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# Remands by Deception

William M. Janssen\*

## INTRODUCTION

“[R]ecurring, decades-old, hand-to-hand combat.”<sup>1</sup> That is how one circuit judge described removal-and-remand litigation fights in federal court.

It is a characterization apt in both fact and metaphor. In point of fact, the fights that mark removal-and-remand litigation contests are often pitched ones: frequently intense, expensive, and prolonged.<sup>2</sup> They have been that way for many years.<sup>3</sup> Faithful to the military metaphor, these fights can be indisputably decisive and terribly wasteful. They are contests to decide the place of battle, and as military strategists have conspired for millennia, choos-

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1. *Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001, 1015 (4th Cir. 2014) (Davis, J., dissenting).

2. See James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493, 518 (2011) (“[T]he removal of cases from state to federal court occurs with numbing regularity today, predictably triggering motions to remand.”); Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 MO. L. REV. 287, 289 & nn.13, 15 (1993) (noting that data compiled from 1980 through 1990 by the Administrative Office of the United States Courts confirmed that approximately eleven percent of the federal trial court civil docket was comprised of removed cases, and other studies showed that approximately fifteen percent of all removed cases were remanded back to state court). See generally Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1507 (1995) (“Most of the business of litigation comprises pretrial disputes. A common and important dispute is over where adjudication should take place.”).

3. See, e.g., *Knapp v. W. Vt. R.R. Co.*, 87 U.S. 117, 121–24 (1873) (notwithstanding a full hearing and judgment by the federal trial court and the intervening death of one of the plaintiffs, judgment reversed by the U.S. Supreme Court for improper removal with directions to remand to the state court in Vermont for further proceedings). See generally *Urtetiqui v. D’Arcy*, 34 U.S. 692, 701–02 (1835) (“But there can be no doubt, that the United States court had a right to examine and decide for itself upon the grounds on which D’Arbel claimed to have his cause removed into the United States court. That court had a right to decide upon its own jurisdiction and remand the cause, if sufficient grounds for a removal were not shown.”).

ing wisely the place of battle can often foretell the outcome of the fight.<sup>4</sup> On the other hand, they have the potential, like all combat engagements, to languish on interminably for months (or years)<sup>5</sup> with little claimed ground to show as a prize.<sup>6</sup> From either perspective, this much is certain: removal-and-remand litigation is usually only the precursor to the merits, not the main event. The substantive merits fight will still lie waiting a resolution either in a courtroom or over a negotiating table.

Because removal-and-remand litigation nearly always postpones the ultimate resolution of the underlying merits dispute, Congress long worried over the mischief this costly, delaying, collateral litigation could wreak on both the federal and state judicial systems (and on federalism more generally).<sup>7</sup> To contain that mischief, Congress devised a mechanism to bring a swift and decisive close to such satellite litigation: it invested the federal trial judges with generally unreviewable autonomy in making remand decisions. Under Congress's approach, the federal trial judges' decisions on remand were to be made by them, and by them only once; and then once made, those decisions were to be final – as to both the deciding judges who issued them and to all appellate tribunals thereafter.<sup>8</sup> This plan, Congress devised, would

4. See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 121 (2002) [hereinafter Clermont & Eisenberg, *Litigation Realities*] (“Forum is worth fighting over because outcome often turns on forum . . . . When the dust settles, the case does too—but on terms that reflect the results of the skirmishing. Thus, the fight over forum can often be the critical dispute in the case.”). See generally ROBERT L. CANTRELL, UNDERSTANDING SUN TZU ON THE ART OF WAR 78 (2003) (“If your enemy . . . has superior strength, evade him. . . . Attack your enemy where he is unprepared, appear where he does not expect you.”).

5. See *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) (noting the “nearly three years of jurisdictional advocacy in the cases before us” that validated Congress’s fears of prolonged removal/remand litigation); *id.* at 650 (Scalia, J., concurring) (“The remand orders in these cases date back to early 2004; over two years later, federal courts are still engaged in appellate review.”).

6. Consider, for example, a Battle of the Somme analogy. The Battle of Somme was fought from July 1 to mid-November 1916, during which forces from Britain and France advanced a negligible five miles after suffering more than 600,000 casualties and inflicting nearly 650,000 casualties on their German adversaries. *Battle of the Somme: 1 July – 13 November 1916*, BBC, [http://www.bbc.co.uk/history/worldwars/wwone/battle\\_somme.shtml](http://www.bbc.co.uk/history/worldwars/wwone/battle_somme.shtml) (last visited Jan. 2, 2016).

7. See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 354–55 (1976) (Rehnquist, J., dissenting) (noting that Congress “obviously thought it equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible”); *Ellenburg v. Spartan Motor Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008) (“The important policy carried in this provision disfavors prolonged interruptions to litigation created by litigating which of two otherwise legitimate courts should resolve the disputes between the parties.”).

8. See *In re La Providencia Dev. Corp.*, 406 F.2d 251, 253 (1st Cir. 1969) (“The district court has one shot, right or wrong.”). See also *Ex parte Pa. Co.*, 137 U.S. 451, 454 (1890) (“[I]t was the intention of Congress to make the judgment of the circuit court [now, district courts] remanding a cause to the state court final and conclu-

at least eliminate the specter of collateral appellate litigation over remand decisions grinding on interminably.<sup>9</sup> The Judiciary Code announces this plan crisply – remand orders are “not reviewable on appeal or otherwise,”<sup>10</sup> except in very few, narrow exceptions.<sup>11</sup> Such has been “the established rule . . . stretching back to 1887,” when Congress first installed this no-review directive.<sup>12</sup> By 1946, the conclusiveness of this directive was so well settled that the U.S. Supreme Court declared it “no longer open to doubt.”<sup>13</sup>

But what if the trial judge’s decision to grant the remand was premised on a lie? Not a non-partisan lie, mind you, but a litigant’s lie. And not some grey-area, stretching-of-the-truth, overly aggressive, leaping misstep in advocacy, but a genuine fabrication. A bald, bold-faced falsehood, calculated deliberately to deceive the federal judge into a factual conclusion that the litigant invented intentionally to spur the court into signing a remand order.

What then?

Congress directs that there be no remand reviews; indeed, Congress “unmistakably commands” it.<sup>14</sup> Does that proscription apply to deceptively-induced remand orders? Or may a hoodwinked judiciary rescind its fraudulently produced (and otherwise “unreviewable”) remand and deny the miscreants their state-forum booty?

This Article explores that conundrum. Part I introduces the preliminaries of removal, remand, and Congress’s no-review directive, supplying an orientation to the background of these concepts, their purpose, and their operation. Part II discusses the only appellate resolution to have ever squarely confronted this question, the Fourth Circuit’s opinions in *Barlow v. Colgate Palmolive Co.*<sup>15</sup> Part III conducts the statutory analysis to evaluate whether

sive.”). *See generally Thermtron Prods., Inc.*, 423 U.S. at 355 (Rehnquist, J., dissenting) (observing that Congress “made the district courts the final arbiters of whether Congress intended that specific actions were to be tried in a federal court”).

9. *See United States v. Rice*, 327 U.S. 742, 751 (1946) (intending to avoid a “prolonged litigation of questions of jurisdiction of the district court to which the cause is removed”); *Ex parte Pa. Co.*, 137 U.S. at 454 (prohibition aspired “to contract the jurisdiction of the federal courts”).

10. 28 U.S.C. § 1447(d) (2012). *See Three J Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 115 (4th Cir. 1979) (“Unquestionably, the statute not only forecloses appellate review, but also bars reconsideration of such an order by the district court.”).

11. *See, e.g., In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 582–83 (4th Cir. 2006); *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1285–86 (11th Cir. 1999). *See generally* S. Vance Wittie, *Appealing Remand Orders*, 22 APP. ADVOC. 111 (2009) (surveying statutory and judicial exceptions).

12. *Thermtron Prods., Inc.*, 423 U.S. at 343. *See In re Lowe*, 102 F.3d 731, 734 (4th Cir. 1996) (“The general rule prohibiting review of remand orders has been a part of American jurisprudence for at least a century.”).

13. *Rice*, 327 U.S. at 751.

14. *Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam).

15. 772 F.3d 1001 (4th Cir. 2014) (en banc), *vacating and replacing* 750 F.3d 437, 442 (4th Cir. 2014) (2-1 panel opinion).

Congress has indeed enacted a statute that actually forestalls the federal judiciary's ability to protect itself against fraud in the remand process. After exploring the nuances of the statute's language, the guide of "ordinary meaning," and the lessons of congressional intent, this Article concludes that, notwithstanding the seemingly absolutist, prohibitory language of Congress's no-review statute, deceptively-induced remands can be vacated by the courts. Part IV considers the potential impacts of such a conclusion and finds that a robust, longstanding body of existing law serves to ensure stability and predictability in this use of the vacatur power.

### I. PRELIMINARIES: REMOVAL, REMAND, AND THE NO-REVIEW DIRECTIVE

In the law, as in life, "[c]ontext matters."<sup>16</sup> On its face, the no-review directive expresses a seemingly unrelenting legislative preference for a one-judge, single-ruling treatment of remand motions. But because context matters, the no-review directive must be understood in its procedural environment. To truly "give meaningful effect to the intent of the enacting legislature, [courts] must interpret statutory text with reference to the statute's purpose and its history."<sup>17</sup> So, to preliminaries this Article now turns and, more specifically, to the context of federal removal, remand, and Congress's no-review statutory directive.

#### A. Removal to Federal Court

The foundational objective of the federal removal statute is easily understood by a metaphor – a horse tale. The Baltimore Colts professional football club played their home games in "the world's largest outdoor insane asylum."<sup>18</sup> Actually, the facility's official name was Memorial Stadium (so named to honor the City of Baltimore's deceased World War I and World War II soldiers),<sup>19</sup> but the nickname proved a fitting one. The team was the first with cheerleaders, the first with a mascot ("Dixie" the colt), the first with nattily logo-emblazoned helmets, and the first with fan clubs; Baltimore's franchise also sported a dazzling marching band, packed the golden arm of future Hall-of-Fame quarterback Johnny Unitas, galvanized the nation in 1958 with their sudden-death overtime win in the "greatest game ever played," and hoisted three championship trophies to measure out their seven-

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16. *United States v. Ressam*, 553 U.S. 272, 283 (2008) (Breyer, J., dissenting).

17. *Id.*

18. See Michael Gibbons, *Baltimore Colts: A Team For The Ages*, MONUMENTAL NETWORK – PRESSBOX BALT. (Sept. 5, 2006), <http://www.pressboxonline.com/story/id/727>.

19. See *Memorial Stadium*, BALLPARKS BASEBALL, <http://www.ballparksofbaseball.com/past/MemorialStadium.htm> (last visited Jan. 17, 2016).

teen post-season appearances.<sup>20</sup> Truly, the Colts and the City of Baltimore had something very special together. As one columnist reminisced, “The love affair between the team and its fans was all-consuming and pristine, exuding the kind of passion that can come only once in the sports-life of a city.”<sup>21</sup> Little surprise, then, that the divorce was bitter and ugly.

After years of unfruitful talks to coax Baltimore into building a modern facility to replace the aging Memorial Stadium, the Colts’ owner, Robert Ir- say, opened negotiations with other cities to explore a possible relocation of the team.<sup>22</sup> When those talks turned ominous, the Maryland legislature re- sponded by authorizing the forcible seizure of the team by eminent domain.<sup>23</sup> The night before the government could finish up its eminent domain authori- zation, the Colts’ owner arranged for a fleet of moving vans to slip into the old stadium at 2:00 a.m. to decamp the team, all its possessions, and its leg- endary horseshoe logo out of the city under cover of darkness.<sup>24</sup> Morning broke to an empty Memorial Stadium and an enraged, heartbroken city.<sup>25</sup>

20. See Gibbons, *supra* note 18.

21. See *id.*

22. See E.M. Swift, *Now You See Him, Now You Don’t*, SPORTS ILLUSTRATED (Dec. 15, 1986), <http://www.si.com/vault/1986/12/15/106777270/now-you-see-him-now-you-dont>.

23. See *Mayor of Balt. v. Balt. Football Club Inc.*, 624 F. Supp. 278, 280–81 (D. Md. 1985).

24. See Phillip B. Wilson, *Thirty Years Later, Remembering How Colts’ Move Went Down*, USA TODAY (Mar. 29, 2014, 12:50 PM), <http://www.usatoday.com/story/sports/nfl/colts/2014/03/29/indianapolis-baltimore-move-30-year-anniversary-mayflower/7053553/>. . The stratagems would have made Tom Clancy envious:

All fifteen moving trucks took a different route to Indianapolis from Balti- more, done as a diversion tactic so the Maryland State Police could not en- force the eminent domain law that had just been signed (which they would have been able to act upon once it took effect to force the Colts back to Balti- more). Once a truck got to Indiana, the Indiana State Police would meet it and escort it to Indianapolis—a process repeated until all fifteen vans had reached the destination.

See *Baltimore Colts Relocation to Indianapolis*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Baltimore\\_Colts\\_relocation\\_to\\_Indianapolis](http://en.wikipedia.org/wiki/Baltimore_Colts_relocation_to_Indianapolis) (last modi- fied Jan. 14, 2016). Or maybe it wasn’t actually fifteen moving vans. See Candus Thomson, *Colts Leave Town: Getting the Story Straight*, BALT. SUN (Mar. 29, 2009), <http://www.baltimoresun.com/sports/ravens/bal-sp.coltsmyths29mar29-story.html> (“Now, 25 years later, the details are a little hazy. So we turn to the writings of the major news giants of our generation. . . . Out of the darkness and into the training complex in Owings Mills rumbled ‘a Mayflower moving van’ (WBAL), ‘11 vans’ (Globe), ‘12 moving vans’ (The New York Times), ‘15 vans’ (The Sun), ‘a fleet’ (The Boston Globe), ‘a caravan’ (The Washington Post).”).

25. See *Baltimore Sun Readers Recall the Colts’ Move to Indianapolis*, BALT. SUN (Mar. 27, 2009), <http://www.baltimoresun.com/sports/baltimore-colts/bal-colts>

The following day, the City of Baltimore leapt into action, filing a petition to condemn the Colts and thereupon to restrain the team from transferring assets away from Baltimore.<sup>26</sup> The tribunal selected to hear this petition was a predictable one – the local Circuit Court of Baltimore County – where the petition received a homey reception: the Circuit Judge issued an injunction, licky-split, to forbid the Colts’ relocation from Maryland.<sup>27</sup> But leaving the dispute in a Baltimore County state court, to be heard by a Baltimore County state judge, was not what the Colts organization had in mind. They promptly filed their notice to remove the case to federal court (invoking diversity jurisdiction, claiming the team was now a citizen of the state of Indiana).<sup>28</sup> Unmoved and insistent on the cozy local tribunal they had selected originally, the City of Baltimore fought back with a swift motion for remand.<sup>29</sup> The desired remand, however, would never come.<sup>30</sup> The condemnation lawsuit had left the local Baltimore County state court for good; it would remain in the federal system.<sup>31</sup>

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memories0329-story.html (Fans had various reactions: “a big part of my life was gone[;]” “shell shocked[;]” “I wanted to blow the tires out on the Mayflower vans[;]” “My grandmother wept and my grandfather fumed as I sat there feeling sad for them, knowing something they loved so much was on its way out of town[;]” “I was sad, hurt, felt betrayed. Like a girlfriend telling you: ‘We need to see other people.’”). It is a city’s shared pain that never fully healed. Phillip P. Wilson, *Colts’ Move Still Stings for Some in Baltimore*, USA TODAY (Jan. 4, 2013, 10:38 PM), <http://www.usatoday.com/story/sports/nfl/2013/01/04/indianapolis-colts-move-baltimore-bitter-feelings/1810527/> (One sports journalist said: “We hated Irsay. We hated Indianapolis. We hated (former Indianapolis mayor Bill) Hudnut. Together, we hated them. There’s no two ways about it. They took something away from us that belonged to us and they had no right to do that. No right at all. . . . The scar will always be there. The wound has healed, but the scar will always be there and you can’t erase history of what was done to us.”).

26. See *Mayor of Balt.*, 624 F. Supp. at 280–81.

27. *Id.* at 281.

28. See *Colts Case Going to Federal Courts*, N.Y. TIMES (June 23, 1984), <http://www.nytimes.com/1984/06/23/sports/colts-case-going-to-federal-courts.html> (“A Federal judge decided today that the city’s lawsuit to return the Colts from Indianapolis should be heard in the Federal courts rather than in the Maryland court system.”).

29. See *Mayor of Balt.*, 624 F. Supp. at 280–81.

30. See *id.* at 281 (The federal trial judge ruled that, “for purposes of diversity jurisdiction, the Colts’ principal place of business [after the moving vans departed] . . . was ‘not in Maryland.’”).

31. *Id.* Nearly two years later, the City of Baltimore and the Colts settled their fight, dismissing all then-pending litigation with, among other terms, a Colts pledge to support Baltimore’s acquisition of a new NFL franchise. See Barry Temkin, *Colts, Baltimore Settle Differences*, CHI. TRIB. (Mar. 18, 1986), [http://articles.chicagotribune.com/1986-03-18/sports/8601200613\\_1\\_colts-glory-colts-owner-robert-irsay-colts-training-facility](http://articles.chicagotribune.com/1986-03-18/sports/8601200613_1_colts-glory-colts-owner-robert-irsay-colts-training-facility). In one of sports’ great historic ironies, the Baltimore fans would claim a new franchise for their heartbroken city by breaking the hearts of the Cleveland Browns’ faithful when they succeeded in inducing the Browns to relocate

The power to remove a pending state lawsuit to federal court is an authority steeped in American civil practice tradition. Although a settled feature in federal jurisdiction since the time of the Judiciary Act of 1789,<sup>32</sup> the right of removal to federal court is not enshrined in the Constitution, nor did it have a comparable ancestor at English common law.<sup>33</sup> Nevertheless, its constitutionality “has long since passed beyond doubt.”<sup>34</sup>

The removal authority is congressionally sanctioned forum-shopping.<sup>35</sup> But it is more than that; it is forum-shopping in litigations where forum-shopping is most highly valued by all the litigants, since both sides have tried

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to Baltimore, where they set up shop as the “Baltimore Ravens.” See Charles Babington & Ken Denlinger, *Modell Announces Browns’ Move to Baltimore*, WASH. POST (Nov. 7, 1995), <http://www.washingtonpost.com/wp-srv/sports/longterm/memories/1995/95nfl4.htm>.

32. Ch. 20, § 25, 1 Stat. 73, 79 (1789) (“That if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, . . . and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, . . . it shall then be the duty of the state court to . . . proceed no further in the cause, and . . . the cause shall proceed [in federal court] in the same manner as if it had been brought there by original process.”). Following its approval by the U.S. Senate by a vote of 14–6 and assent by the U.S. House of Representatives without a roll call vote, President George Washington signed the Act into law on September 24, 1789. See *Primary Documents in American History – Judiciary Act of 1789*, LIBR. CONGRESS (last visited Jan. 17, 2016), <http://www.loc.gov/rr/program/bib/ourdocs/judiciary.html>. See also *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976) (“Removal of cases from state courts has been allowed since the first Judiciary Act . . .”).

33. See 14B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3721, at 3–4 (4th ed. 2009).

34. *Tennessee v. Davis*, 100 U.S. 257, 265 (1879) (Justice Strong pronouncing this dismissive characterization: “The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since.”). The Court set the matter to rest decidedly in 1871. See *Ry. Co. v. Whitton’s Adm’r*, 80 U.S. 270, 288 (1871) (“The judicial power of the United States extends by the Constitution to controversies between citizens of different States as well as to cases arising under the Constitution, treaties, and laws of the United States, and the manner and conditions upon which that power shall be exercised, except as the original or appellate character of the jurisdiction is specially designated in the Constitution, are mere matters of legislative discretion.”).

35. See Adam R. Prescott, Note, *On Removal Jurisdiction’s Unanimous Consent Requirement*, 53 WM. & MARY L. REV. 235, 255 (2011) (footnotes omitted) (“Removal is, at its core, an exercise in forum shopping. The defendant attempts either to avoid a specific state court that is suspected to be plaintiff-friendly or to end litigation that has begun unfavorably in a state tribunal.”). See generally RICHARD D. FREER, *CIVIL PROCEDURE* 222 (2d ed. 2009) (“Removal is a remarkable procedure that gives the *defendant*, sued in state court, the right to ‘remove’ the case to federal court.”).

to do it.<sup>36</sup> Removal was almost certainly intended by Congress as a shield to protect against local “State attachments and State prejudices” which “might affect injuriously the regular administration of justice in the State courts.”<sup>37</sup> The shield was available to plaintiffs, “in the first instance[, through their] . . . election of courts before suit brought” and, correspondingly, “where the suit was commenced in a State court a like election to the defendant afterwards.”<sup>38</sup> Through removal, the defendant unseats the various tactical advantages that the plaintiff so highly prized in preferring a state tribunal, when a federal tribunal was otherwise available.<sup>39</sup> That objective was undoubtedly in mind when the “Indianapolis” Colts chose to remove to federal court to

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36. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 598 (1998) [hereinafter Clermont & Eisenberg, *Win Rates and Removal Jurisdiction*].

37. See *Ry. Co.*, 80 U.S. at 289. See generally WRIGHT ET AL., *supra* note 33, at 3 (“[T]he original right to remove probably was designed to protect nonresidents from the local prejudices of state courts.”); Solimine, *supra* note 2, at 290 n.16 (citing PAUL M. BATOR ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1767 (3d ed. 1988)) (“Historically, passage of the removal statutes appears to have been largely motivated by the perceived need for a federal forum (in the face of a hostile state forum) for at least certain types of cases.”). In the related context of Congress’s purpose of devising escape of any type to a federal forum, Justice Story offered:

The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies [authorized by Article III] . . . it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals.

*Martin v. Hunter’s Lessee*, 14 U.S. 304, 347 (1816). See also *id.* (“In respect to the other enumerated cases—the cases arising under the constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.”).

38. *Ry. Co.*, 80 U.S. at 289. See generally Clermont & Eisenberg, *Win Rates and Removal Jurisdiction*, *supra* note 36, at 592 (footnote omitted) (“[I]n diversity cases, a plaintiff suing in state court typically chooses that court to maximize its advantage. Removal jurisdiction allows the out-of-state defendant to remove the case from the presumably more biased state forum chosen by the plaintiff to a more neutral federal forum.”).

39. See Clermont & Eisenberg, *Win Rates and Removal Jurisdiction*, *supra* note 36, at 598 (“By removal, the defendant defeats the plaintiff’s forum advantage, inducing such changes as dislodging the plaintiff’s lawyer from a familiar and favored forum, and more generally reversing the various biases, costs and other kinds of inconveniences, disparities in court quality, and differences in procedural law that led the plaintiff to prefer state court.”).

escape a hometown judiciary they feared was comprised of angry football fans and a jury pool surging with blue-and-white season ticketholder loyalists. This very same motivation, grounded in similar fears of hometown prejudices, attachments, and predilections, often (if not always) has been motivating removals from state courts throughout the two-and-a-quarter centuries that have followed since 1789.<sup>40</sup>

The removal power is a potent one. With nary a motion nor any judicial officer's blessing, a litigant may summarily and instantly terminate a state court judge's right to continue to preside over a properly begun state court lawsuit by the simple expedient of filing – unilaterally – a “notice” of removal.<sup>41</sup> Careful research tends to verify that removal matters, and significantly so.<sup>42</sup> One empirical study concluded that a plaintiff's likelihood of victory in a removed diversity case (thirty-four percent chance) is greatly lessened from a diversity case where that plaintiff filed originally in federal court (seventy-one percent).<sup>43</sup> As a matter of procedural principle, this data is hardly surprising. After all, “Removal jurisdiction is supposed to affect outcome”;<sup>44</sup> that is, in fact, why Congress enacted the right in the first place.<sup>45</sup> If forum didn't truly matter, there would have been no reason to enact a law empowering a party to change it. Because forum matters so meaningfully, the pitched fight the City of Baltimore and the Baltimore (er, “Indianapolis”) Colts fought over where to litigate the team's location is easy to appreciate. Ergo, as two leading empirical study scholars aptly concluded from all their careful data analysis: “The name of the game indeed is forum-shopping, and so all those lawyers out there are not wasting their clients' money on forum fights.”<sup>46</sup>

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40. *See generally id.* at 602 (“Although the parties clearly think that forum matters, in fact, forum—with all its implications of bias and inconvenience shifted in favor of defendants—may matter even more than they believe.”).

41. *See* 28 U.S.C. § 1446(d) (2012) (“Promptly after the filing” of a notice of removal, defendants “shall file a copy of the notice with the clerk of [the] State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.”). *See generally* Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 549–50 (2014).

42. Clermont & Eisenberg, *Win Rates and Removal Jurisdiction*, *supra* note 36, at 601–02.

43. *Id.* at 581, 584 (“The shift from a favorable forum, chosen by plaintiffs, to a less favorable forum, chosen by defendants, drives down plaintiffs' win rates.”). *See also* Thomas C. Goodhue, Note, *Appellate Review of Remand Orders: A Substantive/Jurisdictional Conundrum*, 91 IOWA L. REV. 1319, 1323 (2006) (“By removing a case to federal court, defendants can change judges, potential biases, and rules of procedure; and removing a case might improve a defendant's chances of victory.”).

44. Clermont & Eisenberg, *Win Rates and Removal Jurisdiction*, *supra* note 36, at 592.

45. *See* WRIGHT ET AL., *supra* note 33, at 2–3.

46. Clermont & Eisenberg, *Litigation Realities*, *supra* note 4, at 124.

Once removed to federal court, a lawsuit will remain there, unless it be remanded back to the state court.<sup>47</sup>

### B. Remand Back to State Court

The federal courts are charged strictly with the duty to exercise the jurisdiction that Congress has conferred upon them.<sup>48</sup> True since the early days of the federal judiciary, the national courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”<sup>49</sup> But equally true, the removal authority conferred by Congress is to be “strictly construed,” that “[d]ue regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”<sup>50</sup> Congress supplied that definition in several places; the Supreme Court has inferred it in others. Both mark litigation circumstances where continued federal jurisdiction ceases<sup>51</sup> and where remand is obligatory, either because it is squarely forbidden or because of the trial court’s exercise of its discretion.<sup>52</sup>

First, a remand is mandatory if federal subject-matter jurisdiction is absent.<sup>53</sup> This, of course, is axiomatic – federal subject-matter jurisdiction cannot be conferred by waiver, forfeiture, estoppel, or consent.<sup>54</sup> Even where uncontested by the litigants, subject-matter jurisdiction “must be policed by the courts on their own initiative.”<sup>55</sup> When subject-matter jurisdiction is lacking, the case cannot stay in federal court.<sup>56</sup>

47. See 28 U.S.C. § 1447(c) (2012).

48. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). This duty, though “strict,” is not “absolute” and may give way where federal abstention is justified by exceptional circumstances. *Id.*

49. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). See *id.* (“It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should.”). Either, ruled the Court, “would be treason to the constitution.” *Id.*

50. *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (second alteration in original) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

51. See generally *Quackenbush*, 517 U.S. at 714 (“When a district court remands a case to a state court, the district court disassociates itself from the case entirely, retaining nothing of the matter on the federal court’s docket.”).

52. See *Syngenta*, 537 U.S. at 32–33.

53. 28 U.S.C. § 1447(c) (2012). See also *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (failing subject-matter jurisdiction “requires remand”).

54. See, e.g., *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)) (cannot be waived or forfeited); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (citations omitted) (cannot be granted by consent or estoppel).

55. *Ruhgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). See also *One & Ken Valley Hous. Grp. v. Me. State Hous. Auth.*, 716 F.3d 218, 224 (1st Cir. 2013) (noting that even though none of the parties raised the issue of subject-matter jurisdic-

Second, a remand is necessary if the removal is based on a non-jurisdictional “defect” in removal procedure<sup>57</sup> – that is, when any procedural requisite for removal has not been satisfied, such as an untimely filing of the removal petition,<sup>58</sup> a failure of all served defendants to “join in or consent” to removal,<sup>59</sup> or removing a type of action Congress has declared “nonremovable.”<sup>60</sup> Unlike defects in subject-matter jurisdiction, which can be raised at any time,<sup>61</sup> these procedural requisite defects must be asserted within thirty days of the filing of the notice of removal, or the right to object (and to a remand) is lost.<sup>62</sup>

Third, a remand is required if the plaintiff seeks, and the trial court elects to grant, the joinder of additional defendants whose arrival into the lawsuit destroys the court’s subject-matter jurisdiction.<sup>63</sup> Granting such joinder forecloses the district court’s right to retain jurisdiction any further in the matter.<sup>64</sup>

Fourth, a remand is necessary if a multi-claim lawsuit is removed to federal court, containing both a federal question claim and a claim that lacks original or supplemental federal subject-matter jurisdiction (or has been made

tion, it remained the court’s “obligation to inquire into our subject matter jurisdiction *sua sponte*”).

56. See § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 69 (1996) (same). Cf. FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

57. § 1447(c). See generally *In re Norfolk S. Ry. Co.*, 756 F.3d 282, 292 (4th Cir. 2014) (citation omitted) (“defect” means “a failure to comply with the statutory requirements for removal”).

58. See § 1446(b) (establishing thirty-day filing deadline); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995) (commenting that untimely removal is “precisely the type of removal defect contemplated by § 1447(c)”).

59. § 1446(b)(2)(A); *Balazik v. Cty. of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995) (“Failure of all defendants to join is a ‘defect in the removal procedure’ within the meaning of § 1447(c).”).

60. See § 1445; *Royal v. State Farm Fire & Cas. Co.*, 685 F.2d 124, 127 (5th Cir. 1982).

61. § 1447(c).

62. *Id.* See *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 69 (1996). See also *id.* at 76–77 (“[I]f, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated.”).

63. See § 1447(e); *Lindner v. Union Pac. R.R. Co.*, 762 F.3d 568, 570–71 (7th Cir. 2014) (when addition of new parties will destroy diversity, the district court is “required to remand the case”).

64. See *Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 759 (7th Cir. 2009) (citation omitted) (“When joinder of a nondiverse party would destroy subject matter jurisdiction, 28 U.S.C. § 1447(e) applies and provides the district court two options: (1) deny joinder, or (2) permit joinder and remand the action to state court. These are the only options; the district court may not permit joinder of a nondiverse defendant *and* retain jurisdiction.”).

otherwise unremovable by statute).<sup>65</sup> In such lawsuits, the non-federal claim must be severed away and remanded to state court.<sup>66</sup>

Fifth, a remand is presumptively required (though only rebuttably so) in litigations made removable under Congress's multiparty, multiforum jurisdiction statute<sup>67</sup> when the district court "has made a liability determination requiring further proceedings as to damages."<sup>68</sup> In such circumstances, however, remand may nevertheless be refused if the court finds that jurisdiction should be retained "for the convenience of parties and witnesses and in the interest of justice."<sup>69</sup>

Sixth, a remand is permitted (though not compelled) when a district court determines that continued exercise of its supplemental jurisdiction over state law claims would be inappropriate.<sup>70</sup> The decision to remand, rather than dismiss, such lawsuits remains vested in the district judge's considered discretion, informed by various considerations, including the status of the applicable statute of limitations, the risk of preclusion of valid state law claims, the state's interests in enforcing its laws, and the "economy, convenience, fairness, and comity" achieved through a remand rather than a more obtrusive dismissal-and-refiling (with its attendant delays and costs).<sup>71</sup>

Seventh, a remand is also permitted, again in the exercise of the district court's discretion, where the litigants seek an equitable or otherwise discretionary remedy and "appropriate circumstances" counsel the court to abstain from exercising federal jurisdiction "altogether" and, instead, warrant the entry of an order "either dismissing the suit or remanding it to state court."<sup>72</sup>

Those are the bases for remanding a removed lawsuit back to state court. Unless one of these bases (or some other, authorized by Congress) for remand

65. See § 1441(c)(1)(A)–(B).

66. See *id.* § 1441(c)(2).

67. See *id.* § 1369. The federal courts' multiparty, multiforum jurisdiction is triggered upon the occurrence of a single sudden accident (or natural event culminating in an accident), which causes the deaths of at least seventy-five natural persons at a discrete location, provided certain other statutory prerequisites are met. *Id.*

68. See *id.* § 1441(e)(2).

69. *Id.*

70. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988) ("Because in some circumstances a remand of a removed case involving pendent claims will better accommodate these values than will dismissal of the case, the animating principle behind the pendent jurisdiction doctrine supports giving a district court discretion to remand when the exercise of pendent jurisdiction is inappropriate."). Although the *Cohill* decision predated Congress's codification of pendent and ancillary jurisdiction in 28 U.S.C. § 1367, the remand option remains recognized as a prerogative of the court in "declin[ing] to exercise supplemental jurisdiction" as Section 1367(c) now allows. See *Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 616–17 (4th Cir. 2001). See also *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 636–41 (2009) (impliedly acknowledging that discretionary declinations of supplemental jurisdiction can support remands back to state court).

71. See *Carnegie-Mellon Univ.*, 484 U.S. at 351–53 & 357.

72. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996).

is implicated, the district court enjoys no other, roving prerogative to remand.<sup>73</sup> This much seems sure. Indeed, the Supreme Court repelled one such attempt in 1976, when it sternly admonished a district judge for having remanded a properly removed case because of that court's crowded docket, the press of other cases on its sparse available trial time, and the feared resulting "severe[] impair[ment]" on the plaintiff's entitlement to relief.<sup>74</sup> The remand authority of federal trial judges, then, is decidedly curtailed.

### C. *The No-Review Directive*

This journey takes now an odd turn. If, as any wide-eyed IL can recite by rote, federal courts are indeed tribunals of limited jurisdiction, entitled to exercise only that authority denominated expressly in the U.S. Constitution and federal law, such that federal subject-matter jurisdiction is presumed *not* to exist (until established otherwise),<sup>75</sup> and if, further, relinquishment of federal judicial power, once acquired, is never to be done idly or without expressly prescribed warrant,<sup>76</sup> this whole business of remand ought to be subject to the most searching, the most scrupulous of oversights.

Not so. Rather than a searching, scrupulous level of oversight, Congress provided none whatsoever when a remand is granted.<sup>77</sup> In point of fact, Congress's mandate was quite a bit more curt, peremptory, and heavy-handed than just a simple "none."<sup>78</sup> In the very crispest of prose,<sup>79</sup> Congress outright forbade it: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."<sup>80</sup> That prohibition now lies codified in Section 1447(d) of the Judiciary Code.<sup>81</sup> Review by direct appeal is forbidden; review by extraordinary writ or "otherwise" is

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73. See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976) (ruling that Congress had not conferred upon the federal trial courts "carte blanche authority . . . to revise the federal statutes governing removal"). See also *Osborn v. Haley*, 549 U.S. 225, 240 (2007).

74. *Thermtron Prods., Inc.*, 423 U.S. at 340–41. See *id.* ("[A]n otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.").

75. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

76. See *supra* notes 48–73 and accompanying text.

77. 28 U.S.C. § 1447(d) (2012).

78. *Id.*

79. See *Osborn v. Haley*, 549 U.S. 225, 268–69 (2007) (Scalia, J., dissenting) ("[I]t is hard to imagine new statutory language accomplishing the desired result any more clearly than § 1447(d) already does").

80. § 1447(d).

81. *Id.*

forbidden.<sup>82</sup> Indeed, even reconsideration by the very judge who issued the remand order in the first place is forbidden.<sup>83</sup> Review is forbidden where the remand decision is challenged as being legally erroneous,<sup>84</sup> where the decision is provable to be *in fact* actually erroneous,<sup>85</sup> and even where the decision is “manifestly, inarguably erroneous.”<sup>86</sup> Review is forbidden where an error in the remand decision could rouse ominous “undesirable consequences,” even in the forebodingly “sensitive” realm of our foreign relations with other nations.<sup>87</sup> Far different than the searching, scrupulous oversight one might have expected, the no-review statute instead “made the district courts the final arbiters of whether Congress intended that specific actions were to be tried in a federal court.”<sup>88</sup> District judges were to make this call, and their

82. See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976); *United States v. Rice*, 327 U.S. 742, 751 (1946); *Ex parte Pa. Co.*, 137 U.S. 451, 454 (1890).

83. See *In re Lowe*, 102 F.3d 731, 734 (4th Cir. 1996) (“Indisputably, ‘otherwise’ in § 1447(d) includes reconsideration by the district court.”); *Three J Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 115 (4th Cir. 1979) (“Unquestionably, the statute not only forecloses appellate review, but also bars reconsideration of such an order by the district court.”); *In re La Providencia Dev. Corp.*, 406 F.2d 251, 252–53 (1st Cir. 1969) (“[T]here is no more reason for a district court being able to review its own decision, and revoke the remand, than for an appellate court requiring it to do so. Both are foreclosed; nothing could be more inclusive than the phrase ‘on appeal or otherwise.’”).

84. See *Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723, 723–24 (1977) (“remands are not reviewable” even when it is suggested that remand was grounded on “erroneous principles”).

85. See *Thermtron Prods., Inc.*, 423 U.S. at 343 (“[T]his section prohibits review of all remand orders issued pursuant to § 1447(c), whether erroneous or not . . .”). See also *Osborn v. Haley*, 549 U.S. 225, 265 (2007) (Scalia, J., dissenting) (“[O]ur precedents make abundantly clear that § 1447(d)’s appellate-review bar applies with full force to erroneous remand orders.”); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) (quoting *Thermtron Prods., Inc.*, 423 U.S. at 351) (applies “whether or not that order might be deemed erroneous by an appellate court”).

86. *In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 582 (4th Cir. 2006) (quoting *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996) (Phillips, J., specially concurring and delivering the opinion of the court on the issue of subject matter jurisdiction)). See also *Kircher*, 547 U.S. at 634 (citing *Briscoe v. Bell*, 432 U.S. 404, 413–14 n.13 (1977)) (“[R]eview is unavailable no matter how plain the legal error in ordering the remand.”).

87. See *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 236–37 (2007). See also *id.* at 238–39 (“Appellate courts must take that jurisdictional prescription seriously, however pressing the merits of the appeal might seem.”).

88. *Thermtron Prods., Inc.*, 423 U.S. at 355 (Rehnquist, J., dissenting). See also *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995) (“Congress has placed broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court.”); *Mo. Pac. Ry. Co. v. Fitzgerald*, 160 U.S. 556, 583 (1896) (“[C]ongress was manifestly of [the] opinion that the determination of the circuit court that jurisdiction could not be maintained should be

call – once made – was to be final. “The district court has one shot, right or wrong.”<sup>89</sup> It is a mantra the Supreme Court has subsequently “relentlessly repeated.”<sup>90</sup>

Courts have had little trouble discerning the legislative rationale behind this “no-review” prohibition.<sup>91</sup> The process of removal “works a significant interference in the conduct of litigation commenced in state court.”<sup>92</sup> Such interference implicates deeply creditable concerns of “judicial economy,” “respect for the state court,” and “principles of comity.”<sup>93</sup> Plainly, Congress must have foreseen those consequences of removal, inexorable as they are; yet by proceeding to craft a removal right, it willingly accepted that intrusion as tolerable and appropriate in those circumstances where the statutory prerequisites for removal were met.<sup>94</sup>

But Congress also endeavored to minimize this intrusion’s capacity to endlessly delay the ultimate adjudication of the merits dispute.<sup>95</sup> It sought a procedural design that would avoid “prolonged litigation of questions of ju-

final.”); *Ex parte Pa. Co.*, 137 U.S. 451, 454 (1890) (“[I]t was the intention of Congress to make the judgment of the circuit court [now, district courts] remanding a cause to the state court final and conclusive.”). See generally James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493, 494 (2011) (“[Section 1447(d)] appears to give district court judges the final word when they grant a motion to remand to state court.”).

89. *In re La Providencia Dev. Corp.*, 406 F.2d 251, 253 (1st Cir. 1969).

90. *Kircher*, 547 U.S. at 640. See, e.g., *Things Remembered, Inc.*, 516 U.S. at 128 (statute “compels the conclusion” that post-entry review is forbidden); *Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam) (statute “unmistakably commands” no-review); *Thermtron Prods., Inc.*, 423 U.S. at 343 (no-review “has been the established rule . . . stretching back to 1887”).

91. See Pfander, *supra* note 88, at 523. To be more precise, they have at least had little trouble in incanting the avoidance-of-prolonged-litigation rationale. See *id.* However, that stated rationale may not, as a matter of historical fact, be entirely accurate. See *id.* It appears that the 1887 advent of the no-review directive may instead have been motivated originally by Congress’s concern with the harrowing backlog of cases on the Supreme Court’s docket “at a time when it was the nation’s only federal appellate tribunal.” *Id.* See also Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L.J. 83, 87 (1994) (opining that no-review directive emerged “in the face of a crushing Supreme Court workload and an inability to reach consensus on the need for a circuit court of appeals”); Solimine, *supra* note 2, at 291 (noting that “Congressional purpose” for the no-review directive “is obscure,” but “[a]t the time, there was great concern over the burgeoning caseloads of federal courts . . . and the 1887 law . . . restricted access to federal courts”).

92. *Thermtron Prods., Inc.*, 423 U.S. at 354 (Rehnquist, J., dissenting).

93. *In re La Providencia Dev. Corp.*, 406 F.2d at 252.

94. See *Thermtron Prods., Inc.*, 423 U.S. at 354 (Rehnquist, J., dissenting) (“Congress felt that making available a federal forum in appropriate instances justifies some such interruption and delay . . .”).

95. See *id.* at 355 (“Congress decided that [the ability to invoke appellate review] was an unacceptable source of additional delay . . .”).

risdiction of the district court to which the cause is removed.”<sup>96</sup> Concomitantly, it intended to limit the disquieting spectacle of the repeated “shuttling” of a lawsuit repeatedly back and forth and back again, between the federal and state fora,<sup>97</sup> not to mention the attendant increase in litigation costs.<sup>98</sup> After all, state courts are presumed certainly competent to address and resolve federal claims.<sup>99</sup>

Congress accomplished these competing objectives by “mak[ing] the judgment of the [federal trial] court remanding a cause to the state court final and conclusive,” thereby “putting an end to the question of removal” by “suppress[ing] further prolongation of the controversy by whatever process.”<sup>100</sup> In short, Congress trimmed the remand/removal contest “by denying any form of review of an order of remand, and, before final judgment, of an order denying remand.”<sup>101</sup> In doing so, “Congress undoubtedly recognized that some remand orders would be entered in error, [but] 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

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96. *United States v. Rice*, 327 U.S. 742, 751 (1946). *Accord* *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 237 & 238 (2007); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006). *See also* *Thermtron Prods., Inc.*, 423 U.S. at 354–55 (Rehnquist, J., dissenting) (“[Congress] obviously thought it equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible.”); *Ellenburg v. Spartan Motor Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008) (“The important policy carried in this provision disfavors prolonged interruptions to litigation created by litigating which of two otherwise legitimate courts should resolve the disputes between the parties.”). *See generally* Solimine, *supra* note 2, at 310 n.129 (noting Congress’s concern with “State or Federal courts, or the parties . . . [being] subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction,” and quoting legislative history explaining amendment to companion provision in Section 1447(c)).

97. *See* *Osborn v. Haley*, 549 U.S. 225, 243 (2007) (commenting that that the no-review prohibition in Section 1447(d) is an “antishuttling” provision). For an interesting exploration of Congress’s broader success in, and impediments against, realizing this “antishuttling” objective, see Julie Fukes Stewart, Note, “*Litigation Is Not Ping-Pong*,” *Except When It Is: Resolving the Westfall Act’s Circularity Problem*, 95 CORNELL L. REV. 1021 (2010).

98. *See* *Osborn*, 549 U.S. at 268 (2007) (Scalia, J., dissenting) (“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.’”).

99. *See* *Mo. Pac. Ry. Co. v. Fitzgerald*, 160 U.S. 556, 583 (1896) (“It must be remembered that when federal questions arise in causes pending in the state courts, those courts are perfectly competent to decide them, and it is their duty to do so.”). This is especially true where subject-matter jurisdiction is founded only on diversity; such cases are, after all, state law claims where the principal advantage a federal tribunal is adding is a further (or at least more public) assurance of impartiality. *Id.*

100. *Ex parte Pa. Co.*, 137 U.S. 451, 454 (1890).

101. *Rice*, 327 U.S. at 751.

endless rounds of forum disputes.”<sup>102</sup> It was, at base, a legislative “tradeoff of sorts.”<sup>103</sup>

It wasn’t always this way. Review of a federal trial judge’s remand orders was formerly part of the federal tradition.<sup>104</sup> The Supreme Court had expressly recognized such review as a proper exercise of the mandamus authority,<sup>105</sup> and later, in 1875, Congress invested in the Supreme Court such review authority by statute.<sup>106</sup> Twelve years hence, however, Congress abruptly abrogated this review path and proscribed all review by appeal or otherwise of federal trial court remand orders.<sup>107</sup> The abrogating statute was reenacted a year later for technical purposes, but its operative no-review prohibition was unchanged.<sup>108</sup> Congress’s intention seemed quite clear to the Supreme Court in 1890: it was “to contract the jurisdiction of the federal courts.”<sup>109</sup> Except for one brief interlude between 1948 and 1949, when re-

102. *Osborn*, 549 U.S. at 268 (Scalia, J., dissenting). See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 355 (1976) (Rehnquist, J., dissenting) (“All decision-makers err from time to time, and judicial systems frequently provide some review to remedy some of those errors. But such review is certainly not compelled. Congress balanced the continued disruption and delay caused by further review against the minimal possible harm to the party attempting removal who will still receive a trial on the merits before a state court which cannot be presumed to be unwilling or unable to afford substantial justice and concluded that no review should be permitted in these cases.”).

103. *Osborn*, 549 U.S. at 268 (Scalia, J., dissenting). See also *Thermtron Prods., Inc.*, 423 U.S. at 355 (Rehnquist, J., dissenting) (“If this balanced concern is disregarded, federal removal provisions may become a device affording litigants a means of substantially delaying justice.”).

104. See Wasserman, *supra* note 91, at 87 (“[F]or a full century—from 1789 to 1887—remand orders were subject to review in the Supreme Court”); Solimine, *supra* note 2, at 290 (“The 1789 [Judiciary] Act did not forbid appellate review (at the time, directly to the Supreme Court), but the Court held that remand decisions were not ‘final orders’ subject to appeal, and could only be reviewed by a writ of mandamus.”).

105. *R.R. Co. v. Wiswall*, 90 U.S. 507, 508 (1874). See *Georgia v. Rachel*, 384 U.S. 780, 786 n.6 (1966).

106. Jurisdiction and Removal Act of 1875, ch. 137, § 5, 18 Stat. 470, 472 (Mar. 3, 1875) (“[T]he order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.”).

107. Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553 (“Whenever any cause shall be removed from any State-court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision, of the circuit court so remanding such cause shall be allowed.”).

108. Act of Aug. 13, 1888, ch. 866, § 2, 25 Stat. 433, 435.

109. *Ex parte Pa. Co.*, 137 U.S. 451, 454 (1890). See also *Mo. Pac. Ry. Co. v. Fitzgerald*, 160 U.S. 556, 583 (1896) (regarding Congress’s intention was “to restrict the jurisdiction of the circuit court, and to restrain the volume of litigation, which,

codification of the remand statute inadvertently omitted the no-review directive, the prohibition against post-entry review of a district court's remand grants has continued to the present day.<sup>110</sup>

Curiously, Congress's commitment to avoiding a prolonging of procedural skirmishes over the place of litigation is only half-hearted. Truly, *Denials* of a remand motion are vulnerable to reversal on appeal, even to interlocutory appellate reexamination upon certification by the district judge.<sup>111</sup> Such reversals could implicate a truly spectacular level of delay and cost by negating an entire series of federal proceedings (perhaps even a post-verdict federal judgment) and forcing a litigation "do-over" in state court.<sup>112</sup> The no-review directive does nothing to lessen this threat to judicial economy.<sup>113</sup> Congress's devotion to suppressing wastes of judicial resources seems somewhat less than zealous.

In any event, the facially unforgiving absolutism of this no-review prohibition mellowed over time.<sup>114</sup> Exemptions and exclusions, both granted statutorily by Congress and uncovered judicially by the Supreme Court, transformed the no-review prohibition from the seemingly imposing legal monolith it once had been into a still sturdy, but not entirely predictable, legal boundary. First, in specifically qualifying the no-review directive, Congress carved two statutorily exempted categories into the very language of the prohibition itself, making those types of lawsuits susceptible to post-entry review.<sup>115</sup> Second, Congress elsewhere provided expressly for review of remands in other specific statutory contexts.<sup>116</sup> Third, the broad, non-specific

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through the expansion of federal jurisdiction in respect of the removal of causes, had been pouring into the courts of the United States").

110. See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 347–48 & 350 n.15 (1976) (tracking codification and recodification of the law, noting that the "no-review" directive had been "inexplicably omitted" from the codifying legislation in 1948, notwithstanding that "[t]here was no intent to change the prior law substantively," and that "[t]he omission was quickly rectified" a year later).

111. See, e.g., *Woodard v. STP Corp.*, 170 F.3d 1043, 1044 (11th Cir. 1999).

112. See generally 15A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3914.11, at 698–99 (2d ed. 1992) (discussing potential waste resulting from intervening proceedings).

113. Of course, if the denial of remand is reversed for lack of subject-matter jurisdiction, neither the courts nor Congress have much choice in the matter. See generally *supra* notes 53–56 and accompanying text.

114. See *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 229 (2007) (determining whether review of a district court's remand order "is, alas, not as easy as one would expect from a mere reading of this text, for we have interpreted § 1447(d) to cover less than its words alone suggest").

115. 28 U.S.C. § 1447(d) (2012) (permitting review "by appeal or otherwise" of certain lawsuits against federal officers or agencies, *id.* § 1442; and certain civil rights lawsuits, *id.* § 1443).

116. See *Powerex Corp.*, 551 U.S. at 237 (noting that "Congress has repeatedly demonstrated its readiness to exempt particular classes of remand orders from § 1447(d) when it wishes," citing examples of such statutory exemptions); *Kircher v.*

no-review directive now gives way when confronted by a different, narrow, and context-specific “antishuttling” law that would be rendered ineffective if post-remand review were refused.<sup>117</sup> Fourth, Congress’s revised no-review statute is now read *in pari materia* with the statute’s other provisions, such that the no-review prohibition in Section 1447(d) only applies to the two remand-authorizing categories set out in the immediately preceding Section 1447(c) – namely, lack of subject-matter jurisdiction and “improvident” removals (replaced, in the now-current statute, with the more cumbersome syntax “any defect other than lack of subject matter jurisdiction”).<sup>118</sup> Fifth, a limited examination of remand rulings can be permitted for the purpose of inquiring whether a district court accurately self-characterized the grounds for its remand decision as jurisdictionally-based.<sup>119</sup> Sixth, when a remand ruling is entered alongside a separate order dismissing one of the parties to the lawsuit, that separate order is not insulated from appeal so long as it can be fairly “disaggregated” from the remand order (which, in all respects, remains unaltered).<sup>120</sup>

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Putnam Funds Trust, 547 U.S. 633, 641 n.8 (2006) (same point); *Osborn v. Haley*, 549 U.S. 225, 265–66 (2007) (Scalia, J., dissenting) (same point).

117. See *Osborn*, 549 U.S. at 244. The Court in *Osborn* examined the Westfall Act, which accords federal employees immunity from certain claims that arise out of conduct undertaken in the scope of their official duties upon certification by the Attorney General that the employees at issue were, indeed, acting at relevant times in the scope of their employment. *Id.* at 229–30. The Court found that certification to be conclusive, that Congress barred district judges from rejecting the Attorney General’s certification, and that remands to State court premised on such rejections were improper and could be overturned – notwithstanding the no-review prohibition of Section 1447(d). *Id.* at 243–44. *But cf. id.* (citations omitted) (“Our decision that [the Westfall Act] leaves the district court without authority to send a certified case back to the state court scarcely means that whenever the district court misconstrues a jurisdictional statute, appellate review of the remand is in order. Such an exception would, of course, collide head on with § 1447(d), and with our precedent. Only in the extraordinary case in which Congress has ordered the intercourt shuttle to travel just one way—from state to federal court—does today’s decision hold sway.”).

118. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345–46 (1976). See *Carlsbad Tech., Inc. v. HIF BIO, Inc.*, 556 U.S. 635, 638 (2009); *Kircher*, 547 U.S. at 640; *Powerex Corp.*, 551 U.S. at 229; *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711–12 (1996); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127–28 (1995). See also *Osborn*, 549 U.S. at 239–40 & n.8, 263 (noting *in pari materia* limitation, and subsequent revision to Section 1447(c) to replace “improvident” removal language).

119. See *Kircher*, 547 U.S. at 641–42. A year later, the Court clarified that these sorts of “behind-the-curtain” inquiries were highly limited ones. See *Powerex Corp.*, 551 U.S. at 234 (“[R]eview of the District Court’s characterization of its remand as resting upon lack of subject-matter jurisdiction, to the extent it is permissible at all, should be limited to confirming that that characterization was colorable.”).

120. See *City of Waco v. U.S. Fidelity & Guar. Co.*, 293 U.S. 140, 143–44 (1934) (“True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had

As this tour shows, Section 1447(d) has become a bit of a puzzle. This no-review directive remains imposing and continues to count loyal vanguards among nearly all the changing members of the Supreme Court, term to term. But, now pockmarked with exemptions from Congress and exclusions by the Court, its barrier is not nearly so formidable as it was when it was first invented about two decades after the death of Lincoln. Still, the Supreme Court has been chary to pull more bricks down off the no-review wall, and it has been unwilling to infer new exclusions premised merely on policy considerations it finds more properly reserved to the province of the legislature: “We will not ignore a clear jurisdictional statute in reliance upon supposition of what Congress *really* wanted.”<sup>121</sup>

The “preliminaries” of removal, remand, and the no-review directive behind us, this Article now turns to its central question: What does Section 1447(d)’s no-review directive portend for remand orders that are the product of litigant deception?

## II. REMANDS BY DECEPTION

In the more than a century and a quarter that the no-review directive of Section 1447(d) has been a fixture in federal law, the total number of reported cases squarely tackling the issue of deceptively-induced remands appears to be exactly one. But that one case is a wonderfully capable canvas on which to sketch out this conundrum and explore its meaning. The case is recent. It is appellate. Its final disposition is en banc. And it enjoys a rich bounty of legal analysis in support and in opposition to the deceptively-induced remands question.

That opinion, the divided en banc decision in *Barlow v. Colgate Palmolive Co.*,<sup>122</sup> is introduced below, first, with a factual orientation to the contest, then sketching the contours of the court’s ruling, and finally exploring the decisional analysis offered by both the court’s majority and dissent. Ultimately, the en banc court ruled “no” – the federal courts’ longstanding no-review prohibition does not prevent a remand order from being overturned if

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control of the cause. . . . A reversal [of the dismissal order on appeal] cannot affect the order of remand, but it will at least, if the dismissal . . . was erroneous, remit the entire controversy, with the [dismissed litigant] still a party, to the state court for such further proceedings as may be in accordance with law.”). *See also Kircher*, 547 U.S. at 644 n.13 (noting that the remand order in *City of Waco* could not, instructed the Court, be “affect[ed]” by the later appeal, since the two orders could be “disaggregated”).

121. *Powerex Corp.*, 551 U.S. at 237. *See also id.* at 237–38 (citation omitted) (holding that whether any particular policy concern “outweighs § 1447(d)’s general interest in avoiding prolonged litigation on threshold nonmerits questions, is a policy debate that belongs in the halls of Congress, not in the hearing room of this Court”). The Court made clear: “As far as the Third Branch is concerned, what the text of § 1447(d) indisputably does prevail over what it ought to have done.” *Id.*

122. 772 F.3d 1001 (4th Cir. 2014).

that order was issued by a deceptively “hoodwinked” district judge.<sup>123</sup> The Fourth Circuit seems to be the very first to so hold.

### A. Barlow v. Colgate: *The Factual Setting*

From the outset of this discussion, one point must be clear. The Fourth Circuit in *Barlow* never ruled that the *litigants* in the lawsuit, or their *attorneys*, actually engaged in any deception of the trial judge, only that proof of such deception (were it to be developed) could, as a matter of law, warrant relief from a remand order in an appropriate case.<sup>124</sup> If that appears a long journey for an ultimately relief-denying outcome, the court is in heady company.<sup>125</sup>

Joyce Barlow and Clara Mosko were each diagnosed with mesothelioma and filed separate personal injury lawsuits in the Circuit Court of Baltimore County against thirty-six defendants, including the Colgate Palmolive Company (“Colgate”).<sup>126</sup> They alleged that they each contracted their illnesses from exposure to asbestos either “during the course of their employment,” or “within their homes, by virtue of second hand asbestos exposure from their husbands or in-home improvement projects.”<sup>127</sup> Each plaintiff demanded \$40 million in compensatory damages and \$15 million in punitive damages on various state law claims, including strict liability, warranty breach, negligence, and fraud.<sup>128</sup> The particular liability theory against defendant Colgate was grounded in both plaintiffs’ long histories using a Colgate beauty powder known as “Cashmere Bouquet” which, they contended, contained harmful asbestos levels that could have caused their mesothelioma.<sup>129</sup>

Plaintiffs Barlow and Mosko were citizens of Maryland and Florida, respectively; Colgate was a citizen of Delaware and New York.<sup>130</sup> Consequently, federal diversity jurisdiction would ordinarily be foreclosed if any of Col-

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123. *Id.* at 1010.

124. In fact, as discussed below, after the Fourth Circuit returned the case to the district court for further proceedings, the presiding trial judge ruled that Colgate failed to carry its heavy burden to warrant a vacatur. *See infra* notes 315–18.

125. *See* *Marbury v. Madison*, 5 U.S. 137 (1803) (denying Mr. Marbury’s petition to force delivery of his commission as a new justice of the peace, but announcing the principle of judicial review while doing so).

126. *Barlow*, 772 F.3d at 1005. *See also* Appellees’ Brief in Opposition, *Barlow*, 772 F.3d 1001 (No. 13-1839(L)), 2013 WL 4397456, at \*1–2.

127. Appellees’ Brief in Opposition, *supra* note 126, at \*2.

128. *See* Brief for Defendant-Appellant Colgate-Palmolive Co., *Barlow*, 772 F.3d 1001, No. 13-1839(L), 2013 WL 3761163, at \*7

129. *Barlow*, 772 F.3d at 1004. *See also* Appellees’ Brief in Opposition, *supra* note 126, at \*1–2.

130. *See* Brief for Defendant-Appellant Colgate-Palmolive Co., *supra* note 128, at \*7.

gate's fellow defendants were citizens of Maryland or Florida.<sup>131</sup> And, indeed, both complaints named several such non-diverse defendants, thereby seemingly to block any removal based on diversity of citizenship.<sup>132</sup>

As discovery progressed in state court in Baltimore, however, it appeared to Colgate that it, and it alone, had evolved into the exclusive, singular target of the plaintiffs' lawsuits.<sup>133</sup> Believing that this maturing discovery record rendered the two lawsuits removable under diversity of citizenship principles, Colgate filed notices of removal in both cases, invoking the doctrine of fraudulent joinder to posit that the citizenships of all defendants other than Colgate should be disregarded in assessing the federal court's diversity jurisdiction.<sup>134</sup>

Plaintiffs responded to the removal by moving the newly presiding federal judges for remands back to the Baltimore state court.<sup>135</sup> To do so, both plaintiffs compiled factual records to support their remand motions.<sup>136</sup> Plaintiff Barlow argued that she had heard that her former place of employment may have had asbestos in the building, that she may have been exposed while working on the assembly lines there, and that she ate lunch under fans at that facility (which may have been recirculating contaminated air).<sup>137</sup> Likewise, Plaintiff Mosko argued that her former place of employment "was frequently being renovated," that new ceilings and a subbasement were under construction, and that invoices from a possible asbestos supplier might indicate the

131. *See id.* *See also* 28 U.S.C. § 1332(a)(1) & (c) (2012); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 (2005) ("Defendants may remove an action on the basis of diversity of citizenship if there is complete diversity between all named plaintiffs and all named defendants, and no defendant is a citizen of the forum State.").

132. *See* Brief for Defendant-Appellant Colgate-Palmolive Co., *supra* note 128, at \*7.

133. *See id.* (alterations in original) (record citations omitted) ("Neither Plaintiff identified any potential source of asbestos other than Colgate's Cashmere Bouquet, either in their . . . responses to Colgate's interrogatories, or in their subsequent depositions in which each Plaintiff agreed that she had no evidence to support a claim against any defendant other than Colgate. Mosko confirmed that 'the only product that [she] believe[s] contained asbestos [she was] exposed to was Cashmere Bouquet.' Barlow likewise repeatedly admitted that she did not 'believe that [she] w[as] exposed to asbestos through any source other than Cashmere Bouquet.'").

134. *Barlow*, 772 F.3d at 1004. *See also* Brief for Defendant-Appellant Colgate-Palmolive Co., *supra* note 128, at \*8–9. Under the doctrine of fraudulent joinder, the citizenship of non-diverse parties will be disregarded for jurisdictional purposes if either (1) an actual fraud was committed by the pleader in naming those parties or (2) "there is *no possibility* that the plaintiff would be able to establish a cause of action against" those parties in state court. *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 218 (4th Cir. 2015).

135. *See* Brief for Defendant-Appellant Colgate-Palmolive Co., *Barlow*, *supra* note 128, at \*10.

136. *Id.*

137. *Barlow*, 772 F.3d at 1005. *See also* Appellees' Brief in Opposition, *supra* note 126, at \*5.

presence of asbestos in the construction.<sup>138</sup> This meager factual record, Plaintiff Barlow conceded, was “hardly ‘unequivocal’”; in fact, it posited a theory that she expressly disavowed later in her deposition where she testified that any workplace-related asbestos source was “based on gossip, rumor, and hearsay” and even failed to convince her.<sup>139</sup> Similarly, Plaintiff Mosko testified during her deposition that she, too, also did not believe that her asbestos exposure had a work-related source.<sup>140</sup>

On the weight of their respective records, both plaintiffs insisted in their remand motions that asbestos-exposure claims against non-diverse defendants were “a possibility” and “certainly plausible.”<sup>141</sup> Agreeing with plaintiffs, the federal judges ruled that the doctrine of “fraudulent joinder” could not apply given the presence of tenable claims against non-diverse parties, that subject-matter jurisdiction over the two lawsuits therefore failed for want of complete diversity, and that remands were required.<sup>142</sup>

Now returned to a Baltimore state court, Plaintiffs Barlow and Mosko moved to consolidate their two cases with other there-pending cases that also were alleging asbestos-related injuries from exposure to Colgate’s “Cashmere Bouquet” beauty powder.<sup>143</sup> But Colgate opposed this consolidation.<sup>144</sup> It emphasized how Plaintiffs’ own arguments before the federal judges demonstrated a variety of diverse, non-Colgate asbestos exposure sources peculiar to these two individual litigants, rendering them quite dissimilar from other, Colgate-only exposure claimants and, thus, unfit for the requested consolidation.<sup>145</sup> Confronted with their earlier advocacy, Plaintiffs did not relent, but instead pressed forward, insisting now that Colgate – and only Colgate – was the source of their respective asbestos exposures:

[Plaintiffs] allege exposure to asbestos-containing Cashmere Bouquet powder products *only* and do not allege exposure to any other asbestos, asbestos-containing products or asbestos-containing dust *in any*

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138. *Barlow*, 772 F.3d at 1005. See also Appellees’ Brief in Opposition, *supra* note 126, at \*5.

139. *Barlow*, 772 F.3d at 1005 & n.4.

140. *Id.* at 1006 & n.5.

141. *Id.* at 1005.

142. *Id.* at 1004–06. See 28 U.S.C. § 1447(c) (2012) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”). See also *In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 589 (4th Cir. 2006) (“[O]nce a district court determines that it lacks subject matter jurisdiction over a removed case, § 1447(c) directs that the case ‘shall be remanded.’ This mandate is so clear that, once a district court has found that it lacks subject matter jurisdiction in a removed case, no other fact-finding, legal analysis, or exercise of judicial discretion is necessary in order to follow the congressional directive; the decision to remand a case to remedy a lack of subject matter jurisdiction is purely ministerial.”).

143. *Barlow*, 772 F.3d at 1005.

144. *Id.* at 1006.

145. *Id.*

*other form. . . .* [N]either Plaintiffs' worksites nor their occupations are relevant to this consolidation review because *each of the Plaintiffs were exposed, in their homes, to asbestos-containing Cashmere Bouquet only. . . .* The occupations or worksites of the Plaintiffs should not affect the consolidation of these cases for trial because not one of the Plaintiffs testified that they were exposed to asbestos as a result of their employment. . . . In short, *there is absolutely no evidence to indicate or even suggest* that the Plaintiffs were exposed to asbestos in any form other than Cashmere Bouquet.<sup>146</sup>

During a hearing on the Plaintiffs' consolidation motion, the seemingly flabbergasted Baltimore state court judge admonished counsel: "I can't believe you actually told [two federal judges] one thing and tell me another."<sup>147</sup> The state judge pressed further:

THE COURT: So you told the judges in the U.S. District Court that you were contending there was no viable claim against any of these other defendants?

COUNSEL: All we had to prove in federal court is that there was a glimmer of hope. And the glimmer of hope is [what] we alleged in the complaint a case against Maryland defendants . . . .

THE COURT: So once the case came back here, the glimmer disappeared? . . . .

COUNSEL: The glimmer is in federal court.<sup>148</sup>

To avoid any uncertainty or misunderstanding on the point, the state court judge pressed Plaintiffs' counsel still further for an unequivocal confirmation: "It is a one-defendant case, right?" Plaintiffs' counsel responded: "Yes."<sup>149</sup>

Colgate returned to federal court. Citing what it believed were Plaintiffs' blatantly contradictory positions, Colgate moved under Rule 11 and Rule 60(b)(3) of the Federal Rules of Civil Procedure for the entry of sanctions, the imposition of monetary penalties, a disciplinary referral, and a vacatur of the remand order.<sup>150</sup> Plaintiffs attempted to resist this press, proffer-

146. *Id.* (alterations in original) (quoting Joint Appendix at 474–76, *Barlow*, 772 F.3d at 1005 (No. 13-1839(L))).

147. *Id.* (quoting Joint Appendix, *supra* note 146, at 494).

148. Brief for Defendant-Appellant Colgate-Palmolive Co., *supra* note 128, at \*14. The "glimmer-of-hope" reference was not idle hyperbole. *See id.* In the courts of the Fourth Circuit, the doctrine of fraudulent joinder is considered to be defeated by "only a slight possibility of a right to relief" or "a glimmer of hope" of relief. *Mayes v. Rapoport*, 198 F.3d 457, 466 (4th Cir. 1999).

149. *Barlow*, 772 F.3d at 1006.

150. *Id.* at 1006–07. Rule 11 authorizes sanctions against a litigant who presents to the court any paper "for any improper purpose" or without supporting legal or

ing that the technical *possibility* of a meritorious claim against the non-diverse defendants correctly defeated removal, even though Plaintiffs lacked both the factual support and the litigation desire to attempt to prove such claims:

The truth is that the Plaintiffs in this case never represented to the federal court that it intended to generate evidence against any of the in-state defendants, or even that they would prevail against the in-state defendants. Indeed, such representations would have been irrelevant to the inquiry, because that is not what the federal standard requires. Instead, the Plaintiffs argued that there was a *possibility* that evidence *could* be generated or a *possibility* that the Plaintiffs *could* prevail against the local defendants, and that is all that is required to obtain remand in a fraudulent joinder argument.<sup>151</sup>

Following argument, the federal court denied Colgate's sanctions and vacatur motion. Finding the motion's allegations "substantial" and the competing statements by Plaintiffs' counsel to "appear to be in sharp conflict," the court ruled nonetheless that the longstanding federal no-review prohibition on remand orders denied it jurisdiction to act.<sup>152</sup> In closing, the court volunteered a further observation: were it not so constrained by the no-review prohibition, the court wrote that it would still have declined to impose sanctions because the conflicting statements were "attributable to different attorneys in markedly different litigation contexts."<sup>153</sup> Colgate appealed.<sup>154</sup>

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factual basis. *See* FED. R. CIV. P. 11(a)–(c). Rule 60(b)(3) authorizes the court to relieve a party from any final judgment procured through fraud, misrepresentation, or misconduct. *See* FED. R. CIV. P. 60(b)(3). Interestingly, Colgate sidestepped another legal recourse that may have been open to it – a second notice of removal, premised on the newly made statement by counsel during the State court consolidation hearing. *See* 28 U.S.C. § 1446(b)(3) (2012) (“[I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable.”). *See generally* Benson v. SI Handling Sys., Inc., 188 F.3d 780, 782 (7th Cir. 1999) (“Nothing in § 1446 forecloses multiple petitions for removal.”).

151. *See* Appellees' Brief in Opposition, *supra* note 126, at \*29.

152. *Barlow*, 772 F.3d at 1007.

153. *Id.* To be sure, vacillating litigation advocacy is not always an exercise in deception. Circumstances change, trial strategies evolve, litigation motivations shift. Plaintiffs here may have personally discounted their alternative source theories but, concerned that Colgate might press them (as it did), Plaintiffs may have wanted simply to ensure that other avenues for compensation remained in the case to hedge against how discovery would unfold. The district judge may have appreciated all of this, and not been duped in the least. Or the judge may have decided that the claims against the other defendants, though dubious and uncertain, were not so incredible as to risk the possibility of having later to confront the emergence of actual, bona fide claims against those non-diverse parties, with the ensuing obligation to belatedly

Meanwhile, back in state court, discovery in the two remanded cases proceeded apace. Colgate evidently was busily constructing an alternative (non-Colgate) exposure record to defend Plaintiffs' claims against the Colgate Cashmere Bouquet product.<sup>155</sup> "Colgate can put on a case," Plaintiffs quoted Colgate's counsel as promising the state court judge, and Colgate "is going to be saying and is entitled to put on proof of these alternative exposures. . . . And we expect to produce substantial evidence, including of the alternative causes that these plaintiffs cited to the federal court."<sup>156</sup>

In federal court, the appellate process in the remand challenge was reaching its conclusion.

### B. Barlow v. Colgate: *The Fourth Circuit's Ruling*

Initially, a divided three-judge panel voted to affirm the district court's decision rejecting the remand challenge.<sup>157</sup> Noting the extraordinary nature of the vacatur request by Colgate, facially contrary to the no-review prohibition on remand orders that has long prevailed in federal law, the panel majority observed:

[N]o court has ever embraced the argument Colgate puts forward today, and for a simple reason: it is a long-standing principle that entry of an order remanding a case to state court divests the district court "*of all jurisdiction in [the] case* and preclude[s] it from entertaining any further proceedings of any character, including the defendants' motion to vacate the original remand order."<sup>158</sup>

Rejecting Colgate's argument in the appeal, the panel majority held that Colgate's pursuit of vacatur as a sanction "is, to put it simply, an anomaly in federal jurisdiction."<sup>159</sup>

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remand. On the other hand, the manner of advocacy and the particular syntax of the argument that was made may have crossed the line in a way that truly resulted in a fraud on the court – all of which validates the wisdom of the en banc panel to reserve the question of actual deception to the trial judge for resolution. *See infra* note 169 and accompanying text.

154. *Barlow*, 772 F.3d at 1009.

155. *See* Appellees' Brief in Opposition, *supra* note 126, at \*8–18. *See also id.* at \*11–12 ("What is interesting . . . is that Plaintiffs did not have any remediation evidence to bolster its argument to this Court in the remand proceedings. Colgate, 'through discovery,' found that out on its very own. . . . Colgate continued to argue that it could and would be able to prove the very exposures (the same exposures that it now claims [Plaintiffs' counsel] fraudulently represented in federal court) were possible to prove to the federal court . . .").

156. *Id.* at \*12 (emphasis omitted).

157. *Barlow v. Colgate Palmolive Co.*, 750 F.3d 437, 442 (4th Cir.), *rev'd and remanded*, 772 F.3d 1001.

158. *Id.* at 442.

159. *Id.*

In a subsequent en banc rehearing, the Fourth Circuit shifted course, vacating the panel affirmance and substituting it with a ruling that now reversed and remanded the district court.<sup>160</sup> The en banc ruling was also divided: six to reverse, one concurring in part and dissenting in part, and one to affirm.<sup>161</sup> The en banc majority opinion was written by Judge Henry F. Floyd, who had dissented from the earlier panel affirmance; the en banc dissent was written by Senior Judge Andre M. Davis, who had prepared the now-vacated panel affirmance.<sup>162</sup>

The new en banc opinion held that the longstanding federal no-review prohibition on remand orders would not foreclose a vacatur of the remand order on the *Barlow* facts.<sup>163</sup> The court explained that “vacating” a fraudulently obtained remand order would not implicate the statutorily forbidden “review” of the underlying merits of the decision to remand.<sup>164</sup> This distinction, explained the court, “is not merely semantic.”<sup>165</sup> Only a merits “review” of remand orders is proscribed by Congress, not vacatur on the collateral ground of attorney misconduct.<sup>166</sup> Because the district court enjoyed the jurisdictional authority to consider vacatur as a remedy for any misconduct found to have been committed by Plaintiffs, its jurisdictionally-based ruling had to be overturned.<sup>167</sup> Furthermore, because the district court had labored under an errant jurisdictional conclusion, its cursory, closing surmise that would have rejected a sanctioned-based vacatur was dismissed by the Fourth Circuit as “mere dicta” entitled to “no weight.”<sup>168</sup> Consequently, the en banc Fourth Circuit returned the matter to the district judge with instructions “to make specific findings – supported by cogent reasoning – on whether Plaintiffs engaged in misconduct while in federal court,” and whether Rule 11 sanctions or a Rule 60(b)(3) vacatur was warranted.<sup>169</sup>

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160. *Barlow*, 772 F.3d at 1007.

161. *Id.* at 1004.

162. *Id.* at 1004, 1007.

163. *Id.* at 1011.

164. *Id.* at 1010.

165. *Id.*

166. *Id.* at 1010–11.

167. *Id.* at 1011–12.

168. *Id.* at 1012.

169. *Id.* It bears repeating here that the en banc court did not find that Plaintiffs or their attorneys misbehaved, that leveling sanctions against either of them was warranted (or that sanction-supported cause existed) on the facts, or that a remand-for-hoodwinking result was proper in this litigation. To the contrary, the Fourth Circuit reserved such conclusions – at least in the first instance – to the district court itself, given that tribunal’s “familiarity with the issues and litigants” and its unique vantage point “better situated than us ‘to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11.’” *Id.* at 1012–13. The import of the *Barlow* decision is not that a vacatur of remand was warranted in that case for a remand-by-hoodwinking, but rather its holding that a vacatur could be proper in *any* remand-by-hoodwinking circumstance. *Id.* at 1010.

A scalding dissent from Judge Davis rebuked the en banc majority for “a new low” in reviewing the labor of trial judges.<sup>170</sup> The en banc result, criticized the dissent, was “a blatant evasion” of the no-review directive – a holding that sister circuits were “unlikely” to follow and one the Supreme Court was almost certain to reject: “[T]his case is a first-round draft choice for summary reversal should plaintiffs choose not to go back to the district court to achieve the preordained results of the do-over unwisely ordered by the majority and instead file a petition for *certiorari*.”<sup>171</sup>

Notwithstanding the sharp critique, the en banc decision stands now as the controlling law within the Fourth Circuit. For the first time in any published opinion, a federal court (and, indeed, an entire federal circuit sitting en banc) has held that Congress’s longstanding prohibition on reviews of remand orders does not foreclose a vacatur when the deciding judge is hoodwinked.

### C. *Barlow v. Colgate: The Majority’s Rationale*

There is little doubt that the en banc Fourth Circuit majority understood the import of Congress’s no-review directive (“This statute generally precludes review of a remand order if the remand is for lack of subject-matter jurisdiction or for defects in the removal procedure”).<sup>172</sup> Nor is there much doubt that the majority appreciated the prohibition’s underlying motivation (“This strict treatment serves the purposes of comity and judicial economy, as an action ‘must not ricochet back and forth depending upon the most recent determination of a federal court.’”).<sup>173</sup>

But the Fourth Circuit also reasoned that when Congress crafted its no-review statute, it selected the statute’s wording artfully. “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”<sup>174</sup> The statutory language Congress wrote directed that federal remand orders are “not reviewable on appeal or otherwise.”<sup>175</sup> That syntax, explained the court, was honed enough to permit a differentiation between “*vacatur* based on a contaminated process” and “*review* of a motion’s merits.”<sup>176</sup> Colgate was foreclosed statutorily from seeking the latter (a review of the remand order’s merits), but free to pursue the former (a vacatur based on a corrupted decisional process):

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170. *Id.* at 1015 (Davis, J., dissenting).

171. *Id.*

172. *Id.* at 1007 (majority opinion) (citation omitted).

173. *Id.* at 1008 (citations omitted).

174. *Id.* at 1010 (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

175. 28 U.S.C. § 1447(d) (2012).

176. *Barlow*, 772 F.3d at 1011.

Colgate requests vacatur, not reconsideration. And unlike reconsideration, vacatur does not require reassessing the facts that were presented to the district court at the time the cases were removed. Again, Colgate only argues that Plaintiffs' counsel misrepresented the actual facts of the case. Colgate therefore attacks the *manner* by which Plaintiffs secured the remand orders, not the merits or correctness of the orders themselves.<sup>177</sup>

In search of corroboration for its reasoning, the Fourth Circuit surveyed decisions from its sister circuits, two of whom had drawn similar distinctions – albeit in different remand contexts – between a “review” and a “vacatur”.<sup>178</sup> Both those opinions, reasoned the en banc panel, validated the court's own distinction in *Barlow* between a reversal premised “on the remand's merits” – an outcome squarely foreclosed by Congress's “no-review” prohibition – and “vacatur based on a collateral consideration” (namely, “Colgate's allegation that the remand orders were procured through attorney misconduct”).<sup>179</sup> The *Barlow* majority acknowledged that three other circuits had ruled in brief, non-binding, unpublished opinions that the no-review prohibition would forbid the sort of vacatur the Fourth Circuit was now approving.<sup>180</sup> But the Fourth Circuit found those rulings insubstantial and unpersuasive.<sup>181</sup>

In the final analysis, the en banc majority was convinced: “[N]othing in the plain language” of Congress's no-review statute “bars vacatur of the district court's remand orders if the court determines that such relief is warranted. Although reconsideration is a subspecies of review, . . . vacatur, without revisiting a prior order's merits, is no such cousin or relative.”<sup>182</sup> Because the district court had misapprehended that it lacked jurisdiction to consider whether a vacatur grounded in litigant-initiated mischief was warranted, that decision was error and had to be overturned.<sup>183</sup>

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177. *Id.* at 1012 (citations omitted). *See also id.* at 1011 (explaining that a Rule 60(b)(3) motion, “[r]ather than assess[ing] the merits of a judgment or order, . . . focuses on the unfair means by which a judgment or order is procured”); *id.* (citing *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)) (finding noteworthy the distinction drawn by the U.S. Supreme Court in *Gonzalez v. Crosby*, between a Rule 60(b) motion that attacks “some defect in the integrity” of the judicial process, and one that attacks “the substance of the federal court's resolution of a claim on the merits”).

178. *Id.* at 1010–11 (citing *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1288 (11th Cir. 1999); *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1028 (5th Cir. 1998)).

179. *Id.*

180. *Id.* at 1011 (discussing *Wachovia Mortg. FSB v. Marquez*, 520 Fed. Appx. 783, 785 (11th Cir. 2013) (per curiam); *Ysais v. Ysais*, 372 Fed. Appx. 843, 844 (10th Cir. 2010); *Lindo v. Westlake Dev. Co.*, 100 F.3d 963, 1996 WL 654413, at \*1 (9th Cir. 1996)).

181. *Id.*

182. *Id.* at 1012.

183. *Id.*

### III. THE BEST GETAWAY RIDE EVER?

The *Barlow* ruling is the latest chapter in the fascinating tale of the no-review directive. There is a fair measure of poetic symmetry in this first-ever judicial encounter with the question of deceptively-induced remands. Un-addressed for nearly 130 years, the *Barlow* drama befits the long wait: an intriguing factual record, a dismissive early affirmance, a divided en banc reversal, a heated dissent, and an ultimate rationale that chooses to navigate around, rather than except, the statutory prohibition.

The no-review directive's text appears unyielding. That much is undebatable. Yet Congress's set of statutory exemptions and the Supreme Court's group of decisional exclusions testify to a much more equivocal judgment. Congress's legislative objective appears clear, yet its underlying policy goals seem, on inspection, less so. Surely, Congress could not really have intended to insulate fraudulently-induced remands from adjustment, could they? Yet, even if that wasn't their intent, might that be the actual implementing effect of the statute Congress wrote? Could it truly be the case that hoodwinked remands are the "perfect crime" in federal jurisdiction, with Section 1447(d) as the very best getaway ride ever?

#### A. *The Starting Line: Statutory Plain Meaning*

Section 1447(d) is a federal statute, and as such, the method for construing it is well prescribed. It is incumbent upon the courts to "give effect to the unambiguously expressed intent of Congress."<sup>184</sup> The first step (and potentially last step) in statutory construction, then, is "the language of the statute itself."<sup>185</sup> If that statutory language "is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms."<sup>186</sup> The labor of statutory construction thus "ceases" when a statute's language is found to be "unambiguous and the statutory

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184. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 665 (2007) (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

185. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989). See *Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Comp. Programs*, 519 U.S. 248, 255 (1997); *Caminetti v. United States*, 242 U.S. 470, 485 (1917). See also *Levin v. United States*, 133 S. Ct. 1224, 1231 (2013); *Moskal v. United States*, 498 U.S. 103, 108 (1990).

186. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1896 (2013) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)); *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). See also *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms."); *Wyeth v. Levine*, 555 U.S. 555, 600 (2009).

scheme is coherent and consistent.”<sup>187</sup> In such a case, the courts “presume that Congress ‘means in a statute what it says there.’”<sup>188</sup>

So, plain meaning is the start. Does the no-review statute “plainly” address the question of the proper fate for hoodwinked remands? The statute reads, in full:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.<sup>189</sup>

Obviously, the statute does not speak specially to deceptively induced remands.<sup>190</sup> The plain meaning inquiry, then, devolves to this question: Can it be fairly said that deceptively-induced remands are – as a class of remands – plainly encompassed within the broad, general scope of non-“reviewable” orders the law so obviously proscribes?

The answer to that question begins with the product and object of the hoodwinking. What justification for remand was the district judge tricked into accepting, and in what type of case? Some responses yield clear answers. By express statutory mandate, remands in certain categories of cases involving federal employees and agencies,<sup>191</sup> civil rights claims,<sup>192</sup> class actions,<sup>193</sup> the Federal Deposit Insurance Corporation,<sup>194</sup> and the foreclosure or sale of tribal lands<sup>195</sup> are reviewable.<sup>196</sup> Likewise, remands on grounds *other*

187. *Millbrook v. United States*, 133 S. Ct. 1441, 1446 (2013) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)).

188. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). *See also* *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary meaning.”); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–76 (2009) (quoting *Engine Mfrs. Assn. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”).

189. 28 U.S.C. § 1447(d) (2012). For a discussion of the two explicit exemptions (Sections 1442 and 1443), see *infra* notes 191–92 and accompanying text.

190. *See* § 1447(d).

191. *Id.* § 1442.

192. *Id.* § 1443.

193. *Id.* § 1453(c).

194. 12 U.S.C. § 1819(b)(2)(C) (2012).

195. *See* 25 U.S.C. § 487(d) (2012) (Spokane Indian Reservation); *id.* at § 610c (Swinomish Indian Tribal Community); *id.* at § 642(b) (Hopi Industrial Park); *id.* at § 670 (Southern Ute Indian Tribe).

196. To this list of express statutory exclusions may also be added context-specific “antishuttling” statutes found to be “collid[ing] head on with § 1447(d),” and any other express statutory exclusion Congress may decide to grant. *Osborn v. Haley*, 549 U.S. 225, 243–44 (2007); *see generally supra* note 116 and accompanying text.

than a lack of subject matter jurisdiction or a timely-raised<sup>197</sup> but nonjurisdictional defect in removal procedure can be reviewed under the Supreme Court's interpretative case law.<sup>198</sup> Consequently, if the district court was deceptively coaxed into remanding one of those statutorily-exempted categories of cases or deceptively induced into remanding on a non-foreclosed ground, then review would be proper because, in those situations, it is always proper.<sup>199</sup>

The vexing question arises in cases that fall into neither these statutorily-exempted categories nor these non-foreclosed grounds. More precisely: Can a deceptively-induced remand be reviewed when it was entered by a federal trial judge who was hoodwinked into doing so in a non-exempt litigation category – for either a lack of subject-matter jurisdiction or a timely-asserted nonjurisdictional defect in removal procedure? Those types of remands are outside both Congress's list of statutory exemptions<sup>200</sup> and the Supreme Court's list of decisional exclusions.<sup>201</sup> Indeed, those types of remands would seem, at first blush, to fall instead squarely within the prohibition zone.<sup>202</sup>

Alas, the plain inquiry examination of Section 1447(d) does not lead to so straightforward a conclusion. To the contrary, as one court has ably quipped, “[s]traightforward’ is about the last word judges attach to section 1447(d) these days.”<sup>203</sup> Determining whether a deceptively-induced remand order that falls seemingly within the no-review prohibition zone is reviewable or not hinges on how the statute's phrase “not reviewable” is defined. In other words, is the vacating of a deceptively-induced remand a “review” (squarely forbidden by Section 1447(d)), or is it something else entirely?

197. To fall within this excluded category, the remand must be based on a *timely*-asserted, nonjurisdictional defect in removal procedure. See Wittie, *supra* note 11, at 113. *Untimely*-asserted nonjurisdictional defects in removal procedure have, oddly, been found to be vulnerable to review under the *Thermtron Products* test. *Id.* (“[C]ourts have held that section 1447(d) does not preclude review where a motion to remand based on defects in the removal is not made within the 30-day period.”).

198. See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976) (permitting review of remand order based on court's crowded docket, a justification found to be grounded neither in a lack of subject-matter jurisdiction nor a nonjurisdictional defect in removal procedure). For a fuller explanation of the Supreme Court's *in pari materia* reading of Sections 1447(c) and 1447(d), and the narrowing effect of that construction, see *supra* note 117 and accompanying text.

199. *Osborn*, 549 U.S. at 243–44.

200. See *supra* notes 114–15 and accompanying text.

201. See *supra* notes 116–19 and accompanying text.

202. See *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 229–30 (2007) (“[Section 1447(d)] preclude[s] review only of remands for lack of subject-matter jurisdiction and for defects in removal procedure.”).

203. *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992). See generally Wittie, *supra* note 11, at 120 (“The straightforward language of section 1447(d) conceals a tangled thicket of rules and exceptions.”).

*B. The Meaning of the Phrase “Not Reviewable”*

In parsing the language of a statute, a settled principle of statutory construction commands that its words be given their “ordinary meaning,”<sup>204</sup> unless Congress supplies a different definition.<sup>205</sup> In Section 1447(d), Congress included no statute-specific definition for “review” or “reviewable,” nor did it elsewhere supply a translegislative definition in the Dictionary Act (which, absent guidance otherwise, must be consulted “[i]n determining the meaning of any Act of Congress”).<sup>206</sup> Consequently, in the absence of an expressed special definition, it is assumed “that the ordinary meaning of that language accurately expresses the legislative purpose.”<sup>207</sup> Therefore, our examination must next consider the “ordinary meaning” in the English language of the word “reviewable” (or “review”).<sup>208</sup>

In conducting a similar examination into “ordinary meaning,” the Supreme Court turned to certain legal and non-legal dictionaries as evaluative sources.<sup>209</sup> Here, a similar consultation merits a try. *Black’s Law Dictionary* defines “review” as: “To re-examine judicially or administratively[,] [a] reconsideration; second view or examination; revision; consideration for pur-

204. See *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014); *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation omitted). See generally *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (“It is a ‘fundamental canon of statutory construction’ that, ‘unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.’”).

205. See *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 877 (2014) (quoting *Greenleaf v. Goodrich*, 101 U.S. 278, 284–85 (1880)) (noting that statutes may depart “from the natural and popular acceptance of language,” through text or context); *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) (“[I]t is normal usage that, in the absence of contrary indication, governs our interpretation of texts.”); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (looking to the ordinary meaning of a statute’s words, because the statute did not otherwise define the operative terms).

206. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (quoting 1 U.S.C. § 1 (2012)).

207. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–76 (2009) (quoting *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)).

208. See *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary meaning”); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012) (“Congress remains free, as always, to give the word a broader or different meaning. But before we will assume it has done so, there must be *some* indication Congress intended such a result.”). See generally *Rowland v. Cal. Men’s Colony, Unit II Men’s Advisory Council*, 506 U.S. 194, 200–01 (1993) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)) (“It is presumable that Congress legislates with knowledge of our basic rules of statutory construction.”).

209. See, e.g., *Schindler Elevator Corp.*, 131 S. Ct. at 1891 (consulting *Black’s Law Dictionary*, the *Oxford English Dictionary*, *Webster’s Third New International Dictionary*, the *American Heritage Dictionary*, and the *Random House Dictionary*).

poses of correction.”<sup>210</sup> Other dictionaries define “review” similarly. The *Oxford English Dictionary* defines the term as: “To view, inspect, or examine a second time or again, . . . [t]o look over or through . . . in order to correct or improve, to revise, . . . [t]o submit (a decree, act, etc.) to examination or revision.”<sup>211</sup> *Webster’s New Universal Unabridged Dictionary* defines the term as: “[T]o view again; to look at, look over, or study again, . . . to re-examine, specifically, to re-examine judicially, as a lower court’s decision.”<sup>212</sup> The *American Heritage Dictionary of the English Language* offers: “To look over, study, examine again, . . . [t]o examine with an eye to criticism or correction, . . . [t]o reexamine (an action or determination) judicially, especially in a higher court, in order to correct possible errors.”<sup>213</sup> The *Random House Dictionary of the English Language* defines “review” as: “[T]o view, look at, or look over again, . . . to reexamine judicially.”<sup>214</sup>

Informed by these Court-credited sources and their expressions of the “ordinary meaning” of the term “review,” have we found a plain meaning answer?<sup>215</sup> Is the vacating of a deceptively-induced remand a “review” and thereby foreclosed by the no-review directive of Section 1447(d)? One could argue it is. A vacatur of a deceptively-induced remand order could be seen as a “second . . . examination” (since the first “examination” was the erroneously entered one), a “revision” (through a “revising” of the former remand direction), or a “consideration for purposes of correction” (because the purpose is a “correction” of the deception). This application of the “ordinary meaning” definitions, thus, could be seen to support a conclusion that a “vacatur” is a forbidden “review.”

A dilemma here comes if the application of the same definitions will also support the opposite, contrary conclusion just as readily. And it does. Is a vacating of a deceptively-induced remand really a “consideration” at all, or a “second time” look, a “look over,” or a “study again”? To be precise, a vacatur that merely negates a deceptively-induced remand order is not actually “reconsidering” or “re-examining” anything. The merits and the legal reasoning undergirding the outcome are, in truth, never “re-”explored (at least not substantively so). Instead, such a vacatur simply nullifies, voids, and cancels the earlier remand order – all without any “reconsideration” or “re-

210. *Review*, BLACK’S LAW DICTIONARY (6th ed. 1991).

211. 1 OXFORD ENGLISH DICTIONARY 831 (2d ed. 1989).

212. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1552 (2d ed. 1983). Webster’s offers no particularly helpful added guidance in defining “reviewable.” See *id.* (defined as “admitting of review; requiring review”).

213. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1492 (4th ed. 2000).

214. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1227 (1983).

215. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (emphasis added) (“Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning *with regard to the particular dispute in the case.*”).

examination” of the soundness or correctness of the remand ruling.<sup>216</sup> In point of fact, a vacated order does not get “corrected”; it simply disappears. Couldn’t that just as snugly demonstrate that “vacatur” is nothing like “review”?

The Fourth, Fifth, and Eleventh Circuits seem to concur that this latter reading is more faithful to Congress’s choice of language.<sup>217</sup> Each of these courts of appeals appears inclined to reason that a vacatur (whether of a deceptively-induced remand order or otherwise) might well not constitute a forbidden “review.” A careful consideration of those courts’ logic proves that their reasoning is not easily dismissed as sophistry.

The en banc Fourth Circuit in *Barlow*, the nation’s only appellate decision squarely confronting the spectre of a deceptively-induced remand,<sup>218</sup> began by incanting the mantra that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”<sup>219</sup> The court then expounded its distinction between “*vacatur* based on a contaminated process” and “*review* of a motion’s merits.”<sup>220</sup> The court reasoned that the no-review directive statutorily forecloses only the latter (a review of the remand order’s merits), and not the former (a vacatur based on a corrupted decisional process): “[U]nlike reconsideration, vacatur does not require reassessing the facts that were presented to the district court at the time the cases were removed.”<sup>221</sup> Where a vacatur motion isolates exclusively on purposeful, calculated misrepresentations about the facts of a case, the motion “attacks the *manner* by which Plaintiffs secured the remand orders, not the merits or correctness of the orders themselves.”<sup>222</sup> The en banc court reasoned, “nothing in the plain language” of Congress’s no-review statute “bars

216. See *Vacate*, BLACK’S LAW DICTIONARY, *supra* note 210 (defining “vacate” as: “To annul; to set aside; to cancel or rescind[,] [t]o render an act void; as, to vacate an entry of record, or a judgment”); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 213, at 1897 (same, as: “To make void or annul; countermand”); 1 OXFORD ENGLISH DICTIONARY, *supra* note 211, at 385 (same, as: “To make void in law; to deprive of legal authority or validity; to annul or cancel”); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 214, at 1227 (same, as: “[T]o render inoperative; deprive of validity; void; annul”).

217. *Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001, 1010–11 (4th Cir. 2014).

218. Though again, to be precise, the Fourth Circuit confronted merely the consequences of a theoretically deceptively-induced remand ruling, expressly reserving to the trial judge the right to pass factually (at least in the first instance) on whether the circumstances at issue there qualified for vacatur. *Id.* at 1012–13. As discussed below, the trial judge, following the case’s return from the Fourth Circuit, held that no vacatur was warranted. See *infra* notes 315–18.

219. *Barlow*, 772 F.3d at 1010 (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

220. *Id.* at 1011.

221. *Id.* at 1012. See also *id.* at 1011 (explaining that a Rule 60(b)(3) motion, “[r]ather than assess[ing] the merits of a judgment or order, . . . focuses on the unfair means by which a judgment or order is procured”).

222. *Id.* at 1012.

vacatur of the district court's remand orders if the court determines that such relief is warranted.<sup>223</sup> Although reconsideration is a subspecies of review, vacatur, without revisiting a prior order's merits, is no such cousin or relative."<sup>224</sup> Because the trial court had misapprehended that it lacked jurisdiction to consider whether a vacatur grounded in litigant-initiated mischief was warranted, that decision was error and had to be overturned.<sup>225</sup>

In a different but still analytically valuable discussion, the Fifth Circuit discovered that it had authority to vacate a district court's remand order if entered by a judge who ought to have recused from even considering the remand motion in the first place.<sup>226</sup> There, the Fifth Circuit employed a similar *review-versus-vacatur* dichotomy to support its result: "Our vacatur of the remand order" does not "constitute a review of the merits of that order" when the court merely "perform[s] an essentially ministerial task of vacating an order that the district court had no authority to enter for reasons unrelated to the order of remand itself."<sup>227</sup>

Likewise, the Eleventh Circuit embraced a similar analysis in holding that a federal court's dismissal of a foreign government agency on sovereign immunity grounds (with resulting remand of the remaining defendants back to state court) was reviewable on appeal, notwithstanding the proscription of the no-review directive.<sup>228</sup> There, the Eleventh Circuit explained: "To 're-

223. *Id.*

224. *Id.* (citation omitted).

225. *Id.*

226. *Tramonte v. Chrysler Corp.*, 136 F.3d 1025 (5th Cir. 1998).

227. *Id.* at 1028.

228. See generally *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279 (11th Cir. 1999). The *Aquamar* decision involved a claim of foreign state immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602–11. *Id.* at 1282. Eight years after *Aquamar* was decided, the Supreme Court considered an appeal contending, among other things, that appellate review was proper over orders remanding lawsuits involving purported foreign government entities denied sovereign immunity treatment under the FSIA, notwithstanding Section 1447(d), since "Congress could not have intended to grant district judges irrevocable authority to decide questions with such sensitive foreign-relations implications." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 236–37 (2007). The Court rejected this argument, holding that courts must take the no-review directive "seriously, however pressing the merits of the appeal might seem," and that therefore Section 1447(d) "bars appellate consideration of petitioner's claim that it is a foreign state for purposes of the FSIA." *Id.* at 238–39. The Supreme Court in *Powerex Corp.* did not confront the particular *review-versus-vacatur* reasoning that persuaded the Eleventh Circuit in *Aquamar*, so the Eleventh Circuit's decision remains technically undisturbed. Candor compels acknowledgement, however, that the sweeping language of *Powerex Corp.* at least seems to undermine (if not flatly contradict) the ultimate outcome the Eleventh Circuit reached in *Aquamar*. See *id.* at 237–38 (citation omitted) ("We are well aware that § 1447(d)'s immunization of erroneous remands has undesirable consequences in the FSIA context. . . . But whether that special concern outweighs § 1447(d)'s general interest in avoiding prolonged litigation on threshold

view’ an order, a court must do more than merely cancel it; it must, to some extent, examine it and determine its merits.”<sup>229</sup> Conversely, if an appeals court orders a district judge simply “to vacate an order for reasons that do not involve a reconsideration or examination of its merits, then we have not ‘reviewed’ the order, and therefore have not fallen afoul of [Congress’s] prohibition on review.”<sup>230</sup>

This theoretical possibility that a vacatur of a deceptively-induced remand does not reflexively constitute a “review” also finds some support in the Supreme Court’s jurisprudence. In the context of examining whether a Rule 60(b) motion for relief from a judgment qualified as an improper successive habeas corpus petition, the Court acknowledged the distinction between a “proper”<sup>231</sup> Rule 60(b) motion – which attacks “some defect in the integrity” of the judicial process – and an improper one – which attacks “the substance of the federal court’s resolution of a claim on the merits.”<sup>232</sup> Indeed, this distinction between “an attempt to relitigate the case” and a fraud that “prevented the moving party from fully and fairly presenting his case” has long been recognized in the law.<sup>233</sup>

Notably, three other court of appeals panels – from the Ninth, Tenth, and Eleventh Circuits – considered the fitness of Rule 60(b) as a tool for vacating an erroneous remand order, and each panel rejected it.<sup>234</sup> Only the Fourth Circuit in *Barlow* expressly weighed the impact of those three decisions in the deceptively-induced remand context, and that en banc court found them unpersuasive – emphasizing that each ruling was unpublished, non-precedential, litigated pro se, supported by only “minimal analysis,” and lacking a consideration of “what relief under Rule 60(b)(3) can entail,” name-

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nonmerits questions is a policy debate that belongs in the halls of Congress, not in the hearing room of this Court. As far as the Third Branch is concerned, what the text of § 1447(d) indisputably does prevails over what it ought to have done.”).

229. *Aquamar*, 179 F.3d at 1288.

230. *Id.*

231. *Gonzalez v. Crosby*, 545 U.S. 524, 538 (2005) (Breyer, J., concurring).

232. *Id.* at 532.

233. 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2860, at 412–24 (3d ed. 2012). See generally *Apotex Corp. v. Merck & Co.*, 507 F.3d 1357, 1360–61 (Fed. Cir. 2007) (“Fraud upon the court is typically limited to egregious events such as bribery of a judge or juror or improper influence exerted on the court, affecting the integrity of the court and its ability to function impartially.”); *Lonsdorf v. Seefeldt*, 47 F.3d 893, 898 (7th Cir. 1995) (“Fed.R.Civ.P. 60(b)(3) an escape valve to protect the fairness and integrity of litigation in federal courts.”); *In re Whitney–Forbes, Inc.*, 770 F.2d 692, 698 (7th Cir. 1985) (quoting *Bulloch v. United States*, 721 F.2d 713, 718 (10th Cir. 1983)) (“‘Fraud on the court involves a particular type of fraud which is directed to the judicial machinery itself,’ and which involves circumstances where the impartial functions of the court have been directly corrupted.”).

234. See *Lindo v. Westlake Dev. Co.*, 100 F.3d 963, 963 (9th Cir. 1996); *Ysais v. Ysais*, 372 Fed. Appx. 843, 844 (10th Cir. 2010); *Wachovia Mortg. FSB v. Marquez*, 520 Fed. Appx. 783, 785 (11th Cir. 2013) (per curiam).

ly a “vacatur based on a contaminated process.”<sup>235</sup> On closer inspection, each of these three decisions does seem to suggest that the vacatur motions there involved attacks on the underlying logic, reasoning, and substantive analysis of the deciding court (true merits “reconsideration” requests), and not summary annulments of the remand orders as illegitimately entered.<sup>236</sup> If that is a proper reading of those three opinions (and it seems it is), then those rulings are not at all in conflict with the reasoning from *Barlow* and its sister circuits when they detect a dispositive, substantive difference between “vacatur” and “review”.

Drawn from this body of decisional law, then, a distinction takes form—one that squares with the “plain meaning” definition of the term “review.” At one pole lies the species of decision that vacates based on “a contaminated process,”<sup>237</sup> which, by virtue of “an essentially ministerial task,”<sup>238</sup> focused solely on “the manner” by which it was secured,<sup>239</sup> results in the contested ruling being “merely cancel[ed].”<sup>240</sup> Guided by our “plain meaning” exploration, this would seem not to qualify as “reconsideration” or “re-examination.”<sup>241</sup> At the opposite analytical pole lies the species of decision that vacates based on a second-look into the substantive “merits or correctness”<sup>242</sup> of a judicial order by, “to some extent, examin[ing] it and determin[ing] its merits,”<sup>243</sup> thereby “reassessing the facts that were presented to the district court.”<sup>244</sup> That would seem to qualify squarely as the “reconsideration” and “re-examination” that aligns with the ordinary meaning of “review.” In the end, application of the “plain meaning” inquiry – informed by the “ordinary meaning” prescription – at least exposes the word “review” as vulnerable to this different, substantively competing meaning in the context of the vacatur of a deceptively-induced remand.<sup>245</sup> Thus, this interpretive journey must continue on.

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235. *Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001, 1011 (4th Cir. 2014).

236. See *Lindo*, 100 F.3d at 963 (describing motion as one “for reconsideration”); *Ysais*, 372 Fed. Appx. at 844 (describing motion as one “again requesting that the district court take jurisdiction over the case”); *Marquez*, 520 Fed. Appx. at 784 (describing motion as one “filing objections to the remand order” and “requesting to cancel the order to remand the case”).

237. *Barlow*, 772 F.3d at 1011.

238. *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1028 (5th Cir. 1998).

239. *Barlow*, 772 F.3d at 1012.

240. *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1288 (11th Cir. 1999).

241. See *supra* notes 211–19 and accompanying text.

242. *Barlow*, 772 F.3d at 1012.

243. *Aquamar*, 179 F.3d at 1288.

244. *Barlow*, 772 F.3d at 1012. See also *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1028 (5th Cir. 1998).

245. See Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947) (“The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phras-

*C. Construing the Phrase “Not Reviewable” to Achieve Congress’s Intent*

Had a “plain meaning” inquiry supplied the dispositive definitional content for the phrase “not reviewable,” settled tenets of statutory construction would bar the courts’ “liberty to add an exception in order to remove apparent hardship in particular cases” of remands that had been deceptively induced.<sup>246</sup> The courts would have been prohibited by their proper role in our government of three branches from disturbing such remand orders, notwithstanding that those orders were extracted through a deliberate, calculated misrepresentation designed to hoodwink the decisionmaker into acting. The profoundly disquieting result of tolerating such an intentional undermining of the “judicial machinery itself”<sup>247</sup> would have been irremediable by statutory edict.<sup>248</sup> But the “plain meaning” journey unearthed no such definitive content for the phrase “not reviewable,” at least not unambiguously so.<sup>249</sup> The task of statutory construction then marches on.<sup>250</sup>

Where, as here, the language of a statute “seem[s] insufficiently precise,” offering “little assistance” in the particular interpretive task before the court, “the ‘natural way’ to draw the line ‘is in light of the statutory pur-

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ing of a document, especially a complicated enactment, seldom attains more than approximate precision.”).

246. *Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924) (“But the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction . . .”).

247. *In re Whitney-Forbes, Inc.*, 770 F.2d 692, 698 (7th Cir. 1985) (quoting *Bulloch v. United States*, 721 F.2d 713, 718 (10th Cir. 1983)).

248. *See Dodd v. United States*, 545 U.S. 353, 359–60 (2005) (“Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted.”); *Tyler v. Cain*, 533 U.S. 656, 663 n.5 (2001) (“[E]ven if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds.”); *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 464 (1934) (“The rule that, where the statute contains no ambiguity, it must be taken literally and given effect according to its language, is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose.”).

249. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”).

250. *See generally* Frankfurter, *supra* note 245, at 527–28 (“When we talk of statutory construction we have in mind cases in which there is a fair contest between two readings, neither of which comes without respectable title deeds. A problem in statutory construction can seriously bother courts only when there is a contest between probabilities of meaning.”).

pose.”<sup>251</sup> Only in this way can the court be sure to “give to [the statute] such a construction as will carry into execution the will of the Legislature.”<sup>252</sup> But this task is often mired in doubt. As Justice Cardozo once remarked as he embarked upon statutory construction: “Here as so often there is a choice between uncertainties. We must be content to choose the lesser.”<sup>253</sup>

On the question of vacating a deceptively induced remand order, what then is the lesser uncertain choice? Which approach best “carries into execution the will of the Legislature”?

The legislative record appears to reflect two congressional objectives animating the no-review directive – to rescue the Supreme Court (and, perhaps, subsequent federal appellate courts) from a buffeting caseload,<sup>254</sup> and to avoid “prolonged litigation of questions of jurisdiction” with their resultant delay, cost, and federalism irritation.<sup>255</sup> Both of those purposes are achieved most robustly by an absolute, unyielding construction of the no-review directive: that no review of any remand order ever be permitted; that instantaneously upon the federal court’s pronouncement of a remand, the cause is whisked back to state court where it remains undisturbed until final disposition there. But Congress diluted such an absolutist objective (if it had one) by its own pen,<sup>256</sup> and the Supreme Court eroded that objective with its series of judicially-crafted encroachments.<sup>257</sup>

Perhaps this hollowing of the seemingly absolutist language of Section 1447(d) reflects the Court’s own interpretive maxim that “it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* fur-

251. *United States v. Article of Drug . . . Bacto-Unidisk . . .*, 394 U.S. 784, 799 (1969).

252. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 60 U.S. 183, 194 (1857)). *See also* *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (“[O]ur obligation is to take statutes as we find them, guided, if ambiguity appears, by the legislative history and statutory purpose.”).

253. *Burnet v. Guggenheim*, 288 U.S. 280, 288 (1933).

254. *See supra* note 90.

255. *United States v. Rice*, 327 U.S. 742, 751 (1946). *See supra* notes 91–98 and accompanying text.

256. *See supra* notes 114–15 and accompanying text (listing the various statutory exemptions Congress enacted to the no-review directive).

257. *See supra* notes 116–19 and accompanying text (listing Court opinions recognizing exemptions to the no-review directive). Spirited objections to this judicial erosion have been hurled along the way. *See Osborn v. Haley*, 549 U.S. 225, 263 (2007) (Scalia, J., dissenting) (“Today’s opinion eviscerates what little remained of Congress’s Court-limiting command.”); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 359 (1988) (White, J., dissenting) (“There is no statutory basis for this holding. . . . This result is inconsistent with Congress’ understanding of the federal courts’ remand authority as well as with the precedents of this Court.”); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 354 (1976) (Rehnquist, J., dissenting) (citation omitted) (“I think it plain that Congress, which has unquestioned authority to do so has expressly prohibited the review sought”). But those entreaties caused no retreat from the Justices in those majorities.

thers the statute’s primary objective must be the law.”<sup>258</sup> Indeed, the Court’s decisions implicitly reflect a type of recurring “*must-have-meant*” treatment of Congress’s no-review directive, as where a majority of the Justices drew the inferences that the legislature *must have meant* to exclude Westfall Act remands,<sup>259</sup> pendent jurisdiction remands,<sup>260</sup> supplemental jurisdiction remands,<sup>261</sup> and abstention remands<sup>262</sup> from its no-review prohibition. The very fountainhead to this parade of judicial exceptions, *Thermtron Products, Inc. v. Hermansdorfer*, squares with an implicit “*must-have-meant*” approach to the no-review direction when the Court there refused to construe Section 1447(d) “so woodenly” to “extinguish” a court’s power – “not touching the propriety of the removal” – “to correct a district court that has not merely erred” but remanded on grounds that were unspecified by statute.<sup>263</sup> This rejection of a “wooden[]” construction of the no-review directive that would have, without “touching the propriety” of the contested removal, corrected a district court ruling that had not “merely erred,” but remanded in an unauthorized manner, is telling.<sup>264</sup> The Fourth Circuit’s decision in *Barlow* to authorize review of a hoodwinked remand order,<sup>265</sup> the Fifth Circuit’s decision to permit review of a recusal-error remand order,<sup>266</sup> and the Eleventh Circuit’s decision to allow review of a foreign government immunity remand order<sup>267</sup> all tend to align with this “*must-have-meant*” approach to Section 1447(d). At the very least, they illustrate the reluctance among the courts of appeals to construe the no-review directive “woodenly” when doing so flies against their considered sense of Congress’s legislative purpose.

To be clear, the Supreme Court’s tolerance for “*must-have-meant*” constructions of the no-review directive is hardly unbounded. In 2007, seven Justices refused to conjure a judicial exception to Section 1447(d) that would have permitted review of remands from determinations that entities did not qualify as a “foreign state” for purposes of the Foreign Sovereign Immunities

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258. *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam).

259. *Osborn*, 549 U.S. 225 (reviewing a remand based on Westfall Act immunity rulings).

260. *Cohill*, 484 U.S. at 351 (reviewing a remand based on inappropriateness of continuing to exercise pendent jurisdiction).

261. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009) (reviewing a remand based on declination of supplemental jurisdiction).

262. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) (reviewing a remand based on abstention principles).

263. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 352 (1976).

264. *See id.*

265. *See supra* notes 156 & 216–24 and accompanying text.

266. *See supra* notes 225–28 and accompanying text.

267. *See supra* notes 227–29 and accompanying text. For a discussion of how the Eleventh Circuit’s opinion aligns with a later decision from the Supreme Court, see *supra* note 228–30 and accompanying text.

Act.<sup>268</sup> They denied relief, even though doing so portended possible serious damage to the nation's foreign relations.<sup>269</sup> The Court explained:

[W]hether that specific concern outweighs § 1447(d)'s general interest in avoiding prolonged litigation on threshold nonmerits question is a policy debate that belongs in the halls of Congress, not in the hearing room of this Court. As far as the Third Branch is concerned, what the text of § 1447(d) indisputably does prevail over what it ought to have done.<sup>270</sup>

A year earlier, the Court resisted an invitation to devise a review path for remands under the Securities Litigation Uniform Standards Act, emphasizing that it has “relentlessly repeated” that the no-review directive applies “whether or not that [remand] order might be deemed erroneous by an appellate court.”<sup>271</sup> A decade earlier, the Court rebuffed an effort to excuse bankruptcy remands from the no-review directive, concluding that “there is no reason” why that directive and the bankruptcy laws “cannot comfortably co-exist.”<sup>272</sup>

But a remand order that has been deceptively induced is a qualitatively different type of remand order than the Court has yet confronted. None of its prior precedents explored a remand order that was the product of a corrupted judicial process. That distinction is critical. Routine remand orders, whether they be correct, debatable, wrong, unreasoned, or even “manifestly erroneous,” are still the products of legitimate judicial deliberation. The litigants have been afforded an opportunity to express their views of the remand question, have been heard, and the district judge, having weighed the competing arguments, has settled on a considered decision. A legitimate, bona fide judicial act has occurred. The district court may have gotten it unquestionably right or abysmally wrong, but it has truly gotten its “one shot.”<sup>273</sup>

Deception sabotages this process, converting it from fair to illegitimate, from a bona fide judicial act to an invalidly commandeered one. Indeed, as one court lucidly cast it: “[A] decision produced by fraud on the court is not

268. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007).

269. *See id.* at 237 (citation omitted) (“A foreign sovereign defendant whose case is wrongly remanded is denied not only the federal forum to which it is entitled . . . , but also certain procedural rights that the FSIA specifically provides foreign sovereigns only in federal court (such as the right to a bench trial.)”); *id.* at 239 (Kennedy & Alito, JJ., concurring) (“[I]t is troubling to be required to issue a decision that might well frustrate a policy of importance to our own Government.”).

270. *Id.* at 237–38 (majority opinion) (citation omitted).

271. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) (quoting *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976)).

272. *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129 (1995).

273. *In re La Providencia Dev. Corp.*, 406 F.2d 251, 253 (1st Cir. 1969) (“The district court has one shot, right or wrong.”).

in essence a decision at all.”<sup>274</sup> A sabotaged process “demands the exercise of the historic power of equity to set aside fraudulently begotten judgments.”<sup>275</sup> So exceptional an intervention is appropriate since “tampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.”<sup>276</sup> This is an “inherent power” of the courts, and one they have long possessed.<sup>277</sup> While such power can certainly be constrained to a degree by Congress through its statutes, such a result is not to be “lightly assume[d].”<sup>278</sup>

In the face of the mischief of deceptively-induced remands, Section 1447(d) ought to stand as no obstacle – notwithstanding its seemingly broad linguistic sweep. Consider, for example, a judge who was forcibly coerced into entering a remand order at gunpoint, or on threat to her life or the safety of her family. Surely, no one would contend that Congress’s no-review directive is so numbingly inflexible that it would shield that remand order from being vacated. Likewise, no remand order procured through bribery could scurry behind Section 1447(d) for cover, nor could one forged with the unauthorized signature of the presiding judge. Those results are (presumably) incontestable. And a principled reasoning explains why – none of those remand orders would have been the product of legitimate judicial deliberation; none was a bona fide judicial act. The Second Circuit made a related point long ago when, in a bribery case against a sitting judge, it rebuffed the defense’s contention that no wrong could be found unless the decisions the bribed judge made were, in fact, actually legally incorrect.<sup>279</sup> Whether the bribed judge’s decisions were legally sound or not is “immaterial,” explained the court; indeed, the court assumed, for its purposes, that all matters “were in fact rightly decided.”<sup>280</sup> That was all quite beside the point, reasoned the court: “Judicial action, whether just or unjust, right or wrong, is not for sale[.]”<sup>281</sup>

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274. *Kenner v. Comm’r*, 387 F.2d 689, 691 (7th Cir. 1968). *Cf.* *United States v. Throckmorton*, 98 U.S. 61, 66 (1878) (when fraud or deception has been practiced, “there has never been a real contest in the trial or hearing of the case”).

275. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944).

276. *Id.* at 246.

277. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). *See also Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 555 & n.1264 (S.D.N.Y. 2014) (noting that courts have recognized their power to refuse the enforcement of rulings obtained through fraud “at least since the seventeenth century”).

278. *See Chambers*, 501 U.S. at 47.

279. *See United States v. Manton*, 107 F.2d 834, 846 (2d Cir. 1939).

280. *Id.*

281. *Id.* *See also Donziger*, 974 F. Supp. 2d at 564–65 (footnote omitted) (no showing that outcome was actually affected is necessary, since “[i]n cases in which the tribunal has been corrupted, ‘no worthwhile interest is served in protecting the judgment’”).

Voiding deceptively-induced remand orders (like the voiding of bribed, forged, or coerced remand orders) comports with Section 1447(d), not because the courts are, ultra viresly, brewing up some new judicial concoction to ladle into this already churning caldron of precedent, but because the deceptively-induced orders are not being “reviewed” at all. They are being “cancelled,” “annulled,” and “rescinded” – without any inspection of their underlying merits. Their correctness or their error is left unexamined. The mischief Congress sought to foreclose, namely, the specter of ricocheting jurisdiction as litigants fight substantively – up and down each judicial system – over the place of tribunal,<sup>282</sup> is not defeated. This is so because, in the context of deceptively-induced remands, the wheels of justice did not spin true the first time. The deception (on which the remand was based) “defiles the court,” and like any such undermining of the rightful progress of the judicial machinery, it commands relief<sup>283</sup> – to which ordinary, routine procedural barriers (even seemingly impregnable ones) must give way. In its hornbook decision applying fraud-on-the-court principles, the Supreme Court wisely instructed: “The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.”<sup>284</sup>

Corroboration for this conclusion comes from two further sources.

First, since their amendment in 1948, the Federal Rules of Civil Procedure have confirmed the authority of federal courts to “relieve a party or a party’s legal representative from a final judgment, order, or proceeding for . . . fraud.”<sup>285</sup> The Rules have likewise confirmed that the courts’ power to entertain “an independent action to relieve a party from a judgment, order, or proceeding . . . or . . . to set aside a judgment for fraud upon the court” is expressly preserved.<sup>286</sup> Exercising the right to grant such relief would be incompatible with an absolutist, unyielding construction of Section 1447(d). The two laws would collide. The longstanding approach to resolving conflicts between a federal procedural rule and a federal statute teaches that the more recent in time prevails.<sup>287</sup> Because Congress delegated rules-of-practice

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282. See *supra* notes 91–102 and accompanying text.

283. See *Dixon v. Comm’r*, 316 F.3d 1041, 1046 (9th Cir. 2003) (quoting *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960) (“When we conclude that the integrity of the judicial process has been harmed . . . and the fraud rises to the level of ‘an unconscionable plan or scheme which is designed to improperly influence the court in its decisions,’ we not only can act, we should.”). See generally *WRIGHT ET AL.*, *supra* note 233, at 575–76 (“If it is found that there was a fraud on the court, the judgment must be vacated and the guilty party denied all relief.”).

284. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

285. FED. R. CIV. P. 60(b)(3) (as amended Mar. 19, 1948).

286. *Id.* at 60(d)(3).

287. See, e.g., *United States v. Wilson*, 306 F.3d 231, 236 (5th Cir. 2002), *overruled on other grounds*, 364 F.3d 578, 586 (5th Cir. 2004) (en banc) (“[W]e have recognized that where a conflict exists between a Rule and a statute, the most recent of the two prevails.”); *Harris v. Garner*, 216 F.3d 970, 982 (11th Cir. 2000) (“[T]he

promulgation authority to the Supreme Court in the Rules Enabling Act, Congress's lawmaking authority over rules-of-practice remains "integral," and therefore the conflicting procedural rule and congressional statute would stand on equally authoritative footing.<sup>288</sup> This comparative dating exercise would relate the no-review directive's initial enactment (1887) to the relevant Federal Rules of Civil Procedure amendment (1948).<sup>289</sup> Consequently, were

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rule would have to yield to the later-enacted statute to the extent of the conflict."); *United States v. Hinton*, No. 99-1340, 2000 WL 717085, at \*1 (10th Cir. 2000) ("Although there are relatively few instances in which the federal courts have been called upon to address a conflict between a federal rule of criminal procedure and a more recently enacted federal statute, in every case, the more recent statute has been found to modify the rule of criminal procedure."). *See generally* Bernadette Bollas Genetin, *The Powers That Be: A Reexamination of the Federal Courts' Rulemaking and Adjudicatory Powers in the Context of A Clash of A Congressional Statute and A Supreme Court Rule*, 57 BAYLOR L. REV. 587, 600-01 (2005) ("The federal courts have traditionally resolved statute-Rule conflicts under the supersession clause in accord with the later-in-time analysis of the canon of statutory interpretation that disfavors implied repeal of existing statutes. Thus, under the supersession clause, courts have permitted a later-promulgated Federal Rule to supersede existing federal statutes to the extent that there was an irreconcilable conflict between the two.").

288. *See Wilson*, 306 F.3d at 236. Professor Bernadette Bollas Genetin has explored the question of federal rule/federal statute clash theory in fascinating detail. She explains the traditional rationale for how statutes enacted by Congress could be negated by a procedural rule promulgated by the Supreme Court: "Ultimately, the legislators accepted an analysis that Congress was, by enactment of the Rules Enabling Act, which itself was subject to bicameralism and presentment, pre-authorizing the Supreme Court to take subsequent action to repeal congressional legislation regarding procedure." Genetin, *supra* note 287, at 605. Though noting this historical legacy, Professor Genetin advocates a more searching inquiry into the relative authority of the respective lawmaker (judiciary or legislature). *See* Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 727 (2002) ("The principal focus in resolving statute-Rule conflicts should be on inquiries specifically tailored to resolve which rulemaker--the Court or Congress--has the authority to create the procedural standards in the specific context.").

289. The no-review directive was first enacted in 1887. *See supra* notes 109-12 and accompanying text. The Federal Rules of Civil Procedure were amended in 1948 to add fraud to the list of reasons justifying relief from a judgment or order and to confirm the authority to "set aside a judgment for fraud on the court." *See* FED. R. CIV. P. 60(b) (as amended Mar. 19, 1948). That is not to say that the no-review directive has remained fixed and unamended over the years. It has not. First, particular statutory exemptions have been added and deleted to the directive over the years. *See supra* notes 114-15 and accompanying text. Second, the original act had contained the phrase "such remand shall be immediately carried into execution," which Congress subsequently deleted from the law in 1949. *Ex parte Pa. Co.*, 137 U.S. 451, 453-54 (1890); ch. 139, 63 Stat. 89, 102 (1949). Neither should influence the choice of comparative dates, however. The addition and deletion of context-specific statutory exemptions is immaterial to the question of deceptively-induced remands, and can offer no illumination on that issue. The excision of the "immediately carried into

there a true clash of laws at issue here, the resolution of that clash by traditional last-in-time principles of statutory construction would have Section 1447(d) give way to the federal courts' Rules-enshrined authority to vacate an order procured by fraud.

Second, our law is steeped in principles embodying the notion that courts do not reward misbehavior by those appearing before them. Both the inherent power and Rule-based doctrine of fraud-on-the-court is just one example. Other examples are legion. The doctrine of judicial estoppel is understood as protecting "the integrity of the judicial process" by denying a prize to those who are "playing fast and loose with the courts to suit the exigencies of self-interest."<sup>290</sup> Both unjust enrichment and constructive trust endeavor to deprive one from retaining some benefit when doing so would be inequitable.<sup>291</sup> The unclean hands maxim teaches similarly, that no one ought to "be permitted to found any claim upon his own inequity or take advantage of his own wrong."<sup>292</sup> The goal of the remedy of disgorgement is generally "to deprive the wrongdoer of his ill-gotten gain" and "to deter others" from similar law-breaking.<sup>293</sup> The exclusionary rule in criminal law "tells police that if they obtain evidence illegally, they will not ordinarily be allowed to use it against the suspect they are after."<sup>294</sup> This pervasive judicial aversion against being an unwilling accomplice to injustice is grounded in bedrock principles of fundamental equity and encompasses the "equitable tradition of vacatur."<sup>295</sup> Section 1447(d)'s no-review directive should be construed in a

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execution" language did not substantively alter the no-review directive. *See* *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976) (no-review "has been the established rule . . . stretching back to 1887"); *In re Lowe*, 102 F.3d 731, 734 (4th Cir. 1996) ("The general rule prohibiting review of remand orders has been a part of American jurisprudence for at least a century."). If relevant for any purpose, it would only tend to soften the absolutism of Congress's insistence on no remand reviews. *Cf.* *United States v. Rice*, 327 U.S. 742, 751 (1946) (emphasizing how the "coupl[ing]" presence of the "immediately carried into execution" phrase contributes to making the no-review directive "no longer open to doubt"); *Ex parte Pa. Co.*, 137 U.S. at 454 (commenting that "the use of the words, 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process.").

290. *See In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)).

291. *See Counihan v. Allstate Ins. Co.*, 194 F.3d 357, 361 (2d Cir. 1999).

292. *See R.H. Stearns Co. v. United States*, 291 U.S. 54, 61–62 (1934).

293. *See SEC v. Teo*, 746 F.3d 90, 104–05 (3d Cir. 2014) (quoting *SEC v. Whittemore*, 659 F.3d 1, 11 n.2 (D.C. Cir. 2011)).

294. *United States v. Swift*, 220 F.3d 502, 506–07 (7th Cir. 2000).

295. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (noting "equitable tradition of vacatur" vested in appellate courts by statute). It may well be that the American tradition of "appeal" found its roots in equity, and as such, our whole appellate structure might be understood to represent Congress's equitable judgment on the appropriate scope of that reviewing opportunity. *See generally* *Mary*

manner that harmonizes with, not collides against, those core building blocks of justice.<sup>296</sup> The legislature's selection of the definitionally imprecise term "reviewable" only reinforces this construction.<sup>297</sup>

Both of these last two tools – clash of laws and law harmonization – align toward the same conclusion. In the search for meaning in Congress's no-review directive, the best symmetry among ordinary meaning, perceived "will of the Legislature," existing interpretative case law, fraud-on-the-court principles, and classical statutory construction tools is produced by the conclusion that "review" in Section 1447(d) means something more than "cancel," "annul," or "rescind." A "re-view" necessarily presupposes a first view, one that was actually a bona fide, legitimate look. If that first view was corrupted – by force, duress, coercion, bribery, forgery, or deception – then no true first view ever took place. When the judicial process has been commandeered, the judiciary retains its ancient, remedial power to undo the mischief. The legitimacy of, and broad public acquiescence in, the judicial process depends inexorably on confidence that the litigation process works fairly.<sup>298</sup>

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Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913 (1997). But even if the drafters of Section 1447(d) were mindful of the appeal's historical grounding in equity, the law they wrote foreclosed only "review" of remand grants, which still leaves unresolved the threshold question of what "review" actually encompasses.

296. See *United States v. Rodgers*, 461 U.S. 677, 716 n.5 (1983) (Blackmun, J., dissenting) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)) ("[D]espite the absolute language of 42 U.S.C. § 1983, the Court has concluded that '§ 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.'"). See also *Miller v. Mylan Inc.*, 741 F.3d 674, 678 (6th Cir. 2014) (quoting *Badaracco v. Comm'r*, 464 U.S. 386, 403 n.3 (1984) (Stevens, J., dissenting)) ("It is axiomatic that statutes in derogation of the common law should be narrowly construed."); *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304 (1959) ("Any such rule of law, being in derogation of the common law, must be strictly construed . . .").

297. See *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304 (1959) (advising that no statute should "be construed as making any innovation upon the common law which it does not fairly express"). See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 318 (2012) ("[S]tatutes will not be interpreted as changing the common law unless they effect the change with clarity.").

298. See, e.g., CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1 ("An independent and honorable judiciary is indispensable to justice in our society."); *id.* at Commentary ("Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges."); *id.* at Canon 2 ("A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); *id.* at Canon 2A, Commentary ("Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges."). See also *Turner v. Pleasant*, 663 F.3d 770, 777 (5th Cir. 2011) ("This court, like the public at large, relies on the integrity and honesty of the district judges. We presume judges to be honest."). See generally Solimine, *supra* note 2, at 323 (footnotes omitted) ("Appellate review is generally conceded to serve numerous salutary values, from both a litigant-oriented perspective (e.g., em-

Thus, in circumstances where a district judge is induced by a party's deception into entering a remand order, that remand should remain subject to vacatur (not "review") when doing so is necessary to safeguard the integrity of the federal court and its judicial processes.

What, then, becomes the fate of the remand motion in the post-vacation litigation? If the vacated remand order is not a "review," would the later replacement ruling on the now suddenly re-pending motion for remand constitute a forbidden "review"? Is the very act of issuing a "replacement" remand ruling, one that substitutes for the original, a "re-examination" (and, thus, a "review")? Or would the fact that the original deceptively-induced remand ruling was vacated (that is, annulled, canceled, rescinded) mean, like a *Casino Royale* Bond reboot, that history has been expunged, that no remand order had ever been entered, and that the trial judge writes afresh on a virgin slate?

Our analysis of fraud-on-the-court supplies a ready answer. Because the deceptive inducement prevented a true first "view" by the federal decisionmaker, and because only "re-views" are barred, the district judge is permitted – informed by the true facts – to render a decision on the newly re-pending motion to remand. That ruling, be it correct or in error, is the first "view" and, once entered, then unreviewable.

#### IV. IMPACT OF A CONSTRUCTION THAT PERMITS VACATUR FOR FRAUD

Back in Richmond, Judge Davis penned a withering dissent after his en banc colleagues in *Barlow* recognized a vacatur right for deceptively-induced remands.<sup>299</sup> He offered this explanation for why removal-and-remand fights have been chippy (or, to borrow his phrase, "recurring, decades-old, hand-to-hand combat"): "Defendants (virtually) always want to be in federal court whenever they can," because, from their perspective, discovery is better, summary judgment is better, jury pools are better; "[o]n the other hand, most plaintiffs . . . (and, more importantly, plaintiffs' counsel) prefer state court over federal court for the very obverse of the above-listed factors."<sup>300</sup> As our survey through removal and remand has shown, perhaps a bit more can be added to Judge Davis's lists. To defendants, nervous to avoid being "homered," a federal forum is often perceived as a last, lonely oasis of neutrality, staffed with even-handed, nonpartisan decisionmakers (harken, the Baltimore/Indianapolis Colts).<sup>301</sup> To plaintiffs, anxious to ensure a welcoming setting to hear their claims, a flight away from a state forum is often seen as

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powering litigants, having their day in court) and a systemic perspective (e.g., diffusing power, increasing rationality and consistency, ensuring adequate law development, providing for error correction).").

299. See *Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001 (4th Cir. 2014).

300. *Id.* at 1015–16 (Davis, J., dissenting). All of this, the dissent reassures the reader, is not a divulging of "palace secrets." *Id.* at 1016.

301. See *supra* Part II.A.

an antiquated delaying tactic grounded on post-colonial suppositions that may have had some modest basis in fact back in the eighteenth century but have no place over the bridge in the twenty-first century.

In these battles, every advantage is prized. A right to vacate deceptively-induced remands adds to the arsenal to be sure. Judge Davis feared an onslaught of strategizing pretrial mischief: “It is now the law of the Fourth Circuit that a Rule 60(b)(3) motion must be entertained by every district judge in the circuit in any remanded case, and the district judge is required to write a convincing opinion showing why ‘*vacatur*’ of the remand order is appropriate.”<sup>302</sup> So distinguished a jurist’s opinion should not be lightly discounted. But there remains formidable counterweights that are likely to mitigate overuse and misuse of such a *vacatur* power.

First, nothing in this type of *vacatur* licenses error-correction. Litigants who feel that they have been unmeritoriously remanded still have no recourse. Section 1447(d) has vaulted shut that door and sealed it remains. A federal judge’s order remanding a removed case back to state court is still “not reviewable on appeal [o]r otherwise”<sup>303</sup> beyond the limited statutory exemptions and judicial exclusions that already exist,<sup>304</sup> regardless of how unmistakable, egregious, or horrifyingly clear the error.<sup>305</sup>

Second, there is no new body of interpretive law to devise in effectuating this right of *vacatur*. It already exists and has for a great many years. The type of misconduct that will qualify as a fraud-on-the-court has long been explored both as an inherently vesting judicial power and, since 1948, in the context of the Federal Rules of Civil Procedure.<sup>306</sup> That body of law is now well developed and constitutes the great reservoir of precedential authority that will serve as the check on any request for a remand *vacatur*. Its long stability also adds grounding and predictability to the elements of proof that must define such *vacatur*.

Third, the burden on the party claiming a right to such *vacatur* is formidable.<sup>307</sup> It ordinarily requires proof of misconduct by an officer of the court (such as an attorney)<sup>308</sup> that is intentionally or recklessly false, directed at “the judicial machinery itself,” and actually succeeds in deceiving the tribu-

302. *Barlow*, 772 F.3d at 1017 (Davis, J., dissenting).

303. *See* *Three J Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 115 (4th Cir. 1979) (“Unquestionably, the statute not only forecloses appellate review, but also bars reconsideration of such an order by the district court.”).

304. 28 U.S.C. § 1447(d) (2012). *See supra* notes 114–19 and accompanying text.

305. *See supra* notes 82–87 and accompanying text.

306. *See generally* WRIGHT ET AL., *supra* note 233, at §§ 2860, 2868–70.

307. *See* *Turner v. Pleasant*, 663 F.3d 770, 777 (5th Cir. 2011) (“Simple fraud is insufficient. . . . Rather, the fraud alleged must be of a greater order of magnitude.”).

308. *See* *NC-DSH, Inc. v. Garner*, 218 P.3d 853, 858–59 (Nev. 2009) (stating fraud perpetrated by attorney serving as officer of the court can trigger fraud-on-the-court).

nal.<sup>309</sup> The movant must also carry its proof by clear and convincing evidence.<sup>310</sup>

Fourth, the constellation of facts and compelling weight of evidence that will support a successful vacatur motion is likely to be rare. Consider that the first case to adopt a deceptively-induced remand right to vacatur came in late 2014, more than a century and a quarter after Congress first installed the no-review directive.<sup>311</sup> And even there, with facts so troubling that it prompted the state court judge on remand to exasperate in disbelief (“I can’t believe you actually told [two federal judges] one thing and tell me another.”),<sup>312</sup> the federal district judge was still unconvinced that even a *sanctionable* event had occurred, let alone a “defiling” fraud-on-the-court.<sup>313</sup> On appeal, the en banc Fourth Circuit found no particular substantive error with the district judge’s conclusions, only that they were unsupported by specific findings.<sup>314</sup> And back in the district court, post appeal, a newly assigned presiding district judge ruled *against* vacatur, following a period of extensive briefing.<sup>315</sup> Colgate had insisted that vacatur-qualifying bad faith was shown by Plaintiffs’ oral argument concession that these were “one-defendant case[s]” and reinforced by Plaintiffs’ decision to not pursue discovery against and, indeed, to later voluntarily dismiss the diversity-destroying in-state defendants.<sup>316</sup> Nevertheless, the trial judge reasoned that while Plaintiffs’ subjective intent to press (or not press) claims against the diversity-destroying in-state defendants

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309. *See, e.g.*, *United States v. Estate of Stonehill*, 660 F.3d 415, 444 (9th Cir. 2011); *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010). *See generally* WRIGHT ET AL., *supra* note 233, at 411–15.

310. *See Estate of Stonehill*, 660 F.3d at 444; *Booker v. Dugger*, 825 F.2d 281, 283–84 (11th Cir. 1987).

311. *See generally* *Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001 (4th Cir. 2014).

312. *Id.* at 1006.

313. Order of the Hon. William M. Nickerson dated June 26, 2013, in *Barlow v. John Crane-Houdaille, Inc.*, No. WMN-12-1780 (D. Md.), Joint Appendix, *supra* note 146, at 1108 (“The statements of Plaintiffs’ counsel in proceedings in this Court and the state court relating to the possible implication of third party, non-diverse, defendants appear to be in sharp conflict. While this is troubling, the Court recognizes that those statements are attributable to different attorneys in markedly different litigation contexts. In these particular circumstances, this Court is not convinced that counsel’s conduct is sanctionable.”).

314. *Barlow*, 772 F.3d at 1012–13 (reasoning that because “the lower court, familiar with the facts and parties, is better suited to make this determination,” the en banc court was returning the matter to the trial judge “to make specific findings—supported by cogent reasoning—on whether Plaintiffs engaged in misconduct while in federal court,” and directing the trial judge to do so by providing “more analysis than that included in the orders’ dicta, which would be too perfunctory to merit meaningful review”).

315. *Barlow v. John Crane-Houdaille, Inc.*, No. WDQ-12-1780, 2015 BL 334332 (D. Md. Oct. 8, 2015).

316. *Id.* at \*8.

was indeed a relevant consideration,<sup>317</sup> the evidence Colgate had mustered failed to dispel the conclusion that Plaintiffs possessed enough of a claim against those defendants to justify a remand.<sup>318</sup> Thus, even in the first ever case of deceptively-induced remand vacatur to percolate up to the courts of appeals, the practical impact of the onerous burden awaiting any such vacatur-aspiring fraud-on-the-court motion was on clear display.

All of these factors should restrain the making of loose or idle vacatur requests, and the road that awaits any such movant is little short of suffocating. Moreover, the volume of cases impacted potentially by deceptively-induced vacatur is modest by any measure.<sup>319</sup> Clearly, this experience is no clarion call for strategic vacatur motion filings.

For certain, one consequence of such vacatur cannot be gainsaid. Anytime “we pull a remanded case back into the federal courts, we delay the progress of justice and give parties a tool and an incentive to engage in dilatory tactics.”<sup>320</sup> A deceptively-induced remand vacatur will risk that. The “hand-to-hand combat” in such a vacatur context is almost certain to be delaying and costly, and an abrupt return to a federal court’s already crowded docket would probably only add further delay. The *Barlow* litigation is telling. It began in 2012, and not until autumn 2015 was there final closure on the threshold question of what tribunal should properly hear the merits.<sup>321</sup>

317. *Id.* at \*14 (footnotes omitted) (holding that “a removing defendant may defeat remand by showing that the plaintiffs cannot succeed against the resident defendants, or by showing that the plaintiffs never intended to”).

318. *Id.* at \*11–12 (“That the Plaintiffs’ counsel decided that it aided their clients to present a different argument to the Circuit Court on a different matter (consolidation) does not mean that the Maryland defendants were fraudulently joined.”). See also *id.* at \*14 (“Colgate has not provided--nor has the Court found--authority for the proposition that a plaintiff’s post-remand voluntary dismissal of resident defendants--or decision not to pursue discovery--sufficiently shows a lack of good faith intent to obtain a judgment for the purpose of establishing a meritorious claim to a federal forum.”). To rule otherwise, wrote the trial judge, would encourage remand vacatur motions “every time a plaintiff decides to dismiss a diversity jurisdiction-defeating defendant from state litigation.” *Id.*

319. See Solimine, *supra* note 2, at 325 (noting that remanded cases occupy “less than two percent” of the federal courts’ civil docket).

320. *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1289 (11th Cir. 1999). Cf. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)) (recounting “nearly three years of jurisdictional advocacy” on the scope of Section 1447(d)’s prohibition as “confirm[ing] the congressional wisdom” of endeavoring to avoid “prolonged litigation of questions of jurisdiction of the district court to which the cause is removed”).

321. The soundness of Plaintiffs’ exposure theory remains in its infancy as this Article goes to press. In what appears to be the first-ever resolution of a Cashmere Bouquet exposure claim, Colgate settled in Spring 2015 a personal injury lawsuit filed by a California couple who had alleged mesothelioma from Cashmere Bouquet exposure; days earlier, a Los Angeles jury had returned a multi-million dollar verdict in the couple’s favor. See Myron Levin, *Colgate-Palmolive Settles Talc-Asbestos*

But what is gained by allowing such vacatur surely overbalances the collateral delay, cost, and federalism impacts – the federal court’s ability to rectify a corruption of its processes. In truth, the judicial system can accept nothing less. If a litigant can deliberately, mischievously misstate (or outright concoct) facts to defeat removal and compel remand, by inducing a district judge to act on an invented factual record, a clear injustice is perpetrated if the miscreant can also invoke Congress’s no-review directive to evade meaningful remediation. What would suffer is not just an individual litigant’s rights, but the integrity and legitimacy of the justice system writ large. As this analysis has shown, such a result is commanded neither by the language of the statute nor by its legislative purpose. It defies good sense to believe Congress envisioned tolerating such a maneuver when it enacted the no-review prohibition, but in any event, such an incredulous statute is not the one it wrote. A vacatur to rescind a remand order that has been deceptively induced is not a “review” forbidden by Congress. Ergo, it is not proscribed.

### CONCLUSION

Removal is, and has always been, about fairness. It is Congress’s recognition that a change in decisional tribunal may be prudent (or critical) in securing fundamental justice and in maintaining confidence in, and the perceived legitimacy of, federal courts. When removal is defeated through a deliberate, calculated misrepresentation designed to deceive the tribunal, Congress’s purpose is not served nor is the legitimacy of the judicial process protected. Because a vacatur of a deceptively-induced remand order is not a “review” proscribed by law, courts retain their longstanding, historic authority to protect against such mischief.

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*Case, Dismisses Link to Cancer*, MIAMI HERALD (May 1, 2015), <http://www.miamiherald.com/news/nation-world/national/article19997730.html>. Plaintiffs had claimed that their cosmetic talc was contaminated with asbestos fibers from having been mined from a deposit interlaced with asbestos. *See id.* In a related context, a seventy-two million dollar verdict was returned in a general talcum powder case by a Missouri jury in early Spring 2016. *See Johnson & Johnson to Pay \$72m in Case Linking Baby Powder to Ovarian Cancer*, GUARDIAN (Feb. 23, 2016), [http://www.theguardian.com/world/2016/feb/24/johnson-johnson-72-million-baby-talcum-powder-ovarian-cancer?CMP=fb\\_gu](http://www.theguardian.com/world/2016/feb/24/johnson-johnson-72-million-baby-talcum-powder-ovarian-cancer?CMP=fb_gu).