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A Lively Debate: the Eighth Circuit and the Forum Defendant Rule

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A LIVELY DEBATE: THE EIGHTH CIRCUIT AND THE FORUM DEFENDANT RULE

Theodore P. "Jack" Metzler, Jr.†

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I. INTRODUCTION

This article describes a circuit split in which the Eighth Circuit stands alone against eight other circuits, including decisions authored by such judicial luminaries as Learned Hand and Henry Friendly. When the Seventh Circuit joined the majority side of the split in 2000, it remarked that the question "has been bouncing

† Thanks to Bob Long and my wife Shelley Finlayson, without whom this article would not have been possible.

1. See Lively v. Wild Oats Mkts., Inc., 456 F.3d 933, 940 (9th Cir. 2006) (collecting cases).
around the federal courts of appeals for more than 75 years." While one might think such a lopsided and persistent division in authority would pique the interest of the Supreme Court, in the decade since the Seventh Circuit considered the question the Court has declined the opportunity to resolve the issue twice, once from each side of the circuit split. And though the Eighth Circuit still lacks for support among its sister circuits, the Supreme Court’s latest denial has inspired scholarship in favor of the Eighth Circuit’s singular view.

The issue in question involves the “forum defendant rule”—the rule that a defendant in a non-federal-question case brought in state court may not remove the case to federal court if any of the defendants are citizens of the forum state. More specifically, the issue is whether the forum defendant rule is properly characterized as jurisdictional or not. Part I of this article explains the forum defendant rule in the context of the federal district courts’ original jurisdiction, the removal of state cases to federal court, and the remand of cases back to state court. Part II describes the circuit split and the arguments raised by courts in favor of and against a jurisdictional characterization of the forum defendant rule. Part III presents a plain language approach that the courts have not yet considered, and also explains why the position of the Eighth Circuit is incorrect. Part IV briefly concludes.

6. See Scott Dodson, In Search of Removal Jurisdiction, 102 NW. U. L. REV. 55 (2008); Aaron E. Hankel, On the Road to the Merits in Our Federal System: Is the “Forum Defendant Rule” a Procedural Speed Bump or a Jurisdictional Road Block?, 28 WASH. U. J. L. & Pol’y 427 (2008). Though Professor Dodson was among the attorneys responsible for the certiorari petition in Lively, and thus was arguing for the Eighth Circuit’s view, he ultimately purports to refrain from taking a position on the merits of the question, instead advocating for a framework for resolving similar questions. Dodson, supra at 58 n. 22, 88–89. While Dodson’s article is quite critical of the Ninth Circuit’s decision in Lively, in fairness, this author was one of the attorneys responsible for the certiorari petition from the Eighth Circuit’s decision in Horton v. Conklin, 431 F.3d 602 (8th Cir. 2005), cert. denied sub nom. Waugh v. Horton, 549 U.S. 813 (2006) (No. 05-1419). Given this article’s criticism of the Eighth Circuit’s decisions, I can hardly cast stones in this regard.
7. 28 U.S.C. § 1441(b) (2006). The text of the rule is:
Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Id.
II. THE FORUM DEFENDANT RULE

The general rule for removal to a federal court of cases originally brought in a state court is found in 28 U.S.C. § 1441: "[A]ny civil action brought in a State court" may be removed if "the district courts of the United States have original jurisdiction" over the case. The district courts' original jurisdiction is defined in §§ 1330–1369. Cases based on a federal question are "removable without regard to the citizenship or residence of the parties." All other cases are removable "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." The latter rule comprises the "forum defendant rule." The question that has split the circuits is whether a violation of the forum defendant rule is "jurisdictional." That is, when a defendant removes a case from state court to federal court even though one of the defendants is a citizen of the forum state, does the violation of the rule mean that the district court has no jurisdiction and must remand the case back to state court? Or is the violation instead the kind that does not affect the district court's jurisdiction? In the latter case, the plaintiff must object or else waive the right to remand.

The question arises because the procedures for removal and remand of cases from state court amount to a "remove first, ask questions later" approach. A defendant can remove "any civil action" simply by filing a signed notice in the appropriate federal district court explaining the grounds for removal, along with a copy of the process and pleadings in the case that have been served on the defendant. The defendant must provide notice to all adverse parties and a copy of the notice to the clerk of the state court. The state court then "shall effect the removal" and proceeds no further unless

8. Id. § 1441(a).
9. In addition to the district courts' original jurisdiction for federal question and diversity cases, federal law specifically provides for original jurisdiction for a myriad of other cases. Id. §§ 1330, 1333–1355, 1338, 1343–1346, 1350, 1353. While many such claims could potentially be brought originally in state courts, certain matters are exclusively reserved to the district courts' original jurisdiction, such as § 1333 (admiralty), § 1334(a) (bankruptcy), § 1338 (patent), and § 1351 (cases involving consuls or members of missions from foreign states).
10. Id. § 1331 (providing jurisdiction for all "civil actions arising under the Constitution, laws, or treaties of the United States").
11. Id. § 1441(b).
12. Id.
13. Id. § 1446(a) (emphasis added).
14. Id. § 1446(d).
there is a remand.15 The defendant can thus unilaterally remove "any civil action" without the approval of either the state court or the federal court.16 So long as the defendant files the notice in the appropriate courts, the removal occurs regardless of whether the case is technically "removable" under federal law.17

The ability to remove does not mean that the case will remain in federal court, of course. After a case is removed, a remand to the state court is appropriate in two circumstances.18 Under § 1447(c), if it appears at any time that the district court lacks subject matter jurisdiction, "the case shall be remanded."19 For example, a case in which there is a lack of complete diversity, or in which the amount in controversy is determined to be less than $75,000, must be remanded for lack of subject matter jurisdiction.20 Second, for any "defect other than lack of subject matter jurisdiction," the plaintiff must file a motion to remand the case within thirty days.21 So if the defendant fails to sign the notice of removal or files the notice beyond the time limit, the plaintiff must move the court within thirty days of the removal in order to obtain a remand.22 But what if the case is "nonremovable" because of the presence of a forum defendant and plaintiff fails to move for remand within thirty days? If the forum defendant rule is jurisdictional, the plaintiff's lack of objection is immaterial and the case must be remanded. But if the forum defendant rule is not jurisdictional, it is simply a "defect other than lack of subject matter jurisdiction" that the plaintiff may waive by failing to object within the prescribed time period.23

To complicate the question, under § 1447(d), "[a]n order remanding a case to the State court from which it was removed is not

15. Id.
16. Id. § 1446(a) (2006).
17. Cf. id. § 1441 (2006) (permitting removal only of cases in which the district courts have original jurisdiction; non-federal-question cases removable only with no forum defendant); id. § 1445 (describing "[n]onremovable actions"). Under the liberal removal procedures of §1446, every action brought in state court is literally "removable" in the sense that the defendant may have it transferred at least temporarily to a federal district court. Accordingly, the so-called "nonremovable" cases—i.e., cases in which the district courts lack original jurisdiction, non-federal question cases with a forum defendant, and the cases listed in §1441—would more accurately be labeled as "remandable."
18. § 1447(c).
19. Id.
20. Id. § 1332.
21. Id. § 1447(c).
22. See id. § 1446(a)—(b).
23. Id. § 1447(c).
On its face, § 1447(d) would neatly take care of erroneous remands so far as the courts of appeals are concerned by preventing all appellate review, but the Supreme Court has held that this provision must “be read in pari materia with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review.” A district court’s remand order thus is reviewable on appeal unless it is “based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction.” The characterization of the forum defendant rule as jurisdictional or not thus also controls whether a district court’s order remanding for a violation of the forum defendant rule (absent a timely motion to remand) is reviewable on appeal. If the rule is jurisdictional, the remand is based on one of the grounds specified in § 1447(c) — lack of subject matter jurisdiction — and for that reason is “not reviewable on appeal or otherwise.” But if the rule is a defect “other than subject matter jurisdiction,” review of the district court’s remand order is not precluded by § 1447(d).

The prohibition on appellate review of most remand orders has a peculiar effect on how the forum defendant rule issue arises in the courts of appeals. In short, when a court is called upon to decide whether the rule is jurisdictional, neither side will have an inherently sympathetic position. The question can only come up once both sides are culpable in part. First, there must be a violation of the forum defendant rule, so the defendants arguing for a non-jurisdictional interpretation typically will be the very parties that removed the case despite the presence of a forum defendant, violating § 1441(b). Second, the question will not arise if the plaintiff makes a motion to remand within thirty days, so the plaintiffs arguing for a jurisdictional forum defendant rule are typically the same parties that failed to

24. Id. § 1447(d).
25. In a dissenting opinion, Justice Scalia articulated this view:
   In an all-too rare effort to reduce the high cost of litigation, Congress provided that remand orders are completely unreviewable “on appeal or otherwise.” Section 1447(d) effectuated a tradeoff of sorts: Even though Congress undoubtedly recognized that some remand orders would be entered in error, it thought that, all in all, justice would better be served by allowing that small minority of cases to proceed in state courts than by subjecting every remanded case to endless rounds of forum disputes.
27. Id.
29. Id.
interpose a timely objection.\textsuperscript{30} If the defendant were scrupulously following the rules, there would be no removal in the first place and therefore no forum defendant rule problem. One might conclude, therefore, that the burden of complying should be put on the defendant because to hold otherwise would reward a defendant who flouts the rules with his forum of choice. But the plaintiff is often equally culpable. If the plaintiff truly wishes to preserve her choice of a state forum for resolution of the case, she would move to remand the case within the prescribed period and the case would be remanded without controversy. A jurisdictional characterization of the forum defendant rule thus rewards an inattentive or ambivalent plaintiff who does nothing to challenge the removal. While specific fact patterns can be more sympathetic to one side or the other,\textsuperscript{31} the breakdown that is required on both sides makes it difficult to place the burden of compliance on one party over the other.

III. THE CIRCUIT SPLIT

The split in the circuits on whether the forum defendant rule is a jurisdictional requirement for removal or a waivable defect other than subject matter jurisdiction has been widely acknowledged by the Eighth and other circuits and also by numerous commentators.\textsuperscript{32}

\textsuperscript{30} Id.

\textsuperscript{31} In \textit{Lively v. Wild Oats Mkts, Inc.}, 456 F.3d 933 (9th Cir. 2006), for instance, the defendant removed the case from a California court, stating in its notice that its principal place of business was Colorado, though the court later determined that it was a citizen of California. \textit{See} Hankel, \textit{supra} note 6, at 440–42. Under a nonjurisdictional forum defendant rule, the \textit{Lively} plaintiff must have challenged the removal despite the defendant's assertion that it was not a forum defendant, a fact within the defendant's knowledge. On the other hand, it is the plaintiff that chooses who is named in the lawsuit, and the plaintiff could therefore be in a good position to investigate the citizenship of the defendants before bringing suit. Moreover, the forum defendant rule only prohibits removal where a "properly joined and served" defendant is a citizen of the forum state. 28 U.S.C. § 1441(b) (2006). The plaintiff will be in a better position to know whether all of the defendants are properly joined and served, yet the defendant is still charged with removing the case in compliance with the forum defendant rule within thirty days of receiving a copy of the initial pleading. \textit{Id.} § 1446(b). Of course, failure to comply with the time limit for removal is itself a "defect other than lack of subject matter jurisdiction" which must be raised by motion within thirty days of the removal lest it be waived. \textit{Id.} § 1447(c).

\textsuperscript{32} Horton \textit{v. Conklin}, 431 F.3d 602, 605 (8th Cir. 2005); \textit{see also} \textit{Lively}, 456 F.3d at 940; Hurley \textit{v. Motor Coach Indus.}, 222 F.3d 377, 379 (7th Cir. 2000); Korea Exch. Bank \textit{v. Trackwise Sales Corp.}, 66 F.3d 46, 50 (3d Cir. 1995); 16 JAMES WM. MOORE ET AL., \textit{MOORE'S FEDERAL PRACTICE} ¶ 107.14(2)(e) (ii) ("The courts are split on whether the ban on local defendants is procedural or jurisdictional."); Dodson, \textit{supra} note 6, at 79–85; Hankel, \textit{supra} note 6, at 428–29; Brian W. Portugal, Note and Comment,
While the Supreme Court's only statement on the matter did not acknowledge the circuit split or Eighth Circuit's precedent, it did note that "several lower courts have held that the presence of a diverse but in-state defendant in a removed action is a 'procedural' defect, not a 'jurisdictional' bar, and that the defect is waived if not timely raised by the plaintiff."\(^{33}\)

The cases on both sides of the circuit split typically follow a standard fact pattern in which the plaintiff files suit initially in state court and the case is subsequently removed on diversity grounds despite the presence of a defendant in the forum state.\(^{34}\) The plaintiff then fails to move for remand entirely\(^ {35}\) or does so after more than thirty days have passed since the removal.\(^ {36}\) From there, the district court holds that the forum defendant rule is jurisdictional and remands to state court on its own motion.\(^ {37}\) On appeal, the question is whether the district court's remand order was based on a lack of subject matter jurisdiction, in which case the court of appeals lacks jurisdiction to review the order, or whether it was a defect other than lack of subject matter jurisdiction, in which case the plaintiff's failure to object may be construed as waiving the defect.\(^ {38}\)

A. Circuits Holding that the Forum Defendant Rule is Nonjurisdictional

Most circuits to address the question have held that the presence

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34. Lively, 456 F.3d at 935; Horton, 431 F.3d at 603–04; Hurley, 222 F.3d at 378; Handelsman v. Bedford Vill. Assoc. Ltd. P’ship, 213 F.3d 48, 50 n.2 (2d Cir. 2000); Blackburn v. United Parcel Serv., 179 F.3d 81, 90 n.3 (3d Cir. 1999); Korea Exch. Bank, 66 F.3d at 47; In re Shell Oil Co., 932 F.2d 1518, 1520 (5th Cir. 1991); Handley-Mack Co. v. Godchaux Sugar Co., 2 F.2d 435, 435–38 (6th Cir. 1924).
35. E.g., Lively, 456 F.3d at 935; Horton, 431 F.3d at 604; Hurley, 222 F.3d at 378–79; Handelsman, 213 F.3d at 50; Handley-Mack, 2 F.2d at 436.
36. E.g., Shell, 932 F.2d at 1519.
37. E.g., Lively, 456 F.3d at 935; Horton, 431 F.3d at 604; Korea Exch. Bank, 66 F.3d at 47. In some cases, the district court proceeded to final judgment and the plaintiff raised the forum defendant rule violation on appeal, asserting that the presence of a forum defendant defeats jurisdiction. E.g., Hurley, 222 F.3d at 378–79; Farm Constr. Servs. v. Fudge, 831 F.2d 18, 19 (1st Cir. 1987).
38. E.g., Lively, 456 F.3d at 935–36; Horton, 431 F.3d at 604. In some cases, the defendant seeks a writ of mandamus directing the district court to recall its remand order, or the court of appeals construes an appeal from a district court's remand order as a request for a writ of mandamus. E.g., Korea Exch. Bank, 66 F.3d at 51–52; Shell, 932 F.2d at 1519. Despite this characterization, courts have recognized that the order is unreviewable under 28 U.S.C. § 1447(d) if a violation of the forum defendant rule is jurisdictional. E.g., Korea Exch. Bank, 66 F.3d at 48; Shell, 932 F.2d at 1520.
of a defendant in the forum state does not preclude federal jurisdiction over a case removed from state court. \(^{40}\) One additional circuit has stated that its interpretation of § 1447(c) leads to the same conclusion. \(^{40}\) These courts rely primarily on (1) the history and language of the federal removal statutes, (2) the purpose of the forum defendant rule, and (3) Supreme Court and other court of appeals precedents.

1. The History and Language of the Removal and Remand Statutes

The characterization of the forum defendant rule as jurisdictional or not arose even before 28 U.S.C. § 1447(c) was enacted to provide a statutory basis for remand of cases removed from state court. In 1924, the Sixth Circuit held in *Handley-Mack Co. v. Godchaux Sugar Co.* that the rule was not jurisdictional. \(^{41}\) *Handley-Mack* involved much of the fact pattern typical of forum-defendant-rule cases: a state action removed by a forum-resident defendant, where no motion was made to remand. \(^{42}\) Then, as now, the rule authorized removal from state court in a diversity case only by a nonresident defendant. \(^{43}\) The court compared the jurisdictional requirements for removal, *viz.* “diverse state citizenship of the parties, or some other jurisdictional fact,” with

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\(^{39}\) In re 1994 Exxon Chem. Fire, 558 F.3d 378, 392–93 (5th Cir. 2009) (concluding that the forum defendant rule is procedural rather than jurisdictional); *Lively*, 456 F.3d at 940; *Handelsman*, 213 F.3d at 50 n.2 (plaintiff waived any objection to forum defendant rule by failing to object within thirty days of removal); *Hurley*, 222 F.3d at 380; *Blackburn*, 179 F.3d at 90 n.3 (noting that presence of forum defendant “is waived if not raised within 30 days after the notice of removal is filed”); *Korea Exch. Bank*, 66 F.3d at 50 (concluding “that section 1441(b)’s bar against removal by a forum-state citizen is not jurisdictional”); *Shell*, 932 F.2d at 1522 (presence of a forum defendant is a nonjurisdictional “defect in the removal procedure”); *Farm Constr. Servs.*, 831 F.2d at 22 (removal with a forum defendant was “improper only for technical reasons”); *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880, 882 (2d Cir. 1970) (explaining that if there was “no timely request for remand, the situation could be considered to be as if the plaintiff had brought the action in the federal court,” and “objection on the score of nonremovability would be deemed waived.”); *Bailey v. Tex. Co.*, 47 F.2d 153, 155 (2d Cir. 1931); *Handley-Mack*, 2 F.2d at 437.

\(^{40}\) Although the Eleventh Circuit has not directly ruled on the issue, in *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1568, 1572 n.4 (11th Cir. 1998), the Eleventh Circuit stated in dicta that a violation of the forum defendant rule is waivable, and in *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1250 (11th Cir. 1999), the court stated that the 1996 revision of the statute suggests that “a removal in violation of 1441(b) is subject to the 30-day time limit.”

\(^{41}\) 2 F.2d 435 (6th Cir. 1924).

\(^{42}\) Id. at 435–36; see supra notes 34, 35, and accompanying text.

"[f]ormal and procedural matters" under the applicable removal statute, which had been held to be waivable.\textsuperscript{44} The court reasoned that neither the Constitution nor any statute limited "the original jurisdiction" of the federal courts "to cases in which the defendant is a nonresident of the state in which the suit is pending."\textsuperscript{45} "It is only the removal clause in question which confines to a nonresident defendant the authority [to remove]."\textsuperscript{46} Moreover, even in 1924, the Supreme Court and other authorities had held that a district court retains jurisdiction over an erroneously removed suit so long as the case is within the court's original jurisdiction.\textsuperscript{47} The court concluded that "'[i]f organic power to hear the controversy exists, it is immaterial when or how the parties get into court.'"\textsuperscript{48}

Seven years later, Judge Learned Hand reviewed the authorities and concluded that the decision in \textit{Handley-Mack} "seems to us conclusive. Indeed we cannot see any reasonable ground to distinguish the effect of such a removal from one made after the time allowed by the statute, in which event it is settled that, if plaintiff consents, the District Court has jurisdiction."\textsuperscript{49} In another Second Circuit case, Judge Henry Friendly found \textit{Handley-Mack} and Judge Learned Hand's decision holding the forum defendant rule to be nonjurisdictional were persuasive, stating that the court was "quite content to follow our distinguished predecessors."\textsuperscript{50}

The current remand statute, 28 U.S.C. § 1447(c), was originally enacted in 1948.\textsuperscript{51} At that time, the statute required remand "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction."\textsuperscript{52} Although "improvidently" and "without jurisdiction" were joined by the conjunction "and" in the original version of the statute, the courts consistently interpreted the statute to provide two separate grounds for remand,\textsuperscript{53} and held that "improvident" removals were those that implicated a defect in the

\begin{itemize}
\item \textsuperscript{44} \textit{Handley-Mack}, 2 F.2d at 436.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.} at 437 (citing Baggs v. Martin, 179 U.S. 206 (1900)).
\item \textsuperscript{48} \textit{Id.} (quoting Toledo, St. Louis & W. R. Co. v. Perenchio, 205 F. 472, 476 (7th Cir. 1913)).
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} Woodward v. D.H. Overmyer Co., 428 F.2d 880, 882–83 (2d Cir. 1970).
\item \textsuperscript{52} \textit{Id.}; Lively v. Wild Oats Mkt., Inc., 456 F.3d 933, 939 (9th Cir. 2006).
\item \textsuperscript{53} Snapper, Inc. v. Redan, 171 F.3d 1249, 1255 n.7 (11th Cir. 1999).
\end{itemize}
procedure for removal. In 1988, Congress expressly separated the two grounds for remand, amending Section 1447(c) to require a motion to remand within thirty days of removal for "any defect in the removal procedure." The 1988 version of Section 1447(c) also provided, "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Despite the clarification of what was meant by "improvident" removal, courts and commentators were still unclear how to classify certain removal requirements—like the forum defendant rule—that did not strictly seem to be part of the removal procedure. Nevertheless, most courts interpreting the 1988 version held that the forum defendant rule is a nonjurisdictional defect in the removal procedure.

In 1996, Congress amended the statute again. The revised statute (which is the current statute) eliminated the "removal procedure" language, instead requiring that "any defect other than lack of subject matter jurisdiction must be made within 30 days of filing the notice of removal." The Eleventh Circuit remarked that "[t]he revised language would seem to address neatly the issue that had concerned courts under the 1988 version, suggesting that a removal in violation of Section 1441(b) [i.e., the forum defendant rule] is subject to the 30-day time limit." Other courts holding that the forum defendant rule is a "defect other than lack of subject matter jurisdiction" have likewise relied on this statutory history.

54. See id. at 1254.
56. Snapper, 171 F.3d at 1256.
57. See Lively, 456 F.3d at 939; id. at 1258.
61. Snapper, 171 F.3d at 1258.
62. Lively, 456 F.3d at 939 (agreeing "with the Eleventh Circuit's historical analysis of § 1447(c)"). Even after the 1996 revision of 28 U.S.C. § 1447(c) removed the language requiring a "procedural" defect, courts have continued to characterize the forum defendant rule as "more a matter of removal procedure, and hence waivable, than a matter of jurisdiction." Hurley v. Motor Coach Indus., 222 F.3d 377, 380 (7th Cir. 2000).
2. **The Purpose of the Forum Defendant Rule**

Courts holding that the forum defendant rule is not jurisdictional have also relied on the policy reasons behind limiting removal to out-of-state defendants in the first place. The primary bases for jurisdiction in the federal courts are the presence of a federal question and diversity of citizenship between the litigants. Both bases for jurisdiction are grounded in Article III of the Constitution. Whereas institutional competency justifies providing a federal forum for federal questions, the rationale for diversity jurisdiction is to prevent the possibility of local prejudice in state courts against an out-of-state litigant. Accordingly, where a defendant is haled into the court of a foreign state, removal provides the opportunity for a forum presumably free from local prejudice. Where the plaintiff chooses the defendant’s state courts, however, the possibility for local prejudice is not present, and thus there is arguably no need to provide a neutral federal forum. The forum defendant rule thus “is designed to preserve the plaintiff’s choice of a (state) forum, under circumstances where it is arguably less urgent to provide a federal forum to prevent prejudice against an out-of-state party.” Characterizing the forum defendant rule as nonjurisdictional thus leaves the choice of forum in the plaintiff’s hands: if the plaintiff wishes to retain the state forum, she need only file a timely remand motion; if the plaintiff is content with a federal forum, she need do nothing.

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63. See Lively, 456 F.3d at 939–40; Hurley, 222 F.3d at 380. As Professor Moore explains, “[t]he policy behind the forum-defendant rule supports the nonjurisdictional characterization.” 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 107.14(2) (e) (ii) (3d ed. 2010).
65. “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority...[and]...to Controversies...between Citizens of different States.” U.S. CONST. art. III, § 2.
66. See Lively, 456 F.3d at 940; Hurley, 222 F.3d at 380; cf. Bailey v. Tex. Co., 47 F.2d 153, 155 (2d Cir. 1924) (finding that where there is “mutual consent...the resulting situation is equivalent to initiating an action in the District Court in which the defendant appears”); Handley-Mack Co. v. Godchaux Sugar Co., 2 F.2d 435, 436–37 (6th Cir. 1924) (finding that a “[p]laintiff’s submission to defendant’s removal proceeding is
characterization, however, would set the forum in stone even if the plaintiff agreed to the federal forum. As the Seventh Circuit held, "the only purpose that would be served by declaring the forum defendant rule jurisdictional would be to preserve for plaintiffs rights that the plaintiffs themselves failed to assert." 70

3. Supreme Court and Court of Appeals Precedent

Courts holding that the presence of a forum defendant is not a jurisdictional bar to proceeding in federal court following removal have also relied on the "overwhelming weight of authority . . . on the nonjurisdictional side of the debate." 71 As detailed above, in a line of cases starting in 1924, and with origins even earlier, the courts of appeals have been nearly unanimous in holding that the forum defendant rule is not jurisdictional. 72 In addition to the many court of appeals decisions, 73 the courts have also relied on "a series of cases in which the Supreme Court consistently refused to treat the removal statute as imposing independent jurisdictional requirements." 74 As early as 1900, the Court held that a removal that was improper due to the lack of a federal question did not divest the district court of subject matter jurisdiction that existed on another ground. 75 In 1913, the Court held that an "irregularly removed" case did not lack for jurisdiction so long as "there was the requisite amount and the diversity of citizenship necessary to give the United States circuit court jurisdiction of the cause." 76 Relying on these cases, the Court later held in Grubbs v. General Electric Credit Corp. that where a case had been

"a short cut" equivalent to discontinuing the suit in state court and filing it in the district court).

70. Hurley, 222 F.3d at 380.
71. Lively, 456 F.3d at 940; id. at 379; see also Korea Exch. Bank v. Trackwise Sales Corp., 66 F.3d 46, 50 (3d Cir. 1995) (noting that the nonjurisdictional conclusion "is consistent with the conclusions reached by almost every other court of appeals that has addressed the issue," and that the "position is endorsed by several leading commentators").
72. See supra notes 41–50 and accompanying text.
73. See, e.g., In re Shell Oil Co., 932 F.2d 1518, 1519 (5th Cir. 1991) (holding that improper removal is a waivable defect).
74. Korea Exch. Bank, 66 F.3d at 49; see also In re 1994 Exxon Chem. Fire, 558 F.3d 378, 394 (5th Cir. 2009); Hurley 222 F.3d at 379; ("[T]he theme of several recent Supreme Court decisions that have considered curable defects in diversity jurisdiction has been to find that as long as the court's jurisdiction is proper at the time of trial and judgment, the case need not be dismissed because of an earlier jurisdictional problem.").
75. See Baggs v. Martin, 179 U.S. 206, 209 (1900).
improperly removed but was tried on the merits without objection, the relevant issue "is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court."\textsuperscript{77} The courts of appeals have generally held that \textit{Grubbs} "clearly suggested" that the removal statute does not "impose[s] independent jurisdictional restrictions on the federal courts."\textsuperscript{78}

B. The Eighth Circuit's Holding that the Forum Defendant Rule is Jurisdictional

Despite the overwhelming weight of authority favoring a nonjurisdictional forum defendant rule, the Eighth Circuit has adopted the contrary rule that the presence of any defendant in the forum state divests the district court of subject matter jurisdiction it would otherwise have over a case removed from state court.\textsuperscript{79} In \textit{Hurt v. Dow Chemical Co.}, the court considered whether a district court retained diversity jurisdiction over a case improperly removed from state court on the basis of federal question jurisdiction, where the plaintiff moved to remand nearly a year after the removal.\textsuperscript{80} The court reasoned that although "the District Court would have had diversity jurisdiction," the case would not have been removable because one defendant was a citizen of the forum state.\textsuperscript{81} Because "[t]he jurisdiction of the lower federal courts, both original and removal, is entirely a creature of statute. . . . [i]f one of the statutory requirements is not met, the district court has no jurisdiction."\textsuperscript{82} The court held that the presence of a forum-state defendant creates "an absence of subject-matter jurisdiction" that "cannot be waived."\textsuperscript{83} The Eighth Circuit distinguished the Supreme Court's decision in \textit{Grubbs} on the basis that \textit{Grubbs} "expressly relied on the fact that the plaintiff had never objected to removal in the district court," whereas the plaintiff in \textit{Hurt} did object, albeit nearly a year after the removal.\textsuperscript{84}

The court reaffirmed its position that the forum defendant rule is

\textsuperscript{78} Korea Exch. Bank., 66 F.3d at 50; see also \textit{In re 1994 Exxon Chem. Fire}, 558 F.3d at 394; Lively v. Wild Oats Mkts., Inc., 456 F.3d 933, 941–42 (9th Cir. 2006); Farm Constr. Servs. v. Fudge, 831 F.2d 18, 22 (1st Cir. 1987).
\textsuperscript{79} Hurt v. Dow Chem. Co., 963 F.2d 1142 (8th Cir. 1992).
\textsuperscript{80} \textit{See id.} at 1143–44.
\textsuperscript{81} \textit{Id.} at 1145.
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.} at 1146 n. 1.
\textsuperscript{84} \textit{Id.} at 1146.
jurisdictional in *Horton v. Conklin*, acknowledging that there was contrary authority from other circuits, but concluding that "*Hurt* sets forth the better rule," and that "the violation of the forum defendant rule is a jurisdictional defect." Given the opportunity to reconsider the holding in *Hurt* en banc, the Eighth Circuit declined.

IV. A VIOLATION OF THE FORUM DEFENDANT RULE DOES NOT DIVEST A DISTRICT COURT OF SUBJECT MATTER JURISDICTION

As described above, the judges who have concluded that the forum defendant rule is nonjurisdictional (including, among others, Learned Hand and Henry Friendly) have given persuasive reasons for doing so. The Eighth Circuit's reasoning in *Hurt*, in contrast, fails to meet the majority of courts' arguments, neglecting to address the history and language of the federal removal statutes or the purpose of the forum defendant rule, and only superficially addressing Supreme Court precedent.

The "overwhelming weight of authority... on the nonjurisdictional side of the debate," is correct for all of these reasons explained above, but even courts on the majority side of the circuit split have yet to fully analyze the plain language of the removal and remand statutes since they were last revised in 1996. Below I present a plain language argument for the nonjurisdictional characterization that precludes finding that the forum defendant rule is jurisdictional.

A. The Eighth Circuit's Arguments in Support of a Jurisdictional Forum Defendant Rule

The Eighth Circuit's decision in *Hurt* relied on two arguments in support of a jurisdictional characterization of the forum defendant rule, neither of which is persuasive.

First, the court stated that a removing defendant "must meet the statutory requirements for removal jurisdiction." The court reasoned that because the lower courts' jurisdiction is "entirely a creature of statute[,...] "[i]f one of the statutory requirements is not met, the

85. 431 F.3d 602, 604 (8th Cir. 2005).
86. Id. at 605.
87. Id., reh'g denied, No. 05-1199, 2006 U.S. App. LEXIS 3245 (8th Cir. Feb. 9, 2006).
89. Hurt, 963 F.2d at 1145 (emphasis added).
district court has no jurisdiction.” But this argument holds little water. Most notably, the court relies on the asserted requirements for “removal jurisdiction,” but removal jurisdiction and subject matter jurisdiction “are not one and the same.” The jurisdictional ground for remand in 28 U.S.C. § 1447(c) is not lack of “removal jurisdiction”—it is lack of “subject matter jurisdiction.” The subject matter jurisdiction of the district courts is contained in the statutes specifically conferring jurisdiction, not in the removal statute. The Eighth Circuit thus was incorrect to equate lack of a statutory requirement for “removal jurisdiction” with a lack of “subject matter jurisdiction.”

Second, the Eighth Circuit attempted to distinguish the Supreme Court’s decision in Grubbs by asserting that unlike the plaintiff in Grubbs, the Hurt plaintiff had objected to removal. In other words, the Eighth Circuit reasoned that a district court could have jurisdiction over an improperly removed case if the plaintiff does not object to the removal, but would lack jurisdiction if the plaintiff does object. But this argument ignores the axiom that a court’s jurisdiction does not depend on the consent of the parties, and that a party may not waive lack of subject matter jurisdiction. Under the reasoning of Hurt, a district court would lack jurisdiction over an improperly removed case only if the plaintiff objected to the removal, but even if there were no objection the court is still obliged to consider sua sponte whether it has subject matter jurisdiction. Whether the plaintiff objects to removal or not thus can have no effect on the court’s subject matter jurisdiction and a fortiori is immaterial to whether a particular condition of removal is or is not jurisdictional.

90. Id.
91. Codgell v. Wyeth, 366 F.3d 1245, 1247 (11th Cir. 2004); see also id. at 1247–48 (discussing “removal jurisdiction”). As the Eleventh Circuit explained, removal jurisdiction “requires more... than subject matter jurisdiction in the federal courts.” Id. at 1247 (emphasis added). For example, a district court can be said to lack “removal” jurisdiction over a case if it was brought in the first instance in federal court, because one obvious requirement for removal is that the case originate in state court. Id. A district court likewise would lack removal jurisdiction if the defendant never filed a notice of removal. Id. Yet neither of these circumstances would divest the court of its subject matter jurisdiction as defined by federal statutes.
93. See id. §§ 1330–1369.
94. Hurt, 963 F.3d at 1145–46.
95. Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 18 n. 17 (1951) (“It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case.” (quoting People’s Bank v. Calhoun, 102 U.S. 256, 260–61 (1880))).
96. Lively v. Wild Oats Mkts., Inc., 456 F.3d 933, 942 n.12 (9th Cir. 2006).
B. A Plain Language Argument

Most of the cases holding that the forum defendant rule is not jurisdictional were decided before the 1996 revision to the remand statute. Accordingly, few of the courts on the majority side of the split had the opportunity to closely consider the interaction between the plain language of the amended statute and that of the forum defendant rule. In the cases decided after 1996, the courts had a long line of precedents upon which to rely, and may not have perceived the need to closely consider the plain language of the revised statute. But a new statute warrants a fresh examination of its plain language. As I show below, a fresh examination of the language here reveals that the forum defendant rule cannot be considered jurisdictional.

The current version of § 1447(c) permits remand under two circumstances: (1) when a timely filed “motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction” is made, and (2) if “the district court lacks subject matter jurisdiction.”\footnote{28 U.S.C. § 1447(c) (2006).} Both circumstances depend on whether the basis for remand is or is not a “lack of subject matter jurisdiction.”\footnote{Id.} If the basis is a lack of subject matter jurisdiction, it need not be raised by motion within the prescribed time period; if it is “a defect other than lack of subject matter jurisdiction,” it must be raised by motion.\footnote{Id. (emphasis added).} I repeat myself because the courts so far have not acknowledged that since 1996, the lack of jurisdiction required to remand under § 1447(c) (and which is insulated from review under § 1447(d)) is lack of jurisdiction over the subject matter of the lawsuit. Subject matter jurisdiction is jurisdiction “over the nature of the case and the type of relief sought” or “the extent to which a court can rule on the conduct of persons or the status of things.”\footnote{BLACK'S LAW DICTIONARY 931 (9th ed. 2009).} It does not describe a court's jurisdiction over a

\footnote{97. See cases cited supra, note 39.} \footnote{98. \textit{Lively}, 456 F.3d at 939 (agreeing with “the Eleventh Circuit’s historical analysis of § 1447(c)”); \textit{cf. Snapper, Inc. v. Redan}, 171 F.3d 1249, 1258 (11th Cir. 1999) (stating that the 1996 revision of the statute suggests that “a removal in violation of § 1441(b) is subject to the 30-day time limit”).} \footnote{99. See, \textit{e.g.}, \textit{Hurley v. Motor Coach Indus.}, 222 F.3d 377, 380 (7th Cir. 2000) (characterizing the forum defendant rule as “more a matter of removal procedure,” despite that the 1996 revision removed the language requiring a “procedural” defect for remand).}
specific case, but rather the court’s jurisdiction over the nature of the case or the type of relief sought. In other words, a court’s subject matter jurisdiction is the abstract category of cases that it is permitted to hear, not the list of cases that have actually been brought in the court and which meet the jurisdictional and procedural requirements to be heard. However one characterizes the requirement that cases must lack a forum defendant to be removable, no case or article has yet suggested that an in-state defendant divests the court of jurisdiction over the subject matter of the lawsuit; for example, a diversity case in which the amount in controversy exceeds the jurisdictional amount. Rather, it is precisely the fact that the district court has jurisdiction over the subject matter that raises the question whether it may still adjudicate the case though the removal was improper. If we take the “subject matter” limitation seriously, the forum defendant rule cannot require remand where the plaintiff fails to raise it by motion as required by § 1447(c).

Turning now to the removal statute, § 1441(b) states that a “civil action of which the district courts have original jurisdiction founded

104. Indeed, most courts, including in the Eighth Circuit, have held that the presence of an in-state defendant does not forbid removal under the forum-defendant rule if the forum defendant has not been served at the time of removal. E.g., McCall v. Scott, 239 F.3d 808, 815 n.2 (6th Cir. 2001) (“Where there is complete diversity of citizenship . . . the inclusion of an unserved resident defendant in the action does not defeat removal under 28 U.S.C. § 1441(b).” (emphasis in original)); Brake v. Reser’s Fine Foods, No. 4:08CV1879 (JCH), 2009 U.S. Dist. LEXIS 5787, at *5 (E.D. Mo. Jan. 28, 2009); Stan Winston Creatures v. Toys “R” Us, 314 F. Supp. 2d 177, 180 (S.D.N.Y. 2003) (“The language of § 1441(b) makes plain that its prohibition on removal applies only where a defendant who has been properly joined and served is a resident of the forum state.” (emphasis in original)); Ott v. Consol. Freightways Corp., 213 F. Supp. 2d 662, 665 (S.D. Miss. 2002) (“[C]ourts have held, virtually uniformly, that where, as here, diversity does exist between the parties, an unserved resident defendant may be ignored in determining removability under 28 U.S.C. § 1441(b).”); Wensil v. E.I. DuPont De Nemours & Co., 792 F. Supp. 447, 449 (D.S.C. 1992); Republic Western Ins. Co. v. Int’l Ins. Co., 765 F. Supp. 628, 629 (N. D. Cal. 1991); see also 14B CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3723 at 784 (4th ed. 2009) (“[T]he language of Section 1441(b) . . . implies that a diverse but resident defendant who has not been served may be ignored in determining removability.”); but see Sullivan v. Novartis Pharms. Corp., 575 F. Supp. 2d 640, 646–47 (D.N.J. 2008) (rejecting “plain meaning application” of § 1441(b)).

105. 28 U.S.C. § 1331 (2006). The argument could be made that for a removed diversity case, the district court’s subject matter jurisdiction is further limited to cases with not only diversity of citizenship where the amount in controversy exceeds the statutory threshold, but also those cases that lack a forum defendant, but that argument would run afoul of the general grant of diversity jurisdiction. This is because § 1331 assigns to the district courts “all civil actions” that meet the amount in controversy and diversity of citizenship requirements. Id. (emphasis added).
on [a federal question] shall be removable without regard to the citizenship or residence of the parties," while "[a]ny other such action" is subject to the forum defendant rule. 106 That is, the forum defendant rule applies to any other "civil action of which the district courts have original jurisdiction." 107 This too bears repeating: it is only a "civil action of which the district courts have original jurisdiction" (based on grounds other than a federal question) that is subject the forum defendant rule. So every forum defendant rule case is one in which the district court has original jurisdiction. "Original jurisdiction" is the power of a court to hear a case in the first instance, 108 and one component of original jurisdiction is necessarily jurisdiction over the subject matter of the lawsuit. Reading the two statutes together, the forum defendant rule applies only to cases in which the district court necessarily has jurisdiction over the subject matter of the lawsuit. Under the plain language of § 1441(b) and § 1447(c), therefore, a violation of the rule must be a "defect other than lack of subject matter jurisdiction" —one that is waived if not raised by motion within thirty days of removal.

V. CONCLUSION

The Supreme Court has twice declined to grant certiorari to finally resolve whether a violation of the forum defendant rule is a jurisdictional rule requiring remand or is instead a defect other than lack of subject matter jurisdiction that the plaintiff may waive by failing to raise it in thirty days. 110 The Eighth Circuit too has declined to hear the issue en banc, and has stated that its decision in Hurt "sets forth the better rule." 111 Nevertheless, in the vast majority of circuits, a violation of the forum defendant rule does not preclude jurisdiction where the plaintiff fails to object to the removal. When the issue arises again, the Eighth Circuit should revisit its erroneous decision in Hurt. Failing that, the Supreme Court should grant certiorari and

106. Id. § 1441(b) (emphasis added).
107. Id.
108. BLACK'S LAW DICTIONARY 930 (9th ed. 2009).
109. 28 U.S.C. § 1441(c) (emphasis added).
110. Lively v. Wild Oats Mks., Inc., 549 U.S. 1207 (2007) (denying certiorari in case where the Ninth Circuit held the forum defendant rule to be nonjurisdictional); Waugh v. Horton, 549 U.S. 813 (2006) (No. 05-1419) (denying certiorari in case where the Eighth Circuit held the forum defendant rule to be jurisdictional).
restore uniformity to the removal and remand of cases in the federal courts. 112

112. See supra note 25 and accompanying text. At least two of the nine Justices, Scalia and Thomas, are unlikely to vote for certiorari given that the issue most often arises in the context of a challenged remand order and their view that 28 U.S.C. § 1447(d) means what it says about the remand orders not being reviewable "on appeal or otherwise." Osborn v. Haley, 549 U.S. 225, 262 (2007) (Scalia, J., dissenting, joined by Thomas, J.). Justice Souter too would have adopted this view. Id. at 254. (Souter, J., concurring in part and dissenting in part) ("I would reaffirm the rule that a district court's remand order is unreviewable even if it is based on an erroneous understanding of the district court's jurisdiction."). Justice Souter's former seat is now held by Justice Sotomayor, who authored an opinion in Handelsman v. Bedford Vill. Assocs. Ltd., 213 F.3d 48, 50 n. 2 (2d Cir. 2000), holding that the forum defendant rule is nonjurisdictional, so there may be new hope for a resolution of this issue by the Supreme Court.