MANDAMUS, STOP IN THE NAME OF DISCRETION: THE JUDICIAL "MYTH" OF THE DISTRICT COURT'S ABSOLUTE AND UNREVIEWABLE DISCRETION IN SECTION 1292(B) CERTIFICATION

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I. INTRODUCTION

By far, most appeals in the federal system "do not begin until the trial court has fully completed its involvement in a case" because of adherence to the final judgment rule.[1] Nevertheless, interlocutory appeals comprise over ten percent of the proceedings in the federal appellate docket, and the availability of appellate review influences litigant and judicial behavior alike at the trial level.[2]

This Comment discusses a particularly potent, but frequently ignored, example of a lack of review: the lack of mandamus review for denials of Section 1292(b) certification of interlocutory appeal. Such a jarring lack of review is traceable to the widespread judicial myth that the district court judge retains absolute discretion to deny certification under Section 1292(b).[3] This myth has become so engrained that few in either legal scholarship[4] or on the bench[5] have seriously questioned it in the fifty-four years since Section 1292(b) was promulgated.

Despite years of unquestioning adherence to this "rule," this Comment seeks to challenge the assumption that a district court judge has absolute discretion, unreviewable by even mandamus, to deny Section 1292(b)

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[1] Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 737 (2006).

[2] Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1166 (1990).

[3] *See infra* Part IV.

[4] For an example of a law review article that has questioned this assumption of the district judge's absolute discretion, *see* Robertson, *supra* note 1, at 780.

[5] *See infra* Part IV.

certification for reasons outside the statutory framework. This piece also hopes to highlight the downside of the current interpretation, which is all the more frustrating because it is unwarranted by the language and legislative history of Section 1292(b) itself.[6] Thus, Part II of this Comment provides a brief overview of the role of mandamus in appellate review, particularly its modern scope. Part III focuses on the weak utilization of Section 1292(b) as a means of interlocutory appeal and points to judges' absolute discretion as an integral culprit. Part IV investigates the origin of the myth and its pervasiveness throughout the federal system. Part V sets out examples of the detrimental effects on the judicial system that can arise from a lack of mandamus review of Section 1292(b) certification decisions. Finally, Part VI makes the case that neither the language of the statute nor its legislative history supports the myth of absolute discretion. It is judicially created and judicially perpetuated. Thus, it is up to the judiciary to reexamine the myth and put it to rest, at least for the sake of statutory integrity and the continued vitality of mandamus review as a tool for the litigant.

II. MANDAMUS AND INTERLOCUTORY REVIEW

"The federal appellate courts derive their authority to issue extraordinary writs from the All Writs Act."[7] A petition for writ of mandamus is not really an appeal. Rather, it is an original proceeding in the appellate court seeking an order directing the trial judge "to act in a manner necessary to fulfill her duties or stop acting in a way that is contrary to her authority."[8] Thus, mandamus review is "best understood as akin to an interlocutory appeal, a means to procure interlocutory review of a district court order" when no other interlocutory review is available.[9]

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[6] *See infra* Parts V, VI.

[7] Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 199 (2001) (citing 28 U.S.C. § 1651 (1994)). According to the United States Code, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2006).

[8] Amy E. Sloan, *Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process*, 35 U. BALT. L. REV. 43, 57 (2006).

[9] Leah Epstein, Comment, *A Balanced Approach to Mandamus Review of Attorney Disqualification Orders*, 72 U. CHI. L. REV. 667, 678 (2005); *see also* Maryellen Fullerton, *Exploring the Far Reaches of Mandamus*, 49 BROOK L. REV. 1131, 1138 (1983) ("A petitioner seeking mandamus requests expedited review by an appellate court of an interlocutory order,

Because of the scope of its power, the extraordinary writ is "one of 'the most potent weapons in the judicial arsenal.'"[10] To keep mandamus as the "tightest safety valve"[11] on the final judgment rule, extremely demanding standards have developed for its issuance.[12] Mandamus is a drastic remedy only justified in exceptional circumstances.[13] There must be no other adequate means of relief,[14] and the petitioner has the burden to show that his right to the writ is "clear and indisputable."[15] As exacting as these standards sound, they are "quintessentially vague."[16] There is a "formalistic pretense that writ usage is governed by hard legal standards when, in reality, writ usage is governed by . . . situational discretion."[17] Thus, over time, the writ's operative scope has enlarged because "the idea of a court acting outside of its 'jurisdiction' in a way subject to mandamus review has expanded from a very literal definition to a broader one,"[18] encompassing

thereby circumventing the general rule that federal courts of appeals have jurisdiction to consider only final decisions of district courts." (footnote omitted)).

[10] Amy Schmidt Jones, Note, *The Use of Mandamus to Vacate Mass Exposure Tort Class Certification Orders*, 72 N.Y.U. L. REV. 232, 241 (1997) (quoting Will v. United States, 389 U.S. 90, 107 (1967)).

[11] *Id.* at 238; *see also* Eisenberg v. U.S. Dist. Court for the So. Dist. of Ill., 910 F.2d 374, 375 (7th Cir. 1990).

[12] *See* Danny S. Ashby et al., *The Increasing Use and Importance of Mandamus in the Fifth Circuit*, 43 TEX. TECH. L. REV. 1049, 1050 (2011).

[13] *See Will*, 389 U.S. at 95. According to the Supreme Court, "[t]he peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Id.* (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)); *see also Ex parte* Fahey, 332 U.S. 258, 259–60 (1947) (stating that mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes").

[14] Kreig v. Prairie Island Dakota Sioux (*In re* Prairie Island Dakota Sioux), 21 F.3d 302, 304 (8th Cir. 1994) (per curiam).

[15] Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953); Cheney v. U.S. Dist. Court for the D.C., 542 U.S. 367, 381 (2004).

[16] *See* Fullerton, *supra* note 9, at 1147 ("Since no other grounds for mandamus were deemed appropriate, the Second Circuit was forced to rely on the 'usurpation of power' and 'abuse of discretion' justifications for mandamus.").

[17] Steven Wisotsky, *Extraordinary Writs: "Appeal" by Other Means*, 26 AM. J. TRIAL ADVOC. 577, 582 (2003).

[18] Jones, *supra* note 10, at 243; *see* Fullerton, *supra* note 9, at 1142–43 (summarizing that "federal appellate courts may issue writs of mandamus directed to a district judge only if all prerequisites are satisfied and one of five situations is present: the judge (1) has acted beyond his jurisdiction; (2) has refused to exercise his jurisdiction when he has no authority to refuse; (3) has usurped judicial power or clearly abused his discretion; (4) has persistently disregarded federal

instances in which "the district court's order is a clear abuse of discretion"[19] or the district judge has "violated a clear duty."[20] Finally, even if the various "conditions" imposed by the courts are met, the appellate court still has final discretion whether or not to issue the writ under the circumstances.[21]

Improper use of mandamus threatens to defeat the purposes of the final judgment rule[22] and seems to have resulted in a "growing extraordinary writ practice."[23] One of the reasons feeding this trend is weak use of another appealability concept, 28 U.S.C. § 1292(b), which, if more vigorously utilized, could sharply curtail improper mandamus petitions.[24]

III. THE UNDERUTILIZATION OF SECTION 1292(B) AND INTERLOCUTORY APPEALS

28 U.S.C. § 1292(b) is another release valve from the harshness of the final judgment rule, and it meets "the recognized need for prompt review of certain nonfinal orders."[25] Enacted as the Interlocutory Appeals Act of 1958, Section 1292(b) as presently codified provides for certification of an interlocutory appeal when the district judge is of the opinion that an 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," and the judge so states in writing.[26] "Within [ten] days of the certificate's

procedural rules; or (5) has been faced with a significant question of first impression concerning the power of the district courts under the federal rules of procedure").

[19] *In re Prairie Island Dakota Sioux*, 21 F.3d at 304.

[20] Eisenberg v. U.S. Dist. Court for the So. Dist. of Ill., 910 F.2d 374, 375 (7th Cir. 1990).

[21] Cheney v. U.S. Dist. Court for the D.C., 542 U.S. 367, 381 (2004).

[22] *See* Jones, *supra* note 10, at 241.

[23] *See* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3929, at 371 (2d ed. 1996). Part V will demonstrate that the refusal to authorize mandamus review of Section 1292(b) certification has contributed to this growing writ practice.

[24] *Id.*

[25] Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978).

[26] According to the United States Code:

> 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 a 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 . . . may thereupon, in its discretion, permit an appeal to be taken from such

issuance, a party may petition the court of appeals to hear the case."[27] Thus, Section 1292(b) is "tailor-made for handling difficult and novel questions of law that would otherwise evade" interlocutory review.[28]

However, "commentators generally discount its effectiveness as a safety valve for interlocutory appeals, since it has been historically utilized infrequently."[29] Diane Bratvold points out that "[i]n 2009, the federal court system received approximately 334 certified requests for review, which represented two certified requests for review for each of the 167 circuit judgeships, in contrast with 50,564 pending appeals nationwide."[30]

There are three reasons for this underutilization, all of which "lie with the district courts' unwillingness to embrace the statute, and not with the statute itself."[31] First, courts commonly announce that "[Section] 1292(b) is to be used sparingly, in exceptional cases."[32] These courts insist that interlocutory appeal is appropriate only in "big" cases, in which prolonged trial is expected following the disputed ruling.[33] Such courts look to the legislative history of Section 1292(b).[34] Other courts find that the "statute

> 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) (2006).

[27] Walter J. Bonner, *Federal Interlocutory Appeals and Mandamus*, *in* APPELLATE PRACTICE FOR THE MARYLAND LAWYER: STATE AND FEDERAL, at pt. II.C (3 ed. 2011), *available at* APML MD-CLE 17-247 (Westlaw).

[28] Robertson, *supra* note 1, at 779.

[29] Solimine, *supra* note 2, at 1193; s*ee also* Robertson, *supra* note 1, at 762 (lamenting that "[Section] 1292(b) appears to be significantly underutilized"); Glynn, *supra* note 7, at 266 ("District court certification is rare."); Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 71 F. Supp. 2d 139, 161 (E.D.N.Y. 1999) ("Over the past decade, there have been slightly more than 40,000 appeals heard by the court of appeals for the Second Circuit from final judgments. During that same period, only 138 interlocutory orders were certified under [S]ection 1292(b) for appeal, of which the court of appeals agreed to hear only 93." (citation omitted)).

[30] Diane B. Bratvold, *How to Get Heard: Practical Advice on Interlocutory Appeals*, FOR THE DEFENSE, Nov. 2010, at 35.

[31] Robertson, *supra* note 1, at 779.

[32] 16 WRIGHT ET AL., *supra* note 23, § 3929, at 365 n.10; Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 111 (1975) (finding the widely held view to be that [Section] 1292(b) certificates are to be issued only under extraordinary circumstances).

[33] 16 WRIGHT ET AL., *supra* note 23, § 3929, at 365.

[34] Solimine, *supra* note 2, at 1173. Solimine cites to *Kraus v. Board of County Road*

was framed in broad language" and resist the "temptation to chart out the types of cases or circumstances in which this . . . type of an appeal should be allowed."[35] There is no reference in the statutory language that Section 1292(b) is limited to exceptional cases.[36] However, this is not the most serious hurdle to Section 1292(b)'s effective use because "even a casual survey of the hundreds of appeals decided under [Section] 1292(b) suggests that it is often used in cases that do not meet the 'exceptional' test."[37]

More important is the district judge's reluctance to be reversed. The district judge has "strong incentives to refuse certification; when the judge chooses to certify, the judge is conceding that the question is a troubling one, and thus, worthy of appellate attention and possible reversal."[38] Thus, district court judges rarely certify interlocutory appeals, sheltered as they are by their initial discretion in making the certification.[39] Indeed, "[t]he district courts enjoy generally absolute discretion to deny a [S]ection 1292(b) certificate."[40] This absolute discretion protects the district court's understandable reluctance to undergo early appellate review.[41] Apparently, Congress had determined by means of district court certification that "the

Commissioners, 364 F.2d 919, 922 (6th Cir. 1966) and *Heddendorf v. Goldfine (In re* Heddendorf*)*, 263 F.2d 887, 888 (1st Cir. 1959) for support. *See also* H.R. REP. NO. 85-1667, at 3 (1958), *reprinted in* 1958 U.S.C.A.N.N. 5255, 5260 ("Your Committee is of the view that the appeal from interlocutory orders thus provided should and will be used only in exceptional cases . . . ."); *But cf.* Solimine, *supra* note 2, at 1193–95 (arguing that this limitation is unjustified and should be disregarded by all courts).

[35] Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 702 (5th Cir. 1961); *see also* Arizona v. Ideal Basic Indus., Inc. (*In re* Cement Antitrust Litig. (MDL No. 296)), 673 F.2d 1020, 1026 (9th Cir. 1982); Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333, 340–41 (1959) ("While use of the phrase 'exceptional cases' in the legislative history suggests the statute applies only to the 'big' case, emphasis was also given to 1292(b)'s ameliorating effect on district court backlogs, a result obtainable only if the new [S]ection is more liberally employed." (footnotes omitted)).

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

[37] 16 WRIGHT ET AL., *supra* note 23, § 3929, at 368.

[38] *See* Glynn, *supra* note 7, at 266; *see also* Robertson, *supra* note 1, at 762 ("From the district court's perspective, there is little incentive to certify orders for appeal; interlocutory appeal increases the opportunities for reversal and 'invites delay and circuit interference.'"); Glynn, *supra* note 7, at 224 (pointing out the district court judge has every incentive not to decide that appellate interference before the end of litigation is warranted).

[39] *See supra* note 38.

[40] Redish, *supra* note 32, at 109; s*ee also* D'Ippolito v. Cities Serv. Co., 374 F.2d 643, 649 (2d Cir. 1967).

[41] *See supra* note 38.

district court, better able to gauge both the timesaving from a reversal and the presence of dilatory motives in the request for appeal, [could] protect the appellate courts from an inundation of applications for appeal."[42] However, the absolute discretion[43] read into the statute[44] by the courts for "the certificate requirement has vastly reduced [S]ection 1292(b)'s potential effectiveness as a safety valve from the rigors of the final judgment rule."[45] It is well noted that "[t]here are fewer institutional constraints to minimize inappropriate considerations when the courts exercise unfettered discretion to decide whether to review" an interlocutory order.[46] In fact, the district judge's discretion has even been held to be unreviewable by mandamus petition,[47] allowing judges to "employ other, troublesome considerations—consciously or unconsciously— in" their decisions to certify because their decisions are "subjective and unchecked by formal or informal constraints in a pure discretionary regime."[48] Therefore, Section 1292(b)'s initial gatekeeper wields considerable power with little institutionalized constraint, whether by mandamus or otherwise. This lack of reviewability by mandamus, in particular, has negative repercussions for the judicial system's integrity, which will be discussed in Part V of this Comment.

[42] Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 379 (1961).

[43] Bonner, *supra* note 27, at pt. II.C ("[T]he statute reposes the broadest discretion in the district court, and denial of the certificate is not appealable under any theory, even mandamus.") (citing Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1344 (2d Cir. 1972)).

[44] Part VI of this Comment will show that "the plain language of [Section] 1292(b) lodges unlimited discretion only in the appellate court, not the district court." *See* Robertson, *supra* note 1, at 779–80.

[45] Redish, *supra* note 32, at 108–09; *see also* Jordan L. Kruse, Comment, *Appealability of Class Certification Orders: The 'Mandamus Appeal' and a Proposal to Amend Rule 23*, 91 NW. U. L. REV. 704, 717 (1997) (noting that the "strength of this exception to the final judgment rule is severely limited by its dual certification requirement").

[46] Glynn, *supra* note 7, at 249.

[47] *See, e.g.*, Exec. Software N. Am., Inc. v. U.S. Dist. Court for Cent. Dist. of Cal., 24 F.3d 1545, 1550 (9th Cir. 1994), *overruled on other grounds by* Cal. Dep't of Water Res. v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008); *see also* Arthur Young & Co. v. U.S. Dist. Court, 549 F.2d 686, 698 (9th Cir. 1977).

[48] Glynn, *supra* note 7, at 245.

IV. ISSUANCE OF MANDAMUS TO COMPEL SECTION 1292(B) CERTIFICATION

A. Courts Have Held Mandamus May Not Issue to Compel Certification

"Efforts to persuade a court of appeals to issue mandamus to compel certification by the district judge [even when a clear abuse of discretion is alleged] have generally proven unsuccessful"[49] because the "district court's refusal to certify is the end of the matter"[50] in the court. The refusal is not reviewable for clear error or clear abuse of discretion.[51] When refusing to issue a writ to compel certification, the vast majority of appellate courts rely on some iteration of the following: "[M]andamus to direct the district judge to exercise his discretion to certify the question is not an appropriate remedy," even when it is alleged that the failure to certify was a 'clear abuse of discretion' for which mandamus review would normally be appropriate.[52] However, for the most part, these appellate courts make little effort to explain the rationale behind this blanket prohibition.[53] Some state that "[c]ertification of an order under [Section] 1292(b) is discretionary with the district court and is not subject to review[,]"[54] implying that the statute confers absolute and unreviewable discretion at the trial level.[55] Others insinuate that the Section 1292(b) scheme, by nature, requires the

[49] 16 WRIGHT ET AL., *supra* note 23, § 3929, at 373; *see, e.g.*, Bachowski v. Usery, 545 F.2d 363, 368 (3d Cir. 1976) ("The certification procedure is not mandatory; indeed, permission to appeal is wholly within the discretion of the courts, even if the criteria are present.").

[50] *In re* Ford Motor Co., 344 F.3d 648, 654 (7th Cir. 2002).

[51] 1 ULRICH, KESSLER & ANGER, P.C. & SIDLEY & AUSTIN, FEDERAL APPELLATE PRACTICE: NINTH CIRCUIT § 3:13 (Cole Benson ed., 1999) ("[The District Court's] decision not to certify is not reviewable.").

[52] *See Arthur Young & Co.*, 549 F.2d at 698 (citing Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1338 (9th Cir. 1976); Plum Tree, Inc. v. Stockment, 488 F.2d 754, 755 n.1 (3d Cir. 1973); United States v. 687.30 Acres, 451 F.2d 667, 670 (8th Cir. 1971)).

[53] *See* Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 71 F. Supp. 2d 139, 162 (E.D.N.Y. 1999) ("The wide discretion available to the district court judge in certifying orders for interlocutory appeal under [S]ection 1292(b) has generally not been remarked on in this circuit.").

[54] *In re* Powerhouse Licensing, LLC, 441 F.3d 467, 471 n.2 (6th Cir. 2006).

[55] *See* 15A WRIGHT ET AL., *supra* note 23, § 3911, at 369 (explaining that the district court and the court of appeals have "equally unfettered discretion" under § 1292(b)).

district judge to have absolute discretion unreviewable by mandamus for it to function as Congress intended:

> The whole point of [Section] 1292(b) is to create a dual gatekeeper system for interlocutory appeals: both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden. If someone disappointed in the district court's refusal to certify a case under [Section] 1292(b) has only to go to the court of appeals for a writ of mandamus requiring such a certification, there will be only one gatekeeper, and the statutory system will not operate as designed.[56]

The district court in *The National Asbestos Workers Medical Fund v. Philip Morris, Inc.* explicitly stated that mandamus may not issue to compel certification because "[d]istrict courts do have independent and 'unreviewable' authority to deny certification" even where the court is of the opinion that the three statutory criteria are met.[57] The district judge's statutory discretion to certify is absolute, unreviewable, and, according to *National Asbestos*, apparently omnipresent throughout the certification process.[58] Of course, such unfettered discretion is free even from the potency of mandamus review, but as such, it has crippled Section 1292(b)'s role in appellate procedure to near irrelevance.[59] A district court with no incentive to seek review of its actions and sheltered by unreviewable discretion is wide open to conscious and unconscious abuse.[60] Any chance for abuse leans toward the increasing marginalization of this interlocutory statute at the expense of a cohesive, measured, and functional appellate process.

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[56] *In re* Ford Motor Co., 344 F.3d 648, 654 (7th Cir. 2002); *see also* D'Ippolito v. Cities Serv. Co., 374 F.2d 643, 649 (2d Cir. 1967).

[57] 71 F. Supp. 2d at 146; *see also* Exec. Software N. Am., Inc., v. U. S. Dist. Court for the Cent. Dist. of Cal., 24 F.3d 1545, 1550 (9th Cir. 1994) ("Even if the remand order meets the [S]ection 1292(b) criteria, the district court must agree to certify the order (a decision that itself is unreviewable) . . . ."), *overruled on other grounds by* Cal. Dep't of Water Res. v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008).

[58] *See* 71 F. Supp. 2d at 146.

[59] *See* Bratvold, *supra* note 30, at 35.

[60] *See supra* notes 46–48 and accompanying text.

B. Strained Reliance on Legislative History

These decisions rely upon an implicit understanding that Section 1292(b) confers absolute discretion upon the trial judge.[61] However, this understanding cannot be traced to the language of the statute itself.[62] In *National Asbestos*, the court acknowledged that the "language of [S]ection 1292(b) . . . is not decisive."[63] Instead, courts that have taken the trouble to justify their holdings rely upon legislative history and statutory design.[64] In particular, the court in *National Asbestos* relied upon letters and statements by members of the Judicial Conference because the "provision was adopted by Congress exactly as drafted and submitted by the Judicial Conference."[65] Several of these judges expressed their beliefs in a letter:

> Only the Trial Court can be fully informed of the nature of the case and the peculiarities which make it appropriate to interlocutory review at the time desirability of the appeal must be determined; and he is probably the only person able to forecast the further course of the litigation with any degree of accuracy.[66]

Accordingly, the court concluded that the "certification requirement was thus adopted to grant the district court authority to consider the multitude of factors peculiar to any given case" and that "[i]n order to effectively make these ad hoc calculations, the district court must necessarily have the power to consider factors[67] beyond the minimum criteria established in [S]ection

[61] *See supra* Part IV.A.

[62] *See infra* Part VI.

[63] 71 F. Supp. 2d at 162.

[64] *See id.* at 162–64.

[65] *Id.* at 162.

[66] H.R. REP. NO. 85-1667, at 5–6 (1958), *reprinted in* 1958 U.S.C.A.N.N. 5255, 5262.

[67] According to the court in *National Asbestos*:

1292(b)."[68] Thus, the district court judge may refuse to certify even when, in his determination, all three statutory criteria are met.[69]

Furthermore, the old "exceptional" cases limitation rears its ugly head once again. For the "exceptional" case requirement gleaned from the legislative history to function, district court judges must "have the flexibility to decide in enormously diverse and particularized litigations which cases are 'extraordinary.'"[70] Independent judgment and great care are required to do this.[71] The *National Asbestos* court determined such judgment and care could not be exercised without unreviewable and unlimited discretion.[72] Despite the court's belief in unreviewable discretion, it assures that "[t]his broad discretion does not mean that the district judge should act arbitrarily in granting or denying [S]ection 1292(b) certification" and the "[e]xercise of discretion should be rational and reasoned even though non-reviewable."[73] The court offers no suggestions as to how to ensure that a trial court does not abuse its non-reviewable discretion in a system that disciplines itself through constant review, including that of mandamus.

V. THE PITFALLS OF A BAR ON MANDAMUS REVIEW FOR SECTION 1292(B) CERTIFICATION

This complete prohibition of mandamus review of Section 1292(b) certification has not failed to elicit responses from the appellate courts.

> In order to determine whether an interlocutory appeal is an efficient use of judicial resources, the district judge needs to weigh numerous factors not specifically provided for in the statute. Among these factors are: (1) the time an appeal would likely take; (2) the need for a stay pending appeal and the effect on the litigation, including discovery, that would result from a stay; (3) the probability of reversal on appeal; (4) the effect of a reversal on the remaining claims; (5) the benefit of further factual development and a complete record on appeal, particularly in rapidly developing or unsettled areas of the law; and (6) the probability that other issues may moot the need for the interlocutory appeal.

71 F. Supp. 2d at 163.

[68] *Id.*

[69] *Id.* at 164.

[70] *Id.*

[71] *See* Milbert v. Bison Labs., Inc., 260 F.2d 431, 433 (3d Cir. 1958); *see also* Westwood Pharm., Inc. v. Nat'l Fuel Gas Distribution Corp., 964 F.2d 85, 89 (2d Cir. 1992).

[72] *See* 71 F. Supp. 2d at 164.

[73] *Id.* at 166.

These responses tend to have negative effects on the appellate system's integrity.[74] The appellate courts' first response is to encourage parties to seek mandamus review on the underlying order instead,[75] which could result in a slew of improper mandamus petitions. The second response is for the appellate courts to essentially threaten the district court with mandamus if certification is not forthcoming,[76] leading to an improper relationship between the district and appellate courts.

A. Mandamus on the Underlying Order

Neither an attempt to seek interlocutory appeal of an order under Section 1292(b) nor having the certification granted are preconditions for filing a mandamus petition on the order itself.[77] Therefore, appellate courts that refuse to consider mandamus review of Section 1292(b) certification will often encourage parties to seek mandamus on the underlying order instead.[78] For example, in *In re* Ford Motor Co., the Seventh Circuit noted that it had not "ruled out the possibility of a writ of mandamus in the [Section] 1292(b) [certification] context for a truly egregious situation, if it seemed that the district court was seriously abusing its authority."[79] However, it decided that the "way to secure appellate consideration in such a situation [was] not by seeking writ of mandamus to require the district court to certify something under [Section] 1292(b) . . . [rather] [i]t [was] simply to file a petition for a writ of mandamus directed to the underlying problem."[80]

However, this advice is legally inconsistent when an order "clearly meets the requirements set out in [Section] 1292(b)" and a district court's refusal to certify it for interlocutory appeal is being challenged for clear

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

[75] *See, e.g.*, *In re* Ford Motor Co., 344 F.3d 648, 654 (7th Cir. 2002).

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

[77] *See* Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 163 n.8 (3d Cir. 1993).

[78] *See, e.g.*, *In re* Lott, 424 F.3d 446, 449 (6th Cir. 2005) (stating that when the district court refused to certify a discovery order for § 1292(b) interlocutory appeal, the appellate court had authority to issue mandamus on the underlying issue instead); *see also In re* Powerhouse Licensing, LLC, 441 F.3d 467, 472–74 (6th Cir. 2006) (refusing to grant mandamus to compel certification but reviewing the underlying issue for violation of attorney-client privilege before denying the mandamus petition).

[79] *In re Ford Motor Co.*, 344 F.3d at 654.

[80] *Id.*

abuse of discretion or clear error.[81] In such cases, when all three statutory criteria have been met, then the "order involves a controlling question of law as to which there is *substantial ground for difference of opinion* and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation."[82] When such is the case and the district court judge refuses to certify, mandamus on the underlying issue is not a legally strong answer. As one frustrated court[83] pointed out when faced with the Section 1292(b) bar to mandamus review and a mandamus petition on the underlying order:

> [M]andamus or prohibition is singularly inappropriate to determine the correctness of a controlling question of law 'as to which there is *substantial ground for difference of opinion*' [because] [t]hese extraordinary writs are generally directed toward situations so bold and plain that the trial Judge's actions are examined in the light of the presence or lack of an abuse of discretion. Merely to decide a question of law incorrectly is certainly not an abuse of discretion. And yet the District Judge's refusal to certify this substantial and controlling question of law puts the Appellate Court in the position of either acquiescing in a useless trial and later appeal or the equally dubious position of saying that the trial Court's error [on the underlying issue] is so gross that it amounts to an abuse of discretion . . . . [N]o one could say Judge Ainsworth was that wrong considering the likelihood that the Supreme

[81] *See* Robertson, *supra* note 1, at 779.

[82] 28 U.S.C. § 1292(b) (2006) (emphasis added). *See supra* note 26.

[83] In this case, a limitation of liability proceeding was pending in federal district court in Texas in which a libellant had been restrained from pursuing a tug and owner regarding a collision. *Ex parte* Tokio Marine & Fire Ins. Co., 322 F.2d 113, 114 (5th Cir. 1963). Then, the libellant filed a direct action in Louisiana district court against the underwriters on the tug's liability policy. *Id.* The insurance companies challenged the jurisdiction of the Louisiana district court. *Id.* The district judge denied those motions and "declined to certify the questions as an interlocutory appeal under [Section] 1292(b)." *Id.* at 14–15. Therefore, the underwriters sought extraordinary relief "(a) directing Judge Ainsworth to vacate his orders, or (b) prohibiting the Judge from exercising jurisdiction over them until final disposition of the limitation proceeding, or (c) directing that the Judge certify the questions under 28 U.S.C.A. § 1292(b)." *Id.*

> Court does not itself know exactly what it meant to hold or now holds under Jane Smith.[84]

While the Fifth Circuit thought that "certification would have been appropriate,"[85] it declined to issue any writ of mandamus or prohibition in this troublesome situation.[86] Instead, it stayed the direct action in the federal district court of Louisiana until the Texas limitation proceeding had been finally determined.[87]

This is a singular example of where appellate courts find themselves when a party alleges that the district court's failure to certify was a 'clear abuse of discretion' or 'clear error.' Because of a prior statutory interpretation,[88] the court is compelled not to review the certification decision through mandamus or otherwise.[89] However, when courts encourage parties to seek mandamus on the underlying issue instead, particularly in cases where all three statutory criteria are met and certification is proper, though denied, it results in a slew of mandamus petitions that should never be granted, as was the case in *Tokio Marine*.[90] "Section 1292(b) is available in many circumstances that do not fall within even expanded views of writ review," and mandamus cannot not be used on those orders that truly fall within Section 1292(b)'s ambit.[91] It undermines the mandamus doctrine completely to reprimand a district judge on an order when there is substantial ground for difference of opinion when it makes much more sense to correct his failure to certify where it amounts to 'clear abuse of discretion' or clear error.

B. Iron Fist in the Velvet Glove: "Requiring" Mandamus

There are appellate courts who, frustrated with the bar to mandamus review, have sought a more direct means of circumventing it by "requiring" or "requesting" certification by the district court. This surely has a negative effect on the balance of power in the appellate system and on the relationship between the two courts.

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[84] *Id.* at 115 (emphasis added).

[85] *Id.* at 116.

[86] *See id.* at 117.

[87] *Id.*

[88] *See supra* Part IV.B.

[89] *See supra* Part IV.A.

[90] *See* 322 F.2d at 114–15.

[91] 16 WRIGHT ET AL., *supra* note 23, § 3929.1, at 411.

It is a rather common practice for the appellate courts to announce "the lower court's error, but [refuse] to issue a writ."[92] In a dissenting opinion, Justice Rehnquist attacked this practice, stating that "[i]f the Court is going to exercise its power to coerce the lower federal courts . . . it [is] obligated to clearly announce that intention [and] to address directly the question of its authority to do so, see 28 U.S.C. § 1651(a)."[93] Walter J. Bonner points out that Rehnquist "suggested by assuming the lower court would act consistently with the language employed in denying the writ, the Court was using the 'iron fist, which show[ed] so clearly through the Court's velvet glove.'"[94]

Certain courts, including the Fifth Circuit, have continued this practice to achieve certification without issuing mandamus by "requiring" certification.[95] In *In re McClelland Engineers, Inc.*, petitioners sought mandamus directing the district court to vacate its order denying their forum non conveniens motions. Clearly annoyed with the district judge, the Fifth Circuit panel found that:

> Although the court's opinion rest[ed] on novel premises, decline[d] to determine what substantive law is to be applied at trial, and appear[ed] to question both the continuing validity of controlling precedent of this Court and that of the Supreme Court, the trial judge refused to certify his interlocutory order for appeal.[96]

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[92] Bonner, *supra* note 27, at pt. II.D.

[93] Conner v. Coleman, 425 U.S. 675, 680 (1976) (Rehnquist, J., dissenting).

[94] Bonner, *supra* note 27, at pt. II.D (quoting *Conner*, 425 U.S. at 680 (Rehnquist, J., dissenting)).

[95] *See* Fernandez-Roque v. Smith, 671 F.2d 426, 431–32 (11th Cir. 1982) ("[T]his case presents the truly 'rare' situation in which it is appropriate for this court to require certification of a controlling issue of national significance. . . . [Then the court ordered the district court to hold a hearing on subject-matter jurisdiction]. . . . The question of subject-matter jurisdiction shall then be certified to this Court, pursuant to 28 U.S.C. § 1292(b), upon request by any party."); *see also* DeMasi v. Weiss, 669 F.2d 114, 123 (3d Cir. 1982) ("If liability is established, the district court, having become aware of our determination that the discovery issue may qualify as one of the 'extraordinary situations' that justify mandamus, and our further determination that the order raises arguable questions of constitutional rights, will then be in a position to certify the question for appeal under 28 U.S.C § 1292(b). The question raised . . . may be considered as one involving a 'controlling question of law as to which there is substantial ground for difference of opinion.'").

[96] *In re* McClelland Eng'rs, Inc., 742 F.2d 837, 837 (5th Cir. 1984), *overruled on other grounds by In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987) *judgment vacated sub nom.*, Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032

The appellate court concluded that "the court's refusal to certify in the circumstances presented constitutes an abuse of discretion."[97] Since the court did not doubt "the [trial] court w[ould] promptly proceed to certify in view of this conclusion and w[ould] abide our decision before proceeding to trial," the court did not issue the writ.[98]

Prior to the *McClelland Engineers* case, the Fifth Circuit's practice had been to "invite the parties to resubmit [the order] for . . . certification."[99] It is the rare district court judge who will refuse to certify upon resubmission once the appellate court has explicitly stated that certification is appropriate, even when mandamus is not mentioned. Thus, even with the prohibition against mandamus review for failure to certify under Section 1292(b), in "an attempt to rectify a potentially disastrous interlocutory order, the practitioner will surely welcome the iron hand of the appellate court, however gloved."[100] The appellate court's coercive power over the lower courts in this context must be checked by proper legal authority to avoid a corruption of the working relationship between the two, something Rehnquist worried about enough to focus on in his dissenting opinion.[101] As Wright has noted, "[i]t is better to rely on a writ directly than to subvert the structure of [Section] 1292(b) . . . by ordering that the trial court certify a [Section] 1292(b) appeal."[102] However, as the next section will argue, this writ review should be permitted for failure to certify when clear abuse of discretion or clear error is merely alleged in the certification process.

VI. THE CASE FOR MANDAMUS REVIEW OF CERTIFICATION DECISIONS

As established in Part IV.A, review of any kind, including mandamus, of a failure to certify is not possible because the district judge's discretion

(1989).

[97] *Id.*

[98] *Id.* at 838.

[99] *Ex parte* Tokio Marine & Fire Ins. Co., Ltd., 322 F.2d 113, 116 (5th Cir. 1963); *see also In re* Humble Oil & Ref. Co., 306 F.2d 567, 568 (5th Cir. 1962) ("Thus, while the District Court in this case has previously declined to certify the appeal under 28 U.S.C.A. § 1292(b), we have many times held that the matter is still in the bosom of the Court, and the parties are free to resubmit the matter to the District Court at which time the Court might reconsider either the decision on the merits, or the desirability of certifying it as an interlocutory appeal under [Section] 1292(b).").

[100] Bonner, *supra* note 27, at pt. II.D.

[101] *See* Conner v. Coleman, 425 U.S. 675, 680 (1976) (Rehnquist, J., dissenting).

[102] 16 WRIGHT ET AL., *supra* note 23, § 3932.1, at 510–11.

whether or not to certify has been held to be unreviewable.[103] This stance has led to the troublesome instances enumerated in Part V.[104] At least two changes have been suggested that would have the effect of correcting such developments.

Professor Charles Wright has suggested a closer integration between writ practice and permissive interlocutory appeals by "expand[ing] [Section] 1292(b) to allow appeal by permission of the court of appeals alone after the district court has denied permission, substituting appeal procedure for writ procedure."[105] Even the American Bar Association has put forth a discretionary system that would exclude district judges from the process, "simply lodging complete discretionary review with the appellate courts."[106] However, this would make the district judge's certification superfluous, which is clearly inconsistent with the statutory language of Section 1292(b), and substitute the opinion of the appellate court for that of the district court without deference to the district court's decision.[107]

Instead, a better approach is to discard the statutory construction that has made the district courts' discretion unreviewable, which would permit mandamus review of a failure to certify and remove the obstacle that created these undesirable developments in the first place. According to Professor Cassandra Robertson, "if a[n] . . . order clearly meets the requirements set out in [Section] 1292(b) and the district court nevertheless refuses to certify it for interlocutory appeal, the appellate court should consider whether the district court has clearly abused its discretion in refusing to certify the case."[108] Under this scheme, mandamus review would be available and appropriate, "(1) when the district court concludes that the conditions of [Section] 1292(b) are met but nevertheless refuses to certify the case, or (2) when the state of the record is such that the district court must reasonably conclude that the prerequisites have been satisfied."[109]

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[103] *See supra* Part IV.A.

[104] *See supra* Part V.

[105] 16 WRIGHT ET AL., *supra* note 23, § 3932.1, at 511.

[106] Robertson, *supra* note 1, at 774. Supporters of this have concluded "that it offers a solution to the recalcitrance of district courts to certify discretionary appeals when 'interlocutory appeals are appropriate but not now available.'" *Id.*

[107] *See id.* at 779 (arguing that, if the appellate court determines there has been an abuse of discretion, mandamus "would then be appropriate to ensure that the purpose of [Section] 1292(b) is not thwarted").

[108] *Id.* at 779.

[109] *Id.* at 781.

A plain language interpretation of the statute would permit this reviewability because the court's reluctance "to conclude that a district court could ever abuse its discretion by refusing to certify an interlocutory appeal . . . does not derive from the statute itself."[110] The plain language approach,[111] most recently spearheaded by Justice Scalia,[112] has played an increasingly important role in recent decisions by the United States Supreme Court.[113] There is nothing in the statute that provides either that (1) the district court's discretion or (2) its decision to certify is unreviewable.[114] Instead, the statute provides a framework by which the court makes its conclusion that "the appealability criteria have been met."[115] Thus, the district court's opinion cannot be one of mere subjective preference that shirks review.[116] The legislative history upon which the current statutory interpretation relies is "irrelevant in the face of an

[110] *Id.* at 779.

[111] INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring). Justice Scalia stands firm on the "venerable principle that if language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity." *Id.*; *see also* Toibb v. Radloff, 501 U.S. 157, 162 (1991) ("First, this Court has repeated with some frequency: 'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.'" (quoting Blum v. Stenson, 465 U.S. 886, 896 (1984))); *see also* Solimine, *supra* note 2, at 1193 ("Accepted norms of statutory construction, however, prescribe reliance on the 'plain meaning' of the language of the law. Generally, analysis of legislative history is necessary only if statutory language is ambiguous or unclear, although exceptionally strong indications of congressional intent within legislative history may override even the plain meaning of a statute.").

[112] *See* William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1133 (1992); William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 650–56 (1990); *see* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) for further discussion of Justice Scalia's "plain-language" methodology of statutory construction.

[113] A few examples include Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (stating that the "regular method" for interpreting a statute is, first, to "find the ordinary meaning of the language in its textual context; and second, using established canons of construction, [to] ask whether there is any clear indication that some permissible meaning other than the ordinary one applies") and Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) ("'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985))).

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

[115] Robertson, *supra* note 1, at 780.

[116] *See id.*

unambiguous statute, and the text of the statute simply does not give the district court unlimited discretion,"[117] making exercise of that discretion reviewable. If the district judge's discretion in whether to certify is not absolute and unreviewable, then it should be reviewable by mandamus petition for 'clear abuse of discretion.'[118]

Had Congress desired to make a failure to certify unreviewable, whether by conferring absolute discretion or otherwise, it could have done so in Section 1292(b)'s text. For example, in another rule of appellate procedure, Section 1447(d), Congress stated that "[a]n order remanding a case to the State court from which it was removed is *not reviewable on appeal or otherwise*."[119] Though the Supreme Court has mangled Section 1447(d) in past decisions,[120] the Court is moving back to a plain-language interpretation in which a grant of a motion to remand is simply not reviewable.[121]

The United States Supreme Court has shown itself reluctant to read into statues additional provisions that are simply are not there. For example, in *Union Bank v. Wolas*, the Ninth Circuit had determined that the exception to preference avoidance in Section 547(c)(2) of the Bankruptcy Code only applied to short-term creditors, not long-term creditors.[122] On appeal, the Supreme Court reversed because of the absence of any language in that subsection distinguishing between long-term and short-term debt.[123] It found that:

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[117] *Id.* (footnote omitted).

[118] *See id.* at 779.

[119] 28 U.S.C. § 1447(d) (emphasis added).

[120] *See* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352 (1976) (holding that, when a motion to remand is granted on a basis other than the grounds specified in Section 1447(d), it is subject to review), *abrogated by* Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996); *but cf.* Osborn v. Haley, 549 U.S. 225, 262, 265 (2007) (Scalia, J., dissenting) ("Few statutes read more clearly than 28 U.S.C. § 1447(d) . . . . Congress knows how to make remand orders reviewable when it wishes to do so.").

[121] *See* Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 642–43 (2009) (Scalia, J., dissenting) ("[O]ur decision in *Thermtron* was questionable in its day and is ripe for reconsideration in the appropriate case . . . . As then-Justice Rehnquist understatingly observed in his *Thermtron* dissent, it would not be 'unreasonabl[e] [to] believ[e] that 28 U.S.C. § 1447(d) means what it says,' and what it says is no appellate review of remand orders." (citing *Thermtron Prod., Inc.*, 423 U.S. at 354).

[122] 502 U.S. 151, 153 (1991).

[123] *Id.* at 155–56. The United States Code states that:

(c) The trustee may not avoid under this section a transfer—

> The text provide[ed] no support for respondent's contention that [Section] 547(c)(2)'s coverage is limited to short-term debt, such as commercial paper or trade debt. Given the clarity of the statutory text, respondent's burden of persuading us that Congress intended to create or to preserve a special rule for long-term debt [was] exceptionally heavy.[124]

Likewise, nothing in the statue supports the interpretation that Section 1292(b) confers unreviewable discretion on the district judge. Any such conclusion has to be imposed on the statute.

Furthermore, even though Section 1292(b)'s language is unambiguous in this regard, there is nothing in the legislative history to support that the district judge's discretion to deny certification is absolute and unreviewable for abuse of discretion. The Senate Report simply states that "[i]t is discretionary in the first instance with the district judge."[125] The Senate Report does mention that the "granting of the appeal is also discretionary with the court of appeals which may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari."[126] This type of discretion is treated as absolute and unreviewable. It is strange that the Senate Committee would highlight that the appellate court has unreviewable discretion and not do the same for the district court if it intended both courts to have such unfettered power. The most likely interpretation is that the Senate Committee had no such intent. At best, there is nothing in the legislative history to overcome the heavy presumption to the contrary imposed by unambiguous text.[127]

. . .

> (2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—
>
> > (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
> >
> > (B) made according to ordinary business terms

11 U.S.C. § 547(c)(2).

[124] *Union Bank*, 502 U.S. at 155–56.

[125] S. REP. NO. 85-2434, at 3 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5255, 5257.

[126] *Id.*

[127] *See Union Bank*, 502 U.S. at 155–56.

The argument that the statutory scheme ("the dual gatekeeper" structure) requires the district court to have unreviewable discretion sheltered even from mandamus is shortsighted.[128] Not only does a two-tiered review combining Section 1292(b) and mandamus do much to correct the problems discussed in Section V by permitting mandamus review, it does not remove the first gatekeeper from the process.[129] Instead, as Robertson points out:

> [I]t merely allows the second gatekeeper to ensure that the first gatekeeper is functioning adequately and fairly, just as an appellate court does in any case. In fact, if the appellate court cannot review the district court's decision at all, then the dual gatekeeper system truly cannot function, because no matter how derelict the first gatekeeper may be, the second gatekeeper would never have the opportunity to offer its guidance. Judicially creating a second layer of absolute discretion for district courts therefore actually disrupts the balance crafted by the statute, as it allows district courts to cut off the discretionary review mechanism before the appellate court even has a chance to consider whether the case is worthy of immediate review.[130]

The district judge is still the initial screener, and, "[e]ven when a party seeks mandamus review of a trial court's refusal to certify an order, the appellate court will have the benefit of a record that establishes what arguments the district court was presented with, and its reasoning for refusing to certify,"[131] as well as the demanding standards of mandamus that already weigh in favor of the district court's affirmation.

VII. CONCLUSION

Because of the doctrine of stare decisis,[132] any litigant seeking mandamus review of a denial of Section 1292(b) certification faces a

[128] Robertson, *supra* note 1, at 781.

[129] *Id.*

[130] *Id.*

[131] *Id.* at 783.

[132] Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1 (2001) ("American courts . . . recognize a rebuttable presumption against overruling their own

difficult uphill battle. This is epitomized by *National Asbestos*, the case where a defendant attempted to challenge the district court's discretion, quite unsuccessfully. Indeed, the court forcefully responded that "[a]n examination of the history, theory, and practice of the final judgment rule and its exceptions demonstrates that [the defendant's] position is untenable."[133] The court went on to set out the broadest possible conception of its own discretion in Section 1292(b) certification, claiming that the court was not bound by the statutory factors and could still refuse to certify even when the statutory criteria were satisfied,[134] all without being subject to mandamus review. This attitude generally reflects the current state of the law with which a litigant must contend.

Litigants who dare to challenge the "myth" are sure to receive much of the same from the bench because of the deeply ingrained nature of this interpretation of Section 1292(b).[135] But unless it is challenged by worthy litigants, the "myth" will never reach the United States Supreme Court, who is in the best position to examine it. The appellate courts are too deep into the "myth" to take the steps necessary to change it.[136] With Justice Scalia's influence on the court, there is a chance that the unambiguous language of the statute will prevail, should the Court ever choose to hear the issue.[137] Then, it will be up to Congress to explicitly limit the reviewability of a district judge's decision not to certify as it has done with a judge's decision to grant a motion to remand in 28 U.S.C. § 1447(d).[138] It is Congress' job to define the limits of appellate review by balancing the inconvenience and costs of piecemeal review against the danger of denying justice by delay.[139]

Even if the Supreme Court does not accept the availability of mandamus review for denials of Section 1292(b) certification, it should at least provide the district judges with instruction. Most importantly, it should remind judges that they, unlike the *National Asbestos* court, should only consider whether the three statutory criteria set out by Congress in Section 1292(b)

past decisions.").

[133] Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 71 F. Supp. 2d 139, 143 (E.D.N.Y. 1999).

[134] *Id.*

[135] *See* Part IV.

[136] *See* Part IV.

[137] *See supra* notes 111–113 and accompanying text.

[138] *See supra* notes 119–120 and accompanying text.

[139] Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1650 (2011).

are met when confronted with a request for certification.[140] Judges are sure to respond to such an instruction, and perhaps then, litigants can have more confidence that, even without review, their requests are being denied because their issue is not the kind of issue that Congress thought appropriate for interlocutory review, and not because of a judge's private inclinations, however well intentioned.

[140] *See* Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 71 F. Supp. 2d 139, 163 (E.D.N.Y. 1999).