INTERLOCUTORY REVIEW OF ORDERS DENYING REMAND MOTIONS

Rory Ryan, Luke Meier, and Jeremy Counseller*

*Rory Ryan, Professor of Law, Baylor Law School; Luke Meier, Associate Professor, Baylor Law School; Jeremy Counseller, Professor of Law, Baylor Law School. The Authors would like to thank Andrea Mehta for her research help and for the following people for reviewing earlier drafts or collaborating on the amicus brief that gave rise to this article: Dustin Benham, Deborah Challener, Scott Dodson, James Pfander, W. Charles Rocky Rhodes, and Evelyn Wilson.

When can an appellate court review a district court's *denial* of a remand motion before a final judgment? Surprisingly little has been written on this topic, especially compared to how much has been written on the review of a district court's *grant* of a remand motion.[1] But recent developments in the Fifth Circuit, including a case in which we participated as amicus,[2] provide a fine case study for addressing these questions. Our goal here is to guide judges and lawyers in answering the opening question. Our short answer is that a remand denial is not inherently different from the typical interlocutory ruling, and therefore a party must follow the ordinary appellate methods prescribed by Congress: either await final judgment or obtain certification under 28 U.S.C. § 1292(b).[3] Mandamus review is generally unavailable because the petitioner has an adequate remedy by appeal. Neither the time, hassle, and expense of enduring trial, nor the possibility that the appeal might ultimately prove unsuccessful render the appellate remedy inadequate.

[1] 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.11 (2d ed. 1992); *see, e.g.*, Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?*, 82 MARQ. L. REV. 535 (1999); James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493 (2011); Thomas C. Goodhue, Note, *Appellate Review of Remand Orders: A Substantive/Jurisdictional Conundrum*, 91 IOWA L. REV. 1319 (2006).

[2] *In re* Crystal Power Co., 641 F.3d 78, 82 (5th Cir.), *opinion withdrawn and superseded by* 641 F.3d 82 (5th Cir. 2011).

[3] *See* 28 U.S.C. § 1291 (2006).

Typically, a ruling on a motion to remand occurs long before a merits disposition.[4] A district judge's denial of such a remand motion raises a difficult policy question that accompanies all important interlocutory rulings: should the litigant have immediate access to review by an appellate court, or should the litigant have to first endure a trial on the merits that may ultimately be nullified because the remand ruling was erroneous?

Congress has specifically addressed this policy issue for orders *granting* a motion to remand with a statute that prohibits most appellate review.[5] Although no statute specifically targets appellate review of a remand *denial*, several generally applicable laws shape the inquiry. A remand denial is, of course, an interlocutory order.[6] Congress has decided, via the final-judgment rule,[7] that interlocutory orders are not generally appealable unless they fit certain narrow substantive categories into which remand denials do not fall[8] or unless the district judge certifies the interlocutory question to the court of appeals under 28 U.S.C. § 1292(b).[9] Thus, the answer to the opening question might seem, on first impression, relatively clear—an appeal lies from a remand denial only if an interlocutory appeal is certified under § 1292(b).

Mandamus, however, muddies this clarity. When appeal is forbidden by the final-judgment rule and not certified under § 1292(b), appellate lawyers have often sought—and sometimes obtained—a writ of mandamus to obtain

[4] *See* WRIGHT ET AL., *supra* note 1, at § 3914.11.

[5] 28 U.S.C. § 1447(d) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." Despite the clarity of this congressional restriction, the Supreme Court was unable to resist the early temptation of reviewing a remand order when a district judge remanded a case because his docket was too crowded. *See* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 340–41 (1976), *abrogated in part by* Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996). Bad facts make bad law, and both the Court and scholars are still trying to fix this problem, which resulted when the Court rejected Congress's balancing. *See, e.g.*, Pfander, *supra* note 1, at 493 (describing the "quiet crisis" created by the Supreme Court's treatment of the appellate review of remand orders).

[6] *See, e.g.*, Estate of Bishop *ex rel.* Bishop v. Bechtel Power Corp., 905 F.2d 1272, 1275 (9th Cir. 1990) (holding that the denial of a remand order is not a final judgment and that the court thus lacked jurisdiction to consider an appeal from a remand denial).

[7] 28 U.S.C. § 1291 (2006); *see also* Headrick v. Toledo Trust Co., No. 86-3772, 1986 WL 18536, at *1 (6th Cir. Dec. 15, 1986) ("Federal courts of appeal do not have jurisdiction of interlocutory orders under 28 U.S.C. section 1291.").

[8] *See infra* Part I.B.

[9] 28 U.S.C. § 1292(b) (2006); *see infra* Part I.C.

immediate review.[10] This misuse of mandamus upsets Congress's appellate-jurisdiction calibration and misunderstands the writ's primary limitation.[11] Mandamus may issue only when a litigant has no other adequate remedy on appeal.[12] There is nothing inherently unique about denied remand motions, however, that renders inadequate a litigant's other avenues for appellate consideration, such as an appeal after a final judgment or a certification under § 1292(b).[13] Federal appellate courts have offered two different reasons why mandamus is necessary to review denied remand motions, but neither of these arguments survives close scrutiny.[14]

Part I begins our inquiry with an explanation of why an order denying a remand motion is not immediately appealable as of right but may, under certain circumstances, be certified by the district court and court of appeals for immediate interlocutory appeal. Part II explains why mandamus is generally unavailable to review an order denying remand. The conclusion in Part II requires a discussion of the perplexing questions that arise regarding the difference between remand motions based on subject-matter jurisdiction and those based on other grounds. Finally, in Part III, we summarize our conclusion and demonstrate how the general unavailability of immediate appellate review is consistent with overlapping and related areas of removal-remand and appellate law.

I. AN ORDER DENYING A REMAND MOTION IS NOT IMMEDIATELY APPEALABLE AS OF RIGHT BUT MAY BE ELIGIBLE FOR DISCRETIONARY INTERLOCUTORY APPEAL.

The material in this Part is uncontroversial but foundational. The conclusion reached in this Part about the availability of interlocutory *appeals* is easy to state. An order denying remand is not a final judgment and does not qualify for any categorical exceptions to the final-judgment rule, but it may be appealable via a discretionary interlocutory appeal. Nevertheless, the process of reaching this conclusion should not be skipped because it is critical to an understanding of the more difficult questions

[10] *See, e.g.*, *In re* Hot-Hed Inc., 477 F.3d 320, 322–23 (5th Cir. 2007).

[11] Kerr v. U.S. Dist. Ct. for N. Dist. of Cal., 426 U.S. 394, 403 (1976) ("A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.").

[12] *Id.*

[13] *See infra* Part II.

[14] *See infra* Part II.

involving mandamus in Part II. Because mandamus's availability depends upon whether there is an "adequate remedy by appeal," we begin by examining Congress's appellate-remedy structure.

A. The Final-Judgment Rule

The first principle of appellate jurisdiction is the final-judgment rule.[15] This rule derives from 28 U.S.C. § 1291, which grants (and by negative implication limits) the appellate jurisdiction of the courts of appeals to review of "final decisions of district courts."[16] A final judgment is one that disposes of all claims against all parties[17] and is one by which a "district court disassociates itself from a case" either formally[18] or practically.[19] The final-judgment rule does not render interlocutory rulings forever

[15] The Supreme Court has recognized the historic development of the final-judgment rule:

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Cobbledick v. United States, 309 U.S. 323, 324–25 (1940) (footnotes omitted); *see also* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 726–29 (1993) (tracing the development of the final-judgment rule as a mainstay of federal appellate jurisdiction).

[16] 28 U.S.C. § 1291 (2006); Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 429 (1985).

[17] *See* Bonner v. Perry, 564 F.3d 424, 427 (6th Cir. 2009).

[18] Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 604–05 (2009) (quoting Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42 (1995)).

[19] *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 713–14 (1996) (finding an order functionally indistinguishable from a final judgment when it put the litigants effectively out of federal court). Although the Court has frequently stated that the final decision must "end[] the litigation on the merits," *e.g.*, Catlin v. United States, 324 U.S. 229, 233 (1945), this definition does not fairly encompass orders that end the federal suit but do not end litigation on the merits. For example, as the Court noted in *Quackenbush*, remanding a case to state court ends the federal suit and is a final judgment under § 1291 despite being in tension with the *Catlin* formulation. 517 U.S. at 714; *see also* Benson v. SI Handling Sys., Inc., 188 F.3d 780, 782 (7th Cir. 1999).

unreviewable. Instead, the rule generally prohibits the litigant from appealing decisions immediately.[20] In other words, via the final-judgment rule Congress has limited a party "to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated."[21]

Unlike a remand grant, a remand denial is not a final judgment.[22] When a district judge grants a remand motion, it disassociates itself from the case and finally ends the federal proceeding.[23] Thus, an order remanding a case is appealable as a final judgment under 28 U.S.C. § 1291, though 28 U.S.C. § 1447(d) will bar all but a few of those appeals.[24] Conversely, a denied remand motion does not disassociate the federal court from the case or dispose of all parties and all claims. Indeed, it does the opposite: it commits the federal court to resolving the parties' claims. Accordingly, "[o]ne aspect of appealing orders as to removal and remand remains blessedly simple. An order denying remand is not final."[25]

Thus, the final-judgment rule treats a remand denial like most other interlocutory orders: a district judge's decision to deny a motion to remand cannot be reviewed immediately but can be reviewed after the court disposes of all claims and all parties.[26] A plaintiff need not take further

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[20] *Quackenbush*, 517 U.S. at 712.

[21] *Id.* (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994)). *See, e.g.*, Whitt v. Sherman Int'l Corp., 147 F.3d 1325, 1333 (11th Cir. 1998) (vacating the underlying final judgment because of an improper denial of a jurisdiction-based remand motion).

[22] Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860, 861 (7th Cir. 1984) (per curiam) ("An order denying a motion to remand a case to state court cannot, by any stretch of the imagination, be considered 'final' within the meaning of § 1291.") (citing Chi., Rock Island & Pac. R.R. Co. v. Stude, 346 U.S 574, 578 (1954)).

[23] *In re* FMC Corp. Packaging Sys. Div., 208 F.3d 445, 449 (3d Cir. 2000); *Benson*, 188 F.3d at 782. Although the Supreme Court once concluded that only mandamus could be used to challenge an order granting remand, Thermtron Prods. v. Hermansdorfer, 423 U.S. 336, 352–53 (1976), it later "reversed that conclusion," and it is now clear that a remand grant is final under 28 U.S.C. § 1291. *See Quackenbush*, 517 U.S. at 713; *In re FMC*, 208 F.3d at 449; *Benson*, 188 F.3d at 782.

[24] 28 U.S.C. § 1447(d) (2006); *see also* Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 1862, 1865–66 (2009); Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 229 (2007).

[25] *See* WRIGHT ET AL., *supra* note 1, at § 3914.11. It is worth noting here that the "blessedly simple" description of finality is clouded by the collateral-order doctrine, which pretends that certain orders are final and which we briefly discuss in Part III.B.

[26] *See Chi., Rock Island & Pac. R.R. Co.*, 346 U.S. at 578; B., Inc. v. Miller Brewing Co., 663 F.2d 545, 548 (5th Cir. Unit A Dec. 1981); WRIGHT ET AL., *supra* note 1, at § 3914.11 ("The denial of remand is reviewable on appeal from the final judgment, following the ordinary rule that

steps to preserve error—the denial of the remand motion preserves error for appeal after final judgment.[27]

The final-judgment rule represents the congressional solution to one of our procedural system's most difficult problems: balancing the case-specific inefficiencies created by delaying challenges until after final judgment with the system-wide inefficiencies created by authorizing interlocutory challenges.[28]

At a client-specific level, the balance is often difficult to explain. A client who loses a significant trial ruling is not always comforted by assurances of a future do-over after spending money to endure a trial. Whenever the final-judgment rule surfaces in the context of a particular factual scenario, it is tempting to side with the litigant who faces the time and expense of facing a trial that may be for naught.[29] But there are fragile and competing concerns that impact the macroefficiency of our adversarial system.[30] Most litigants who lose rulings believe judges are wrong. At a

interlocutory orders merge in the final judgment.").

[27] *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 74 (1996). Strategically, however, plaintiffs should consider the discussion in the next Part regarding "adequate remedies by appeal" to determine whether their objection is practically preserved when the remand motion is based on a nonjurisdictional ground. *See infra* Part II.B.

[28] Flanagan v. United States, 465 U.S. 259, 263–64 (1984) ("The final judgment rule serves several important interests. It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice."); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (quoting Cobbledick v. United States, 309 U.S. 323, 325 (1940)) ("[The final-judgment rule] serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of 'avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.'"); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974) ("Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy.").

[29] *See e.g.*, *In re* Volkswagen of Am., Inc., 545 F.3d 304, 319 (5th Cir. 2008) (finding that there was no adequate remedy for denial of a motion to transfer venue because "the harm—inconvenience to witnesses, parties and other—will already have been done by the time the case is tried and appealed, and the prejudice suffered cannot be put back in the bottle.").

[30] *See, e.g.*, Sec. & Exch. Comm'n v. Stewart, 476 F.2d 755, 765 (2d Cir. 1973) (Timbers, J.,

case-specific level it is tempting to allow Joe Client to challenge *now* at least all potentially dispositive or forum-changing rulings. But that ignores what would happen if Joe Client, Jane Client, and every Client could each challenge immediately every adverse denial of a motion for summary judgment, motion to dismiss, motion to remand, motion to exclude, etc.

Plenty has been written about how the balance ought to be resolved,[31] but for our purposes it is sufficient to observe that Congress has resolved it.[32] But the final-judgment rule was not enacted as a stand-alone, harsh solution to the balancing problem. Instead, Congress also recognized that the rule created undue hardship when applied to certain types of rulings.[33] Accordingly, Congress created categorical exceptions to the final-judgment rule in 28 U.S.C. § 1292(a), which authorizes certain interlocutory appeals.

B. An Order Denying a Remand Motion Does Not Meet the Categorical Exceptions to the Final-Judgment Rule.

A party attempting an interlocutory appeal must locate a statute authorizing it.[34] The final-judgment rule is a congressional restriction on federal appellate jurisdiction.[35] Because that statute generally prevents interlocutory appeals, a litigant wanting an interlocutory appeal must locate a statute authorizing an exception to Congress's restriction.[36]

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dissenting) ("Our practice has been to balance the policy underlying the final judgment rule against the claim in an individual case that justice and the effective administration of our courts demands immediate review.").

[31] *E.g.*, Timothy B. Dyk, *Supreme Court Review of Interlocutory State-Court Decisions: "The Twilight Zone of Finality"*, 19 STAN. L. REV. 907, 936–39 (1967) (discussing the policy advantages of the final-judgment rule). *See also* Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 180 (2001).

[32] *See* Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 758–59 n.320 (1995) ("[T]he final judgment rule values the time of appellate courts more than the time of trial courts. The final judgment rule requires the trial court to hold trials that may turn out after an appeal to have been unnecessary or to retry cases that the appellate court later finds were tainted with significant error. A contrary rule is neither unthinkable nor obviously inefficient.").

[33] *See* Carson v. Am. Brands, Inc., 450 U.S. 79, 83 (1981).

[34] *See* E. End Taxi Servs., Inc. v. V.I. Taxi Ass'n, 411 F. App'x 495, 498–99 (3d Cir. 2011) (quoting Gov't of V.I. v. Hodge, 359 F.3d 312, 318–19 (3d Cir. 2004)) (stating that the court cannot review an interlocutory order "absent specific statutory authorization").

[35] *See* 28 U.S.C. § 1291 (2006).

[36] *See id; see also E. End Taxi Servs., Inc.*, 411 F. App'x at 498–99 (quoting *Hodge*, 359 F.3d at 318–19) (stating that the court cannot review an interlocutory order "absent specific statutory

As noted above, Congress resolved the systemic-efficiency issues in favor of a single appeal after final judgment, but it exempted certain rulings because delay in those circumstances imposed hardships that tipped the efficiency balance in favor of immediate review.[37] Under 28 U.S.C. § 1292(a), parties may appeal immediately orders granting injunctions,[38] orders appointing receivers,[39] and certain admiralty orders.[40] Congress has elsewhere authorized interlocutory challenges for certain other types of rulings.[41]

Congress did not, however, authorize an automatic interlocutory appeal for orders denying remand,[42] and the absence of such authorization was not the result of congressional inattention. Despite devoting an entire chapter of the Judicial Code to nearly every aspect of removal and remand,[43] Congress did not authorize an interlocutory challenge to remand orders generally.[44] Congress expressly removed the right to challenge most orders *granting* remand,[45] and Congress expressly allowed immediate challenges to certain remand rulings in certain class actions.[46] Therefore, orders denying remand fall outside both the definition of a final judgment and the congressional list of rulings that should be categorically excepted from it.[47]

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authorization").

[37] *See E. End Taxi Servs., Inc.*, 411 F. App'x at 498–99 (quoting *Hodge*, 359 F.3d at 318–19) (stating that the court cannot review an interlocutory order "absent specific statutory authorization"); *see also* Recent Cases, *Unexplained Dismissal Without Prejudice of Intervenor's Counterclaims Seeking Injunctive Relief Is Appealable*—Stewart-Warner Corp. v. Westinghouse Elec. Corp. *(2d Cir. 1963)*, 77 HARV. L. REV. 1535, 1538 (1964) (discussing § 1292(a) as a "device[] for relieving the substantial hardship that often" occurs under the final-judgment rule).

[38] 28 U.S.C. § 1292(a)(1) (2006).

[39] *Id.* § 1292(a)(2).

[40] *Id.* § 1292(a)(3).

[41] *E.g.*, *id.* § 1453(c) (authorizing interlocutory review of a CAFA removal order).

[42] Subject-matter jurisdiction can, however, be considered ancillary to an otherwise proper interlocutory appeal, such as an appeal from an injunction ruling. Humphrey v. Sequentia, Inc., 58 F.3d 1238, 1241 (8th Cir. 1995); O'Halloran v. Univ. of Wash., 856 F.2d 1375, 1378 (9th Cir. 1988); James v. Bellotti, 733 F.2d 989, 992 (1st Cir. 1984).

[43] 28 U.S.C. §§ 1441–53.

[44] *Id.*

[45] *Id.* § 1447(d).

[46] *Id.* § 1453(c)(1).

[47] Tucker v. Cox Tex. Newspapers, L.P., 137 F. App'x 650, 651 (5th Cir. 2005); Woodard v. STP Corp., 170 F.3d 1043, 1044 (11th Cir. 1999); Walker v. Nationsbank, No. 97-1158, 1997 WL 158089, at *1 (4th Cir. April 4, 1997); Melancon v. Texaco, Inc., 659 F.2d 551, 552–53 (5th Cir. Unit A Oct. 1981).

C. The Order Denying a Remand Motion May Be Immediately Appealed Under 28 U.S.C. § 1292(b), but Only with District Court Approval.

In 28 U.S.C. § 1292(b) Congress provided a specific, interlocutory appellate remedy for rulings that satisfy neither the final-judgment rule nor any of 28 U.S.C. § 1292(a)'s categorical exceptions.[48] Recognizing that some cases would warrant early review but could not be easily categorized ahead of time, Congress created a flexible option for appellate review of controlling, debatable legal issues whose early resolution would advance the litigation in a way that outweighed the costs of an early appeal.[49] Congress also, however, placed an important "dual-certification" limitation in the statute.[50] That is, interlocutory review pursuant to § 1292(b) is only available when the district court is "of the opinion" that the statutory

[48] 28 U.S.C. § 1292(b) states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b); Cardona v. Gen. Motors Corp., 939 F. Supp. 351, 353 (D.N.J. 1996) (listing the elements of § 1292(b) review as: "(1) a controlling question of law, (2) about which there is substantial ground for difference of opinion, the immediate resolution of which by the appeals court will (3) materially advance the ultimate termination of the litigation.").

[49] As the Second Circuit noted:

> Section 1292(b) was the result of dissatisfaction with the prolongation of litigation and with harm to litigants uncorrectable on appeal from a final judgment, sometimes resulting from strict application of the federal final judgment rule. It was thus designed to cure these difficulties by permitting speedy determination of debatable legal issues, the resolution of which might greatly advance the ultimate determination of the controversy, without requiring the parties first to participate in a trial.

Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 995 (2d Cir. 1975), *abrogated on other grounds by* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

[50] *See, e.g.*, Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1172 (1990) (discussing the legislative compromise behind § 1292(b) that resulted in the "dual certification" requirement).

requirements are satisfied and certifies the same to the appellate court.[51] Then, and only then, the appellate court can review the statutory requirements and exercise its discretion to accept the appeal.[52] Thus, even if an appellate court might independently conclude that the prerequisites of § 1292(b) are present, appellate review is not available unless the district court has also arrived at this same conclusion and "certified" the issue for potential appeal under § 1292(b).[53] Because an appeal under § 1292(b) thus requires both the district court and the appellate court to independently conclude that the prerequisites of the statute are satisfied, commentators have dubbed this aspect of § 1292(b) to be a "dual-certification" requirement.[54]

Section 1292(b) review is a viable option for interlocutory review of forum-selection rulings. District courts have certified orders denying both jurisdiction-based remand motions[55] and remand motions based on

[51] *See* 28 U.S.C. § 1292(b).

[52] *Id.*

[53] Aucoin v. Matador Servs., Inc., 749 F.2d 1180, 1181 (5th Cir. 1985).

[54] *See, e.g.*, Solimine, *supra* note 50, at 1172 (discussing the legislative compromise behind § 1292(b) that resulted in the "dual certification" requirement).

[55] *E.g.*, Watson v. Philip Morris Cos., 551 U.S. 142, 146–47 (2007); Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 349 (1999); Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 249 (1992); Knudson v. Sys. Painters, Inc., 634 F.3d 968, 971–72 (8th Cir. 2011); Dial v. Healthspring of Ala., Inc., 541 F.3d 1044, 1047 (11th Cir. 2008); Bennett v. Sw. Airlines Co., 484 F.3d 907, 908 (7th Cir. 2007); Rico v. Flores, 481 F.3d 234, 238 (5th Cir. 2007); Louisiana v. Union Oil Co., 458 F.3d 364, 366 (5th Cir. 2006); Mattel, Inc. v. Bryant, 446 F.3d 1011, 1013 (9th Cir. 2006); Melder v. Allstate Corp., 404 F.3d 328, 330 (5th Cir. 2005); Rainwater v. Lamar Life Ins. Co., 391 F.3d 636, 637 (5th Cir. 2004); Bolen v. Miss. Admin. Servs., Inc., 73 F. App'x 764, 764 (5th Cir. 2003); Sonoco Prods. Co. v. Physicians Health Plan, Inc., 338 F.3d 366, 368 (4th Cir. 2003); Grant v. Chevron Phillips Chem. Co., 309 F.3d 864, 868 (5th Cir. 2002); Rosmer v. Pfizer Inc., 263 F.3d 110, 113 (4th Cir. 2001); Badon v. RJR Nabisco Inc., 224 F.3d 382, 388 (5th Cir. 2000); McClelland v. Gronwaldt, 155 F.3d 507, 511 (5th Cir. 1998); Ard v. Transcon. Gas Pipe Line Corp., 138 F.3d 596, 600 (5th Cir. 1998); Warren v. Blue Cross & Blue Shield of S.C., No. 97-1374, 1997 WL 701413, at *1 (4th Cir. Nov. 12, 1997); Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 365 (5th Cir. 1995); Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1483 (5th Cir. 1992); Amoco Prod. Co. v. Sea Robin Pipeline Co., 844 F.2d 1202, 1204 (5th Cir. 1988); Sullivan v. First Affiliated Sec., Inc., 813 F.2d 1368, 1371 (9th Cir. 1987); Elston Inv., Ltd. v. David Altman Leasing Corp., 731 F.2d 436, 437 (7th Cir. 1984); *Aucoin*, 749 F.2d at 1181; Hartwell Corp. v. Boeing Co., 678 F.2d 842, 842 (9th Cir. 1982); Guinasso v. Pac. First Fed. Savings & Loan Ass'n, 656 F.2d 1364, 1365 (9th Cir. 1981); Nuclear Eng'g Co. v. Scott, 660 F.2d 241, 245 (7th Cir. 1981); Gamble v. Cent. of Ga. Ry. Co., 486 F.2d 781, 782 (5th Cir. 1973); Climax Chem. Co. v. C.F. Braun & Co., 370 F.2d 616, 617 (10th Cir. 1966); Dodd v. Fawcett Publ'ns, Inc., 329 F.2d 82, 83 (10th Cir. 1964); Parks v. N.Y. Times Co., 308 F.2d 474,

nonjurisdictional grounds,[56] as well as orders denying jurisdiction-based motions to dismiss.[57] Of course, the dual-certification requirement makes interlocutory review of a remand denial more difficult to obtain.[58] District judges may refuse to certify because, for example, they think they are clearly right[59] or because immediate resolution will not advance efficiency enough to justify the cost.[60] The appellate judges may also decline for

474 (5th Cir. 1962).

[56] *E.g.*, *Knudson*, 634 F.3d at 971–72; Allen v. Christenberry, 327 F.3d 1290, 1291 (11th Cir. 2003); *Badon*, 224 F.3d at 387; Somlyo v. J. Lu-Rob Enters., Inc., 932 F.2d 1043, 1045 (2d Cir. 1991); Brown v. Demco, Inc., 792 F.2d 478, 480 (5th Cir. 1986).

[57] *E.g.*, Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 914–15 (5th Cir. 2008); Puryear v. Cnty. of Roanoke, 214 F.3d 514, 517 (4th Cir. 2000); Fed. Express Corp. v. U.S. Postal Serv., 151 F.3d 536, 537–38 (6th Cir. 1998); Palumbo v. Waste Techs. Indus., 989 F.2d 156, 158–59 (4th Cir. 1993); Smith v. Reagan, 844 F.2d 195, 197–98 (4th Cir. 1988); Madsen v. U.S. *ex rel.* U.S. Army Corps of Eng'rs, 841 F.2d 1011, 1012 (10th Cir. 1987); U.S. *ex rel.* Wis. Dep't of Health & Human Servs. v. Dean, 729 F.2d 1100, 1103 (7th Cir. 1984); Int'l Ass'n. of Machinists & Aerospace Workers v. Nw. Airlines, Inc., 673 F.2d 700, 703 (3d Cir. 1982); Stern v. U.S. Gypsum, Inc., 547 F.2d 1329, 1331 (7th Cir. 1977); Exch. Nat'l Bank v. Touche Ross & Co., 544 F.2d 1126, 1130 (2d Cir. 1976); Hernandez v. Travelers Ins. Co., 489 F.2d 721, 722 (5th Cir. 1974); Smith v. Canadian Pac. Airways, Ltd., 452 F.2d 798, 799 (2d Cir. 1971); Gillette Co. v. "42" Prods. Ltd., 435 F.2d 1114, 1114 (9th Cir. 1970).

[58] This is the result that Congress intended when it crafted the dual-certification requirement. *See, e.g.*, Solimine, *supra* note 50, at 1172 (explaining that the dual-certification requirement was a compromise "between those who did not want any expansion of interlocutory appeals[] and those who favored" the more expansive version of § 1292(b) that had been initially proposed).

[59] See 28 U.S.C. § 1292(b) (requiring that there be a "substantial ground for difference of opinion . . ."); *see also*, Martineau, *supra* note 15 at 733 ("A court of appeals . . . has absolute discretion to refuse to hear the appeal [under § 1292(b)].").

[60] *See* 28 U.S.C. § 1292(b) (2006) (requiring that "an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ."). Courts have even held that a district court retains *complete* discretion to deny certification even when the other requirements of the statute are met. *See, e.g.*, Bachowski v. Usery, 545 F.2d 363, 368 (3d Cir. 1976) ("[P]ermission to appeal [under § 1292(b)] is wholly within the discretion of the courts, even if the criteria are present."); Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 71 F. Supp. 2d 139, 162 (E.D.N.Y. 1999) ("The legislative history, congressional design and case law indicate that district court judges retain unfettered discretion to deny certification of an order for interlocutory appeal even where the three legislative criteria of section 1292(b) appear to be met."). Commentators, however, appear to split on this question. *Compare* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 109 (1975) ("The district courts enjoy generally absolute discretion to deny a section 1292(b) certificate, and the procedures for obtaining appellate court certification once the district court certificate has been issued are comparatively cursory.") (footnote omitted), *with* Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 780 (2006) ("[T]he text of [§ 1292(b)] simply

various reasons.[61] But *dual* certification is precisely the condition that Congress imposed so that 28 U.S.C. § 1292(b) would not completely undermine the final-judgment rule.

We return to 28 U.S.C. § 1292(b) in the next Part discussing the availability of mandamus, as we turn to the question of whether a litigant has an "adequate remedy by appeal."[62] For now, we summarize where we have been: a denied remand order is not a final judgment subject to immediate appeal, and it satisfies none of the categorical exceptions authorizing interlocutory appeal.[63] Therefore, the party suffering a denied remand motion generally has two appellate remedies: appeal after a final judgment or seek interlocutory certification under 28 U.S.C. § 1292(b).

II. EXCEPT IN EXTRAORDINARY CIRCUMSTANCES, MANDAMUS WILL NOT LIE TO CORRECT AN ORDER DENYING A REMAND MOTION BECAUSE REMAND MOVANTS HAVE AN ADEQUATE REMEDY BY APPEAL.

The All Writs Act[64] provides the statutory basis for the issuance of a writ of mandamus by an appellate court to a lower court.[65] The Supreme Court has consistently interpreted this statute such that the "remedy of mandamus is a drastic one, to be invoked only in extraordinary situations"[66] or "exceptional circumstances."[67] The Court has long ago[68]—and recently[69]—and in between[70]—demanded that three conditions *must* be

does not give the district court unlimited discretion [to deny certification when the statutory factors are present]."). *See also* Robertson, *supra* at 777–87 (considering whether mandamus can be used to correct district court errors in refusing to certify an appeal under § 1292(b)).

[61] *See* 28 U.S.C. § 1292(b) (explaining that a court of appeals may decline § 1292(b) review "in its discretion").

[62] *See infra* Part II.

[63] *See supra* Part I.B.

[64] 28 U.S.C. § 1651 (2006).

[65] *See* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3932 (2d. ed. 1992) (explaining how the All Writs Act has been interpreted to allow appellate review of interlocutory decisions).

[66] Kerr v. U.S. Dist. Ct. for N. Dist. of Cal., 426 U.S. 394, 402 (1976).

[67] *Id.*

[68] *Ex parte* Fahey, 332 U.S. 258, 260 (1947). *See also infra* note 72 and accompanying text.

[69] *See, e.g.*, Hollingsworth v. Perry, 130 S. Ct. 705, 710 (2010).

[70] *See, e.g.*, Cheney v. U.S. Dist. Ct. for D.C., 542 US 367, 380–81 (2004); *Kerr*, 426 U.S. at 403.

satisfied before mandamus may issue. The first, and our primary focus, is that "'the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires[]'—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process."[71] Some courts of appeals have developed purportedly flexible multi-factor tests,[72] but those formulations, whatever they purport to offer in terms of flexibility, cannot forgive what the Court and the writ have always required—that a mandamus petitioner have "no adequate remedy by appeal."[73]

Thus, the starting presumption in determining whether mandamus is generally available to review any category of case must be "no." Recently, however, the Fifth Circuit has decided otherwise with regard to remand denials.[74] This conclusion by the Fifth Circuit in favor of mandamus has proceeded along two separate modes of analysis involving two different types of cases.[75] The first type of case involves a remand motion that is based on the district court's lack of subject-matter jurisdiction. The second type of case involves a remand motion that is based on nonjurisdictional grounds.[76]

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[71] *Cheney*, 542 U.S. at 380–81 (internal citation omitted).

[72] *E.g.*, *In re* Lott, 424 F.3d 446, 449 (6th Cir. 2005) (adopting *Bauman's* five-factor test); Bauman v. U.S. Dist. Ct., 557 F.2d 650, 654–55 (9th Cir. 1977) (adopting five "guidelines" for reviewing a mandamus petition: whether (1) the party seeking the writ has no other means, such as a direct appeal, of attaining the desired relief, (2) the petitioner will be damaged in a way not correctable on appeal, (3) the district court's order is clearly erroneous as a matter of law, (4) the order is an oft-repeated error, or manifests a persistent disregard of the federal rules, and (5) the order raises new and important problems, or issues of law of first impression.).

[73] *E.g.*, *In re* Huguley Mfg. Co., 184 U.S. 297, 301 (1902) ("[T]he writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is only granted, as a general rule, where there is no other adequate remedy."); *In re* Blake, 175 U.S. 114, 117 (1899) ("The writ of mandamus cannot be issued to compel a judicial tribunal to decide a matter within its discretion in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction, nor be used to perform the office of an appeal or writ of error. And it only lies, as a general rule, where there is no other adequate remedy."); *Ex parte* Hoard, 105 U.S. 578, 580 (1881) (denying mandamus review where the case could be reviewed after a final judgment, stating that "[i]t is an elementary principle that a *mandamus* cannot be used to perform the office of an appeal or a writ of error"); *Ex parte* Cutting, 94 U.S. 14, 20 (1876) ("The office of a *mandamus* is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such a performance, and who has no other adequate remedy.").

[74] *See infra* Part II.A. and Part II.B.

[75] *See infra* Part II.A.

[76] *See infra* Part II.B.

In the first type of case, the Fifth Circuit concluded that the mandamus petitioner does not have an adequate remedy on appeal because of the expense and delay associated with waiting to correct this alleged jurisdictional defect until after a final judgment.[77] In the second type of case, the Fifth Circuit reasoned that a procedural defect in removal might be considered harmless error in an appeal after a final judgment and that mandamus is therefore necessary to correct this mistake immediately.[78]

Before proceeding to evaluate these two categories, an initial observation reveals an internal inconsistency. For alleged jurisdictional defects, the conclusion in favor of mandamus is premised on the notion that a jurisdictional defect is so harm*ful* that it must be corrected immediately.[79] That is, because a jurisdictional defect will automatically constitute reversible error, immediate review must be available.[80] But for remand motions based upon alleged procedural defects in the removal process, the conclusion in favor of mandamus is based on the notion that a procedural defect may prove harmless after appeal and therefore appeal is an inadequate remedy.[81] This "heads-I-win, tails-you-lose" rationale makes mandamus available to review *any* denial of a remand motion. In reality, however, *neither* of these modes of analysis is supportable. The first—used in cases involving remand motions alleging lack of subject-matter jurisdiction—is foreclosed by long-standing Supreme Court precedent.[82] The second—used in cases involving remand motions alleging procedural defects in the removal process—is based on an analytical process that warps the traditional understanding of the relationship between mandamus and appeals after final judgment.[83]

[77] *In re* Crystal Power Co., 641 F.3d 78, 82 (5th Cir.), *opinion withdrawn and superseded by* 641 F.3d 82 (5th Cir. 2011).

[78] *In re* Beazley Ins. Co., No. 09-20005, 2009 WL 7361370, at *3 (5th Cir. May 4, 2009) (per curiam).

[79] *See infra* Part II.A.

[80] *See infra* Part II.A.

[81] *See infra* Part II.B.

[82] *See infra* note 108 and accompanying text.

[83] *See infra* Part II.B.

A. A Movant Complaining of the Denial of a Jurisdiction-Based Remand Motion Has an Adequate Remedy by Appeal.

Often, remand motions are based on the plaintiff's argument that the district court does not have subject-matter jurisdiction over the controversy. For example, a plaintiff might argue that federal-question jurisdiction is absent,[84] that a particular defendant was not fraudulently joined (and therefore diversity jurisdiction is absent),[85] or that the amount in controversy does not exceed the threshold.[86] To be sure, difficult questions may arise regarding whether a particular impediment to the court proceeding is truly a jurisdictional impediment.[87] But we leave that line-drawing to others and proceed using the phrasal adjective "jurisdiction-based" to refer to remand motions based upon an argument that, if accepted, would be properly characterized as defeating the court's subject-matter jurisdiction. Absent extraordinary circumstances, appellate remedies are adequate (and therefore mandamus is unavailable) because: (1) a successful appeal after final judgment will require the appellate court to vacate the adverse district-court decision;[88] and (2) the expenditure of time and resources of going to trial does not make post-judgment appeal an inadequate remedy.[89] Further, 28 U.S.C. § 1292(b) and its place in the appellate-jurisdiction structure counsel against court-initiated expansion of the mandamus remedy in this context.[90]

1. Appeal After Final Judgment Is an Adequate Remedy Because an Appellate Court Can Vacate the Lower-Court Decision.

Rulings on jurisdiction-based remand motions are reviewable on appeal after final judgment without regard to any harmless-error analysis. If the

[84] *E.g.*, Bennett v. Sw. Airlines Co., 484 F.3d 907, 908 (7th Cir. 2007).

[85] *E.g.*, Rico v. Flores, 481 F.3d 234, 237–38 (5th Cir. 2007); Dodd v. Fawcett Publ'ns, Inc., 329 F.2d 82, 83 (10th Cir. 1964).

[86] *E.g.*, Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792 (11th Cir. 1999); Ard v. Transcon. Gas Pipe Line Corp., 138 F.3d 596 (5th Cir. 1998).

[87] To be sure, it is not always clear whether a particular impediment to a court hearing a case is a restriction on the court's subject-matter jurisdiction. *See, e.g.*, Bowles v. Russell, 551 U.S. 205, 208–10 (2007) (holding that the time to file a notice of appeal is jurisdictional). *See generally* Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55 (2008); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005).

[88] *See infra* Part II.A.1.

[89] *See infra* Part II.A.2.

[90] *See infra* Part II.A.3.

appellate court concludes that the district court had no subject-matter jurisdiction when judgment was rendered, the court of appeals will vacate the underlying judgment and remand the case to state court.[91] Typically, when a civil litigant presents an argument to an appellate court, the litigant must show not only a preserved error but also that the error has affected the litigant's substantial rights.[92] Generally speaking, this means a party that loses a final judgment must show that the error likely had some impact on the result.[93] But the harm analysis plays no role when a district court improperly exercises subject-matter jurisdiction. We do not see, for example, the Supreme Court in the famous *Mottley*[94] or *Mansfield*[95] cases opining as to whether the state court would have ruled differently had the federal court not improperly exercised jurisdiction.

So, a plaintiff who loses a jurisdiction-based remand motion will unquestionably be able to challenge the denial after a final judgment. And if the plaintiff prevails, the appellate court will order the case remanded back to state court and vacate any judgment that was rendered without jurisdiction.

2. The Time and Expense of Trial Does Not Make Post-Judgment Appeal an Inadequate Remedy.

Although we have seen that a plaintiff losing a jurisdiction-based remand motion will prevail after final judgment if the motion is erroneously denied,[96] the plaintiff must endure the time and expense of trial. The question is whether mandamus relief is available because having to wait

[91] *E.g.*, Grupo Dataflux v. Atlas Global Grp., 541 US 567, 586–87 (2004). Indeed, so long as a defect in subject-matter jurisdiction is identified before direct appellate proceedings have ended, the appellate court must vacate the underlying proceedings without regard to waiver, harm, forfeiture, and estoppel. Ins. Corp. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). For completeness, we note here the quirky line of "cure" cases in which dismissal of a party who destroyed diversity jurisdiction can cure a relevant jurisdictional defect in some circumstances. *Grupo Dataflux*, 541 U.S. at 573–75 (discussing Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996) and Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989)).

[92] 28 U.S.C. § 2111 (2006); FED. R. CIV. P. 61.

[93] *See* McDonough Power Equip., Inc. v. Greenwood, 464 US 548, 556 (1984); *In re* Nat'l Presto Indus., Inc., 347 F.3d 662, 663 (7th Cir. 2003); Howard v. Gonzales, 658 F.2d 352, 357 (5th Cir. Unit A Oct. 1981); Flanigan v. Burlington N., Inc., 632 F.2d 880, 889 (8th Cir. 1980).

[94] Louisville & Nashville R.R. Co. v. Mottley, 211 US 149, 154 (1908).

[95] Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 388–89 (1884).

[96] *See supra* Part II.A.1.

until after a trial renders appeal inadequate. A recent progression of cases in the Fifth Circuit provides a good case study.

In 2007, in a seemingly innocuous (but published) *per curiam* opinion, *In re Hot-Hed, Inc.*,[97] the Fifth Circuit declared that when the writ of mandamus is sought to review the denial of a remand motion based on a lack of subject-matter jurisdiction, "the court should issue the writ almost as a matter of course."[98] *Hot-Hed* contained no discussion of whether the petitioner had an adequate remedy by appeal.[99] Five years later, a panel in *In re Crystal Power* also granted a mandamus petition challenging a jurisdiction-based remand denial.[100] The *Crystal Power* panel attempted to justify the writ's issuance under the no-adequate-remedy prong:

> Appeal is not an adequate remedy because, although it may be possible for the parties to try this case to verdict in federal court before addressing the lack of federal jurisdiction on appeal, this would demand time and resources to an end that cannot be upheld. As we have said in the past under similar circumstances, "[w]e need not enforce such an absurd result and require petitioner[ ] to go to trial in federal court and await an appellate remedy."[101]

After the panel issued *Hot-Hed*, we joined a small group of law professors[102] in asking the Fifth Circuit to rehear the case *en banc* to reject the panel's decision. We argued, as we do today, that mandamus is unavailable under Supreme Court precedent and that sound policy supports that precedent.[103]

Starting with *Hot-Hed*, the Fifth Circuit had flipped the relevant rule. *Hot-Hed* declared that mandamus should be available "as a matter of

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[97] 477 F.3d 320, 322 (5th Cir. 2007) (per curiam).

[98] *Id.* at 323.

[99] *Id.*

[100] *In re* Crystal Power Co., 641 F.3d 78, 82 (5th Cir.), *opinion withdrawn and superseded by* 641 F.3d 82 (5th Cir. 2011).

[101] *Id.* (quoting *In re* Dutile, 935 F.2d 61, 64 (5th Cir. 1991).

[102] Deborah Challener (Associate Professor of Law, Mississippi College School of Law), Jeremy Counseller (Professor of Law, Baylor Law School), Luke Meier (Associate Professor of Law, Baylor Law School), W. Charles "Rocky" Rhodes (Godwin Fonquillo PC Research Professor and Professor of Law, South Texas College of Law), Rory Ryan (Professor of Law, Baylor Law School), and Evelyn Wilson (Horatio C. Thompson Endowed Professor of Law, Southern University Law Center).

[103] *In re Crystal Power*, 641 F.3d at 85–86.

course" to review remand denials based on a lack of subject-matter jurisdiction.[104] But the Supreme Court long ago set, and has not since disturbed, the rule that "the writ of mandamus may not be used to correct alleged error in a refusal to remand where, after final judgment, the order may be reviewed upon a writ of error on appeal."[105] A few years later, the Court again confronted an attempt to use mandamus to correct a "clear" jurisdictional error committed before final judgment.[106] And again, the Court confirmed that the clarity of error does not make an appeal an inadequate remedy.[107] Accepting the argument that even clear jurisdictional errors in remand motions must await final judgment, the Court stated: "It is not disputable that the proposition thus relied upon is well founded and hence absolutely debars us from reviewing by mandamus the action of the court below complained of, whatever may be our conviction as to its clear error."[108]

And given that the Court has rejected the availability of mandamus to review remand orders, it is unsurprising that it has also rejected the reasoning that was first proposed by the *Crystal Power* panel. The *Crystal Power* panel had reasoned that appeal is an inadequate remedy to review a jurisdiction-based remand motion because awaiting final judgment "would demand time and resources to an end that cannot be upheld" and because "we need not enforce such an absurd result and require petitioner to go to trial in federal court and await an appellate remedy."[109] But it is

[104] *In re* Hot-Hed, Inc., 477 F.3d 320, 323 (5th Cir. 2007) (per curiam).

[105] *Ex parte* Roe, 234 U.S. 70, 73–74 (1914); *see In re* Briscoe, 448 F.3d 201, 216 (3d Cir. 2006) ("The United States Supreme Court has long rejected the general availability of mandamus 'as a means of reviewing the action of the district court in denying a motion to remand a cause to the state court from which it had been removed.'") (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30–31); *see also* Orange Cnty. Water Dist. v. Unocal Corp., 584 F.3d 43, 48 (2d Cir. 2009).

[106] *Ex parte* Park Square Auto. Station, 244 U.S. 412, 414 (1917).

[107] *Id.*

[108] *Id.* In emphatically concluding that the matter had been settled, the *Park Square* decision relies primarily upon *Ex parte Roe*, 234 U.S. 70 (1914) and *Ex parte Harding*, 219 U.S. 363 (1911). *Ex parte Harding* is an important decision for one doing historical research because it addressed some previously inconsistent cases regarding the availability of mandamus. 219 U.S. 363. The Court "disapprove[d] and qualifie[d]" earlier civil cases suggesting that mandamus could correct a refusal to remand. *Id.* at 379. The Court noted that these earlier civil cases had misapplied a previous decision under which mandamus was available to review the refusal to remand a *criminal* prosecution. *Id.* "[U]nder the law as it then stood, no power would otherwise have existed to correct the wrongful assumption of jurisdiction by the circuit court." *Id.* at 373.

[109] *In re* Crystal Power Co., 641 F.3d 78, 82 (5th Cir.), *opinion withdrawn and superseded by*

fundamental mandamus law that the time and expense of proceeding to final judgment does not render an appeal an inadequate remedy, lest most significant interlocutory rulings would be subject to immediate review via mandamus.[110] Again, the Court has spoken with unmistakable clarity: "[T]rial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in finding that only final judgments should be reviewable."[111]

The *Crystal Power* panel correctly withdrew its opinion and denied mandamus. As the Supreme Court case law cited above demonstrates, mandamus is generally not available to review a jurisdiction-based remand order.[112] Such an order is reviewable on appeal after final judgment and by discretionary interlocutory appeal under § 1292(b), and the time, expense, and difficulty associated with these appellate remedies does not render them

641 F.3d 82 (5th Cir. 2011).

[110] N.J., Dep't of Treasury, Div. of Inv. v. Fuld, 604 F.3d 816, 822–23 (3d Cir. 2010); *In re* Nat'l Presto Indust., Inc., 347 F.3d 662, 663 (7th Cir. 2003).

[111] Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30 (1943); *see also In re* Roche Molecular Sys., Inc., 516 F.3d 1003, 1004 (Fed. Cir. 2008); *In re* Briscoe, 448 F.3d 201, 214 (3rd Cir. 2006) ("Such rulings may well increase the cost of litigation, cause inconvenience, or result in unanticipated delay in prosecuting the case. But these added burdens . . . typically do not suffice to warrant the extraordinary step of mandamus intervention.").

[112] Although this article focuses on review of denied *remand* orders, a similar analysis should apply to denials of jurisdiction-based motions to dismiss cases filed in federal court. Such denials are obviously not final and find no help from the 28 U.S.C. § 1292(a) exceptions. *Catlin v. United States* confirms this general rule that the denial of a motion to dismiss for want of subject-matter jurisdiction is generally not subject to interlocutory review. 324 U.S. 229, 235–36 (1945). And, the rationale of the remand-denial cases applies equally here because the denial is correctable after final judgment and the time and expense of enduring trial cannot render an appeal an inadequate remedy. Nonetheless, courts occasionally depart from proper mandamus standards and issue the writ to correct a denied motion to dismiss. *E.g.*, *In re* Gillis, 836 F.2d 1001, 1012 (6th Cir. 1988) (listing adequate-remedy-by-appeal as one of many flexible factors, changing the test during application, and then ultimately (and bafflingly) concluding its harm analysis by stating that mandamus is the only remedy that will "avert the necessity of trial on the merits."); Bell v. Sellevold, 713 F.2d 1396, 1403 (8th Cir. 1983) (opining anew about the no-adequate-remedy prong and contradicting the rationale from the remand cases); BancOhio Corp. v. Fox, 516 F.2d 29, 33 (6th Cir. 1975) (focusing on the error being really wrong and not explaining why post-judgment appeal was inadequate); *see also* United States v. Boe, 543 F.2d 151, 161 (C.C.P.A. 1976) (relying on the approach rejected by *Ex Parte Harding*, 219 U.S. 363 (1911), and ultimately finding exceptional circumstances because the district court was wrong in denying the motion to dismiss).

inadequate.[113] The next section explains that this result is not only compelled by precedent but also reflects the correct respect for the appellate remedies Congress has provided.

3. 28 U.S.C. § 1292(b) and Its Place in the Appellate-Jurisdiction Structure Counsel Against Court-Initiated Expansion of the Mandamus Remedy in This Context.

Congress has already decided when the time and expense of awaiting trial justifies immediate appeal. Usually it doesn't; hence the final-judgment rule. For some categories of decisions it does; hence the

[113] Modern cases usually recognize this general rule. *In re* Crystal Power Co., 641 F.3d 82, 84 (5th Cir. 2011); *In re* Briscoe, 448 F.3d at 214; *In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., 93 F. App'x 345, 348–49 (3d Cir. 2004); Madden v. U.S. Dist. Ct. for S. Dist. of Cal., Nos. 99-71354 & 99-71525, 2000 WL 1171169, at *1–2 (9th Cir. Aug. 17, 2000); Direct Transit Lines, Inc. v. Starr, 219 F.2d 699 (6th Cir. 1955). Of course, although the time and expense of waiting to appeal after a final judgment does not, alone, justify mandamus review, extraordinary circumstances may exist that justify the issuance of the writ. In several cases, the writ has issued because the courts found exceptional circumstances beyond the mere time and expense of enduring trial in a tribunal that is without subject-matter jurisdiction. Whether these cases correctly resolve what circumstances are exceptional, they can at least be explained by the proper analysis. For example, courts have found that the Saving-to-Suitors Clause in the Jones Act creates an "uncommon right" for plaintiffs to choose a forum without interference by the defendant, and therefore mandamus should issue if the district court fails to remand. *In re* Dutile, 935 F.2d 61, 63–64 (5th Cir. 1991); *see also In re* Chimenti, 79 F.3d 534 537–40 (6th Cir. 1996). Three other modern cases provide examples of where unusual circumstances at least arguably make post-judgment appeal inadequate. Orange Cnty. Water Dist. v. Unocal Corp., 584 F.3d 43, 48 (2d Cir. 2009) (where similarly situated parties in the litigation were treated differently, the court held that the unique nature of the case counseled in favor of review); Three J Farms, Inc. v. Alton Box Bd. Co., 609 F.2d 112, 116 (4th Cir. 1979) (finding compelling circumstances where the district court lacked jurisdiction to vacate an original order of remand because "'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction'") (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943); *In re* La Providencia Dev. Corp., 406 F.2d 251, 253 (1st Cir. 1969) (holding that exceptional circumstances existed for three reasons: first, "the district court has misunderstood the plain meaning of the statute. Secondly, although even substantial inconvenience to the parties is normally insufficient, as any erroneous judgment may ultimately be corrected, the question whether the sizable attachments in the present case should be released or continued involves possibly irreparable immediate harm in case of an erroneous decision either way. Finally, while comity is not controlling even on mandamus, it adds weight to the two prior special circumstances; the local, and appropriate, court should be the one to decide any questions relating to the attachments.") (internal citations omitted).

§ 1292(a) exceptions. Remand denials satisfy none of those categories. And if a litigant seeks to depart from this scheme on a case-specific basis, that litigant has to satisfy § 1292(b) and follow the procedures set by Congress, including obtaining district court permission for an immediate appeal. Courts should not use mandamus to recalibrate the congressionally approved balance between the micro and macro efficiencies set by the final-judgment rule and § 1292.

The no-adequate-remedy-by-appeal requirement is a limitation designed to prevent courts from using mandamus to circumvent Congress's appellate scheme.[114] It is not authorization for courts to reweigh the policies Congress considered and to determine whether the congressional solution is an adequate one. As the Supreme Court has observed, the no-adequate-remedy requirement must be viewed in light of

> Congress'[s] determination since the Judiciary Act of 1789 that as a general rule "appellate review should be postponed . . . until after final judgment has been rendered by the trial court." A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.[115]

In other words, appellate judges cannot use the inadequate-remedy requirement of mandamus to second guess Congress's allocation: "Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals."[116]

To be sure, truly exceptional circumstances may exist where the harm of denying immediate review transcends the time and expense of awaiting

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[114] *See* Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380–81 (2004) (stating that "'the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires[]'—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process" (quoting Kerr v. U.S. Dist. Ct. for N. Dist. Cal., 426 U.S. 394, 403 (1976) (internal citation omitted))); Jordon L. Kruse, *Appealability of Class Certification Orders: The "Mandamus Appeal" and a Proposal to Amend Rule 23*, 91 NW. U. L. REV. 704, 733 (1997) (explaining that mandamus should not "circumvent the clear and sound policies of the final judgment rule").

[115] *Kerr*, 426 U.S. at 403 (quoting Will v. United States, 389 U.S. 90, 96 (1967)).

[116] *Roche*, 319 U.S. at 30–31.

final judgment.[117] But when those circumstances do not exist, a mandamus petitioner cannot circumvent Congress's scheme by rearguing the final-judgment rule and declaring Congress's resolution inadequate.

In the context of jurisdiction-based remand denials,[118] this anti-circumvention rationale is also informed by the availability of 28 U.S.C. § 1292(b). In § 1292(b), Congress provided an interlocutory appellate remedy designed to allow case-specific consideration of whether efficiency concerns justify a departure from the final-judgment rule.[119] Congress did not write a generally applicable, as-of-right interlocutory appeal statute (which would represent a repudiation of the final-judgment rule).[120] Rather, it limited this appellate remedy to certain types of rulings that would advance efficiency and required certain procedures that would advance efficiency.[121] To obtain § 1292(b) relief, a petitioner must have suffered an adverse ruling on a controlling question of law[122] and the petitioner must

[117] *See supra* note 111 and accompanying text.

[118] This clause provides an important limitation in two ways. It limits this section to remand denials, and then even more specifically to jurisdiction-based remand denials. The latter limitation will be further explored in the next section, Part II.B. The first limitation recognizes the complexity of the relationship between the § 1292(b) appellate remedy and the mandamus requirement that petitioner have no adequate remedy by appeal, and we leave broader consideration of that relationship to another article. We note that in attempting to reconcile mandamus and § 1292(b), some courts have held that parties do not need to attempt an appeal under 28 U.S.C. § 1292(b) before petitioning for mandamus. *In re* Chimenti, 79 F.3d 534, 538–39 (6th Cir. 1996). Some courts have suggested that a 28 U.S.C. § 1292(b) attempt is required before mandamus; others have described such an attempt as optional or recommended. Exec. Software N. Am. v. U.S. Dist. Ct. for Cent. Dist. of Cal., 24 F.3d 1545, 1549–50 (9th Cir. 1994), *overruled by* Cal. Dep't of Water Res. v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008); Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 163 n.8 (3d. Cir. 1993); *In re* Sch. Asbestos Litig., 977 F.2d 764, 773 (3d Cir. 1992). Others have granted mandamus for the precise reason the district court refused to certify. *In re* Dutile, 935 F.2d 61, 62 (5th Cir. 1991) ("When the district court declined to certify an appeal, petitioners applied to our court for a writ of mandamus."). None of these cases satisfactorily struggles with what we think warrants another future article. If mandamus requires no adequate remedy by appeal, and if § 1292(b) provides a remedy by appeal, then for which interlocutory rulings is this new appeal adequate? As explained above, it surely is no answer to declare that the remedy is inadequate because a litigant fails to satisfy its requirements (*see infra* note 135 about the amount in controversy on appeal), which is the actual effect of the unsatisfying rulings that require a party to try the interlocutory appeal but then allow mandamus if the appeal is not certified.

[119] *See* 28 U.S.C. § 1292(b) (2006).

[120] *See id.*

[121] *See id.*

[122] *Id.*

convince *both* the trial court and the appellate court that efficiency would be advanced by allowing the immediate appeal.[123]

So Congress has actually provided two appellate remedies for a plaintiff whose jurisdiction-based remand motion has been wrongly denied. First, the plaintiff can appeal after an adverse final judgment, and the court of appeals will vacate the adverse judgment and order the case remanded back to state court.[124] The plaintiff will have to endure the time and expense of trial, but those are the precise policies Congress balanced in the final-judgment rule.[125] And a plaintiff cannot circumvent that balance by arguing that it was resolved inadequately.[126] Or second, a plaintiff whose jurisdiction-based remand motion has been wrongly denied can seek relief under § 1292(b).[127] Courts have frequently accommodated plaintiffs in precisely this situation.[128]

To the extent courts of appeals and litigants believe that the requirement of obtaining the district court's permission before obtaining interlocutory review renders the statute too stingy, the proper solution is to take up the issue with Congress rather than to circumvent Congress's decision through mandamus.[129] Suppose that a district judge denies a plaintiff's jurisdiction-based motion to remand and then refuses to certify the appeal under § 1292(b) because the judge is not "of the opinion" that the question is a controlling one of law or that immediate appeal will advance the ultimate resolution. Can the plaintiff now obtain mandamus review by arguing that the denial of certification leaves the plaintiff without an adequate remedy by appeal? If the plaintiff's only harm argument relies upon the time and expense of having to endure trial (however this argument may be disguised),[130] then the answer is "absolutely not" for two reasons. First, in

[123] Swint v. Chambers Cnty Comm'n, 514 U.S. 35, 46 (1995).

[124] *See* Koehler v. Bank of Berm. Ltd., 101 F.3d 863, 865–66 (2d Cir. 1996).

[125] *In re* Briscoe, 448 F.3d 201, 214 (3d Cir. 2006).

[126] *Id.* at 214.

[127] *See Koehler*, 101 F.3d at 864.

[128] *See* Solimine, *supra* note 50, at 1172 (discussing the legislative compromise behind § 1292(b) that resulted in the "dual certification" requirement).

[129] *Cf. infra* Part II.B. (explaining that mandamus is not appropriate vehicle to correct perceived shortcomings stemming from the application of the harmless-error rule).

[130] Again, we caution against reading through this introductory limitation. When the inadequate-remedy argument is that a post-judgment appeal is inadequate because the plaintiff must endure the time and expense of trial before obtaining reversal, then the argument targets the very policies Congress balanced in the final-judgment rule and its exceptions. When a party alleges some harm apart from time and expense, the anti-circumvention rationale does not apply

this context, even before § 1292(b) existed, an appeal after final judgment provided an adequate remedy and could not be circumvented by the time-and-expense argument.[131] Section 1292(b) provides an additional, discretionary appellate remedy and certainly does not render appeal after final judgment inadequate.

Second, Section 1292(b) is *the* appellate remedy Congress provided to address the precise situation of when the time and expense of awaiting final judgment justify departure from the usually applicable final-judgment rule.[132] Section 1292(b) sets certain requirements. One requirement is district-court certification, and that certification depends upon the *district* judge being "of the opinion" that the statutory requirements are met.[133] The *dual*-certification requirement was itself designed to advance efficiency and represents an additional balance that should be protected against circumvention.[134] Just as the final-judgment rule does not become an inadequate appellate remedy merely because a mandamus petitioner has no final judgment, neither does the dual-certification-dependent interlocutory remedy become inadequate because the petitioner cannot satisfy its requirement of dual certification.[135]

directly, and it is there mandamus finds its exceptional-circumstances home.

[131] *See supra* Part II.A.2.

[132] *See* Redish, *supra* note 60 at n.202–05 (acknowledging that it is difficult to defend judicially created exceptions to the final-judgment requirement that are based on the same policy rationales underlying § 1292(b)). For another interesting preliminary exploration of a proposal, see James E. Pfander and David R. Pekarek Krohn, 105 NW. L. REV. (forthcoming 2011) ("In brief, we propose a rule that would empower the parties, by consent, to request the district court to certify a question for interlocutory review. If the district court approved the joint request, the party contesting the district court's order could appeal the certified question without first having to secure leave from the appellate court.").

[133] 28 U.S.C. § 1292(b) (2006).

[134] *Cf.* Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 46–48 (1995). As described by the Wright and Miller treatise, "[t]he *Swint* Court concluded that § 1292(b) was deliberately drafted to require district-court permission, and that it would be subverted by allowing the court of appeals to exercise unilateral discretion to permit appeal by an additional appellant merely because a different party had taken an available appeal." 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3929.1 n.1 (2d ed. 1996); *see also* Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 632–33 (1975) (discussing the policy objectives behind the dual-permission requirement). Because the statute obligates the district judge to certify only if the judge is "of the opinion" that the criteria are met, the only room for appellate review of the certification decision should be of a district judge who fails to certify *despite* being of the opinion that the criteria are met.

[135] Consider an additional example. Suppose that Congress has required, as it can require,

In Part III, we will place in a larger context our conclusions about interlocutory review (via appeal or mandamus) of denied remand orders. But before doing so, an intriguing distinction in types of remand motions requires separate attention. What if the remand motion is based not on a defect in the district court's subject-matter jurisdiction, but rather is based upon some nonjurisdictional defect that justifies remand?

B. Mandamus Is Not Appropriate to Review the Denial of a Remand Motion Asserting Nonjurisdictional Grounds

The previous section demonstrated that mandamus is usually unavailable to review the denial of a remand motion asserting jurisdictional grounds. This section will consider whether mandamus is available to review the denial of a remand motion asserting nonjurisdictional arguments. Does this difference matter? Obviously, the intuitive answer to this question is "no." If a litigant cannot use mandamus to correct what she believes is a jurisdictional defect in the district court proceedings, surely mandamus is not available to a litigant whose denied remand is based on *non*jurisdictional grounds.

A recent Fifth Circuit decision, however, held otherwise by focusing on an issue (harmless error) that arises only in the context of remand motions alleging nonjurisdictional (as opposed to jurisdictional) defects.[136] There is a tempting appeal to the logic used by the Fifth Circuit in this case. The logic is this: Because the nonjurisdictional arguments for remand might be considered harmless error in an appeal after a final judgment, mandamus review is warranted now.

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that an appellate court's jurisdiction is limited to cases in which the amount in controversy exceeds $10,000. Further suppose that D suffers an adverse judgment of $200. Can D petition the court of appeals for mandamus relief from the adverse judgment by arguing that it has no adequate remedy by appeal? Of course not. In that case, too, the inadequacy argument is an impermissible attempt to circumvent the policies Congress considered and the limitations it set on obtaining relief. Similarly, Congress did not allow interlocutory appeals of controlling legal questions as of right. Nor did it allow such appeals upon permission of an appellate court. Rather, it required dual permission. And mandamus ought not be used to disrupt the dual-permission requirement when the harm alleged (the time and expense of enduring trial) is the precise end targeted by the appellate scheme of which dual permission is one requirement. *See In re* Cal. Pub., 79 F. App'x 478, 479 (2d Cir. 2003).

[136] *In re* Beazley Ins. Co., No. 09-20005, 2009 WL 7361370, at *3 (5th Cir. May 4, 2009) (per curiam).

Other circuit courts have employed this same logic to conclude that mandamus is appropriate.[137] But, the logic is faulty; despite its surface appeal, it is based on a misunderstanding regarding the relationship between (1) the mandamus requirement that a litigant have no other adequate means to attain relief and (2) the harmless-error rule. Simply put, the conclusion that a district court error is harmless does not mean that a litigant is without adequate means to attain relief. Indeed, if harmless district court errors were the proper basis of mandamus review, evidentiary rulings (which are usually considered harmless in an appeal after a final judgment) could be reviewed in a mandamus petition. This result, of course, is directly at odds with the notion that mandamus is reserved for "extraordinary circumstances." Under the logic used by the Fifth Circuit, the more ordinary and unimportant the ruling, the more appropriate it is for mandamus.

Before proceeding further, it is first necessary to briefly explore the nonjurisdictional arguments that can be legitimately raised in a remand motion. As alluded to in the previous section, 28 U.S.C. § 1441 allows removal of cases from state to federal court only when the federal court has subject-matter jurisdiction over the claim.[138] This prerequisite to removal ensures that cases removed to federal court fall within the scope of the judicial power defined by Article III of the Constitution[139] and the jurisdictional parameters imposed by congressional statute.[140] Obviously, then, a remand motion can raise any perceived defects in the district court's subject-matter jurisdiction.

But a defect in subject-matter jurisdiction is not the only ground on which a remand motion can be based.[141] Nonjurisdictional defects in the removal from state court can also be legitimately raised in a remand motion.[142] This conclusion is underscored by 28 U.S.C § 1447(c), which

[137] *See, e.g.*, *In re* Nat'l Presto Indus., Inc., 347 F.3d 662, 663 (7th Cir. 2003).

[138] *See supra* Part I.A.

[139] U.S. CONST. art. III § 1.

[140] *See* Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement after* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 553, 596–99 (1993) (discussing the necessity of subject-matter jurisdiction in the context of removal and remand). *See also* Rory Ryan, *It's Just Not Worth Searching for Welcome Mats with a Kaleidoscope and a Broken Compass*, 75 TENN. L. REV. 659, 685–86 (2008).

[141] *See* Orange Cnty. Water Dist. v. Unocal Corp., 584 F.3d 43, 49–51 (2d Cir. 2009) (discussing differences between jurisdiction-based remand orders and other remand orders).

[142] *See id.*

requires that "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal . . . ."[143] Of the nonjurisdictional grounds referred to in § 1447(c), most are of a procedural nature.[144] For instance, a defendant's removal notice must be timely.[145] If it is not, a remand motion raising this issue should be granted.[146] In addition to these procedural defects, there are also discretionary principles that permit a district court to remand a case to state court even though the district court has jurisdiction over the case.[147]

The recent Fifth Circuit litigation in *In re Beazley Insurance Co.*[148] involved a remand motion asserting a nonjurisdictional, procedural defect in the removal from state to federal court.[149] The litigation was originally initiated in Texas state court against two defendants, one of which was Beazley.[150] After the suit was filed, the defendant other than Beazley removed the litigation to a federal district court in Texas.[151] When one defendant seeks removal to federal court, it is usually necessary to get the consent of other defendants in the litigation; this is referred to as the unanimity rule.[152] In the *Beazley* litigation, however, the removing defendant did not get the consent of Beazley for the removal to federal court.[153] The removing defendant believed that Beazley was a nominal defendant and that the unanimity rule thus did not require Beazley's consent.[154]

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[143] *See* 28 U.S.C § 1447(c) (2006).

[144] *See id.*

[145] *Id.*

[146] *Id.*

[147] *See* Deborah J. Challener, *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 RUTGERS L.J. 847, 887–90 (2007) (discussing abstention-based remands and abstention-based stays).

[148] No. 09-20005, 2009 WL 7361370 (5th Cir. May 4, 2009) (per curiam).

[149] *Id.* at *1.

[150] *Id.*

[151] *Id.*

[152] *E.g.*, Air Starter Components, Inc. v. Molina, 442 F. Supp. 2d 374, 377 (S.D. Tex. 2006) (stating that "[u]nder the unanimity rule, all properly served defendants must timely join in or consent to the removal").

[153] *Beazley*, 2009 WL 7361370, at * 1.

[154] *Id.*

Beazley filed a motion to remand to state court on the grounds of the unanimity rule.[155] According to Beazley, it was not a nominal party and its consent was required for a proper removal.[156] The district court denied the remand motion.[157] Beazley then filed a petition for mandamus in the Fifth Circuit asking the court to review the denial of Beazley's nonjurisdictional remand motion.[158] As discussed in the previous section regarding jurisdictional-based remand motions, mandamus is appropriate only if the mandamus petitioner has "no other adequate means to attain relief."[159] According to Beazley, it had no other means to attain relief because an appeal after a final judgment would require Beazley to comply with the harmless-error rule.[160]

The harmless-error rule is a requirement for an appellant seeking appellate court reversal of a final judgment entered by a lower court.[161] The harmless-error rule captures the common-sense notion that a legal error made by a lower court should not require a reversal on appeal if the legal error did not affect the ultimate outcome below.[162] Thus, for instance, a

[155] *Id.* at *2.

[156] *Id.*

[157] *Id.*

[158] *Id.* at *3.

[159] *E.g.*, Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980) ("In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires . . . .").

[160] *Beazley*, 2009 WL 7361370, at *3.

[161] There are a variety of sources for the harmless-error rule. Rule 61 of the Federal Rules of Civil Procedure addresses the harmless-error rule, although the more natural location of the rule might have been in the Federal Rules of Appellate Procedure. FED. R. CIV. P. 61. In any event, 28 U.S.C. § 2111 also expresses the harmless-error principle, and this provision is applicable to all federal courts, including federal appellate courts. *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2882 (2d ed. 1995) (explaining the applicability of § 2111 to federal appellate courts). Even without a positive source for the rule, federal courts might nevertheless apply the principle of the harmless-error rule. *See id.* (suggesting that the harmless-error rule would be applied even without § 2111 and Rule 61). This is the case for many state appellate courts. *See, e.g.*, Palmer v. Hall, 680 So. 2d 307, 307–08 (Ala. Civ. App. 1996) (stating that the court can affirm based on the harmless-error rule, but not providing a statutory basis for doing so); Bean v. Superior Bowen Asphalt Co., 340 S.W.3d 275, 279 (Mo. Ct. App. 2011) (stating that "[t]o reverse a trial court's grant of a new trial due to instructional error, the appellant must either show that the instructions were not, in fact, erroneous or that there was no potential for prejudice from the erroneous instruction," but not citing a state statute in support of the assertion).

[162] *See* Kotteakos v. United States, 328 U.S. 750, 760 (1946) ("[The harmless-error principle] comes down on its face to a very plain admonition: 'Do not be technical, where technicality does

trial court's decision to admit documentary evidence that has not been authenticated might be an error,[163] but on appeal, the harmless-error rule allows an appellate court to determine that the judgment below need not be reversed simply because of this technicality.[164]

The harmless-error rule and the final-judgment rule are interrelated. Because litigants are usually forced to litigate in a lower court through a final judgment before an appeal is permitted, the harmless-error rule is a reflection of the fact that considerable time and effort has been required in reaching this judgment and that errors in that process should be ignored if they did not affect the ultimate outcome. Without the harmless-error rule, any technical error by a lower court would require a reversal on appeal. Under this scenario, then, the final-judgment rule would probably have to be reconsidered; the efficiencies and benefits supporting the final-judgment rule would be outweighed by the enormous costs associated with having to redo lower court proceedings based on errors that did not affect the ultimate decision.

In *Beazley*, the mandamus petitioner's argument was that it had no adequate remedy on appeal because the district court's improper failure to remand the case to state court might be considered a harmless error in an appeal after a final judgment.[165] In other words, Beazley contended that the harmless-error rule might preclude appellate relief after a final judgment because Beazley would be unable to show that a remand to state court might have resulted in a different final judgment.

The Fifth Circuit agreed with Beazley's argument.[166] In fact, this conclusion was arguably compelled by precedents that had considered the exact same argument in the context of motions to transfer to another federal court based on venue or forum non conveniens.

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not really hurt the party whose rights in the trial and in its outcome the technicality affects.'"); WRIGHT ET AL., *supra* note 161 at § 2883 ("Plainly Rule 61 teaches that the proceedings are not to be disturbed because of an error that prejudiced no one.").

[163] *See, e.g.*, United States v. Luna, 649 F.3d 91, 103–04 (1st Cir. 2011) (stating that while "[e]vidence must be authenticated before it may be admitted," the failure to do so need not result in remand if, for example, prior testimony supported the same conclusion because it would render the error harmless).

[164] *See id.*

[165] 2009 WL 7361370, at *3.

[166] *Id.*

One case on which the court relied in *Beazley* was *In re Volkswagen*,[167] a much-discussed decision[168] also decided by the Fifth Circuit. The *Volkswagen* litigation involved a mandamus petition from a litigant whose motion to transfer to a different venue had been denied.[169] The Fifth Circuit eventually granted the petition,[170] but not without a protracted struggle with a host of issues raised by the petition.[171] The Court had no apparent difficulty, however, in determining that the petitioner had satisfied the mandamus requirement that a petitioner "have no other adequate means to attain . . . relief . . . ."[172] According to the court, that requirement was "certainly satisfied"[173] in that case because of the difficulty petitioner would have in winning an appeal after a final judgment.[174] The harmless-error rule would require the petitioner "to show that it would have won the case had it been tried in [the legally correct forum]."[175]

In addition to its *Volkswagen* precedent, the *Beazley* court also cited Judge Posner's opinion in *In re National Presto Industrial Inc.*[176] as support for its conclusion that mandamus was appropriate.[177] The *Presto* litigation involved a suit by the Securities and Exchange Commission against National Presto Industries ("Presto") in federal district court in Chicago.[178]

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[167] 545 F.3d 304 (5th Cir. 2008).

[168] *See, e.g.*, Elizabeth Durham, *Will All Roads Still Lead to the Eastern District of Texas? Transfer Practice After* Volkswagen *and* TS Tech, 21 INTELL. PROP. & TECH. L.J. 12 (2009); Paul M. Janicke, *Patent Venue and Convenience Transfer: New World or Small Shift?*, 11 N.C. J. L. & TECH. ONLINE EDUC. (2009); Donald W. Rupert & Daniel H. Shulman, *Clarifying, Confusing, or Changing the Legal Landscape: A Sampling of Recent Cases from the Federal Circuit*, 19 FED. CIR. B.J. 521, 526–36 (2010).

[169] *Volkswagen*, 545 F.3d at 308.

[170] *Id.* at 319.

[171] There were three opinions by the Fifth Circuit in this litigation. The initial panel denied the mandamus petition, *In re* Volkswagen of Am., Inc., 223 F. App'x 305 (5th Cir. 2007), but then reversed course on rehearing and granted the petition, *In re* Volkswagen of Am., Inc., 506 F.3d 376 (5th Cir. 2007). This result was confirmed by the entire court in a rehearing en banc. *In re* Volkswagen of Am., Inc., 517 F.3d 785 (5th Cir. 2008).

[172] *Volkswagen*, 545 F.3d at 311 (quoting Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380–81 (2004)).

[173] *Id.* at 318.

[174] *Id.*

[175] *Id.* at 319.

[176] 347 F.3d 662 (7th Cir. 2003).

[177] *In re* Beazley Ins. Co., No. 09-20005, 2009 WL 7361370, at *3 (5th Cir. May 4, 2009) (per curiam).

[178] *In re Nat'l Presto*, 347 F.3d at 663.

Presto filed a motion requesting a change of venue based on "convenience" and "justice."[179] This motion was denied by the district court,[180] and Presto sought mandamus review of this decision by the Seventh Circuit.[181] The opinion by Judge Posner begins with the question of whether Presto had satisfied the mandamus requirement that "the challenged order cannot be repaired by any means other than mandamus . . . ."[182] Judge Posner concludes, without citation to authority, that Presto had satisfied this requirement because Presto "would not be able to show that it would have won the case had it been tried in a convenient forum."[183]

The *Beazley*, *Volkswagen*, and *Presto* cases all involve slightly different factual contexts. The *Beazley* case involved mandamus from the denial of a remand motion to state court, which is the specific issue to which this article is devoted.[184] The *Volkwagen* case involved mandamus from the denial of a motion for a venue change.[185] And the *Presto* case involved mandamus from the denial of a motion to transfer based on forum non conveniens.[186] Yet, despite these factual distinctions, the conclusion in favor of mandamus in each of these cases follows an identical analytical path. In each, the court draws the *conclusion* that mandamus is proper based on the *premise* that any error made by the court would be harmless. As explained below, the premise relied on by the courts in these three cases is questionable. Even if the premise is valid, however, the conclusion drawn from it is unsound.

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[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.* The mandamus petition in *Presto* was eventually denied, as the court concluded that Presto had not satisfied the requirement that the lower court's ruling was "patently erroneous." *See id.* at 663–64. The court in *Presto* could have reached this conclusion against mandamus without even offering an opinion on whether Presto had satisfied the mandamus requirement that there be no adequate remedy on appeal. *See id.* The court's opinion on this issue, then, was obiter dicta. Considering the deficiencies in the analysis employed by the Seventh Circuit in *Presto* (explored in the Article below), and considering that the *Presto* opinion by Judge Posner seems to be the origin of the modern progeny of cases such as *Beazley* and *Volkswagen*, the court would have been well advised to avoid this dicta.

[184] *In re* Beazley Ins. Co., No. 09-20005, 2009 WL 7361370, at *1 (5th Cir. May 4, 2009) (per curiam).

[185] *In re* Volkswagen of Am., Inc., 545 F.3d 304, 308 (5th Cir. 2008).

[186] *In re Nat'l Presto*, 347 F.3d at 663.

First, it is not entirely clear that the premise on which the conclusions in *Beazley*, *Volkswagen*, and *Presto* are based is accurate. In each case, the court seemed fairly certain that the alleged error by the district court would be harmless error in an appeal after a final judgment, although in each opinion this conclusion was reached without citation to convincing authority.[187] Moreover, there is some case law suggesting the exact *opposite* of what was assumed in *Beazley*, *Volkswagen*, and *Presto*.[188]

An underlying difficulty in this area is that courts and commentators have not settled upon a clear standard for measuring whether a district court's error is harmless. At a surface level, the harmless-error concept is intuitive and easily comprehendible: A final decision should not be reversed simply because of an error that had no impact on the underlying litigation. Beneath this surface level, however, challenging complexities exist. As Professor Sunderland noted long ago: "The problem of [harmless] error is a problem in professional psychology. No rules can be framed which will solve it . . . ."[189] The harmless-error rule is articulated by courts and commentators in wildly different manners that reflect actual conceptual, rather than semantic, differences.[190] Moreover, even if this

[187] *See Beazley*, 2009 WL 7361370, at *3; *Volkswagen*, 545 F.3d at 318–19; *In re Nat'l Presto*, 347 F.3d at 663.

[188] *See, e.g.*, McKinney v. Bd. of Trs., 955 F.2d 924, 927–28 (4th Cir. 1992) (affirming the denial of a remand motion asserting procedural grounds, in an appeal after a final judgment, without considering whether the alleged error is harmless); Wilson v. Gen. Motors Corp., 888 F.2d 779, 780–81 (11th Cir. 1989) (same); Marbury-Pattillo Constr. Co. v. Bayside Warehouse Co., 490 F.2d 155, 157–58 (5th Cir. 1974) (affirming the denial of a transfer motion, in an appeal after a final judgment, without considering whether the alleged error is harmless). There is also substantial case law suggesting that the denial of any sort of transfer order is harmless in an appeal after a final judgment. *See* 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3855 (3d ed. 2007) (citing cases for the proposition that an error in a transfer decision is "very unlikely to constitute reversible error" in an appeal after a final judgment). *See generally* Christina Melady Morin, Note, *Review and Appeal of Forum Non Conveniens and Venue Transfer Orders*, 59 GEO. WASH. L. REV. 715, 727–28 (1991) (discussing the frequency with which forum non conveniens or venue transfer decisions by a district court are reversed in an appeal after a final judgment).

[189] Edson R. Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 146–47 (1927).

[190] *Compare* Palmer v. Hoffman, 318 U.S. 109, 116 (1943) ("He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted."), *with* Citron v. Aro Corp., 377 F.2d 750, 753 (3d Cir. 1967) (reversing erroneous decision of district court because prejudice was "within the range of possibility, [therefore] a demonstration of prejudice was not required.").

problem was resolved and a unified approach for determining harmless error was settled upon, the application of this test in actual litigation would usually seem to require a case-by-case approach. The Supreme Court has warned "against attempting to generalize broadly"[191] in determining whether an error is harmless, and one leading commentator has concluded that "[i]n considering whether an error [i]s harmless, the court necessarily must look to the circumstances of the particular case, and decision in other cases are of only limited value."[192] Thus, there are reasons to doubt that the premise on which the *Beazley*, *Volkswagen*, and *Presto* cases is based—that the alleged error made by the district court in refusing to transfer the litigation to another forum would be harmless in an appeal after a final judgment—is accurate.

Even if this premise is accurate, though, the conclusion that the *Beazley*, *Volkswagen*, and *Presto* cases drew from it cannot withstand close scrutiny. The court in each of those cases reasoned that mandamus must be available to review a particular ruling because an appeal of that ruling after final judgment would prove unsuccessful because of the harmless-error rule.[193] Indeed, there is a tempting appeal to the logic that an error must be corrected on mandamus because it cannot be corrected in appeal after a final judgment. This logic, however, is erroneous. The analytical error is in assuming that *every* district court mistake should be correctable on appeal after a final judgment or correctable through mandamus. In reality, however, district court errors are often insulated from appellate court review in an appeal after a final judgment by a variety of different rules serving various policy objectives.[194] The potential application of these calibrated rules in an appeal does not render an appeal an inadequate remedy.

Consider, for instance, the well-settled rule that an appellant cannot win an appeal after a final judgment if the error has not been preserved in the district court.[195] Under the rationale employed in *Beazley*, *Volkswagen*, and

[191] Kotteakos v. United States, 328 U.S. 750, 765 (1946).

[192] WRIGHT ET AL., *supra* note 161 at § 2883.

[193] *See In re* Beazley Ins. Co., No. 09-20005, 2009 WL 7361370, at *3 (5th Cir. May 4, 2009) (per curiam); *In re* Volkswagen of Am., Inc., 545 F.3d 304, 319 (5th Cir. 2008); *In re* Nat'l Presto Indus., Inc., 347 F.3d 662, 663 (7th Cir. 2003).

[194] 14C CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 3740 (4th ed. 2009).

[195] *See, e.g.*, Charter Sch. of Pine Grove, Inc. v. St. Helena Parish Sch. Bd., 417 F.3d 444, 447 (5th Cir. 2005) ("Ordinarily, arguments not raised in the district court cannot be asserted for the

Presto, the futility of an appeal after a final judgment based on an error that was not preserved would justify mandamus review of that error. This would, of course, entirely circumvent the policy objectives represented by the error-preservation rule.[196] An appeal is "inadequate" in the sense that the party losing that ruling cannot prevail. But that doesn't make appeal an inadequate remedy thereby justifying mandamus. Unpreserved errors are errors, but they possess a trait—unpreservedness—that defines the very reason a party cannot prevail on an appeal. Similarly, some errors are considered "harmless errors" because they are insufficiently likely to impact the final result in the case.[197] If an error possesses that harmless trait, the error will not produce a successful appeal after final judgment.[198] The existence of a trait that the law deems fatal to an appeal ought not be the justification for declaring the appellate remedy inadequate. Otherwise, the threshold mandamus requirement—which is supposed to keep mandamus from circumventing the appellate process—would be met precisely because this type of error cannot be successfully challenged on appeal.

Indeed, under the *Beazley*, *Volkswagen*, and *Presto* logic, the more mundane and unimportant the district court ruling, the more appropriate it is for mandamus review. Consider how the *Beazley*, *Volkswagen*, and *Presto* logic would apply to a mandamus petition requesting appellate court review of a district court's decision to admit hearsay testimony. Assuming that this hearsay testimony is cumulative of other similar evidence which has been, or will be, admitted at trial, the erroneous admission of this evidence would almost surely constitute harmless error in an appeal after a final

first time on appeal."); Holland v. Big River Minerals Corp., 181 F.3d 597, 605 (4th Cir. 1999) ("Generally, issues that were not raised in the district court will not be addressed on appeal.").

[196] *See* Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 U. KAN. L. REV. 947, 950 (1998) (examining the justifications for the error-preservation rule in the criminal law context but identifying concepts that apply equally in civil litigation). The problem with the logic used in *Beazley*, *Volkswagen*, and *Presto* can also be exposed by considering the following hypothetical: what if Congress imposed an amount-in-controversy requirement on appellate jurisdiction? Under the *Beazley*, *Volkswagen*, and *Presto* logic, legal errors in the lower-valued trial proceedings would warrant mandamus review because the litigant would be unable to satisfy Congress's requirement for prosecuting an appeal. This, of course, would completely undermine the policy reasons supporting Congress's hypothetical decision to limit appeal to cases involving a sufficient amount in controversy. *See* 28 U.S.C. § 1291 (2006).

[197] *See* 28 U.S.C. § 2111; FED. R. CIV. P. 61.

[198] *See* 28 U.S.C. § 2111; FED. R. CIV. P. 61.

judgment.[199] Yet, under the *Beazley*, *Volkswagen*, and *Presto* logic, the *harmless nature of this error* would render appeal an inadequate remedy. Indeed, because "[c]laims of error with regard to the admission or exclusion of evidence are prime candidates for application of the harmless[-]error rule,"[200] the *entire* panoply of evidentiary rulings made by a district court would become the fodder of mandamus review under the logic of *Beazley*, *Volkswagen*, and *Presto*.[201]

The fundamental mistake in *Beazley*, *Volkswagen*, and *Presto* is in assuming that an appeal after final judgment is not adequate simply because that appeal will be unsuccessful. In reality, an appellant's opportunity to appeal after a final judgment is not inadequate simply because that appeal might ultimately prove unsuccessful. A successful appeal is not generally guaranteed in our system, and there are delicate policy considerations represented by the rules that—like the harmless-error rule or the requirement that a litigant preserve error—sometimes preclude a successful appeal even though error was made in the court below.[202] In *Beazley*, *Volkswagen*, and *Presto*, the court lost sight of this bigger picture in favor of the attractive (but wrong) argument that a litigant is absolutely entitled to have a district court's error corrected on appeal.

This is not to say, however, that the intuition driving the courts in *Beazley*, *Volkswagen*, and *Presto* was *entirely* incorrect. In each of these cases, the court was obviously troubled with the notion that an incorrect interlocutory ruling on forum selection might go unremedied in an appeal after a final judgment.[203] As briefly discussed above, it is not entirely clear

[199] *See* United States v. Robinson, 639 F.3d 489, 493 (8th Cir. 2011) (holding the admitted hearsay evidence harmless because it mirrored prior testimony and was, thus, cumulative evidence). *See also* Coughlin v. Capitol Cement Co., 571 F.2d 290, 307–08 (5th Cir. 1978) (holding the admission of hearsay evidence harmless when it was cumulative to other evidence tending to prove the same proposition).

[200] WRIGHT ET AL., *supra* note 161 at § 2885.

[201] Predictably, in the few instances in which mandamus has been actually used to seek review of a district court evidentiary ruling, it has been refused. *See, e.g.*, Durham v. Tasco, Inc., 630 F.2d 612, 613 (8th Cir. 1980); *see also* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1273–75 (2007) (producing an exhaustive list of issues that have been reviewed through mandamus and not listing any evidentiary rulings).

[202] WRIGHT ET AL, *supra* note 194 at § 3740.

[203] *See In re* Beazley Ins. Co., No. 09-20005, 2009 WL 7361370, at *3 (5th Cir. May 4, 2009) (per curiam); *In re* Volkswagen of Am., Inc., 545 F.3d 304, 318 (5th Cir. 2008); *In re* Nat'l Presto Indus., Inc., 347 F.3d 662, 663 (7th Cir. 2003).

whether, as a descriptive matter, the court was correct in this assumption.[204] The court in each case, however, assumed this to be true even though, as a normative matter, the court obviously disagreed that a forum question should be considered harmless.[205] Judges and litigants know that the forum has a very real (though probably indeterminable) impact on the proceedings. These courts are convinced that forum-selection rulings are significant.

The problem in *Beazley*, *Volkswagen*, and *Presto* was that the courts chose to correct, through mandamus, a perceived deficiency in the harmless-error rule. This led the court in each case to adopt the faulty logic discussed above, wherein an unsuccessful appeal is presumed to be an inadequate appeal and therefore appellate review via mandamus is appropriate *because* the ruling has some trait that systemically has been determined to not justify appellate reversal. Stated simply, these courts are convinced that forum-selection rulings are significant. The proper audience for that argument is with the rule that defines when errors are significant: the harmless-error rule. The answer is not to issue extraordinary writs correcting errors on the very grounds that the system deems them too insignificant to have appellate significance.[206] Either a federal court's decision to retain a case is likely to have a significant impact on the proceedings or it is not. If so, the wrong decision constitutes harmful, reversible error. If not, the answer cannot be that errors in that category now satisfy the mandamus threshold because they were determined to be unlikely to significantly impact the proceedings.[207]

III. THE STATUTORY SURROUNDINGS SUPPORT A LIMITED ROLE FOR MANDAMUS IN REVIEWING DENIED REMAND MOTIONS.

The final-judgment rule is likely not intuitive to most whose perspective involves a case or a few cases. It is certainly easy to criticize in particular

[204] *See supra* note 188 and accompanying text.

[205] *See Beazley*, 2009 WL 7361370, at *3; *Volkswagen*, 545 F.3d at 318; *In re Nat'l Presto*, 347 F.3d at 663.

[206] As discussed *supra* in note 50, forum determinations such as those involved in a remand motion are also likely candidates for certification under § 1292(b).

[207] Similarly, if problems exist with regard to *proving* how a forum-selection ruling impacted a trial, that too can be addressed in the harmless-error context. It is simply not sound to bypass this inquiry and to declare that because a person cannot satisfy the harm showing on normal appeal, the person can obtain the extraordinary writ whose threshold no-adequate-remedy requirement is supposed to keep mandamus from circumventing the appellate process and rules.

cases when asking why a client ought to endure the pointless exercise of a trial that will surely be undone because of some incorrect interlocutory ruling, such as a denied motion to remand. But as discussed throughout this article, the final-judgment rule is not focused on a particular case but rather reflects the systemic consequences of allowing immediate interlocutory appeals and the difficulty of prospectively defining cases where the balance justifies the early appeal. Mandamus is not supposed to be a way to circumvent these policies, and the adequate-remedy-by-appeal requirement is the anti-circumvention prong.

When the final-judgment rule is respected and mandamus properly limited, a cohesive and sensible picture emerges with regard to appellate review of remand denials. First, allowing mandamus review of remand denials would disrupt the congruity Congress obviously desired for the remand context. Second, our conclusions with respect to the availability of immediate appeals and mandamus in this context complement the similar analysis and conclusion under the collateral-order doctrine. And third, given recent rulemaking delegations, a court may properly conclude that remand denials should be immediately appealable—but that court ought to be the Supreme Court exercising its delegated rulemaking powers, not lower courts relaxing the finality requirements or expanding the mandamus powers.

A. Allowing Mandamus Review of Remand Denials Disrupts the No-Review Congruity Congress Desired and Enacted in the Remand Context.

Disallowing immediate review of remand denials is consistent with Congress's scheme and hardly unfair to plaintiffs. Congress implemented a scheme where neither grants nor denials of remand motions are reviewable before the parties litigate the merits. A remand *grant* based on a lack of subject-matter jurisdiction or a defect in removal procedure is already unreviewable by appeal *or* by mandamus because of 28 U.S.C. § 1447(d)'s statutory bar.[208] This restriction on appellate review of remand grants is not just a delay; it is a bar forever. Once the case is sent back to state court, there is no opportunity to challenge the remand order.[209] So, while a

[208] 28 U.S.C. § 1447(d) (2006); Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 229–30 (2007).

[209] Indeed, a district court cannot even choose to certify such a remand order under § 1292(b). Feidt v. Owens Corning Fiberglas Corp., 153 F.3d 124 (3d Cir. 1998) (attempted certification of a

plaintiff may have to delay challenging the federal court's decision to retain the case, a defendant is forever barred from challenging a remand grant that is even colorably based on a defect in subject-matter jurisdiction or removal procedure.[210]

So then, two different statutory restrictions converge to create a scheme that disallows pre-merits review of remand-motion rulings. The remand denial is generally unreviewable because of the final-judgment rule.[211] And, a remand grant is generally unreviewable because of 28 U.S.C. § 1447(d).[212] The Supreme Court long ago observed this congruity:

> Congress, by the adoption of these provisions, as thus construed, established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. This was accomplished by denying any form of review of an order of remand and, before final judgment, of an order denying remand.[213]

remand order governed by § 1447(d) is "inappropriate and does not circumvent the section 1447(d) jurisdictional bar"); Krangel v. Gen. Dynamics Corp., 968 F.2d 914, 916 (9th Cir. 1992) (holding that § 1447(d) precluded it from granting a § 1292(b) petition for permission to appeal); *In re* TMI Litig. Cases Consol. II, 940 F.2d 832, 846 (3rd Cir. 1991) (suggesting in dicta that review under § 1292(b) would not be available); Ray v. Am. Nat'l Red Cross, 921 F.2d 324, 326 (D.C. Cir. 1990); *In re* Rosenthal-Block China Corp., 278 F.2d 713, 714 (2d Cir. 1960) (citing *In re Bear River* with approval); *In re* Bear River Drainage Dist., 267 F.2d 849, 851 (10th Cir. 1959) (holding that § 1292(b) does not apply to allow an appeal otherwise precluded by § 1447(d)). Nor can the district court avoid the bar by certifying an appeal *before* ruling on the remand motion. *Ray*, 921 F.2d at 324.

[210] *Powerex*, 551 U.S. at 234. In a sense, if the plaintiff is confident in the jurisdictional argument, the plaintiff may get two proverbial bites at the apple because if the plaintiff wins on the merits she will not reurge her jurisdictional objection. If the plaintiff loses and prevails on the jurisdictional argument, the case will be remanded for trial in the state court. Of course, this analysis is complicated by the fact that, however disfavored and impractical it may be, the removing defendant can himself raise the jurisdictional objection should the plaintiff prevail on the merits. *See* Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 388–89 (1884).

[211] 28 U.S.C. § 1291. *See supra* Part I.

[212] *Id.* § 1447(d); *Powerex Corp.*, 551 U.S. at 229 ("The authority of appellate courts to review district-court orders remanding removed cases to state court is substantially limited by statute. Title 28 U.S.C. § 1447(d) . . . .").

[213] United States v. Rice, 327 U.S. 742, 751 (1946).

It is sometimes difficult for an appellate judge to be told that a ruling perceived to be incorrect is beyond correction, whether by § 1447(d)'s bar on reviewing remand grants or the mandamus limitations that prevent immediate review of remand denials. And if one were to *start* with the assumption that the unreviewable ruling were *wrong*, then it would indeed be easy to conclude that it is pointless or "absurd"[214] to not correct such an obviously wrong ruling. Why, one might ask, would Congress ever pass a statute forbidding review of obviously wrong rulings? But that misses the point of no-review statutes. They prevent courts from hearing certain challenges because hearing all challenges within that category imposes costs. Preventing courts only from hearing unmeritorious challenges prevents no meaningful limitation because the judicial proceeding is necessary to determine the challenge's meritorious nature.[215] And, it doesn't take much litigation experience to understand the practical center of these types of rules: parties who lose believe they have meritorious challenges.

We can see this flawed thinking present itself in the way courts sometimes address whether mandamus is available. Take the first panel decision in *Crystal Power*.[216] There, the court notes the three mandamus requirements, the first of which is whether there are no other means to obtain the relief it desires (or, no adequate remedy by appeal.).[217] But the panel nonetheless starts with the second requirement, which evaluates whether the district court was clearly wrong.[218] Having started with "was there clear error," the court then finds itself in the unpleasant circumstance of later lamenting the pointlessness of sending this case back to be inevitably reversed.[219] Surely Congress wouldn't have wanted to prevent an interlocutory challenge to an incorrect ruling! At that level of specificity, we suppose the exclamation is correct. But Congress cannot advance

[214] *In re* Dutile, 935 F.2d 61, 64 (5th Cir. 1991) (first resolving the jurisdictional challenge and then declaring that it would be absurd to not correct the error).

[215] *See* Kircher v. Putnam Funds Trust, 547 U.S. 633, 649 (Scalia, J., concurring).

[216] *In re* Crystal Power Co., 641 F.3d 78, 81 (5th Cir.), *opinion withdrawn and superseded by* 641 F.3d 82 (5th Cir. 2011).

[217] *Id.* at 81.

[218] *Id.* at 81–82.

[219] *In re* Crystal Power Co., 641 F.3d 82, 85 n.10 ("We confess puzzlement over why respondents insist on litigating this case in federal court even though, as our previous opinion explained, any judgment issued by the district court will surely be reversed—no matter which side it favors—for lack of federal jurisdiction due to improper removal.").

efficiency by defining worthy challengers as those who will win, and courts confuse the purpose and function of no-challenge statutes when they first perform the forbidden task (evaluating the challenge) and then lament the fact that they cannot correct the problem they were not supposed to evaluate.[220]

But, answered the *Crystal Power* panel, appellate courts can minimize delay and disruption by sternly insisting that mandamus petitions present not just errors but "clear and indisputable errors."[221] This requirement seems daunting, but clear-error review presents no obstacle when the argument is a question of law,[222] which will often be the case with jurisdiction-based remand motions. Indeed, although standards such as "clear abuse of discretion" and "clear error" seem to capture only a small bit of egregious district-judge conduct, a judge will be found to have clearly erred or abused her discretion by incorrectly answering even a legal question of first impression.[223] Ultimately, the panel's insistence that courts of appeals are "fully capable"[224] of sorting out the winners from the losers by mandamus overemphasizes the nature of clear-error review on legal questions, circumvents the two appellate remedies available, and

[220] *See, e.g.*, BancOhio Corp v. Fox, 516 F.2d 29, 33 (6th Cir. 1975) (concluding that the district court had no jurisdiction and then turning to the question whether this court should issue a writ of mandamus); Direct Transit Lines, Inc. v. Starr, 219 F.2d 699, 701 (6th Cir. 1955) (after resolving the merits of a jurisdictional challenge, stating: "[D]espite the opinion we have expressed, we should refrain from issuing a writ of mandamus, since the district court's refusal to remand will be reviewable upon appeal appropriately taken from a final judgment. We reach this conclusion with reluctance, realizing as we do the inconvenience, delay and expense to the litigants that it may occasion, but our conclusion is dictated by authority."). Indeed, the Ninth Circuit has now declared that whether there is "clear error" as a matter of law is the dispositive factor that must be addressed first. It is easy to be seduced by the word "clear," but the deference it purportedly creates is an illusion when applied to questions of law, which will usually be the proper characterization of remand motions.

[221] 641 F.3d at 84 n.6.

[222] *In re* Cement Antitrust Litig., 688 F.2d 1297, 1305–07 (9th Cir. 1982); *see also* Sec. & Exch. Comm'n. v. Rajaratnam, 622 F.3d 159, 171 (2d Cir. 2010) ("A district court abuses its discretion if it based its ruling on an erroneous view of the law." (internal quotation marks omitted)). Despite scary-sounding adjectives, it's difficult to find federal appellate opinions deferring to district-court resolutions of legal questions, whether the standard of review is described as abuse of discretion, clear error, or de novo. *See* Koon v. United States, 518 U.S. 81, 100 (1996).

[223] San Jose Mercury News, Inc. v. U.S. Dist. Ct.—N. Dist. (San Jose), 187 F.3d 1096, 1099 (9th Cir. 1999); *In re* Von Bulow, 828 F.2d 94, 97 (2d Cir. 1987).

[224] *In re Crystal Power*, 641 F.3d at 84–85 n.6.

undermines the policy Congress enacted generally prohibiting any party from delaying merits proceeding to review immediately a remand-motion ruling.

The lessons of 28 U.S.C. § 1447(d) are still being learned, and one would hope appellate courts would not repeat their sins. There is an eerie resemblance between the § 1447(d) cases involving appellate review of orders granting remand and the remand-denial cases we have been discussing. In both situations, statutes prohibit appellate review of remand orders. Both statutes impose categorical rules whose purpose is thwarted by ad hoc review. Yet, in the § 1447(d) context, the Supreme Court just could not resist allowing bad facts to make bad law, and it opened the door to reviewing some orders anyway in *Thermtron*.[225] Although we point the reader to others for a detailed description of this line of cases,[226] it seems safe to describe its approach as less than aspirational. Justice Scalia's observation in a recent § 1447(d) case, quoting the majority opinion, is a fitting way to sum up the result: "How can a statute explicitly eliminating appellate jurisdiction to review a remand order not 'control' whether an appellate court has jurisdiction to review a remand order?"[227] Similar conceptual problems plague the use of mandamus to circumvent the final-judgment rule and the interlocutory-review scheme Congress did enact. And the first step towards that folly is *starting* with the forbidden interlocutory review of the legal issue and then evaluating whether a court ought to be able to review the wrong ruling it was not supposed to be reviewing.

[225] Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976), *abrogated in part by* Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

[226] Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 1862, 1868 (2009) (Stevens, J., concurring) (stating that "*stare decisis* compels the conclusion that the District Court's remand order is reviewable notwithstanding § 1447(d)'s unambiguous contrary command"); *Id.* (Scalia, J., concurring) ("[O]ur decision in *Thermtron* was questionable in its day and is ripe for reconsideration in the appropriate case."); *Id.* at 1869–70 (Breyer, J., concurring) ("Consequently, while joining the majority, I suggest that experts in this area of the law reexamine the matter with an eye toward determining whether statutory revision is appropriate."); *see also* Pfander, *supra* note 1 (describing the "quiet crisis" created by the Supreme Court's treatment of the appellate review of remand orders).

[227] Osborn v. Haley, 549 U.S. 225, 264–65 (2007) (Scalia, J., dissenting).

B. Collateral-Order Doctrine

The collateral-order doctrine is a fiction that, technically, is not an exception to the final-judgment rule. Instead, this fiction deems a narrow category of rulings "final" thereby *satisfying* the final-judgment rule.[228] The Supreme Court has steadily narrowed the doctrine's scope,[229] and recently reaffirmed that little room exists for the doctrine's expansion.[230] From those opinions and those of lower courts, it is obvious enough that the collateral-order doctrine does not make remand denials categorically appealable, and therefore we do not delve deeply into the doctrine. Instead, we describe the intersection of the two doctrines to demonstrate consistency with our preceding analysis.

Although interlocutory immunity-from-suit rulings are reviewable under the collateral-order doctrine,[231] courts have routinely rejected attempts to extend the doctrine to jurisdictional rulings that do not involve immunity from suit.[232] This consistent rejection stems from a restriction on collateral-order review that resembles mandamus's no-adequate-remedy prong:[233] to obtain collateral-order review, the appellant must show that the order being appealed is of a category "effectively unreviewable on appeal from a final judgment."[234] The same anti-circumvention rationale that informs the mandamus inquiry, therefore, also informs the scope of the collateral-order doctrine. That is, the anticipated cost of the final-judgment rule (the time and expense of awaiting appeal after final judgment) cannot be the rationale for declaring an appeal an ineffective review.[235] "As long as the class of

[228] *See* Mohawk Indus., Inc. v. Carpenter, 130 S.Ct. 599, 605 (2009).

[229] *Id.* at 609. *See* Glynn, *supra* note 31 at 204.

[230] *See Mohawk*, 130 S. Ct. at 609.

[231] *E.g.*, P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993) (holding that an order denying a claim of Eleventh Amendment sovereign immunity is immediately appealable as a collateral order); Mitchell v. Forsyth, 472 U.S. 511, 526–30 (1985) (holding that an order denying qualified immunity is immediately appealable as a collateral order).

[232] *E.g.*, N.J., Dep't of Treasury, Div. of Inv. v. Fuld, 604 F.3d 816, 822–24 (3d Cir. 2010) (overruling Dieffenbach v. CIGNA, Inc., 310 F. App'x 504 (3d Cir. 2009)); Neal v. Brown, 980 F.2d 747, 748–49 (D.C. Cir. 1992); Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860, 862–63 (7th Cir. 1984); *see also* Estate of Bishop *ex rel.* Bishop v. Bechtel Power Corp., 905 F.2d 1272, 1275 (9th Cir. 1990).

[233] *In re* Papandreou, 139 F.3d 247, 250 (D.C. Cir. 1998) ("The two clearly have one element in common: mandamus's 'no other adequate means' requirement tracks [the collateral-order] bar on issues effectively reviewable on appeal.").

[234] *Mohawk*, 130 S. Ct. at 605.

[235] *See* Digital Equip. Corp. v. Desktop Direct, Inc., 511 US 863, 868 (1994) (citing Van

claims, taken as a whole, can be adequately vindicated by other means, 'the chance that the litigation at hand might be speeded, or a "particular injustic[e]" averted,' does not" justify application of the doctrine.[236]

The case we have made for properly constraining mandamus is in line with and supports the courts' refusal to treat remand denials as collateral orders. First, with regard to denial of jurisdiction-based remand motions, neither mandamus nor the collateral-order doctrine can justifiably recalibrate the final-judgment rule by accepting the anticipated costs of the rule as the reason for an exception to it.[237] Second, with regard to remand motions not based on jurisdiction, making the harmless-error-based argument is as flawed there (to argue that the issue is *effectively* unreviewable) as it was in the mandamus context (to argue that appeal was an inadequate remedy). Once again, any argument for the issue being "effectively" unreviewable on appeal would be a misplaced attack on the harmless-error rule.

C. Rulemaking Delegation

The astute reader will by now have recognized that the arguments advanced in this Article are descriptive rather than normative. Our conclusion that remand denials are usually only appealable after a final judgment is based on a straightforward application of the controlling congressional statutes and the established Supreme Court cases interpreting

Cauwenberghe v. Biard, 486 U.S. 517, 529 (1988)).

[236] *Mohawk*, 130 S. Ct. at 605–06 (quoting *Van Cauwenberghe*, 486 U.S. at 529).

[237] *Supra* note 229 and accompanying text; Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30 (1943) ("Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable."); *In re* Huguley Mfg. Co., 184 U.S. 297, 301 (1902) ("[T]he writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is only granted as a general rule where there is no other adequate remedy."); *In re* Blake, 175 U.S. 114, 117 (1899) ("The writ of mandamus cannot be issued to compel a judicial tribunal to decide a matter within its discretion in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction, nor be used to perform the office of an appeal or writ of error. And it only lies, as a general rule, where there is no other adequate remedy."); *Ex parte* Hoard, 105 U.S. 578, 580 (1881) (denying mandamus review where the case could be reviewed after a final judgment, stating that "it is an elementary principle that a *mandamus* cannot be used to perform the office of an appeal or a writ of error"); *In re* Ivy, 901 F.2d 7, 10 (2d Cir. 1990) (quoting *Roche*, 319 U.S. at 26–31).

these statutes. These statutes are based on value judgments made by Congress.[238]

The most fundamental value judgment made by Congress, of course, is that which underlies the final-judgment rule. As discussed above, the final-judgment rule is Congress's primary answer to the competing interests that are implicated in determining when a litigant can seek appellate review of an unfavorable ruling.[239] Since the original Judiciary Act of 1789, the final-judgment rule has been a mainstay of statutes defining the appellate jurisdiction of federal appellate courts.[240]

Despite Congress's long-standing use of the final-judgment rule, it has been willing to reconsider the policy considerations that are implicated in determining when a litigant can appeal to an appellate court. The All Writs Act represents a built-in safety valve for unique issues that do not lend themselves to meaningful appellate consideration after a final judgment.[241] The adoption of § 1292 represents a congressional realization that, in certain circumstances, the benefits of an immediate appeal outweigh the usual advantages of allowing an appeal only after a final judgment.[242]

Along these same lines, and much more recently, Congress again addressed this general topic by amending the Rules Enabling Act[243] to give the Supreme Court additional rulemaking power in this area. In 1990, Congress authorized the Court to adopt rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291."[244] Shortly thereafter, Congress enacted a provision that gives the Supreme Court the power to "prescribe rules . . . to provide for an appeal of an

[238] *See supra* notes 28–32 and accompanying text.

[239] *See supra* note 28 and accompanying text.

[240] *See* Martineau *supra* note 15, at 726 ("The final judgment rule and the problems it causes were introduced to the federal legal system by three sections of the statute that established the federal court system, the Judiciary Act of 1789.").

[241] *See, e.g.*, Eisenberg v. U.S. Dist. Ct. for S. Dist. of Ill., 910 F.2d 374, 375 (7th Cir. 1990) ("It is true that mandamus is one of the safety valves [on the final judgment] rule but it is one of the tightest."); Amy Schmidt Jones, *The Use of Mandamus to Vacate Mass Exposure Tort Class Certification Orders*, 72 N.Y.U. L. Rev. 232, 239 (1997) ("[T]he All Writs Act permit[s] the courts to provide for interlocutory appellate review when rigid adherence to the final judgment rule may result in injustice." (footnotes omitted)).

[242] *See* Solimine *supra* note 50, at 1169 (describing § 1292(b) as an exception to the final-judgment rule that "can save cost and time by shortening, streamlining or terminating the litigation").

[243] 28 U.S.C. § 2072(c) (2006).

[244] *Id.*; Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 609 (2009).

interlocutory decision to the courts of appeals that is not otherwise provided for under [§ 1292]."[245]

These recent amendments to the Rules Enabling Act are important in signaling (1) Congress's willingness to reconsider the advantages and disadvantages of interlocutory review before a final judgment, and (2) Congress's strong preference that reforms in this area be accomplished through a methodical and contemplative process. The Supreme Court has acknowledged the import of these amendments:

> Congress thus has empowered this Court to clarify when a decision qualifies as "final" for appellate review purposes, and to expand the list of orders appealable on an interlocutory basis. The procedure Congress ordered for such changes, however, is not expansion by court decision, but by rulemaking . . . . Our rulemaking authority is constrained by §§ 2073 and 2074, which require, among other things, that meetings of bench-bar committees established to recommend rules ordinarily be open to the public, § 2073(c)(1), and that any proposed rule be submitted to Congress before the rule takes effect, § 2074(a). Congress'[s] designation of the rulemaking process as the way to define or refine when a district court ruling is "final" and when an interlocutory order is appealable warrants the Judiciary's full respect.[246]

For the reader interested in the normative question as to whether remand denials *should be* appealable before a final judgment, this rulemaking process represents the legitimate mechanism for implementing any desired changes in this area of the law. This Article takes no position on this normative issue. There are certainly plausible arguments in favor of general interlocutory review of remand denials. This normative debate might be worth having. If so, it should be through the formal rulemaking process that Congress has required. Attempting to implement any normative conclusions outside this rulemaking process undermines the balance that Congress has struck in this area and the process that Congress has required for reconsidering this balance.

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[245] *Mohawk*, 130 S. Ct. at 609.

[246] Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 48 (1995).

IV. CONCLUSION

When a motion to remand to state court is denied by a federal district court, various issues arise regarding when a party can challenge that ruling. These issues, however, are not unique to the remand context, and instead are the common issues presented by interlocutory rulings and contemplated by the final-judgment rule. Thus, the timing of an appeal from a remand denial must be answered by the same principles that govern the timing of an appeal for other interlocutory orders. Recent attempts to use mandamus to categorically except remand-denial rulings from these principles have been incorrect. Therefore, interlocutory review is not generally available absent truly extraordinary circumstances or the district court's certification under § 1292(b).