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ACID RAIN: DETOXIFYING DIVERSITY JURISDICTION'S POISONOUS CYCLE

Baerett R. Nelson¹ and Gavyn Roedel

I. INTRODUCTION

Unless a federal court is enforcing the Constitution, they lack authority to create or abrogate state laws. Therefore, in civil court, if the dispute is over a state law, you will be in state court and vice versa. A dispute's governing law will be applied, while the "venue" is the court that presides over the issue. Oftentimes, a case or dispute has multiple courts that could exercise "concurrent" jurisdiction; plaintiffs may select any suitable court, usually filing in whichever forum is most convenient or advantageous for them. While state and federal courts always exercise jurisdiction over interpretation of their respective laws, they may also concurrent jurisdiction through diversity jurisdiction.

When federal courts serve as venues under diversity jurisdiction, they lack authority to create state policy or common law; despite

1 "We have all drunk from wells we did not dig, and warmed ourselves by fires we did not build." (fmr. US Solicitor Gen. and BYU President, Rex E. Lee quoting Deut. 6.11). This author would like to offer sincerest gratitude to those who have most contributed to this paper. In the words of Abraham Lincoln, "Everything I am, or hope to be, I owe to my angel mother." Likewise, this author owes "everything" his mother, to Barbara Nelson. This author is similarly grateful for countless conversations and counsel on the topics of this paper provided by his father, the Hon. Ryan D. Nelson. Finally, Professor E. Farish Percy of the University of Mississippi School of Law was instrumental in instilling passion and understanding through not only her articles, but her personal critique and guidance of this paper as well. These authors are grateful for her generosity and indebted to her.

federal adjudication, state law still governs. Accordingly, legal outcomes of diversity courts must be substantively the same as in state venues. This creates an “anomalous position” for federal judges who ordinarily must “abstain from state law question[s]” but must predict a state tribunal’s ruling if a case is brought under diversity jurisdiction.² This carve-out of states’ absolute authority to preside over their laws was first adopted through the Judiciary Act of 1789 and is now codified in 28 U.S.C. § 1332.

The Court has determined that federal tribunals must maintain state substantive law and federal procedural law in diversity cases. These “procedural” differences between state and federal courts create inherent discrepancies, harmless and unavoidable sans total obliteration of diversity jurisdiction. However, “substantive” discrepancies also plague the judiciary. These contribute to deviation in rulings and the “legal outcome” of a case³. The latter cannot be tolerated. In *Erie* and *Guarantee Trust*, the Court directed inferior courts to eliminate “substantive” discrepancies. But despite this jurisprudence, diversity courts err far too often – failing to produce diversity outcomes that are authentic to their respective state supreme courts. This damage to state court legitimacy and autonomy calls into question the continued necessity of diversity jurisdiction. The scope of this paper contains neither an endorsement nor a rejection of diversity jurisdiction altogether. Rather, this debate is included to contextualize the current illness of diversity jurisdiction and emphasize how desperately it needs change to remain viable.

2 Dolores K Sloviter, *A Federal Judge Views Diversity Jurisdiction*, 78 Virginia Law Review 1671-87 (1992).

3 *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)
Guaranty Trust Co. v. York, 326 U.S. 99 (1945)

Federal courts produce incongruent rulings by misinterpreting state laws⁴. This incongruence contributes to gamesmanship over venue as parties seek or flee state rulings. Subsequent proceedings bloat federal dockets and overextend courts. Exhausted, diversity courts are more prone to mistakes – especially as they adjudicate outside their federal “wheelhouse.” Thus, the current state of diversity jurisdiction harms the judiciary through 1) forum gamesmanship, 2) excessive pleadings, 3) exhausted courts, and 4) altered legal outcomes.

The four core problems of diversity jurisdiction are cyclical, each one grows the latter. And this toxic cycle continues to worsen. Comprehensive reform is needed; both Congress and the judiciary must act in concert. This paper proposes five solutions to ensure comprehensive reform. The first three solutions come from Congress: 1) Congress must prevent the snap removal loophole in the Forum Defendant Rule. 2) Congress must explicitly provide courts with the permissive power to remand cases where dismissal of claims drops the amount in controversy below threshold. 3) The Legislature must award the judiciary greater latitude in staying, certifying, or repairing proceedings concerning novel or complex issues of state law.

Congressional intervention alone is insufficient to combat inadequacies in diversity jurisdiction. Therefore, federal tribunals must take advantage of these new statutory powers. After doing so, judicial action is required. 1) courts must recognize and apply the Procedural Misjoinder Doctrine. 2) courts should allow and give deference to post-removal damage stipulations when used as clarification.

4 See Sloviter, *id.* Referencing incongruent rulings in cases such as Memphis Dev. Found. V Factors ETC., INC 616 F “holding that Elvis Presley’s ‘right of publicity was not inheritable’) Cert. denied 449 US (1980), Factors etc., INC, 652 (2nd Cir. (Deferring to 6th Cir. Prediction of Tenn. Law despite that court’s admission that they were speculating. Cert. denied (1982) and the Tennessee Supreme Court’s rejection of the appellate decision as incorrect in *Elvis Presley v Crowell* and Tennessee’s legislature enacting a statute to ensure this interpretation. *Elvis Presley Int’l Memorial Foundation v. Crowell*, 733289 (Ct. App. of Tenn. 1987). *Elvis Presley Enterprises, Inc., v. City of Memphis*, 2182718 (U.S. District Court For The W.D. Tenn. Western Division 2020).

Cumulatively, these prescriptions equip courts with tests and tools to defend themselves, reduce forum shopping, filter the removal process, conserve their resources, and properly predicate legal outcomes.

II. BACKGROUND

A. History and Contemporary

The Constitution established diversity jurisdiction in Article III Sec. 2 with the intention of transforming federal courts into impartial conduits for certain types of cases. Legal scholars debate the full range of rationale behind this provision, but the standard theory is the intention to protect citizens against out-of-state bias. Section 2 addresses the principle of diversity jurisdiction, but it also enables federal question jurisdiction, (the other significant component of subject matter jurisdiction.) This, however, was not codified until 1875, while diversity jurisdiction was created by the very first judicial law Congress passed in 1789. Thus, for nearly a century, diversity jurisdiction was the first, and only extension of federal tribunal adjudication over state law proceedings.

Cautious of unbridled federal power, early legislatures leashed the supervision of state cases. Protective stop gates included the retention of concurrent state authority and requirement of litigant consent. Importantly, these federal forums were required to maintain state governing law, rather than federal statutes (the evolution of this principle is addressed more extensively later in this paper). These measures help avoid nullification of state court validity. Today, Congress has created additional measures as a response to both policy concerns and federalism concerns- these have diminished, but have not eliminated, diversity cases.

Modern policy makers must walk a tightrope between conflicting responsibilities: respecting states' rights but also intervening when "the State tribunals cannot be supposed to be impartial." One of the earliest concepts of diversity jurisdiction is found in Federalist No. 80. Here, Madison proposes concurrent jurisdiction between federal and state courts in litigation where "the State tribunals cannot be

supposed to be impartial and unbiased.”⁵ Though hotly debated⁶ and somewhat apathetically defended⁷, a desire to strengthen national identity and incubate interstate commerce⁸, as well as ensuring access to “unbiased” forums, ensured diversity jurisdiction’s inclusion in the Constitution.⁹

A broadly accepted rationale for diversity jurisdiction is to protect against out-of-state bias. But “...critics also often argue that even if... local bias exists... legal framework for diversity jurisdiction is not adequately tailored to address local bias concerns.” Diversity jurisdiction has been extended to circumstances absent the threat of out-of-state bias. Nevertheless, these two criteria (buttressed by

5 Alexander Hamilton, *Federalist 80*

6 With the gradual decline in state sovereignty and sectional identity, arguments that the decay of state bias eliminates the need for diversity jurisdiction have grown and persist today. The complexity of policing its use, its drain of judicial resources, contributions to forum shopping, federalism concerns, and the potential for incongruence in the application of State law, have stoked the fire for proponents of its abolition. At times, Congress, federal court advisory committees, and even Supreme Court justices have advocated for the abrogation or complete abolishment of diversity jurisdiction. *See generally*, The Report of the Federal Courts Study Committee April 2, 1990 (proposing the near-complete undoing of diversity jurisdiction.); *See also*, Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts 8-9 (Mar. & Sept. 1977) (endorsing H.R. 761, 95th Cong., 1st Sess. (1977), which proposed abolition of diversity jurisdiction)

7 Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 *Harvard Law Review*. 483, 484 (1928) “The most astounding thing, however, is not the vigor of the attack but the apathy of the defense.” “As to its cognizance of disputes between citizens of different states, I will not say it is a matter of much importance. Perhaps it might be left to the state courts.” Jonathan Elliot, *Debates on the adoption of the federal constitution in the convention held at Philadelphia in 1787* 48-50 (2nd ed. 1907).

8 Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 *Duke Law Journal* 267-322 (2019).

9 U.S. Const. art. III, § 2. “The [Federal] judicial Power shall extend to all Cases... between a State and Citizens of another State;”

caselaw and supplemental statutes,) gatekeep federal forum access. Requiring complete diversity of citizenship works to filter out cases where out-of-state bias is not an overt concern.

B. Jurisdiction

Federal courts are “of limited jurisdiction[.]”¹⁰ Policy and constitutional concerns demand that criteria exist to limit the courts’ power and to stem the drain of their resources. 28 U.S.C. §1441 and §1332 detail the two criteria for diversity jurisdiction, demanding that the amount in controversy exceeds \$75,000, and that the parties’ state citizenship is completely diverse.¹¹ The absence of either criteria destroys jurisdiction and results in the case being remanded to state court through party motion or sua sponte by the federal court¹². If these conditions are met, the plaintiff, as “Master of the Claim,” may initiate proceedings in federal court. Otherwise, a defendant may also “remove” state court proceedings to federal court. These conflicting rights over litigants’ choice of venue can lead to “venue gamesmanship,” “litigation tourism,” or “forum shopping.”

Forum shopping occurs when plaintiffs or defendants jockey for their preferred forum – Often by manipulating their pleadings.¹³ Because defendants covet the benefits of federal court, they are incentivized to remove state cases whenever possible. Naturally, plaintiffs work to frustrate defendant tactics and deprive them of jurisdiction.

10 Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978)

11 28 U.S.C. § 1441 and 1332.

12 Vanessa Wilkins; Victoria Pouncy; Annette Stapleton; And Shannon Stapleton v. Marissa Stapleton; And John Does 1-25, 617 (U.S. District Court, M.D. Fla., Orlando Division. 1987).

One judge expressed his outrage at litigant failure to properly allege federal jurisdiction, writing with “the desperate hope that perhaps—just perhaps—members of the Bar will read... this reminder: ‘[f]ederal courts are courts of limited jurisdiction!’ ... This failure to demonstrate even a passing familiarity with the jurisdictional requirements of the federal courts results in a waste of judicial resources that cannot continue.”

13 Neil Goldberg, *Fraudulent Misjoinder: Combating Artful Pleadings Designed to Destroy Diversity Jurisdiction*, For The Defense 12-17 (2015).

This battle leads to aggressive and even deceitful maneuvering by both parties; the beachhead being the two criteria.

Defendants often pursue removal due to federal courts' perceived benefits: chiefly, impartial federal judges, better odds at settling, and Federal (rather than state) Rules of Civil Procedure. These differences can shift the scales in a lawsuit, and plaintiffs will often work to thwart a removal if possible. Other perceived benefits stem from variations not between courts, but in attorney demographics and their subsequent familiarities with certain legal procedure:

Plaintiff attorneys represent individuals in 75% of the sample cases. Privately owned corporations comprised an additional 15% of plaintiff attorneys' cases, with other types of businesses making up most of the remainder. Defense attorneys primarily represent businesses, with insurance companies and publicly owned corporations each equaling 30% of the defense clients. Defense attorneys represent individual citizens in 9.4% of cases and state or local government in 3.2% of cases.¹⁴

Plaintiffs representing individuals may suppose sympathy from state judges and juries, while high-powered corporate defense attorneys frequently deal with the uniform federal courts and assume more favorable attitudes towards their massive clients. These demographics help rationalize why plaintiffs generally prefer state court and defendants may flee to federal jurisdiction when possible. The data reflects these perceptions: “[plaintiff] win rate in original diversity cases is 71%, but in removed diversity cases it is only 34%[.]”¹⁵

Choice of forum matters. Unfortunately, the importance of venue choice compels many defendants to remove litigation even when a claim fails to meet the jurisdictional criteria. Today, the sheer volume of resources drained by illegitimate diversity proceedings has become a significant problem. Original diversity jurisdiction produces about 36% of all private cases in federal district court dockets,

14 Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 14 *The American University Law Review* 369-452 (1992).

15 Kevin M Clermont, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 *Cornell Faculty Law Publications* 581-607 (1992).

and even more diversity cases are removed after initial filing in state court.¹⁶

III. KEY PROBLEMS

The first key problem is that of forum shopping. Forum shopping, gamesmanship, or “litigation tourism,” is when litigants fight over a case’s venue. Minor “jockeying” or posturing for preferable courts are part of the practice of law. It is not a travesty for lawyers to gravitate towards an equal, but preferential forum. However, when we see a constant tug of war over forums due to different applications of the same law, this becomes a problem.

To keep forum shopping in check, it is necessary to identify and minimize factors that stimulate it. *Erie* permits procedural differences as non-impactful on the legal outcome – these are tolerable and need not be eliminated. However, substantive differences between state and federal courts *do* impact the legal outcome. Distinguishing between the two is critical in healing diversity jurisdiction. Once we understand where differences in legal outcomes come from, we can better target them in our prescriptions. Federal civil procedure itself lends benefits to defendants more often than plaintiffs. Plaintiff attorneys more commonly represent individuals, while defense attorneys largely work for larger firms or public and incorporated companies.¹⁷

A. Confusion and Abuse of Courts

Litigants engaging in procedural duels have little regard for presiding judges who may get caught in the crossfire. Legal tactics have evolved through an arms race of abuse and when the dust has settled, massive legal fees and exhausted judges remain. Perhaps one of the most complex, and therefore prone to manipulation, general areas of law is the removal. Just as a home field advantage impacts rivalry

16 United States, *Judicial Business 2020*, United States Courts <https://www.uscourts.gov/statistics-reports/judicial-business-2020>.

17 *Wilkins v. Stapleton*

football games, familiar forums can provide parties with a slight edge in their legal skirmishes. Obviously, a game needs a field, and a court case needs a courtroom, but as much as fans lament poor or inconstant calls by refs, judge discrepancies or “bad calls” lead to much more than lost games or heckling. Attorneys are no dummies: they recognize and pursue the opportunity for incongruent legal outcomes or federal “*Erie* Guesses” which may favor their clients. This spurs forum shopping and fraudulent or excessive moves and procedural complexity.

Circuit and district splits are vulnerable to abuse by litigants which comes to the expense of judicial resources. By identifying areas of confusion, plaintiffs can increase their odds of remand, while defendants can chart a course straight into federal court. These confusing legal concepts should be clarified to reduce circuit splits.

B. Exhaustion of Judicial Resources

When plaintiffs prefer federal court, they simply file there. Defendants are unlikely to contest federal jurisdiction. Remands in these cases occur almost exclusively *sua sponte*. Most altercations over diversity jurisdiction follow removal by defendants. Evaluating jurisdiction has proved particularly challenging and subsequent circuit splits have emerged. Confusion and nonconformity over many niche areas of removal law have therefore confounded courts and depleted time on the part of both litigants and judges. Unfortunately, federal courts face daunting caseloads; they do not have time to waste.

Federal dockets are bloated.¹⁸ Even aside from the drain of removal proceedings, the federal judicial system is straining under the weight of massive caseloads and ill-furnished benches. The Founders wisely recognized the importance of evaluating lifetime tenured judges and structured the confirmation process with several failsafe measures. In the past, these floodgates have merely served as barriers against unsuitable candidates. But as the American population has grown and society has become more litigious, these barriers have impeded judicial capabilities. The result is judicial vacancies and a shrunken quantity of judges who must undertake an overwhelming amount of work.¹⁹

18 Sudhin Thanawala, *Wheels of justice slow at overloaded federal courts*, AP News (Sept. 27, 2015), <https://apnews.com/article/54175de3d735409ab99a2f10e872d58e>.

“California’s Eastern District, which covers a large swath of the state that includes Sacramento and Fresno, has had an unfilled judicial vacancy for nearly three years, and it has the same number of judicial positions — six — it had in 1978, according to the Administrative Office of the U.S. Courts... In the late 1990s, the median time for civil cases to go to trial in the district averaged 2 years and four months. From 2009 to 2014, that number jumped by more than a year. The median time to resolve criminal cases nearly doubled to an average of 13 months.” (

Also remarking: “The Judicial Conference of the United States, the national policy-making body for the federal courts, has recommended Congress double the number of judicial positions in the district.”

19 Tracey Tully, *Judges Juggle Over 2,700 Cases Each as Families Wait for Day in Court*, The New York Times (Mar. 17, 2021), <https://www.nytimes.com/2021/03/17/nyregion/federal-court-nj-judges.html>.

The federal district of New Jersey is considered one of the nation’s busiest. One third of its judicial seats are vacant and each seated judge has left with a pending caseload “well over three times that national average.” also quoting Professor Carl Tobias, a federal court scholar and professor at the University of Richmond School of Law stating that New Jersey’s judicial vacancies are “a bad situation and it’s been bad for a long time,” “And you compound it with a year of Covid, and it’s a worst-case scenario.” Craig Carpenito, formerly the State’s top federal prosecutor, criticizes the overload which forces “judges were working around the clock, and that’s not sustainable,” “... You’re walking out late at night and their cars are still there. They’re there on weekends.”

Increased politicization of judicial appointments is one catalyst for the growing suffocation of federal judges.²⁰ To some degree the sheer magnitude of their importance has always created political pressure for nominations.²¹ However, the degree of bitterness and contention stirred by contemporary appointees at all levels of the federal judiciary has never been so pronounced. Political pressure now makes appointing federal judges more strenuous²² and makes the creation of new courts a virtual political impossibility. Congressmen recognize this, and politicians and pundits across the aisle frequently bemoan how *their* candidates become political footballs. But when the shoe is on the other foot, they are often all too quick to

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- 20 In the 1980's it was not unusual for the confirmation of Justices to be unanimous. Sandra Day O'Connor (99-0) and Anthony Kennedy (97-0) faced little to no political opposition. *See generally*, How Politicized Judicial Nominations Polarize Attitudes Toward the Courts (Jon C. Rogowski and Andrew R. Stone, H.L.R. 2018)
- 21 The confirmation of John Marshall (who simultaneously served as US Secretary of State and the country's 4th Chief Supreme Court Justice,) was accompanied by significant legal turmoil. Due to his strong commitment to judicial restraint, Federalists and Anti-Federalists sparred over his nomination and entire courts were abolished in the wake of these disputes; compare the relative calm that followed with the rise in candidate scrutiny beginning with President Coolidge's appointment of Harlan Fiske Stone, the first Supreme Court appointee dragged before the Senate Judiciary Committee before his appointment in 1941. Nowadays even appellate appointees are grilled by members of the senate and votes typically fall strictly on party lines.
- 22 Despite this, President Trump was able to appoint a staggering 245 Federal judges due to support from a Republican Senate and the leadership of Senator Mitch McConnell.

assail the other party's appointees.²³ Even if all existing vacancies could be filled, Congress has failed to set up sufficient judgeships. The number of Circuit courts has also remained the same since 1891.²⁴

To relieve the exhausted judiciary, the Judicial Conference of the United States has suggested reform.²⁵ But, such legislation, though sorely needed, is likely too politically hot.²⁶ Debates over both the number and location of new judgeships would be heated and prolonged. The politics hindering the federal judicial deserve a complete and independent analysis, the specifics of which are outside the scope of this paper. Suffice it to say, it is critical that the needless drain

23 Ben Sasse, *Sasse on Kavanaugh Hearing: We Can And We Should Do Better Than This*, US Senator for Nebraska Ben Sasse (Sept. 4, 2018), <https://www.sasse.senate.gov/public/index.cfm/2018/9/sasse-on-kavanaugh-hearing-we-can-and-we-should-do-better-than-this>.

Senator Ben Sasse recognized the absurd levels this politicization had reached, admitting that Republicans were guilty of it as well. "Judge: Since your nomination in July, you've been accused of hating women, hating children, hating clean air, wanting dirty water.... declared an existential threat to our nation. Alumni of Yale Law School... wrote a public letter to the school saying quote, 'People will die if Brett Kavanaugh is confirmed.'... We can and we should do better than this. It's predictable now that every confirmation hearing is going to be an overblown, politicized circus. (Remarks during the hearing on the nomination of Brett Kavanaugh to be an Associate Justice of the US Supreme Court, 2018)

24 The Judiciary Act of 1891, or the Evarts Act, reorganized the Federal Circuit Courts. This number of courts has remained unchanged.

25 *See*, Recent Recommendations by the Judicial Conference for New U.S. Circuit and District Court Judgeships: Overview and Analysis (Sept. 2019), arguing the necessity of these expansions by stating that Congress has not approved comprehensive judgeship legislation since 1990, (although they acknowledge that a smaller number of district court judgeships have since been realized.)

26 Testimony before the U.S. House Judiciary Committee Subcommittee on Courts, Intellectual Property, and the Internet, 117 Cong. (2021) (Statement of Kari Kammel).
Chief District Judge Kimberly Mueller of the Eastern District of California also recognized this longstanding issue and Congress' failure to address it: "For 20 years-plus we've been in a judicial emergency," The bottom line of my testimony today is that we cannot fulfill our obligations without congressional action to create new judgeships."

of courts' limited time and energy is addressed and prevented. In undertaking this endeavor, it is impossible to pass over the waste caused by frivolous filings, proceedings, cases, confusion, and gamesmanship, which can be solely attributed to removal through diversity jurisdiction.²⁷

Chief Justice Rehnquist and the Federal Courts Study Committee offered guidance to "improve the federal courts capacity to resolve disputes... by relieving them of some functions that involve federal rights or interests only marginally if at all."²⁸ This Study proposed a complete abolition of diversity jurisdiction to stretch courts' insufficient resources.²⁹ There is strong support for and against this proposal, as well as alternate solutions.³⁰ The wide acknowledgment of problems within diversity jurisdiction is clear evidence that if diversity jurisdiction is to remain, it desperately needs comprehensive reform.

Federalism issues aside, the policy recognition that diversity jurisdiction is broken is important and must be addressed. After all, "Justice delayed is justice denied" is not merely an adage, but

27 United States Government, *Caseload Statistics Data Tables 4.3 and 4.8*, United States Courts (Dec. 31, 2021), <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>.

In 2019, diversity cases accounted for over 35% of U.S. District Court civil dockets, removals alone were responsible for about 12% of the entirety of Federal District court litigation.

28 *Id.* At 13.

29 There was also legislation proposed to abolish diversity jurisdiction and provide State courts federal funding to help with the resulting influx of cases.

30 Federal Courts Access Act of 2018, S. 3249, 115th Cong. (2018). Intended to increase out-of-state litigants access to federal courts "By creating a minimal diversity requirement consistent with the vision of the very first Congress," but this bill never became law.

a Constitutional right.³¹ The exhaustion of judicial resources is a severe problem; diversity cases are responsible for that problem.³² To prune out needless proceedings, reduce gamesmanship, and clarify complex removal issues is to help resolve this key problem—a problem so grave it solicits calls for the utter abolishment of diversity jurisdiction.

C. Perforation and Misprediction of State Caselaw

As counsel flood the federal courts with diversity cases, they simultaneously deprive states of important cases and kneecap their ability to develop caselaw and provide judges with experience. This is another cyclical problem, as diversity migration strips cases from states. litigants may advantage of richer and more developed federal jurisprudence.

Especially in matters of law with sparse state guidance, lower federal courts will turn to federal appellate predictions of similar issues. These appellate decisions may be incorrect *Erie* guesses³³ but by the time state courts can correct them countless decisions may be swayed and guided by subpar appellate predictions of state law. States must govern themselves and create their own laws; any

31 U.S. Const. amend. § 6.

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...” Though this paper focuses on civil litigation, Federal dockets also include criminal cases. The policy concern for civil litigants who receive delayed justice is parallel to the jeopardy Constitutional rights are placed in due to exhaustion of judicial resources. This Constitutional crisis is thus partially created by defects in diversity jurisdiction.

32 *Wilkins v. Stapleton*

Judge Dalton wrote: “The U.S. District Court for the Middle District of Florida is one of the busiest district courts in the country and its limited resources are precious. Time spent screening cases for jurisdictional defects, issuing orders directing repair of deficiencies, then rescreening the amended filings and responses to show cause orders is time that could and should be devoted to the substantive work of the Court.”

33 *Id.* At 2

“Some Federal courts even rely on federal over State precedence at pre-“*Erie*” levels.”

encroachment on policymaking is a travesty.³⁴ Under diversity jurisdiction, devastating blows to federalism land all too frequently.

Take *Memphis Dev. Found. V Factors Etc., INC*,³⁵ for example. Here, the 6th Circuit oversaw how defamation and publicity laws in Tennessee could extend to Elvis Presley's son. The 6th Circuit ruling set strong precedence which was followed by a number of cases including in *Factors Etc., INC, v Pro Arts, INC*, one year later.³⁶ Despite the *Factors* Court's "admission that they were speculating,"³⁷ they nevertheless stuck to the 6th Circuit's persuasive prediction of Tennessee law. These predictions were wrong and later rejected in *Elvis Presley v Cronwell* by the State of Tennessee when its courts were finally presented with a similar matter.³⁸ State courts have no way to rectify these skewed interpretations of their own laws.³⁹ Many state courts lacked mechanisms for advisory opinions or certification and were therefore could unable provide any form of mandatory or even persuasive guidance to federal courts.⁴⁰

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- 34 Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harvard Law Review. 483, 484 (1928)
- 35 Dolores K Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Virginia Law Review 1671-1687 (1992).
- 36 *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978)
- 37 *Id.* at 24.
- 38 *Elvis Presley v Cronwell*, 733 S.W 2d 89, 95-99 (Tenn. Ct. App. 1987) Where the Tennessee appellate court "[provided] that the right of publicity is exclusive in individuals and heirs until terminated.
- 39 Many states today do allow for certification, but *Pullman* is too narrow and federal courts occasionally ignore guidance from the very courts whose ruling they ought to emulate.
- 40 *See, United Services Life Ins. Co. v Delaney*, 396 S.W. 2d 855, 862-63 (Tex. 1965)
(Regretfully refraining from certification as the Supreme Court of Texas lacked the pertinent procedural mechanisms. Consequently, the Court held that issuance of a Declaratory Judgment for the 5th Circuit constituted an "Impermissible advisory opinion."; *See also, United Services Life Ins. Co. v Delaney*, 328 F. 2d 483

Diversity rulings are “coined predictions of state law” that may be seen as “less abrasive,”⁴¹ but they are nonetheless damaging to states’ rights.⁴² Perforation of state caselaw poses a federalism risk that can and should be mitigated. This mitigation should take the form of increased state guidance. While the Supreme Court has provided narrow circumstances for state intervention in diversity cases, it does not go far enough. Federal courts ought to be chomping at the bit to receive state tribunals’ “two cents,” on their own laws, but they currently fall short of even Supreme Court standards on certification and abstinence.

Without comprehensive change, these defects will get worse, not better. Symptoms of the “toxic cycle” will continue to jeopardize justice. America must have legitimacy in its courts. Fraud, exhaustion, and incongruence born of attunement and exhaustion make that impossible. Only by reversing the cycle can we preserve diversity jurisdiction as a viable mechanism to allow federal jurisdiction.

IV. SOLUTIONS

The breadth and depth of these problems warrant comprehensive reform that is just as broad and deep. The Toxic Cycle of forum shopping, excessive removals, exhaustion of judicial resources, misprediction and incongruence, and incentive for more forum shopping continues and worsens at the expense of justice. Federal tribunals and litigants are in desperate need of change. In the words of AC/DC, “There ought to be a law... there ought to be a whole lot more.”⁴³ We prescribe 5 solutions, both legislative and judicial, to cure these current defects. Our solutions are both legislative and judicial guidance and encompass the removal process and diversity jurisdiction all along the way.

Our Statutory claims consist of providing federal courts permissive powers to remand if a case’s amount in controversy drops below

41 Id Footnote 24

42 *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496, 499-500 (1941).

43 AC/DC, *If you Want Blood (You’ve Got It)*, on *Highway to Hell* (Atlantic Records 1979)

the threshold, and to allow greater latitude to federal courts predicting novel or complex issues of state law, and to close the “Snap Removal” loophole. Next, our judicial prescriptions offer guidance to tribunals regarding Fraudulent misjoinders, Post Removal Damage Stipulations and reach out to states to ensure state law is interpreted correctly.

Applied altogether, these prescriptions will dramatically slim bloated dockets, allow courts to interpret state law more accurately, reduce artificial differences between the forums, and reduce the need for attorneys to forum shop. Like the toxic cycle that currently exists, this healthy cycle will clean out and recurring change will slowly but persistently promote positive change to diversity jurisdiction.

Litigants need these changes, judges need these changes, and justice demands these changes. We will prove that the benefit of implementing these changes is needed and for the greater good. These changes adhere to principles of federalism and are easily and uncontroversially attainable. Lastly, we will prove that our approaches are the optimal way to make these needed changes.

A. Legislative Prescriptions

The first three solutions require Congress to provide relief. The Forum Defendant Rule, as it stands, does not promote justice. The text of this law reads “otherwise removable solely on the basis of diversity of 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.”⁴⁴ Currently, defendants who should be blocked from federal forums are able to circumvent that restriction by fleeing before they are properly served. Especially with the growth of technology in law, attorneys are hyper aware of impending lawsuits and able to see court filings long before being properly served in person. Additionally, defense attorneys may advise or encourage their clients to avoid or dodge service until they are able to remove. We propose that Congress rewrite this law so that the “and served” language is stricken. An acceptable solution could

44 Removal of Civil Actions, 28 U.S.C. § 14412 (LexisNexis).

be: "...may not be removed if any of the parties in interest properly joined as defendants is a citizen of the State in which such action is brought..."

As it is written, there are split circuits regarding snap removals.⁴⁵ Experienced judges who take this route are not wrong, they are just using different statutory interpretations. Those courts which have found snap removals permissible do so under valid and sound reasoning. A textualism reading finds no fault with exploiting this loophole. After all, Defendants must have been *served* per the exact text of the law. Judges should not be forced to rejection the text and rely on purposivism or legislative intent in their analysis. As Justice Kagan famously said, "we are all textualists now."

Judges using a purposivism interpretation or legislative intent consider *why* this law was written, instead of the explicit text. This equally valid theory of interpretation looks to the purpose of the law: to prevent defendants from fleeing their home states. Many judges now recognize and reject snap removals. The ravine between purpose and text is a defect that should be cured by Congress. Fixing broken laws is not the prerogative of the federal judiciary. These powers belong to Congress, they do *not* belong to the judiciary. It is federal overreach for judges to apply this law flex-

45 Compare, *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147 (3d Cir. 2018). There, the court reviewed whether § 1441(b)(2) permits snap removal by a forum defendant concluding the "language of the forum defendant rule in section 1441(b)(2) is unambiguous. Its plain meaning precludes removal on the basis of in state citizenship only when the defendant has been properly joined and served." The court acknowledged that "[r]easonable minds might" question the policy of that result, but did not consider that question relevant to its statutory interpretation. With Second Circuit precedent that "[t]he statute plainly provides that an action may not be removed to federal court on the basis of diversity of citizenship once a home state defendant has been 'properly joined and served.'" *Gibbons*, 919 F.3d at 705 (quoting 28 U.S.C. § 1441(b)(2)). "By its text, then, Section 1441(b)(2) is inapplicable until a home state defendant has been served in accordance with state law[.]" *Id.* The Court added that "while it might seem anomalous to permit a defendant sued in its home state to remove a diversity action," that practice "'does not contravene' Congress's intent to combat fraudulent joinder."

ibly purely because they want it to be that way. § 1441(b)(2) should therefore be rewritten.⁴⁶

State court systems have evolved through American history. It was only in the mid to late 1900's that states even uniformly established intermediate courts, and state supreme court certiorari was established even later.⁴⁷ States have historically lacked procedures to provide effective guidance for diversity cases. Now, however, most states have adopted processes to advise in these instances. But federal procedure and caselaw limit state input. To ensure accurate prediction, circumstances should be expanded and methods for seeking state participation guidance should be enlarged.

The next legislative prescription is to grant courts wider latitude to receive state input regarding novel or complex issues of state law. Our solutions will conserve federal judicial resources and provide more time and energy to properly predict state rulings. However, increased resources are insufficient to rout misinterpretation. Although many federal district court judges will be from the state they preside over, they are still imperfectly suited to predict state law. Deviation in outcome is largely due to a lack of attunement of federal judges to state policy.

Especially at the appellate level, federal judges preside over broad regions of states. The 9th Circuit, for example, includes dramatically different state cultures from states such as California, Hawaii, or Alaska. Out-of-state judges are not attuned to state politics, history, or culture. They are also less experienced in interpreting state law. They therefore pose a federalism risk that can and should be mitigated. This mitigation should take the form of state guidance.

46 *See generally*, It's Time for Congress to Snap to It and Amend 28 § U.S.C. 1441(1)(b)(2) to Prohibit Snap Removals That Circumvent the Forum Defendant Rule, 73 Rutgers University Law Review 579 (2021).

47 M O Osthus; M H Stiegler, State Intermediate Appellate Courts, U.S. Dept. of Justice, Office of Justice Programs (1980), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/state-intermediate-appellate-courts#:~:text=Thirty%2Dtwo%20States%20have%20established,structures%2C%20jurisdictions%2C%20and%20procedures.>

Current Abstention Doctrines include, among others, three separate cases: *Pullman*, *Burford*, and *Colorado River*.⁴⁸ *Pullman* abstention permits diversity courts to “restrain” their adjudication when states can resolve litigation. This done to alleviate federalism concerns and practice “scrupulous regard for the rightful independence of state governments[.]”⁴⁹ *Burford* abstention outlines two instances where federal courts can abstain from diversity proceedings: 1) “difficult [and substantive] questions of state law” or 2) judgment would be “disruptive [to] state efforts to establish a coherent policy.”⁵⁰ Lastly, *Colorado River* abstention can stop proceedings when parallel case(s) are proceeding in state court.⁵¹ The *Colorado River* Court directed inferior courts to only abstain in “exceptional circumstances.”⁵² This doctrine, along with *Pullman* and *Burford*, are far too narrow.

While these three cases serve to limit needless proceedings and protect state judicial sovereignty, they do not go far enough. We propose Congress codify the express power for diversity courts to abstain from adjudication temporarily at the request of states, or liberally when any of these doctrines are met.

When there is uncertainty as to how a state supreme court would rule, they should liberally abstain from judgment. In these cases, federal courts should abstain from ruling until a similar case is decided on the state level, until they can obtain certification from the state, or until state courts can repair matters of law in the case. While state certification and advisory opinions are not technically mandatory, there is little to no reason that federal courts should not follow them. The right to create state law belongs solely to the state.

Federal courts benefit greatly from certification of novel and complex issues of state law. Certification amplifies the ability of

48 See generally, Martha A. Field Abstention Doctrine Today, 125 U. Pa. L. Rev. 590 (1977).

49 *R.R. Commn. of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)

50 *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)

51 *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800 (1976)

52 *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800 (1976)

federal courts to predict accurate legal outcomes. Congress should therefore codify greater authority for certification or the advisement of diversity rulings. Likewise, if certain legal issues can be severed, they should be repaired or remanded for state resolution. Again, federal courts already possess these powers, they simply need them expanded.

Lastly, Congress award courts permissive remand the amount in controversy drops below the threshold. Several courts have already set this precedent. They consider the policy implications as well as potential federalism issues. Indeed, if a case does not meet the threshold federal courts arguably *lack* jurisdiction and must therefore immediately remand. *St. Paul Mercury* leads to disagreement over this approach and appellate courts are consequently split. In fairness, since criteria is determined “at the moment of removal,”⁵³ it is unclear how courts should respond.

More settled is the application of *St. Paul Mercury* to the diversity of citizenship criteria. It is well-established that if parties move during litigation, it does not destroy diversity. However, if it is later discovered that complete diversity of citizen did not exist at removal, courts are prohibited from retaining proceeding and must remand. Even final decisions have been post-humorously vacated if it is discovered that diversity jurisdiction conditions were not met.⁵⁴

The argument, therefore, is whether a non-meritorious claim was non-meritorious from the start. If so, and a subsequent dismissal merely represents a recognition of what already existed, it follows that courts should remand if the amount in controversy was insufficient initially. A policy consideration is that courts' resources should

53 *St. Paul Mercury Ins. Co. v. Ford*, 585 F.2d 760 (5th Cir. 1978).

54 *Thermoset Corp. v. Building Materials Corp of Am.*, 849 F.3d 1313, 1315 (11th Cir. 2017). (Vacating summary judgment for the plaintiff where trial court lacked subject matter jurisdiction due to the presence of a non-diverse defendant); *Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co.*, 509 F.3d 271, 272 (6th Cir. 2007). (Finding there was a lack of diversity and reversing summary judgment for defendant); and *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). (Allowing for vacation of judgment if there was no fed. jurisdiction)

be conserved for cases which warrant their attention. And who better than the presiding judge to make that determination. Admittedly, these remands would increase state caseload, but only nominally.⁵⁵

This approach provides needed relief to the judicial system, while allowing defendants access to a neutral forum when the controversy is truly over \$75,000. This prescription ensures that cases which belong in federal court, stay in federal court; it also leaves judges to discern which cases do not belong and would be preserved at the expense of other lawsuits.

These legislative solutions will provide an influx of judicial vitality and legitimacy. But making diversity jurisdiction justifiable is a daunting task – legislative change alone is insufficient. Not only must courts apply these legislative gifts, but they also have legwork of their own. Empowering legislation is applied ineffectively by overburdened courts; the stem of excessive and fraudulent drains of federal resources must be eliminated. This means stopping fraudulent proceedings from both parties. Our judicial prescriptions accomplish this, outlining actions, tests, and doctrine, that will aid courts. Court action is the way to do this.

Success of the legislative prescriptions depends on turning the gears and giving courts breathing room to digest and fully take advantage of new laws. Until that happens, forum shopping will continue to plague diversity cases. The front lines of forum shopping are removals, which make up a substantial portion of diversity cases. Both parties are guilty of greedy manipulation to the detriment of justice. First, defendants employ Snap Removals and other tricks to secure their judge and forum. Judges should recognize Snap

55 Data analysis from the 1970s and 1990s calculated an increase of only around 1 percent to state dockets from abolition of diversity jurisdiction. See Victor E Flango & Nora F Blair, *The Relative Impact of Diversity Cases on State Trial Courts* 252-253 (1978). (“If diversity cases were distributed evenly among the states, each state would experience an average 1.03 percent increase in civil filings”); Kramer, *supra* note 1, at 110–17 (calculating that complete abolition of diversity jurisdiction would increase state caseloads by around 1 percent and workloads by about 5 percent)

Removals and use their newfound authority to dismiss and sanction attorneys who ignore the law.

Contributing to the arms race of jurisdictional manipulation, “Masters of the Claim” also work to deny their opponents the upper hand. Plaintiff schemes needlessly burn judicial resources and attempt to rip away defendants’ legitimate rights. Plaintiffs focus typically revolves around the criteria required for removal. They primarily use two methods to destroy federal jurisdiction, attacking it both preemptively and reactively. Our paper focuses on two prevalent breaches: fraudulent misjoinders and Post Removal Damage Stipulations. Chronologically, plaintiffs first attempted to cheat the system comes before state proceedings are even initiated; enter the fraudulent misjoinder.

B. Judicial Prescriptions

Courts have long recognized plaintiff use of the fraudulent *joinder* as a scam to anchor their case to state court. This doctrine is when plaintiff joins invalid or fraudulent claims or parties to an otherwise removable case. These “spoilers” convolute federal proceedings upon removal. Federal courts must sort out whether the claims are valid and must formulate a response. The accepted way to handle this is to determine if invalid joinders exist and move to sever or dismiss them. Evaluating claims upon removal is difficult, and the element of “fraud” in fraudulent joinders need not stem from an act of fraud or misrepresentation.

Indeed, courts often must take the time to carve out earnest or legitimate joinders, effectively performing an analysis akin to how they would in response to a 12(b)(6) motion to dismiss. This burns court resources, but the practice has been well documented, and courts have caught on to this deceit. Although it takes time, the Fraudulent Joinder Doctrine has evolved and now streamlines court reactions.⁵⁶

56 See generally, Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine, 29 Harvard Journal of Law and Public Policy 569 (2006).

What is less clear, however, is how to respond to a fraudulent misjoinder. Here, plaintiffs join *legitimate* claims or parties. A fraudulent misjoinder is also referred to as a “Procedural” misjoinder, as the problem is not substantive but procedural. Fraudulent Misjoinders occur when an unrelated claim or party is linked to another in a way that destroys diversity. This destruction can arise when complete diversity between the parties is spoiled, or when the unrelated party is tethered to state court under the Forum Defendant Rule. This Doctrine may not be understood by defendants or may not be recognized or applied by courts. In either case the result is the same, defendants are denied their rights. Even if a court recognizes and applies the Doctrine, plaintiffs force them and defendants to incur needless costs.

Circuit courts are split on the Doctrine of Fraudulent Misjoinder. Those which do not recognize it have different rationales. Some insist that state courts have the responsibility to sever these claims, but states may lack time and experience needed to respond to every instance of fraudulent misjoinder. Defendants often rely on Federal courts as their first opportunity to be disconnected from spoilers. Other courts simply see remand under diversity jurisdiction as too complex already; they reject the Fraudulent Misjoinder Doctrine as “adding layers of complexity” to an already convoluted process. These responses are understandable, but a defendants’ right to legitimate diversity jurisdiction must be protected, regardless of Federal confusion or unfounded concerns of federalism dangers.

Uniform adoption of the Fraudulent Misjoinder Doctrine would smooth out needless proceedings and eliminate costly confusion. We prescribe the uniform approach needed, as well as distinguish the authority by which courts can identify, sever, and sanction in instances of fraudulent misjoinders. There is a dire need to prevent needless proceeding and deprivations of rights caused by rampant fraudulent joinder.

Tapscott laid the groundwork as courts faced valid spoilers which were improperly joined to destroy diversity of an unrelated claim or party. Since then, courts have applied a “Reasonable Basis” test to determine whether legitimate claims should be joinder. The *Tapscott* Court wrote that “other tests are problematic and raise federalism

concerns because they inappropriately encourage federal courts to resolve ambiguous or novel questions of state law...”

Using the Reasonable Basis Test to apply the Fraudulent Misjoinder Doctrine protects rights while reducing judicial drain.

While fraudulent misjoinders destroy diversity of citizenship criteria. Post removal damage stipulations impact the amount in controversy requirement. When plaintiffs contest that the amount in controversy bars removal, some courts have applied a “preponderance of the evidence” test, while others have applied a “facially apparent” test. Still other circuits have set precedence applying the far more stringent “Legal Certainty” test, which places the burden of proof squarely on the plaintiff to prove to a legal certainty that the amount does *not* allow federal oversight.⁵⁷ Parties may reach the requisite amount through various methods. First, aggregation of damages is allowed when a plaintiff has multiple claims against a defendant or multiple plaintiffs share similar claims against a defendant that arise from the same circumstances. It is worth noting that CAFA also raises the \$75,000 threshold to \$5 million in class actions.⁵⁸ In any case, when courts are not confident that the amount in controversy or complete diversity criteria have been satisfied, they will turn the case over to the proper state venue.⁵⁹

Many plaintiffs assert that they are master of the claim and as such know best how much relief they are requesting. Still others connected through affidavit that they will reject relief over \$75,000 even if it is awarded. Courts are split on how to receive and regard these post removal damage stipulations. Some circuits have held that *St. Paul Mercury*, prevents consideration of these stipulations if filed

57 (i.e., a “fair reading” of the complaint) that the amount in controversy exceeds \$75,000, the defendant has the burden to submit evidence that the amount in controversy is satisfied. *Williams v. Best Buy Co.*, 269 F.3d 1316, 1321 (11th Cir. 2001). (Subject Matter Jurisdiction: Diversity–Time to Cross Your “T’s” and Dot Your “I’s”
<https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2017/subject-matter-jurisdiction-diversity-cross-ts-dot-is/>)

58 The Class Action Fairness Act of 2005

59 Federal courts must “zealously insure that jurisdiction exists.” See *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001).

after removal. Indeed, allowing affidavits to alter the amount in controversy post removal opens the door for plaintiffs to flee federal court any time litigation does not go their way.⁶⁰ Some circuits stand by outright rejection of post removal damage stipulations, but other courts take a more liberal view.

Some circuits are willing to accept stipulations indiscriminately. Even if plaintiffs fail the Legal Certainty Test, these courts may permit carefully phrased affidavits as the final word on the amount in controversy. In support of their decisions, courts reason that the plaintiff is the master of the claim and should have control over what relief they are seeking. What's more, allow plaintiffs to amend their relief requested with the intent to avoid federal court. Districts and circuit courts have allowed plaintiffs to "sacrifice" relief for the strategic purpose of keeping their preferred forum. Still other courts fall somewhere in the middle of the spectrum, only recognizing post removal damage stipulations in certain circumstances.

Many circuits have held that while post removal damage stipulations cannot be considered as new evidence to amend their complaint, they may serve to *clarify* the amount requested. This approach strikes a balance that these authors endorse. Allowing stipulations to serve as clarification adheres to Supreme Court precedent and respects plaintiffs' right to exercise control over their case. Additionally, this approach offers uniform fairness to plaintiffs in all states, as litigant complaints' may be subject to *Ad Damnum* clauses certain restrictions depending on the state. These restrictions vary widely.

Ad Damnum clauses are sections of the complaint which list to relief sought- either attached to the cover page or just in the text of

60 A Device Designed to Manipulate Diversity Jurisdiction recognizing Wait and See tactics when "plaintiffs... devilishly move to limit their damages and return to state court only after litigation has taken an unfavorable turn." (*Brooks v. Pre-Paid Legal Servs., Inc.*, 153 F. Supp. 2d 1299, 1302 (M.D. Ala. 2001); see also *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 872 (6th Cir. 2000). (stating that "[i]f plaintiffs were able to defeat jurisdiction by way of a post-removal stipulation, they could unfairly manipulate proceedings merely because their federal case begins to look unfavorable"); *Simmons v. PCR Tech.*, 209 F. Supp. 2d 1029, 1033 (N.D. Cal. 2002). (stating that post-removal stipulations are "likely to manipulate the amount in controversy to secure jurisdiction in the desired court"))

the complaint. States have total control over how litigants must structure these clauses. Some states require a complaint to specify a range of damages. Other states may require an exact amount, still others disallow plaintiffs to list *any* specific dollar amount as numbers may act as an anchoring bias to juries or may ignite public attention if a case unrealistically sues for extravagant amounts.⁶¹

Restrictions are all based in different rationale determined at the sole discretion of state legislature. Federal courts are powerless to change state policy; they must, however, recognize and react to these differing standards. The variance in these restrictions necessitates allowing plaintiffs to stipulate as clarification. Since for many plaintiffs a stipulation might be the first possible opportunity for them to specify a dollar amount.

Our prescription regarding post removal damage stipulations is that courts should recognize carefully crafted post removal damage stipulations if done as *clarification* of their originally requested amount. These stipulations should then shift the burden of proof to defendants under the “Reverse-Legal Certainty Test.” Stipulations must be filed alongside a motion to remand, this precludes wait and see tactics.

If plaintiffs can “clarify” amount in controversy at any point during federal proceedings, they could wait to see how their case fares and destroy diversity if the outcome begins to look unfavorable. This destructive behavior must be prevented. Requiring stipulations to accompany motions to remand or else be waived eliminates confusion and belated remands. Plaintiffs can remain Master of the Claim, but courts are not subject to wasted proceedings at the whim of a plaintiff stipulation.

61 Benjamin T Clark, *A Device Designed to Manipulate Diversity Jurisdiction: Why Courts Should Refuse To Recognize Post-Removal Damage Al Damage Stipulations*, 58 Oklahoma Law Review 221-253 (2005).

“[W]hen the state in which the federal court is sitting either does not require that the complaint contain a demand for a specific monetary amount, expressly forbids the inclusion of such a demand in the prayer for relief, or requires only that more than a certain threshold state court jurisdictional amount be alleged[, it is not surprising] the federal courts have had some difficulties in measuring the amount in controversy.”

These 5 legislative and judicial claims address and resolve many diversity defects. Conserving judicial resources and empowering courts to accurately predict state law, will promote adherence to the *Erie* Doctrine. Issues of federalism, policy concerns, and the general interest of justice will be promoted if these prescriptions are applied.

V. CONCLUSION

When federal courts adjudicate under diversity jurisdiction, they merely act as venue; the governing law is unchanged. The objective is to ensure consistent application of law between all citizens, but diversity jurisdiction is broken. Ironically, this mechanism now promotes inconsistency in rulings and reduces justice in intra state litigation.

Diversity jurisdiction relies on variance between federal and state courts; they are not supposed to be exactly the same. But the legal outcome must be. Some variations between the tribunal detract from justice. Over the years, artificial differences have warped diversity litigation. Despite clear guidance otherwise, courts are ill equipped to predict state decisions

The problems in diversity jurisdiction are cyclical in nature: 1) legal incongruence between state and federal outcomes incentivizes excessive and illegitimate proceedings; 2) the resulting flood of proceedings overwhelms federal courts, exhausting them and forcing decisions under the gun; 3) crunched for time, unattuned federal courts fall short of accurately and swiftly predicting how a state court would rule, thus creating more incongruence in legal outcomes. This toxic cycle is perpetuated at the expense of justice.

American courts must have legitimacy. Exhaustion and incongruence diminish that. Only by reversing the cycle can diversity jurisdiction work as a viable mechanism. Courts must act to save diversity jurisdiction, but as they lack some tools to do so, Congress must also empower them with a legislative overhaul. First, federal courts need greater legislative authorization to receive state input on novel or complex issues. Streamlined processes for certification, repair, and advisement should be accompanied by expansion of Abstention Doctrines.

Second, courts require legislation permitting permissive remand when the amount in controversy below the requisite threshold. Courts should weigh federal intervention against policy and federalism concerns. Bestowing these powers provides permission for judges to redistribute, at their discretion, sorely needed judicial resources away from cases which no longer justify federal focus.

The third and final legislative prescription is for Congress to prevent snap removals. The chasm between the text and its intent indicates a deficit in the law itself, but judges should not fix broken laws. Congress must ensure judges can uniformly respond to this loophole.

Courts need codified foundations when they fill gaps in diversity jurisdiction. Courts must act, but a separation of powers demands the introduction of these written laws to avoid judicial overreach. With these three legislative arrows in their quiver, federal tribunals must also apply two judicial salves to fully heal diversity jurisdiction. These prescriptions eliminate circuit splits and set the standard for remanding diversity cases.

Uncertainty and circuit splits exist over the fraudulent misjoinder and post removal damage stipulations. The responses to these are best left to the judiciary, although like the first three legislative prescriptions, they could benefit from collective federal action.

First judges should uniformly adopt the Fraudulent Misjoinder Doctrine and sever spoilers which would improperly destroy diversity. Once these spoilers have been dismissed or remanded, federal courts are free to adjudicate. Second, judges must allow plaintiffs to clarify their requested relief thorough damage stipulations. When these stipulations accompany a motion to remand, they should be given wide deference and the Reverse-Legal Certainty Test should be applied. To survive remand, defendants then face the burden pf proving to a legal certainty that the amount in controversy meets the requisite threshold.

Diversity jurisdiction will become more viable if these prescriptions are applied and enforced. Fatigued federal tribunals will be rejuvenated after using these prescriptions to streamline and standardize procedures. Litigants' rights will be protected, and federalism concerns will be diminished. Since the sickness of diversity

jurisdiction extends to all stages of litigation, its solutions must also address aspects from removal to dispositive motions. We therefore propose these five claims as a wholistic salve. We are confident that they will be greater together than the sum of their parts.

The Founders envisioned diversity jurisdiction to ensure equal access to justice. But it currently perpetuates injustice by spewing unequal results. We cannot stand idly by as our court systems fails to protect the right to honest resolutions. Everyone deserves a fair and balanced rule of law. Justice cannot depend on the venue. Ending the toxic cycle seems daunting, but through implementation of these prescriptions, it can be done.