On the Road to the Merits in Our Federal System: Is the "Forum Defendant Rule" a Procedural Speed Bump or a Jurisdictional Road Block?

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INTRODUCTION

While most were celebrating the 2006 holiday season, a team of litigators and academics were battling fiercely over the scope of federal court removal jurisdiction. Specifically, they disagreed whether the language of 28 U.S.C. § 1441(b) ("Forum Defendant Rule"),[1] which bars removing a claim from state to federal court if the defendant is a resident of the state where the claim was filed, is a procedural "speed bump" or a jurisdictional "road block." If the Rule is merely procedural, a plaintiff that fails to seek a remand order within the statutory time frame will waive any right to object after that time frame has expired.[2] However, if the Rule is jurisdictional, an action removed in violation of the Rule would not be within the subject-matter jurisdiction of the federal court, and thus, not amenable to any compulsory remand timeframes.[3] Although removal jurisdiction issues may not attract as many viewers as the new season of *American Idol*,[4] they are still important, as they greatly affect the ultimate likelihood of prevailing on the merits.[5] Moreover, while the

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1. 28 U.S.C. § 1441(b) (2000). For the text of the statute, *see infra* note 49.
2. *See infra* note 56.
3. *See generally* Horton v. Conklin, 431 F.3d 602 (8th Cir. 2005), *cert. denied*, 127 S. Ct. 60 (2006).
4. *American Idol* (FOX television broadcast Jan. 16, 2007).
5. *See infra* notes 60–83 and accompanying text.

precise issue presented is not new,[6] recent conflicting federal circuit decisions have spawned a fresh round of debate on the topic.[7]

Lively v. Wild Oats,[8] a recent circuit court case interpreting the statutory restriction embodied in § 1441(b), has sparked this new round of debate.[9] In *Lively*, the Court of Appeals for the Ninth Circuit determined that the forum-state restriction provided for in § 1441(b)[10] is not a limitation on the federal courts' subject-matter jurisdiction.[11] Consequently, the *Lively* court interpreted the Forum Defendant Rule as a procedural technicality, subject to the thirty-day filing limit for any motion to remand provided in 28 U.S.C. § 1447(c).[12]

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6. The issue is whether the Forum Defendant Rule, contained in § 1441(b), further restricts the subject-matter jurisdiction of the federal courts. On brief to the Supreme Court, the parties have framed as follows: The Plaintiff in *Lively* [hereinafter "Lively" or "Petitioner"] asks, "[w]hether the forum defendant exception to removal jurisdiction is inapplicable whenever a plaintiff seeking remand fails to raise it within thirty days of removal." Petition for Writ of Certiorari at i, Lively v. Wild Oats Mkts., 456 F.3d 933 (9th Cir. 2006) (No. 04-56682), *cert. denied*, 127 S. Ct. 1265 (2007).

While the Defendant in *Lively* [hereinafter "Wild Oats" or "Respondent"] questions, "[w]hether violation of the no local defendant rule deprives the Federal Courts of subject matter jurisdiction when the requirements of diversity jurisdiction are met at all times, the plaintiff fails to object to removal and instead completes discovery and the issue is raised *sua sponte* by the District Court." Brief in Opposition to Petition for Writ of Certiorari at i, Lively v. Wild Oats Mkts., 456 F.3d 933 (9th Cir. 2006) (No. 04-56682), *cert. denied*, 127 S. Ct. 1265 (2007).

7. *Compare Horton*, 431 F.3d at 605 (holding that the "better rule" of law requires reading the Forum Defendant Rule as a jurisdictional road block on the subject-matter of the district courts), *with* Lively v. Wild Oats, 456 F.3d 933 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1265 (2007) (holding that the Forum Defendant Rule is a procedural technicality—or a procedural speed bump on the road to the merits—that may be waived by the parties in absence of a timely petition for remand).

8. 456 F.3d at 933.

9. *See id*. In essence, the Forum Defendant Rule restricts removal from a state court to a federal district where the defendant is a resident of the state where the action is commenced. *See* 28 U.S.C. § 1441(b) (2000). So, for instance, if X is a resident of California and is sued in California, under the operation of 28 U.S.C. § 1441(b), X can not remove the action to federal district court, even if the district court would have had original jurisdiction. *See infra* notes 44–56 and accompanying text.

10. 28 U.S.C. § 1441(b). Section 1441—titled "Actions Removable Generally"—defines and confines removal to cases where the defendant is not a resident of the forum state. *Id*. For the relevant text of the statute, *see infra* notes 44 and 49.

11. *Lively*, 456 F.3d at 939.

12. *Id*. at 942 (citing 28 U.S.C. § 1447(c) (2000)). Rules governing removal procedure are set forth in § 1447 and § 1446. *See* 28 U.S.C. §§ 1446–47 (2000) (§ 1446 is titled "Procedure for removal" and § 1447 is titled "Procedure after removal generally"). For the relevant text of the statutes, *see infra* notes 54–56.

The conclusion at the heart of the *Lively* decision is of paramount significance to litigants, as the win rates can dramatically change from a state to federal forum.[13] Moreover, the decision is of potential significance to federal judiciary, because more actions will likely end up in federal courts.[14] This significance is exacerbated when one considers the emphasis courts place on refraining from the exercise of nonexistent jurisdiction.[15] While a majority of the circuits that have decided this issue are in accord with the *Lively* decision,[16] presently the Eighth Circuit has held that a contrary interpretation of § 1441(b) is required.[17] However, the United States Supreme Court has yet to resolve the issue.[18] Due to a lack of Supreme Court precedent, the

13. *See infra* notes 60–65 and accompanying text.

14. *See infra* notes 66–83 and accompanying text.

15. *See generally* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (dismissing the action, *sua sponte*, for lack of subject-matter jurisdiction after years of litigation).

16. 456 F.3d 933, 940 (9th Cir. 2006). The *Lively* court recounts these decisions as:

> Our interpretation of § 1441(b) comports with eight of the nine circuits that have addressed this issue. *See, e.g.*, Handelsman v. Bedford Vill. Assocs. Ltd. P'ship, 213 F.3d 48, 50 n. 2 (2d Cir. 2000) (describing a violation of the forum defendant rule as a waivable "procedural defect"); Hurley v. Motor Coach Indus. Inc., 222 F.3d 377, 380 (7th Cir. 2000) (holding that the forum defendant rule "is more a matter of removal procedure, and hence waivable, than a matter of jurisdiction"); Blackburn v. United Parcel Serv., Inc., 179 F.3d 81, 90 n. 3 [sic] (3d Cir. 1999) (describing a § 1441(b) violation as a waivable removal defect); Pacheco de Perez v. AT & T Co., 139 F.3d 1368, 1372 n. 4 [sic] (11th Cir. 1998) (same); *In re* Shell Oil Co., 932 F.2d 1518, 1523 (5th Cir. 1991) (same); Farm Constr. Servs., Inc. v. Fudge, 831 F.2d 18, 22 (1st Cir. 1987) (holding that a violation of the forum defendant rule did not strip the district court of its jurisdiction because it was a "technical" defect that had been waived); Am. Oil Co. v. McMullin, 433 F.2d 1091, 1095 (10th Cir. 1970) (describing a § 1441(b) violation as a waivable defect in removal proceedings); Handley-Mack Co. v. Godchaux Sugar Co., 2 F.2d 435, 437 (6th Cir. 1924) (describing removal by a forum defendant as a "technical" violation).

Id.

17. Hurt v. Dow Chem. Co., 963 F.2d 1142, 1146 n.1 (8th Cir. 1992) (characterizing the Forum Defendant Rule as a limitation on the subject-matter jurisdiction of the federal courts). *See infra* notes 114–23.

18. Horton v. Conklin, 431 F.3d 602 (8th Cir. 2005), *cert. denied*, 127 S. Ct. 60 (2006) (denying certiorari for a decision of the Eighth Circuit that addressed the same issue as the *Lively* court; the court held that the Forum Defendant Rule is a limit on the subject-matter jurisdiction of federal courts).

Even if there is room for disagreement as to the proper interpretation of the Forum Defendant Rule, there is no room to disagree that Supreme Court intervention is necessary. If the holding in *Lively* is correct, then the Supreme Court would need to correct the improper construction of the rule advanced by the Eighth Circuit Court of Appeals. Moreover, if the

rules of the various circuits could have a profound impact on the efficient and uniform operations of the federal judiciary.[19]

This Note explains why the Supreme Court should have resolved this issue, and why it should have reversed the Court of Appeals for the Ninth Circuit and held that the Forum Defendant Rule is a jurisdictional defect not capable of being waived by the parties. Part I of this Note will briefly discuss the origins and history of federal jurisdiction and removal statutes and will also discuss why the *Lively* decision is of consequence to litigators and the judiciary. Part II of this Note will present the arguments utilized by the *Lively* court in support of its holding. Finally, Part III will conclude with a critical analysis of the arguments in favor of the *Lively* decision, the correct interpretation of the statute, and the relevant policy considerations crucial to reach the correct, albeit opposite, conclusion.

I. HISTORY

A. The Evolution of Removal Jurisdiction and the Forum Defendant Rule

> Rules of jurisdiction in a sense speak from a position outside the court system and prescribe the authority of the courts within the system. They are to a large extent constitutional rules. The provisions of the U.S. Constitution specify *the outer limits* of the subject-matter jurisdiction of the federal courts and authorize Congress, within those limits, to establish by statute the organization and jurisdiction of the federal courts.[20]

Article III of the United States Constitution creates one Supreme Court, and leaves the creation of inferior federal courts to the United

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Lively decision is incorrect, the Court needs to intervene to correct the improper construction of the majority of the circuits.

19. *See infra* notes 79–82 and accompanying text.

20. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 55 § 2.1 (5th ed. 2001) (emphasis added). This Note will not focus on the jurisdiction of the federal courts per se. Rather, a narrower focus is given to a discussion of whether the forum-state restriction embodied in 28 U.S.C. § 1441(b) (2000) (containing the Forum Defendant Rule) is a limit upon a federal courts subject-matter jurisdiction.

States Congress.[21] Article III extends judicial power (jurisdiction) to a limited number of enumerated cases.[22] However, removal jurisdiction[23] is not explicitly mentioned anywhere in the Constitution[24] and is entirely a creature of statute.[25]

Article III is interpreted as empowering Congress with the ability to grant jurisdiction to federal courts in three circumstances.[26] First, Congress can grant federal appellate jurisdiction over cases litigated and determined in state courts (i.e., federal appellate and/or habeas corpus jurisdiction).[27] Second, Congress can grant federal trial courts jurisdiction to determine cases filed as an initial matter by a plaintiff (i.e., original jurisdiction).[28] Finally, Congress can provide for

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21. U.S. CONST. art. III, § 1. This section states, "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . ." *Id.*

22. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority; [and to a limited number of enumerated cases and controversies] . . . ."). *See generally* Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099, 1108–09 (1995).

23. *See infra* notes 43–49. Removal jurisdiction is not an independent right to federal court. Rather, it is a descriptor used to connote the *method* by which an action comes before the court. *See infra* notes 43–49.

24. JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.03 (3d ed. 2006).

25. 28 U.S.C. §§ 1441–47. *See* Hurt v. Dow Chem. Co., 963 F.2d 1142, 1145 (8th Cir. 1992).

26. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 322 (2d ed. 1994).

27. U.S. CONST. art. III, § 2, cl. 2. This section states,

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 315 (1816) (stating "therefore, the appellate jurisdiction [of the Supreme Court] must extend beyond appeals from the courts of the United States only.").

28. *See generally* Kline v. Burke Constr. Co., 260 U.S. 226 (1922) ("Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress."); *Martin*, 14 U.S. (1 Wheat.) at 331 ("It would seem, therefore, to follow [from the text of Article III], that congress are bound to create some inferior courts, in which to vest all that jurisdiction, which, under the constitution, is *exclusively* vested in the United States, and of which the supreme court cannot take original cognizance.").

Whether Article III *requires* the creation of inferior courts, as Justice Story believed, or whether Article III merely permits the creation of inferior courts, as Justice Sutherland believed,

removal of claims filed in state courts to federal court (i.e., removal jurisdiction).[29] By enacting the Judiciary Act of 1789,[30] Congress embraced the constitutional call, and chose to implement all three of these mechanisms to grant federal jurisdiction.[31] Despite these seemingly stark, conceptually simplistic demarcations in the character and origins of federal jurisdiction, there has always been considerable overlap in the existence of federal jurisdiction.[32]

From its inception,[33] removal jurisdiction has undergone considerable judicial interpretation and legislative change.[34] These changes have left the law governing removal rife with confusion and incoherence.[35] However, the rationale for removal jurisdiction is readily identifiable. Where the cause of action involves a federal question,[36] removal is designed to ensure that the tribunal better informed on questions of federal law would adjudicate the matter.[37] Where removal is predicated on the diverse citizenship of the litigants,[38] removal is designed to protect out-of-state defendants

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one aspect of inferior courts' genesis is clear: Congress, not Article III, technically creates inferior courts. *See generally id.*

29. Hartnett, *supra* note 22, at 1107.

30. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (establishing the Judicial Courts of the United States).

31. Hartnett, *supra* note 22, at 1108–09.

32. *Id.* at 1109. (detailing instances where federal courts would have both original and removal jurisdiction).

33. Initially, one basis for removal jurisdiction existed if:

> [A] suit [is] 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 . . . five hundred dollars, . . . and the defendant . . . file[s] for a petition for the removal of the cause . . . the cause shall there proceed in the same manner as if it had been filed [in federal court] by original process.

Judiciary Act of 1789, ch. 20, § 12, 2 Stat. 73.

34. *See generally* Hartnett, *supra* note 22 (detailing the progression of the modern removal statutes from their origin).

35. Hagerla v. Miss. River Power Co., 202 F. 771, 773 (S.D. Iowa 1912) ("That there is no other phase of American jurisprudence with so many refinements and subtleties, as relate to removal proceedings, is known by all who have to deal with them.").

36. *See generally* 28 U.S.C. § 1331 (2000) (creating, generally speaking, original jurisdiction over actions "arising under" the Constitution, laws, or treaties of the United States).

37. *See* Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 827 (1986).

38. *See generally* 28 U.S.C. § 1332 (2000) (creating, generally speaking, original jurisdiction over actions where the plaintiff(s) and defendant(s) are citizens of different states; this has come to be known as "diversity jurisdiction"). *See also* Strawbridge v. Curtiss, 7 U.S.

from a perceived local bias in favor of local plaintiffs while still maintaining proper respect for state courts.[39]

Ultimately, the goal of removal is to provide a defendant with a federal forum.[40] In providing a federal forum, the effect of removal is to deprive a state court of an action that is properly within its jurisdiction.[41] As such, removal jurisdiction creates federalism concerns.[42]

The removal privilege and procedures are statutory, and thus governed in various sections of the United States Code.[43] The general removal statute, which applies to all civil cases, is located in 28 U.S.C. § 1441(a).[44] Under this statute, an action is removable if four conditions are satisfied: (1) the action commenced is a civil action initiated in state court, (2) the action could have been commenced originally in federal court,[45] (3) the defendant is the party seeking

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(3 Cranch) 267 (1806) (first Supreme Court case to require complete diversity of all litigants for proper federal subject matter jurisdiction).

39. *See* United Steelworkers v. R. H. Bouligny, Inc., 382 U.S. 145, 150 (1965) (discussing one of the rationales for diversity jurisdiction is to protect a nonresident litigant from local prejudice); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 109 (1941) ("'Due regard for the rightful independence of state governments . . . requires . . . [federal courts to] scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'") (citing Healy v. Ratta, 292 U.S. 263, 270 (1934)). *See also* China Basin Prop., Ltd. v. Allendale Mut. Ins. Co., 818 F. Supp. 1301, 1303 (N.D. Cal. 1992) ("The diversity statute is strictly construed, and any doubts are resolved against finding jurisdiction.") (citing Kantor v. Wellesley Galleries, Ltd., 704 F.2d 1088, 1092 (9th Cir. 1983)).

40. *See Merrell Dow Pharm.*, 478 U.S. at 809.

41. MOORE, *supra* note 24, § 107.03.

42. *See* California *ex rel*. Sacramento Metro. Air Quality Mgmt. Dist. v. United States, 215 F.3d 1005, 1010–14 (9th Cir. 2000); Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 365 (5th Cir. 1995).

43. *See* 28 U.S.C. §§ 1441–47 (2000). The statutory scheme for removal is quite unambiguous. The right of removal is governed by § 1441 (actions removable generally). The procedure for removal is governed by §§ 1446–47 (procedure for removal and procedure after removal generally). *See supra* note 12 and *infra* notes 54–56 and accompanying text.

44. The statute provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (2000).

45. That is, the action was within the district court's original jurisdiction, as limited by Article III and the various sections of the United States Code further refining the reach of the original jurisdiction of the district courts. For example, 28 U.S.C. § 1332 restricts a district

removal,[46] and (4) the action is removed to the district court for the district and division embracing the state action.[47]

Yet, where removal is predicated upon the diversity of the litigants, Congress rejected a per se right to removal and conditioned the defendant's right to remove upon his relation to the forum state.[48] This restriction is embodied in § 1441(b),[49] and has been dubbed the Forum Defendant Rule.[50] There is no corresponding restriction upon removal where the claim presents a federal question.[51] However, where the basis for removal is diversity of citizenship, the defendant's right to remove the litigation from a state court of competent jurisdiction to the federal courts only exists where the defendant is not a resident of the forum state.[52] This restriction is reasonable considering the rationale for removal of diversity actions, namely the possibility for bias against an out-of-state defendant.[53]

While the creation of the defendant's substantive right to remove is governed by § 1441, § 1446 governs the procedure a defendant must follow to affect the right to remove.[54] Assuming a defendant

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court's original jurisdiction to cases where amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332 (2000).

46. *See* 28 U.S.C. § 1441.

47. *Id*.

48. *See infra* note 49. A per se right of removal would allow a defendant to remove an action currently before a state court to federal district upon the mere showing of original jurisdiction (e.g., 28 U.S.C. § 1331 or § 1332 has been satisfied). This is not the removal scheme Congress has enacted. *See infra* notes 128–31 and accompanying text.

49. The statute provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action *shall be removable only if* none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b) (2000) (emphasis added).

50. The restriction contained in the second sentence of § 1441(b), namely that any other civil action shall be removable only if none of the parties is a forum defendant, was first dubbed the "Forum Defendant Rule" in *Hurley v. Motor Coach Industries*, 222 F.3d 377, 378 (7th Cir. 2000).

51. *See* 28 U.S.C. § 1332 (2000).

52. 28 U.S.C. § 1441(b).

53. *See* United Steelworkers v. R. H. Bouligny, Inc., 382 U.S. 145, 150 (1965).

54. 28 U.S.C. § 1446(a) (2000). This statute states:

> A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and

properly removes, the onus is shifted to the plaintiff to remand the action back to state court if he so chooses. Section 1447 governs the remand procedure.[55] Section 1447(c) requires a plaintiff to remand within thirty days of the defendant's filing a notice of removal, unless the remand is predicated on the federal court's lack of subject-matter jurisdiction.[56]

From these requirements, the issue presented in *Lively* was raised. Namely, is the restriction embodied in the Forum Defendant Rule, which prohibits removal of a local action by a local defendant, a restriction upon the subject-matter jurisdiction of the federal court and thus immune from the thirty-day filing limit of § 1447(c)? Or, is the restriction procedural and thus subject to the thirty-day filing limit? In order to properly appreciate this issue, one must understand why it matters and what is at stake.

> division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

Id. The statute continues to enumerate certain procedural requirements to properly effect a removal. First, the defendant must file for removal within thirty days of service of process. 28 U.S.C. § 1446(b) (2000). Moreover, "[the] case may not be removed on the basis of [diversity] jurisdiction . . . more than 1 year after commencement of the action." *Id.*

55. 28 U.S.C. § 1447 (2000). Although the remand guidelines listed in § 1447 are procedures to effect a remand, failure to follow these procedures does not necessarily confer jurisdiction to the federal court. For instance, if a plaintiff files suit against a defendant in a court that lacks personal jurisdiction over the defendant, the defendant still must follow certain procedures to avoid the court's jurisdiction. Merely following the procedure to avoid jurisdiction obviously does not confer jurisdiction. In the same sense, failing to follow the remand procedure should not grant jurisdiction. One should not infer that Congress intended to let in the backdoor—or more appropriately, the boarded up window—what is not allowed through the front door.

56. 28 U.S.C. § 1447(c) (2000). This statute states:

> A motion to remand the case on the basis of any defect other than lack of subject-matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Id.

B. Why Does This Matter?

The discussion of why the Forum Defendant Rule establishes a jurisdictional road block to the exercise of federal subject-matter jurisdiction would be little more than an academic diatribe if the consequences were not so dire.[57] As detailed below, and further explored in Part II of this Note, this rule could potentially harm countless litigants, both directly and indirectly.

The decision of where to file suit, whether in state or federal court, is an important decision a plaintiff must make.[58] This decision can have a profound impact on several areas of the litigation and can result in favorable or unfavorable consequences to both the plaintiff and the defendant.[59] The most severe consequence is the ultimate effect removal may have on a plaintiff's likelihood of success. A recent study has indicated that a plaintiff's probability of prevailing on the merits in a case removed to federal court is drastically lower than a case originally filed in federal courts.[60] This study revealed that the win rate for plaintiffs in original diversity cases is 70 percent, but in removed diversity cases it is only 34 percent.[61] However, this result should not be too surprising, considering the entire premise of removal is to affect the outcome of the litigation.[62] The study suggested two possible reasons for this result: the effect of the forum,[63] and the effect of case selection.[64] Despite the inherent

57. *See infra* notes 60–83 and accompanying text.

58. *See infra* notes 60–83 and accompanying text. As this discussion illustrates, more than the merits are relevant in the ultimate disposition of a claim.

59. *See infra* notes 60–83 and accompanying text. This note only considers the adverse impacts that may result to the plaintiff.

60. 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, 602 (1998).

61. *Id*. at 581.

62. *Id*. at 592.

63. *Id*. at 599–602. Here, the authors note several differences between the state and federal courts. Of special significance are the differences in civil procedure that tend to favor removing defendants, namely the effect of the trier of fact (whether judge or jury) and the magnitude of federal judges' antipathy to plaintiffs. *Id.* at 601.

64. *Id.* at 602–06. First, the authors note that the representative defendants may be litigation averse, and thus only defend cases where they feel they can prevail on the merits (i.e., the removed cases represent the weakest plaintiff's claims). *Id.* at 603. Second, the authors discuss how these plaintiff lawyers may be too "unskilled to prevent removal, and otherwise

ambiguity of evaluating removal jurisdiction and win rate data, the most likely cause of a plaintiff prevailing on the merits is the effect of the forum.[65]

This forum effect likely has many origins, but is rooted deeply in the decision of *Erie Railroad Co. v. Tompkins*.[66] In *Erie*, the Supreme Court declared that where actions are based upon diversity jurisdiction and are initiated in federal court, the federal court must apply the substantive law of the state in which they sit.[67] Essentially, *Erie* stands for the proposition that the *substantive* law of the state will govern any litigation in federal courts in order to assure that the judgment of the federal court is substantially similar to what the judgment would have been in state court.[68] However, the substantially similar[69] results are not absolute,[70] and in all

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inferior to the aggressive and knowledgeable defendants' lawyers." *Id.* at 604. As between these rationales for such a significant drop in win-rates, the authors believe the weakest claims argument is the most likely. *Id*. However, the authors, noting that this conclusion (that only the strongest claims are removed and defended) may be the exact opposite of what is occurring in practice, state that "the risk of removal might lead the plaintiffs' lawyers to discount their clients' chances, resulting in bringing only strong cases, thus leading to a stronger set of removed cases. . . . [A]rguments exist that the set of removed cases is, in fact, not a weaker set of cases at all." *Id.* at 605–06.

65. *Id*. at 607 ("The inherent ambiguity of win-rate data will often yield . . . to sound analytic techniques. Here, a study of win-rate data on removal jurisdiction leads to the conclusion that forum really does affect outcome, with removal taking the defendant to a forum much more favorable in terms of biases and inconveniences.").

66. 304 U.S. 64 (1938).

67. *Id.* at 78. In *Erie*, the plaintiff, a citizen of Pennsylvania, sued the defendant, incorporated in New York, for injuries sustained by the plaintiff resulting from being struck by a protruding object from the defendant's train. *Id*. at 69–70. The plaintiff initiated suit in New York federal court. *Id*. The trial judge refused to apply the law of Pennsylvania, which would have precluded plaintiff's recovery. *Id.* at 70. In doing so, the trial judge, who was affirmed by the Circuit Court of Appeals, said the issue of which standard of negligence was to be applied was a question of federal law, as opposed to state law. The Supreme Court rejected this conclusion, and held that absent some express constitutional or statutory directive, federal courts sitting in diversity jurisdiction must apply the relevant state law. *Id*. at 79.

The rationale for Erie was twofold. First, it eliminated the potential benefit to a plaintiff of forum shopping. Second, it avoided unfair administration of law (i.e., different forums, different results). *See generally* Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235 (1999).

68. *See* Bauer, *supra* note 67, at 1255–56.

69. *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945). In *Guaranty Trust*, the issue was whether the federal court, sitting with diversity jurisdiction, must apply the state statute of limitations, which would have barred the plaintiff's recovery. *Id.* at 107. The Supreme Court interpreted *Erie* as limiting federal courts from reaching a result that a state court would not have reached had the litigation proceeded in state court. *Id*. at 107–09. The result of *Guaranty*

circumstances thus far, federal courts have applied the Federal Rules of Civil Procedure.[71] Restated, *Erie* and its progeny establish certain circumstances where the procedural rules governing a litigated case will vary depending on where the case is litigated (i.e., federal or state forum).[72] These differences can be substantial, including whether or not a jury is to hear and decide an issue,[73] which method of process must be used,[74] whether a unanimous jury verdict is required,[75] what procedures govern certifying a witness as an expert,[76] whether federal judges are appointed for life and generally

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Trust, simply restated, was that the outcome of the litigation should be substantially the same as if the action had proceeded in state court (i.e., an "outcome-determinative" test). *Id.* at 109. For a discussion of the evolution and application of this standard, see Bauer, *supra* note 67, at 1257–58.

70. *See* Byrd v. Blue Ridge, 356 U.S. 525 (1958). In *Byrd*, the Supreme Court had to decide whether a judge or a jury should resolve the question of whether an injured party is an employee or independent contractor. *Id.* at 529–30. According to state practice, the question should be decided by a judge. *Id.* at 536. According to federal practice, the issue should be decided by a jury. *Id.* The Supreme Court, in requiring the issue be resolved by a jury, rejected the position that the mere possibility that a federal practice may change the outcome of the litigation automatically requires application of state law. *Id.* at 537–38 ("The policy of uniform enforcement of state-created rights and obligations . . . cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury.") (citation omitted). The *Byrd* Court held that the federal policy favoring jury trials, exemplified by the Seventh Amendment, outweighed any competing state interests. *Id.* at 539.

71. *See generally* Hanna v. Plumer, 380 U.S. 460, 473–74 (1965) (holding that if there is a conflicting state and federal rule of procedure, the federal rule is applied unless the rule is beyond the rulemaking power extended to the Supreme Court by the Rules Enabling Act, 28 U.S.C. § 2072 (2000), or the rule is unconstitutional). To date, no Federal Rule of Civil Procedure has been invalidated as beyond the scope of the Rules Enabling Act. STEVEN YEAZELL, CIVIL PROCEDURE 293 (5th ed. 2000). Moreover, no rule has been held unconstitutional. *Id.*

72. *See supra* notes 66–71.

73. *See Byrd*, 356 U.S. at 536.

74. *See Hanna*, 380 U.S. at 461.

75. *See* FED. R. CIV. P. 48. This rule requires that unless stipulated otherwise, all jury verdicts for a plaintiff must be unanimous. *Id.*

There is some indication that the defendant in *Lively* may have sought removal to gain the unanimous jury verdict requirement of federal courts, and to avoid the perceived "liberal" juries of California. Appellee's Answering Brief at 5–6, Lively v. Wild Oats Mkts., 456 F.3d 933 (9th Cir. 2006) (No. 04-56682), *cert. denied*, 127 S. Ct. 1265 (2007) (where Lively asserted "[o]bviously, [Wild Oats] removed in order to avoid the three fourths state court jury verdict requirement and potentially liberal state court juries.").

76. *See generally* Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993) (holding the federal evidence rules apply in determining the standard for admitting expert testimony in

considered immune from political pressures,[77] and how large the constituency of the jury pool may be.[78] While this list is not exhaustive, it is demonstrative of how so-called changes in procedure can substantially alter substantive rights.

Aside from the substantial *procedural* differences between state and federal courts, other considerations reveal why this issue is of extreme importance. In *Klaxon v. Stentor Manufacturing Co.*,[79] the Supreme Court required the federal court to apply the choice-of-law rules of the state court where it sits.[80] However, there is no guarantee that the federal court will reach the same determination as the state court would have reached regarding which law applies.[81] If such is the case, and the federal court chooses to apply a different law than the state court would have, the consequence of improperly exercising jurisdiction not only changes the rules of the game (i.e., the procedure), it changes the game itself (i.e., the substantive law).

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federal cases). Since states may have differing rules of evidence, state courts may provide for a different standard to determine whether the witness is indeed an expert.

77. MOORE, *supra* note 24, § 100.04.

78. *Id*. § 120.20.

79. 313 U.S. 487 (1941).

80. *Id.* at 496–97.

81. This discussion focuses on principles of choice-of-law. States have selected various choice-of-law methods. Minnesota, for instance, utilizes the "better law" approach to reconcile conflicting laws. Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973). Under this approach, if a conflict of laws exists, Minnesota courts are obligated to apply the law they deem as the better law. *Id*. at 413 (stating that Minnesota decisions "indicat[e] our preference for the better-law approach. . . . We have come to the conclusion in this case that plaintiff should be allowed to proceed with her action under our common-law rules of negligence and should not be bound by the guest statute requirements of the [other jurisdiction].").

However, the test is inherently malleable and subject to the personal reflections of the bench. *See* Jepson v. Gen. Cas. Co., 513 N.W.2d 467, 473 (Minn. 1994) (defining the "better law" as the rule that makes "good socio-economic sense for the time when the court speaks") (citation omitted). To illustrate how confusing the "better law" approach can become, the *Jepson* court stated: "Sometimes different laws are neither better nor worse in an objective way, just different." *Id*.

Plainly, whether a rule of law is better, worse, or simply "just different" is a judicial determination that cannot be predicted with any certainty. As such, a different court (e.g., a federal court instead of a state court) will necessarily entail a different determination of which law is better, worse, or merely different. The difference in applicable law is further exacerbated by the trend in "modern" approaches to apply the law of the forum state. *See generally* Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989) (finding a pro-forum orientation in choice of law selection). If the question presented is decided in federal court, there is no guarantee that the federal court will not buck this trend and apply the foreign law.

There are numerous other practical considerations that stem from the litigation proceeding in the federal forum. For instance, the docket of a federal court may be more congested and it may take longer to reach a trial.[82] Moreover, by treating the removal jurisdiction as coextensive with original jurisdiction, the number of cases in federal courts will likely increase, further exacerbating an already congested docket.[83] Finally, the plaintiff's attorney may not be admitted in the federal court or may be unfamiliar with federal procedure.[84]

With the myriad of reasons establishing why the forum selection process is of supreme importance, one would assume the logic of the *Lively* court would be sound. Why else would the *Lively* court divest a California state court of its jurisdiction and Lively of her right to choose the forum? Unfortunately, critical examination of the *Lively* decision reveals that this is not the case.

C. Lively v. Wild Oats[85]

The decision in *Lively* was consistent with the majority of the courts.[86] As such, the decision was not unexpected. However, the mere fact that the decision was expected does not make it acceptable.

1. Background

In *Lively*, the plaintiff filed a personal injury action against Wild Oats in California state court.[87] In this action, Lively sought damages resulting from a slip-and-fall accident that occurred on Wild Oats's property.[88] Both parties agreed that the amount in controversy

82. MOORE, *supra* note 24, § 107.04.

83. Approximately 12 percent of all cases in federal courts—some 31,000—are cases removed to federal courts. Admin. Off. U.S. Cts., Judicial Business of United States Courts, Table S-7, at 58 (1998). *See also* MOORE, *supra* note 24, § 107.04.

84. MOORE, *supra* note 24, § 107.04.

85. Lively v. Wild Oats Mkts., 456 F.3d 933 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1265 (2007).

86. *See supra* note 16.

87. *Lively*, 456 F.3d at 936.

88. *Id*.

exceeded $75,000.[89] Lively was a citizen of New York, and Wild Oats was incorporated in Delaware.[90] In its notice of removal, filed on September 26, 2003, Wild Oats improperly stated that its principle place of business was Colorado.[91] Based upon this improper assertion, Lively did not seek a remand to state court.[92]

The litigation proceeded in federal court without incident until August 25, 2004, when the district court ordered Wild Oats to show cause why the case should not be remanded to state court for lack of subject-matter jurisdiction.[93] The district court instructed Wild Oats to produce its percentage of gross revenue generated in California, its percentage of tangible property then present in California, and its percentage of employees employed in California.[94] Wild Oats failed to provide the district court with this requested information,[95] and the district court then took judicial notice that Wild Oats' principle place of business was California (the forum state), and not Colorado as alleged.[96] Upon making this finding, the district court remanded the

89. *Id*. This, along with diversity of citizenship, is a prerequisite for the court to have diversity jurisdiction over the action. *See* 28 U.S.C. § 1332 (2000), *supra* note 38.

90. *Lively*, 456 F.3d at 936.

91. *Id*. The principle place of business and the state of incorporation both establish a corporation's citizenship for purposes of diversity jurisdiction. *See* 28 U.S.C. § 1332(c)(1) (2000) ("[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .").

92. *Lively*, 456 F.3d at 936.

93. *Id.*

94. Appellee's Answering Brief at 4, Lively v. Wild Oats Mkts., 456 F.3d 933 (No. 04-56682) (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1265 (2007). The district court felt this information was relevant to establish Wild Oats' principle place of business. *Id.* The district court sought this information because the Ninth Circuit applies the "total activities" test to determine a corporation's principle place of business. *Id.* (citing Indus. Tectonics, Inc. v. Aero Alloy, 912 F.2d 1090, 1094 (9th Cir. 1990)). Under this test, the court takes into account all the aspects of the corporation's business. *Indus. Tectonics Inc.*, 912 F.2d at 1094. This includes the volume of sales, purchases, operating income, production, employees, and the value of the corporation's tangible property in each state where the corporation does business. *Id.*

Wild Oats contended that all the information requested in the show cause order was produced. Reply Brief of Defendant-Appellant at 5, Lively v. Wild Oats Mkts., 456 F.3d 933 (No. 04-56682) (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1265 (2007). Wild Oats boldly asserted "it does not matter whether [Wild Oats] is a citizen of Colorado or California because that is not the issue." *Id*.

95. Appellee's Answering Brief, *supra* note 94, at 4–5.

96. *Id.* Petitioner summarized the events as follows:

> The district court, pursuant to Federal Rule of Evidence 201, took judicial notice [of Wild Oats's] website, www.wildoats.com, which evidenced the fact that [Wild Oats]

case to state court for lack of subject-matter jurisdiction because the case was removed in violation of the Forum Defendant Rule.[97] Wild Oats timely appealed the motion to remand issued by the district court, and the Ninth Circuit vacated the district court order.[98] In vacating, the *Lively* court held that the restriction embodied in § 1441(b) is a procedural, or at least "non-jurisdictional," rule.[99] The court rationalized its holding on three separate theories: the legislative history of § 1447(c), the policy rationale behind § 1441(b), and the prevailing law of the other circuits and Supreme Court precedent.[100]

2. The Rationale of the *Lively* Court

The *Lively* court justified its holding upon three separate theories, each of which will be addressed separately.

> operates a larger number of stores in California than Colorado or any other state. Based on th[is] information . . . the district court found that [Wild Oats] was indeed a citizen of California and properly found that removal of this action was barred by 28 U.S.C. § 1441(b) since [Wild Oats] was, in fact, a [forum] defendant.

Id. at 5.

97. *Lively*, 456 F.3d at 936–37 ("[T]he district court determined that removal was improper because Wild Oats, a California citizen and local defendant, violated the forum defendant rule contained in § 1441(b). The court determined that this violation 'constitute[d] a jurisdictional defect' and therefore remand was 'timely and proper' pursuant to § 1447(c).").

The district court's determination that the remand order was "timely and proper" was contingent upon how it characterized the Forum Defendant Rule (i.e., whether it held the violation of the Forum Defendant Rule creates a procedural speed bump or a jurisdictional road block). If a violation of the Forum Defendant Rule is jurisdictional, a remand order can be issued at "any time before final judgment." *See* 28 U.S.C. § 1447(c) (2000). However, if the Forum Defendant Rule is procedural (or in the words of the *Lively* court, "non-jurisdictional"), a violation of the Rule would be a defect other than lack of subject-matter jurisdiction and a motion for remand would need to be made within thirty days of the notice of removal. *Lively*, 456 F.3d at 936–37. In remanding the case, the district court determined that the Forum Defendant Rule placed a restriction on the removal jurisdiction of the court (i.e., that on the road to the merits in our federal system of government, the Forum Defendant Rule created a jurisdictional road block). *Id*. at 936.

98. *Lively*, 455 F.3d at 937, 942.

99. *Id.* at 939.

100. *Id.* at 939–40.

a. The Legislative History of § 1447(c) Requires Interpreting the Forum Defendant Rule as Procedural

The *Lively* court began by reciting the relevant statutory changes in the language of § 1447(c).[101] The court noted that as originally written, § 1447(c) required a district court to issue a remand order if the case had been "removed improvidently and without jurisdiction."[102] However, in 1998, Congress amended this original language due to the ambiguous nature of the term "improvidently."[103] The amended language of § 1447(c) required a district court to remand where there was "any defect in removal procedure."[104] As a result of this changed language, removal defects that were not traditionally recognized as procedural, but were also not considered to affect the subject-matter jurisdiction of the court, occupied a grey area in removal jurisprudence.[105] Congress again revised the language of § 1447(c) in 1996, replacing "any defect in removal procedure," with "any defect other than lack of subject-matter jurisdiction must be made within 30 days after the filing of notice of removal under § 1446(a)."[106]

Interpreting these changes, the *Lively* court concluded that Congress intended to ensure more substantive removal defects—like removal in violation of the Forum Defendant Rule—were subject to the thirty-day filing limit.[107]

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101. *Id.*

102. *Id.* (citing 28 U.S.C. § 1447(c) (1948)).

103. *Lively*, 456 F.3d at 939.

104. *Id.* While the language of what constituted a "defect in removal procedure" was an improvement over "improvident," courts remained confused as to what removal defects triggered the thirty day time limit. *Id.* (citing David D. Siegel, *Commentary on 1996 Revision of Section 1447(c)*, 28 U.S.C.A. § 1447 (West. Supp. 1988)).

105. *Lively*, 456 F.3d at 939.

106. *Id.* (citing Pub. L. No. 104-219, § 1 (1996)).

107. *Lively*, 456 F.3d at 939 (citing with approval Snapper, Inc. v. Redan, 171 F.3d 1249, 1257–58 (11th Cir. 1999)).

b. The Rationale for the Forum Defendant Rule Supports the Conclusion that It Is Not a Jurisdictional Restriction

The *Lively* court's second rationale for treating the Forum Defendant Rule as procedural was predicated on the purpose of the Rule.[108] As stated, the primary rationale for allowing a defendant to remove cases involving diversity of citizenship to a federal forum is to protect out-of-state defendants from the possible prejudices against the defendant in foreign state courts.[109] The need for such protections does not exist when the defendant is a resident of the forum state.[110] The *Lively* court reasoned that a procedural characterization of the Forum Defendant Rule honored the purpose of the Rule by allowing a plaintiff to regain control over the forum selection process, if the plaintiff so desired.[111] The court apparently expressed dismay with a jurisdictional reading of the Rule, which the court conceded would also allow the plaintiff to regain control over the forum selection process, because a jurisdictional characterization would require the district court to remand cases *sua sponte*, even if the plaintiff preferred to stay in federal court.[112]

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108. *Lively*, 456 F.3d at 940.

109. *Id.* (citing Tosco Corp. v. Cmtys. for a Better Env't., 236 F.3d 495, 502 (9th Cir. 2001) ("The purpose of diversity jurisdiction is to provide a federal forum for out-of-state litigants where they are free from prejudice in favor of a local litigant."). *See supra* Part I.A.

110. *Lively*, 456 F.3d at 940.

111. *Id.* The *Lively* court explained its reasoning by stating:

> [T]he forum defendant rule allows the plaintiff to regain some control over forum selection by requesting that the case be remanded to state court. A procedural characterization of this rule honors this purpose because the plaintiff can either move to remand the case to state court within the 30-day time limit, or allow the case to remain in federal court by doing nothing. Either way, the plaintiff exercises control over the forum.

Id. The *Lively* court made no attempt to explain why a plaintiff would file an action in state court, where the action could have been brought in federal court, and then wish to remain in federal court.

112. *Id.* (citing Skranak v. Castenada, 425 F.3d 1213, 1216 (9th Cir. 2005) (stating that a lack of subject-matter jurisdiction can not be waived, and may be addressed *sua sponte*)). The *Lively* court seems to base its characterization upon the principle that a procedural characterization allows the plaintiff to exercise his or her discretion in seeking a remand, and thus allows the plaintiff to regain his control over forum selection. *Lively*, 456 F.3d at 940. The court conceded that the jurisdictional reading would effect the same end, allowing the plaintiff to "exercise control" over the forum selection process. *Id.* The court seems to disagree with a

c. The Weight of Authority and Supreme Court Precedent

The *Lively* court also supported its holding by referring to the weight of authority that had previously decided the issue and what the court perceived to be the improper reasoning of the Eight Circuit, the lone dissenting circuit.[113] While the *Lively* court merely cited the supporting decisions, it invested a significant level of discussion in attacking the rationale of the Eighth Circuit opinion of *Hurt v. Dow Chemical Co*.[114]

In *Hurt*, the plaintiff brought an action against Dow Chemical Company, the manufacturer of the pesticide Dursban, and Rose Exterminator Company, the exterminating company that applied Dursban.[115] After defendant's removal and several other procedural steps,[116] the *Hurt* court was ultimately presented with the same question at issue in *Lively*.[117] The court, after concluding that removal based upon federal question jurisdiction was improper, held that removal was also improper where the defendant removed the case in violation of § 1441(b).[118] The *Hurt* court reasoned that removal jurisdiction is a creature of statute, and that in order for removal to be permissible, the statutory requirements of removal jurisdiction must

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jurisdictional characterization because it would require a district court to remand the action back to state court, even where both parties wanted to remain in federal court. *Id*.

113. *Lively*, 456 F.3d at 940–41.

114. 963 F.2d 1142 (8th Cir. 1992).

115. *Id*. at 1143.

116. The *Hurt* court described the procedural posture as:

> Dow, with Rose's consent, filed a petition to remove the case to federal court on the basis of federal-question removal jurisdiction. *See* 28 U.S.C. § 1441. . . . After removal, Dow filed a motion to dismiss . . . [which was granted] but [the district court] specifically stated that any other state-law claims . . . were not pre-empted. Plaintiff then filed a motion for leave to file an amended complaint, which was granted . . . Shortly thereafter, she filed an amended complaint . . . [and] moved to remand the case to state court, asserting that the case had been improperly removed on federal-question grounds. The District Court denied the motion, holding that removal on federal-question grounds was proper at the time of removal, Hurt 'waived any non-jurisdictional objection to the impropriety of removal,' Hurt v. Dow Chemical Company, No. 90-0783-C(3), slip op. 3 (E.D.Mo. May 22, 1991), and that diversity jurisdiction existed even if federal-question jurisdiction did not. Hurt then voluntarily dismissed her remaining claims and appealed to this Court.

Id. at 1143–44.

117. *Id.* at 1144 ("The sole question we address here is, was removal proper?").

118. *Id.* at 1144–45.

be satisfied.[119] The court detailed how the statutory requirements for removal were not met, as one of the defendants was a resident of the forum state.[120] The court determined that the mere possibility that the plaintiff *could have* invoked the original jurisdiction of the district court was irrelevant, as the plaintiff specifically elected the jurisdiction of the Missouri state court.[121] Resolution of this issue, the court determined, was insufficient to remand the case. The *Hurt* court next addressed the applicability of the Supreme Court decision in *Grubbs v. General Electric Credit Corp.*[122] The *Hurt* court distinguished the *Grubbs* decision on the grounds that "the plaintiff [in Grubbs] had never objected to removal in the district court," and the plaintiff in *Hurt* had so objected.[123]

The *Lively* court rejected the reasoning of the Eighth Circuit in *Hurt*, stating "if the removal statute imposes jurisdictional requirements, as *Hurt* holds, a plaintiff's non-objection on the one hand and untimely objection on the other is a distinction without a difference."[124] According to the *Lively* court, this is a "distinction

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119. *Id.* at 1145.

120. *Id.* In *Hurt*, the defendants were residents of Delaware and Missouri, and the plaintiff was an Illinois domiciliary. *Id.* The action was filed in Missouri state court. *Id.* Despite the complete diversity requirement being satisfied, the court concluded that the removal was improper in view of § 1441(b), because one of the defendants was a resident of the forum state. *Id.*

121. *Id.* Specifically, the court found that the Forum Defendant Rule makes "diversity jurisdiction in removal cases narrower than if the case were originally filed in federal court by the plaintiff." *Id.*

122. 405 U.S. 699 (1972). In *Grubbs*, the action was removed to federal court, and the removal was never challenged. *Id.* at 701. After the district court entered final judgment, the plaintiff appealed to the Court of Appeals for the Fifth Circuit. *Id.* The Fifth Circuit, acting *sua sponte*, determined that there had never been federal jurisdiction because removal was improper and remanded the action back to state court. *Id.* at 702. The Supreme Court reversed, stating "where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue [becomes] not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Id.* The *Hurt* court described the *Grubbs* holding as:

> [W]here after removal a case is tried on the merits *without objection and the federal court enters judgment*, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

Hurt, 963 F.2d at 1145 (emphasis added).

123. *Id.* at 1146.

124. Lively v. Wild Oats Mkts., 456 F.3d 933, 942 n.12 (9th Cir. 2006), *cert. denied*, 127

without a difference" because a defect in subject-matter jurisdiction is not capable of being waived and federal courts have an obligation to determine if it lacked subject-matter jurisdiction.[125]

II. ANALYSIS

For many reasons, the decision in *Lively* is incorrect. The *Lively* court interpreted the textual changes to the removal statute as supporting a procedural characterization of the Forum Defendant Rule.[126] However, as noted by Petitioner, this construction ignores the clear will of the legislature in drafting and passing the present removal scheme.[127]

First, the statutory scheme governing removal is quite clear. The statutory grant of removal jurisdiction—§ 1441, titled "Actions removable generally"—contains the Forum Defendant Rule.[128] This

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S. Ct. 1265 (2007).

125. *Id.* In so holding, the *Lively* court also rejected the holding of *WRS Motion Picture & Video Laboratory v. Post Modern Edit, Inc.*, 33 F. Supp. 2d 876 (C.D. Cal. 1999). In *WRS*, the district court issued a remand order, *sua sponte*, based upon a removal in violation of the Forum Defendant Rule. *Id.* at 877–78. The *WRS* court reasoned that the Forum Defendant Rule placed an additional limitation on the original diversity jurisdiction of the district court, and a violation of this limitation precluded the court from exercising subject-matter jurisdiction. *Id.* The *WRS* court, like the Court of Appeals for the Eighth Circuit in *Hurt*, distinguished the *Grubbs* decision on the grounds that the case had not yet been tried on the merits. *Id.*

Recall that *Grubbs* stated that removal defects are waived, and the issue collapses into a question of subject-matter jurisdiction if the removal went uncontested until such a time where the case had been tried on the merits and a final judgment had been entered. *Grubbs*, 405 U.S. at 701. The holding in *Grubbs*, while seemingly controlling, has not been implicated by the facts present in *Lively*. *See infra* notes 146–48 and accompanying text.

The *Lively* court believed that this distinction, as the distinction in *Hurt*, misunderstood the import of the Supreme Court's decision in *Grubbs*. *Lively*, 456 F.3d at 941. While noting that the *Grubbs* Court expressly stated that a removal defect "may not be raised for the first time on appeal," the *Lively* court stated that a lack of subject-matter jurisdiction may be raised at any time. *Id.* at 941–942.

126. *See generally supra* notes 102–07 and accompanying text.

127. *See generally* Brief for the Petitioner, *supra* note 6, at 13–14.

128. 28 U.S.C. § 1441 (1988). The statutory scheme indicates that the provisions of § 1441 define when an action is within the proper metes and bounds of removal jurisdiction. *See* Brief for the Petitioner, *supra* note 6, at 13–14. Had Congress intended for the restriction to be nothing more than a procedural speed bump as opposed to a jurisdictional road block, Congress would have surely placed the restriction with the two sections of the U.S. Code governing removal procedure. At the very least, this negates the interpretation of the legislative history advanced by the Respondent and the *Lively* decision. *See supra* notes 102–07 and accompanying text.

is in stark contrast to the sections of the United States Code that outline the procedure of removal and remand.[129] As such, any characterization of the Forum Defendant Rule as procedural denies legislative will at the most basic level.[130] The very essence of this contention, in its simplest terms, is that any attempt to remove an action that is not "removable generally" is inoperative.[131] In fact,

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129. Recall that § 1446 is titled "Procedure for removal" and § 1447 is titled "Procedure after removal generally." *See supra* note 12.

130. To consider this argument fully, consider how absurd the opposite conclusion would sound. Section 1446(a) requires the removing party to sign the notice of removal pursuant to Rule 11 of the Federal Rules of Civil Procedure. 28 U.S.C. § 1446(a) (1988). Would the *Lively* court be so bold as to classify this requirement as limiting the removal jurisdiction of the District Court? Surely not. One would imagine this hypothetical *Lively* court would point to the title and purpose of § 1446 (*Procedure* for Removal), and conclude that the requirement is clearly of the type that should be classified as procedural.

131. This is the logic seized by the Eighth Circuit in the *Hurt* decision. *See* Hurt v. Dow Chem. Co., 963 F.2d 1142, 1145 (8th Cir. 1992). The *Hurt* court explained:

> In order for Dow and Rose to invoke the jurisdiction of the federal court, they must meet the statutory requirements for removal jurisdiction. Title 28 U.S.C. § 1441(b) makes diversity jurisdiction in removal cases narrower than if the case were originally filed in federal court by the plaintiff. A defendant may not remove to federal court on the basis of diversity if any of the defendants is a citizen of the state where the action was filed. As we have stated, defendant Rose is a citizen of Missouri. The fact that Irene Hurt could have invoked the original jurisdiction of the federal court initially is irrelevant. She did not. *The jurisdiction of the lower federal courts, both original and removal, is entirely a creature of statute*. *See* Continental Cablevision v. United States Postal Service, 945 F.2d 1434, 1435 (8th Cir. 1991). If one of the statutory requirements is not met, the district court has no jurisdiction.

Id. (emphasis added).

In other words, the notice of removal filed by Wild Oats was worth nothing more than the piece of paper it was filed on. It did not carry any legal force. To reach the opposite conclusion would erroneously deny the will and direction of the enacting Congress. By analogy, a court would not think twice about disregarding a properly recorded deed purporting to sell land not owned by the grantor. Where the legal right does not exist, whether by statute or otherwise, a party can not artificially create the right.

By the very nature of the statute conferring a right to remove (28 U.S.C. § 1441), an attempted removal of an action that is not "removable generally" carries no legal weight. To borrow an edifying term from corporate law, the attempted removal here was "ultra vires," or "beyond the . . . power . . . allowed . . . by law." BLACK'S LAW DICTIONARY 1559 (8th ed. 2004). Simply restated, when Wild Oats removed, nothing happened. The action was not removable, and thus, was not removed. Questions concerning removal and remand procedure are irrelevant, as they only become germane once a generally removable action has been removed. *See Hurt*, 963 F.2d at 1145; Brief for the Petitioner, *supra* note 6, at 13–14; *supra* note 28 and accompanying text (recounting the genesis of the inferior federal courts and explaining that any and all authority to exercise jurisdiction is a matter of statutory grace, not constitutional compulsion).

courts have routinely used this "dead on arrival" approach for similar situations, and application here would require no additional or novel judicial tools.[132]

Second, the procedural characterization eviscerates any distinction between removal and original jurisdiction. Essentially, the decision makes the two coextensive, subject only to the will of the removing party.[133] The *Lively* court justified this position by asserting that the non-moving party can still exercise "some control" over the forum selection process by deciding whether to seek a remand.[134] This rationale, however, is unsupportable upon examination. The *Lively* court used the rationale for the *exception* as a means to swallow a portion of the general rule.[135] In addition, had Congress intended for removal jurisdiction to be coextensive with original jurisdiction, it surely would have articulated that.[136] Moreover, if the *Lively* decision

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132. *See generally* N. Ill. Gas Co. v. Airco Indus. Gases, Inc., 676 F.2d 270, 273 (7th Cir. 1982) (holding removal petition defective where defendant failed to allege a short and plain statement of facts which entitled petitioner to remove and petitioner failed to include all named defendants in notice of removal); Home Owners Funding Corp. of Am. v. Allison, 756 F. Supp. 290, 291 (N.D. Tex. 1991).

133. The relevant inquiry, according to the *Lively* court, is whether the case is within the original jurisdiction of the district court (i.e., the case could have been filed there at first instance). Lively v. Wild Oats Mkts., 456 F.3d 933, 940 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1265 (2007). *See generally supra* notes 108–12.

134. *See supra* note 111 and accompanying text.

135. Much can be made of this point, and it depends on personal characterization. The general rule is that an action cannot be removed. This general rule is supported by the fact that Congress did not give defendants a per se right to remove cases. *See supra* note 48.

There are, of course, exceptions to this general rule. *See* 28 U.S.C. § 1441 (2000). Specifically, where the question presented is one of federal law or the litigants are diverse citizens. *Id*. Under this framework, the Forum Defendant Rule is a situation where the exception is not applicable.

Here, the *Lively* court uses the rationale of the exception (i.e., a right to certain diversity cases because of the perceived local bias) to swallow a portion of the general rule (that removal is not necessary or available).

136. Consider the lengthy discussion the *Lively* court gives to the legislative history of the current removal scheme. *See generally supra* notes 102–07 and accompanying text. Clearly, by the very rationale used by the *Lively* court, Congress paid considerable attention to this topic. If this is so, and the *Lively* court reached the proper conclusion, query why Congress did not state explicitly: "All cases which may have been brought in a District Court of the United States can be removed." This hypothetical removal scheme would have been an effective means to the ends the *Lively* court believed the enacting Congress desired. It certainly would have been simpler than the judicial inferences.

Simply stated, Congress did not intend for original jurisdiction to swallow removal jurisdiction. The enacting Congress intended for the division to remain vital and distinct.

were correct, Congress likely would have extended the time in which a party can seek remand, especially in cases where the citizenship of the parties is subject to dispute.[137] The *Lively* interpretation, while eviscerating any meaningful distinction between removal and original jurisdiction, refuses to recognize that Congress specifically enumerated classes of cases where original jurisdiction and removal jurisdiction are not coterminous.[138]

Third, the *Lively* decision implies that Congress intended the presence of a local defendant as a basis to seek remand, and not as a bar to removal.[139] However, this interpretation is inconsistent with the language of the statute and the statutory scheme.[140] The plain language of § 1441 explicitly states that the presence of a local defendant is a jurisdictional road block.[141] Despite this clear indication, the *Lively* interpretation will shift unfairly the burden of

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However, this is exactly what the *Lively* decision does, as the facts illustrate. Here, a party ended up in federal court merely because the action could have been commenced in federal court.

137. A motion to remand the case on the basis of any defect other than lack of subject-matter jurisdiction must be made within thirty days after the filing of the notice of removal. 28 U.S.C. § 1447(c) (2000). However, under the *Lively* construction, we are left with an anomalous fact pattern. Consider a notice of removal and a lengthy evidentiary dispute as to whether the district court has subject-matter jurisdiction (i.e., the amount in controversy is not evident or contested, or the citizenship of various parties is in dispute). How, under the construction proffered by the *Lively* court, should these issues be resolved? If the court ultimately determines it does not have subject-matter jurisdiction, no remand order is necessary. 28 U.S.C. § 1447(c). However, if the court determines it would have had subject-matter jurisdiction but the action was improperly removed (e.g., the action was removed by a forum defendant) the plaintiff should be allowed to seek remand.

138. *See* 28 U.S.C. § 1445 (2000) (detailing certain classes of cases which are not removable, such as civil actions brought in state courts arising under the state's workmen's compensation laws or actions brought in state courts arising under § 40302 of the Violence Against Women Act of 1994).

An interesting question would arise if the *Lively* court is ultimately affirmed, namely how a court would treat a removed action in violation of the prohibitions contained in § 1445. Under the construction offered by the *Lively* court, it would seem that the directive of § 1445 is procedural, even though it purports to remove the action from the removal jurisdiction of the district courts. If subject-matter jurisdiction exists in *Lively*, then an action removed in violation of § 1445 must also be "non-jurisdictional." However, this is a clear over-extension of the jurisdiction of the federal courts. The point remains that Congress intended for removal jurisdiction to contain a narrower class of cases than original jurisdiction.

139. *Lively*, 456 F.3d at 939–41.

140. *See* 28 U.S.C. § 1441(a), *supra* note 44. The statutes governing the removal scheme are silent as to when a party can seek a remand.

141. *See* 28 U.S.C. § 1441(b), *supra* note 49.

seeking remand to the plaintiff.[142] However, by the terms of the statute granting removal jurisdiction and the governing procedure, the burden of establishing "the grounds for removal" rests with the party seeking removal.[143]

Finally, construing the Forum Defendant Rule as a jurisdictional road block does not undermine Supreme Court precedent.[144] As an initial matter, *Grubbs* did not address the issue presented to the *Lively* court.[145] Moreover, under the reasoning offered by the Eighth Circuit, an action removed in violation of the statutory grant of removal jurisdiction was never properly before the district court.[146] Here, the removal was objected to—albeit by the district court—before any

142. Section 1441 states that an action "*shall be removable only if* none of the . . . defendants is a citizen of the State in which such action is brought." *Id.* (emphasis added). However, the *Lively* court's interpretation would require a remanding party to use the presence of a forum defendant *as a basis for remand*. *Lively*, 456 F.3d at 940 ("[A procedural characterization of] the forum defendant rule allows the plaintiff to regain some control over forum selection by requesting that the case be remanded to state court [if the action was removed in violation of the Forum Defendant Rule]."). Thus, despite the clear statutory language that requires the removing party to establish "the grounds for removal," *see* § 1441(b), the *Lively* construction requires the remanding party to establish that removal was improper. Consequently, the burden now rests with the remanding party, as opposed to the removing party, to prove that removal is improper.

143. 28 U.S.C. § 1446(a) (2000). Essentially, the *Lively* decision requires the remanding plaintiff to produce evidence that the right to remove does not exist. This ignores the wealth of evidence, as pertaining the citizenship of the defendant(s), uniquely within the control of the removing defendant(s). Brief for the Petitioner, *supra* note 6, at 17. This problem will be compounded where there is a basis for evidentiary dispute as to the citizenship of one or all of the removing defendants.

144. Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 701 (1972) ("[W]here after removal a case is tried on the merits without objection and the federal court enters judgment, the issue [becomes] not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court."). Essentially, the Supreme Court stated that removal jurisdiction becomes coextensive with original jurisdiction when three specific requirements have been met. First, there must be a trial on the merits. *Id.* Second, the plaintiff must not have objected to removal prior to final judgment. *Id.* Finally, a federal court must have entered a final judgment. *Id.*

At the time the *Lively* decision was announced, none of the three requirements of *Grubbs* had been satisfied. Consequently, the *Grubbs* decision was irrelevant. Moreover, the *Grubbs* decision necessary implies that removal jurisdiction and original jurisdiction are not coextensive unless the elements enumerated in *Grubbs* are satisfied. Here, however, the *Lively* court collapsed the two components of federal jurisdiction without the required showing.

145. *See supra* notes 122–25 and accompanying text.

146. *See supra* notes 128–31 and accompanying text. The question is not whether the action would have been in the original jurisdiction of the district court had the action been initially filed there, but rather whether, as the facts have developed, the action was ever in front of the court.

trial on the merits, let alone final judgment.[147] In fact, Supreme Court precedent arguably requires a jurisdictional interpretation of the Forum Defendant Rule.[148] At the very least, the *Grubbs* decision cast doubt on the propriety of the *Lively* decision.[149]

These differing interpretive approaches, standing alone, are likely insufficient to resolve the conflict.[150] Where statutes, such as the removal scheme, are amenable to conflicting views, courts should consider, from a practical perspective, the implications of their decisions. If this exercise had been undertaken by the *Lively* court, policy would seem to dictate the opposite conclusion.

III. PROPOSAL

Disparate results that potentially could arise by increasing defendant access to the federal courts should encourage the Supreme Court to grant Petitioner a writ of certiorari.[151] Aside from the textual and interpretative problems raised by the *Lively* decision,[152] there was considerable disregard for the policy implications of the decision.[153] Along with the previously identified interpretative problems of

147. *See supra* note 97 and accompanying text.

148. Reply Brief in Support of Petition for Writ of Certiorari at 3, Lively v. Wild Oats Mkts., 456 F.3d 933 (9th Cir. 2006) (No. 06-748), *cert. denied*, 127 S. Ct. 1265 (2007). The Petitioner states:

> Reliance on *Grubbs* ignores entirely this Court's holding in Martin v. Snyder, 148 U.S. 663 (1893), which is directly on point. As the petition explains (at 14), *Martin* specifically held that a defendant's failure to satisfy the forum defendant rule results in a 'want of jurisdiction.' As such, this Court vacated a decree in the defendant's favor and remanded the case to state court. 148 U.S. at 664. Respondent does not even mention—much less distinguish—*Martin*, which has never been overruled or called into question by this Court.

Id.

149. *See supra* note 144.

150. However, it probably should. A long line of precedent requires courts to strictly construe removal statutes in favor of not exercising jurisdiction. *See generally* Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691 (2003) (discussing the policy to narrowly construe removal legislation but finding it inadequate to issue remand); Takeda v. Nw. Nat'l Life Ins. Co., 765 F.2d 815, 818 (9th Cir. 1985) ("We strictly construe the removal statute against removal jurisdiction.") (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-9 (1940)).

151. *See supra* notes 57–82 and accompanying text.

152. *See supra* notes 126–48 and accompanying text.

153. *See supra* notes 155–69 and accompanying text.

Lively, concepts of judicial comity,[154] fundamental fairness, and judicial economy deserve equal consideration upon any ultimate Supreme Court review.

A. On Grounds of Comity, Federal Courts Should Resolve This Ambiguity in Favor of a Jurisdictional Interpretation of the Forum Defendant Rule

Due to the federalism concerns inherent in removal jurisdiction,[155] federal courts should, in absence of a clear jurisdictional command,[156] refuse to exercise jurisdiction for reasons of judicial comity.[157]

This practice would not be new. For example, in cases involving multinational parties, U.S. courts have refused to exercise subject-matter jurisdiction because a foreign jurisdiction should resolve the controversy.[158] These courts reason, in part, that other jurisdictions have a superior interest in the resolution of the matter and that the local legislature (of the forum) likely did not intend to govern the

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154. "The recognition and respect that a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other's laws and political decisions." BLACK'S LAW DICTIONARY 863 (8th ed. 2004).

155. *See supra* notes 41–42 and accompanying text.

156. Here assume, *arguendo*, that the Forum Defendant Rule does not provide a restriction on the subject-matter jurisdiction of the district courts. While this interpretation is incorrect, assuming its validity will assist in reaching the correct result through a different method of analysis.

157. This is why, generally speaking, removal statutes are strictly construed. *See supra* note 150.

158. *See generally* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164–65 (2004). The Supreme Court stated:

> This Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow. This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.

Id. (citations omitted). There are many cases where U.S. courts have exercised jurisdiction over multinational cases, seemingly at odds with the idea of judicial comity. However, the point remains the same, courts do—and should—respect the jurisdiction and judgments of foreign courts, especially where the interests of the foreign court are superior to the interests of the forum court.

specific behavior at issue and that ambiguity should be resolved in favor of declining jurisdiction.[159] Moreover, the principle of judicial comity also exists in domestic cases, as embodied by principle of forum non conveniens.[160]

Quite obviously, these judicial tools were developed for situations similar to the issue presented in *Lively*.[161] In *Lively*, a federal court divested a state court of competent jurisdiction, where reasonable minds could disagree as to the propriety.[162] Considering the policy reasons behind removal in general and the principle of judicial comity, federal courts should refuse to exercise jurisdiction in similar cases.[163] Where the legislative motive is undisturbed, federal courts

159. *Id*. These rationales are sound and illustrate why merely being capable to exercise jurisdiction (again, assuming the Forum Defendant Rule is procedural) does not necessarily mean that a court *must* exercise jurisdiction.

160. *See generally* 32A AM. JUR. 2d *Federal Courts* §§ 1353–73 (2007) (outlining the considerations for the application of forum non conveniens).

"Forum non conveniens" is a species of the genus for judicial comity. The factors that inform the deference to foreign jurisdictions seem to inform the decision to dismiss a case under the principle of forum non conveniens, with some notable additions. In deciding whether an action should be dismissed on the grounds of forum non conveniens, the Supreme Court has outlined two important aspects to consider: (1) the affect on the private litigants, and (2) the affect on the public interest. *See generally* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). Effects to the private litigants include: the ease of access to evidence; the availability of compulsory process; the burdens to witnesses; and any other practical considerations that make trial of a case easy, expeditious and inexpensive in another forum. *See* 32A AM. JUR. 2d *Federal Courts* § 1367. Effects on the public include: the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; and avoiding the difficult task of applying foreign law. *See id*. § 1370.

161. Again, this assumes that the Forum Defendant Rule is procedural. If such assumption is correct, the situation presented in *Lively* is one where two courts, both having proper subject-matter jurisdiction, are called upon to resolve one case.

162. *See supra* note 97 and notes 114–23.

163. *See supra* notes 36–39 and accompanying text. In cases such as *Lively*, the legislative motives for enacting the governing statutes are not invoked. The reasons for removal are to provide an expert forum in cases involving questions of federal law. Moreover, when diversity jurisdiction would exist, the purpose of removal is to protect out-of-state defendants from answering in a forum hostile to foreigners. *See supra* note 39 and accompanying text.

Here, however, there are no questions of federal law. Lively v. Wild Oats Mkts., 456 F.3d 933, 936 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1265 (2007). Moreover, the defendant was not asked to defend in a forum hostile to its status as a California resident (granted, this assumes that Californian residents do not discriminate against other Californian residents). On the contrary, the opposite is probably true, at least if the general rationale for removal of diversity cases is correct. Here, a foreign domiciliary seeks redress in the forum of his adversary. If there

should respect the competent jurisdiction of the states, just as it would respect the competent jurisdiction of foreign countries.[164] Moreover, it is troubling that federal courts afford greater deference to foreign courts than they do to the courts of their own country.

B. On Grounds of Fundamental Fairness and Judicial Economy, Federal Courts Should Resolve This Ambiguity in Favor of a Jurisdictional Interpretation of the Forum Defendant Rule

The rule announced by the *Lively* court creates a perverse incentive for defendants to remove in violation of the Forum Defendant Rule.[165] This illogical rule will likely cause defendants to seek removal where there is any ambiguity as to their citizenship.[166] Under the *Lively* interpretation of the Forum Defendant Rule, defendants will be more likely to remove because the burden of establishing the propriety of the removal has been shifted to the party seeking a remand.[167]

The increase in defendant removals will strain federal judicial resources in two significant ways. Under the *Lively* interpretation, federal district courts will be called on to settle initial evidentiary disputes as to the citizenship of the removing defendant(s). This, in turn, will result in either determining that the removal was improper—as it violated the Forum Defendant Rule—or that the removal was proper. In either event, federal district courts have invested significant resources into questions that could be better

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ever be a time where removal would seem unnecessarily oppressive and vexatious, it is certainly on these facts.

164. *See supra* note 163.

165. *See supra* notes 128–43 and accompanying text.

166. First, recall that defendants are much more successful in federal courts. *See supra* notes 61–65 and accompanying text. Consequently, any rational defendant would like to have its status adjudicated in a federal forum. Moreover, the *Lively* decision essentially shifts the burden of proving the presence a local defendant on the plaintiff. *See supra* note 143. In cases where the dispute is a close call, defendants will benefit from this shifted burden, as the plaintiff may not be able to provide sufficient evidence to conclusively establish the local residency of one of the defendants.

167. Recall that defendants are much more likely to prevail in federal court. *See supra* notes 60–65. As such, rational defendants would like to reduce the likelihood of losing on the merits. The *Lively* interpretation encourages defendants, especially defendants with ambiguous citizenship, to seek removal. The burden will then shift to the party seeking remand to establish a removal in violation of the Forum Defendant Rule. *See supra* notes 139–43.

avoided by a proper construction of the Forum Defendant Rule. Second, by favoring removal, there is a substantial likelihood that more state law claims will be adjudicated in federal courts.[168] While it is true that our federal system assumes that the federal courts are experts on questions of federal law, the same cannot be said as to questions of state law.[169]

Essentially, viewing the Forum Defendant Rule as a procedural speed bump on the road to the merits casts too broad a net over matters that are only of local concern. Moreover, such an interpretation provides a wily litigant with the means to sneak within the ambit of that excessively broad net.

CONCLUSION

Unfortunately, the Supreme Court denied certiorari to review the *Lively* decision on February 27, 2007. As a result, what is left is a non-uniform and faulty removal regime. Congress or the Court should revisit this issue, with an eye for reversing the holding in *Lively*. If followed, a new disposition could alleviate many of the interpretive problems present in the *Lively* decision. Essentially, a reversal would properly produce a statutory scheme of removal, the congressional intent of a clearly delineated and distinct removal and original jurisdiction scheme, the proper burden allocation of the statute, and Supreme Court precedent. Moreover, reversal would recognize the equal standing of the state court judicial system, and protect the federal judiciary from unnecessary and burdensome evidentiary disputes and questions of state law.

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168. Recall that nearly 12 percent of all cases in federal court are removed cases. *See supra* note 83. Increasing access to the federal courts will likely increase this number.

169. *See supra* notes 36–39 and accompanying text. In fact, the rationale behind removal jurisdiction requires quite the opposite conclusion. We allow federal questions to be removed because we want the experts of federal law involved. This seems to support the conclusion that the court more familiar with the action should evaluate the merits. Most likely, this rationale is supported on grounds of judicial efficiency and uniformity of results. The *Lively* decision effectively undermines this rationale by divesting state courts of jurisdiction over state law claims and in-state parties.