
COMMENT

AN INCONVENIENT TRUTH: HOW FORUM NON
CONVENIENS DOCTRINE ALLOWS
DEFENDANTS TO ESCAPE STATE
COURT JURISDICTION

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INTRODUCTION

Imagine you are a foreign citizen. You have been injured in a foreign country due to the negligence of a U.S. company and have a legitimate tort claim for millions of dollars against the company. You file suit in the state court in Missoula, Montana—located at 200 W. Broadway, Missoula, Montana 59802.¹ The defendant company removes the case, on the basis of diversity of citizenship, to the United States District Court of Montana—located at 201 E. Broadway, Missoula, Montana 59802²—and argues that the case should be dismissed under the doctrine of forum non conveniens. The state court probably would not have granted the motion, but rather would have allowed the case to proceed to the merits.³ But now that the case has been moved just two blocks away⁴ to a federal district court, that court can exercise its discretion under federal forum non conveniens doctrine and dismiss the case.⁵ This sequence of events does not occur infrequently.⁶

¹ 4th Judicial District, MONT. JUD. BRANCH, <http://courts.mt.gov/locator/dist4.mcpix> (last visited Jan. 16, 2015), archived at <http://perma.cc/V45-3E4G>.

² Missoula Courthouse, U.S. DISTRICT CT. DISTRICT MONT., <http://www.mtd.uscourts.gov/missoula.html> (last visited Jan. 16, 2015), archived at <http://perma.cc/FL9C-JA2J>.

³ Montana has explicitly ruled out forum non conveniens in Federal Employers Liability Act (FELA) cases, see *Rule v. Burlington N. & Santa Fe Ry. Co.*, 106 P.3d 533, 536 (Mont. 2005), and has not decided whether the doctrine has general applicability, see *State ex rel. Burlington N. R.R. Co. v. Dist. Court*, 891 P.2d 493, 498 (Mont. 1995) (noting that Montana has not yet “accepted nor rejected” whether parties can argue forum non conveniens in any context).

⁴ Driving Directions from 200 W Broadway St., Missoula, MT 59802 to 201 E Broadway St., Missoula, MT 59802, MAPQUEST, <http://www.mapquest.com> (follow “Get Directions” hyperlink; then search “A” for “200 W Broadway St., Missoula, MT 59802” and search “B” for “201 E Broadway St., Missoula, MT 59802”; then follow “Get Directions” hyperlink).

⁵ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (noting that district courts can dismiss cases under the doctrine of forum non conveniens “where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice”); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-08 (1947) (accepting the power of district courts to dismiss cases under the doctrine of forum non conveniens).

⁶ For one example, see *Sibaja v. Dow Chemical Company*, 757 F.2d 1215 (11th Cir.), cert. denied 474 U.S. 948 (1985). There, the defendants properly removed the case to federal court in Florida and moved for dismissal under the federal rule of forum non conveniens. *Id.* at 1216. At the time of the suit, Florida’s forum non conveniens doctrine precluded dismissal where one of the parties to the suit was a Florida resident. *Id.* at 1217. Hence, because the plaintiff was a resident of Florida,

Because almost every federal court applies federal forum non conveniens law in diversity cases,⁷ defendants can remove cases to federal court solely for the purpose of getting them dismissed on forum non conveniens grounds. In cases where a state would not dismiss under its own forum non conveniens doctrine, it is unfair for defendants to exploit removal to obtain dismissal. Allowing defendants to engage in this practice undercuts the rights of the parties and undermines the purpose of the forum non conveniens doctrine.

The appropriate remedy is for courts to find that defendants who remove from state court waive their right to argue forum non conveniens in federal court when the state would not have dismissed the case under its forum non conveniens law. This would prevent the injustice of defendants using removal as a mechanism for dismissal. However, courts may be unwilling to adopt waiver. Ultimately, I propose that Congress remedy this injustice by amending the removal statute to permit remand to the state court when the federal court dismisses on forum non conveniens grounds.

In this Comment, I discuss the inequities of the current system and why my proposal would remedy this injustice. In Part I, I trace the development of the forum non conveniens doctrine and delineate its importance in cases today. In Part II, I explain how the decision of most federal courts to use federal forum non conveniens law in diversity cases creates an inequity that has effects beyond the forum non conveniens inquiry. Finally, in Part III, I propose that the proper remedy is to impute waiver of forum non conveniens arguments to defendants who remove a case from a state that would not have dismissed under its forum non conveniens doctrine. The courts could do this themselves by adopting waiver into the common law. But ultimately, to remedy this inequity, Congress should amend the removal statute to require remand to state court, rather than outright dismissal, when a federal court concludes that it is an inconvenient forum.

the state court likely would have allowed the case to proceed to the merits. *Id.* at 1219. The Eleventh Circuit acknowledged that application of the federal rule would change the outcome of the case, but decided that it was nevertheless appropriate to use the federal standard and upheld the district court's dismissal for federal forum non conveniens. *Id.*

⁷ See *infra* notes 44-47 and accompanying text.

I. THE DEVELOPMENT OF THE FORUM NON CONVENIENS DOCTRINE

A. *The Origins of the Forum Non Conveniens Doctrine*

The Supreme Court has long recognized the discretion of both state and federal courts to decline to exercise jurisdiction in exceptional circumstances.⁸ In *Gulf Oil Corp. v. Gilbert*, the Court acknowledged the availability of forum non conveniens doctrine as a tool to dismiss cases in federal court.⁹ The forum non conveniens inquiry was formulated as an equitable test focusing on the unfairness associated with having the dispute heard in a particular forum, with the plaintiff's choice of forum rarely disturbed.¹⁰ Rather than articulating a particular rule, the Court instead enumerated a list of private considerations—directed to the dynamics of the lawsuit—and public considerations—directed to the community's interest in the resolution of the dispute—for courts to consider in forum non conveniens determinations.¹¹ However, to trigger the doctrine's application, a court must first find that an adequate alternative forum exists.¹²

The question of what qualifies as an adequate alternative became the central inquiry in the Court's next major forum non conveniens case, *Piper Aircraft Co. v. Reyno*.¹³ There, the plaintiff filed a wrongful death suit in California state court arising out of a plane crash that occurred in Scotland.¹⁴

⁸ See *Broderick v. Rosner*, 294 U.S. 629, 642-43 (1935) (recognizing that states may limit the jurisdiction of their courts as long as the limitation does not conflict with provisions of the federal Constitution); *Can. Malting Co. v. Patterson S.S.*, 285 U.S. 413, 422 (1932) (“Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true . . .”).

⁹ 330 U.S. at 507 (“The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.”).

¹⁰ *Id.* at 508 (suggesting the plaintiff's choice of forum will normally not be disturbed unless used to “vex, harass, or oppress” the defendant by inflicting upon him expense or trouble not necessary to [the plaintiff's] right to pursue his remedy”); see also *Piper Aircraft*, 454 U.S. at 249 (“Under *Gilbert*, dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.”).

¹¹ *Gilbert*, 330 U.S. at 508-09 (listing private interest factors such as “ease of access to sources of proof,” “availability of compulsory process,” and “cost of obtaining attendance of [] witnesses” and public interest factors such as “[a]dministrative difficulties” and “[j]ury duty” as relevant in the forum non conveniens analysis); see also *Piper Aircraft*, 454 U.S. at 241 (“[T]he Court [in *Gilbert*] provided a list of ‘private interest factors’ affecting the convenience of the litigants, and a list of ‘public interest factors’ affecting the convenience of the forum.”).

¹² *Gilbert*, 330 U.S. at 506-07 (“In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.”).

¹³ 454 U.S. 235 (1981).

¹⁴ *Id.* at 238-40.

The defendants removed the case to federal court and obtained a transfer to the United States District Court for the Middle District of Pennsylvania.¹⁵ The defendants then moved for dismissal under the doctrine of *forum non conveniens*, arguing that Scotland was the more appropriate forum.¹⁶ The plaintiff opposed this motion, contending that dismissal would be unfair because Scottish law was significantly less favorable than California law.¹⁷

The Supreme Court agreed with the defendants, holding that Scotland was an adequate alternative forum and that dismissal for *forum non conveniens* was therefore appropriate.¹⁸ The Court recognized that because the central focus of *Gilbert's* *forum non conveniens* inquiry was convenience, “dismissal [could] not be barred solely because of the possibility of an unfavorable change in law.”¹⁹ The Court further noted the need to retain flexibility in the doctrine,²⁰ thereby solidifying *forum non conveniens* as a discretionary tool by which district courts can dismiss inconvenient litigation when the balance of inequities strongly favors the defendant.

B. *The Continuing Importance of the Forum Non Conveniens Doctrine*

Section 1404 empowers a federal district court to transfer a case to another district court in which the case could have been filed originally when doing so furthers the interests of convenience and justice.²¹ A district court's latitude to grant a transfer under § 1404(a) has been interpreted to be much greater than its latitude to dismiss under *forum non conveniens*.²² Modern transfer procedures have effectively eliminated the use of the *forum non conveniens* doctrine in cases where the alternative forum is another U.S.

¹⁵ *Id.* at 240-41.

¹⁶ *Id.* at 241-42.

¹⁷ *Id.* at 244.

¹⁸ *Id.* at 261.

¹⁹ *Id.* at 249.

²⁰ *Id.*; see also *Gilbert*, 330 U.S. at 508 (declining to identify specific circumstances that require a *forum non conveniens* dismissal); *Williams v. Green Bay & W. R.R. Co.*, 326 U.S. 549, 556-57 (1946) (noting that the applicability of the *forum non conveniens* doctrine turns on the facts of each case).

²¹ See 28 U.S.C. § 1404(a) (2012); *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (“[T]he purpose of [§ 1404(a)] is to prevent the waste ‘of time, energy and money’ and ‘to protect litigants, witnesses and the public against unnecessary inconvenience and expense’” (quoting *Cont'l Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26-27 (1960))).

²² See *Piper Aircraft*, 454 U.S. at 253 (“District courts [a]re given more discretion to transfer under § 1404(a) than they ha[ve] to dismiss on grounds of *forum non conveniens*.” (citing *Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32 (1955))). *But see* *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 580 (2013) (suggesting that courts should treat arguments for transfer under § 1404(a) and dismissal under *forum non conveniens* almost identically).

district court.²³ Nevertheless, the federal forum non conveniens doctrine is still applicable where the alternative forum is a foreign court.²⁴

The continued vitality of forum non conveniens in cases involving foreign events is especially important as the world increasingly moves toward international harmonization. Countries have adopted similar commercial and legal standards to facilitate cooperation.²⁵ Globalization will likely lead to more international disputes filed in U.S. courts.²⁶ And because these disputes usually involve non-U.S. citizens, they will often end up in federal courts²⁷ and implicate the doctrine of forum non conveniens.²⁸

Furthermore, foreign plaintiffs have both opportunity and incentive to file in U.S. courts. Foreign plaintiffs generally prefer to file in the United States to benefit from the procedural advantages—including extensive pretrial discovery, contingency fees, and efficient resolution and enforcement of judgments—as well as the substantive advantages—including plaintiff-friendly

²³ See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) (“[T]he federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad.”).

²⁴ See *id.* The Supreme Court has recognized that federal forum non conveniens may also apply where the alternative forum is a state or territorial court, see *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007), but forum non conveniens generally does more work in cases involving foreign parties and foreign disputes.

²⁵ For example, in March 2013, the United States updated its patent system from a first-to-invent to a first-to-file system to better align with the standard employed by the rest of the world. See David S. Abrams & R. Polk Wagner, *Poisoning the Next Apple? The America Invents Act and Individual Inventors*, 65 STAN. L. REV. 517, 528 (2013) (explaining that efficiency and international harmonization were driving factors in enacting the America Invents Act); Patrick M. Boucher, *Recent Developments in US Patent Law*, PHYSICS TODAY, Jan. 2012, at 27 (recognizing that the United States was the last country to move from the first-to-invent to the first-to-file system).

²⁶ See Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 495-96 (2011) (“Globalization entails increasingly numerous transnational interactions. More transnational interactions give rise to more transnational disputes. And plaintiffs purportedly bring a disproportionately large number of these disputes to U.S. courts because the American forum shopping system promises them access to favorable U.S. substantive and procedural laws.”); see also Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT’L L. 153, 163 (2003) (“Globalization and the greater ease of global communication have led courts to reexamine [jurisdictional] doctrine and, in several prominent recent cases, accept cases that previously might have been rejected as too remote to the interests of U.S. courts and the U.S. justice system.”).

²⁷ This could occur in two ways: (1) direct filing in federal district court on the basis of diversity of citizenship, see 28 U.S.C. § 1332(a)(2) (2012) (authorizing federal jurisdiction over suits between “citizens of a State and citizens or subjects of a foreign state”); *id.* § 1332(a)(3) (authorizing federal jurisdiction over suits between “citizens of different States and in which citizens or subjects of a foreign state are additional parties”), or (2) removal by the defendant from state court, see *id.* § 1441(a) (allowing removal to federal district court of any action over which the district court would have original jurisdiction).

²⁸ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50 (1981) (recognizing that foreign plaintiffs can usually bring their suits in a foreign forum and so forum non conveniens may be warranted to prevent an influx of foreign cases into U.S. courts).

juries and liability awards allowing both compensatory and punitive damages—unique to the U.S. court system.²⁹

After the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*,³⁰ foreign plaintiffs have even greater incentives to bring claims in state courts. The Court held that federal courts have no jurisdiction under the Alien Tort Statute (ATS)³¹ where the act underlying the dispute occurred outside of the United States.³² This effectively abrogated the lower courts' more liberal grants of jurisdiction under the ATS.³³ Although the decision leaves open the possibility that federal district courts will be able to hear disputes when the claims at issue sufficiently "touch and concern the territory of the United States,"³⁴ this exception is very narrow.³⁵

Because the Supreme Court severely limited the circumstances in which federal courts have original jurisdiction under the ATS, commentators suggest that plaintiffs will have to bring these claims under international or state law, rather than under the ATS.³⁶ This will lead to an increase in filings in state courts.³⁷ Since a large portion of these disputes will involve an international party, it is likely that many will be removed to federal court on the basis of diversity jurisdiction.³⁸ These considerations suggest that defendants will continue to use forum non conveniens as a tool for dismissal in federal court.

²⁹ See Sidney K. Smith, Note, *Forum Non Conveniens and Foreign Policy: Time for Congressional Intervention?*, 90 TEX. L. REV. 743, 743 (2012); see also Jena A. Sold, Comment, *Inappropriate Forum or Inappropriate Law? A Choice-of-Law Solution to the Jurisdictional Standoff Between the United States and Latin America*, 60 EMORY L.J. 1437, 1452 (2011) ("Many procedural and systemic advantages are, for the most part, unique to the American legal system. These include extensive pretrial discovery, conspicuously plaintiff-friendly juries, the contingency fee system, large damage awards, and relatively efficient disposition and enforcement of judgments.").

³⁰ 133 S. Ct. 1659 (2013).

³¹ 28 U.S.C. § 1350 (2012).

³² *Kiobel*, 133 S. Ct. at 1669.

³³ See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980) (holding that the ATS grants federal jurisdiction for cases by aliens alleging violations of international rights), *abrogated by Kiobel*, 133 S. Ct. 1659 (2013).

³⁴ *Kiobel*, 133 S. Ct. at 1669.

³⁵ See *id.* (espousing a "presumption against extraterritorial application" even where the relevant conduct touches and concerns the United States).

³⁶ See, e.g., Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 739 (2012) ("Perhaps we are about to witness a new wave of human-rights litigation not based on the ATS but based on state law or even foreign law.").

³⁷ See *id.* ("[N]early all these battles in federal court concerning federal ATS claims will soon make their way to state- and foreign- law claims and, in some cases, to state courts, raising a host of interesting, new problems . . .").

³⁸ See *supra* note 27 and accompanying text.

II. HOW REMOVAL POSES SPECIAL PROBLEMS FOR THE FORUM NON CONVENIENS DOCTRINE AND UNDERCUTS OTHER PROTECTIONS

A. *The Forum Non Conveniens Doctrine Under Erie and the Problem Posed by Removal*

After the adoption of the Federal Rules of Civil Procedure in 1938, the Supreme Court recognized that its rule in *Swift v. Tyson*—that federal courts hearing cases in diversity were free to fashion rules of federal common law³⁹—was unconstitutional.⁴⁰ According to the Court, the policy of federal jurisdiction required elimination of the *Swift* rule, which had resulted in unequal administration of the law and encouraged litigants to forum shop between state and federal courts.⁴¹ The Court instead adopted the view that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”⁴² Since *Erie*, the Court has struggled to adopt a coherent test for determining whether federal courts should apply federal or state law in diversity actions.⁴³

The Court has deliberately left unanswered the question whether, under its *Erie* jurisprudence, federal courts should apply state or federal forum non conveniens doctrine in diversity cases.⁴⁴ Nevertheless, federal courts that

³⁹ *Swift v. Tyson*, 41 U.S. 1, 18 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁴⁰ *Erie*, 304 U.S. at 77-78.

⁴¹ *See id.* at 74-76 (discussing how the *Swift* rule created negative incentives by leading to different outcomes in state and federal courts); *see also* *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (“The ‘outcome-determination’ test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”).

⁴² *Erie*, 304 U.S. at 78.

⁴³ *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 25 (2010) (referring to the Court’s “confused jurisprudence that followed *Erie Railroad Co. v. Tompkins*”). For a summary of the different tests the Court has adopted since *Erie*, *see Hanna*, 380 U.S. at 471 (articulating a separate track of analysis when the situation is covered by a Federal Rule of Civil Procedure); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537-38 (1958) (adopting a balancing test between federal and state interests, wherein disruption of the state rule is permissible when there is a strong countervailing federal interest); *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945) (“[I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.”).

⁴⁴ *See Piper Aircraft v. Reyno*, 454 U.S. 235, 248 n.13 (1981) (refusing to resolve whether federal or state law controls because “Pennsylvania and California law on *forum non conveniens* dismissals are virtually identical to federal law”); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) (avoiding the *Erie* question by noting that New York and federal forum non conveniens

have reached the question have almost universally concluded that federal forum non conveniens governs.⁴⁵ Their reasoning is suspect.⁴⁶ There is

standards were identical); *Williams v. Green Bay & W. R.R. Co.*, 326 U.S. 549, 559 (1946) (“We reserve decision on th[e] *Erie* question. For even if we assume the New York rule to be applicable here, we would reach no different result.”).

⁴⁵ See, e.g., *Ravelo Monegro v. Rosa*, 211 F.3d 509, 511-12 (9th Cir. 2000) (holding that “a forum non conveniens motion in federal court is governed by federal law”); *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 992 (10th Cir. 1993) (“The *forum non conveniens* doctrine is a rule of venue, not a rule of decision’ and, therefore, the *Erie* doctrine does not require the application of state *forum non conveniens* rules.” (quoting *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1219 (11th Cir. 1985)); *Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis, Ltda.*, 906 F.2d 45, 50 (1st Cir. 1990) (“[S]tate *forum non conveniens* laws ‘ought not to be’ binding on federal courts in diversity cases.”); *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1159 (5th Cir. 1987) (en banc) (concluding that federal forum non conveniens applies in diversity cases because federal interests outweigh the need for uniformity), *vacated on other grounds sub nom.* *Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032, *prior opinion reinstated in relevant part*, 883 F.2d 17 (5th Cir. 1989); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1219 (11th Cir.) (holding that the application of forum non conveniens did not “transgress *Erie*’s constitutional prohibition” because it “did not operate as a state substantive rule of law”), *cert. denied* 474 U.S. 948 (1985). *But see Air Crash Disaster*, 821 F.2d at 1180-83 (Higginbotham, J., concurring in the judgment) (suggesting that the interests favoring application of state law probably outweigh the federal forum’s interests in self-administration, and that, under *Erie*, federal courts should thus apply state forum non conveniens); *Weiss v. Routh*, 149 F.2d 193, 195 (2d Cir. 1945) (holding that state forum non conveniens law should govern in diversity cases to preserve *Erie*’s goal of uniformity).

⁴⁶ As Judge Higginbotham noted in his concurrence in *Air Crash Disaster*, applying federal forum non conveniens in diversity cases likely undermines the twin aims of *Erie*, at least where the federal and state standards differ markedly. 821 F.2d at 1182-83 (Higginbotham, J., concurring in the judgment). Federal courts have relied on the Supreme Court’s statement that “the doctrine [of forum non conveniens] is one of procedure rather than substance” in *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994), to support their conclusion that federal doctrine governs. See, e.g., *Rosa*, 211 F.3d at 511-12 (“Our conclusion is reinforced by the Supreme Court’s statement in *American Dredging* . . .”). However, the Court has long distanced itself from the unworkable, purely semantic distinction between law that is “procedural” and law that is “substantive.” See *Hanna*, 380 U.S. at 465-66 (recognizing that although federal courts should apply state substantive law and federal procedural law under *Erie*, reference to the traditional distinction between substance and procedure is uninformative); *Guar. Trust Co.*, 326 U.S. at 109 (“[T]he question is not whether a statute of limitations is deemed a matter of ‘procedure’ in some sense. The question is whether such a statute . . . significantly affect[s] the result of a litigation for a federal court to disregard a law of a State . . . ?”). Further, most courts relied on *Byrd* in reaching this conclusion, pointing to the federal interest in regulating courts’ caseloads as more important than maintaining uniformity between federal and state courts. See, e.g., *Air Crash Disaster*, 821 F.2d at 1159 (“We hold that the interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important than the disruption of uniformity created by applying federal *forum non conveniens* in diversity cases.”). This reliance on *Byrd* seems misplaced, given that *Byrd* probably does not have much vitality after *Hanna*. See Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1949 (2006) (“[T]he Court has not cited [*Byrd*] very often, and the thrust of its *Erie* jurisprudence since *Byrd* has been a repudiation of the balancing process *Byrd* seemed to authorize . . .”). *But see* Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1231 (2011) (noting that the Supreme Court has

continuing debate as to whether the federal courts have reached the right result.⁴⁷

Whether or not it is correct to apply federal forum non conveniens law in diversity cases, it creates a special problem: defendants can use removal to have cases dismissed under federal forum non conveniens. Because federal courts apply federal law in these cases, defendants get the benefit of federal law, obtaining dismissal of cases that the state court would not have dismissed.⁴⁸ This result is inconsistent with both the traditional justification for diversity jurisdiction—providing an unbiased forum for out-of-state defendants⁴⁹—and the justification compellingly advanced by Edward Purcell—providing a forum for commercially important cases.⁵⁰ Instead, under the current operation of the forum non conveniens doctrine, defendants can exploit the procedural tool of removal solely for the purpose of obtaining dismissal.

This issue is implicated only if the forum non conveniens doctrines of the states differ from the federal standard, and probably only if there are

never overruled *Byrd*); cf. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1446 (2010) (“We are unaware of any rule to the effect that a holding of ours expires if the case setting it forth is not periodically revalidated.”).

⁴⁷ Compare Smith, *supra* note 29, at 745 (concluding that federal courts sitting in diversity should use the federal standard since forum non conveniens is procedural), with Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1392 (1991) (arguing that state interests and the important impact on international litigation are enough for federal courts to apply state forum non conveniens in diversity cases).

⁴⁸ See *Sibaja*, 757 F.2d at 1219 (recognizing that federal forum non conveniens compelled dismissal even though the state standard would allow the case to be heard on the merits).

⁴⁹ See *Hanrick v. Hanrick*, 153 U.S. 192, 198 (1894) (“The whole object of allowing a defendant to remove a suit or controversy into the Circuit Court of the United States is to prevent the plaintiff from obtaining any advantage against him by reason of prejudice or local influence.”); *Ry. Co. v. Whitton*, 80 U.S. (13 Wall.) 270, 289 (1871) (interpreting the purpose of diversity jurisdiction as preventing unfairness in state court proceedings); Adam R. Prescott, Note, *On Removal Jurisdiction’s Unanimous Consent Requirement*, 53 WM. & MARY L. REV. 235, 257-58 (2011) (detailing the history of removal as a tool to curtail unfair advantages gained by local plaintiffs in state courts). Some commentators question whether bias against out-of-state defendants still exists as a justification for retaining diversity jurisdiction, see, e.g., FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 40 (1990), but practitioners continue to make arguments for the vitality of this rationale, see, e.g., Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 379 (1992) (noting that one of the reasons that attorneys argue for keeping diversity jurisdiction is that “the federal courts provide superior justice to that provided by state courts”).

⁵⁰ See EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 241 (1992) (accepting as the justification for diversity jurisdiction the need “to recognize the dominant role of large corporations in the nation’s economy and to accord their activities the time and attention of the national courts”).

significant variations between the two standards. While most states have adopted the federal standard,⁵¹ a significant number use a different test and the Supreme Court has protected the right of states to formulate their own doctrine.⁵² At the time of writing, thirty-seven states and the District of Columbia have adopted either the federal forum non conveniens doctrine or something similar.⁵³ However, even within this group, there are variations

⁵¹ See *infra* note 53; see also Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 315 & nn.17-18 (2002) (finding that, at the time of writing, thirty states and the District of Columbia had adopted the federal forum non conveniens standard). For a table summarizing each state's formulation of the forum non conveniens doctrine, see Appendix.

⁵² See *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 5 (1950) (announcing that state courts "should be free[] to decide the availability of the principle of *forum non conveniens* in [FELA] suits according to [their] own local law"); *Broderick v. Rosner*, 294 U.S. 629, 643 (1935) (allowing states to fashion their own versions of forum non conveniens for application in appropriate cases); cf. *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 372 (1990) ("The States thus have great latitude to establish the structure and jurisdiction of their own courts."); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988) ("Federal *forum non conveniens* principles simply cannot determine whether [state] courts . . . would consider themselves an appropriate forum for petitioner's lawsuit.").

⁵³ The states that follow the federal standard are Alaska, see *Bromley v. Mitchell*, 902 P.2d 797, 800-01 (Alaska 1995); Arizona, see *Parra v. Cont'l Tire N. Am., Inc.*, 213 P.3d 361, 364 (Ariz. Ct. App. 2009); Arkansas, see *Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Gadbury-Swift*, 362 S.W.3d 291, 294-95 (Ark. 2010); California, see *Stangvik v. Shiley Inc.*, 819 P.2d 14, 18-21 (Cal. 1991) (en banc); Connecticut, see *Durkin v. Intevac, Inc.*, 782 A.2d 103, 111-12 (Conn. 2001); the District of Columbia, see *Blake v. Prof'l Travel Corp.*, 768 A.2d 568, 572 (D.C. 2001); Florida, see *Cortez v. Palace Resorts, Inc.*, 123 So. 3d 1085, 1095 (Fla. 2013); Illinois, see *Dawdy v. Union Pac. R.R. Co.*, 797 N.E.2d 687, 693-96 (Ill. 2003); Indiana, see *Anyango v. Rolls-Royce Corp.*, 971 N.E.2d 654, 659-63 (Ind. 2012); Iowa, see *In re Marriage of Kimura*, 471 N.W.2d 869, 878-79 (Iowa 1991); Kansas, see *Volt Delta Res., Inc. v. Devine*, 740 P.2d 1089, 1093-94 (Kan. 1987); Kentucky, see *Lykins Enters., Inc. v. Felix*, Nos. 06-142, 06-624, 2007 WL 4139637, at *4 (Ky. Nov. 21, 2007); Maine, see *Corning v. Corning*, 563 A.2d 379, 380 (Me. 1989); Maryland, see *Johnson v. G.D. Searle & Co.*, 552 A.2d 29, 30-31 (Md. 1989); Massachusetts, see *New Amsterdam Cas. Co. v. Estes*, 228 N.E.2d 440, 443-44 (Mass. 1967); Michigan, see *Radeljak v. Daimlerchrysler Corp.*, 719 N.W.2d 40, 42-43 (Mich. 2006); Minnesota, see *Paulownia Plantations de Panama Corp. v. Rajamannan*, 793 N.W.2d 128, 137 (Minn. 2009); Mississippi, see *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 728 So.2d 573, 575-76 (Miss. 1999); Missouri, see *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 220 (Mo. 2008) (en banc); Nebraska, see *Ameritas Inv. Corp. v. McKinney*, 694 N.W.2d 191, 202 (Neb. 2005); Nevada, see *Eaton v. Second Judicial Dist. Court*, 616 P.2d 400, 401 (Nev. 1980) (per curiam), *overruled on other grounds by Pan v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 88 P.3d 840 (Nev. 2004) (per curiam); New Hampshire, see *Digital Equip. Corp. v. Int'l Digital Sys. Corp.*, 540 A.2d 1230, 1232 (N.H. 1988); New Jersey, see *Kurzke v. Nissan Motor Corp. in U.S.A.*, 752 A.2d 708, 710-12 (N.J. 2000); New Mexico, see *First Fin. Trust Co. v. Scott*, 929 P.2d 263, 264 (N.M. 1996); New York, see *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245, 247-48 (N.Y. 1984); North Carolina, see *Motor Inn Mgmt., Inc. v. Irvin-Fuller Dev. Co.*, 266 S.E.2d 368, 371 (N.C. Ct. App. 1980); North Dakota, see *Vicknair v. Phelps Dodge Indus., Inc.*, 767 N.W.2d 171, 176-78 (N.D. 2009); Ohio, see *State ex rel. Smith v. Cuyahoga Cnty. Court of Common Pleas*, 832 N.E.2d 1206, 1209-10 (Ohio 2005) (per curiam); Oklahoma, see *Binder v. Shepard's Inc.*, 133 P.3d 276, 278-80 (Okla. 2006) (per curiam); Pennsylvania, see *Rini v. N.Y. Cent. R.R. Co.*, 240 A.2d 372, 373-74 (Pa. 1968); Rhode Island, see *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1182-85

on how the doctrine is applied, as some states place greater emphasis on certain factors.⁵⁴ Three states have never explicitly adopted federal forum non conveniens standards, but have indicated a willingness to follow the federal standards.⁵⁵ Another state has not yet adopted a specific formulation of the doctrine.⁵⁶ Six states have adopted more limited versions of forum non conveniens,⁵⁷ and two states preclude forum non conveniens dismissal

(R.I. 2008); South Dakota, *see* *Rothluebbers v. Obee*, 668 N.W.2d 313, 317-18 (S.D. 2003); Tennessee, *see* *Zurick v. Inman*, 426 S.W.2d 767, 771-72 (Tenn. 1968); Texas, *see* *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 315 S.W.3d 28, 32 (Tex. 2010) (per curiam); Utah, *see* *Energy Claims Ltd. v. Catalyst Inv. Grp. Ltd.*, 325 P.3d 70, 77-78 (Utah 2014); Washington, *see* *Sales v. Weyerhaeuser Co.*, 177 P.3d 1122, 1124-25 (Wash. 2008) (en banc); West Virginia, *see* *Mace v. Mylan Pharm., Inc.*, 714 S.E.2d 223, 231-33 (W. Va. 2011); and Wisconsin, *see* *Lau v. Chi. & N. W. Ry. Co.*, 111 N.W.2d 158, 162-63 (Wis. 1961).

⁵⁴ *See, e.g.*, *Stangvik v. Shiley Inc.*, 819 P.2d 14, 18-21 (Cal. 1991) (en banc) (holding that an unfavorable change in the law is not relevant when the alternative forum offers some remedy, unlike in *Piper Aircraft*, where an unfavorable change in law is always relevant but given substantial weight only when the alternative forum offers no remedy); *Myers v. Boeing Co.*, 794 P.2d 1272, 1280-81 (Wash. 1990) (en banc) (refusing to adopt *Piper Aircraft*'s presumption of less deference to a foreign plaintiff's choice of forum as unconvincing and unnecessary).

⁵⁵ These three states are Hawaii, *see* *UFJ Bank Ltd. v. Ieda*, 123 P.3d 1232, 1240 (Haw. 2005) (recognizing that the forum non conveniens inquiry requires an analysis of the availability of an alternative forum); Oregon, *see* *Maricich v. Lacoss*, 129 P.3d 193, 195 n.1 (Or. Ct. App. 2006) ("We assume, for purposes of this case, that the [federal] doctrine can be applied in Oregon courts."); *Novich v. McClean*, 18 P.3d 424, 430 (Or. Ct. App. 2001) ("Although Oregon has not, as of yet, adopted the *Piper* balancing test as the proper test to use in applying the inconvenient forum doctrine, we do not take issue with the trial court's use of the test."); and Virginia, *see* *Va. Elec. & Power Co. v. Dungee*, 520 S.E.2d 164, 170-71 (Va. 1999) (including the *Gilbert* factors in the "good cause" requirement for dismissal under forum non conveniens).

⁵⁶ Idaho has not yet promulgated a forum non conveniens standard because Idaho courts have failed to reach the question on procedural grounds. *See, e.g.*, *Rasmuson v. Walker Bank & Trust Co.*, 625 P.2d 1098, 1102 (Idaho 1981) ("[F]orum non conveniens [dismissal] specifically requires a party to object before the court is required to review whether it will entertain a proceeding . . ."); *Marco Distrib., Inc. v. Biehl*, 555 P.2d 393, 396-97 (Idaho 1976) (failing to reach the forum non conveniens question after holding that the trial court should have instead decided the motion to dismiss on personal jurisdiction grounds).

⁵⁷ Alabama requires that defendants show the plaintiff's claims arose outside the state before analyzing whether a more appropriate alternative forum exists. *See* *Malsch v. Bell Helicopter Textron, Inc.*, 916 So. 2d 600, 602 (Ala. 2005) ("[A] defendant seeking dismissal of an action on the basis of *forum non conveniens* must show, first, that the plaintiff's claims arose outside of Alabama, and second, that an alternative forum exists."). While Colorado has effectively eliminated forum non conveniens dismissals in cases brought by resident plaintiffs, *see* *McDonnell-Douglas Corp. v. Lohn*, 557 P.2d 373, 373-74 (Colo. 1976) (en banc) (holding that the Colorado constitution "limits very stringently the power to exclude resident plaintiffs from [the] court system where jurisdiction has otherwise been properly established" and that the "doctrine of *forum non conveniens* has only the most limited application in Colorado courts, and except in most unusual circumstances the choice of a Colorado forum by a resident plaintiff will not be disturbed"), South Carolina has expressly ruled that this is an inappropriate basis for a dismissal under forum non conveniens, *see* *Chapman v. S. Ry. Co.*, 95 S.E.2d 170, 173 (S.C. 1956) ("[Forum non conveniens] should not be applied in this case when the plaintiff is a resident of South Carolina."). Delaware requires

except in a narrow range of cases.⁵⁸ Finally, one state has questioned whether the doctrine of *forum non conveniens* is generally applicable in that state.⁵⁹ Because many states have adopted versions of *forum non conveniens* that differ significantly from the federal doctrine and states can continue to modify their rules, this problem deserves attention.

defendants to show that they have met a range of factors similar to the federal factors and to demonstrate with particularity that there is an “overwhelming hardship.” *Martinez v. E.I. DuPont de Nemours & Co.*, 86 A.3d 1102, 1104 (Del. 2014); *see also Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P’ship*, 669 A.2d 104, 105 (Del. 1995) (“The trial court must consider the weight of those factors in the particular case and determine whether any or all of them truly cause both inconvenience and hardship.”). Vermont has emphasized that application of *forum non conveniens* “is by far the exception, not the rule” and that “its cardinal purpose is to prevent the plaintiff from seeking to vex, harass, or oppress the defendant by inflicting upon him [unnecessary] expenses.” *Burrington v. Ashland Oil Co.*, 356 A.2d 506, 510 (Vt. 1976). Wyoming precludes dismissal as long as the suit is “based . . . on rational grounds” and “not brought for purposes of harassment.” *W. Tex. Utils. Co. v. Exxon Coal USA, Inc.*, 807 P.2d 932, 935 (Wyo. 1991).

⁵⁸ Louisiana allows *forum non conveniens* arguments only for federal causes of action and specifically eliminated the doctrine’s application in cases brought under the Jones Act or federal maritime law. *See Miller v. Am. Dredging Co.*, 595 So. 2d 615, 617 (La. 1992) (“A clear reading of article 123(C) leads to the conclusion that the doctrine of *forum non conveniens* is specifically made unavailable in a Jones Act or maritime law case.”), *aff’d*, 510 U.S. 443 (1994); *cf.* LA. CODE CIV. PROC. ANN. art. 123 (1989) (stating that *forum non conveniens* dismissals are confined to cases “in which a claim or cause of action is predicated solely upon a federal statute” and not “brought pursuant to [the Jones Act] or federal maritime law”). Louisiana has also restricted the factors that its courts can consider in a *forum non conveniens* analysis. *See Holland v. Lincoln Gen. Hosp.*, 48 So. 3d 1050, 1054-55 (La. 2010) (noting that the Louisiana Code limits the factors that courts may consider in a *forum non conveniens* analysis to the “convenience of the parties and the witnesses” and “the interest of justice”). Georgia has permitted *forum non conveniens* only when authorized by statute and in the very limited circumstance where nonresidents bring suit for injuries that occurred outside the United States. *See Gonzalez v. Dep’t of Transp.*, 610 S.E.2d 527, 528-29 (Ga. 2005) (holding that Georgia’s *forum non conveniens* rule “is not authority for dismissing a suit by a nonresident alien based on injuries suffered in this country”); *AT & T Corp. v. Sigala*, 549 S.E.2d 373, 377 (Ga. 2001) (“Relying on our inherent judicial power, we adopt the doctrine of *forum non conveniens* for use in lawsuits brought in our state courts by nonresident aliens who suffer injuries outside this country.”); *Holtscaw v. Holtscaw*, 496 S.E.2d 262, 263 (Ga. 1998) (recognizing that the *forum non conveniens* doctrine is “generally controlled by statutory provisions” and applies to cases under the Uniform Child Custody Jurisdiction Act).

⁵⁹ Montana does not allow *forum non conveniens* in FELA cases, *see Rule v. Burlington N. & Santa Fe Ry. Co.*, 106 P.3d 533, 536 (Mont. 2005), and has not yet decided whether the doctrine has general applicability, *see State ex rel. Burlington N. R.R. Co. v. Dist. Court*, 891 P.2d 493, 498 (Mont. 1995) (explaining that the court has “neither accepted nor rejected the application of *forum non conveniens* in non-FELA cases and . . . ha[s] neither denied nor recognized the existence of that doctrine in cases where there is no strong policy favoring plaintiff’s forum selection”).

B. *How Applying Federal Forum Non Conveniens in Diversity Cases Undercuts Other Protections*

Although the federal courts' use of federal forum non conveniens law in diversity cases may not pose any problems in the abstract, especially if one agrees with the courts' *Erie* analyses, the doctrine's application is problematic because it threatens to undercut a range of protections. Most important, it tends to undermine the equitable purpose of the doctrine. However, it has further effects beyond the doctrine itself, subverting the interests of both the parties and the states.

1. Equitable Nature of the Forum Non Conveniens Doctrine

As described above, the doctrine of forum non conveniens has developed as an equitable tool to dismiss a case only when it is inconvenient to try the case in the forum where it was originally filed.⁶⁰ District courts may dismiss cases after examining the factors weighing both for and against dismissal, and their rulings are reviewed for abuse of discretion.⁶¹ And although courts are directed to consider some factors related to the court's interests in each case,⁶² most of the factors are directed to the interests of the parties in the suit.⁶³

Applying a different standard in federal court on removal weakens one of the main factors that courts consider in the forum non conveniens balancing test: the availability of an alternative forum. As the Supreme Court has directed, the first step of the analysis should be to determine

⁶⁰ See *supra* Section I.A; see also *Stangvik v. Shiley Inc.*, 819 P.2d 14, 17 (Cal. 1991) (en banc) ("Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere."); Paula C. Johnson, *Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government*, 25 SUFFOLK U. L. REV. 1, 51-52 (1991) ("Forum non conveniens is an equitable, common-law doctrine reflecting the concept that litigation ought to be conducted in a reasonably 'convenient' or appropriate tribunal."); John W. Joyce, Comment, *Forum Non Conveniens in Louisiana*, 60 LA. L. REV. 293, 317 (1999) (concluding that forum non conveniens is an important tool whose main purpose is to "eliminate suits with little or no connection to the forum state").

⁶¹ See *Piper Aircraft v. Reyno*, 454 U.S. 235, 257 (1981) ("The *forum non conveniens* determination is committed to the sound discretion of the trial court [and] may be reversed only when there has been a clear abuse of discretion . . .").

⁶² *Gulf Oil Corp v. Gilbert*, 330 U.S. 501, 508-09 (1947) (cataloging the public factors relevant to the forum non conveniens analysis, including administrative burden on the court and complexity of the conflict of laws).

⁶³ See *id.* at 508 ("An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant.").

whether there exists another adequate forum.⁶⁴ Although the bar for availability of an adequate alternative forum is low,⁶⁵ it is an important factor that can be dispositive.⁶⁶ In some cases, a state court might be an alternative forum;⁶⁷ hence, a federal court may consider whether the state court is both available and adequate. But if the defendant brought the case to federal court by way of removal and the federal court dismissed for forum non conveniens, the plaintiff would never be able to pursue the action in state court because, presumably, the defendant could always remove to federal court.⁶⁸ In this situation, even though there is an adequate alternative forum (i.e., the state court), the plaintiff can never gain access to it. In fact, this situation may explain why many federal courts will not entertain a forum non conveniens argument where the alternative forum is in the same state as the federal forum.⁶⁹ It seems particularly problematic that a federal

⁶⁴ See *Piper Aircraft*, 454 U.S. at 254 n.22 (“At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum.”); *Gilbert*, 330 U.S. at 507 (noting that the forum non conveniens doctrine “presupposes at least two forums in which the defendant is amenable to process”).

⁶⁵ The Supreme Court has held that even an unfavorable change of the law does not warrant dismissal, *Piper Aircraft*, 454 U.S. at 249, unless the remedy is “so clearly inadequate or unsatisfactory that it is no remedy at all,” *id.* at 254.

⁶⁶ See, e.g., *Bank of Credit & Commerce Int’l (Overseas) Ltd. v. State Bank of Pak.*, 273 F.3d 241, 246-47 (2d Cir. 2001) (reversing and remanding a forum non conveniens dismissal where the district court relied on the availability of an adequate alternative forum on the basis of a law in that forum that was modified after the district court’s decision); *Vandam v. Smit*, 148 A.2d 289, 291 (N.H. 1959) (“Where, as in this case, the record discloses only a forum in New Hampshire, the Court was correct in denying the application of the doctrine of *forum non conveniens* as a matter of law.”). But see *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245, 250 (N.Y. 1984) (allowing a district court to reject jurisdiction even in the absence of a suitable alternative forum).

⁶⁷ The Supreme Court has explicitly recognized the possibility that a state court may in some instances be the most convenient forum. See *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007).

⁶⁸ There is no practical barrier to block the plaintiff from refileing his action in state court. The defendant likely could not obtain an injunction under the Anti-Injunction Act, 28 U.S.C. § 2283 (2012), because the presumption against federal court enjoinder of state proceedings holds when an action is dismissed under forum non conveniens in federal court, then subsequently refiled in state court. See *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149 (1988) (“[A] federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law . . .”). Nevertheless, after the plaintiff refiles, the defendant can remove the case to federal court and obtain dismissal.

⁶⁹ See, e.g., *Park v. Didden*, 695 F.2d 626, 633 (D.C. Cir. 1982) (reversing the lower court’s finding that a case can be dismissed where the alternative forum is in the same place as the selected forum); *Wade v. Ilisagvik Coll.*, No. A05-86, 2005 WL 2340710, at *4 (D. Alaska Sept. 20, 2005) (finding that forum non conveniens applies only in cases where the alternative forum is abroad); *Rogge v. Menard Cnty. Mut. Fire Ins. Co.*, 184 F. Supp. 289, 291 (S.D. Ill. 1960) (“The doctrine of forum non conveniens is inapplicable here for the reason that the State court is located at Petersburg, Illinois, approximately 25 miles from Springfield, in which city is located the

court can dismiss a case and force the plaintiff to initiate the action in a foreign court when there is a U.S. court willing to adjudicate the dispute.

Using federal forum non conveniens law in diversity cases also undermines the underlying equitable purpose of the doctrine. In deciding whether to remove to federal court, defendants can now calculate the probability of obtaining dismissal under the federal standard, and compare it with the probability of dismissal under the state standard. This shifts the focus of the forum non conveniens inquiry toward strategic legal argument and away from thorough examination of the hardships accruing to the defendant and the forum.⁷⁰ By empowering the defendant to choose the forum, the federal courts erode two other important facets of the forum non conveniens doctrine: (1) the law's presumption that the plaintiff's forum is convenient, and (2) the defendant's burden to upset that presumption by demonstrating unfairness.⁷¹ These inequities have become even more pronounced because courts have formulated the doctrine liberally to broaden judicial discretion, and then used this discretion extensively to dismiss cases.⁷²

The counterargument that extensive dismissal under forum non conveniens is compelled by *Erie* and its progeny is unavailing. As the Court noted in *Hanna v. Plumer*, the outcome-determination test must always be viewed in light of the twin aims of *Erie*: preventing forum shopping and ensuring

courthouse for this court.”). *But see* Kettenbach v. Demoulas, 822 F. Supp. 43, 45 (D. Mass. 1993) (concluding that the same principles govern the forum non conveniens inquiry where the alternative forum is a state court rather than a foreign court).

⁷⁰ The Supreme Court has suggested that the core focus of a forum non conveniens inquiry is a thorough analysis of the convenience to the parties involved in the dispute. *See Piper Aircraft*, 454 U.S. at 249. Mere strategy to choose a favorable forum is not a cause for dismissal, *see Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947), so the doctrine should not shift to encompass it.

⁷¹ A plaintiff's choice of forum is generally entitled to deference, *see Gilbert*, 330 U.S. at 508 (“[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.”), and the defendant has a heavy burden of demonstrating that the plaintiff's choice of forum is “unnecessarily burdensome,” *Piper Aircraft*, 454 U.S. at 252 n.19. Deference to the plaintiff's choice of forum and the burden imposed on the defendant are both devalued when defendants can use removal to effectuate a different standard and more easily obtain dismissal.

⁷² *See* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 940 (1990) (arguing that the federal courts' aggressive use of dismissal under forum non conveniens has led plaintiffs to file transnational personal injury cases in state courts); Whytock, *supra* note 26, at 502-04 (finding higher dismissal rates of transnational claims on forum non conveniens grounds since the Supreme Court's decision in *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007)); Christopher Speer, Comment, *The Continued Use of Forum Non Conveniens: Is It Justified?*, 58 J. AIR L. & COM. 845, 859 (1993) (“[T]he doctrine of forum non conveniens is often outcome-determinative. Therefore, the shift in the forum non conveniens application from the restrictive ‘abuse of process version’ to the more liberal ‘most suitable forum version’ seriously impairs a plaintiff's chance of recovery.” (footnote omitted)).

equitable administration of the laws.⁷³ The federal courts' analysis of forum non conveniens implicates both of these concerns.

First, it encourages forum shopping, at least by defendants. Although the Court in *Erie* was primarily concerned with vertical forum shopping by plaintiffs,⁷⁴ the doctrine broadly prohibits using the accident of diversity as an excuse to obtain a favorable change in the law.⁷⁵ And this is exactly what defendants are doing: they are leveraging removal to escape state court jurisdiction by opening the possibility of dismissal under the federal doctrine. Removal of a case to federal court will always result in the change of the procedural law applied in the case under *Erie*,⁷⁶ but the purpose of the removal statute is only to provide an unbiased forum where the case can be heard.⁷⁷ Removal should not have so great an effect on the outcome of the case that defendants can use it solely for the purpose of getting the case dismissed under federal forum non conveniens.⁷⁸ The transfer statute was adopted to explicitly address these forum-shopping concerns, and applying federal forum non conveniens in diversity cases undercuts these protections.⁷⁹

Second, the federal courts' rule treats similarly situated defendants differently. Based solely on his citizenship, the diverse defendant secures an opportunity unavailable to the nondiverse (or in-state) defendant: removing the case and arguing dismissal under federal forum non conveniens. Furthermore, as discussed above, it produces inherent unfairness.⁸⁰ Defendants should not be able to exploit removal as a tool to obtain dismissal.

⁷³ 380 U.S. 460, 468 (1965).

⁷⁴ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (criticizing the *Swift v. Tyson* rule because it allowed nonresident plaintiffs to obtain a favorable change in the law by choosing whether to file the case in state or federal court). But see EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 141-91 (2000) (suggesting that the *Erie* decision was masking Justice Brandeis's real concern about removal by corporate defendants).

⁷⁵ See *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945) ("The nub of the policy that underlies [*Erie*] is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (declaring that federal courts must apply state conflict-of-laws rules to avoid unequal administration of the laws when a nonresident is a party).

⁷⁶ See *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2374 n.2 (2011) ("[F]ederal procedural rules govern a case that has been removed to federal court." (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010))).

⁷⁷ See *supra* note 49 and accompanying text.

⁷⁸ A contrary result would seem to undermine the outcome-determination test established by the Court in *York*, 326 U.S. at 109.

⁷⁹ See *infra* subsection II.B.2.

⁸⁰ See *supra* notes 70-72 and accompanying text.

Additionally, federal courts should not be able to require plaintiffs to refile cases in foreign courts when a state court is willing to hear the case. This is especially true where the policy in the federal courts has shifted away from dismissing cases and toward transferring cases to a convenient forum.⁸¹

2. Transfer of Law Under § 1404(a)

Section 1404(a) allows a district court to transfer an inconvenient case to any other district court where venue is proper.⁸² Nevertheless, in *Van Dusen v. Barrack*, the Supreme Court—citing the policy underlying the statute—decided that the law to be applied in the original forum is transferred with the case.⁸³ The Court sought to maintain the relationship between the federal court sitting in diversity and the state court,⁸⁴ and to prevent defendants from using transfer as an opportunity to secure more favorable law.⁸⁵

An overbroad reading of *Van Dusen* might suggest that the Supreme Court wanted the law originally associated with a case to track the case. A better reading is that the Supreme Court was signaling a fear that defendants could use procedural levers to gain unfair advantages.⁸⁶ This is a more persuasive interpretation of the statute, since the legislative history suggests that

⁸¹ See *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (“The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer.”).

⁸² 28 U.S.C. § 1404(a) (2012); see also *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (“[T]he purpose of [§ 1404(a)] is to prevent the waste ‘of time, energy and money’ and ‘to protect litigants, witnesses and the public against unnecessary inconvenience and expense’” (quoting *Cont’l Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 26, 27 (1960))).

⁸³ See *Van Dusen*, 376 U.S. at 639 (“We conclude, therefore, that in cases . . . where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue.”).

⁸⁴ See *id.* (“[T]he critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed.”).

⁸⁵ See *id.* at 638 (“[W]e should ensure that the ‘accident’ of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed.”); see also *id.* at 633-34 (“There is nothing, however, in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue.”).

⁸⁶ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (“The Court [in *Van Dusen*] feared that if a change in venue were accompanied by a change in law, forum-shopping parties would take unfair advantage of the relaxed standards for transfer.”); cf. *Levy v. Pyramid Co. of Ithaca*, 687 F. Supp. 48, 52 (N.D.N.Y. 1988) (“The underlying rationale for th[e] *Van Dusen* decision was that defendants might transform section 1404 into a forum shopping device, obtaining a ‘change of law as a bonus for a change of venue.’”), *aff’d*, 871 F.2d 9 (2d Cir. 1989).

§ 1404(a) was never intended to be used by parties to engage in forum shopping.⁸⁷

The Court's underlying reasoning applies with equal force to the analysis of forum non conveniens. Federal courts cannot remedy this problem by using § 1404(a) to remand or transfer cases to state court.⁸⁸ But they can embrace the reasoning of the *Van Dusen* Court by avoiding rules that encourage defendants to remove solely for the purpose of having a case dismissed. Treating forum non conveniens and transfer differently makes it difficult to reconcile the underlying rationales in the *Piper Aircraft* and *Van Dusen* decisions because defendants can circumvent the protections in *Van Dusen* by getting the case dismissed under the *Piper Aircraft* formulation of the forum non conveniens doctrine.

There may be good reasons for the standards in *Piper Aircraft* and *Van Dusen* to be incongruent. The doctrines of transfer and forum non conveniens are directed toward answering two different questions,⁸⁹ and appellate courts are directed to give district courts greater latitude under § 1404(a).⁹⁰ Nevertheless, the analysis under either doctrine is practically identical.⁹¹ Section 1404(a) was intended to supplement forum non conveniens—not replace it—by favoring transfer over dismissal.⁹² And the Supreme Court's most recent

⁸⁷ See *Van Dusen*, 376 U.S. at 635-36 (interpreting the legislative history and purposes of § 1404(a) to suggest that the section was intended only as a "federal judicial housekeeping measure" and was not meant to encourage forum shopping); see also *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990) (expressing the need to construe § 1404(a) so that neither party obtains a favorable change in the law by way of transfer).

⁸⁸ See 28 U.S.C. § 1404(a) (2012) (permitting transfer only from one district court to another); *Piper Aircraft*, 454 U.S. at 254 ("[Section 1404(a)] was designed as a 'federal housekeeping measure,' allowing easy change of venue within a unified federal system.").

⁸⁹ Compare *Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32 (1955) ("It is perfectly clear that the purpose of [§ 1404(a)] was to grant broadly the power of transfer for the convenience of parties and witnesses, in the interest of justice, whether dismissal under the doctrine of forum non conveniens would have been appropriate or not." (quoting *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F.2d 360, 362 (4th Cir. 1949))), with *id.* at 31 ("[Forum non conveniens] involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else." (quoting *All States Freight v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952))).

⁹⁰ See *id.* at 32 (construing § 1404 "to permit courts to grant transfers upon a lesser showing of inconvenience" than is needed for a dismissal under forum non conveniens).

⁹¹ See *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 580 (2013) ("[B]oth § 1404(a) and the *forum non conveniens* doctrine from which it derives entail the same balancing-of-interests standard"); *Norwood*, 349 U.S. at 32 (suggesting that courts should analyze the same factors for both transfer and forum non conveniens but that transfer requires a "lesser showing of inconvenience").

⁹² See *Atl. Marine*, 134 S. Ct. at 580 ("Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal

discussion of the two doctrines treats them as functionally equivalent.⁹³ The best interpretation is to harmonize these cases to preserve the protections afforded to litigants under both doctrines.

3. Interests of the States

In addition to threatening the interests of the parties, using federal forum non conveniens in diversity cases affects the interests of the states. States have the power to formulate the jurisdictional requirements of their own court systems.⁹⁴ Although states cannot use this authority to block litigants from bringing federal claims in state court, they have broad discretion to control the type and number of cases that their courts will hear.⁹⁵ Therefore, they can formulate the forum non conveniens doctrine to accomplish any purpose they deem fit.⁹⁶ The federal courts' application of federal forum non conveniens law in diversity cases diminishes this power. Because federal courts apply different forum non conveniens standards, they can dismiss cases that a state court is willing to hear.

Moreover, the federal courts can exert influence over a state's choice of its forum non conveniens standard. This is best illustrated by example. In 1978, Florida adopted the rule that a case could not be dismissed for forum non conveniens where either of the parties to the suit was a Florida resident.⁹⁷ The court reasoned that Florida had a "fundamental interest in resolving controversies involving its citizens," such that providing

with transfer."); *Norwood*, 349 U.S. at 32 ("The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer.").

⁹³ See *Atl. Marine*, 134 S. Ct. at 580.

⁹⁴ See *Broderick v. Rosner*, 294 U.S. 629, 642-43 (1935) ("A State may adopt such system of courts and form of remedy as it sees fit."); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) (espousing the rule that states have broad authority to legislate to control their own jurisdictions).

⁹⁵ See *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934) ("The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution.").

⁹⁶ In fact, states were engaging in this practice long before the Supreme Court approved the use of forum non conveniens in the federal courts. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 450 (1994) (recognizing that forum non conveniens was adopted by the states before its formal recognition in the federal courts); Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 911-12 (1947) (finding evidence that the states had been using forum non conveniens at least as far back as 1929).

⁹⁷ *Seaboard Coast Line R.R. Co. v. Swain*, 362 So. 2d 17, 18 (Fla. 1978) ("[A] case may be dismissed from the Florida courts in favor of a more convenient forum in another state only where none of the parties involved in the suit are residents of this state."); *Houston v. Caldwell*, 359 So. 2d 858, 861 (Fla. 1978) ("[W]e hold that the doctrine of forum non conveniens is inapplicable to any suit properly filed in this state where either party is a resident of Florida."), *abrogated by Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86 (Fla. 1996).

a forum for its citizens' disputes was more important than furthering the convenience of the parties.⁹⁸

In 1985, the United States Court of Appeals for the Eleventh Circuit held that it was proper for district courts to apply federal forum non conveniens law in diversity cases.⁹⁹ Since defendants who are citizens of the state in which they are being sued cannot remove to federal court,¹⁰⁰ this created problems for the Florida standard. The Florida courts recognized that their standard—adopted for the purpose of settling Florida disputes—was systematically disadvantaging Florida defendants.¹⁰¹ Unlike nonresident defendants who had the opportunity to remove and argue dismissal under the federal version of forum non conveniens, resident defendants could not raise a forum non conveniens argument.¹⁰² In other words, because “Florida [was] appl[ying] a less vigorous doctrine of forum non conveniens, the state actually [was] disadvantaging some of its own residents.”¹⁰³ For this reason and because of other negative results created by the state standard,¹⁰⁴ the Florida Supreme Court felt compelled to adopt the federal standard of forum non conveniens.¹⁰⁵ Florida has continued to develop its forum non conveniens doctrine to more closely mirror the federal standard.¹⁰⁶

This case demonstrates the undue influence that the federal courts may exert—although indirectly—on a state's determination of its jurisdictional rules. Such a result cannot be squared with the states' broad power to control the jurisdiction of their own courts.¹⁰⁷ Considering this problem in conjunction with the other inequities resulting from defendants using removal for the purpose of having a case dismissed under forum non

⁹⁸ *Houston*, 359 So. 2d at 861.

⁹⁹ *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1219 (11th Cir. 1985).

¹⁰⁰ See 28 U.S.C. § 1441(b)(2) (2012).

¹⁰¹ See *Kinney Sys.*, 674 So. 2d at 88 (“A Florida lawsuit filed against a non-Florida defendant sometimes can be mandatorily removed to federal court and there dismissed based on the federal doctrine of forum non conveniens, as happened in *Sibaja v. Dow Chemical Co.* However, when a defendant is a Florida resident, removal may not be permitted.” (citation omitted)), *holding modified on other grounds* by *Cortez v. Palace Resorts, Inc.*, 123 So. 3d 1085 (Fla. 2013).

¹⁰² See *id.*

¹⁰³ *Id.*

¹⁰⁴ The court was also concerned about “additional burdens imposed upon Florida's trial courts over and above those caused by disputes with substantial connections to state interests.” *Id.*

¹⁰⁵ See *id.* at 93 (“[W]e are persuaded that the time has come for Florida to adopt the federal doctrine of forum non conveniens.”).

¹⁰⁶ *Cortez v. Palace Resorts, Inc.*, 123 So. 3d 1085, 1095 (Fla. 2013) (clarifying that the Florida forum non conveniens rule, like the federal rule, affords less deference to the plaintiff's choice of forum only where the plaintiff is a non-U.S. resident).

¹⁰⁷ See *supra* notes 94-95 and accompanying text.

conveniens,¹⁰⁸ the courts—and ultimately Congress—must take action to prevent defendants from engaging in this practice.

III. THE PROPOSED REMEDY

A. *Waiver as a Workable Solution*

The easiest—and most practical—way to prevent defendants from engaging in this behavior is for courts to require defendants to forfeit the *forum non conveniens* argument when they remove to federal court. This remedy should be limited to those cases where the state *forum non conveniens* doctrine would not dismiss. This would directly cut off defendants' unjust use of *forum non conveniens* to disadvantage plaintiffs.

Courts have adopted waiver in a range of situations to promote judicial efficiency and fairness.¹⁰⁹ Adopting waiver in this context will make defendants use removal in a way more consistent with its intended purpose. Defendants are not required to remove diversity cases¹¹⁰ to federal court, but instead can elect whether removal would be advantageous.¹¹¹ Because removal is voluntary, courts are more willing to find that defendants who remove have consented to the jurisdiction of the federal court.¹¹² This is consistent with the accepted purpose of diversity jurisdiction, namely, providing an unbiased forum to adjudicate the dispute.¹¹³ If defendants are

¹⁰⁸ See *supra* subsections II.B.1-2.

¹⁰⁹ See, e.g., *Image Technical Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1356-57 (9th Cir. 1998) (“[Waiver] applies when a party attempts to raise a new issue in its reply brief, because an issue advanced only in reply provides the appellee no opportunity to meet the contention.” (internal quotation marks and brackets omitted)); *Heller v. Equitable Life Assurance Soc’y of the U.S.*, 833 F.2d 1253, 1261 (7th Cir. 1987) (adopting waiver when a party raises an argument for the first time on appeal because trial judges should not be “obligated to conduct a search for other issues”).

¹¹⁰ Under § 1441, defendants can also remove cases where the case involves a federal question. See 28 U.S.C. § 1441(a) (2012); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (holding that defendants can remove cases where federal question jurisdiction lies because they originally could have been filed in the federal court). However, that type of case is not implicated by this Comment because it would not be subject to *Erie* analysis.

¹¹¹ See 28 U.S.C. § 1441(a) (“[A]ny 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 . . .” (emphasis added)).

¹¹² See, e.g., *Sayles v. Nw. Ins. Co.*, 21 F. Cas. 608, 608 (Curtis, Circuit Justice, C.C.D.R.I. 1854) (No. 12,421) (finding that, by removing, a defendant “waive[s] any personal privilege he might have had to be sued in another [court]” and upholding jurisdiction against the defendant’s challenge, even though the case could not have been originally maintained in the federal court to which it was removed).

¹¹³ Courts have continually stated that the purpose of allowing defendants to remove when there is complete diversity of citizenship is “to prevent the plaintiff from obtaining any advantage against him by reason of prejudice or local influence.” *Hanrick v. Hanrick*, 153 U.S. 192, 198 (1894);

removing cases to federal court solely for the purpose of obtaining an unbiased forum, there is no injustice in forcing them to waive arguments to forum non conveniens, especially where the choice to remove is voluntary. Although the courts will take away a tool that defendants use periodically to effectuate dismissal of cases, adopting waiver is not unfair because there was never any intention for defendants to use removal for this purpose. Instead, once this rule is established, defendants can include it in their calculus when determining whether or not it is advantageous to remove.

Courts have adopted waiver-by-removal in other similar cases. For example, the Supreme Court has recognized that a state waives its Eleventh Amendment argument to sovereign immunity when it removes to federal court.¹¹⁴ The Court reasoned that by removing, a state “voluntarily invoke[s] the federal court’s jurisdiction” and waives any argument that it could not be sued in federal court.¹¹⁵ The policy underlying the decision in *Lapides* was motivated by a fear that without waiver-by-removal, states would be able to exploit procedural rules to obtain unfair advantages.¹¹⁶

When a defendant removes for the purpose of invoking federal forum non conveniens doctrine, the same injustice occurs. Although the sovereign immunity cases rely primarily on the well-settled notion that voluntary actions by the State waive immunity,¹¹⁷ the policy concerns address the inherent unfairness of allowing defendants to use removal as a tool to obtain strategic advantages in a case. In drafting the Class Action Fairness Act of 2005 (CAFA),¹¹⁸ Congress specifically excluded class actions brought against states from the statute’s purview in order to prevent states from exploiting removal solely to argue sovereign immunity in the federal courts.¹¹⁹ Because

see also Ry. Co. v. Whitton, 80 U.S. (13 Wall.) 270, 289 (1871) (interpreting the purpose of diversity jurisdiction as preventing unfairness in state court proceedings).

¹¹⁴ *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002).

¹¹⁵ *Id.*

¹¹⁶ *See id.* at 621 (expressing the concern that adopting the State’s Eleventh Amendment position would allow “unfair tactical advantages” and make jurisdictional rules too unclear).

¹¹⁷ *See* *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) (“[W]here a State voluntarily becomes a party to a cause, and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.” (emphasis added)).

¹¹⁸ Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

¹¹⁹ *See* 28 U.S.C. § 1332(d)(5)(A) (2012) (stating that the CAFA jurisdictional provisions do not apply to actions where “the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief”); S. REP. NO. 109-14, at 42 (2005) (“The purpose of the ‘state action’ cases provision is to prevent states, state officials, or other governmental entities from dodging legitimate claims by removing class actions to federal court and then arguing that the federal courts are constitutionally prohibited from granting the requested relief.”); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1453-54 (2008) (“It is apparent

a defendant's use of removal to argue dismissal under federal forum non conveniens implicates the same policy concerns,¹²⁰ courts should import the concept of waiver.

Federal courts may be adverse to adopting waiver as the solution to this problem. Adopting waiver in this context would completely eliminate a judge's ability to evaluate the convenience factors in a subset of cases—albeit a small subset—which would undercut the discretion and flexibility traditionally afforded to federal judges to dismiss cases that have no connection to the forum.¹²¹ Courts may also have an institutional self-interest in preserving the right to dismiss these cases to avoid potential problems, such as inaccuracy and inefficiency in adjudication.¹²²

These are valid concerns, but they underestimate the need for and narrow scope of the remedy. It is necessary for courts to curtail defendants' abusive use of procedural tools to disadvantage plaintiffs. The remedy is narrowly tailored to apply only in cases where this abuse is actually occurring: when the state would not dismiss under its own formulation of the forum non conveniens doctrine.¹²³ A defendant who chooses not to remove will not be able to obtain a dismissal in federal court. And although there are incentives to file in U.S. courts,¹²⁴ the remedy of waiver is further limited because it would be available only in cases where forum non conveniens arguments are appropriate¹²⁵ that were originally filed in state court and then removed to federal court.

Without either additional consideration of the concerns highlighted above or explicit guidance from Congress, courts may be unwilling to implement the solution of waiver-by-removal. Courts have limited the applicability of

that . . . [§ 1332(d)(5)(A)] acknowledges the unfairness of permitting state officials to remove cases, only to plead the bar of sovereign immunity.”).

¹²⁰ See *supra* subsection II.B.1.

¹²¹ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (highlighting the discretionary nature of the forum non conveniens inquiry and the broad authority conferred to district court judges); see also *id.* at 249-50 (“If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.”).

¹²² *Cf. id.* at 251 (recognizing that the doctrine of forum non conveniens is formulated in part to “avoid conducting complex exercises in comparative law”).

¹²³ Where the state standard would have dismissed the case anyway, there is no inequity. Hence, these cases will arise only where the state has no forum non conveniens doctrine or one less robust than the federal doctrine.

¹²⁴ See *supra* note 29.

¹²⁵ These cases will be restricted to those that involve either foreign parties or events that occurred abroad. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) (suggesting that forum non conveniens applies only in cases where the alternative forum is a foreign court).

waiver in other contexts to ensure the equity of the remedy.¹²⁶ Hence, Congress should ultimately legislate in this area to solve this problem.

B. *Amendment of the Removal Statute as the Preferred Solution*

Congress has a range of legislative options to address this problem. For example, Congress could adopt a statute that requires federal courts sitting in diversity to apply state forum non conveniens law.¹²⁷ Although this statute would probably be workable, it is not ideal because it would require most of the federal courts to reverse course on a settled practice.¹²⁸

A better option is for Congress to codify the requirement that defendants waive their argument for a forum non conveniens dismissal upon removal if the state standard would not warrant dismissal. This amendment would essentially mirror the sovereign immunity carve-out in CAFA by selecting a class of cases in which defendants waive arguments when they remove a case to federal court.¹²⁹ Just as the CAFA sovereign immunity exception exists to prevent the inequity of defendants removing solely for the purpose of getting the case dismissed,¹³⁰ this same carve-out should be recognized for the doctrine of forum non conveniens to prevent the unfairness that results from the same maneuver. At least one notable civil procedure scholar has already recognized that this would be a viable option.¹³¹

¹²⁶ See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (recognizing an exception to the general rule of waiver when the issue was not ruled on in a lower court “where the proper resolution is beyond any doubt or where ‘injustice might otherwise result’” (citations omitted)); *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 439 (7th Cir. 1994) (allowing courts to consider new factual allegations on appeal when reviewing a Rule 12(b)(6) dismissal as long as they are consistent with the complaint).

¹²⁷ Under the *Hanna v. Plumer* analysis, the federal statute would govern the controversy and could be struck down only if it violated Congress’s authority under the Constitution. See 380 U.S. 460, 471-72 (1965).

¹²⁸ The problem identified in this Comment stems directly from the federal courts’ treatment of forum non conveniens under *Erie*. The proposed statute would have the benefit of addressing the identified unfairness without requiring the Supreme Court to decide whether the federal courts have reached the right result under *Erie*. However, because almost all of the circuits have concluded that federal forum non conveniens law applies in diversity cases, see *supra* note 45, it may be unwise to require so many federal courts to change their practices.

¹²⁹ See *supra* note 119 and accompanying text.

¹³⁰ See *Burbank*, *supra* note 119, at 1453-54 (discerning that the sovereign immunity exception in CAFA operates to prevent the injustice of states using removal to obtain unfair advantages).

¹³¹ See *id.* at 1454 n.52 (arguing that “[t]he federal courts could learn a valuable lesson from [the CAFA sovereign immunity exception] in their administration of the forum non conveniens doctrine in diversity cases” because it is unfair that “state courts that do not have any [forum non conveniens] doctrine, or that follow a version that is less robust, be deprived of the power to hear a case” when the removing party makes that argument for dismissal).

However, the best option is to amend the removal statute¹³² to require federal courts to remand, rather than dismiss, removed cases to the state court after concluding that a case is inconvenient under federal forum non conveniens. Adopting remand in this context would directly address the problem identified in this Comment. Instead of dismissing cases deemed inconvenient under federal law, federal courts would send the cases back to the state court for an independent forum non conveniens analysis. This would keep intact the federal courts' current practice of applying federal forum non conveniens in diversity cases. Nevertheless, remand would allow states to apply their own forum non conveniens doctrine and thus retain jurisdiction when their forum non conveniens law does not compel dismissal. This amendment would allow both state and federal courts to continue to operate exactly as they do now, while permitting states to hear cases that they deem important and preventing defendants from exploiting procedural rules to disadvantage plaintiffs.

CONCLUSION

Stare decisis requires that courts follow the rules established in previous cases.¹³³ But it does not create a straightjacket that binds courts forever. Judges are free to reevaluate old rules and revise them when they are outdated or unworkable.¹³⁴

This is the case with the federal courts' *Erie* analysis of the forum non conveniens doctrine. Federal courts have almost universally held that federal forum non conveniens law applies in diversity cases.¹³⁵ Hence, defendants can obtain a change in forum non conveniens law by removing from state

¹³² 28 U.S.C. § 1441 (2012).

¹³³ See *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580, 583 (7th Cir. 2005) ("The essence of stare decisis is that the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases."); *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1570 (Fed. Cir. 1993) (describing stare decisis as the creation of binding legal precedent on future cases before the same court or a lower court); *Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 939 (Cal. 1962) (en banc) ("Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction."). Obviously, the Supreme Court is not constrained by this policy. See *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991) (recognizing that, although it is good policy, the Court is not required to follow prior decisions).

¹³⁴ See *Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) ("[A] decision may properly be overruled if seriously out of keeping with contemporary views or passed by in the development of the law or proved to be unworkable . . ." (quoting *EEOC v. Trabucco*, 791 F.2d 1, 4 (1st Cir. 1986))); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) ("[Courts are] not absolutely bound by [their previous decisions], and must give fair consideration to any substantial argument that a litigant makes for overruling a previous decision.").

¹³⁵ See *supra* notes 44-47 and accompanying text.

courts. This provides an incentive for defendants to exploit the removal process, bringing the case to federal court solely for the purpose of having it dismissed under forum non conveniens.

This has a particularly unfair effect in cases where the state has no forum non conveniens doctrine or a forum non conveniens doctrine that is less robust than the federal standard.¹³⁶ Even though the state court would have allowed the case to proceed, defendants can now secure dismissal in the federal court. This practice has further effects beyond the scope of the forum non conveniens doctrine itself, diminishing both parties' and states' interests. These concerns have not been adequately considered by courts in determining how forum non conveniens should be analyzed under the *Erie* doctrine.

To eliminate these inequities, I propose that federal courts adopt a rule that defendants waive their arguments to forum non conveniens in the federal court when they remove from a state where the case would not be dismissed under the state forum non conveniens doctrine. If courts will not endorse this rule, then Congress should codify it in the removal statute or require remand to the state courts for an independent forum non conveniens determination whenever federal forum non conveniens authorizes dismissal.

¹³⁶ See Burbank, *supra* note 119, at 1454 & n.52.

APPENDIX

Table 1: State Formulations of the Forum Non Conveniens Doctrine

State	Description
<i>States Following Standard Similar or Identical to Federal Forum Non Conveniens (37 & D.C.)</i>	
Alaska ¹³⁷	
Arizona ¹³⁸	
Arkansas ¹³⁹	
California ¹⁴⁰	
Connecticut ¹⁴¹	
D.C. ¹⁴²	
Florida ¹⁴³	
Illinois ¹⁴⁴	
Indiana ¹⁴⁵	
Iowa ¹⁴⁶	

¹³⁷ Bromley v. Mitchell, 902 P.2d 797, 800-01 (Alaska 1995); Crowson v. Sealaska Corp., 705 P.2d 905, 907 (Alaska 1985).

¹³⁸ Parra v. Cont'l Tire N. Am., Inc., 213 P.3d 361, 364 (Ariz. Ct. App. 2009); Cal Fed Partners *ex rel.* Cal Fed Syndications v. Heers, 751 P.2d 561, 562-63 (Ariz. Ct. App. 1987).

¹³⁹ Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Gadbury-Swift, 362 S.W.3d 291, 294-95 (Ark. 2010).

¹⁴⁰ Stangvik v. Shiley Inc., 819 P.2d 14, 18-21 (Cal. 1991) (en banc).

¹⁴¹ Durkin v. Intevac, Inc., 782 A.2d 103, 111-12 (Conn. 2001).

¹⁴² Blake v. Prof'l Travel Corp., 768 A.2d 568, 572 (D.C. 2001).

¹⁴³ Cortez v. Palace Resorts, Inc., 123 So. 3d 1085, 1095 (Fla. 2013); Kinney Sys., Inc. v. Cont'l Ins. Co., 674 So. 2d 86, 88 (Fla. 1996).

¹⁴⁴ Dawdy v. Union Pac. R.R. Co., 797 N.E.2d 687, 693-96 (Ill. 2003); McClain v. Ill. Cent. Gulf R.R. Co., 520 N.E.2d 368, 372-74 (Ill. 1988).

¹⁴⁵ Anyango v. Rolls-Royce Corp., 971 N.E.2d 654, 659-63 (Ind. 2012).

¹⁴⁶ *In re* Marriage of Kimura, 471 N.W.2d 869, 878-79 (Iowa 1991); Silversmith v. Kenosha Auto Transp., 301 N.W.2d 725, 727 (Iowa 1981).

State	Description
Kansas ¹⁴⁷	
Kentucky ¹⁴⁸	
Maine ¹⁴⁹	
Maryland ¹⁵⁰	
Massachusetts ¹⁵¹	
Michigan ¹⁵²	
Minnesota ¹⁵³	
Mississippi ¹⁵⁴	
Missouri ¹⁵⁵	
Nebraska ¹⁵⁶	
Nevada ¹⁵⁷	
New Hampshire ¹⁵⁸	

¹⁴⁷ Volt Delta Res., Inc. v. Devine, 740 P.2d 1089, 1094 (Kan. 1987); Envtl. Ventures, Inc. v. Alda Servs. Corp., 868 P.2d 540, 546 (Kan. Ct. App. 1994).

¹⁴⁸ Lykins Enters., Inc. v. Felix, Nos. 06-142, 06-624, 2007 WL 4139637, at *4 (Ky. Nov. 21, 2007); Beaven v. McAnulty, 980 S.W.2d 284, 287-88 (Ky. 1998), *superseded on other grounds by* KY. REV. STAT. ANN. § 452.105 (2000).

¹⁴⁹ Corning v. Corning, 563 A.2d 379, 380 (Me. 1989).

¹⁵⁰ Johnson v. G.D. Searle & Co., 552 A.2d 29, 30-31 (Md. 1989); Nace v. Miller, 28 A.3d 737, 751-52 (Md. Ct. Spec. App. 2011).

¹⁵¹ New Amsterdam Cas. Co. v. Estes, 228 N.E.2d 440, 443-44 (Mass. 1967).

¹⁵² Radeljak v. Daimlerchrysler Corp., 719 N.W.2d 40, 42-43 (Mich. 2006); Cray v. Gen. Motors Corp., 207 N.W.2d 393, 398-99 (Mich. 1973).

¹⁵³ Paulownia Plantations de Panama Corp. v. Rajamannan, 793 N.W.2d 128, 137 (Minn. 2009); Bergquist v. Medtronic, Inc., 379 N.W.2d 508, 511-12 (Minn. 1986).

¹⁵⁴ Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co., 728 So. 2d 573, 575-76 (Miss. 1999).

¹⁵⁵ State *ex rel.* Wyeth v. Grady, 262 S.W.3d 216, 220 (Mo. 2008) (en banc); Anglim v. Mo. Pac. R.R. Co., 832 S.W.2d 298, 302-03 (Mo. 1992) (en banc).

¹⁵⁶ Ameritas Inv. Corp. v. McKinney, 694 N.W.2d 191, 202 (Neb. 2005).

¹⁵⁷ Eaton v. Second Judicial Dist. Court, 616 P.2d 400, 401 (Nev. 1980), *overruled on other grounds by* Pan v. Eighth Judicial Dist. Court *ex rel.* Cnty. of Clark, 88 P.3d 840 (Nev. 2004) (per curiam).

¹⁵⁸ Digital Equip. Corp. v. Int'l Digital Sys. Corp., 540 A.2d 1230, 1232 (N.H. 1988).

State	Description
New Jersey ¹⁵⁹	
New Mexico ¹⁶⁰	
New York ¹⁶¹	
North Carolina ¹⁶²	
North Dakota ¹⁶³	
Ohio ¹⁶⁴	
Oklahoma ¹⁶⁵	
Pennsylvania ¹⁶⁶	
Rhode Island ¹⁶⁷	
South Dakota ¹⁶⁸	
Tennessee ¹⁶⁹	
Texas ¹⁷⁰	

¹⁵⁹ *Kurzke v. Nissan Motor Corp.* in U.S.A., 752 A.2d 708, 710-12 (N.J. 2000); *In re Vioxx Litig.*, 928 A.2d 935, 937-38 (N.J. Super. Ct. App. Div. 2007).

¹⁶⁰ *First Fin. Trust Co. v. Scott*, 929 P.2d 263, 264 (N.M. 1996); *Buckner v. Buckner*, 622 P.2d 242, 243-44 (N.M. 1981).

¹⁶¹ *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245, 247-48 (N.Y. 1984); *In re Oxycontin II*, 908 N.Y.S.2d 239, 242 (N.Y. App. Div. 2010).

¹⁶² *Motor Inn Mgmt., Inc. v. Irvin-Fuller Dev. Co.*, 266 S.E.2d 368, 371 (N.C. 1980).

¹⁶³ *Vicknair v. Phelps Dodge Indus., Inc.*, 767 N.W.2d 171, 176-78 (N.D. 2009).

¹⁶⁴ *State ex rel. Smith v. Cuyahoga Cnty. Court of Common Pleas*, 832 N.E.2d 1206, 1209-10 (Ohio 2005) (per curiam); *Chambers v. Merrell-Dow Pharm., Inc.*, 519 N.E.2d 370, 372-74 (Ohio 1988).

¹⁶⁵ *Binder v. Shepard's Inc.*, 133 P.3d 276, 278-80 (Okla. 2006) (per curiam); *Conoco Inc. v. Agrico Chem. Co.*, 115 P.3d 829, 833 (Okla. 2004).

¹⁶⁶ *Rini v. N.Y. Cent. R.R. Co.*, 240 A.2d 372, 373-74 (Pa. 1968); *Bochetto v. Piper Aircraft Co.*, 2014 PA Super 120, 8-11.

¹⁶⁷ *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1182-85 (R.I. 2008).

¹⁶⁸ *Rothluebbbers v. Obee*, 668 N.W.2d 313, 317-18 (S.D. 2003).

¹⁶⁹ *Zurick v. Inman*, 426 S.W.2d 767, 771-72 (Tenn. 1968); *Luna v. Sherwood*, 208 S.W.3d 403, 405-06 (Tenn. Ct. App. 2006).

¹⁷⁰ *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 315 S.W.3d 28, 32 (Tex. 2010) (per curiam).

State	Description
Utah ¹⁷¹	
Washington ¹⁷²	
West Virginia ¹⁷³	
Wisconsin ¹⁷⁴	
<i>States Indicating a Willingness to Follow Federal Forum Non Conveniens (3)</i>	
Hawaii	The Hawaii Supreme Court has recognized that the forum non conveniens inquiry requires an analysis of the availability of an alternative forum. ¹⁷⁵
Oregon	Multiple cases have assumed that district courts can use the federal forum non conveniens standard to dismiss cases even though it has not been formally adopted. ¹⁷⁶
Virginia	The Virginia Supreme Court has included the <i>Gilbert</i> factors in the “good cause” requirement for dismissal under forum non conveniens. ¹⁷⁷

¹⁷¹ *Energy Claims Ltd. v. Catalyst Inv. Grp. Ltd.*, 325 P.3d 70, 77-78 (Utah 2014); *Summa Corp. v. Lancer Indus., Inc.*, 559 P.2d 544, 546 (Utah 1977).

¹⁷² *Sales v. Weyerhaeuser Co.*, 177 P.3d 1122, 1124-25 (Wash. 2008) (en banc); *Johnson v. Spider Staging Corp.*, 555 P.2d 997, 999-1000 (Wash. 1976) (en banc).

¹⁷³ *Mace v. Mylan Pharm., Inc.*, 714 S.E.2d 223, 231-33 (W. Va. 2011); *Norfolk & W. Ry. Co. v. Tsapis*, 400 S.E.2d 239, 242-44 (W. Va. 1990).

¹⁷⁴ *Lau v. Chi. & N. W. Ry. Co.*, 111 N.W.2d 158, 162-63 (Wis. 1961).

¹⁷⁵ *See UFJ Bank Ltd. v. Ieda*, 123 P.3d 1232, 1240 (Haw. 2005).

¹⁷⁶ *See Maricich v. Lacoss*, 129 P.3d 193, 195 n.1 (Or. Ct. App. 2006); *Novich v. McClean*, 18 P.3d 424, 430 (Or. Ct. App. 2001).

¹⁷⁷ *See Va. Elec. & Power Co. v. Dungee*, 520 S.E.2d 164, 170-71 (Va. 1999).

State	Description
<i>States that Have Not Yet Adopted a Specific Formulation of the Forum Non Conveniens Doctrine (1)</i>	
Idaho	Idaho has not yet promulgated a forum non conveniens standard because its courts have failed to reach the question on procedural grounds. ¹⁷⁸
<i>States Adopting More Limited Versions of Forum Non Conveniens (6)</i>	
Alabama	Alabama requires that defendants show the plaintiff's claims arose outside the state before deciding whether a more appropriate alternative forum exists. ¹⁷⁹
Colorado	Colorado has effectively eliminated forum non conveniens dismissals in cases brought by resident plaintiffs. ¹⁸⁰
Delaware	Delaware requires defendants to show that they have met a range of factors similar to the federal factors and to show with particularity that there is an "overwhelming hardship." ¹⁸¹
South Carolina	The South Carolina Supreme Court has expressly ruled that it is inappropriate to dismiss a case brought by a resident plaintiff under forum non conveniens. ¹⁸²
Vermont	Vermont applies forum non conveniens as an "exception, not the rule" whose "cardinal purpose is to prevent the plaintiff from seeking to vex, harass, or oppress the defendant by inflicting upon him [unnecessary] expenses." ¹⁸³

¹⁷⁸ See, e.g., *Rasmuson v. Walker Bank & Trust Co.*, 625 P.2d 1098, 1102 (Idaho 1981); *Marco Distrib., Inc. v. Biehl*, 555 P.2d 393, 396-97 (Idaho 1976).

¹⁷⁹ See *Malsch v. Bell Helicopter Textron, Inc.*, 916 So. 2d 600, 602 (Ala. 2005).

¹⁸⁰ See *McDonnell-Douglas Corp. v. Lohn*, 557 P.2d 373, 373-74 (Colo. 1976) (en banc); *UIH-SFCC Holdings, L.P. v. Brigato*, 51 P.3d 1076, 1078-79 (Colo. Ct. App. 2002).

¹⁸¹ See *Martinez v. E.I. DuPont de Nemours & Co.*, 86 A.3d 1102, 1104 (Del. 2014); *Marland Indus. Contractors, Inc. v. Caribbean Petrol. Ref., L.P.*, 777 A.2d 774, 778 (Del. 2001).

¹⁸² See *Chapman v. S. Ry. Co.*, 95 S.E.2d 170, 173 (S.C. 1956).

¹⁸³ See *Burrington v. Ashland Oil Co.*, 356 A.2d 506, 510 (Vt. 1976).

State	Description
Wyoming	The Wyoming courts preclude dismissal as long as the suit is “based . . . on rational grounds” and “not brought for purposes of harassment.” ¹⁸⁴
<i>States Restricting Forum Non Conveniens to a Limited Range of Cases (2)</i>	
Louisiana	Louisiana allows forum non conveniens arguments only for federal causes of action and specifically eliminates its use for cases brought under the Jones Act or federal maritime law. ¹⁸⁵ Louisiana has also limited the factors considered for forum non conveniens to “convenience of the parties and the witnesses” and “the interest of justice.” ¹⁸⁶
Georgia	The Georgia Supreme Court has limited forum non conveniens to cases in which it is authorized by statute and cases where nonresidents bring suit for injuries that occurred outside the United States. ¹⁸⁷
<i>States Questioning Whether the Doctrine of Forum Non Conveniens Is Generally Applicable (1)</i>	
Montana	Montana does not allow forum non conveniens in FELA cases ¹⁸⁸ and has resisted its application in other contexts, ¹⁸⁹ but has applied the doctrine in at least one case. ¹⁹⁰

¹⁸⁴ See *W. Tex. Utils. Co. v. Exxon Coal USA, Inc.*, 807 P.2d 932, 935 (Wyo. 1991).

¹⁸⁵ See *Miller v. Am. Dredging Co.*, 595 So. 2d 615, 617 (La. 1992), *aff'd*, 510 U.S. 443 (1994); LA. CODE CIV. PROC. ANN. art. 123 (1989).

¹⁸⁶ See *Holland v. Lincoln Gen. Hosp.*, 48 So. 3d 1050, 1054-55 (La. 2010).

¹⁸⁷ See *Gonzalez v. Dep't of Transp.*, 610 S.E.2d 527, 528-29 (Ga. 2005); *AT & T Corp. v. Sigala*, 549 S.E.2d 373, 377 (Ga. 2001); *Holtsclaw v. Holtsclaw*, 496 S.E.2d 262, 263 (Ga. 1998).

¹⁸⁸ See *Rule v. Burlington N. & Santa Fe Ry. Co.*, 106 P.3d 533, 536 (Mont. 2005).

¹⁸⁹ See *State ex rel. Burlington N. R.R. Co. v. Dist. Court*, 891 P.2d 493, 498 (Mont. 1995).

¹⁹⁰ See *San Diego Gas & Elec. Co. v. Gilbert*, 329 P.3d 1264, 1271-72 (Mont. 2014) (relying heavily on a mandatory contractual forum selection clause to conclude that noncontractual issues should be dismissed under forum non conveniens).