FRAUDULENT REMOVAL

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INTRODUCTION

In *TransUnion LLC v. Ramirez*,[1] the Supreme Court held that individuals claiming a violation of a federal statute had no standing unless they could show they suffered a concrete injury.[2] The availability of a statutory penalty alone, the Court explained, was not enough to confer standing to sue in federal court.[3] This narrowing of federal standing, as Justice Thomas observed in dissent, might lead plaintiffs to bring federal claims in state courts with more permissive standing rules.[4] If plaintiffs followed this advice, however, defendants might remove cases from state to federal court and then try to kill them on standing grounds. By doing so, though, the defendants essentially admit that the removals were improper because the federal court lacked jurisdiction in the first place. While this maneuver is not new, recent standing decisions in *TransUnion* and *Spokeo, Inc. v. Robins*[5] will only make it more appealing. Indeed, in another case last Term, the Court acknowledged that a newly announced rule of appellate jurisdiction also might increase the frequency with which defendants offer questionable arguments for removal from state court.[6]

This Essay draws attention to this phenomenon and gives it a name: fraudulent removal. Removal is the process by which a defendant in state court seeks to transfer a case to federal court, provided that the

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1 141 S. Ct. 2190 (2021).

2 *Id.* at 2200.

3 *Id.* at 2205.

4 *Id.* at 2224 n.9 (Thomas, J., dissenting) ("By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions.").

5 136 S. Ct. 1540 (2016).

6 BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1542–43 (2021) ("[Plaintiff] warns that our interpretation will invite gamesmanship: Defendants may frivolously add § 1442 or § 1443 to their other grounds for removal, all with an eye to ensuring appellate review down the line if the case is remanded." *Id.* at 1542.). The case involved the rather arcane issue of appellate review of remand orders that send removed cases back to state court. *Id.* at 1536. Remand orders are generally not reviewable, but there is an exception for cases involving federal officers. *Id.* The Court held that an appellate court may consider the entire remand motion as long as the federal officer question is among the issues presented. *Id.* at 1538, 1543.

federal court would have had original jurisdiction over the proceeding.[7] "Fraudulent removal" occurs when a removing defendant's assertion of federal jurisdiction is made in bad faith or is wholly insubstantial.[8]

The clearest example of fraudulent removal is when a defendant removes a case to federal court and plans to immediately argue that the federal court lacks subject matter jurisdiction. This self-incriminating motion shows that the defendant knew or should have known that removal was improper. For example, in *Mocek v. Allsaints USA Ltd.*,[9] the plaintiff filed a putative consumer class action in state court.[10] Although the plaintiff sued under a federal statute, the state and federal courts had concurrent jurisdiction.[11] The defendant removed and a month later moved to dismiss (with prejudice) for lack of standing.[12] The plaintiff then sought an order to remand the case.[13] The plaintiff argued that it was the defendant's burden to prove that the federal court had jurisdiction under the removal statute and that the defendant had admitted that the court lacked jurisdiction in its motion to dismiss, thus clarifying that it could not meet its burden for removal in the first place.[14] The district court ultimately remanded the case to state court and awarded attorney fees to the plaintiff for litigating the motion on grounds that the defendant should have known "that with no party asking for the merits of plaintiff's claim to be decided in federal court, and both sides arguing against federal jurisdiction, the only possible outcome was for the case to end up right back where it started: in state court."[15]

As this example suggests, fraudulent removal wastes judicial resources, needlessly delays proceedings, and offends notions of federalism. It is different from merely forum shopping, but instead is more like a form of misrepresentation, a fraud upon the court. If litigation were

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[7] *See* 28 U.S.C. § 1441.

[8] Note that our definition of fraudulent removals differs from Professor Lonny Hoffman and Erin Mendez's idea of "wrongful removals," which they define as cases in which defendants seek to extend the existing law of removal to situations the authors find exorbitant. *See* Lonny Hoffman & Erin Horan Mendez, *Wrongful Removals*, 71 FLA. L. REV. F. 220, 221 (2020) (defining wrongful removal as cases "in which defendants have invoked arguments to gain access to the federal forum that were — or, still are — highly questionable"). Most of their examples of wrongful removal would not be fraudulent under our definition. Note also that our definition differs from Professors Theodore Eisenberg and Trevor Morrison's idea of "erroneous removals," which they define to include any case that is removed and then remanded. *See* Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551, 551 (2005). Our fraudulent removals are a subset of erroneous removals. *See infra* note 30 and accompanying text. Our definition is closer to their "abusive removal," a topic they briefly mention but do not analyze deeply. *See* Eisenberg & Morrison, *supra*, at 561–62.

[9] 220 F. Supp. 3d 910 (N.D. Ill. 2016).

[10] *Id.* at 911.

[11] *Id.* at 912.

[12] *Id.* at 911, 913.

[13] *Id.* at 911.

[14] *Id.*

[15] *Id.* at 914–15.

a game, it would be cheating. But litigation is not a game. When a defendant removes, it should have both a colorable basis for arguing that the federal court has jurisdiction and the intention to argue that position zealously in support of its motion.

Fraudulent removal may not be rampant, but it exists. With the narrowing of Article III standing to sue, it may become an even larger problem for the courts. Defendants may be tempted to engage in fraudulent removal when they stand to benefit from it, such as when the cost that delay imposes on plaintiffs is worth the risk of fee shifting. Cases such as *Mocek* show that existing sanctions are not sufficient deterrents. The ability of the *Mocek* court to award attorney fees, while better than nothing for the plaintiff, did not stop the defendant from executing a fraudulent removal.

This Essay aims to assist courts in solving the problem of fraudulent removal by naming the phenomenon and proposing ways to curb it without waiting for legislative action. In the first Part of this Essay, we briefly explain the law of removal and when removal is fraudulent. We then show in Part II that fraudulent removal offends notions of federalism and fairness. In the final Part, we propose some solutions judges can adopt without any statutory changes to punish and deter fraudulent removal.

I. FRAUDULENT REMOVAL IN CONTEXT

Federal courts are courts of limited jurisdiction. Both the Constitution and federal statutes limit the subject matter jurisdiction of federal courts to discrete categories.[16] Most of these categories of federal jurisdiction are concurrent with those of state courts, meaning that plaintiffs in most federal cases could have filed their actions in state court.[17]

The overlapping jurisdiction of federal and state courts — and among state courts — means that many cases could be litigated in multiple forums. In general, plaintiffs choose the forum in which they file. Federal statutes also give defendants a role in forum selection. The removal statute, 28 U.S.C. § 1441(a), provides that a defendant can remove a case over which the federal courts have concurrent jurisdiction, subject to some exceptions and some limitations.[18] While a number of

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[16] *See* U.S. CONST. art. III, § 2, cl. 1 (describing the boundaries of judicial power); 28 U.S.C. § 1251 (providing original jurisdiction for the United States Supreme Court).

[17] *See, e.g.*, Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990) (discussing a "deeply rooted presumption in favor of concurrent state court jurisdiction" unless "Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim," *id.* at 459).

[18] For a recent example of thoughtful commentary on removal, see Joan Steinman, *Waiving Removal, Waiving Remand — The Hidden and Unequal Dangers of Participating in Litigation*, 71 FLA. L. REV. 689 (2019).

requirements have to be met for removal to be proper, the core requirement is that the federal court have subject matter jurisdiction over the case.[19] The defendant, as the movant on the motion to remove, bears the burden of proof on the question of the federal court's jurisdiction.[20] Upon removal, all activity in the state court must cease — as a practical matter, there is no more state case.[21] Not all removed cases stay in federal court, however. A plaintiff may seek remand to state court because the federal court lacked jurisdiction (or because the removal was otherwise defective).[22] In the event that the court orders remand, the removal statute permits the award of costs and fees, including attorney fees.[23]

One complexity in removed cases is the interaction between motions to remand and motions to dismiss. Both are preliminary motions filed at the outset of the case's arrival in federal court. Once a case is removed, if the plaintiff seeks a remand to state court and the defendant files a motion to dismiss, the court must decide the order of motions. That is, it must determine whether to hear the motion to dismiss on threshold grounds or the motion to remand first.[24]

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[19] 28 U.S.C. § 1441(a).

[20] *Id.* §§ 1441(a), 1446(a).

[21] *See id.* § 1446(d) (providing that after removal "the State court shall proceed no further unless and until the case is remanded"); 14C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3736 (4th ed.) (Westlaw) (last visited Nov. 24, 2021) ("[N]umerous courts have ruled that any post-removal proceedings in the state court are considered coram non judice and will be vacated by the federal court, even if the removal subsequently is found to have been improper and the case is remanded back to that state court." (footnotes omitted)).

[22] *See* Eisenberg & Morrison, *supra* note 8, at 564–68 (documenting empirically the rise in removals resulting in remands from 1979 to 2003). *But see* Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1925–26 (2009) (showing that this trend seemed to reverse by 2006). Our research revealed no definitive recent studies of removal and remand rates in the federal courts, illustrating the need for more descriptive statistics of court processes.

[23] Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The statute does not specify when the exercise of the discretion to award expenses is appropriate. The Supreme Court has explained that improper removal "delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources." Martin v. Franklin Cap. Corp., 546 U.S. 132, 140 (2005). The purpose of the fee provision is to prevent a waste of time and money for all participants. Accordingly, discretion in the awarding of fees should be exercised with these purposes in mind. "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Id.* at 141. The Court underscored that there was not a presumption in favor of fees and costs, explaining that there was "no heavy congressional thumb on either side of the scales." *Id.* at 139.

[24] Although the Supreme Court has held that a federal court cannot proceed on "hypothetical jurisdiction" and must determine that it has jurisdiction before ruling on the merits, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998), federal courts have significant discretion in deciding which threshold motion they will consider, *see* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 587–88 (1999) (holding that the district court may consider a personal jurisdiction motion before subject matter jurisdiction); Meyers v. Oneida Tribe of Indians of Wis., 836 F.3d 818, 821 (7th Cir. 2016) ("[A] federal court has leeway to choose among threshold grounds for denying audience to a

The availability of concurrent jurisdiction and removal invites both plaintiffs and defendants to try to maneuver cases into their preferred forums. Where there is concurrent jurisdiction, plaintiffs choosing between state and federal court will go to state court if that forum will offer the best expected outcome. Defendants, conversely, will remove if they conclude federal court would be preferable to state court.

Some of this maneuvering triggers judicial policing. Consider so-called fraudulent joinder. Imagine a plaintiff from Ohio sues a defendant from New York in Ohio state court under state law. To insulate the case against removal, plaintiff joins as a defendant an Ohio citizen — thus destroying complete diversity and depriving the federal court of diversity jurisdiction. The Wright and Miller treatise defines fraudulent joinder as "when the plaintiff plainly has not stated or cannot state a claim for relief against that non-diverse individual or entity under the applicable substantive law or does not intend to secure a judgment against that particular defendant."[25] The law has a response to this tactic: when defendant removes, a federal court invoking the doctrine of fraudulent joinder might permit removal despite the lack of complete diversity on grounds that the joinder of the nondiverse party was improper.[26] Courts are worried both about attempts at joinder in bad faith and about those that are clearly improper.

In other cases, plaintiffs might seek to maneuver cases into federal court when federal jurisdiction is not otherwise present. They might do so by manufacturing a federal claim and attaching state-law claims invoking supplemental jurisdiction. The Supreme Court has not permitted such manipulation either. In *Bell v. Hood*,[27] the Court explained that a complaint should be dismissed if the federal question claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and

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case on the merits." (citation omitted)); *see also* Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 874 (2018) (demonstrating flexibility in order of motions). *See generally* Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primary and Intrasuit Preclusion*, 63 FLA. L. REV. 301 (2011) (discussing optimal order of motions). The order in which a court reviews motions can have significant consequences for the plaintiff. If the federal court finds that it lacks jurisdiction, a removed case ordinarily will be remanded: it simply returns to the state court from which it came. But if a federal court elects to dismiss the case rather than remand it, that could have adverse consequences for the plaintiff's ability to continue to litigate in state court, such as the running of the statute of limitations. And, presumably, it would mean that the plaintiff would not be eligible for the fees available under the removal statute. We have more to say about this interaction in Part III below.

[25] 14C WRIGHT & MILLER, *supra* note 21, § 3723.1.

[26] Under the related doctrine of fraudulent misjoinder, a court might sever claims — both of which might be valid but are improperly joined to one another — in order to preserve federal jurisdiction in a removed case. *Id.*

[27] 327 U.S. 678 (1946).

frivolous."[28] Like fraudulent joinder, bad faith or wholly baseless claims might trigger this doctrine.[29]

Defendants, too, might manipulate the jurisdictional rules to their advantage. In this Essay, we are concerned with what might be thought of as the inverse of fraudulent joinder or wholly insubstantial pleading — what we call *fraudulent removal*. The idea is simple: defendants serve a notice of removal even though they know or should know that a federal court would lack subject matter jurisdiction. The case is removed and (at least should be) remanded, but, in the meantime, time and litigation dollars are spent on unnecessary process. Worse yet, sometimes a case will be dismissed rather than remanded, triggering further adverse consequences for plaintiffs. As with fraudulent joinder and *Bell v. Hood*, removals may be in bad faith or wholly insubstantial. Accordingly, and to maintain symmetry and coherence with these other doctrines, we define a fraudulent removal as a removal that is made in bad faith or is "wholly insubstantial," meaning it has no basis in law.[30]

To provide a little more detail, consider the following situations that might indicate fraudulent removal.[31] We begin with what we consider the quintessential type of fraudulent removal: the self-incriminating motion. As mentioned above, one requirement of removal is that the federal court would have had subject matter jurisdiction if the case had been originally filed in federal court. So what should we make of cases where defendants remove and then immediately file a motion to dismiss

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[28] *Id.* at 682–83; *see also id.* at 678, 685 (holding that federal jurisdiction over civil rights suit was proper).

[29] Though *Bell v. Hood* speaks in the disjunctive, at least one scholar has argued it should read in the conjunctive. *See* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1011–12 (2006) (making the argument in favor of the conjunctive approach for federal question jurisdiction).

[30] Many cases that would trigger the fraudulent removal doctrine are likely to be both in bad faith and without basis in law or fact. *Cf. id.* But that will not always be true. For example, in the self-incriminating motion scenario, it may be perfectly reasonable (viewed in isolation) to think that a removal and a follow-on motion to dismiss on standing grounds are each nonfrivolous. When they are viewed together, however, they appear to be made in bad faith. Our rule captures this bad faith removal even if not wholly baseless, and it would capture a wholly baseless removal where proof of bad faith is hard to come by.

As noted in the text, our disjunctive approach privileges symmetry and coherence with related doctrines, hopefully ensuring that assertions of jurisdiction by plaintiffs and defendants are treated evenhandedly. It has been brought to our attention that some courts apply fraudulent joinder only when the claim is insubstantial, regardless of motive. *See, e.g.*, Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 32 (3d Cir. 1985) (observing that the plaintiff's motive "is not considered indicative of fraudulent joinder"). In those courts, we would be more amenable to an approach to fraudulent removal that focuses only on the insubstantiality of the claim of jurisdiction.

[31] In practice, determining fraudulent removal will be subject to judicial discretion, drawing on the approaches to analogous issues such as *Bell v. Hood* determinations, fraudulent joinder, or Rule 11 sanctions. *See, e.g.*, 14C WRIGHT & MILLER, *supra* note 21, § 3723.1 (discussing the approach of courts to fraudulent joinder); 5A WRIGHT & MILLER, *supra* note 21, § 1336.1 (discussing the approach of courts to Rule 11). Again, we aim for symmetry with these other doctrines.

for lack of subject matter jurisdiction? Sounds fanciful, but it turns out that this maneuver is not uncommon. We find a number of cases fitting this pattern.[32] A defendant might engage in this practice, we surmise, because it sees some value in delay[33] or because it hopes that the federal court's jurisdictional determination might accrue to its benefit in this or later cases.[34]

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[32] *See, e.g.*, Collier v. SP Plus Corp., 889 F.3d 894, 895 (7th Cir. 2018) (per curiam) ("SP Plus removed the action to federal court, *see* 28 U.S.C. § 1441(a), arguing that the district court had federal-question jurisdiction because the claim arose under a federal statute. A week later SP Plus moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of Article III standing . . . ."); Katz v. Six Flags Great Adventure, LLC, No. 18-116, 2018 WL 3831337, at *1–2 (D.N.J. Aug. 13, 2018) (remanding case after removing defendant filed motion to dismiss for lack of standing); Kiefer v. Bob Evans Farms, LLC, 313 F. Supp. 3d 966, 968 (C.D. Ill. 2018) ("On November 30, 2017, the Defendants filed a Notice of Removal in this Court. . . . [O]n December 7, 2017, the Defendants filed a Motion to Dismiss. (D. 7). They argue that pursuant to Federal Rule of Civil Procedure 12(b)(1), this Court lacks subject matter jurisdiction over the matter because the Plaintiff's Complaint does not properly allege she has standing under Article III of the United States Constitution."); May v. Consumer Adjustment Co., No. 14CV166, 2017 WL 227964, at *1 (E.D. Mo. Jan. 19, 2017) (remanding case after removing defendant filed motion to dismiss for lack of standing); Barnes v. ARYZTA, LLC, 288 F. Supp. 3d 834, 839–40 (N.D. Ill. 2017) (recounting how removing defendant filed motion to dismiss for lack of standing, then withdrew motion but did not concede that plaintiff had standing); Hopkins v. Staffing Network Holdings, LLC, No. 16 C 7907, 2016 WL 6462095, at *1 (N.D. Ill. Oct. 18, 2016) ("Defendants removed the case to this court and [then] moved to dismiss (Doc. 9) for lack of standing under Fed. R. Civ. P. 12(b)(1) . . . ."); Mocek v. Allsaints USA Ltd., 220 F. Supp. 3d 910, 914 (N.D. Ill. 2016) ("[D]efendant tried to have it both ways by asserting, then immediately disavowing, federal jurisdiction, apparently in hopes of achieving outright dismissal, with prejudice, rather than the remand required by § 1447(c)."); Macon County *ex rel.* Ahola v. Merscorp, Inc., 968 F. Supp. 2d 959, 964 (C.D. Ill. 2013) ("Defendants invoked federal jurisdiction by removing the case from state court to federal court. Perplexingly, Defendants now challenge the constitutional standing of the claims . . . ." (citation omitted)); Black v. Main St. Acquisition Corp., No. 11-CV-0577, 2013 WL 1295854, at *1–2 (N.D.N.Y. Mar. 27, 2013) (remanding case when removing defendant filed motion to dismiss for lack of subject matter jurisdiction); Cont'l Cas. Co. v. S. Co., 284 F. Supp. 2d 1118, 1120 (N.D. Ill. 2003) ("[Defendant] Southern's argument that this case should be dismissed for lack of subject matter jurisdiction is somewhat confused. It was Southern who initially invoked the subject matter jurisdiction of this court when it filed a notice of removal. In the notice of removal, Southern asserted that [a federal court] could properly exercise diversity jurisdiction over this case."); *see also, e.g.*, Dixon v. Wash. & Jane Smith Cmty.–Beverly, No. 17 C 8033, 2018 WL 2445292, at *5–7 (N.D. Ill. May 31, 2018) (observing that plaintiff challenged statutory standing by relying on cases that addressed Article III standing, and implying that defendant may have intended to draw attention to this issue without incurring penalties for improper removal).

[33] *See infra* p. 97.

[34] Defendants might engage in fraudulent removal in hopes of establishing a precedent useful in future federal cases against it. Or defendants might believe that the federal decision could be persuasive in the state case after remand — that is, if the federal court determines that it lacks standing, the state court may defer to that conclusion when assessing state standing. To give an example, in *TransUnion*, the Court found that persons who were inaccurately flagged as terrorists by a credit agency but who had not engaged in any subsequent transactions that required pulling their credit history were not concretely injured. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2209–10 (2021). But it would be equally plausible on that set of facts to find that the harm was concrete because at any moment a person may be in an auto accident and need a new car, choose to purchase a home, seek to rent an apartment, or apply for a credit card triggering a credit check that would be a concrete harm. *See id.* at 2224 (Thomas, J., dissenting). It is possible that a federal judge's

An area ripe for this type of maneuver is standing. Modern federal standing law requires that the "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[35] In *Spokeo* and *TransUnion*, the Supreme Court held that even in cases where Congress has authorized a private right of action, the plaintiff must still meet the injury-in-fact requirement of standing, opening up the possibility for defendants to urge dismissal on standing grounds of federal cases seeking penalties clearly authorized by the statute.[36] The presumption of concurrent jurisdiction, however, means that plaintiffs might bring such suits in state court if the state's standing rules allow.[37] Plaintiffs turning to state court following *Spokeo* and *TransUnion* thus might be targets for fraudulent removals.[38]

In addition to the self-incriminating motion, one could imagine other cases where defendants' arguments are so weak that they could be considered baseless. Certainly, defendants should have the ability to test arguments, even ones that have been rejected before. But how many times may a defendant try an argument that has been rejected in nearly identical cases involving the same defendant?

This issue arose in the national prescription opioid litigation. Thousands of cases raising many of the same allegations against opioid manufacturers and distributors were filed in state and federal courts across the country. The federal cases were ultimately consolidated in a federal multi-district litigation (MDL) in front of Judge Polster in the Northern District of Ohio.[39] Some opioid defendants removed a series of state cases, alleging that federal jurisdiction was proper based on

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determination that the injury was not concrete might color the state judge's assessment of a similar question under state law. The incentive to remove for this reason is all the greater if the defendant is facing a suit in a state court they think is unfriendly — whether because they know the individual judge or because the court in which the suit is brought is generally regarded as plaintiff-friendly as compared to the federal bench in the associated district.

[35] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016); *see also TransUnion*, 141 S. Ct. at 2203.

[36] *TransUnion*, 141 S. Ct. at 2197; *Spokeo*, 136 S. Ct. at 1542–43.

[37] *See* Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1444–45, 1460–61 (2018) (explaining why plaintiffs may bring federal claims in state court even if there would have been no Article III standing and why it might reflect sound legislative strategy). *See generally* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) (describing certain state courts that "explicitly distinguish their approach from that of the federal system" by "refus[ing] to limit standing to private, individualistic conceptions of harm," *id.* at 1857).

[38] Indeed, in a number of removed cases, the federal court or the removing party invoked *Spokeo* in its standing arguments. *See, e.g.*, Collier v. SP Plus Corp., 889 F.3d 894, 896 (7th Cir. 2018) (per curiam); Katz v. Six Flags Great Adventure, LLC, No. 18-116, 2018 WL 3831337, at *6–7 (D.N.J. Aug. 13, 2018); Barnes v. ARYZTA, LLC, 288 F. Supp. 3d 834, 839–40 (N.D. Ill. 2017); Mocek v. Allsaints USA Ltd., 220 F. Supp. 3d 910, 914 (N.D. Ill. 2016); Hopkins v. Staffing Network Holdings, LLC, No. 16 C 7907, 2016 WL 6462095, at *1 (N.D. Ill. Oct. 18, 2016).

[39] *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1380 (J.P.M.L. 2017).

the connection between the claims and the federal Controlled Substances Act. This was a losing argument, but many of the same defendants made it in court after court. In *Florida Health Sciences Center, Inc. v. Sackler*,[40] a district court in Florida rejected this argument and remanded the case, citing *nineteen* other decisions from the opioid litigation rejecting the same argument.[41]

These cases also reveal another reason why defendants might pursue this strategy — and a reason why judicial attention is necessary. In the opioid litigation, the MDL judge had put a moratorium on all motions, including motions to remand for lack of subject matter jurisdiction.[42] The judge's idea, it seemed, was that the litigation should be shepherded to a global settlement without the distractions of motion practice.[43] If the district court in *Florida Health Sciences Center* had left the remand motion to the MDL judge, that case likely would still be sitting in federal court.

Finally, there may be cases where removal is in fact motivated by an improper purpose.[44] These cases are easy to imagine but hard to prove. Defendants might see an advantage in delay, knowing that they benefit from holding the assets that might make up the recovery. Or, defendants might see an advantage in racking up litigation costs, especially where resources are unequal. We want to leave open the possibility that an enterprising plaintiff might find a smoking gun that proves such an improper purpose, though we suspect in practice this category will be rarely used. To be clear, we do not think that discovery should be granted to ferret out fraudulent removal as opposed to merely unsuccessful removal, given that this would itself prolong litigation and increase costs.

II. VALUES

We point out these examples of problematic removal not only because they are unjustified and should make judges uncomfortable, but also because they strike at important values in the legal system.

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[40] No. 19-62992-CIV, 2020 WL 1046601 (S.D. Fla. Jan. 24, 2020).

[41] *Id.* at *2 & n.1.

[42] *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d at 1379 ("[W]e deny the requests to delay transfer pending rulings on various pretrial motions (*e.g.*, motions to dismiss or to remand to state court) . . . .").

[43] *See id.* (pointing to the multiple benefits of aggregating cases).

[44] We propose this category to capture cases that do not fit neatly in the other categories, as a kind of catchall provision. This category would function in a similar way as 28 U.S.C. § 1391(b)(3), the catchall provision of the venue statute allowing actions that cannot be brought under the first two provisions to be brought wherever there is personal jurisdiction over the defendant.

First, federal jurisdiction in general and removal in particular reflect a deep commitment to balancing federal and state interests in the allocation of cases among state and federal courts. For example, the presumption of concurrent jurisdiction over federal claims respects state-court decisionmaking.[45] Indeed, state courts may hear some federal claims even when a federal court could not.[46] Limits on forum-defendant removal in diversity cases[47] and on federal jurisdiction in local class actions[48] also express a respect for state courts' abilities to decide matters with respect to their own citizens. And abstention doctrine allows federal courts to relinquish jurisdiction when parallel state cases are proceeding in exceptional circumstances.[49] Of course, some rules favor federal power. The exclusive jurisdiction of the federal courts over cases involving the United States government[50] is a primary example.

In implementing the various jurisdictional rules, both state and federal courts have been cognizant of the importance of respecting one another. Much has been written on this topic.[51] The Supreme Court of the United States has recognized that a balance ought to be struck fairly between these multiple sovereigns on numerous occasions. For example, the Court famously described as a:

> [V]ital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[52]

Similarly, the Court has expressed its "confidence" in the state courts' ability to uphold federal law.[53]

There is some difficulty in determining in a particular situation how this balance ought to be struck so that it remains a balance rather than a one-way ratchet, but both federal common law doctrines (such as various

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[45] *See, e.g.*, Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990).

[46] *See, e.g.*, Clopton, *supra* note 37, at 1444–45, 1460–61.

[47] 28 U.S.C. § 1446(b)(2); *see also* Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 315 (2019).

[48] 28 U.S.C. § 1332(d)(3).

[49] *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813–17 (1976) (noting that the doctrine of abstention is "the exception, not the rule," *id.* at 813, and is limited to three categories of cases).

[50] 28 U.S.C. § 1346.

[51] *See generally* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004); James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-contentious Jurisdiction*, 124 YALE L.J. 1346 (2015); Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1077 (2020); Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101 (2019).

[52] Younger v. Harris, 401 U.S. 37, 44 (1971).

[53] Allen v. McCurry, 449 U.S. 90, 105 (1980).

abstention doctrines) and legislation have attempted to create an equilibrium. For example, the Class Action Fairness Act[54] (CAFA) resulted in nearly all national class actions being heard in federal court, but it was careful to carve out local class actions for state jurisdiction and gave discretion with respect to class actions that have both national and local aspects.[55] Whether or not we agree with the particular balance struck in CAFA, it is clear that the Constitution and Congress have the power to strike a balance. Fraudulent removal upsets the balance they struck.

Second, we worry that fraudulent removals in practice have consequences for fairness. Removal is a tool available only to parties on one side of the "v," so it can be abused only by defendants.[56] But our concern with fraudulent removal is not just an example of "anti-defendant bias." The asymmetry in access to fraudulent removal may have important distributional consequences. This is because defendant and plaintiff are not sociological categories. Fraudulent removals make sense when delay is more costly to plaintiffs than defendants; otherwise defendants would not do it. It is easy to imagine how a well-capitalized pharmaceutical company such as the defendants in the opioids litigation might benefit from delay while an individual plaintiff seeking immediate recovery would be harmed by it. By contrast, a poorer defendant may not have the resources to pursue a fraudulent removal because it must preserve them for litigating the merits of the case. Because defendants also risk the imposition of attorney fees under § 1447(c), we assume that defendants will attempt fraudulent removal only when the expected value is greater than the expected sanction. This raises the concern that not policing fraudulent removals systematically favors one type of party — the kind for whom delay and associated costs are better than an adjudication on the merits — at the expense of parties for whom these costs are prohibitive.[57]

All of these negative consequences obtain even if the fraudulent removal is ferreted out. But as the opioid example makes clear, that may not always be the case. In those situations, the consequences for federalism and fairness may be worse. If a federal court resolves a dispute outside of its subject matter jurisdiction, it potentially offends state courts. And allowing defendants access to a court for which they are not entitled — a court they accessed presumably because it would give

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[54] Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

[55] *See* 28 U.S.C. § 1332(d).

[56] *See* 28 U.S.C. § 1441(a) ("Generally . . . any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants . . . ."); Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1747–50 (2019) (holding that 28 U.S.C. § 1441(a) does not permit removal by a counterclaim defendant).

[57] This is part of a broader discussion of economic inequality in federal procedural law. *See generally, e.g.*, Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 DEPAUL L. REV. 269 (2020); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016).

them a better outcome than the proper state court — undercuts the fairness of the outcome.

III. SOLUTIONS

Having shown that fraudulent removal offends widely held understandings of federalism and fairness, this Part turns to what can be done. We do not call for new statutes to be adopted or rules to be amended, although such possibilities remain open. Instead, we look to existing tools that could be more effectively wielded to respond to — and hopefully to discourage — this practice.

To begin with, there is a statutory basis for judicial action. Congress anticipated that defendants might abuse the removal process for tactical advantage. In 1988, Congress added § 1447(c) to the removal statute, providing in relevant part that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."[58] The goal of this provision was deterrence. The new language made explicit the ability to award attorney fees, and its proponents understood that it would be supplemented by Rule 11 sanctions where necessary.[59] When the Supreme Court was called upon to interpret § 1447(c), the Court acknowledged Congress's purpose: "Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff."[60]

Twenty-five years ago, the Supreme Court thought this was sufficient.[61] We are concerned that our examples demonstrate that § 1447(c) as applied is not doing enough to deter fraudulent removals today. Either defendants believe that the chances that fees will be imposed are too low, or they have concluded that the magnitude of the sanction is

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[58] 28 U.S.C. § 1447(c); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(c), 102 Stat. 4642, 4670 (1988); *see also* 14C WRIGHT & MILLER, *supra* note 21, § 3739.3 (noting federal district court's ability to impose "just costs," including attorney fees).

[59] *See* BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1542–43 (2021) (listing § 1447(c) and Rule 11 sanctions as the possible responses to baseless removal); *Judicial Improvements and Access to Justice Act: Hearing on H.R. 3152 Before the Subcomm. on Cts., C.L. & the Admin. of Just. of the H. Comm. on the Judiciary*, 100th Cong. 658 (1987) [hereinafter *Hearing on H.R. 3152*]. The Judicial Conference proposal that included this new language explicitly referred to the availability of sanctions, observing that "civil rule 11 can be used to impose a more severe sanction when appropriate." *Id.* at 658. The Judiciary Committee incorporated this admonition into the House Report accompanying the resolution. *See* H.R. REP. NO. 100-889, pt. 1, at 72 (1988).

[60] Martin v. Franklin Cap. Corp., 546 U.S. 132, 140 (2005).

[61] Caterpillar Inc. v. Lewis, 519 U.S. 61, 77–78 (1996) ("The well-advised defendant, we are satisfied, will foresee the likely outcome of an unwarranted removal — a swift and nonreviewable remand order, see 28 U.S.C. §§ 1447(c), (d), attended by the displeasure of a district court whose authority has been improperly invoked. The odds against any gain from a wrongful removal, in sum, render improbable [the] projection of increased resort to the maneuver.").

too small as compared with the benefits they obtain in terms of time and plaintiff cost.[62]

If the problem is that these awards are given too infrequently, we hope that this Essay can help by contributing to a "name and shame" strategy. Psychologists have long appreciated that the giving of a label affects the salience of a category (for good or ill).[63] Human rights lawyers have pursued a strategy of naming and shaming offenders even when formal sanctions are not available.[64] Labelling as "fraudulent removal" the practice of purposefully removing even when one knows that the removal is improper might raise the salience of the issue — encouraging plaintiffs to request fees and encouraging courts to grant them.

Courts also could discourage the use of fraudulent removal by decreasing the benefits of this practice. If the goal is delay, then courts should be encouraged to resolve issues of subject matter jurisdiction expeditiously. This would be consistent with the frequent admonition that courts should confirm their subject matter jurisdiction early in the case.[65] But we think this point is worth emphasizing, especially if there is a chance that the practice of staying remand motions in MDLs catches on. Leaving cases in limbo for years when remand would have been appropriate does not respect the comity that the federal courts owe the states. We also would encourage judges to consider subject matter jurisdiction issues sua sponte, as they are permitted to do under Rule 12.[66]

Fee awards can also play a role. Currently, under *Martin v. Franklin Capital Corp.*,[67] attorney fees are appropriate "only where the removing party lacked an objectively reasonable basis for seeking removal,"[68] and any decision to award them is discretionary.[69] The *Martin* Court was at pains to underscore the value of discretion in this context, and indeed the discretionary approach is a good one in cases that come close to the line or are merely improper.

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[62] *Cf.* William M. Landes & Richard A. Posner, *Altruism in Law and Economics*, 68 AM. ECON. REV. 417, 417–21 (1978) (discussing the "law of rescue").

[63] *See* Susan A. Gelman & Natalie S. Davidson, *Conceptual Influences on Category-Based Induction*, 66 COGNITIVE PSYCH. 327, 347–49 (2013) (describing results of experiments demonstrating adults' use of category membership to guide inductive inference).

[64] *See, e.g.*, ROBERT F. DRINAN, S.J., THE MOBILIZATION OF SHAME 94 (2001).

[65] *See, e.g.*, Miller v. Sw. Airlines Co., 926 F.3d 898, 902 (7th Cir. 2019) ("Subject-matter jurisdiction is the first issue in any case . . . ."); United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 946 (7th Cir. 2003) ("Subject matter jurisdiction is, as we know, . . . an issue that should be resolved early but must be considered at any stage of the litigation."); Conroy v. Fresh Del Monte Produce, Inc., 325 F. Supp. 2d 1049, 1054 (N.D. Cal. 2004) ("[I]t is in the interest of judicial economy to decide issues of jurisdiction as early in the litigation process as possible. If federal jurisdiction does not exist, the case can be remanded before federal resources are further expended.").

[66] *See* FED. R. CIV. P. 12(b)(1).

[67] 546 U.S. 132 (2005).

[68] *Id.* at 141.

[69] *See id.* at 137–41.

In cases of fraudulent removal, as defined here, the exercise of discretion only encourages wrongdoing. Even if the defendants are ultimately forced to pay attorney fees, these fees are likely to be too low relative to the value of the case to be a true deterrent, and the fees may be worth paying for delay or the chance of having the case dismissed on standing grounds with the attendant problems for the plaintiffs. Courts can (and should) create a presumption that fees will be awarded when removal is fraudulent. Most obviously, in cases of concurrent jurisdiction where a removing defendant files an early motion to dismiss for lack of subject matter jurisdiction, the court should automatically order remand (not dismissal) and presumptively award attorney fees under § 1447(c). This will prevent delay, minimize the judicial workload, and respect the state-federal balance. Our proposal may be a narrow rule, but it will be a salutary one. There may be other situations in which remand (or remand and the award of fees) ought to be automatically granted for these same reasons, and the federal courts would do well to adopt a rule-like approach in these cases.[70]

Still, even expeditious remands combined with a maximalist use of fees might not do the trick if the problem is that the fee awards are too small. In that case, the question is how courts might increase the magnitude of the penalty, beyond the fees awarded in "objectively unreasonable" cases.[71] Here, our view is that a finding of "objectively unreasonable" removal should not only lead to a fee award but also trigger additional scrutiny in both federal and state court.[72]

First, in federal court, an attorney that signs a notice of removal might be subject to Rule 11 sanctions, as the notice of removal is among the "other papers" to which that rule applies.[73] As noted above, the drafters of § 1447(c) saw it working hand in glove with Rule 11 sanctions — and, importantly, § 1447(c) was adopted during an era when

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[70] *See, e.g.*, Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 511–17 (2012) (comparing and contrasting the creation of judicial rules versus standards regarding federal jurisdiction).

[71] *See Martin*, 546 U.S. at 141 (providing for fees only when "an objectively reasonable basis exists").

[72] It would not be unheard of for the federal courts to attach additional consequences to potentially manipulative removals. In *Lapides v. Board of Regents*, 535 U.S. 613 (2002), a State defendant joined the removal of an action from state court only to seek immediate dismissal based on Eleventh Amendment immunity, applicable only in federal court. *Id.* at 616–18. To avoid "seriously unfair results," the Supreme Court held that a State's removal of an action to federal court waived its Eleventh Amendment immunity. *Id.* at 619.

[73] FED. R. CIV. P. 11. *See* Nogess v. Poydras Ctr., LLC, No. 16-15227, 2017 WL 396307, at *4 (E.D. La. Jan. 27, 2017) (discussing whether attorney is subject to sanctions for filing Notice of Removal that did not contain sufficient jurisdictional facts).

Rule 11 sanctions were intended to be imposed more liberally than today.[74] Rule 11 sanctions would be appropriate if the removals were done in bad faith or were based on a baseless legal theory — in other words, if they met our definition of fraudulent removal. The problem with this solution is that Rule 11 has not proven to be an all-powerful weapon against attorney misconduct, largely because of judicial reluctance to impose sanctions. There have also been criticisms that Rule 11 sanctions tend to single out certain types of litigants.[75] Those worries are less relevant in the fraudulent removal context, and if the rules are clear we hope that judges will be more comfortable awarding sanctions than they are in situations of greater uncertainty.

Second, a finding of an objectively unreasonable removal might trigger additional scrutiny in state court. One reason that § 1447(c) might be an insufficient deterrent is that it only allows for the award of costs, expenses, and fees "incurred as a result of the removal."[76] As discussed above, this means that plaintiffs must be willing to outlay these expenditures, and it means that courts cannot compensate plaintiffs beyond those expenditures — for example, compensating them for lost time, which after all might be the goal of the fraudulent removal. However, § 1447(c) says nothing about what a state court might be do after remand. We have found occasional examples of state courts taking matters into their own hands and imposing fees or sanctions after remand.[77] Such responses could go beyond actual expenses. In the words of the

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[74] *See* FED. R. CIV. P. 11 advisory committee's note to 1983 amendment ("The new language is intended to reduce the reluctance of courts to impose sanctions . . . ."); FED. R. CIV. P. 11 advisory committee's note to 1993 amendment ("The revision . . . places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court.").

[75] *See, e.g.*, Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 111 (2002) (documenting disproportionate use of Rule 11 sanctions against civil rights plaintiffs in federal court).

[76] 28 U.S.C. § 1447(c).

[77] *See, e.g.*, Guardianship of O.D. v. Dillard, 177 So. 3d 175, 181–82 (Miss. 2015) (explaining that a Mississippi court may award fee for improper removal in part because the notice of removal filed in state court qualifies under state statute as litigation abuse); *Ex parte* Bon Secours–St. Francis Xavier Hosp., Inc., 713 S.E.2d 624, 629 (S.C. 2011); *In re* Rapid Settlements, Ltd.'s, 359 P.3d 823, 835 (Wash. Ct. App. 2015) (approving award of fees including for effort necessary to secure remand from improper removal); Nodier v. Ungarino & Eckert, LLC, No. 2006 CA 1461, 2007 WL 1300805, at *5 (La. Ct. App. May 4, 2007) (discussing factual inquiry to determine whether counsel signed pleading in good faith); Stratton v. Frankwell Inv. Serv., Inc., Nos. 01-99-00405-CV, 01-99-00459-CV, 2000 WL 233110, at *4 (Tex. Ct. App. Mar. 2, 2000) (affirming decision to issue sanctions for wrongful removal). Indeed, in one case, a Texas court assessed sanctions for bad faith even after a federal court found no bad faith. *See* Ricardo N., Inc. v. Turcios de Argueta, 870 S.W.2d 95, 105–06 (Tex. Ct. App. 1993). *But see* Ricardo N., Inc. v. Turcios de Argueta, 907 S.W.2d 423, 429 (Tex. 1995) (holding that sanctions were an abuse of discretion, but not disputing the power to issue post-remand sanctions for removal).

South Carolina Supreme Court, "vexatious removal is sanctionable conduct, and parties will be held accountable for the unnecessary expense *and delay* caused by abuses of the right to removal."[78]

Federal courts could also encourage this type of state-court intervention. Even if a federal court concluded that a fee award would be ineffective, it should be encouraged to make a finding of "objectively unreasonable" removal in order to alert the state court of potential fraudulent removal. Indeed, such a finding might be entitled to issue preclusive effect in the state court in some limited circumstances.[79] In such a case, the plaintiff would not have to relitigate the question of whether removal was objectively unreasonable, which itself adds to costs and deters plaintiffs from seeking fees. In any event, the state court may pay special attention to the federal court's findings as a matter of comity.

The application of preclusion in this context seems to offend the maxim that a court without subject matter jurisdiction may not create a valid judgment to which preclusion attaches.[80] That maxim is not always true, however. Two lines of cases would support preclusion here. First, cases such as *Ruhrgas AG v. Marathon Oil Co.*[81] will attach limited preclusive effect to judgments where subject matter jurisdiction is hypothesized.[82] Second, in a contempt proceeding, a court may rely on

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[78] *Bon Secours*, 713 S.E.2d at 629 (emphasis added). Although the original award in this case was more than costs and fees, the court ultimately struck down that portion. *Id.* There is some risk that state court action of this kind might be found to violate the Supremacy Clause because it discourages removal. But we are less troubled about state courts penalizing fraudulent removal *after* the federal court has done so itself. In that case, it is a federal court action that triggers the state court sanction, suggesting (at least to us) that there is no offense to the federal court.

[79] *See, e.g.*, Massad v. Greaves, 977 A.2d 662, 667–68 (Conn. App. Ct. 2009) (approving the state trial court's imposition of attorney fees and explaining that § 1447 does not bar state courts from imposing fees for improper removal, but also that any federal court determination might be entitled to preclusive effect). One potential problem with applying issue preclusion is that the federal court remand decision is not usually appealable, a common requirement for issue preclusion. If the federal court's finding of objective unreasonableness were in a sanctions order, though, then an appeal would be possible and therefore preclusion might attach.

[80] However, just as a federal court will find a determination of Article III standing issue preclusive in a subsequent lawsuit raising that identical issue, a determination of subject matter jurisdiction for removal purposes should be similarly preclusive so long as the issue is identical and brought by the same party. *See* Brereton v. Bountiful City Corp., 434 F.3d 1213, 1218–19 (10th Cir. 2006) (explaining that "the district court's standing ruling precludes [the Defendant] from relitigating the standing *issue* . . . but does not preclude his *claim*," *id.* at 1219); 13B WRIGHT & MILLER, *supra* note 21, § 3531.15 ("A decision finding standing should support issue preclusion, despite the jurisdictional characterization, if the same issue of standing arises in subsequent litigation. The vagaries of standing theory are such, however, that it may often be difficult to conclude that the same issue is presented." (footnote omitted)).

[81] 526 U.S. 574 (1999).

[82] *See, e.g.*, Clermont, *supra* note 24, at 322 ("[*Ruhrgas*'s] hypothetical jurisdiction will supply subject-matter jurisdiction to produce a valid judgment for the very limited purpose of jurisdiction-to-determine-no-jurisdiction with respect to the ground for threshold dismissal.").

the preclusive effect of a prior order (for example, a temporary restraining order) even if the court lacked subject matter jurisdiction in the prior proceeding.[83] Taken together, these doctrines would support attaching preclusive effect to the federal court's finding of "objectively unreasonable" removal within the same case (on remand) and for the limited purpose of a state-court contempt proceeding.[84]

CONCLUSION

Fraudulent removal is an example of a litigation practice that abuses the civil justice system, increases costs for both parties, and drains judicial resources. We have argued that to be consistent with federalism and fairness, Article III judges should routinely award attorney fees in cases where they find removal to be fraudulent, and should do so automatically in cases where the defendant has made a self-incriminating motion. Further, if the award of fees does not stop the practice, we suggest that the federal courts have more substantial sanctions available to them under Rule 11 — tracking the legislative history of the removal statute — and preclusion doctrine. Our most important contribution, however, is to name and shame this phenomenon. Please cite us accordingly.[85]

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[83] *See* Walker v. City of Birmingham, 388 U.S. 307, 315 (1967) (noting that the state court, as a court of equity, had the power to grant a temporary injunction and that the injunction's constitutionality could not be collaterally attacked in a contempt proceeding); United States v. United Mine Workers, 330 U.S. 258, 289–90 (1947) (finding that a district court "had the power to issue a restraining order . . . pending a decision upon its own jurisdiction," *id.* at 290).

[84] A more extreme application of preclusion would seek to use nonmutual issue preclusion against the same defendant removing a related case filed by a different plaintiff. This would apply, for example, in the opioid litigation where defendants attempted the same faulty removal at least twenty times. This is likely a bridge too far for federal courts, weary of both unnecessary extensions of nonmutual preclusion and of interference with the right to remove. We would note, however, that since most of the relevant preclusion principles are creatures of common law, it likely would not be beyond the authority of the federal courts to fashion a more expansive preclusion rule.

[85] We kid.