snap removal in the contradictory scenarios from Part III.B “thwart[s] the purpose of the over-all statutory scheme,”¹⁵⁵ creating an absurd result. The forum-defendant rule divests a resident defendant of its ability to remove a case;¹⁵⁶ the rule of unanimity ensures that nonresident codefendants have equal power to consent to removal.¹⁵⁷ In both cases, Congress included the specific language of “properly joined and served” to negate a plaintiff’s ability to affect either of those purposes in bad faith.¹⁵⁸ In contrast to this scheme, the prevailing interpretation of this language can give a forum defendant *sole* discretion over removal, at least when both codefendants are joined in good faith but not served.¹⁵⁹ When viewed together, the overlap between snap removal and the rule of unanimity creates an absurd result that would not exist otherwise. In essence, it thwarts the broader purpose of two statutory rules with one blow. Thus, the proposed approach adds further support to the position taken by disapproving district courts: snap removal creates an absurd result as a matter of statutory interpretation.¹⁶⁰

Those opposed to this approach would likely cite the reasoning provided by the appellate circuits: the result of the interpretation being outside the bounds of what Congress intended does not inherently create an absurd outcome.¹⁶¹ However, defeating the purpose of a statutory scheme *is* an absurd result as a matter of

153. Compare *id.* at 1218-19, with *Vivas v. Boeing Co.*, 486 F. Supp. 2d 726, 734-35 (N.D. Ill. 2007).

154. See, e.g., *Vivas*, 486 F. Supp. 2d at 734-35.

155. See *Watanabe*, 684 F. Supp. 2d at 1216 (quoting *United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1012 (9th Cir. 2001)).

156. See 28 U.S.C. § 1441(b)(2).

157. See § 1446(b)(2)(A).

158. See *Ressler*, *supra* note 73, at 1397-98.

159. See discussion *supra* Part III.C.

160. See, e.g., *Vivas v. Boeing Co.*, 486 F. Supp. 2d 726, 734-35 (N.D. Ill. 2007).

161. See *supra* note 54 and accompanying text.

interpretation.¹⁶² Through the contradiction described above, the statutory scheme surrounding the forum-defendant rule has not only been defeated, it has been twisted to the exact opposite of its purpose.¹⁶³ The overlap between snap removal and the rule of unanimity can empower a forum defendant to unilaterally decide whether a case will be heard in federal court; yet, the purpose of the statutory scheme is to inhibit the defendant's ability to be in federal court at all.¹⁶⁴ This outcome exceeds simply being contrary to congressional intent and extends into the territory of absurd.

B. Comparison to Other Approaches

Taking a judicial approach provides an additional and immediate level of efficacy not present in the legislative approaches suggested by other scholars.¹⁶⁵ Namely, it ensures a degree of reliability.¹⁶⁶ Appellate circuits adopting this approach going forward could create a circuit split with the current circuits approving snap removal.¹⁶⁷ This would set the stage for the Supreme Court to weigh in on the issue directly, potentially creating a uniform precedent that would hopefully align the fragmented district courts regardless of the outcome.¹⁶⁸ Of course, the legislative approaches to reforming snap removal supersede any courts' decisions on the matter, but the debate over the propriety of snap removal has continued for nearly two decades with no action from Congress.¹⁶⁹ The judicial approach presents an immediate and necessary opportunity to clarify the courts' procedural mechanisms without waiting on legislation.

Notwithstanding the probability of such a solution arriving, proponents of the legislative approach tout its expediency and finality

162. See *Watanabe v. Lankford*, 684 F. Supp. 2d 1210, 1216 (D. Haw. 2010).

163. See *Nannery*, *supra* note 55, at 550-56.

164. See 28 U.S.C. § 1441(b)(2).

165. Stempel et al. indicate that legislation may be a secondary choice in the absence of Supreme Court authority. See Stempel et al., *supra* note 6, at 430.

166. See generally *Nannery*, *supra* note 55, at 575 ("While the current statute's text and history can be and has been read to not permit removal of diversity cases if no defendant has been served ... courts continue to reach different conclusions.").

167. See *Hellman et al.*, *supra* note 55, at 106-07.

168. See *id.*

169. See Stempel et al., *supra* note 6, at 450-52.

compared to a judicial fix.¹⁷⁰ However, a judicial approach could be preferable, not just a second-best option,¹⁷¹ despite what relevant scholarship would seem to suggest.¹⁷² Admittedly, adjusting the statutory language could eliminate the interpretation question of snap removal altogether.¹⁷³ However, the unintended consequences of adjusting legislation could create new problems.¹⁷⁴ As the 2011 removal statute amendments show, newfound ambiguity in modified legislation can create unforeseen outcomes.¹⁷⁵ If Congress were to create another open question by adding language to the removal statutes, this ongoing debate on snap removal could begin anew with a different loophole or workaround.¹⁷⁶ In contrast, binding precedent declaring snap removal inconsistent with the existing statute would have the simple effect of cutting off the problem without adjusting the source material.¹⁷⁷ Therefore, the judiciary's ability to craft a narrow ruling presents an avenue to create a tailored and specific solution without the potential pitfalls of a legislative fix.

CONCLUSION

Appellate circuits have started weighing in on the district court split regarding the propriety of snap removal, uniformly in favor of the practice so far.¹⁷⁸ However, courts and commentators alike oppose the existence of the statutory loophole to the forum-defendant rule, even when they feel compelled to approve of it through judicial interpretation.¹⁷⁹ The rule of unanimity overlaps with snap

170. *See, e.g.*, Hellman et al., *supra* note 55, at 108.

171. *See* discussion *supra* Part IV.A.

172. *See* Hellman et al., *supra* note 55, at 108.

173. *See id.* at 106-08.

174. *See generally* Ressler, *supra* note 73, at 1406-09 (discussing the unintended consequences of the Federal Courts Jurisdiction and Venue Clarification Act of 2011).

175. *See id.*

176. *Cf. id.* at 1401-07 (explaining that the 2011 attempt to resolve ambiguity regarding removal timing, for example, effectively created statutory opportunities for unfair strategic behavior).

177. *See* Stempel et al., *supra* note 6, at 430, 476-83.

178. *See* discussion *supra* Part I.C.

179. *See* discussion *supra* Part I.D.

removal significantly and presents an opportunity to align jurisprudence with that negative sentiment. Through a specific factual scenario implicating both doctrines, contradictions can be drawn between their application and the purposes of their statutory schemes.¹⁸⁰ These contradictions create an absurd result that lends further credence to a federal court's reasoning for departing from a plain meaning interpretation of the operative statutes. Reversing the appellate trend through this judicial interpretation approach provides an alternative to proposed legislative amendments, creating an immediate fix for a problem well within the purview of the federal courts.

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180. See discussion *supra* Part III.B.

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