Missouri Law Review

Volume 88 | Issue 4 Article 11

Fall 2024

The House of Cards Topples: Examining Appellate Jurisdiction for Transfers of Venue in Federal Court

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NOTE

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Def. Distributed v. Platkin, 55 F.4th 486, 491 (5th Cir. 2022).

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I. INTRODUCTION

Many a lunch table argument has been had about a battle between unlikely foes. Who would win: a gorilla or a grizzly bear? A great white shark or a crocodile? Opponents throw their support behind one animal or another and vigorously debate the matchup—"a grizzly bear might be bigger, but a gorilla has opposable thumbs and superior intelligence!" As thrilling and engaging as these debates may be, participants recognize their theoretical nature. Part of the fun is that the question "who would win?" is often unanswerable. The hypothetical combatants simply do not encounter one another in the wild, leaving the matter perpetually open to debate.

Like the animal kingdom, the federal judiciary is—for the most part—neatly cabined. Each district court answers to a single circuit court on appeal, determined by geography. A visual of the federal court system in an American government textbook would show a tight, pyramidal structure, with ninety-four district courts flowing orderly into twelve circuit courts. The routes are well established; a given district court answers to the same appellate court for each appeal, virtually without exception. For that reason, it may surprise the legal observer to learn that a recent clash in the federal courts system saw a district court in New Jersey spar with an appellate court located hundreds of miles to the south. Our observer may be even more surprised to learn that the district

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court prevailed, effectively overruling the appellate court. Worryingly, the circumstances that created the clash are much more likely to recur than finding a grizzly bear in the rain forest.

The conflict occurred because of a transfer of venue made under 28 U.S.C. § 1404(a), a statute that allows a district court to transfer a civil suit to any other district "where it might have been brought,"[1] in the interest of justice and for the convenience of the parties and witnesses. Conflict between circuits can arise when a district court transfers a case *out* of circuit, i.e., to a district court over which the appellate court in the transferor circuit has no territorial jurisdiction.

The transfer of a case from one circuit to another unquestionably divests the transferor circuit of jurisdiction at some point in the transfer process. To determine when the divestment of jurisdiction occurs, most circuits use the "physical transfer" rule.[2] The physical transfer rule holds that the transferor circuit court loses the ability to review the transfer order when the file is physically transferred out of the circuit.[3] But this rule is a relic of a pre-digital era, when transfer took days or weeks, requiring stacks of documents to be mailed across the country. Today, the physical transfer rule allows a transfer order to escape review unless the circuit court wins an unwinnable race: rendering a decision on the propriety of a transfer order before the clerk of the district court electronically transfers the case out of circuit with a few quick clicks.

Several circuits that follow the physical transfer rule have devised a solution. Even though these circuit courts maintain that they have no power to *order* a return of the case, they circumvent this dilemma by ordering the transferor court to *request* a return of the case.[4] This request is nonbinding and produces a fragile system dependent on the voluntary compliance of an out-of-circuit district court to correct an improper transfer.[5] Refusal by the transferee court amounts to a district court effectively overruling the circuit court's decision that the case should be returned. Fortunately, for decades, every transferee court that received such a request willingly complied and voluntarily returned the wrongfully

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[1] 28 U.S.C. § 1404(a).

[2] Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1516 (10th Cir. 1991) (collecting cases from other U.S. Circuits).

[3] *Id.*

[4] *In re* Warrick, 70 F.3d 736, 741 (2d Cir. 1995); Def. Distributed v. Platkin, 55 F.4th 486, 492 (5th Cir. 2022); *In re* Nine Mile Ltd., 673 F.2d 242, 243 (8th Cir. 1982); Matrix Grp. Ltd., Inc. v. Rawlings Sporting Goods Co., 378 F.3d 29, 32 (1st Cir. 2004); Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 989 n.10 (11th Cir. 1982); Town of N. Bonneville v. U.S. Dist. Ct., W. Dist. of Wash., 732 F.2d 747, 752 (9th Cir. 1984).

[5] *See* In re *Nine Mile Ltd.*, 673 F.2d at 244; *Platkin*, 55 F.4th at 493.

transferred case.[6] This established procedure changed with *Defense Distributed v. Platkin*,[7] when the Fifth Circuit was confronted with the physical transfer rule's worst case scenario: a far-away transferee court that refused a request to return the case.

Part II details the factual and procedural background that led to the Fifth Circuit's decision. Part III examines the legal context surrounding appellate review of transfer orders and discusses various jurisdictional rules that courts have adopted to govern them. Part IV describes the court's analysis and application of the physical transfer rule. Finally, Part V uses the outcome of the case to scrutinize the physical transfer rule and proposes two solutions to the intractable problem of appellate review of transfer orders.

II. FACTS AND HOLDING

Given this Note's primary concern with the transfer of a case, *Platkin*'s underlying merits are of lesser importance. However, it is useful to establish a brief overview of the parties and the nature of the dispute in order to better grasp the rationale behind the transfer decisions. The named plaintiff in the case is Defense Distributed, a Texas-based corporation with the stated purpose of making blueprints available to enable users to print three–dimensional firearms.[8] In 2018, New Jersey passed a law prohibiting the publication and proliferation of Defense Distributed's gun plans, and several states sued to enjoin the dissemination of the plans.[9] In response, Defense Distributed filed suit in the U.S. District Court for the Western District of Texas (the Texas district court) against nine attorneys general in their official capacities as representatives of those states.[10] The New Jersey Attorney General (NJAG) was among the defendants. In early 2019, the attorneys general moved to dismiss for lack of personal jurisdiction,[11] and the Texas district court granted the motion.[12] Defense Distributed appealed the ruling to the Fifth Circuit.[13]

The Fifth Circuit reversed, finding that the Texas district court had personal jurisdiction over the defendants.[14] The court noted that the defendants' actions established foreseeable harm in Texas, and a cease-

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[6] Def. Distributed v. Platkin, 48 F.4th 607, 608 (5th Cir. 2022) (per curiam) (Ho, J., concurring).

[7] *Platkin*, 55 F.4th at 489.

[8] *Id.*

[9] Def. Distributed v. Grewal, 368 F. Supp. 3d 1087, 1089 (W.D. Tex. 2018).

[10] *Platkin*, 55 F.4th at 488.

[11] Def. Distributed v. Grewal, 364 F. Supp. 3d 681, 685 (W.D. Tex. 2019), *rev'd and remanded*, 971 F.3d 485 (5th Cir. 2020).

[12] *Id.* at 691.

[13] *Grewal*, 971 F.3d at 488 (5th Cir. 2020).

[14] *Id.* at 496.

and-desist letter, along with other conduct, constituted minimum contacts.[15] On remand, the Texas district court considered a motion by the NJAG to sever and transfer the action to the District of New Jersey (the New Jersey district court).[16] The Texas district court granted the motion, applying four public and four private factors in its transfer analysis to compare the Texas district court to its New Jersey counterpart.[17] Per the court's analysis, three of the four public interest factors favored transfer.[18] Similarly, the court held that two of the four private interest factors were neutral, and the other two favored transfer.[19] Having found that "all the relevant factors are neutral or weigh in favor of transfer," the court granted the severance and transfer motion on April 19, 2021.[20] The case was then "physically" transferred and docketed in New Jersey just one day later.[21]

Defense Distributed appealed the order the next day, sending the parties to the Fifth Circuit once again.[22] Defense Distributed sought a writ of mandamus, ordering the Texas district court to request retransfer from the New Jersey court.[23] The Fifth Circuit granted the petition.[24] It held that the Texas district court "erred legally and factually in virtually every aspect of this issue," and found that the transfer order represented a clear abuse of discretion.[25] The Fifth Circuit pointed out that the Texas district court weighed certain factors in favor of transfer to New Jersey without any explanation as to how the proposed forum better satisfied those factors.[26] Further, the Fifth Circuit found that the Texas district court erroneously considered multiple factors together during the analysis.[27]

Recall that this Note focuses on the *process* of appellate review of transfer orders, not the proper substantive standards for reversing them. Even if the Fifth Circuit "wrongly" decided that the transfer should be reversed here, the next case may be one that rightfully requires reversal.

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[15] *Id.* at 495–96.

[16] Def. Distributed v. Grewal, No. 1:18-CV-637-RP, 2021 WL 1614328, at *1 (W.D. Tex. Apr. 19, 2021), *mandamus granted, order vacated sub nom*. Def. Distributed v. Bruck, 30 F.4th 414 (5th Cir. 2022).

[17] *Id.* at *6–8.

[18] *Id.* at *6–7.

[19] *Id.* at *7–8.

[20] *Id.* at *8.

[21] *See* Docket Entry #147, Def. Distributed v. Grewal, No. 1:18-cv-00637-RP (W.D. Tex. Apr. 20, 2020) ("Case transferred from TXWD and has been received and opened in District of New Jersey . . . .").

[22] Def. Distributed v. Bruck, 30 F.4th 414, 424 (5th Cir. 2022).

[23] *Id.* at 421.

[24] *Id.* at 437.

[25] *Id.* at 436.

[26] *Id.*

[27] *Id.* at 435.

Thus, this Note assumes, without deciding, that the Fifth Circuit correctly concluded that the case was wrongfully transferred.

The writ of mandamus issued by the Fifth Circuit directed the Texas district court to vacate its transfer order and request return of the case from the New Jersey district court.[28] The Texas district court complied and requested the case back from the New Jersey district court.

The New Jersey court refused. In a fifty-five-page opinion in July 2022, the New Jersey district court performed the case's third transfer analysis and came to a third different set of conclusions.[29] Notably, the New Jersey court was not "reviewing" the transfer order from the Texas district court but was instead conducting its own transfer analysis from scratch. Consequently, the New Jersey court was applying Third Circuit precedent to the motion—precedent which consisted of slightly different factor tests than Fifth Circuit case law.[30] The New Jersey court found that, while the private interest factors were balanced, the public interest factors counseled against transfer back to the Texas district court.[31] The New Jersey court stressed that the request for retransfer was nonbinding, and neither comity nor the law-of-the-case doctrine compelled compliance with the request.[32]

Two months after the New Jersey court's refusal to retransfer the case, two members of the Fifth Circuit's motions panel wrote an opinion imploring the New Jersey court to comply with the retransfer request.[33] The Fifth Circuit said it could "think of no substantive reason" for the case to proceed in New Jersey.[34] It "respectfully" asked the New Jersey court to honor the Fifth Circuit's decision and grant the request to return the case to Texas.[35] This course of action, the Fifth Circuit claimed, was

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[28] *Id.* at 436–37.

[29] Def. Distributed v. Platkin, 617 F. Supp. 3d 213, 241 (D.N.J. 2022).

[30] *Compare In re* Volkswagen of Am., Inc., 545 F.3d 304, 315 (5th Cir. 2008) (describing the Fifth Circuit's four public and four private interest factors*), with* Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995) (describing the Third Circuit's six public and six private interest factors).

[31] *Platkin*, 617 F. Supp. 3d at 239–40.

[32] *Id.* at 240. The law of the case doctrine is defined as "[t]he doctrine that when a point or question arising in the course of a lawsuit has been finally decided, the legal rule or principle announced as applicable to the facts governs the lawsuit in all its later stages and developments." *Law of the Case*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Comity is "[t]he principle encouraging federal district courts to refrain from interfering in each other's affairs. Under this doctrine, a federal court has the discretion to transfer, stay, or dismiss a case that is duplicative of a case filed in another federal court." *Federal Comity Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[33] Def. Distributed v. Platkin, 48 F.4th 607 (5th Cir. 2022) (per curiam) (Ho, J., concurring).

[34] *Id.*

[35] *Id.*

"consistent with the judiciary's longstanding tradition of comity."[36] The court highlighted numerous examples of "courts across America" granting such requests,[37] underscoring that "these cases originated elsewhere and only ended up in the transferee court as a result of mistake."[38] The Fifth Circuit noted that it was not aware of a previous case in which such a request was denied, and it believed there was "no reason . . . this case should be the first."[39]

The New Jersey district court was not persuaded.[40] The next month, in October 2022, it denied Defense Distributed's motion for reconsideration of its denial of the transfer order.[41] The New Jersey court described the Fifth Circuit's mandamus as "an isolated outlier," claiming the reason no court had refused a request to retransfer is that the request itself had "never been provided in such context."[42] "Comity," wrote Judge Wolfson of the New Jersey court, "in no way requires that I substitute the analysis of the Fifth Circuit for my own."[43]

Undeterred, Defense Distributed attempted to proceed with its litigation on the merits in the Texas district court. The court entered a short order claiming it no longer had jurisdiction, and the parties ventured to the Fifth Circuit for a third and final time.[44] In a December opinion, the Fifth Circuit conceded defeat. Despite its urging, the New Jersey court had refused to retransfer.[45] The circuit court held that when a case has been physically transferred out-of-circuit, the transferor circuit is divested of appellate authority over the transfer order.[46] While it may request a retransfer, it is powerless if the transferee district court refuses.[47]

III. LEGAL BACKGROUND

This section begins with a brief introduction to venue transfer, focusing on its history and modern usage. It then discusses appellate review of transfer orders. Finally, it details the jurisdictional issues that arise when a case is transferred out-of-circuit and catalogs the various solutions that courts have adopted.

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[36] *Id.*

[37] *Id.*

[38] *Id.* at 607–08.

[39] *Id.* at 608.

[40] Def. Distributed v. Platkin, No. CV 19-04753 (FLW), 2022 WL 14558237, at *6 (D.N.J. Oct. 25, 2022).

[41] *Id.*

[42] *Id.* at *2, *4.

[43] *Id.* at *4.

[44] *Id.* at *6.

[45] Def. Distributed v. Platkin, 55 F.4th 486, 493 (5th Cir. 2022).

[46] *Id.*

[47] *Id.*

A. Origin and Modern Importance of Venue Transfer

Venue transfer between federal courts is governed by 28 U.S.C. § 1404.[48] Section 1404(a) instructs that "a district court may transfer any civil action to any other district . . . where it might have been brought . . . [f]or the convenience of parties and witnesses, in the interest of justice."[49] At the time of its enactment in 1948, § 1404(a) was designed to assist federal courts with the then-increasing problem of litigation in inconvenient forums.[50] The Supreme Court has long made clear that the purpose of § 1404(a) is to "protect litigants, witnesses, and the public against inconvenience and expense" and to prevent waste of "time, energy and money."[51]

As the text and case law make evident, the primary considerations underlying § 1404(a) transfer are convenience and justice. When courts are faced with a motion to transfer, they deploy a multifactor test, divided into "public interest" and "private interest" categories.[52] While the phrasing of the factors lacks uniformity across courts, their substance is "remarkably similar."[53] Despite substantial similarities, several circuit courts weigh these factors differently.[54] Consequently, it is entirely possible that two circuit courts could reach two different results on the same motion to transfer.[55]

Public interest factors often include judicial economy, familiarity with the governing law, the interests of the locality in deciding the controversy, and court congestion.[56] Private interest factors focus on the parties' convenience of litigating in a given forum, the location in which

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[48] 28 U.S.C. § 1404.

[49] *Id.* § 1404(a).

[50] *Id.*

[51] Cont'l Grain Co. v. The FBL-585, 364 U.S. 19, 26–27 (1960).

[52] 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3847 (4th ed. 2023) (discussing generally the standard in considering transfer).

[53] *Id.*

[54] *Compare* Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970) (The Third Circuit holds that a "plaintiff's choice of forum is a paramount consideration in [a § 1404] transfer request."), *with In re* Volkswagen of Am., Inc., 545 F.3d 304, 313 (5th Cir. 2008) (The Fifth Circuit holds that "§ 1404(a) tempers the effects of [a plaintiff's choice of forum].").

[55] *See* Robert L. Uriarte, *How to Get Out Of Dodge: Winning Patent Venue Transfer Strategies and the Federal Circuit*, ORRICK HERRINGTON & SUTCLIFFE LLP (Mar. 19, 2014), https://www.orrick.com/en/Insights/2014/03/How-to-Get-Out-Of-Dodge-Winning-Patent-Venue-Transfer-Strategies-and-the-Federal-Circuit [https://perma.cc/9DUB-FUK5] ("[N]uanced differences in circuit precedent can result in different outcomes on the same or similar facts.").

[56] WRIGHT & MILLER § 3847, *supra* note 52.

the claim arose, and access to evidence.[57] Typically, a district court queues up the set of private and public interest factors used in its circuit, then marches down the line with a factor-by-factor comparison between the current court and the proposed alternate forum.[58] When the dust settles, the court declares a winner under the balancing test and rules accordingly, either issuing the transfer order or denying the motion.[59]

Despite its roots as a simple tool to make litigation more convenient, modern venue transfer is of immense tactical importance to litigants.[60] Transferring a case to another district court can affect how quickly the case will come to a resolution,[61] the composition of the jury pool at trial,[62] and even whether the judge will rule in a party's favor on motions.[63] Put simply, venue can be—and often is—outcome determinative. Empirical evidence demonstrates just how influential venue can be in federal court, with one study finding that plaintiffs' success rate—typically about fifty-eight percent—plummets to twenty-nine percent when transfer is granted.[64]

B. Appellate Review of Transfer Orders

Historically, appellate courts disfavor review of a transfer order.[65] In one of the earliest cases dealing with appellate review of transfer orders, the Third Circuit denounced the practice, stating it "defeat[s] the object of the statute. Instead of making the business of the courts easier, quicker

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[57] *Id.*

[58] 1 A.L.R. Fed. 15 (originally published in 1969).

[59] *Id.*

[60] *See* Motion to Transfer Venue (Federal), Practical Law, Practice Note w-000-3770 (listing strategic reasons for seeking transfer).

[61] *See* UNITED STATES COURTS, TABLES FOR THE JUDICIARY, Tbl. C-5 (2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_c5_0930.2022.pdf [https://perma.cc/PL8Y-63N9] [hereinafter TABLES FOR THE JUDICIARY] (reporting median time from filing to disposition in civil cases for 2022; *compare* the Southern District of Florida (3.7 months), *with* the Eastern District of Louisiana (69.4 months)).

[62] Phillip F. Cramer, *Constructing Alternative Avenues of Jurisdictional Protection: Bypassing* Burnham's *Roadblock Via § 1404(a)*, 53 VAND. L. REV 311, 317 (2000).

[63] *See* Gregory C. Sisk & Michael Heise, *Ideology 'All the Way Down'? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1205 (2012) (finding substantial ideological differences in the rulings of federal district court judges using establishment clause cases as the subject matter, noting that a claimant's chances for success were 2.25 times greater in front of a judge appointed by a democratic president than one appointed by a republican president).

[64] Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV 1507, 1507 (1995).

[65] 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3855 (4th ed. 2023) (discussing appellate review of transfer rulings).

and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried."[66] Courts shuddered at the notion that what was intended to be a procedural improvement could result in double litigation—one dispute about the merits and another about venue.[67] This was the judiciary's prevailing view from the time of § 1404(a)'s enactment in 1948 through the 1970s.[68] Commentators of the time echoed this position.[69] In these first few decades of § 1404(a), appellate courts refused review of transfer orders "except in really extraordinary situations."[70] Because they were virtually unappealable, courts at this time had little reason to establish rules for appellate jurisdiction over transfer orders. Ensuing decades, however, witnessed a shift.[71] Recently, perhaps in recognition of the tactical value of venue transfer, appellate courts have been much more willing to review transfer orders.[72] Instead of limiting review to "really extraordinary situations," most appellate courts now review transfer orders for abuse of discretion.[73] While the exact contours of what constitutes such an abuse vary by circuit, it is clear that transfer orders are now being reviewed more frequently and more exactingly than they used to be.[74]

Jurisdiction for review of a transfer order is rarely in question when the transferor and transferee district courts are located in the same circuit.[75] The case remains under the authority of the same circuit court at all times,

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[66] All States Freight v. Modarelli, 196 F.2d 1010, 1012 (3d Cir. 1952).

[67] *Id.*

[68] WRIGHT & MILLER § 3855, *supra* note 65.

[69] Irving R. Kaufman, *Further Observations on Transfers Under Section 1404(a)*, 56 COLUM. L. REV. 1, 11 (1956).

[70] *In re* Josephson, 218 F.2d 174, 183 (1st Cir. 1954).

[71] WRIGHT & MILLER § 3855, *supra* note 65.

[72] *Id.*

[73] *See e.g.*, *In re* Chatman-Bey, 718 F.2d 484, 486–87 (D.C. Cir. 1983) (reviewable "to prevent abuses of a district court's discretion to transfer a case"); *In re* Genentech, Inc., 566 F.3d 1338, 1348 (Fed. Cir. 2009) (reviewable in the event of a clear abuse of discretion); Coady v. Ashcraft & Gerel, 223 F.3d 1, 11 (1st Cir. 2000) ("We would review the district court's decision on transfer of venue for an abuse of discretion"); *In re* Warrick, 70 F.3d 736, 740 (2d Cir. 1995) ("A court of appeals will issue a writ of mandamus to correct a district court's disposition of a section 1404 transfer motion for a clear abuse of discretion"); *In re*: Howmedica Osteonics Corp., 867 F.3d 390, 401 (3d Cir. 2017) ("[I]f the petitioner shows . . . a clear and indisputable abuse of discretion or error of law"); Def. Distributed v. Bruck, 30 F.4th 414, 433 (5th Cir. 2022) (reviewing for abuse of discretion); *but see In re* Ralston Purina Co., 726 F.2d 1002, 1004 (4th Cir. 1984) (rejecting an abuse of discretion standard for a transfer order and requiring "judicial usurpation of power").

[74] WRIGHT & MILLER § 3855, *supra* note 65.

[75] *See* Great N. Ry. Co. v. Hyde, 238 F.2d 852, 855 (8th Cir. 1956) (There is "no possibility of the appellate jurisdiction of this Court being affected in any way by [an intercircuit] transfer.").

and it is that circuit court which has the power to review the transfer.[76] But of course, motions to transfer do not exclusively occur within the same circuit. Jurisdiction becomes a murkier proposition in an inter-circuit transfer, where the case is sent to a court outside the circuit in which the case originated.

C. The Jurisdictional Dilemma in Out-of-Circuit Transfers

The appellate mechanism that permits review of out-of-circuit transfer orders is the writ of mandamus.[77] The All Writs Act, codified in 28 U.S.C. § 1651, empowers appellate courts to issue writs of mandamus even if no appeal has been perfected, as long as the court possesses final appellate jurisdiction.[78] Virtually all appellate courts agree that, in theory, writs of mandamus can be used to review a transfer order;[79] however, some appellate courts are more willing to issue a writ than others.[80]

Clearly, inter-circuit transfer, once complete, moves the case out of the jurisdiction of the transferor appellate court. Thus, at some point in the inter-circuit transfer process, the appellate court in the transferor circuit loses jurisdiction over the case. Defining the exact point in time when that loss occurs is critical for determining which court, if any, can review the transfer order. The possibilities and circumstances for determining this critical point are best laid out through an illustration.

Picture Zone A and Zone B. Each zone has a district court and a circuit court. Think of the case as a ball—something capable of being "thrown" from one zone to another. The transfer order itself is akin to the district court in Zone A throwing the case to the district court in Zone B. Assume that the throw (i.e., the transfer) was done erroneously, and the case should have remained in Zone A. Who can make the determination that the transfer was wrongful, and at what point? One option is that the circuit court in Zone B, as the superior authority in that zone, could pick up the case and throw it back to Zone A. Courts have foreclosed this course of action, however, holding that a transfer order is not immediately appealable in the transferee circuit.[81] The rationale is that a transferee

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[76] *Id.*

[77] *See In re* Volkswagen of Am., Inc., 545 F.3d 304, 309 n.3 (5th Cir. 2008) (compiling cases). Mandamus is "[a] writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usu. to correct a prior action or failure to act." *Mandamus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[78] *See* Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 25 (1943).

[79] WRIGHT & MILLER § 3855, *supra* note 65.

[80] *Id.*

[81] *See* Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 986 (11th Cir. 1982); Linnell v. Sloan, 636 F.2d 65, 67 (4th Cir. 1980); Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1518 (10th Cir. 1991); Posnanski v. Gibney, 421 F.3d 977, 980 (9th Cir. 2005); Purex Corp. v. St. Louis Nat'l

circuit court generally has no authority to review orders from district courts located outside of its territorial jurisdiction.[82]

Another possibility is that the district court in Zone B, the recipient of the erroneous transfer, could throw the case back itself. This option also faces considerable roadblocks. The law of the case doctrine, which generally prevents reconsideration of the same legal issues in the same case,[83] means the transferee court will typically defer to the transferor court's determination that the case should have been transferred.[84] In another scintillating ball analogy, the Sixth Circuit cautioned against the transferee court engaging in a "jurisdictional ping-pong" by batting the case back to its court of origin.[85]

If neither court in Zone B can correct the mistake, only one possibility remains: Zone A's occupants must attempt to rectify the situation by returning the case to its rightful home. The district court is no use. Recall our assumption—that the case was *wrongfully* transferred. It was the district court in Zone A who caused the problem because of its incorrect belief that the case should have been transferred, and it seems unlikely that it would have a spontaneous change of heart. That means it's ultimately up to the circuit court to set things right.

1. The Physical Transfer Rule

Unfortunately, most courts have held that the circuit court in Zone A is powerless to retrieve a case once it is thrown into Zone B, because the physical transfer process removes the case from the transferor circuit court's jurisdiction.[86] The widespread consensus among courts is that "[t]he date the papers in the transferred case are docketed in the transferee court," i.e., when the case lands in Zone B, "forms the effective date that appellate jurisdiction in the transferor circuit is terminated; the transfer

Stockyards Co., 374 F.2d 998, 1000 (7th Cir. 1967); Corley v. Long-Lewis, Inc., 965 F.3d 1222, 1232 (11th Cir. 2020) (compiling cases that describe the "uniform consensus of our sister circuits that an out-of-circuit transfer order is not reviewable on appeal in the transferee circuit.").

[82] *Roofing & Sheet Metal Servs., Inc.*, 689 F.2d at 986.

[83] *Law of the Case*, MERRIAM WEBSTER'S DICTIONARY, https://www.merriam-webster.com/legal/law%20of%20the%20case [https://perma.cc/56NB-8EKD] (last visited Oct. 12, 2023).

[84] WRIGHT & MILLER § 3855, *supra* note 65.

[85] Moses v. Bus. Card Express Inc., 929 F.2d 1131, 1137 (6th Cir. 1991) (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988)).

[86] Starnes v. McGuire, 512 F.2d 918, 924 (D.C. Cir. 1974); *Chrysler Credit Corp.*, 928 F.2d at 1516–17; *In re* Nine Mile Ltd., 673 F.2d 242, 243 (8th Cir. 1982); *In re* Sosa, 712 F.2d 1479, 1480 (D.C. Cir. 1983); *In re* Sw. Mobile Homes, Inc., 317 F.2d 65, 66 (5th Cir. 1963); Drabik v. Murphy, 246 F.2d 408, 409 (2d Cir. 1957).

order becomes unreviewable as of that date."[87] In these circuits, once the case hits the ground in Zone B, Zone A courts are divested of any jurisdiction.

Courts employing this physical transfer standard often permit the use of mandamus, not to *force* retransfer of the case but rather to order the transferor court to *request* retransfer.[88] This is akin to the circuit court in Zone A telling the district court in Zone A to ask the district court in Zone B to return the case. Of course, the peril of this tactic is that it depends on the Zone B district court to voluntarily comply with the request. Appellate courts in the transferor district that elect to make this request acknowledge that it is nonbinding and depends on the consent of the transferee court.[89] Fortunately for those using this delicate solution, it almost always works out. Transferee district courts typically respect the request of the transferor circuit and retransfer when asked.[90]

2. The "Proceeds" Rule

Another standard aside from the physical transfer test exists, crafted by the Third Circuit. The Third Circuit holds that the transferor circuit court is not divested of jurisdiction to review an out-of-circuit transfer until "the transferee court *proceeds* with the transferred case," provided the party opposing the transfer acts with "sufficient dispatch."[91] This is notably different from the physical transfer standard. This "proceeds" standard is akin to the circuit court in Zone A walking over to Zone B, retrieving the case, and bringing it back, so long as the district court in Zone B has not "picked up" the case off the ground and controlled it sufficiently. "The justification for this rule is clear," claimed the Third Circuit.[92] "A district court cannot divest an appellate court of jurisdiction by the mere expedient of ordering a transfer of the file documents to any other district court without following procedures established for such a transfer."[93] In other words, a lower court's erroneous order should not escape appellate review by its governing circuit court just because it quickly passed the case to another circuit.

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[87] *Chrysler Credit Corp.*, 928 F.2d at 1516 (collecting cases).

[88] *See In re* Warrick, 70 F.3d 736, 741 (2d Cir. 1995); *see also* Def. Distributed v. Platkin, 55 F.4th 486, 492 (5th Cir. 2022); In re *Nine Mile Ltd.*, 673 F.2d at 243; Matrix Grp. Ltd., Inc. v. Rawlings Sporting Goods Co., 378 F.3d 29, 32 (1st Cir. 2004); Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 989 n.10 (11th Cir. 1982); Town of N. Bonneville v. U.S. Dist. Ct., W. Dist. of Wash., 732 F.2d 747, 752 (9th Cir. 1984).

[89] *See* In re *Nine Mile Ltd.*, 673 F.2d at 244.

[90] *Platkin*, 48 F.4th at 608.

[91] *In re* United States, 273 F.3d 380, 384 (3d Cir. 2001) (emphasis added).

[92] *Id.*

[93] *Id.*

While the Third Circuit has not fully established what constitutes "proceeding" with the case in the transferee district, it has laid some framework in recent cases. In *In re United States*, the court found that the transferee district court had not "proceeded" with the case sufficient to deprive the Third Circuit of appellate jurisdiction by merely issuing a trial scheduling order.[94] In that case, the petitioner waited thirty-three days to file a petition for mandamus.[95]

Similarly, in *In re: Howmedica Osteonics Corp*, the Third Circuit held that the transferee district court had not "proceeded" with the case even when it issued two case management scheduling orders and an order relating the transferred case to another pending before it.[96] The petitioners in *Howmedica* waited twenty-seven days after the transfer order to file for mandamus, which the court held satisfied the "sufficient dispatch" requirement.[97]

One year later, in *In re McGraw-Hill Global Education Holdings LLC*, the Third Circuit permitted another exercise of appellate jurisdiction over a case that had been transferred to and docketed in the transferee court, but found that mandamus was not warranted.[98] The court refrained from further defining "proceeds," but noted that "[i]n the typical case, so long as the party seeking mandamus has 'acted with sufficient dispatch,' we will retain jurisdiction."[99]

3. A Mandatory Stay Pending Review

While the physical transfer and "proceeds" tests are the only defined standards used to determine when appellate jurisdiction expires over a transfer order, some courts evade the jurisdictional quandary altogether through mandatory stays of the transfer order to permit review.[100] This approach has the benefit of avoiding jurisdictional dilemmas altogether, since the case remains in the transferor circuit until an opportunity for review occurs. A small group of district courts have elected to codify a

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[94] *Id.*

[95] *In re:* Howmedica Osteonics Corp, 867 F.3d 390, 400 (3d Cir. 2017).

[96] *Id.*

[97] *Id.*

[98] *In re* McGraw-Hill Glob. Educ. Holdings LLC, 909 F.3d 48, 71 (3d Cir. 2018).

[99] *Id.* at 56.

[100] *In re* Nine Mile Ltd., 673 F.2d 242, 243–44 (8th Cir. 1982) (directing that transfer orders be stayed for a reasonable time pending possible petition for reconsideration or review); Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267, 275 n.11 (3d Cir. 1962) (suggesting adoption of a local rule staying transfer for a state number of days); *In re* Asemani, 455 F.3d 296, 300 (D.C. Cir. 2006) (suggesting stay of transfer orders to allow review in the transferor circuit).

mandatory stay of transfer orders in their local rules.[101] In keeping with the analogy, the mandatory stay of the order to permit appellate review is akin to requiring the district court in Zone A to tell the circuit court in Zone A of its intention to throw the case, allowing the circuit court in Zone A time to decide whether such a throw would be proper.

In summary, the appellate court in the transferor circuit is the obvious, and perhaps the only, actor equipped to review an out-of-circuit transfer order. By its very nature, however, transfer out-of-circuit will divest this court of its appellate power at some point. Many circuits, including the Fifth Circuit, use the physical transfer rule, holding that the physical transfer of the case marks the point where the transfer order becomes unreviewable. These circuits have developed a workaround in which mandamus is granted to order the transferor court to *request* retransfer. This approach depends on the cooperation of the transferee court.

Conversely, the Third Circuit employs the "proceeds" approach, which permits the transferor appellate court to exercise jurisdiction until the transferee court "proceeds" with the case in some substantial way. Some circuits and individual courts have attempted to evade jurisdictional headache altogether by imposing a stay on transfer orders to permit review. These three different approaches have their strengths and weaknesses, as *Platkin* demonstrates.

IV. INSTANT DECISION

The Fifth Circuit's opinion in *Platkin* opened with a succinct recap of the case's lengthy procedural history.[102] The court detailed its previous decision to vacate the transfer order and grant mandamus instructing the Texas district court to request retransfer, as well as the New Jersey district court's rejection of the request.[103] The court mentioned the reissuing of the request to retransfer that it made in October 2022 and the New Jersey court's second refusal to retransfer that followed.[104]

The court's analysis first identified that "[t]he key question centers on . . . power."[105] "Specifically," it wrote, "the question is whether the district court has the power to adjudicate plaintiffs' request for a preliminary injunction, regardless of the transfer."[106] The standard of

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[101] E.D. PA. LOC. CIV. R. 3.2 (21-day stay); D. CONN. L. CIV. R. 83.7 (2009) (11-day stay); N.D. ILL. CIV. R. 83.4 (2011) (14-day stay); S.D.N.Y. & E.D.N.Y. LOC. R. 83.1 (2018) (7-day stay).

[102] Def. Distributed v. Platkin, 55 F.4th 486, 489–90 (5th Cir. 2022).

[103] *Id.* at 490.

[104] *Id.*

[105] *Id.*

[106] *Id.*

review as to the legal issue of jurisdiction was *de novo*.[107] At the outset, the court pointed out that "[t]he twist in this case is the transfer to a district court outside the Fifth Circuit, a court over which this court exercises no control. This court lacks power to order a return of the case to our circuit."[108] This significant opening concession from the court signaled more of what was to come in the opinion: a steadfast adherence to the physical transfer rule for divesting appellate jurisdiction over the transfer order. The court explained that it followed the established practice of several other circuits in using mandamus to direct the transferor court to request retransfer.[109]

The plaintiffs asserted two procedural theories aimed at establishing jurisdiction in the Western District of Texas.[110] First, plaintiffs asserted that Federal Rule of Civil Procedure 15 permitted the refiling of claims against the NJAG, and they did so when they requested leave to amend to add the NJAG to the existing Texas case post-transfer.[111] This contention was promptly dispatched by the court as "off target."[112] The novel theory failed, according to the court, primarily because an attempt to refile the same case that was just transferred would violate the "first to file rule" by raising issues that heavily overlapped with those in the transferred case.[113] The court's analysis focused mostly on the second jurisdictional argument the plaintiffs advanced.

Second, the plaintiffs contended that the vacatur of the severance and transfer order automatically revived the claims in the Fifth Circuit.[114] For support, they relied on the black-letter-law definition of vacatur, providing that after a judgment is vacated, "the matter stands precisely as if there had been no judgment . . . and places the parties in the position they occupied before entry of the judgment . . . ."[115] The plaintiffs' argument was that vacatur reestablished the *status quo ante*, i.e., before the vacated order the case against the NJAG was in Texas; after the vacatur the case should be back in Texas.[116] The court conceded this contention holds true in ordinary cases, but it was of no use in a case that "calls into question the territorial limitations of this circuit's power."[117] In dismissing this argument, the

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[107] *Id.* at 490–91.

[108] *Id.* at 491 (quoting Def. Distributed v. Bruck, 30 F.4th 414, 423 (5th Cir. 2022)).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 494.

[113] *Id.* at 494–95.

[114] *Id.* at 491.

[115] *Id.* (quoting 47 Am. Jur. 2d Judgments § 676 (2009)).

[116] *Id.*

[117] *Id.* at 492.

court showed fidelity to the physical transfer rule, contending that "it seems uncontroversial" that a case is removed from its jurisdiction "once the files are transferred physically."[118]

Thus, the court foreclosed all of the plaintiffs' theories of jurisdiction. The court said that in the case of an erroneous out-of-circuit transfer it "can do no more" than "politely request[] that the [transferee] court return the case."[119] The court went on to identify a potential solution to the plaintiffs' "jurisdictional morass."[120] According to the court, the plaintiffs could have moved to stay the transfer order prior to physical transfer.[121] The court acknowledged, however, that expecting the plaintiffs to do so is "not necessarily fair," since the plaintiffs had no reason to believe that the transferee court would refuse the request to retransfer the case.[122]

The court concluded its jurisdictional analysis by finding, somewhat reluctantly, that "NJAG prevails."[123] However, the court dedicated another section of the opinion to discussing the "prudential concerns" with its ruling.[124] It emphasized that "this court has already found that the claims against NJAG should be heard in the Western District of Texas," and that "it took an erroneously granted" motion to bring them to New Jersey at all.[125] The court underscored that wrongful out-of-circuit transfers are not a new phenomenon.[126]

Historically, the court noted, judges have adhered to principles of comity and returned cases to the transferor district when asked.[127] Neither party, nor the court, was able to find a single instance in which a transferee court refused to retransfer a case when a request was made.[128] Whatever the merits of the court's decision to vacate the transfer, the court stressed that the New Jersey court only received this case "as a result of a mistake."[129] The court concluded with perhaps the most striking point in the opinion: the transferee court's refusal to retransfer "permits a New Jersey district court functionally to nullify a Fifth Circuit decision."[130]

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[118] *Id.*
[119] *Id.* at 493.
[120] *Id.* at 492.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 495.
[124] *Id.*
[125] *Id.* at 495.
[126] *Id.*
[127] *Id.* at 496.
[128] *Id.*
[129] *Id.*
[130] *Id.*

V. COMMENT

To avoid other embarrassing refusals to retransfer, like in *Platkin*, courts should adopt one of two options: a mandatory stay of the transfer order to allow for its appeal or the "proceeds" standard of the Third Circuit. But before making an argument to abandon current practice in favor of new rules, an important question must be answered: Who cares? If the physical transfer rule with the mandamus workaround has only failed us once in decades of use, is a fix really necessary? Would this ever happen again if we just did nothing? The rationale behind the affirmative answer is three-fold.

First, courts are reviewing motions to transfer with greater frequency than ever before.[131] Thus, the tactical importance of venue coupled with the increased willingness to review transfer orders indicates that the sheer number of opportunities for the current system to fail are increasing.[132] Second, more scrutinizing review of transfer orders might mean that more "close" cases will be decided. *Platkin* itself fits this mold. The Fifth Circuit found an abuse of discretion in the district court's *application* of the factor test.[133] The New Jersey district court pointed out the novelty of that ruling.[134] If the trend persists and appellate courts weigh in on more of these close cases, transferee courts are more likely to believe that the appellate court got it wrong, and district courts will be increasingly motivated to refuse a request to retransfer.

Third, *Platkin* itself may encourage other transferee judges to refuse retransfer requests. It is a timeless fact of human behavior that departure from norms becomes easier once the first rebellion has taken place. In the wake of *Platkin*, there is also greater certainty as to the consequences of refusal. The New Jersey district court wanted to keep the case and was able to do exactly that. Other judges may think "it worked for them; it will probably work for me." Taken together, these considerations suggest that, even though *Platkin* may be the first refusal of its kind, absent a change in policy, it won't be the last. Transfer orders are of great tactical importance. Consequently, review by a court must be available to ensure their proper execution, and the appellate court from the transferor circuit is the best and perhaps only court for the job. As *Platkin* demonstrates, though, a writ of mandamus requesting retransfer is too feeble a response, leaving correction of the mistaken transfer in the hands of an out-of-circuit district

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[131] WRIGHT & MILLER § 3855, *supra* note 65.

[132] *See* Thomas B. Bennett, *There is no Such Thing as Circuit Law*, 107 MINN. L. REV. 1681, 1711 (2023) ("[F]ederal procedural rules have increasingly accommodated transfers of cases among judicial districts and circuits.").

[133] Def. Distributed v. Bruck, 30 F.4th 414, 436 (5th Cir. 2022).

[134] Def. Distributed v. Platkin, No. CV 19-04753 (FLW), 2022 WL 14558237, at *4 (D.N.J. Oct. 25, 2022).

court. The current method of immediate transfer paired with the physical transfer rule for divesting appellate jurisdiction prevents the transferor circuit court from doing its job: correcting mistakes made by district courts.

A. The Importance of an Effective Mechanism to Review Out-of-Circuit Transfers

This argument begins with the premise that transfer orders must be reviewable by some court. Appellate courts and the Supreme Court have developed a substantial body of law establishing standards for a motion to transfer.[135] If out-of-circuit transfer orders are unreviewable, compliance with these binding rules will remain uncertain—an unacceptable result. Venue is of paramount importance for litigation in federal court. A change in venue can be the difference between settling and not settling, a speedy disposition and a sluggish one,[136] a sympathetic jury pool and a hostile one,[137] and a favorable and a contrary one.[138] Venue is frequently outcome determinative.[139] Every federal circuit court appears to agree that review is necessary, with all but the Fourth Circuit reviewing for some form of abuse of discretion.[140] Every circuit also appears to recognize that mandamus is available for interlocutory review of transfer orders in at least some instances.[141] This may be because appealing a transfer order after a final judgment is likely to be unsuccessful. [142] Regardless, the general trend is toward permitting interlocutory review using mandamus.[143]

Proceeding from the premise that review of transfer orders must be made available, this Note posits that the proper actor is the appellate court in the transferor circuit. It is both the best and the only actor able to provide such review. The first argument for having the transferor appellate court review a transfer is one of feasibility. Simply put, all other courts involved in the transfer are generally unable to perform a review under current case law. It is the "uniform consensus" that the appellate court in the transferee circuit is unable to review the order.[144] To do so

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[135] *See generally* WRIGHT & MILLER § 3847, *supra* note 52.

[136] *See* TABLES FOR THE JUDICIARY, *supra* note 61.

[137] Cramer, *supra* note 62.

[138] *See* Sisk & Heise, *supra* note 63.

[139] Clermont & Eisenberg, *supra* note 64.

[140] The Fourth Circuit still permits review of a transfer order, but only for "judicial usurpation of power."

[141] § 3855 Appellate Review of Transfer Rulings, 15 Fed. Prac. & Proc. Juris. § 3855 (4th ed.).

[142] 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE – CIVIL § 111.63 (2023).

[143] *Id.* at § 111.61.

[144] WRIGHT & MILLER § 3855, *supra* note 65.

would violate the territorial jurisdiction rules in 28 U.S.C. § 1294 by allowing review of a decision made by a district court outside the circuit court's territory.[145]

The transferee district court is also a dead end. Strictly speaking, it cannot "review" the order given that district courts have no appellate power over one another.[146] It can, in theory, retransfer the case to the transferor court, but this is highly unlikely. The law of the case doctrine makes retransfer infeasible and circuit court precedent counsels against it.[147] Consequently, the only viable actor to review a transfer order is the appellate court in the transferor circuit.

Separate from feasibility, the notion that a district court should be supervised by the appellate court for the circuit in which it sits is in harmony with the federal court system. The transferor court is required to apply that circuit's case law when evaluating the transfer motion. There is no actor better suited to evaluate compliance with the Fifth Circuit's transfer precedent than the Fifth Circuit itself. Indeed, in *Platkin* there was a sharp discordance to the New Jersey court's transfer analysis because it applied *Third Circuit* transfer tests.[148] Despite significant Supreme Court guidance on the issue of transfer, much of the subject remains unsettled. It seems quite possible that applying transferee circuit precedent may produce a different outcome than transferor circuit precedent.[149] This means a case could be *incorrectly* transferred under the transferor circuit precedent, then properly kept in the transferee court due to the application of slightly different precedent.[150] Transfer orders must be reviewable, and it ought to be the transferor appellate court that does the reviewing.

That is not a controversial take—virtually all circuit courts agree that transfer orders are reviewable by the transferor appellate court.[151] The question is *how* should it be done? Currently, most circuits use a combination of the physical transfer rule with the mandamus workaround

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[145] 28 U.S.C. § 1294(1).

[146] United States v. Choi, 818 F. Supp. 2d 79, 85 (D.D.C. 2011).

[147] *See* Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1518 (10th Cir. 1991) (noting that, because of the law of the case doctrine, a request for retransfer is "far more deferential than direct appellate review."); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) ("[A]s a rule, courts should be loathe to [order retransfer] in the absence of extraordinary circumstances . . . ."); Hill v. Henderson, 195 F.3d 671, 677 (1999) ("[A]t the time of a motion to retransfer the transfer order would be law of the case binding the second district court . . . ."); *In re* Cragar Indus., Inc., 706 F.2d 503, 505 (5th Cir. 1983) ("Certainly, the decision of a transferor court should not be reviewed again by the transferee court.").

[148] Def. Distributed v. Platkin, No. CV 19-04753 (FLW), 2022 WL 14558237, at *4 (D.N.J. Oct. 25, 2022).

[149] Uriarte, *supra* note 55 ("[N]uanced differences in circuit precedent can result in different outcomes on the same or similar facts . . . .").

[150] *Id.*

[151] WRIGHT & MILLER § 3855, *supra* note 65.

without a stay of the order.[152] This Note advocates for a change to either (1) a rule requiring a stay of an out of circuit transfer order to allow for appellate review or (2) the "proceeds" rule. The current method in most circuits is both unworkable and poorly reasoned.

B. Problems with the Physical Transfer Rule

Platkin demonstrates that the physical transfer rule is unworkable. The mandamus workaround was a proverbial house of cards for years, tenuously allowing circuit courts to correct a mistaken transfer only with the blessing of an out-of-circuit district court.[153] That system effectively permitted a district court in New Jersey to have the final say on a Texas district court's ruling to the exclusion of the Fifth Circuit.[154] Phrased differently, the mandamus workaround allows a district court to "overrule" a circuit court, an outcome that creates unnecessary uncertainty for litigants. It adds another step to the process, where they must worry not only about the circuit court ruling in their favor but also the transferee court *complying* with the ensuing request to retransfer. This creates needlessly duplicative litigation—as exemplified in *Platkin*—where Defense Distributed argued in the Fifth Circuit that the case should be retransferred and then flew to New Jersey to reiterate the same argument to the district court.[155]

The consequences when this house of cards topples are immense. For one thing, parties are forced to litigate in a court to which they were wrongfully sent. This could well mean that litigation becomes more costly and inconvenient—a tragically ironic outcome given that the transfer process is explicitly geared towards convenience. Beyond convenience, the outcome-determinative aspects of venue discussed above indicate that getting the venue issue right is important. The transferee court's ability to refuse to retransfer serves as another roadblock to achieving proper venue. Further, the optics of a refusal set a troublesome tone for the federal court system. Permitting courts to work against one another in the manner displayed in *Platkin* produces frustration and conflict between courts. Instead of one synchronized, "well-cabined" federal system, the courts

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[152] *In re* Warrick, 70 F.3d 736, 741 (2d Cir. 1995); Def. Distributed v. Platkin, 55 F.4th 486, 492 (5th Cir. 2022); *In re* Nine Mile Ltd., 673 F.2d 242, 243 (8th Cir. 1982); Matrix Grp. Ltd., Inc. v. Rawlings Sporting Goods Co., 378 F.3d 29, 32, 32 n.2 (1st Cir. 2004); Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 989 n.10 (11th Cir. 1982); Town of N. Bonneville v. U.S. Dist. Ct., W. Dist. of Wash., 732 F.2d 747, 752 (9th Cir. 1984).

[153] In re *Nine Mile Ltd.*, 673 F.2d at 244; *Platkin*, 55 F.4th at 493.

[154] *Platkin*, 55 F.4th at 490.

[155] *See id.* at 488–89; Def. Distributed v. Platkin, 617 F. Supp. 3d 213, 228 (D.N.J. 2022).

were undercutting one another and insisting that "comity," "courtesy," and "mutual respect" were not being observed.[156]

In addition to being unworkable, the physical transfer rule is poorly reasoned. To be more precise, it is simply not "reasoned" at all. It is virtually never rationalized in the modern opinions that invoke it. One can start with a modern case that uses the physical transfer rule and go down a rabbit hole of cases cited for the same proposition, back to the 1950s, without finding any justification for the rule.[157] The absence of any stated rationale for the physical transfer rule leaves one contemplating why it was adopted in the first place.

One possibility is that the rule reflects pragmatic concerns of the time in which it was created. In the 1950s, transferring a case was surely a cumbersome task, where potentially thousands of documents had to be mailed or faxed from one court to another. Because of the effort that preceded it, the physical receipt of those documents was a credible bright line for jurisdiction. One can easily imagine a judge shuddering at the wasted effort involved in the return of a case that his staff just spent days or weeks packing up and shipping out. Now, such concerns of wasted effort are obsolete. Transfer can now be effectuated with the pressing of a few keys on a keyboard.[158]

Another possible rationale for the physical transfer rule is the desire to avoid redundant effort by a transferee court—the fear being that a transferee court may do some work on the case just to have it later yanked back to the transferor court. This concern is adequately accounted for under the "proceeds" regime, however, by divesting appellate jurisdiction when the transferee court sufficiently proceeds with the case.[159]

C. The Solutions

Courts should abandon the outdated and ineffective pairing of the physical transfer rule with the mandamus workaround and adopt the "proceeds" approach or a mandatory stay to allow for review. The virtue of the "proceeds" approach is its certainty: it eliminates the need to rely on voluntary compliance by the transferee district court by empowering the transferor appellate court to order the case back when it determines that transfer was improper. Admittedly, the "proceeds" rule might render,

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[156] *Platkin*, 55 F.4th at 496 (5th Cir. 2022).

[157] *See* Starnes v. McGuire, 512 F.2d 918, 924 (D.C. Cir. 1974); Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1517 (10th Cir. 1991); In re *Nine Mile Ltd.*, 673 F.2d at 243; *In re* Sosa, 712 F.2d 1479, 1480 (D.C. Cir. 1983); *In re* Sw. Mobile Homes, Inc., 317 F.2d 65, 66 (5th Cir. 1963); Drabik v. Murphy, 246 F.2d 408, 409 (2d Cir. 1957) (all citing the physical transfer rule without rationale).

[158] Telephone Interview with Terri Moore, Div. Manager, Cent. Div. of the W.D. of Mo. (Apr. 12, 2023) [hereinafter Terri Moore Interview].

[159] *In re* United States, 273 F.3d 380, 384 (3d Cir. 2001).

and indeed has already rendered, some case management orders moot that were issued by the transferee court.[160] But this mild inconvenience serves an important purpose: the need to ensure the case is heard in the proper venue. The "proceeds" rule better values the importance of allowing the transferor circuit court to review the decision of its underling court and would impose minimal costs in the form of wasted effort.

Perhaps the better solution, however, is the implementation of mandatory stays of out-of-circuit transfer orders. Several circuits have either adopted this policy or heavily endorsed it.[161] Commentators have called the mandatory stay "the better practice,"[162] and several individual district courts have elected to codify mandatory stays in their local rules.[163] A mandatory stay avoids jurisdictional problems altogether, as the case is kept in the same circuit for the duration of the stay.

The only conceivable drawback of such a stay is a short delay in continuing the case in the transferee court. First, this harm pales in comparison to the headache in *Platkin*. Sacrificing a few days of litigation time to avoid a possible costly and contentious jurisdictional thicket is a small price to pay. Stays need not be more than a handful of days and would signal a clear deadline for aggrieved parties to petition for relief.

Second, delays of several days or even several weeks were common in physical transfers done in the pre-electronic era of court docketing.[164] A mandatory stay would do nothing but restore the traditional buffer between the granting of the transfer order and the physical transfer of the case file. In 1974, the D.C. Circuit noted that the period in which physical transfer was completed would "allow the judge to consider any late-

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[160] *See id.*; *In re:* Howmedica Osteonics Corp, 867 F.3d 390, 400 (3d Cir. 2017).

[161] Technitrol, Inc. v. McManus, 405 F.2d 84, 86 (8th Cir. 1968) ("It would appear to be the better procedure to hold up the transfer for a reasonable time pending possible petition for reconsideration or review."); Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 988 n.10 (11th Cir. 1982) ("[T]he prevailing approach is to delay the physical transfer of the papers in a case long enough to allow an aggrieved party the opportunity to file a petition for mandamus."); *In re* Asemani, 455 F.3d 296, 300 (D.C. Cir. 2006) (suggesting stay of transfer orders to allow review in the transferor circuit).

[162] 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3846 (4th ed. 2023) (discussing the effect of transfer).

[163] E.D. PA. LOC. CIV. R. 3.2 (21-day stay); D. CONN. L. CIV. R. 83.7 (2009) (11-day stay); N.D. ILL. CIV. R. 83.4 (2011) (14-day stay); S.D.N.Y. & E.D.N.Y. LOC. R. 83.1 (2018) (7-day stay).

[164] *See e.g.*, Robbins v. Pocket Beverage Co., 779 F.2d 351, 353 (7th Cir. 1985) (twenty-one days between granting of transfer order and motion from opposing party); Hudson United Bank v. Chase Manhattan Bank of Conn., 43 F.3d 843, 845 n.4 (3d Cir. 1994) (twenty-five days between granting of transfer order and further action on the case in transferor court); Lou v. Belzberg, 834 F.2d 730, 733 (9th Cir. 1987) (fifteen days between mailing of the physical case and proper appeal by opposing party).

arriving . . . opposition to the transfer."[165] There are numerous cases on the books from the paper-only era that permitted parties to appeal a transfer order after it had been granted, but before the file arrived in the transferee court.[166] This process took multiple weeks in some cases, giving parties plenty of time to decide whether to appeal the order.[167]

Electronic transfer now makes this window considerably shorter.[168] Instead of spending hours or even days compiling thousands of physical documents, court staff conducting a modern transfer need only select the transferee district from a dropdown menu, extract the case files, and send a link to the new court.[169] This process is "completely . . . electronic" and takes "about thirty seconds" to complete.[170] The physical transfer rule allows a party to petition for review if they can do so before the case file arrives in the transferee court. This used to be a fair footrace, but the advent of electronic docketing has outfitted the clerk of the court with a proverbial jetpack. A physical transfer that used to take weeks to complete can now be done in an instant with just a few clicks. Adopting mandatory stays would equip today's litigants with the same buffer enjoyed by their pre-electronic docketing counterparts.

Further, adopting a mandatory stay does not require overruling current precedent. The physical transfer rule can remain in effect in circuits that have it on the books, but the pitfalls of the rule are avoided since parties will be guaranteed time to petition for review. Adoption of a mandatory stay can be codified as a binding local rule with a mere majority of judges in a given district court.[171] Because the passage of a local rule does not require a case or controversy, nor would it conflict with any circuit precedent such as the physical transfer rule, a mandatory stay could be codified almost immediately.

VI. CONCLUSION

Transfer orders are vitally important in modern-day litigation, and the availability of interlocutory appellate review is a crucial check on these orders. The appellate court in the transferor circuit is the only viable actor to provide review. The physical transfer rule, which divests the transferor

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[165] Starnes v. McGuire, 512 F.2d 918, 934–35 (D.C. Cir. 1974).

[166] *See e.g.*, *Robbins*, 779 F.2d at 353 (twenty-one days between granting of transfer order and motion from opposing party); *Hudson United Bank*, 43 F.3d at 845 n.4 (twenty-five days between granting of transfer order and further action on the case in transferor court); *Lou*, 834 F.2d at 733 (fifteen days between mailing of the physical case and proper appeal by opposing party).

[167] *Id.*

[168] Terri Moore Interview, *supra* note 158.

[169] *Id.*

[170] *Id.*

[171] FED. R. CIV. P. 83(a)(1).

circuit of jurisdiction upon the physical transfer of the case to the transferee court, creates a serious roadblock to appellate review. Several circuits have adopted a workaround in which mandamus is granted directing the transferor court to *request* retransfer of the case—an approach that works until it does not. *Platkin* encapsulated the weakness and unworkability in the mandamus workaround of the physical transfer rule. The case demonstrated that the workaround will not always succeed and indeed may fail spectacularly. The current approach used in a majority of circuits allows for a refusal just like the one in *Platkin*, empowering district courts from outside the circuit to overrule a circuit court.

This Note proposes two solutions to this problem—both of which are used in circuits in the federal court system at this very moment. Circuit courts should either (1) incorporate mandatory stays of the orders to permit parties to seek appellate review or (2) adopt the Third Circuit's rule that allows for appellate jurisdiction over a transfer order until the transferee court "proceeds" with the case. Codifying a mandatory stay of these out-of-circuit orders is the simpler, more practical option. But adopting either rule would eliminate the possibility for inter-circuit conflict—a laudable goal, because some fights are better suited for speculative lunchroom talk than the real world.