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Hearing on H.R. ____, the Fraudulent Joinder Prevention Act of 2015

Before the Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
United States House of Representatives

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Chairman Franks, Vice-Chairman DeSantis, Ranking Member Cohen, and members of the Committee: Thank you for inviting me to testify today on H.R. ____, the Fraudulent Joinder Prevention Act of 2015.

INTRODUCTION

There is no warrant for amending 28 U.S.C. §1447. More than a century old, fraudulent joinder law is well-settled and strikes the proper balance among competing policies in how it evaluates the joinder of non-diverse defendants. With recognition that there are sound reasons for not trying to exhaustively examine the merits of the plaintiff's claims immediately after removal, courts across the circuits uniformly impose a high burden on the defendant to demonstrate that a non-diverse defendant's joinder was improper. That burden can only be met if the defendant establishes that the joinder of the diversity-destroying party in the state court action was made without a reasonable basis of proving any liability against that party. By greatly expanding the scope of the fraudulent joinder inquiry, this bill would displace the well-functioning law with wasteful adjudications that district courts are ill-equipped to undertake at the remand stage, burdening the judicial system and raising litigation costs for all parties, especially for plaintiffs on whom this bill imposes the burden of proof. Finally, by requiring that courts resolve merits inquiries that under current law are decided by state courts, the proposed amendments to §1447 raise federalism concerns.

By way of introduction, I am the Law Foundation Professor of Law at the University of Houston Law Center, where I have taught since 2001. My scholarship and teaching interests are focused on civil procedural law and the means by which that law influences judicial access. I have previously appeared twice before the House Judiciary Committee. My most recent appearance was with regard to H.R. 966, the Lawsuit Abuse Reduction Act of 2011. Before that, I testified with regard to H.R. 5281, the Removal Clarification Act of 2010. In connection with that bill, the Chairman, citing my comments at the hearing, subsequently introduced a revised version of the bill that was later enacted into law in 28 U.S.C. §1442.

I appear before this Committee in my individual capacity. As university guidelines require, I attest that my testimony is not authorized by, and should not be construed as reflecting on the position of, the University of Houston.

I. THERE IS NO NEED FOR THE PROPOSED AMENDMENTS TO §1447

In evaluating any proposed amendment to existing law, the first question should always be whether a need for change has been demonstrated. The burden properly rests with proponents of reform to show that there is a problem serious enough to justify doing something. In this instance, however, no such showing can be made.

A. Fraudulent Joinder Law Is Well-Settled And Strikes A Reasonable Balance In How Joinder Of Non-Diverse Defendants Is Evaluated

More than a century old, fraudulent joinder law is well-settled and strikes an appropriate balance among competing policies in how it evaluates the joinder of non-diverse defendants. Under the existing law, properly joined defendants are able, in appropriate cases, to effectuate their statutory right of removal to federal court. For instance, if a plaintiff's claim against a non-diverse defendant is untimely because it is barred as matter of law by the statute of limitations, the court will find that the plaintiff has not stated even a colorable claim against the resident defendant and any motion to remand will be denied. *See, e.g., In re Briscoe*, 448 F.3d 201 (3d Cir. 2006) ("If a district court can discern, as a matter of law, that a cause of action is time-barred under state law, it follows that the cause fails to present even a colorable claim against the non-diverse defendant.").

Yet, even as the existing doctrine is vital enough to address improperly joined defendants, the well-settled decisional standard also protects Article III jurisdiction by construing the removal statutes strictly; honors the presumption in favor of allowing plaintiffs to select the forum and which defendants to sue; avoids unnecessary entanglements with merits inquiries at the jurisdictional stage; and respects state courts to faithfully apply their own state law to determine the validity of claims asserted. As leading procedure scholars have put it, fraudulent joinder doctrine "tries to strike a reasonable balance among not rewarding abusive pleading by the plaintiff, the plaintiff's tactical prerogative to select the forum, and the defendant's statutory right to remove." 14B CHARLES A. WRIGHT, ARTHUR MILLER, ET. AL., FEDERAL PRACTICE AND PROCEDURE §3723 (4th ed. 2015).

Under the well-settled law, fraudulent joinder will only be found if the defendant establishes that the joinder of the diversity-destroying party in the state court action was made without a reasonable basis of proving any liability against that party.[1]

[1] *See, e.g., Pampillonia v. RJR Nabisco, Inc*., 138 F.3d 459, 461 (2d Cir. 1998) ("In order to show that naming a non-diverse defendant is a 'fraudulent joinder' effected to defeat diversity, the defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court"); *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d. Cir. 1992) (noting that joinder is fraudulent "where there is no reasonable basis in fact or colorable grounds supporting the claim against the joined defendant"); *Marshall v. Manville Sales Corp*., 6 F.3d 229, 222-23 (4th Cir.

Of course, with hundreds of cases to choose from (thousands, if unpublished decisions are also included), it is hardly surprising that minor variances can be found in the particular language that courts have used to describe the standard for testing proper joinder. For instance, as the collected cases in the prior footnote reflect, some courts phrase the standard for fraudulent joinder in terms of showing that the plaintiff has "no possibility" of recovery against the non-diverse defendant; others note that there must be a showing of "no reasonable basis" or "no reasonable possibility." There is no evidence, however, that these semantic differences reflect any meaningful differences in how the doctrine is applied. Indeed, as the Fifth Circuit has noted with regard to its own circuit law, "[T]he test for fraudulent joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Smallwood v. Illinois Central Railroad Co*., 385 F.3d 568, 573 (5th Cir. 2004) (en banc). The Fifth Circuit's observation makes plain the fundamental consistency of the settled doctrine. Thus, the basic framework that has been established for deciding the propriety of joinder can be readily summarized:

> [T]he removing party has the burden on the motion to remand of showing the district court that the joinder of the diversity-destroying party in the state court action was made without a reasonable basis of establishing any liability against that party and was undertaken solely to defeat the federal court's removal jurisdiction. Many courts also describe the standard as one that is deferential to the allegations in the plaintiff's complaint that can be overcome only by proof that the state's highest court would not uphold the sufficiency of the complaint on a motion to dismiss and indicate that the burden on the party seeking removal is a

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1993) ("The burden on the defendant claiming fraudulent joinder is heavy: The defendant must show that the plaintiff cannot establish a claim against the nondiverse defendant even after resolving all issues of fact and law in the plaintiff's favor. A claim need not ultimately succeed to defeat removal; only a possibility of a right to relief need be asserted."); *Alexander v. Electronic Data Systems Corp*., 13 F.3d 940, 949 (6th Cir. 1994) (describing fraudulent joinder test as "whether there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved"); *Schur v. L.A. Weight Loss Centers, Inc*., 577 F.3d 752, 764 (7th Cir. 2009) ("Fraudulent joinder is difficult to establish—a defendant must demonstrate that, 'after resolving all issues of fact *and law* in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant.' Framed a different way, the district court must ask whether there is 'any reasonable possibility' that the plaintiff could prevail against the non-diverse defendant") (citations omitted; emphasis in original); *In re Prempro Products Liab. Litig*., 591 F.3d 613, 620 (8th Cir. 2010) ("When determining if a party has been fraudulently joined, a court considers whether there is any reasonable basis in fact or law to support a claim against a nondiverse defendant"); *Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368, 1380 (11th Cir. 1998) ("Where a plaintiff states even a colorable claim against the resident defendant, joiner is proper and the case should be remanded to state court.").

> heavy one. These basic principles regarding the procedure on a motion to remand based on a claim of fraudulent joinder have been articulated in innumerable federal judicial opinions over the years.

13F CHARLES A. WRIGHT, ARTHUR MILLER, ET. AL., FEDERAL PRACTICE AND PROCEDURE §3641.1 (4th ed. 2015).

B. The Courts Uniformly Impose A Heavy Burden On The Defendant To Prove Fraudulent Joinder

More critical than the precise language used by courts to describe the decisional standard is the universal acknowledgement by courts that the showing required to establish fraudulent joinder is a very exacting one. Recognizing that there are sound reasons for not trying to exhaustively examine the merits of the plaintiff's claims immediately after removal, courts across the circuits uniformly impose a high burden on the defendant to demonstrate that a non-diverse defendant's joinder was improper. *See* 14B CHARLES A. WRIGHT, ARTHUR MILLER, ET. AL., FEDERAL PRACTICE AND PROCEDURE §3723 (4th ed. 2015) (noting that "the cases indicate that the burden on the party seeking removal on the basis of fraudulent joinder is a heavy one" and collecting authorities). This heavy burden on the defendant to show fraudulent joinder emanates in part from the doctrinal foundation that all doubts should be resolved in favor of remand. Justice Harlan Stone's opinion for the Court in *Shamrock Oil & Gas Corporation v. Sheets* reflects the well-established principle:

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.

Shamrock Oil & Gas, 313 U.S. 100, 108 (1941). *Shamrock*'s fundamental acknowledgement of the defendant's heavy burden at removal has been repeatedly reaffirmed. *See, e.g., Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002) ("statutory procedures for removal are to be strictly construed") (citing, *inter alia*, *Shamrock Oil & Gas*). Out of this bedrock principal has come universal agreement among the courts that in evaluating fraudulent joinder the judge should resolve all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party. *See, e.g., Carriere v. Sears Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990) (noting that "all disputed questions of fact and all ambiguities in the controlling state law are resolved in favor of the nonremoving party"); *see generally* 14B CHARLES A. WRIGHT, ARTHUR MILLER, ET. AL., FEDERAL PRACTICE AND PROCEDURE §3721 (4th ed. 2015) ("[T]here is ample case support at all levels of the federal courts—the Supreme Court, the courts of appeal, and the district courts—for the proposition that removal statutes generally will be strictly construed, and that all doubts should be resolved against removal.").

As discussed further in Part III, sound reasons explain why courts do not engage in an ill-timed exhaustive review of the merits of plaintiff's allegations immediately after removal. For present purposes, the key point is simply this: any suggestion that the proposed amendments to §1447 are warranted by a lack of consistency or coherence in the case law does not withstand scrutiny. Fraudulent joinder law is well-settled and functions effectively, striking an appropriate balance among competing policies in how it evaluates the joinder of non-diverse defendants.

II. THE PROPOSED AMENDMENTS TO §1447 WILL NOT ACHIEVE THE DESIRED UNIFORMITY

Adopting the proposed statutory changes to §1447 would not, in any event, achieve the uniformity desired by the amendment's proponents. Indeed, if the amendments were to be adopted, then instead of the well-established and understood decisional law standard for judging proper joinder, it is certain that the law will become more fractured for years to come.

A. What is "Plausible"? The Proposed Amendments Offer No Guidance

A key difficulty of this bill is that it would force courts to struggle with determining what "plausible" means for purposes of deciding whether to grant remand. This can be reasonably predicted because of what is already known about the Court's plausibility doctrine from *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). These cases have spawned decisions from the lower courts almost too numerous to count. Alexander Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. ___ (forthcoming 2015) (noting that *Iqbal* alone has been cited "by more than 85,000 courts"). To put that number in perspective, in less than six years the *Iqbal* decision has eclipsed what previously had been the most cited case of all time, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), which took more than twenty years to achieve that mark. *See* Adam Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 82 (2006) (providing statistics).

The deluge of cases applying the Court's plausibility test has not brought uniformity to pleading law. Instead, what counts as plausible varies, often greatly, from circuit to circuit, which is exactly what commentators expected would happen when the Court announced this ambiguous new pleading sufficiency test. *See* Kevin Clermont and Stephen Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) ("[B]y inventing a foggy test for the threshold stage of every lawsuit, [the Supreme Court has] destabilized the entire system of civil litigation"); Stephen Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WISC. L. REV. 535, 560 (2009) ("*Twombly*'s most obvious and immediate consequence has been enormous confusion and transaction costs as a result of uncertainty about the requirements it imposes and its scope of application."); Lonny Hoffman, *Burn Up the Chaff With*

Unquenchable Fire, 88 BOSTON U. L. REV. 1217, 1257 (2008) ("Virtually everyone . . . regards plausibility as an ambiguous standard"). Because each inquiry into plausibility—whether undertaken as part of Rule 12(b)(6) or a motion to remand—is fact-driven, it is unavoidable that some claims will be found implausible while others, nearly identical, will be found plausible.

Beyond plausibility's inherent ambiguities, an equally significant problem is the test's novelty. Before *Twombly* and *Iqbal*, the Court had repeated, over and again, that Rule 8 demanded only fair notice. *See, e.g., Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). Even heightened pleading requirements (such as Rule 9, and certain statutes) offer no doctrinal analogue to the Court's plausibility pleading which demands not factual detail but "factual convincingness." *See* Clermont and Yeazell, 95 IOWA L. REV. 821, 833. Plausibility pleading has no doctrinal analogue—and courts have struggled to apply this novel test in a consistent and coherent way. *Id*. at 846 ("The Court's fact- and context-specific approach guarantees that extrapolation to new cases will remain difficult despite successive decisions."). The attempt to incorporate plausibility into jurisdictional law would raise identical difficulties to those that now plague the cacophony of Rule 12(b)(6) decisional law. Yet, the proposed amendments are oblivious to this danger and silent on how district courts are to determine whether the claims asserted against a non-diverse defendant are plausible.

In sum, then, the novelty of the doctrinal approach, along with the ambiguities inherent in judging what makes some allegations plausible and others not, means that just as "it will likely take years before any given circuit settles on a view of plausibility applicable to a wide variety of common complaints," *id*. at 845, so too will it take years—if ever—for fraudulent jurisdiction law in the circuits to settle again on consistent precedents upon which lower courts and litigants can rely.

B. The Bill Gives No Guidance For How A Court Is To Inquire Into A Plaintiff's "Good Faith" Immediately After Removal

A second way in which the proposed amendments will destabilize existing law is that the amendments, if adopted, would direct all courts to determine immediately after removal whether the plaintiff had "a good faith intention to prosecute the action against each nondiverse defendant." By contrast, under existing law the term "fraudulent" in "fraudulent joinder" has been recognized as "a term of art" that "does not require a finding of fraudulent intent." *Schwenn v. Sears, Roebuck Co*., 822 F. Supp. 1453, 1455 (D. Minn. 1993) ("When speaking of jurisdiction, 'fraudulent' is a term of art"). As another court similarly explained, fraudulent joinder doctrine "does not reflect on the integrity of plaintiff or counsel, but is merely the rubric applied when a court finds either that no cause of action is stated against the nondiverse defendant, or in fact no cause of action exists." *AIDS Counseling & Testing Centers v. Group W Television, Inc*., 903 F.2d 1000, 1003 (4th Cir. 1990) (internal citations omitted) (brackets and emphasis in original); *see also Barger v. Bristol-Myers Squibb Co.*, 1994 WL 69508 (D. Kan., Feb. 25, 1994) ("Fraudulent joinder is a term of art, which does not reflect on the

integrity of the plaintiff or counsel, but rather exists regardless of the plaintiff's motives when the circumstances do not offer any other justifiable reason for joining the defendant.") (citing, *inter alia*, *Lewis v. Time, Inc.*, 83 F.R.D. 455, 460 (E. D. Ca. 1979)). Rather than focusing on the plaintiff's good faith or subjective intent, current fraudulent joinder law focuses on the validity of the legal theory being asserted against the non-diverse defendant. As the Seventh Circuit has put it, "In most cases fraudulent joinder involves a claim against an in-state defendant that simply has no chance of success, whatever the plaintiff's motives." *Poulos v. Naas Foods, Inc*., 959 F.2d 69, 73 (7th Cir. 1992).

Yet, the proposed amendments mandate that district judges will now have to make a determination of the plaintiff's "good faith intention" of bringing a viable claim against the non-diverse defendant, and they offer no guidance for how this determination is to be made. Nevertheless, the inquiry would now be mandatory—and would have to be done immediately after removal. Consider, by contrast, the only other place that removal law requires an inquiry into the plaintiff's subjective intent. In 2011, Congress amended §1446. The former version of §1446 set a hard deadline for removal of no more than one year after a case had been commenced. Codifying case law in which district courts extended the one year deadline only on a showing that the plaintiff had intentionally tried to prevent removal within the one year time limit, §1446(c)(1) was amended to permit district courts to allow removals more than one year after commencement if the plaintiff acted in "bad faith" to prevent removal. Critically, however, the inquiry into bad faith that §1446(c)(1) permits only comes after the case has been on file for at least a year. Thus, a court can consider whether the plaintiff has been pursuing its case equally against the diverse and non-diverse defendants. For instance, the plaintiff may not have sought any discovery from the non-diverse defendant while aggressively doing so against the diverse defendant. This could be regarded as evidence of the plaintiff's bad faith in naming the non-diverse defendant solely to defeat the diverse defendant's right to remove. The district judge's ability to look back at a year's worth of actual litigation activity is the critical lynchpin to this legal test that Congress authorized in §1446. By contrast, the proposed amendments to §1447 offer no guidance for how a district judge is to divine the plaintiff's "good faith" immediately after removal.

C. Further Unanswered Questions That Courts Will Struggle To Answer

Finally, the proposed amendments to §1447 will raise many other questions that courts will struggle to answer. For instance, under the proposed new statutory requirements, what is the evidentiary standard for showing a "plausible" claim for relief and that the plaintiff acted in "good faith" in bringing the action? Will it be a clear and convincing evidentiary standard? Or must plausibility and the plaintiff's subjective intent be shown by a preponderance of the evidence? Or must they be shown to a legal certainty, or beyond a reasonable doubt? Once again, although the bill mandates that courts consider evidence to establish plausibility and good faith, the proposed amendments are silent on what the evidentiary standard should be.

In sum, without providing any guidance to courts on the required factual showing to be made, the proposed amendments to §1447 are certain to lead not to harmonizing fraudulent joinder law, but fracturing it. The end result is sure to be more protracted and more costly litigation for the court system and for all parties, especially for plaintiffs on whom the proposed amendments place the burden of proof.

III. THE PROPOSED AMENDMENTS WOULD DRAMATICALLY ALTER EXISTING JURISDICTIONAL LAW

Though the bill is only a page and a half long, there should be no misunderstanding that the proposed amendments to §1447 are anything but modest; if enacted, they would dramatically alter existing jurisdictional law. Sound reasons of judicial administration explain why the courts at all levels of the federal judiciary have been steadfast in applying fraudulent joinder law so that the inquiry is appropriately limited and does not attempt to pretry the plaintiff's claims. These same policy reasons animate the limited review that courts undertake as to all other subject matter jurisdiction inquiries.

A. Courts Are Ill-Equipped To Engage In Extensive Merits Review On A Motion To Remand

Courts and commentators alike recognize that judges are ill-equipped to engage in exhaustive merits inquiries at the jurisdictional stage, before the court's jurisdiction has been established and an opportunity for factual development has been afforded to the parties and the court. As a result, the case law consistently draws a sharp contrast between existing fraudulent joinder doctrine and the more extensive merits inquiries undertaken in Rule 12(b)(6) or Rule 56. Typical is the Tenth Circuit's decision in *Montano v. Allstate Indemnity*, 2000 WL 525592 (10th Cir., Apr. 14, 2000) in which the court recognized that the fraudulent joinder standard "is more exacting than that for dismissing a claim under Fed. R. Civ. P. 12(b)(6)." *Montano*, 2000 WL 525592, at *2. "Of paramount importance," another court has said, "is that a court's inquiry . . . be closely restricted so as not to become an inquiry into the merits of a plaintiff's case." *Hill v. Olin Corp.*, 2007 WL 1431865, at *5 (S.D. Ill., May 14, 2007). Similarly, the Third Circuit has explained that under existing fraudulent joinder doctrine a court is permitted to take only "a limited look outside the pleadings [that] does not risk crossing the line between a proper threshold jurisdictional inquiry and an improper decision on the merits." *In re Briscoe*, 448 F.3d 201, 220 (3d Cir. 2006). In this same connection, a significant criticism that has been lodged against the Court's plausibility pleading doctrine is that it requires courts to engage in merits review at a time when they are ill-equipped to do so. Arthur Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 49-50 (2010) ("It seems obvious that in many contexts attempting to distinguish the frivolous from the potentially meritorious on the basis of a single pleading is a dangerously uncertain endeavor").

Moreover, there is equal reason to doubt that a plausibility test employed at the beginning of a case, whether at the Rule 12(b)(6) stage or remand stage, will be effective at filtering out nonmeritorious claims. A recent study by a mixed group of research psychologists, law professors and one federal district court judge addressed how attitudes and stereotypes affect factual decision-making in the courtroom. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012). Drawing on extensive social psychological research, the authors observed that judges form opinions about the facts alleged by a single plaintiff based on views they already possess, in general, about similar people; and when more specific—more "individuating" information—is not available, they are unavoidably influenced even more these more general views. Moreover, although judges may be aware of—and want to resist—the tendency to draw conclusions about the individual from their general pre-existing views, the research suggests that doing so requires more than just a matter of will and good intention. Try as we might to rely on individual-specific information, numerous psychological studies show that we can be easily fooled by what is called "the illusion of individuating information." *Id*. (citing, *inter alia*, John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCOL. 20, 22–23 (1983); Vincent Y. Yzerbyt et al., *Social Judgeability: The Impact of Meta-Informational Cues on the Use of Stereotypes*, 66 J. PERSONALITY & SOC. PSYCOL. 48 (1994)).

While the risk that pre-existing attitudes and stereotypes may also lead to erroneous decisions at a later stage in the case, such as at summary judgment, that risk is lessened by the opportunity for discovery and further case development that are not available at the beginning of a case. This explains why traditional pleading doctrine credits nonconclusory allegations as true, just as fraudulent joinder law resolves all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party. Yet, the proposed amendments to §1447 ignore that courts are ill-equipped to engage in exhaustive merits inquiries at the jurisdictional stage, before an opportunity for factual development has been afforded.

B. Mandating Extensive Merits Review At Remand Would Be Inefficient and Costly

The bill's mandated entanglements into the merits of a case at the jurisdictional stage will also raise costs significantly for the court system and all parties, especially plaintiffs on whom the bill would place the burden of proving plausibility of the claims asserted (as well as proving their good faith in bringing the claim). Courts and commentators have previously recognized that expanding the fraudulent joinder inquiry would raise litigation costs substantially. *See generally* E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 228 (2005) (noting that a Rule 12(b)(6) type inquiry for fraudulent joinder "increases the possibility of 'runaway' fraudulent joinder proceedings where courts may spend an inordinate amount of time holding evidentiary hearings and weighing other evidence only to determine there is no jurisdiction");

Mattingly v. Chartis Claims, Inc., 2011 WL 4402428, at *3 (E.D. Ky., Sept. 20, 2011) ("It is important that courts impose a heavy burden on defendants who remove on the basis of fraudulent joinder because the practice of routinely removing cases to federal court by making borderline arguments of fraudulent joinder imposes tremendous costs on plaintiffs and the court system.").

C. Requiring Extensive Merits Inquiry At The Jurisdictional Stage Would Be Inconsistent With All Other Kinds Of Subject Matter Jurisdiction Inquiries

All other subject matter doctrines recognize that the merits inquiry at the jurisdictional stage should be appropriately limited. To show that the plaintiff cannot maintain her diversity case in federal court because the amount in controversy is insufficient to satisfy the statutory grant of diversity jurisdiction, the defendant bears the heavy burden of showing "to a legal certainty that the claim is really for less than the jurisdictional amount" in order to get the case dismissed. *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). The same approach is taken with regard to federal question jurisdiction. Only a showing by the defendant that the plaintiff's federal claim "is wholly insubstantial and frivolous" will warrant dismissal. *Bell v. Hood*, 327 U.S. 678, 683 (1946); *see also Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974) (reiterating that dismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy").

Moreover, by shifting the burden of proof from the defendant (the party seeking federal jurisdiction in the fraudulent joinder context) to the plaintiff (the party opposing federal jurisdiction), the proposed amendments to §1447 are inconsistent with the approach taken as to all other subject matter jurisdiction inquiries, which always places the burden on the party seeking to establish federal jurisdiction. This principle lies at the bedrock of all subject matter jurisdiction examinations. *See, e.g., Kokkonen v. Guardian Life Ins. Co of Am.*, 511 U.S. 375, 377 ("It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction"); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936) (observing that "the party allegation jurisdiction [must] justify his allegations by a preponderance of evidence").

Thus, to adopt the amendments to §1447 that this bill proposes would cause one branch of subject matter jurisdiction analysis to be wholly out of step with how all other jurisdictional inquiries are conducted. For all other kinds of subject matter jurisdiction inquiries, the burden of proof always rests with the party seeking to establish federal jurisdiction; and with all other subject matter jurisdiction inquiries, doctrinal law recognizes that the scope of the examination should be limited so that courts are not bogged down in premature, wasteful adjudications of the merits at the jurisdictional stage, before they can or should be engaged in such evaluative examination.

D. The Proposed Amendments to §1447 Also Raise Federalism Concerns

Finally, by divesting state courts of jurisdiction and deciding merits questions that state courts now routinely resolve, proponents appear deaf to the serious federalism concerns that the bill raises.

Because removal always raises federalism issues about the powers that should be left to the state courts, the removal statutes are strictly and narrowly construed, and all doubts resolved against removal. *See Univ. of South Alabama v. American Tobacco,* 168 F.3d 405, 411 (11th Cir. 1999) ("Because removal jurisdiction raises significant federalism concerns, federal courts are directed to construe removal statutes strictly.") (citing *Shamrock Oil & Gas*, 313 U.S. 100, 108-09); *Brown v. Endo Pharm., Inc*., 38 F. Supp. 2d 1312, 1318 (S.D. Ala. 2014) ("Because removal infringes upon state sovereignty and implicates central concepts of federalism, removal statutes must be construed narrowly, with all jurisdictional doubts being resolved in favor of remand to state court."). The proposed amendments to §1447 turn these longstanding constructional presumptions on their head by directing courts to conduct the kind of merits inquiries that are normally left to state courts. *Montano v. Allstate Indemnity*, 2000 WL 525592 (10th Cir., Apr. 14, 2000) at *2 (noting that the fraudulent joinder standard "is more exacting than that for dismissing a claim under Fed. R. Civ. P. 12(b)(6); indeed, the latter entails the kind of merits determination that, absent fraudulent joinder, should be left to the state court where the action was commenced").

Moreover, when the suit is maintained in a state court, the applicable pleading standards are governed by state law—and many of those remain only a standard of fair notice, eschewing the plausibility pleading of *Twombly* and *Iqbal*. By applying a plausibility standard to fraudulent joinder claims, the proposed legislation effectively imposes federal pleading requirements on cases filed in state court, in derogation of state authority to set their own pleading rules. And what makes the intrusion on state rights particularly hard to defend is that the proposed amendments are not necessary. If a defendant suspects improper joinder, it always has the option of seeking dismissal in state court of the claims against the non-diverse defendant, and then removing the remainder of the case after dismissal. This is the preferred practice for all of the reasons outlined above, and explains why the fraudulent joinder inquiry in federal court is, and should be, appropriately circumscribed.

CONCLUSION

This legislative body should recognize the collective judicial wisdom and experience that fraudulent joinder law reflects, and resist legislating technical procedural reforms that it is ill-equipped to undertake. Prudence especially warrants restraint when there has not been the kind of rigorous doctrinal and empirical study of long-established law that such reforms demand, and the available record provides

inadequate understanding of how such reforms might affect the administration of justice.