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I Like to Move It, Move It: Partial Venue Transfer for Less Than a Full Legal Action

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I Like to Move It, Move It: Partial Venue Transfer for Less Than a Full Legal Action

Krystal Brunner Swendsboe*

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I. Introduction

On July 23, 2010, pro se plaintiff Shepard Johnson filed a diversity action in the U.S. District Court for the Eastern District of California.¹ Johnson alleged that more than a dozen defendants initiated criminal proceedings against Johnson in Panama and conspired to avoid fulfilling conditions, covenants, and restrictions for a planned development.² Johnson alleged malicious prosecution and civil conspiracy to commit malicious

1. *Johnson v. Mitchell*, No. CIV S-10-1968, 2012 WL 1657643, at *1 (E.D. Cal. May 10, 2012). In *Johnson*, the court asked whether it had personal jurisdiction over a defendant, *id.* at *2–7, and whether a claim against a defendant over whom the court lacked personal jurisdiction could be severed from the action and transferred to another venue. *Id.* at *8–10. The *Johnson* court, finding that personal jurisdiction did not exist over defendant Kim Parsons, severed the plaintiff’s claims against Parsons under Federal Rule of Civil Procedure 21 and transferred the claims to the U.S. District Court for the District of Colorado. *Id.* at *9. The court determined that personal jurisdiction did not exist over Parsons in California and personal jurisdiction for the other defendants did not exist in Colorado (where Parsons resided). *Id.* at *8. The *Johnson* court then conducted a review of the federal circuits’ decisions on whether the language of 28 U.S.C. § 1631 permitted federal courts to transfer less than a full action (excluding the plaintiff’s claims against other defendants) and determined that such a transfer was permitted. *Id.* at *8–9. After determining that a transfer would be in the interests of justice, *id.* at *9, the court severed the plaintiff’s claims against Parsons and transferred those claims to the U.S. District Court for the District of Colorado, *id.*

2. *See id.* at *1 (providing case background).

prosecution by individual defendants in California, Minnesota, Tennessee, Colorado, Florida, New Hampshire, and Texas.³

Johnson sought a remedy for the wrongs he alleged, but he was a pro se litigant who lacked legal training.⁴ Colorado resident and defendant Kim Parsons sought dismissal from the case arguing that the California district court lacked personal jurisdiction over her.⁵ The *Johnson* court noted that, when a court lacks personal jurisdiction over a defendant, it must decide whether to dismiss the plaintiff's claim against that defendant or transfer the case to a forum that would have personal jurisdiction over that defendant.⁶ In this case, the court found that Parsons's home state of Colorado would have personal jurisdiction over Parsons, but transfer or dismissal would be problematic.⁷

Dismissing the claim for lack of personal jurisdiction⁸ was unacceptable because "the statute of limitations would likely bar refiling the claims against defendant Parsons in Colorado and plaintiff would be unnecessarily required to pay another filing fee."⁹ Alternatively, the court might have transferred the entire action to Colorado under a federal statute that permits the transfer of a "civil action" to an appropriate court if "there is a

3. See *id.* (listing defendants and summarizing the plaintiff's claims).

4. See *id.* (describing the plaintiff as pro se); BLACK'S LAW DICTIONARY 1341 (9th ed. 2009) ("[A pro se litigant is] one who represents oneself in a court proceeding without the assistance of a lawyer . . .").

5. See *Johnson*, 2012 WL 1657643, at *1 (noting defendant Parsons's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2)); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (explaining the standard required for a court to exercise personal jurisdiction over a nonresident defendant). If a defendant is not "present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* (internal citations omitted). The *Johnson* court determined that Parsons lacked the necessary minimum contacts with California to justify the exercise of personal jurisdiction. See *Johnson*, 2012 WL 1657643, at *6 ("The court concludes that it does not have personal jurisdiction over defendant Parsons.").

6. See *Johnson*, 2012 WL 1657643, at *8 ("[T]he only issue remaining is whether plaintiff's claims against defendant Parsons should be dismissed or transferred to the District of Colorado where Parsons resides.").

7. See *id.* at *8 (explaining that the court could not transfer the entire action and dismissal was not "in the interest of justice").

8. See FED. R. CIV. P. 12(b)(2) (listing a lack of personal jurisdiction as a defense that a defendant may raise to a complaint).

9. *Johnson*, 2012 WL 1657643, at *9.

want of jurisdiction” and “it is in the interest of justice.”¹⁰ The *Johnson* court noted, however, that it “cannot transfer the entire action to the District of Colorado because it is obvious that the Colorado district court would lack personal jurisdiction over several of the defendants.”¹¹

In attempting to determine how to handle the claim related to defendant Parsons, the *Johnson* court encountered a split between the federal circuits about how to handle the dismissal or transfer of an action when the court has jurisdiction over only some of the claims and defendants.¹² The heart of the conflict is a disagreement about whether a federal district court may transfer less than a full action to another forum where jurisdiction is appropriate over only a part of the action.¹³

On one side, the D.C. Circuit has found a court may not transfer less than an entire legal action.¹⁴ On the opposite side, the Tenth Circuit,¹⁵ Third Circuit,¹⁶ and the Federal Circuit¹⁷ have found that a district court may transfer claims, less than an entire legal action, where the court lacks jurisdiction over those

10. 28 U.S.C. § 1631 (2012).

11. *Johnson*, 2012 WL 1657643, at *8.

12. *See id.* (“The Circuits are split regarding whether the language of 28 U.S.C. § 1631 permits federal courts to partially transfer an action.”).

13. *See infra* Part III.A–B (discussing the circuit split and the primary ways partial venue transfer is rationalized).

14. *See Hill v. U.S. Air Force*, 795 F.2d 1067, 1070 (D.C. Cir. 1986) (“Because Section 1631 directs a court to transfer an ‘action’ over which it lacks jurisdiction, rather than an individual claim, we find that the District Court did not abuse its discretion in failing . . . to transfer Hill’s claims . . .”); *infra* notes 156–61 and accompanying text (discussing the D.C. Circuit’s views).

15. *See FDIC v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996) (affirming a district court’s order that transferred some, but not all, of plaintiff’s claims because the court effectively severed the problematic claims under Federal Rule of Civil Procedure 21 prior to transfer); *infra* notes 162–70 and accompanying text (discussing the Tenth Circuit’s views on the circuit split).

16. *See D’Jamoos v. Pilatus Aircraft Ltd*, 566 F.3d 94, 110 (3d Cir. 2009) (permitting “transfer of all or only part of an action”); *infra* notes 171–75 and accompanying text (discussing the Third Circuit’s view of the circuit split).

17. *See United States v. Cnty. of Cook, Ill.*, 170 F.3d 1084, 1088 (Fed. Cir. 1999) (holding that “§ 1631 allows for the transfer of less than all of the claims in a civil action to the Court of Federal Claims”); *infra* notes 176–87 and accompanying text (discussing the Federal Circuit’s rationale for allowing severance and transfer of a partial action).

claims and the associated defendants.¹⁸ The circuits that allow transfer of less than an entire action disagree regarding the justification for transfer.¹⁹

This Note argues that the circuit split regarding whether less than a full action may be transferred under 28 U.S.C. § 1631²⁰ should be resolved by amending the terms “civil action” and “case” to include “claims” in §§ 1631, 1404, and 1406 to consistently allow district courts to transfer claims that are filed in an inconvenient or flawed forum.²¹ Part II of this Note discusses the historical doctrine of forum non conveniens and the development of the various statutory mechanisms for transferring federal cases between judicial districts, noting the major differences between the various statutory means of transfer.²² Part III details the circuit split regarding partial transfers under § 1631 and the different interpretations of § 1631.²³ Part IV discusses the possibilities for resolving the circuit split and explains why amending Title 28 is the best means for resolving the conflict.²⁴

This Note demonstrates that § 1631 should be interpreted in light of its historical development from the forum non conveniens doctrine and transfers effectuated under § 1631 should be treated similarly to §§ 1404 (a transfer mechanism for the sake of convenience) and 1406 (a transfer mechanism that addresses claims filed in a flawed forum).²⁵ These considerations are best served by amending the current transfer statutes to reflect permissive transfer of claims within an action and detailing a clear process for severance and transfer of claims over which a district court lacks jurisdiction.²⁶

18. See *infra* Part III.A (explaining the circuit split in detail).

19. See *infra* Part III.B (discussing the primary division between the circuits on § 1631).

20. 28 U.S.C. § 1631 (2012).

21. See *infra* Part IV (recommending a resolution for the circuit split).

22. See *infra* Part II (discussing the historical and modern venue transfer mechanisms).

23. See *infra* Part III (explaining the current circuit split regarding partial transfer).

24. See *infra* Part IV (discussing the recommendation to resolve the circuit split).

25. See *infra* Part IV.B–C (detailing support for Title 28 amendment).

26. See *infra* Part IV.A (discussing the proposed amendment to Title 28).

II. The Development of Transfer Mechanisms and Venue Rules

Venue rules are designed to assist the federal procedural goal of “expeditious and orderly adjudication of cases and controversies on their merits.”²⁷ While primarily concerned with convenience,²⁸ venue rules are also used to correct improperly filed actions and prevent injustice that may result when an action is dismissed for improper filing.²⁹ A court cannot hear a case or issue a binding resolution if it lacks jurisdiction,³⁰ and venue rules assist in moving a case to a place where jurisdiction is appropriate.³¹

There are a variety of statutory transfer mechanisms available, but each is designed to serve a specific purpose. The most common, or most familiar, venue transfer devices are the statutory provisions that provide for a transfer for convenience³² or a transfer to cure an improper filing.³³ Upon a motion to

27. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962).

28. *See Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 582 n.7 (2013) (“[The] purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial.” (quoting *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183–84 (1979))); 17 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 110.01[1] (3d ed. 1999) (“Venue statutes generally are concerned with convenience. They seek to channel lawsuits to an appropriately convenient court, given the matters raised and the parties involved in an action.”).

29. *See Goldlawr*, 369 U.S. at 466 (noting that § 1406 was enacted to avoid “the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn”); C.P. Jhong, Annotation, *Construction and Application of Federal Statute (28 U.S.C. § 1406) Providing for Dismissal or Transfer of Cases for Improper Venue*, 3 A.L.R. FED. 467, 467 (2014) [hereinafter Jhong, *28 U.S.C. § 1406*] (discussing the means by which transfer may be accomplished when the original forum was not a proper venue).

30. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316–19 (1945) (noting that due process requires a defendant to have sufficient contacts, ties, or relations to a forum to allow the court to make a judgment binding on that defendant); BLACK’S LAW DICTIONARY 927 (9th ed. 2009) (describing jurisdiction as “[a] court’s power to decide a case or issue a decree”).

31. *See Jhong*, *28 U.S.C. § 1406*, *supra* note 29, at 467 (discussing transfer when the original forum was not a proper venue).

32. *See 28 U.S.C. § 1404* (2012) (detailing the standard for transferring a case from one proper venue to another for the convenience of the parties and witnesses and “in the interest of justice”).

33. *See id.* § 1406 (explaining the standard for transferring a case “laying

transfer, the reviewing court has the discretion to dismiss the action for refileing in another venue, to transfer the action to a new forum, or to deny transfer based upon the “interests of justice” or “fairness” that might be served.³⁴ The consequences of the mechanism used, however, can vary, particularly with regards to the choice-of-law principles that apply.³⁵

A. Common Law Transfer and Dismissal Mechanisms

The most prominent venue transfer statutes grew from the historical *forum non conveniens* doctrine.³⁶ The *forum non conveniens* doctrine is a common law development that allows a district court to “decline to exercise its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum.”³⁷ The doctrine allowed a federal court to dismiss a case if

venue in the wrong division or district”); *id.* § 1631 (detailing the standard for transferring a case where “there is a want of jurisdiction”).

34. See *id.* § 1404 (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer . . .”); *id.* § 1406 (“The district court . . . shall dismiss, or if it be in the interest of justice, transfer a case . . .”); *id.* § 1631 (“[T]he court shall, if it is in the interest of justice, transfer such action or appeal to any other such court . . .”).

35. See *infra* notes 74–78 and accompanying text (discussing the choice-of-law rules that apply to transfer effectuated under § 1404); *infra* notes 100–02 and accompanying text (discussing choice-of-law rules that apply for a § 1406 transfer); *infra* notes 121–22 and accompanying text (discussing the choice-of-law rules that accompany § 1631 transfers).

36. See 17 MOORE ET AL., *supra* note 28, §§ 111.70–.95 (discussing the *forum non conveniens* doctrine in detail).

37. *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 828 (5th Cir. 1993) (citing *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 250 (1981)); see also *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 532 (1947) (noting that a district court may decline to exercise jurisdiction when “a defendant shows much harassment and plaintiff’s response . . . indicates such disadvantage as to support the inference that the forum he chose would not ordinarily be thought a suitable one to decide the controversy”); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (“The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.”); 17 MOORE ET AL., *supra* note 28, § 111.70 (discussing the purpose of the *forum non conveniens* doctrine).

there was a more convenient alternative forum, requiring the plaintiff to refile the case as a new action elsewhere.³⁸

Forum non conveniens is a flexible doctrine that considers the fairness and convenience of a forum for the parties in each individual case.³⁹ The relative convenience of a forum may change depending upon the facts of the case, and thus, a “rigid rule to govern discretion” is not appropriate and “each case turns on its facts.”⁴⁰ The plaintiff’s choice of forum is given deference and “should rarely be disturbed” by dismissal on forum non conveniens grounds.⁴¹ The Supreme Court has noted, however, that “[j]urisdiction and venue requirements are often easily satisfied” and plaintiffs will often have an opportunity to choose a forum that is inconvenient for defendants.⁴² Even so, a plaintiff’s choice should not be overruled unless the facts of the case establish “oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff’s convenience” or that the “court’s own administrative or legal problems” show the chosen forum to be inappropriate.⁴³ “In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home

38. See *Howe v. Goldcorp Invest. Ltd.*, 946 F.2d 944, 947 (1st Cir. 1991) (noting that dismissal under the forum non conveniens doctrine “has the practical effect of requiring the plaintiff to file his complaint in a more convenient forum elsewhere”); 17 MOORE ET AL., *supra* note 28, § 111.70 (discussing the purpose of the forum non conveniens doctrine).

39. See *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 249 (1981) (emphasizing the Court’s repeated support of “the need to retain flexibility”); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 531 (1947) (noting that the district court did not abuse its discretion in relying on defendant’s silence regarding convenience of the parties and witnesses, cost of litigation, speed of trial, or adequacy of remedy); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (listing a variety of interests that might be considered when dismissing under forum non conveniens); *Windt v. Qwest Commc’ns Int’l, Inc.*, 529 F.3d 183, 188 (3d Cir. 2008) (noting that a “district court is accorded substantial flexibility in evaluating a forum non conveniens motion” (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988))); Thomas T. McClendon, Note, *The Power of a Suggestion: The Use of Forum Selection Clauses by Delaware Corporations*, 69 WASH. & LEE L. REV. 2067, 2086–87 (2012) (listing nine factors relevant in forum non conveniens analysis and noting cases in support).

40. *Piper Aircraft Co.*, 454 U.S. at 249 (quoting *Williams v. Green Bay & W. R.R.*, 326 U.S. 549, 557 (1946)).

41. *Id.* at 241.

42. *Id.* at 250.

43. *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

forum will normally outweigh the inconvenience the defendant may have shown.”⁴⁴

Historically, dismissal under the forum non conveniens doctrine was the only means of protection available to defendants if a plaintiff chose to abuse venue provisions.⁴⁵ This doctrine, however, created problems. In some instances, forum non conveniens could not be applied due to certain federal law restrictions, like the Federal Employers Liability Act.⁴⁶ The doctrine has also been found to be inconvenient and harsh to plaintiffs when a court dismissed a case on forum non conveniens grounds and the plaintiff was forced to refile in a new forum.⁴⁷ As noted in *Johnson v. Mitchell*,⁴⁸ the refiled case may be barred by a statute of limitations in the new forum.⁴⁹ Some courts have imposed conditions on forum non conveniens dismissal, preventing a defendant from raising statute of limitation, jurisdiction, or venue defenses once the plaintiff has refiled the case.⁵⁰ Conditional relief in refileing, however, is not uniformly

44. *Id.*

45. See Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 679 (1984) (explaining that until 1948 “[d]ismissal on grounds of forum non conveniens was the only remedy for abuse of venue provisions”); Jeremy Jay Butler, Note, *Venue Transfer When a Court Lacks Personal Jurisdiction: Where Are Courts Going With 28 U.S.C. § 1631*, 40 VAL. U. L. REV. 789, 795 (2006) (discussing the legal background of venue transfer).

46. 45 U.S.C. §§ 51–60 (2012); see, e.g., *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44, 48–53 (1941) (denying the applicability of the forum non conveniens doctrine because the Federal Employers Liability Act allowed a claim to be filed in a limited number of venues and dismissal under forum non conveniens meant that the case would be barred upon refileing).

47. See *Norwood v. Kirkpatrick*, 349 U.S. 29, 30–31 (1955) (noting that the creation of § 1404 was designed to relieve the harsh results of forum non conveniens by allowing the opportunity to transfer a case rather than subjecting it to dismissal (citing *All States Freight v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952))).

48. No. CIV S-10-1968, 2012 WL 1657643 (E.D. Cal. May 10, 2012).

49. See *id.* at *9 (noting that a statute of limitation may bar refileing after a case is dismissed).

50. See *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986) (requiring three conditions prior to forum non conveniens dismissal), *aff'd in part, modified in part*, 809 F.3d 195, 205–06 (2d Cir. 1987); John Bies, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 500–03 (2000) (discussing the different types of conditions that have been imposed on dismissal and listing cases in support).

used, and the harsh results of a forum non conveniens dismissal are still present.⁵¹

Use of the forum non conveniens doctrine is no longer as prevalent in federal courts due to the creation of 28 U.S.C. § 1404,⁵² a new way for a case to be moved from one jurisdiction to another for the sake of convenience.⁵³ The development of § 1404 allows for transfer between forums within the federal system without the harsh consequences of dismissal.⁵⁴ After the creation of § 1404, the forum non conveniens doctrine is only applicable in federal courts when the alternative forum is outside the federal court system, for example abroad or a state court.⁵⁵ Section 1404(a) is a “codification of the doctrine of forum non conveniens for the subset of cases in which the transferee forum is within the federal system For the remaining set of cases calling for a nonfederal forum, § 1404(a) has no application, but

51. Bies, *supra* note 50, at 504–05 (discussing the different circumstances when courts have conditioned forum non conveniens dismissals).

52. 28 U.S.C. § 1404 (2012).

53. See *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955) (“An order transferring it to another district does not end [a case] but preserves it as against the running of the statute of limitations and for all other purposes.” (quoting *Jiffy Lubricator Co, Inc. v. Stewart-Warner Corp.*, 177 F.2d 360, 362 (4th Cir. 1949))).

54. See § 1404(a) (“[A] district court may transfer any civil action to any other district or division where it might have been brought”); *Norwood*, 349 U.S. at 32 (“The harshest result of the application of the old doctrine of forum non conveniens, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer.”); *Howe v. Goldcorp Invest. Ltd.*, 946 F.2d 944, 947 (1st Cir. 1991) (noting the difference between application of the forum non conveniens doctrine and § 1404); C.P. Jhong, Annotation, *Application of Common-Law Doctrine of Forum Non Conveniens in Federal Courts After the Enactment of 28 U.S.C. § 1404(a) Authorizing Transfer to Another District*, 10 A.L.R. FED. 352, 352 (2014) [hereinafter Jhong, *Forum Non Conveniens*] (detailing changes to the federal forum non conveniens doctrine after the creation of 28 U.S.C. § 1404).

55. See *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007) (explaining that the forum non conveniens doctrine continues to be applicable in federal courts only when alternative forum is abroad “and perhaps in rare instances where a state or territorial court serves litigational convenience best”); *U.S. Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) (“[T]he federal doctrine of forum non conveniens has continuing application only in cases where the alternative forum is abroad.”); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 261 (1981) (dismissing a wrongful death action to be refiled in a foreign jurisdiction).

the residual doctrine of forum non conveniens” does.⁵⁶ While applied in different litigation circumstances, § 1404(a) and the forum non conveniens doctrine entail the same “balancing-of-interests standard.”⁵⁷

Under the forum non conveniens doctrine, a court may, in rare instances, maintain a partial action, keeping claims in an action while dismissing others.⁵⁸ Courts have explained that “[i]n deciding where a trial should be held the central notions of the doctrine of forum non conveniens are the convenience of the parties and their witnesses and that justice be served.”⁵⁹ Forum non conveniens is a flexible doctrine and “[d]epending upon the facts of the particular case, a district court may dismiss part of a lawsuit while deciding the merits of other issues.”⁶⁰ While partial dismissal is rooted in the traditional concerns of fairness and flexibility that support the forum non conveniens doctrine, it is a relatively recent development of the doctrine beginning after the creation of § 1404.⁶¹ Partial dismissal under the forum non conveniens doctrine has also been accepted in some state courts, but it is equally rare.⁶²

56. *Atl. Marine Constr. Co v. U.S. Dist. Court*, 134 S. Ct. 568, 580 (2013) (citing *Sinochem*, 549 U.S. at 430).

57. *Id.* (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37 (1988) (Scalia, J., dissenting)).

58. *See Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 505–06 (1947) (noting that the use of the doctrine of forum non conveniens should be rare); *Scottish Air Int'l, Inc. v. British Caledonian Grp., PLC*, 81 F.3d 1224, 1234–35 (2d Cir. 1996) (allowing the district court to retain a contempt claim and dismiss other claims on forum non conveniens grounds).

59. *Scottish Air Int'l, Inc.*, 81 F.3d at 1227.

60. *Id.* at 1234 (citing *Olympic Corp. v. Societe Generale*, 462 F.2d 376, 378 (2d Cir. 1972)); *see also Allarcom Pay TV, Ltd. v. Home Box Office, Inc.*, 210 F.3d 381, 381 (9th Cir. 2000) (noting that the Ninth Circuit and others “hold[] that district courts have discretion to enter final judgment on some claims and dismiss the remainder for forum non conveniens”).

61. *See supra* notes 58–60 and accompanying text (listing cases that have allowed partial dismissal; the supporting cases have taken place after the creation of § 1404).

62. *See Field Indus., Inc. v. D.J. Williams, Inc.*, 470 A.2d 1266, 1266 (Me. 1984) (affirming dismissal of a counterclaim on forum non conveniens grounds while the main claim is retained); *United Techs. Corp. v. Liberty Mut. Ins., Co.*, 555 N.E.2d 224, 227–29 (Mass. 1990) (noting in dicta that part of an action could be dismissed on forum non conveniens grounds if all the issues could not be resolved in a single forum); *Carwell v. Copeland*, 63 S.W.2d 669, 671 (Mo. Ct. App. 1982) (affirming dismissal of a counterclaim on forum non conveniens

B. Statutory Venue Transfer Rules

1. Transfer for the Sake of Convenience, 28 U.S.C. § 1404

Use of the forum non conveniens doctrine diminished after the adoption of a statutory mechanism for transfer within the federal judicial system, namely 28 U.S.C. § 1404.⁶³ Section 1404 governs venue transfers for the convenience of the parties and witnesses and was adopted in 1948.⁶⁴ This act combined a number of preexisting sections⁶⁵ and was drafted to modify the doctrine of forum non conveniens to permit the transfer of a case from a proper venue to a more convenient venue if it was “in the interests of justice.”⁶⁶ Congress intended to create an easy means to transfer cases from an original federal forum to a more convenient federal forum.⁶⁷ The adoption of § 1404 was thought to resolve the venue provision issues that arose under the Federal

grounds and resolution of the main claim in summary judgment); *Imperial Imps. Co. v. Hugo Neu & Sons, Inc.*, 555 N.Y.S.2d 323, 324 (N.Y. App. Div. 1990) (noting that a New York code provision allows that “a court may stay or dismiss an action in whole or in part on forum non conveniens grounds upon the motion of a party”).

63. 28 U.S.C. § 1404 (2012); *see supra* notes 52–57 and accompanying text (discussing the relationships between the forum non conveniens doctrine and § 1404).

64. *See* Judicial Code of 1948, Pub. L. No. 80-773, § 1404, 62 Stat. 869, 937 (codified as amended at 28 U.S.C. § 1404 (2012)) (including the language of § 1404 for the first time); *Ex parte Collett*, 337 U.S. 55, 65–71 (1949) (discussing in detail the legislative history of § 1404).

65. *See* § 1404, 62 Stat. at 937 (consolidating §§ 119 and 163 of title 28, U.S.C., 1940 ed.).

66. *See* Jhong, *Forum Non Conveniens*, *supra* note 54, at 352 (detailing changes to the forum non conveniens doctrine after the creation of 28 U.S.C. § 1404); 15 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3841 (4th ed. 2010) (noting that the development of § 1404(a) was intended to prevent the inconvenience created by the forum non conveniens doctrine and the waste of time and money associated with refiling).

67. *See* *Ferens v. John Deere Co.*, 494 U.S. 516, 522 (1990) (noting that Congress responded to the problem of broad venue provisions by permitting transfer to a convenient federal court under § 1404(a) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 634–36 (1964))); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (stating that § 1404(a) was enacted to allow “easy change of venue”); *Van Dusen*, 376 U.S. at 616 (noting that § 1404(a) “reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice”).

Employers Liability Act⁶⁸ and to prevent abuse to defendants under the new liberal federal joinder rules.⁶⁹ Section 1404 was “drafted in accordance with the doctrine of forum non conveniens,”⁷⁰ and after its enactment, the forum non conveniens doctrine fell out of common use within the federal system.⁷¹

In pertinent part, § 1404 states:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district of division where it might have been brought or to any district of division to which all parties have consented.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature . . . , may be transferred, in the discretion of the court⁷²

Section 1404 permits transfer from one proper venue to another proper venue for the purposes of convenience and if the interests of justice so demand.⁷³ Transfers that take place under this section must follow the choice-of-law rules of the transferor (sending) court.⁷⁴ The *Erie* doctrine generally requires that a federal court sitting in diversity apply the law that the local state courts would apply to achieve uniformity of result between

68. 45 U.S.C. §§ 51–60 (2012); *see also Ex parte Collett*, 337 U.S. at 60 (addressing the interaction of the venue provisions of the Federal Employers Liability Act and the new § 1404).

69. *See* Edgar E. Bethell & Herschel Friday, *The Federal Judicial Code of 1948*, 3 ARK. L. REV. 146, 150 (1948) (commenting on the major changes proposed by the Federal Judicial Code of 1948).

70. Hon. Clarence G. Galson, *An Introduction to the New Federal Judicial Code*, 8 F.R.D. 201, 206 (1948).

71. *See* 17 MOORE ET AL., *supra* note 28, § 111.11 (discussing the purpose of a § 1404 transfer); *see generally* 14D WRIGHT ET AL., *supra* note 66, § 3828 (describing the relationship between the forum non conveniens doctrine and § 1404).

72. 28 U.S.C. § 1404 (2012).

73. *See id.* (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district of division where it might have been brought . . .”).

74. *See* Van Dusen v. Barrack, 376 U.S. 612, 635–37 (1964) (finding that, when a venue transfer takes place under §1404, a transferee court must apply the state law that would have been applied if there had been no change of venue).

federal and state courts.⁷⁵ Uniformity of results is important because it assists in preventing forum shopping and achieving equitable administration of the laws, the two major goals of the *Erie* doctrine.⁷⁶ A case transferred under § 1404 might present an opportunity for forum-shopping litigants to benefit if different laws applied after transfer.⁷⁷ Thus, “[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms.”⁷⁸

Additionally, § 1404 differs from the forum non conveniens doctrine because it requires that a full action be transferred if a transfer takes place.⁷⁹ An entire action, however, need not mean the case as it was originally filed.⁸⁰ Several circuits have allowed claims to be severed under Federal Rule of Civil Procedure 21⁸¹ and then permitted the severed claim to be transferred to a more

75. See *id.* at 638 (“This Court has often formulated the *Erie* doctrine by stating that it establishes the principle of uniformity within a state, and declaring that federal courts in diversity of citizenship cases are to apply the laws ‘of the state in which they sit.’” (quoting *Griffin v. McCoach*, 313 U.S. 798, 503 (1941))).

76. See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (naming these two concerns the “twin aims of the *Erie* rule”).

77. See *Van Dusen*, 367 U.S. at 638 (explaining that the purpose of the *Erie* doctrine would be defeated if defendants were able to gain the benefits of the laws of another jurisdiction through transfer).

78. *Id.* at 639.

79. See *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1518 (10th Cir. 1991) (“Section 1404(a) only authorizes the transfer of an entire action, not individual claims.”); *In re Flight Transp. Corp. Sec. Litig.*, 764 F.2d 515, 516 (8th Cir. 1985) (“It is well established that the transferor court under § 1404 loses all jurisdiction over a case once transfer has occurred.” (internal citation omitted)); *Wyndham Assocs. v. Bintliff*, 398 F.2d 614, 618 (2d Cir. 1968) (noting that § 1404(a) “authorizes the transfer only of an entire action and not of individual claims”), *cert. denied*, 393 U.S. 977 (1968).

80. See FED. R. CIV. P. 21 (“[M]isjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.”); *AEP Energy Servs. Gas Holdings Co., v. Bank of Am., N.A.*, 626 F.3d 699, 720 (2d Cir. 2010) (explaining that where certain claims are properly severed the result is two or more separate actions); *Wyndham Assocs.*, 398 F.2d at 618 (“We believe that where the administration of justice would be materially advanced by severance and transfer, a district court may properly sever the claims against one or more defendants for the purpose of permitting the transfer of the action against the other defendants . . .”).

81. FED. R. CIV. P. 21.

convenient or proper venue.⁸² In keeping with the traditional concerns of fairness and flexibility of the forum non conveniens doctrine, it seems as if its statutory progeny is equally open to allowing an action to be divided and its various parts to be transferred or dismissed if the interests of justice so demand.

2. Transfer to Cure Filing in an Improper Venue, 28 U.S.C. § 1406

The current form of 28 U.S.C. § 1406⁸³ was also introduced in 1948.⁸⁴ Section 1406 is a mechanism that allows a district court to transfer a case from an improper venue to a proper venue.⁸⁵ In pertinent part, § 1406 states: “The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.”⁸⁶ Section 1406 includes a discretionary element, allowing a court the choice of dismissing or transferring the case “in the interest of justice” if the original venue was improper⁸⁷ or if venue and personal jurisdiction are lacking.⁸⁸ But if a party

82. See *AEP Energy Servs. Gas Holdings Co.*, 626 F.3d at 720 (“Where certain claims are properly severed, the result is that there are then two or more separate ‘actions,’ and the district court may, pursuant to § 1404(a), transfer certain of such separate actions while retaining jurisdiction of others.”); *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977) (holding that the district court had the power to sever a single count from a complaint under Federal Rule of Civil Procedure 21 and transfer the count and a counterclaim to another federal district court); see, e.g., *Sunbelt Corp. v. Noble, Denton & Assocs.*, 5 F.3d 28, 33–34 (3d Cir. 1993) (accepting that severance and transfer may be used in cases where the defendants are only indirectly connected, but denying that circumstance in the present case).

83. 28 U.S.C. § 1406 (2012).

84. See Judicial Code of 1948, Pub. L. No. 80-773, § 1406, 62 Stat. 869, 937 (codified as amended at 28 U.S.C. § 1406 (2012)) (stating the text of § 1406 for the first time).

85. See 28 U.S.C. § 1406 (providing means to correct an improper venue).

86. *Id.* § 1406(a).

87. See *id.* § 1391 (explaining that proper venue is a judicial district where all defendants reside, where a “substantial part of the events or omissions giving rise to the claim occurred,” or where “any defendant is subject to the court’s personal jurisdiction” if the other two provisions are not satisfied).

88. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962) (“The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the

seeks to change venue under § 1406, and the dispute is not waived, the court does not have the liberty to keep the case because it is not a proper venue.⁸⁹ Similarly, if venue is proper, then the motion to transfer under § 1406 must generally be denied.⁹⁰ The definitions of a “proper” or “improper venue” have been extended in some circuits to include transfer where venue may be appropriate in the original forum, but some other obstacle stands in the way of adjudication on the merits.⁹¹ For example, some courts have found that an “improper venue” may exist when the statutory venue provisions are met but the court lacked personal jurisdiction over defendants.⁹² Thus, a motion to transfer under § 1406 must be denied when venue is proper and the court has personal jurisdiction over the defendant.⁹³

Prior to the enactment of § 1406, dismissal was the only option for a court faced with a case filed in an improper venue.⁹⁴

court in which it was filed had personal jurisdiction over the defendants or not.”).

89. See 28 U.S.C. § 1406(a) (“The district court . . . shall dismiss, or if it be in the interest of justice transfer such case . . .” (emphasis added)); Jhong, 28 U.S.C. § 1406, *supra* note 29, at 467 (discussing the means by which transfer is accomplished under § 1406).

90. See 14D WRIGHT ET AL., *supra* note 66, § 3827 (“A prerequisite to invoking § 1406(a) is that the venue chosen by the plaintiff is improper.”); Jhong, 28 U.S.C. § 1406, *supra* note 29, at 467 (discussing the means by which transfer is accomplished under § 1406 and listing cases in support).

91. See *Mayo Clinic v. Kaiser*, 383 F.2d 653, 656 (8th Cir. 1967) (noting that “the first forum chosen is improper in the sense that the litigation may not proceed there”); *Dubin v. United States*, 380 F.2d 813, 815 (5th Cir. 1967) (“The statute does not refer to ‘wrong’ venue, but rather to venue laid in a ‘wrong division or district.’ We conclude that a district is ‘wrong’ within the meaning of § 1406 whenever there exists and ‘obstacle [to] . . . an expeditious and orderly adjudication’ on the merits.”); Jhong, 28 U.S.C. § 1406, *supra* note 29, at 467 n.12 (noting that the term “improper venue” has been interpreted broadly).

92. See *Porter v. Groat*, 840 F.2d 255, 257–58 (4th Cir. 1988) (noting that § 1406 has been interpreted “to afford broad remedial relief” and listing circuits in agreement); Jhong, 28 U.S.C. § 1406, *supra* note 29, at 467 (noting that the term “improper venue” has been expanded and listing cases in support).

93. See Jhong, 28 U.S.C. § 1406, *supra* note 29, at 467 (noting that § 1406 is not concerned with the convenience of the parties, only whether venue is proper); *supra* notes 91–92 and accompanying text (discussing the expansive definition of “improper venue”).

94. See *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 430 (1965) (stating that § 1406(a) prevents “the unfairness of barring a plaintiff’s action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run”); *Goldlawr, Inc. v. Heiman*, 369 U.S.

Section 1406 is a way to transfer a case, rather than to dismiss it, and “avoid . . . the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions would turn.”⁹⁵ Similar to § 1404, § 1406 was designed to remove “whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits.”⁹⁶ The similarity of purpose and of result between § 1404 and § 1406, however, has created significant confusion.⁹⁷ While the line between the two statutes can become blurred, the two are mutually exclusive.⁹⁸ As one court explains, “Section 1404(a) permits transfer of a civil action to any other district in which it could have been brought, and refers to a civil action in which venue is properly laid Section 1406(a) pertains to transfer of a case laying venue in the ‘wrong district.’”⁹⁹

In general, when a case is transferred under § 1406 to correct filing in an improper venue, the law of the transferee (receiving) court will apply.¹⁰⁰ The different choice-of-law rules that apply

463, 466 (1962) (noting that the purpose of 28 U.S.C. § 1406(a) was to avoid injustices such as plaintiff “losing a substantial part of its cause of action under the statute of limitations” because it made a mistake in venue).

95. *Goldlawr*, 369 U.S. at 466; see 14D WRIGHT ET AL., *supra* note 66, § 3827 (detailing the goals of § 1406(a)).

96. *Goldlawr*, 369 U.S. at 466.

97. See 14D WRIGHT ET AL., *supra* note 66, § 3827 (noting that a number of courts have said that either § 1404 or § 1406 may be used a basis for transfer).

98. *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1147 (5th Cir. 1984) (noting that § 1404(a) and § 1406(a) are “both short, apparently clear, and seemingly mutually exclusive”); *Ellis v. Great S.W. Corp.*, 646 F.2d 1099, 1104 (5th Cir. Unit A June 1981) (explaining that “sections 1404(a) and 1406(a) would appear to apply in two mutually exclusive situations” (citing *Goldlawr*, 369 U.S. at 466–67)).

99. *Liaw Su Teng*, 743 F.2d at 1147.

100. See *Eggleton v. Plasser & Theurer Exp. Von Bahnbaumaschinen Gessellschaft, MBH*, 495 F.3d 582, 588 (8th Cir. 2007) (relying on precedent that requires the law of the transferee court to apply when a case is transferred under § 1406 (internal citations omitted)); *GBJ Corp. v. E. Ohio Paving Co.*, 139 F.3d 1080, 1084 (6th Cir. 1998) (“When a case is transferred [under § 1406(a)], the choice-of-law rules of the transferee court apply.”); *Schaeffer v. Vill. of Ossining*, 58 F.3d 48, 50 (2d Cir. 1995) (“Following a section 1406(a) transfer . . . ‘the transferee court should apply whatever law it would have applied had the action been properly commenced there.’” (internal citations omitted)); *Myelle v. Am. Cyanamid Co.*, 57 F.3d 411, 413 (4th Cir. 1995) (noting

when a case is transferred under § 1404 and under § 1406 are designed to “prevent forum shopping” and to deny any extra advantage to a party who would not have been entitled to those advantages if the case was brought in the proper forum.¹⁰¹ A plaintiff should only gain the benefit of the law that would apply in the original forum if the venue is proper and the court has personal jurisdiction over the defendant.¹⁰²

Again, similar to transfers effectuated under § 1404, a court generally may not transfer less than a full action in a venue transfer under § 1406, but certain claims may be severed from the action and transferred on their own.¹⁰³ Several courts have severed claims under Federal Rule of Civil Procedure 21¹⁰⁴ and transferred those claims to a district where venue was proper.¹⁰⁵

that “a district court receiving a case under the mandatory transfer provisions of § 1406(a) must apply the law of the state in which it is held rather than the law of the transferor district court”); *Tel-Phonic Servs., Inc. v. TBS Int’l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992) (“When a case is transferred from a district in another circuit, the precedent of the circuit court encompassing the transferee district court applies to the case on matters of federal law.” (internal citation omitted)).

101. See *Nelson v. Int’l Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983) (explaining the reason that different choice-of-law rules would apply depending upon the venue transfer statute invoked and listing cases in support).

102. See 14D WRIGHT ET AL., *supra* note 66, § 3827 (explaining the interrelation between venue transfer and choice-of-law rules).

103. See *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (noting that Congress, in creating the limited venue statute 15 U.S.C. § 15, must have contemplated that venue might not be appropriate as to all defendants of a single action and that “such proceedings might be severed and transferred or filed in separate districts originally”); *In re Vitamins Antitrust Litig.*, 270 F. Supp. 2d 15, 37 (D.D.C. 2003) (finding the severance and transfer of certain claims to a proper forum is appropriate under both § 1404 and § 1406); *Doelcher Prods., Inc. v. Hydrofoil Int’l, Inc.*, 735 F. Supp. 666, 669 (D. Md. 1989) (severing a defendant from the plaintiff’s case and transferring the remaining claims to the U.S. District Court for the Southern District of New York); *ABC Great States, Inc. v. Globe Ticket Co.*, 310 F. Supp. 739, 744 (N.D. Ill. 1970) (“[T]he conclusion that venue is improper in this District does not require dismissal of the action against [two defendants]—they may be severed from the main actions, and their actions may be transferred ‘in the interest of justice’ under 28 U.S.C. § 1406(a) . . .”).

104. FED. R. CIV. P. 21.

105. See *Wultz v. Islamic Republic of Iran*, 762 F. Supp. 2d 18, 32 (D.D.C. 2011) (severing certain claims under Federal Rule of Civil Procedure 21 and transferring those claims to the South District of New York); *O’Shatz v. Bailey*, 220 F. Supp. 444, 446–48 (D. Md. 1963) (sustaining a motion to transfer for improper venue, severing certain defendants from the action, and transferring

Severance and transfer of claims under § 1406 appears to be more widely accepted than severance and transfer under § 1404 and began shortly after the adoption of § 1406.¹⁰⁶

3. *Transfer to Cure Lack of Jurisdiction, 28 U.S.C. § 1631*

Federal statutory provision, 28 U.S.C. § 1631,¹⁰⁷ governs when a venue transfer is effectuated for lack of jurisdiction:

Whenever a civil action is filed in a court . . . and that court finds there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.¹⁰⁸

Section 1631 was enacted as part of the Federal Courts Improvement Act of 1982¹⁰⁹ to cure subject matter jurisdiction problems that arise when a case was filed in the wrong court.¹¹⁰

the claims to the Eastern District of New York); *United Nations Korean Reconstruction Agency v. Glass Prod. Methods, Inc.*, 143 F. Supp. 248, 250 (S.D.N.Y. 1956) (severing the action as to certain defendants and transferring some of the claims to the District Court of Connecticut).

106. See *Bankers Life & Cas. Co.*, 346 U.S. at 384 (noting that Congress must have contemplated the possibility of severance and transfer in cases where venue may not be appropriate as to all defendants); *United Nations Korean Reconstruction Agency*, 143 F. Supp. at 250 (severing the action as to certain defendants and transferring some of the claims to the District Court of Connecticut).

107. 28 U.S.C. § 1631 (2012).

108. *Id.*

109. Pub. L. No. 97-164, § 1631, 96 Stat. 25, 55 (codified at 28 U.S.C. §§ 41, 1631 (2012)).

110. See *Britell v. United States*, 318 F.3d 70, 74 (1st Cir. 2003) (noting that Congress crafted § 1631 to ensure that litigants were not deprived of a remedy due to error or procedural technicality resulting from some statutory uncertainty and to prevent duplicative litigation that would result if litigants were required to file in two courts to ensure jurisdiction); *United States v. Am. River Transp., Inc.*, 150 F.R.D. 587, 591 (C.D. Ill. 1993) (“The impetus for this legislation was the jurisdictional confusion caused by the creation of specialized federal courts, such as the Court of Claims, which have jurisdiction over certain matters.”); *Mortensen v. Wheel Horse Prods., Inc.*, 772 F. Supp. 85, 86–87

Section 1631 was particularly necessary after the decision in *Goldlawr, Inc. v. Heiman*,¹¹¹ which found that transfer for lack of venue or lack of personal jurisdiction could be effectuated under § 1406,¹¹² but left no avenue for transfer when a court lacked subject matter jurisdiction over an action.¹¹³ Section 1631 was designed to save the expenditure of time and money in refileing an action after dismissal and to prevent a refiled claim from being barred by expiration of the statute of limitations period.¹¹⁴

Section 1631 is a broad grant of authority to transfer a case where “there is a want of jurisdiction.”¹¹⁵ The term “jurisdiction,” as used in the statute, has created some controversy.¹¹⁶ Some courts have found that § 1631 should be used only in cases where subject matter jurisdiction is lacking.¹¹⁷ Other courts have

(N.D.N.Y. 1991) (stating that § 1631 was created to cure filing confusion when “two or more federal courts” have jurisdiction and the “wasteful and costly practice of filing an action in several courts to ensure that the litigant will not be left ‘without a remedy because of a lawyer’s error or a technicality of procedure.’” (quoting S. REP. NO. 97-275, at 11 (1981), *reprinted* in 1982 U.S.C.C.A.N. 11, 21)).

111. 369 U.S. 463 (1962).

112. *See id.* at 466 (“The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not.”).

113. *See* 14D WRIGHT ET AL., *supra* note 66, § 3827 (noting that a court was not permitted to transfer an action under §§ 1404 or 1406 unless it had subject matter jurisdiction).

114. *See* S. REP. NO. 97-275, at 30 (1981), *reprinted* in 1982 U.S.C.C.A.N. 11, 40.

115. *See* *Ross v. Colo. Outward Bound Sch., Inc.*, 822 F.2d 1524, 1526 (10th Cir. 1987) (noting that “Congress gave broad authority [under § 1631] to permit the transfer of an action between any two federal courts”); *McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 436, 429 (3d Cir. 1983) (stating that § 1631 “is broadly drafted to allow transfer between any two Federal courts”).

116. *See* *Cimon v. Gaffney*, 401 F.3d 1, 7 n.21 (1st Cir. 2005) (noting that there is a debate regarding what the term “jurisdiction” means in 28 U.S.C. § 1631 and listing cases in support); 17 MOORE ET AL., *supra* note 28, § 111.51[2] n.7 (listing cases in support of transfer where subject matter jurisdiction is lacking); *id.* § 111.51[3] n.8 (listing cases that have found transfer under § 1631 to be proper where personal jurisdiction is lacking).

117. *See* *McTyre v. Broward Gen. Med. Ctr.*, 749 F. Supp. 102, 105 (D.N.J. 1990) (finding that § 1631 applies only when subject matter jurisdiction is lacking in the transferor court); *Levy v. Pyramid Co. of Ithaca*, 687 F. Supp. 48, 51 (N.D.N.Y. 1988) (noting that § 1631 “was only intended to apply to cases in which the transferor court lacks *subject* matter jurisdiction”), *aff’d*, 871 F.2d 9

interpreted the statute to also authorize a transfer to cure lack of personal jurisdiction or improper venue.¹¹⁸ The language of the statute appears to be broad enough to address defects in both personal and subject matter jurisdiction, but the legislative history of § 1631 expressly refers to subject matter jurisdiction and does not mention defects in personal jurisdiction.¹¹⁹ Limiting transfer under § 1631 to instances where a case lacks subject matter jurisdiction appears to be the correct reading and in line with Congress's intent, particularly in light of the Supreme Court's holding that transfer for lack of venue and personal jurisdiction may be accomplished under § 1406.¹²⁰

When a case is transferred for lack of jurisdiction, the choice-of-law rules of the transferee (receiving) court will apply to the case.¹²¹ Much like in the case of a transfer effectuated under § 1406, applying the rules of the transferee court helps to discourage forum shopping and prevents either party from gaining advantages they otherwise would not have had if the case had been brought in the appropriate forum originally.¹²² The

(2d Cir. 1989); 17 MOORE ET AL., *supra* note 28, § 111.51[2] (describing the debate about whether § 1631 addresses subject matter jurisdiction, personal jurisdiction, or both); Jeffrey W. Tayon, *Federal Transfer Statute: 28 U.S.C. § 1631*, 29 S. TEX. L. REV. 189, 224 (1987) (describing the legislative history of § 1631 and explaining that "it appears to be directed to correcting subject matter jurisdictional defects").

118. See *Ross*, 822 F.2d at 1527 (allowing a transfer under § 1631 when the transferor court lacked personal jurisdiction); 17 MOORE ET AL., *supra* note 28, § 111.51[3] (citing cases in support of transfers effectuated under § 1631 for lack of personal jurisdiction).

119. See S. REP. NO. 97-275, at 30 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 40 (noting that the proposed § 1631 would authorize a court to transfer a case that had been improperly filed to a court where subject matter jurisdiction was proper); Tayon, *supra* note 117, at 224 (discussing the meaning of the term "jurisdiction" in § 1631).

120. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962) ("The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not.").

121. See *Viernow v. Euripides Dev. Corp.*, 157 F.3d 785, 793-94 (10th Cir. 1998) (noting that when a case is transferred under § 1631 then the transferee court's choice-of-law principles will be applied).

122. See *Nelson v. Int'l Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983) (explaining that different choice-of-law rules would apply depending upon the venue transfer statute invoked and listing cases in support).

federal circuits are currently divided regarding a court's ability to transfer less than an entire action under § 1631.¹²³

4. *Transfer and Consolidation in Multidistrict Litigation*, 28
U.S.C. § 1407

There is also a statutory provision for addressing large legal actions that are filed in a number of different venues. While 28 U.S.C. § 1407¹²⁴ does not derive from the same historical roots as the other sections mentioned, it is a representation of the goals of the judiciary in creating simple, clear, and efficient venue rules to address new challenges in litigation.¹²⁵ Congress has created a special legislative provision to address transfers in multidistrict litigation: a case may be transferred under 28 U.S.C. § 1407 when it is a civil action “involving one or more common questions of fact that are pending in different districts.”¹²⁶ The Judicial Panel on Multidistrict Litigation effectuates transfers if it determines that “transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”¹²⁷ The advent of large multidistrict tort, patent, antitrust, and securities cases prompted Congress to “provide judicial machinery to transfer, for coordinated or consolidated pretrial proceedings, civil actions, having one or

123. See 17 MOORE ET AL., *supra* note 28, § 111.51[2] nn.7.0.2 & 7.1 (noting the existence of a circuit split with the D.C. Circuit on one side and the Third, Tenth, and Federal Circuit on the other); *infra* Part III.A (discussing the circuit split).

124. 28 U.S.C. § 1407 (2012).

125. See JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE REPORT, PROCEDURE IN ANTI-TRUST AND OTHER PROTRACTED CASES, *reprinted in* Hon. Leon R. Yankwich, “Short Cuts” in Long Cases: A Commentary on the Report Entitled Procedure in Anti-Trust and Other Protracted Cases Adopted by the Judicial Conference of the United States, September 26, 1951, 13 F.R.D. 41, 62–84 (1952) (reviewing problems presented by an increase in complex cases and recommending certain judicial solutions); JUDICIAL CONFERENCE STUDY GROUP ON PROCEDURE IN PROTRACTED LITIGATION, HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, 25 F.R.D. 351, 373–432 (1960) (explaining non-mandatory procedures for addressing complex cases); 15 WRIGHT ET AL., *supra* note 66, § 3861 (discussing the historical development of the Judicial Panel on Multidistrict Litigation).

126. 28 U.S.C. § 1407.

127. *Id.*

more common questions of fact, pending in different judicial districts.”¹²⁸ Section 1407 was enacted in 1968 to provide “centralized management” of pretrial proceedings in multidistrict litigation to “assure just and efficient conduct.”¹²⁹ It is important to note that a transfer under § 1407 is for pretrial proceedings, not trial or final disposition of the case,¹³⁰ although a transferee court does have the power to handle dispositive pretrial motions.¹³¹

When presented with a case involving a number of claims, cross-claims, counterclaims, or third-party claims, the Judicial Panel on Multidistrict Litigation has the authority to separate any claim from the action, and it may transfer the claims or remand them,¹³² including claims that lack common questions of fact.¹³³ The Panel’s discretion to separate claims is limited, however, and it may not sever claims that share a common question of fact or assign them to different courts.¹³⁴ The Panel is not designed to address substantive or procedural matters, but only to determine whether actions ought to be transferred for

128. H.R. REP. NO. 90-1130, at *1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1898.

129. *Id.* at *2–3.

130. *See* 28 U.S.C. § 1407(a) (“[E]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated”); H.R. REP. NO. 90-1130, at *3 (“[T]he bill provides for the transfer of venue to an action for the limited purpose of conducting coordinated pretrial proceedings.”).

131. *See* 28 U.S.C. § 1407(b) (providing that a court may address pretrial proceedings); 17 MOORE ET AL., *supra* note 28, § 112.03 n.74 (listing cases in support of the proposition that a transferee court may handle dispositive motions).

132. *See* 28 U.S.C. § 1407(a) (“[T]he panel may separate any claim, cross-claim, counterclaim, or third-party claim and remand any of such claims before the remainder of the action is remanded.”); 17 MOORE ET AL., *supra* note 28, § 112.02 n.12 (citing cases in support of the Panel’s authority to separate claims).

133. *See In re* 1980 Decennial Census Adjustment Litig., 506 F. Supp. 648, 650–51 (J.P.M.L. 1981) (requiring that “claims to be returned to the transferor court involve little or no factual overlap with the claims to be transferred”); *In re* Data Gen. Corp. Antitrust Litig., 510 F. Supp. 1220, 1227 (J.P.M.L. 1979) (requiring transfer of multiple claims because there was some factual overlap and “substantial overlapping discovery [would] be required”).

134. *See* 17 MOORE ET AL., *supra* note 28, § 112.02 n.14 (citing cases in support).

pretrial purposes and whether actions previously transferred should be remanded for trial.¹³⁵ Similar to transfers conducted under § 1404, cases transferred under § 1407 are governed by the choice-of-law rules of the transferor court.¹³⁶

C. Transfer After Severance Under Federal Rule of Civil Procedure 21

Prior to any partial transfer, the offending claims or defendants must be separated from the action as a whole.¹³⁷ The most common means for separating claims and defendants within a federal action is Federal Rule of Civil Procedure 21.¹³⁸ Rule 21 provides that: “On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.”¹³⁹ If less than a full action is to be transferred, the transferring claim and related defendants must first be severed from the original action.¹⁴⁰ Upon severance under Rule 21, the single claim becomes a discrete and independent suit and proceeds as a separate action.¹⁴¹

135. See *id.* § 112.02(d) (discussing the role of the Panel and citing cases in support).

136. See *Van Dusen v. Barrack*, 376 U.S. 612, 633–34 (1964) (determining that the court should use the choice-of-law rules of the original court if the case was filed in a proper venue); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (“The conflict of laws rules to be applied by the federal court in Delaware must confirm to those prevailing in Delaware’s state courts.”); Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 766–80 (2012) (discussing the legal development of choice-of-law rules and how they apply when a case is transferred to a proper venue).

137. See 4 MOORE ET AL., *supra* note 28, § 21.06 n.13 (listing cases in support of the requirement for severance prior to transfer).

138. See FED. R. CIV. P. 21 (providing for the severance of parties and claims); 7 WRIGHT ET AL., *supra* note 66, § 1689 (discussing how Rule 21 severance is used); *id.* § 1682 (“The scope of application of Rule 21 is extremely broad and covers any civil action in the federal courts.”).

139. FED. R. CIV. P. 21.

140. See 4 MOORE ET AL., *supra* note 28, § 21.06 n.13 (noting that severance is a prerequisite for transfer of a claim and listing cases in support); 7 WRIGHT ET AL., *supra* note 66, § 1689 (explaining the use of Rule 21 as a means to allow claims and cases to go forward towards trial).

141. See FED. R. CIV. P. 21 (“The court may also sever any claim against a party.”); 4 MOORE ET AL., *supra* note 28, § 21.06 (listing cases in support); 7

The main focus of Rule 21 and its historical predecessors has been to correct misjoinder or nonjoinder of parties.¹⁴² District courts have broad discretion to address severance questions, and the ability to sever claims and parties has been extended to a broad variety of scenarios.¹⁴³ To determine whether severance should be granted, some courts consider whether the issues presented are “significantly different,” whether the issues rely on different witnesses or proof, or whether a party may be prejudiced if severance is denied.¹⁴⁴ All courts, however, seem to agree that “[t]he decision of whether to grant severance is committed to the sound discretion of the trial court.”¹⁴⁵

Like the transfer mechanisms noted above, severance is a preferred remedy and is undertaken to prevent prejudice to a party that may suffer due to a dismissal.¹⁴⁶ Rule 21 may be

WRIGHT ET AL., *supra* note 66, § 1689 (“Once a claim has been severed . . . it proceeds as a discrete unit until its own final judgment, from which an appeal may be taken.”).

142. See FED. EQUITY R. 43–44 (1912), reprinted in JAMES L. HOPKINS, THE NEW FEDERAL EQUITY RULES 238–39 (1913) (noting that a district court has discretionary power to dismiss an action or allow addition of necessary parties); 7 WRIGHT ET AL., *supra* note 66, § 1689 (noting that the primary use of Rule 21 has been in the context of joinder of parties); Daniel K. Hopkinson, *The New Federal Rules of Civil Procedure Compared with the Former Equity Rules and the Wisconsin Code*, 43 MARQ. L. REV. 170 (noting that Rule 21’s joinder rules are “much more liberal than Equity Rules 43 and 44” which dealt entirely with misjoinder and nonjoinder).

143. See 4 MOORE ET AL., *supra* note 28, § 21.06 (explaining that the decision to sever is “committed to the sound discretion of the court,” and listing cases in support); 7 WRIGHT ET AL., *supra* note 66, § 1689 (noting the broad discretion of district courts in severing claims and parties).

144. See *German v. Fed. Home Loan Mortg. Corp.*, 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995) (“[C]ourts generally consider (1) whether the issues sought to be tried separately are significantly different . . . , (2) whether the separable issues require the testimony of different witnesses and different documentary proof, (3) whether the party opposing the severance will be prejudiced if it is granted and (4) whether the party requesting the severance will be prejudiced . . .”).

145. *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1082 (2d Cir. 1988); see 4 MOORE ET AL., *supra* note 28, § 21.06 (explaining that the decision to sever is “committed to the sound discretion of the court” and listing cases in support).

146. See *Strandlund v. Hawley*, 532 F.3d 741, 745 (8th Cir. 2008) (noting that discretion under Rule 21 includes consideration of what is “just” and when there is a choice between dismissal or severance, severance is preferable); *DirecTV, Inc. v. Leto*, 467 F.3d 842, 846 (3d Cir. 2006) (“Although a district court has discretion to choose either severance or dismissal in remedying

employed to remove non-diverse parties when federal jurisdiction relies on diversity of citizenship.¹⁴⁷ Severance has been found to be appropriate in cases when separate treatment of an unrelated claim was found to be in the interests of justice.¹⁴⁸ Claims have also been severed when venue is improper for some but not all defendants and the claims are separable.¹⁴⁹ Even where venue is proper, claim severance has been found to be appropriate when the forum is inconvenient for a party and the claim could be separated from the rest of the action.¹⁵⁰ In rarer circumstances, claim severance has also been found appropriate when it would enable a defendant to implead a plaintiff under Rule 14,¹⁵¹ or when a private individual is joined as a codefendant with the United States in actions where the United States must be sued alone.¹⁵²

misjoinder, it is permitted under Rule 21 to opt for the latter only if ‘just’—that is, if doing so ‘will not prejudice any substantial right.’” (internal citations omitted)); *Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000) (“[I]n formulating a remedy for a misjoinder the judge is required to avoid gratuitous harm to the parties, including the misjoined party.”).

147. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989) (“[I]t is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered.”).

148. *See United States v. O’Neil*, 709 F.2d 361, 369–72 (5th Cir. 1983) (allowing severance of counterclaims and crossclaims); 7 WRIGHT ET AL., *supra* note 66, § 1689 (listing cases in support).

149. *See* 7 WRIGHT ET AL., *supra* note 66, § 1689 (listing cases that support severance for venue reasons).

150. *See id.* (listing cases that support severance for convenience).

151. *See Sporia v. Pa. Greyhound Lines*, 143 F.2d 105, 107–08 (3d Cir. 1944) (allowing severance for the purpose of impleader, noting that later consolidation under Rule 42 was still possible); 7 WRIGHT ET AL., *supra* note 66, § 1689 (listing cases in support of the use of severance for impleader).

152. *See Lynn v. United States*, 110 F.2d 586, 589 (5th Cir. 1940) (finding that “in the spirit of Rule 21,” a claim arising under the Tucker Act should not be dismissed but that the claims should be severed); 7 WRIGHT ET AL., *supra* note 66, § 1689 (discussing instances when severance has been found to be appropriate).

III. Disagreement on Transfer of Less Than a Full Action Under § 1631

There is currently a circuit split regarding whether a court may transfer less than a full action under 28 U.S.C. § 1631. Similar to transfers effectuated under § 1404 and § 1406, the Third, Tenth, and Federal Circuits have embraced transfer of less than a full action under § 1631 if the interest of justice demands it.¹⁵³ The D.C. Circuit, however, has denied transfer of less than an entire action because of the precise wording of § 1631.¹⁵⁴ The key division between the circuits is the proper interpretation of the term “action” within the statute.¹⁵⁵

A. The Circuit Split

The D.C. Circuit has found that a court may not transfer less than an entire legal action.¹⁵⁶ In *Hill v. United States Air Force*,¹⁵⁷ the D.C. Circuit considered whether the D.C. District Court erred in failing to transfer a claim, separated from the full action, under 28 U.S.C. § 1631.¹⁵⁸ The D.C. Circuit found that the district court’s actions were acceptable because § 1631 “directs a court to

153. See *infra* notes 162–87 and accompanying text (detailing one side of the circuit split).

154. See *infra* notes 156–61 and accompanying text (discussing the D.C. Circuit’s reasoning).

155. See *infra* Part III.B (discussing the statutory interpretation disagreement).

156. See *Hill v. U.S. Air Force*, 795 F.2d 1067, 1070 (D.C. Cir. 1986) (“Because Section 1631 directs a court to transfer an ‘action’ over which it lacks jurisdiction, rather than an individual claim, we find that the District Court did not abuse its discretion in failing . . . to transfer Hill’s claims”); *Halim v. Donovan*, No. 12-00384, 2013 U.S. Dist. LEXIS 91862, at *6 (D.D.C. July 1, 2013) (“[I]t is not clear to the [c]ourt that it would have the authority to effectuate a piecemeal transfer of Plaintiffs’ ‘case’ against the City Defendants, while retaining jurisdiction over Halim’s claims against HUD.”); cf. *Bailey v. Fulwood*, 780 F. Supp. 2d 20, 25–26 (D.D.C. 2011) (noting that the court “may not transfer the habeas claims while maintaining the Privacy Act claims, because they arise in the same ‘action,’” but allowing the claims to be severed into separate actions).

157. 795 F.2d 1067 (D.C. Cir. 1986).

158. See *id.* at 1070 (“[W]e conclude that the District Court did not err in failing to transfer this case to the District Court in New Mexico pursuant to 28 U.S.C. § 1631 (1982).”).

transfer an ‘action’ over which it lacks jurisdiction, rather than an individual claim”¹⁵⁹ The D.C. Circuit has generally adopted a “strong policy against piecemeal” cases or appeals.¹⁶⁰ The court, however, has recognized a small exception when it has dismissed certain claims, transferred the remainder of the case elsewhere, and no other review of the dismissed claims was possible.¹⁶¹

On the opposite end of the spectrum, the Tenth Circuit has found that transfer of less than an entire action under § 1631 may be appropriate when a district court severs, or demonstrates the intent to sever, the transferred claims from the remaining action.¹⁶² When a claim may be severed, the resulting pieces may be disposed of as the court sees fit.¹⁶³ The court borrows this reasoning from its prior decisions regarding partial transfers

159. *Id.* (noting that when a federal court finds it lacks jurisdiction and that another federal court has authority to hear the case, “the first federal court must transfer the case to the proper court” (citing *Ctr. for Nuclear Responsibility v. U.S. Nuclear Regulatory Comm’n*, 781 F.2d 935, 943 (D.C. Cir. 1986) (Ginsburg, J., dissenting))); see *Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 80 (D.C. Cir. 1985) (“[W]here a court finds that it lacks jurisdiction, it must transfer such action to the proper court . . .”).

160. *Hill v. Henderson*, 195 F.3d 671, 672 (D.C. Cir. 1999).

161. See *Murthy v. Vilsac*, 609 F.3d 460, 463–64 (D.C. Cir. 2010) (explaining that an exception to the court’s view of partial transfers may exist). The D.C. Circuit exercised appellate review of a dismissed Title VII claim, a portion of a case that was previously transferred to the Court of Federal Claims, because of the “specialized jurisdiction of the Court of Federal Claims and the Federal Circuit’s treatment of partial transfers, neither the federal district court nor the Court of Federal Claims could exercise jurisdiction over all the claims” in plaintiff’s complaint. *Id.* at 464 (citing *Greenhill v. Spellings*, 482 F.3d 569, 574 (D.C. Cir. 2007)).

162. See *FDIC v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996) (affirming the district court’s order to transfer some, but not all, of plaintiff’s claims because the court effectively severed the problematic claims under Federal Rule of Civil Procedure 21 prior to transfer); *Salazar v. Ashcroft*, 116 Fed. App’x 167, 167 n.1 (10th Cir. 2004) (explaining that it lacked jurisdiction over certain claims because the district court intended to sever those claims under Federal Rule of Civil Procedure 21 and transferred the claims under § 1631 to the Ninth Circuit); *Burkins v. United States*, 112 F.3d 444, 451 (10th Cir. 1997) (remanding case to the district court for severance under Federal Rules of Civil Procedure 21 and transfer to the Federal Claims Court).

163. See *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1519–20 (10th Cir. 1991) (noting that when an action is severed into various new and separate actions the court has discretion to treat the new actions distinctly if appropriate).

under § 1404: “§ 1404’s authorization for transfer of ‘any civil action’ did not allow a district court to transfer a portion of the action in the absence of a severance under Rule 21.”¹⁶⁴ A severance, the Tenth Circuit has noted, creates “two separate actions . . . ; a district court may transfer one action while retaining jurisdiction over the other.”¹⁶⁵ The district court’s transfer order, however, must “clearly indicate[] that the district court intended to create two separate actions.”¹⁶⁶ The Tenth Circuit has found severance and transfer under § 1631 to be discretionary and only to be used in limited circumstances.¹⁶⁷ The Tenth Circuit has noted that it is “aware of no authority even permitting, much less requiring, a district court to unilaterally split up an action and transfer the resultant components to diverse jurisdictions” under § 1631.¹⁶⁸ Severance and transfer should be undertaken only “in the interests of justice,”¹⁶⁹ and even then, the Tenth Circuit has recognized that such an action is within the court’s discretion.¹⁷⁰

164. *Id.*

165. *Id.* (citing *Wyndham Assocs. v. Bintliff*, 398 F.2d 614, 618 (2d Cir. 1968)).

166. *McGlamery*, 74 F.3d at 222 (citing, in contrast, *Chrysler Credit*, 928 F.2d at 1519, which discussed an order that could not be construed as a Rule 21 severance: “[N]owhere in the order does the court refer to Rule 21 or imply that two separate actions are being created”).

167. *See Shrader v. Biddinger*, 633 F.3d 1235, 1249–50 (10th Cir. 2011) (citing *Trujillo v. Williams*, 465 F.3d 1210, 1222–23 & n.15 (10th Cir. 2006)) (explaining that § 1631 should be considered to cure deficiencies related to personal jurisdiction, but that in the present case there was no single court where the action could be transferred with any “assurance that jurisdiction would have been proper”).

168. *See Shrader*, 633 F.3d at 1249–50 (exploring a requirement to sever a claim and transfer it to another forum).

169. 28 U.S.C. § 1631 (2012); *see also Trujillo v. Williams*, 465 F.3d 1210, 1222–23 (10th Cir. 2006) (noting that “[a]lthough both § 1406(a) and § 1631 contain the word ‘shall,’ [the court has] interpreted the phrase ‘if it is in the interest of justice’ to grant the district court discretion in making a decision to transfer an action or instead to dismiss the action without prejudice” (internal citations omitted)).

170. *See Shrader*, 633 F.3d at 1249 (“We are aware of no authority even permitting, much less requiring, a district court to unilaterally split up an action and transfer the resultant components to diverse jurisdictions under the auspices of § 1631.”)

The Third Circuit has interpreted § 1631 “to permit the transfer of all or only part of an action.”¹⁷¹ The Third Circuit has found that transfers completed under § 1631 are comparable to those completed under § 1404.¹⁷² Similar to the Tenth Circuit, the Third Circuit observed that “where a case could have been brought against some defendants in the transferee district, the claims against those defendants may be severed and transferred while the claims against the remaining defendants, for whom transfer would not be proper, are retained.”¹⁷³ The court has noted that such a transfer is not a partial transfer but the creation of what may be regarded as “two or more separate and independent actions.”¹⁷⁴ Prior to transfer, however, a district court should “weigh the factors favoring transfer against the potential inefficiency of requiring similar or overlapping issues to be litigated in two separate forums.”¹⁷⁵

The Federal Circuit has completed a full analysis of § 1631 and has found partial venue transfers to be appropriate.¹⁷⁶ While

171. *D’Jamoos v. Pilatus Aircraft Ltd*, 566 F.3d 94, 110 (3d Cir. 2009); see *Miller v. United States*, 753 F.2d 270 (3d Cir. 1985) (allowing partial transfer, but without an analysis of its decision to do so); *Patchen v. McGuire*, No. 11-5388, 2012 WL 4473233, *15–18 (E.D. Pa. Sept. 27, 2012) (recognizing that the court may transfer less than a full action should a claim or defendant be severable); *Liberi v. Taitz*, No. 09-1898, 2010 U.S. Dist. LEXIS 54695, at *7 n.4 (E.D. Pa. June 4, 2010) (relying on the *D’Jamoos* decision regarding § 1631).

172. See *D’Jamoos*, 566 F.3d at 110 (discussing the comparability of § 1631 and § 1404 and the similarity of the means by which transfer is accomplished).

173. *Id.* (citing *White v. ABCO Eng’g Corp.*, 199 F.3d 140, 144 (3d Cir. 1999)).

174. *Id.*

175. *Id.* at 111 (citing *White*, 199 F.3d at 144–45); see *Sunbelt Corp. v. Nobel, Denton & Assocs.*, 5 F.3d 28, 33–34 (3d Cir. 1993) (noting that a court “should not sever if the defendant over whom jurisdiction is retained is so involved in the controversy to be transferred that partial transfer would require the same issues to be litigated in two places” (quoting *Liaw Su Teng v. Saarup Shipping Corp.*, 743 F.2d 1140, 1148 (5th Cir. 1984))).

176. See *United States v. Cnty. of Cook, Ill.*, 170 F.3d 1084, 1088 (Fed. Cir. 1999) (holding that “§ 1631 allows for the transfer of less than all of the claims in a civil action to the Court of Federal Claims”); see, e.g., *Griffin v. United States*, 590 F.3d 1291, 1292 (Fed. Cir. 2009) (upholding transfer of a single claim within a larger action (citing *Cnty. of Cook*, 170 F.3d at 1089)); *James v. Caldera*, 159 F.3d 573, 582–83 (Fed. Cir. 1998) (noting that division of plaintiff’s claims may be acceptable but not discussing the issue fully); *Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1001 (Fed. Cir. 1987) (noting that “[c]ourts have exercised their §1631 transfer powers but not usually, or preferably, in the

the Federal Circuit differs from the other circuits because it is a court of limited subject matter jurisdiction, its analysis of this issue is thorough.¹⁷⁷ Additionally, as a court of limited jurisdiction, the Federal Circuit is often confronted with cases where it may lack subject matter jurisdiction over some of the claims in an action.¹⁷⁸ Looking specifically at the language of the statute, the Federal Circuit has determined that while there was support for the notion that § 1631 refers only to the transfer of “civil actions”¹⁷⁹ the language was not dispositive of Congress’s intention regarding severance and transfer of an action under § 1631.¹⁸⁰ The Federal Circuit found that the language of § 1631 should be interpreted in light of an additional statute, 28 U.S.C. § 1292,¹⁸¹ which grants the Federal Circuit exclusive jurisdiction over an appeal “granting or denying, in whole or in part, a motion to transfer an action” to the Court of Federal Claims under § 1631.¹⁸² The court “read § 1292(d)(4)(A) as reflective of Congress’s intention in § 1631 to permit the transfer of less than all the claims in an action.”¹⁸³ Such a reading provides a remedy for a litigant who mistakenly files his or her case in a court that lacks jurisdiction.¹⁸⁴ Additionally, such a reading appears to be

form of bifurcation of claims,” but declining to transfer any claims in the case); *Carter v. United States*, 62 Fed. Cl. 365, 370 (Fed. Cl. 2004) (“The Federal Circuit has held that this statute permits the transfer of less than all the claims in an action.” (citing *Cnty. of Cook*, 70 F.3d at 1089)).

177. See 28 U.S.C. § 1295 (2012) (detailing the jurisdiction of the Federal Circuit); Brian H. Redmond, Annotation, *Jurisdiction of the United States Court of Appeal for Federal Circuit Under 28 U.S.C. § 1292 and 1295*, 97 A.L.R. Fed. 694, 694 (2014) (discussing the scope the Federal Circuit’s jurisdiction).

178. See *supra* note 176 (listing cases where the Federal Circuit had jurisdiction over only part of the claims).

179. See *Cnty. of Cook*, 170 F.3d at 1088 (relying upon the use of the term “civil action” in Rules 2, 3, and 8 of the Federal Rules of Civil Procedure).

180. See *id.* (referring to 28 U.S.C. § 1292(d)(4)(A) (2012) for insight on the term “civil action”).

181. 28 U.S.C. § 1292(d)(4)(A) (2012).

182. *Id.*

183. *Cnty. of Cook*, 170 F.3d at 1089.

184. See *id.* (noting that litigants may have trouble filing claims in a proper court due to the “complexity of the Federal court system and of special jurisdictional provisions,” particularly with regard to the Court of Federal Claims which may have jurisdiction over some claims but not others (internal citations omitted)).

logical. The court has noted that it was unreasonable to allow a district court to transfer an action “containing a single claim over which it lacked jurisdiction” under § 1631, but not permit the court to transfer the same claim if the litigant appended an additional claim to the action over which the court did have jurisdiction.¹⁸⁵ Thus, the Federal Circuit has allowed less than a full action to be transferred under § 1631.¹⁸⁶ Such a transfer may raise other issues of jurisdiction in the Court of Federal Claims,¹⁸⁷ but the Federal Circuit has found that it is both proper and logical under the language of the statute.

The other circuits, while relying upon § 1631 in different capacities, have not weighed in on the circuit split so definitively. The Ninth Circuit, while not directly addressing the issue, has accepted that a portion of a case may be transferred.¹⁸⁸

185. *Id.*

186. *See supra* note 176 and accompanying text (discussing the Federal Circuit’s allowance of partial transfers under § 1631).

187. *See* 28 U.S.C. § 1500 (2012) (stating that the Court of Federal Claims “shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States”). A lack of jurisdiction under § 1500 may arise if only some of the claims in an action are transferred to the Court of Federal Claims under § 1631 and the transferred claim and the retained claim “arise from the same operative facts [and] . . . seek the same relief.” *United States v. Cnty. of Cook, Ill.*, 170 F.3d 1084, 1091 (Fed. Cir. 1999) (quoting *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1551 (Fed. Cir. 1994)); *see also d’Abrera v. United States*, 78 Fed. Cl. 51, 57 (Fed. Cl. 2007) (“Section 1500 is not implicated . . . : (1) when all of the claims in an action are transferred to the Court of Federal Claims . . . and (2) when claims based on differing operative facts or seeking differing remedies are filed in district court and a transfer is made to this court . . .” (citing *Cnty. of Cook*, 170 F.3d at 1091 n.8)).

188. *See Baeta v. Sonchik*, 273 F.3d 1261, 1264 (9th Cir. 2001) (“Under the circumstances presented, transfer of the portion of the habeas petition raising nationality allegations to this Court is appropriate.”). Magistrate Judge Hollows of the Eastern District of California has also allowed severance and transfer under § 1631 of four related claims, adopting reasoning similar to that of the Third and Tenth Circuits. *See Johnson v. Mitchell*, No. CIV S-10-1968, 2012 WL 2446098, at *5–7 (E.D. Cal. June 26, 2012) (recommending severance of claims against a single defendant and transfer to Minnesota); *Johnson v. Mitchell*, No. CIV S-10-1968, 2012 WL 1657643, at *8–9 (E.D. Cal. May 10, 2012) (recommending severance of claims against a single defendant and transfer to Colorado); *Johnson v. Mitchell*, No. CIV S-10-1968, 2012 WL 1594203, at *4–7 (E.D. Cal. May 4, 2012) (recommending severance of claims against a single defendant and transfer to Vermont); *Johnson v. Mitchell*, No. CIV S-10-1968, 2012 WL 691765, at *15–17 (E.D. Cal. Mar. 2, 2012) (recommending severance of claims against a single defendant and transfer to Colorado).

Alternatively, the First Circuit has not excluded the possibility that § 1631 may allow transfer of less than an entire action, but it has declined to interpret the provision.¹⁸⁹ The Fourth Circuit has not weighed in on the circuit split.¹⁹⁰

B. Division Regarding Interpretation of the Term “Action”

The key distinction between the divided circuits noted above is the interpretation of the term “action” as it is used in § 1631. The D.C. Circuit has found that the term should be strictly interpreted and that “action” means something akin to the case as it was originally filed or a case as it would appear when ready to proceed to summary judgment or trial.¹⁹¹ A transferred action will usually include all viable claims and any “tag along” claims that were dismissed but might be subject to review when a final order is entered.¹⁹² Additionally, while the D.C. Circuit is not entirely clear on its understanding of the term “action,” it is helpful to see how the court has interpreted the term in other contexts. For example, the D.C. Circuit has also strictly interpreted the term “civil action” in § 717 of the Equal

189. See *Cimon v. Gaffney*, 401 F.3d 1, 7 n.20 (1st Cir. 2005) (refusing to affirm or review defendant’s argument that § 1631 “directs a court to transfer an ‘action’ over which it lacks jurisdiction, rather than an individual claim” (quoting *Hill v. U.S. Air Force*, 795 F.2d 1067, 1070 (D.C. Cir. 1986))).

190. See *Mohamed v. Holder*, No. 1:11-cv-50, 2011 WL 3820711, at *10 (E.D. Va. Aug. 26, 2011) (noting that “[a]lthough the Fourth Circuit has not addressed the application of § 46110 with respect to transfer under § 1631, other federal circuits have concluded . . . that § 1631 permits the severance and transfer of less than an entire action” (internal references omitted)).

191. See *Hill v. U.S. Air Force*, 795 F.2d 1067, 1070 (D.C. Cir. 1986) (“Because Section 1631 directs a court to transfer an ‘action’ over which it lacks jurisdiction, rather than an individual claim, we find that the District Court did not abuse its discretion in failing . . . to transfer Hill’s claims”); *supra* notes 156–61 and accompanying text (discussing the D.C. Circuit’s view of the circuit split).

192. See *Hill v. Henderson*, 195 F.3d 671, 674 (D.C. Cir. 1999) (“The review of any order of the district court in a transferred cause, made before transfer, is within the jurisdiction of the court of appeals of the circuit to which the cause has been transferred.” (quoting *Magnetic Eng’g & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 870 (2d Cir. 1950))); *Murthy v. Vilsac*, 609 F.3d 460, 463–64 (D.C. Cir. 2010) (noting an exception to the *Hill* rule when the court of appeals of the circuit to which the cause has been transferred is unable to hear an appeal of the dismissed claim).

Employment Opportunity Act¹⁹³ and has found that Congress could have used a different term if it meant something other than “civil action.”¹⁹⁴

Alternatively, the Tenth Circuit and the Third Circuit have looked to previous transfers under § 1404 to support their allowance of partial transfers.¹⁹⁵ Relying on a decision that dealt with transfer under § 1404, the Tenth Circuit has found that transfer was appropriate if severance under Rule 21 was completed or the district court intended to sever the offending claims from the action.¹⁹⁶ For transfer effectuated under § 1404, the Tenth Circuit has found that an “action” may change depending upon the dismissal or severance of certain parts.¹⁹⁷ The original action is maintained even if certain claims are severed and transferred elsewhere.¹⁹⁸ The Third Circuit has found that transfer under § 1404 is similar to transfer under § 1631 and “where a case could have been brought against some defendants in the transferee district, the claims against those defendants may be severed and transferred while the claims against the remaining defendants, for whom transfer would not be proper, are retained.”¹⁹⁹

The Federal Circuit has examined the language and congressional intent of § 1631 and has determined that it “allows

193. 42 U.S.C. § 2000e-16 (2012) (prohibiting discriminatory practices in employment by the federal government).

194. See *Hackley v. Roudebush*, 520 F.2d 108, 120 n.46 (D.C. Cir. 1975) (noting that the term “civil action” is the “same term which characterizes unrestricted suits” and Congress could easily have used a different term “had a different type of proceedings been intended”).

195. See *supra* notes 162–75 and accompanying text (discussing the Tenth and Third Circuits’ views).

196. See *FDIC v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996) (upholding transfer of less than a full action because the district court severed the claims under Federal Rule of Civil Procedure 21 (internal citations omitted)).

197. See *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1519–20 (10th Cir. 1991) (explaining that the form of an “action” may change over time (internal citations omitted)).

198. See *id.* (noting that § 1404(a) “authorizes the transfer only of an entire action and not of individual claims,” but an action does not necessarily mean the action at the time it was filed (citing *Wyndham Assocs. v. Bintliff*, 398 F.2d 614, 618 (2d Cir. 1968))).

199. *D’Jamoos v. Pilatus Aircraft Ltd*, 566 F.3d 94, 110 (3d Cir. 2009) (citing *White v. ABCO Eng’g Corp.*, 199 F.3d 140, 144 (3d Cir. 1999)).

for the transfer of less than all of the claims in a civil action to the Court of Federal Claims.”²⁰⁰ The Federal Circuit has denied giving the term “civil action” determinative weight, instead looking to congressional intent and the statute’s legislative history to determine the true meaning of the term.²⁰¹ Prior to the enactment of § 1631, a litigant’s only resource for preserving an action when unsure of jurisdiction “[was] the wasteful and costly one of filing in two or more courts at the same time.”²⁰² The purpose of § 1631 was to “remedy the situation where a litigant has mistakenly filed an action in a court that lacks jurisdiction” and prevent the costly—and perhaps unjust—dismissal of claims.

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IV. Recommendation to Resolve the Circuit Split

As demonstrated by *Johnson v. Mitchell* and the cases discussed above, the result of the current circuit split is confusion, inefficiency, and inconsistent transfer use depending upon which transfer mechanism is relied upon.²⁰⁴ Partial transfer issues have arisen when cases are filed by pro se plaintiffs who lack legal sophistication²⁰⁵ or even experienced attorneys who are caught in the circuit split.²⁰⁶ If a court lacks jurisdiction over a legitimate claim, and the court dismisses it, the plaintiff may be

200. *United States v. Cnty. of Cook, Ill.*, 170 F.3d 1084, 1088–89 (Fed. Cir. 1999).

201. *See id.* at 1089 (noting that Congress’s intent is more clearly spelled out in 28 U.S.C. § 1292 (2012)).

202. *Id.* at 1089 n.5 (citing S. REP. NO. 97-275, at 11 (1981), *reprinted* in 1982 U.S.C.C.A.N. 11, 21).

203. *Id.* (citing S. REP. NO. 97-275, at 30 (1981), *reprinted* in 1982 U.S.C.C.A.N. 11, 40).

204. *See supra* Part III.A–B (discussing the circuit split and interaction between the transfer statutes).

205. *See Johnson v. Mitchell*, No. CIV S-10-1968, 2012 WL 1657643, at *1 (E.D. Cal. May 10, 2012) (discussing a case filed by a pro se plaintiff who sued defendants across the U.S.).

206. *See Butler, supra* note 45, at 804–27 (discussing the problems and unexpected pitfalls that attorneys encounter in addressing venue transfer); Tayon, *supra* note 117, at 198–99 (noting that the ambiguities of venue transfer prior to enactment of § 1631 were akin to “jurisdictional badminton” (quoting *Inv. Co. Inst. v. Bd. of Governors of the Fed. Reserve Sys.*, 551 F.3d 1270, 1283–84 n.2 (D.C. Cir. 1977) (Levanthal, J., concurring))).

forced to undergo the additional expense of refileing its claim or deprived of a remedy that could have been achieved in another venue had it been brought in time.²⁰⁷ A resolution is necessary to prevent these issues from continuing and to help maintain the efficiency of the judiciary.

A. Amend Title 28 to Reflect Allowance of Partial Transfers

The most effective way to resolve the circuit split and overcome the current inconsistency regarding venue transfer is to amend the term “civil action” in §§ 1404, 1406, and 1631 to include the transfer of “civil claims.” Alternatively, to prevent the excessive transfer of single claims or the “piecemeal” adjudication of related claims,²⁰⁸ the phrase “or any civil claim upon determination of severance” should be added to modify the term “civil action.”

With the proposed amendment, § 1404(a) would read: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action, *or civil claim upon determination of severance*, to any other district or division where it might have been brought or to any district or division to which all parties have consented.”²⁰⁹ Similarly, the proposed amendment to § 1406 would read:

The district court of a district in which is filed a case *or claim* laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case *or claim upon determination of severance* to any district or division in which it could have been brought.²¹⁰

207. See *Baeta v. Sonchik*, 273 F.3d 1261, 1264 (9th Cir. 2001) (discussing an alien plaintiff whose habeas corpus petition was denied as late because a district court refused to accept the filing and the plaintiff was forced to refile in the appropriate court); *Johnson*, 2012 WL 1657643, at *9 (discussing the possibility that plaintiff would be required to refile his claim or lose the case due to the expiration of a statute of limitations if transfer was not allowed).

208. See *Hill v. Henderson*, 195 F.3d 671, 672 (D.C. Cir. 1999) (expressing the D.C. Circuit’s strong stance against piecemeal adjudication).

209. 28 U.S.C. § 1404(a) (2012) (proposed amendment in italics).

210. *Id.* § 1406(a) (proposed amendment in italics).

Due to the current circuit split discussed above, § 1631 is the most important statutory provision to amend. The proposed amendment to § 1631 would read:

Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action, *claim upon determination of severance*, or appeal to any other such court in which the action, *claim*, or appeal could have been brought at the time it was filed or noticed, and the action, *claim*, or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.²¹¹

While the current circuit split does not include § 1404 and § 1406, it would be advantageous to implement an amendment consistently across the three primary venue transfer statutes. A consistent amendment would signal to the courts that the terms are designed to be applied uniformly, despite the different circumstances of transfer. Additionally, the terms “civil action” and “case” as used in §§ 1404 and 1406 have already been found to allow severance and transfer of less than the full civil action.²¹² An amendment to these two sections would simply bring the text of the rules in alignment with their understood meaning and application. Amending these sections of Title 28 to include the term “civil claim” or “or any civil claim upon determination of severance” would help to resolve the circuit split and provide clarity and instruction in a complicated area of the law.

B. Amendment Comports with Congressional Intent and the Historical Development of Venue Transfer Mechanisms

The amendment proposed above, or a similar one, should be adopted because such a change aligns with the purpose and intent underlying the creation of the various venue transfer mechanisms. The various venue transfer statutes were created

211. *Id.* § 1631 (proposed amendment in italics).

212. *See supra* notes 79–82 and accompanying text (discussing partial transfers effectuated under § 1404); *supra* notes 103–06 and accompanying text (discussing partial transfers effectuated under § 1406).

primarily to serve the interests of justice²¹³ and to assist in the “expeditious and orderly adjudication of cases and controversies on their merits.”²¹⁴ First, the forum non conveniens doctrine had harsh consequences, and Congress sought to remedy those effects by providing a means to transfer cases between forums in the federal system.²¹⁵ Statutory venue provisions were adopted to prevent the cost, delay, and injustice that accompanied a forum non conveniens dismissal and to allow more cases to be decided on their merits rather than suffering from a convenience or procedural dismissal.²¹⁶ Section 1406 in particular was designed to “avoid . . . the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions would turn.”²¹⁷

Second, Congress has repeatedly taken initiative to resolve federal procedure conflicts and to promote clear and just venue rules. Sections 1404 and 1406 were adopted as a response to the problems presented by the forum non conveniens doctrine.²¹⁸ Similarly, § 1631 was created as a remedy for cases subject to dismissal and refiling because a court lacked subject matter jurisdiction.²¹⁹ Section 1631 became necessary after the *Goldlawr, Inc. v. Heiman*²²⁰ decision highlighted a court’s inability to use the statutory venue transfer mechanisms when it lacked subject

213. See *supra* note 66 and accompanying text (discussing the importance of justice and the “interests of justice” in the venue transfer process).

214. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962).

215. See *supra* notes 53–54 and accompanying text (discussing the purpose and intent for adoption of § 1404).

216. See *supra* notes 63–71 and accompanying text (discussing the legislative purpose for enacting § 1404); *supra* notes 94–96 and accompanying text (discussing the legislative intent for enacting § 1406).

217. *Goldlawr*, 369 U.S. at 466.

218. See *supra* notes 46–51 and accompanying text (discussing some of the problems with the forum non conveniens doctrine); *supra* notes 54–56 and accompanying text (discussing how adoption of § 1404 corrected some of the problems of the forum non conveniens doctrine); *supra* notes 94–96 and accompanying text (discussing how adoption of § 1406 corrected some of the problems with the forum non conveniens doctrine).

219. See *supra* note 110 and accompanying text (explaining that § 1631 was adopted to cure transfer problems when a district court lacked subject matter jurisdiction).

220. 369 U.S. 463 (1962).

matter jurisdiction.²²¹ Congress rose to the occasion and § 1631 was “broadly drafted to allow transfer between any two federal courts”²²² when “there is a want of jurisdiction” in the original forum.²²³ Additionally, § 1407 is an example of Congress responding to the growing needs of complex multidistrict litigation.²²⁴ The rapid increase in large tort, antitrust, and patent cases in the 1950s and 1960s prompted Congress to adopt § 1407 to “provide judicial machinery to transfer, for coordinated or consolidated pretrial proceedings, civil actions, having one or more common questions of fact, pending in different judicial districts.”²²⁵

The current circuit split has created a situation very similar to the one in existence when §§ 1404 and 1406 were adopted, particularly for the D.C. Circuit. There currently is not a clear and consistent way to transfer a claim from one jurisdiction to another when a court lacks jurisdiction over one or more claims within an action.²²⁶ Thus, the ability to sever and transfer a claim for a want of jurisdiction depends upon where the plaintiff decides to file her action.²²⁷ If the plaintiff files within the D.C. Circuit and the court lacks jurisdiction over a claim, the court must dismiss the claim (with or without prejudice) and the plaintiff may suffer harsh consequences similar to those experienced under the forum non conveniens doctrine.²²⁸ It is

221. See *id.* at 466 (noting that § 1406 was broad enough to “authorize the transfer of cases . . . whether the court in which it was filed had personal jurisdiction over the defendants or not,” but failing to extend its reasoning to cases when the court lacks subject matter jurisdiction); 14D WRIGHT ET AL., *supra* note 66, § 3827 (noting that a court was not permitted to transfer an action under §§ 1404 or 1406 unless it had subject matter jurisdiction).

222. S. REP. NO. 97-275, at 30 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 40.

223. 28 U.S.C. § 1631 (2012).

224. See *supra* notes 125–29 and accompanying text (discussing the historical development of § 1407).

225. H.R. REP. NO. 90-1130, at *1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1898.

226. See *supra* notes 79–82 (discussing partial transfer under § 1404); *supra* notes 103–06 (discussing partial transfer under § 1406); *supra* Part III.A (discussing the circuit split regarding partial transfers under § 1631).

227. See *supra* Part III.A (describing the availability of partial transfers under § 1631 and noting that partial transfer is available in some circuits but not others).

228. See *supra* note 37–38 and accompanying text (discussing how the forum

precisely this kind of scenario where Congress has intervened in the past and provided guidance for the proper means of transfer.²²⁹

Third, the proposed amendment reflects the flexibility and “balancing-of-interests”²³⁰ concerns inherent to the development of venue transfer mechanisms and severance. Currently, due to the language of §§ 1404, 1406, and 1631 and the rigidity of their interpretation, a district court is denied the flexibility to resolve a lack of jurisdiction in a way that promotes justice for all parties.²³¹ In contrast, the forum non conveniens doctrine is a flexible doctrine that developed in equity to promote fairness and convenience.²³² The doctrine decried rigid rules that limited judicial discretion, even while recognizing that a plaintiff’s choice of forum should be respected in a number of cases.²³³ Under the forum non conveniens doctrine, “each case turns on its facts.”²³⁴ Additionally, the forum non conveniens doctrine anticipates the availability of differing treatment for multiple claims within an action.²³⁵ “Depending upon the facts of the particular case, a district court may dismiss part of a lawsuit while deciding the merits of other issues.”²³⁶

non conveniens doctrine works); *supra* note 207 and accompanying text (listing examples of problems associated with dismissing a claim for refiling).

229. *See supra* notes 218–23 and accompanying text (discussing Congress’s previous activity to remedy confusion and conflict in venue transfer rules).

230. *Atl. Marine Constr. Co v. U.S. Dist. Court*, 134 S. Ct. 568, 580 (2013) (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37 (1988) (Scalia, J., dissenting)).

231. *See supra* notes 226–29 and accompanying text (discussing the current lack of flexibility in transfers effectuated under § 1631).

232. *See supra* notes 39–44 (discussing the role of flexibility and balancing in the forum non conveniens doctrine).

233. *See supra* notes 40–44 and accompanying text (describing the historical concerns of balancing a plaintiff’s interest in choosing a forum with the defendant’s convenience and ability to present its case).

234. *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 249 (1981) (quoting *Williams v. Green Bay & W. R.R.*, 326 U.S. 549, 557 (1946)).

235. *See supra* notes 58–62 (discussing the possibility of dismissing part of an action while deciding the merits of the other claims under the forum non conveniens doctrine).

236. *Scottish Air Int’l, Inc. v. British Caledonian Grp., PLC*, 81 F.3d 1224, 1234 (2d Cir. 1996).

Flexibility has also been supported through the use and interpretation of Federal Rule of Civil Procedure 21.²³⁷ Severance of a claim is preferred to dismissal of a claim²³⁸ and severance has been employed in a number of different scenarios to allow a claim to proceed on its merits.²³⁹ Rule 21 and other joinder rules “evidence the general purpose of the new Rules to eliminate the old restrictive and inflexible rules of joinder designed when formalism was the vogue”²⁴⁰ and to allow a claim to proceed to adjudication on its merits.²⁴¹

Finally, the proposed amendment will clarify and affect venue transfer rules to reflect the majority of venue transfer practices. A number of courts have already allowed individual claims to be severed under Rule 21 and transferred to a proper or more convenient venue under §§ 1404 and 1406.²⁴² With regards to § 1631, the Tenth, Third, and Federal Circuits have also allowed claims to be severed and transferred to a forum with jurisdiction.²⁴³ In addition to codifying the availability and mechanism for partial transfer, the proposed amendment would unify the practice of seeking transfer when a court lacks venue or jurisdiction over less than the full action.²⁴⁴ A single, unified means of addressing venue transfer assists litigants because it helps them know the law prior to filing and helps both litigants to correct mistakes without suffering the harsh consequences of dismissal.

237. FED. R. CIV. P. 21.

238. See *supra* note 146 and accompanying text (noting that Rule 21 is a preferred remedy).

239. See *supra* notes 143–52 and accompanying text (discussing the variety of reasons why courts have severed claims and parties under Rule 21).

240. Soc’y of European State Authors & Composers v. WCAU Broad. Co., 1 F.R.D. 264, 266 (E.D. Pa. 1940).

241. See 7 WRIGHT ET AL., *supra* note 66, § 1681 (explaining the history and purpose of Rule 21).

242. See *supra* notes 79–82 and accompanying text (discussing the availability of partial transfer under § 1404); *supra* notes 103–06 and accompanying text (discussing the availability of partial transfer under § 1406).

243. See *supra* notes 162–87 and accompanying text (discussing the Tenth, Third, and Federal Circuits’ reasoning for allowing partial transfers under § 1631).

244. See *supra* Part IV.A (proposing an amendment to add identical clarifying language to §§ 1404, 1406, and 1631).

C. Current Transfer Mechanisms Cannot Solve the Problem

The proposed amendment is necessary because existing common law and statutory transfer mechanisms are unable to resolve the circuit split. The current split is the result of disagreement in statutory interpretation, and a statutory change is a clear and preferable way to resolve the conflict.

The forum non conveniens doctrine would not satisfy the circuit split because it has largely been preempted by the creation of §§ 1404, 1406, and 1631 and is now only applied when a case cannot be transferred to a more appropriate federal court.²⁴⁵ The doctrine, however, may be an advantageous tool when a court is presented with an action that includes both a claim better suited to a foreign jurisdiction and a claim proper for the district court to decide.²⁴⁶ The ability to dismiss part of an action under the forum non conveniens doctrine while retaining the rest of the claims is possible in these rare circumstances.²⁴⁷ The forum non conveniens doctrine may assist the courts in determining what to do when presented with an action where they lack jurisdiction over some claims and not others, but it is only applicable to a small segment of the disagreement noted above.

It may also be possible to rely on other federal statutory provisions to resolve the circuit split. Reliance on §§ 1404 and 1406 to remedy the circuit split, however, is inadvisable because both statutes were enacted to remedy problems with venue, not jurisdiction and certainly not a lack of subject matter jurisdiction.²⁴⁸ First, § 1404 was designed to transfer a case from one proper venue to another, albeit more convenient, proper

245. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981) (noting that § 1404(a) was enacted to permit a change of venue between federal courts and was intended to be a revision of the doctrine and not simply a “codification of the common law”); *supra* notes 52–57 (discussing the current use of the forum non conveniens doctrine).

246. See *Scottish Air Int’l v. British Caledonian Grp., PLC*, 81 F.3d 1224, 1234–35 (2d Cir. 1995) (dismissing part of an action on forum non conveniens grounds and retaining a claim because it “could only be decided in the Southern District of New York”).

247. See *supra* notes 58–62 (discussing the availability of partial transfers under the forum non conveniens doctrine).

248. See *supra* Parts II.B.1–2 (discussing the application of §§ 1404 and 1406).

venue.²⁴⁹ While consideration of personal jurisdiction is inherent to the decision to transfer a case under § 1404,²⁵⁰ it is a secondary inquiry and not the purpose of the statute.²⁵¹ There may be instances where venue is proper, but jurisdiction is lacking.²⁵² Any attempt to use § 1404 to correct a lack of jurisdiction distorts the statute because it ignores the essential purpose of the statute: to provide courts with a means by which they may transfer a case from one proper venue to another for the sake of convenience of the defendant.²⁵³

Additionally, misuse of a § 1404 transfer may result in misapplication of choice-of-law rules. Transfer under § 1404 requires application of the original court's choice-of-law rules, while transfer under § 1631 requires application of the transferee court's choice-of-law rules.²⁵⁴ An improper transfer standard may result in the application of the wrong substantive law and may lead to an inaccurate or unjust holding.²⁵⁵

Likewise, transfer under § 1406 to correct subject matter jurisdiction distorts the purpose of the statute.²⁵⁶ Section 1406 has been found to encompass transfers effectuated for lack of venue and lack of personal jurisdiction.²⁵⁷ This section, however,

249. See *supra* notes 96–99 and accompanying text (discussing the purpose of §§ 1404 and 1406 and how the two statutes differ).

250. See 28 U.S.C. § 1391(d) (2012) (noting that residency of a corporation for purposes of determining a proper venue is dependent upon whether that corporation is subject to personal jurisdiction in a given judicial district).

251. See *supra* notes 96–99 and accompanying text (discussing the purpose of §§ 1404 and 1406 and how the two statutes differ).

252. See 28 U.S.C. § 1391(b) (noting that a civil action may be brought in a judicial district where all defendants reside, where a substantial part of the events or omissions giving rise to the claim occurred, or where any defendant is subject to personal jurisdiction if the other two provisions do not apply).

253. See *supra* note 99 and accompanying text (discussing the key differences between §§ 1404 and 1406).

254. See *supra* notes 74–78 and accompanying text (discussing the choice-of-law rules that apply to transfer under § 1404); *supra* notes 121–23 and accompanying text (discussing the choice-of-law rules apply to transfer under § 1406).

255. See *supra* notes 74–78 and accompanying text (discussing the importance of applying the correct choice-of-law rules in venue transfer to avoid forum shopping).

256. See *supra* notes 96–99 and accompanying text (discussing the purpose of §§ 1404 and 1406 and how the two statutes differ).

257. See *supra* note 88 and accompanying text (discussing the *Goldlaur*

is not an option for transfer in all circumstances where a court lacks personal jurisdiction or where a court lacks subject matter jurisdiction.²⁵⁸ Thus, while use of § 1406 may assist the courts in transferring cases that lack venue and personal jurisdiction, it is only applicable to a part of the disagreement noted above. Section 1406 might provide a better remedy to the circuit split than § 1404 because the accompanying choice-of-law rules protect against forum shopping²⁵⁹ and mirror those that accompany transfers effectuated under § 1631.²⁶⁰ While closer to the mark, § 1406 still does not address the entire disagreement noted above.

Finally, while partial venue transfers after severance are possible under §§ 1404 and 1406, and under § 1631 in some circuits, they are not common.²⁶¹ The availability of claim severance and transfer of that claim to an appropriate venue is largely a creation of modern statutory interpretation and common law.²⁶² These options for venue transfer are not reliable and their inconsistent use creates confusion and may provide opportunities for abuse.²⁶³ Congressional action appears to be the most helpful means of resolving the circuit split. The current situation is similar to instances where Congress has acted in the past,²⁶⁴ and

decision which expanded the concept of “improper venue” to cases where venue and personal jurisdiction were lacking).

258. See *supra* notes 110–13 and accompanying text (explaining that, prior to the adoption of § 1631, courts were unable to transfer cases when they lacked subject matter jurisdiction over the action).

259. See *supra* notes 100–02 and accompanying text (explaining the choice-of-law rules that accompany transfers effectuated under § 1406).

260. See *supra* notes 121–22 and accompanying text (discussing the choice-of-law rules that apply when transfer is completed under § 1631).

261. See *supra* notes 79–82 and accompanying text (exploring the availability of partial transfers under § 1404); *supra* notes 103–06 and accompanying text (discussing the availability of partial transfers under § 1406); *supra* Part III.A (explaining the availability of partial transfers under § 1631 and the current circuit split).

262. See *supra* notes 79–82 and accompanying text (discussing the availability of partial transfers under § 1404); *supra* notes 103–06 and accompanying text (discussing the availability of partial transfers under § 1406); *supra* Part III.A (discussing the availability of partial transfers under § 1631 and the current circuit split).

263. See Butler, *supra* note 45, at 804–27 (discussing the problems and unexpected pitfalls that attorneys encounter in addressing inconsistent venue transfer rules).

264. See *supra* notes 218–29 and accompanying text (discussing instances

Congressional action would be particularly helpful because the circuit split is primarily due to differing interpretations of Congress's use of the term "civil action."²⁶⁵

V. Conclusion

The problem noted by the court in *Johnson v. Mitchell*²⁶⁶ does not show signs of being resolved quickly. The D.C. Circuit has determined that a court may not transfer less than an entire legal action,²⁶⁷ but the Tenth Circuit,²⁶⁸ Third Circuit,²⁶⁹ and the Federal Circuit²⁷⁰ have found that a district court may transfer less than an entire legal action when the court lacks jurisdiction over certain claims and the associated defendants.²⁷¹ As discussed above, the inconsistency and current lack of clarity regarding venue rules can cause a number of problems, the least of which are increased costs, delays, and dismissal of a meritorious claim without the ability to refile in another forum.

The best means of resolving the circuit split is to amend Title 28 by changing the limited terms "civil action" and "case" in

where Congress has acted to remedy problems with venue transfers).

265. See *supra* Part III.B (discussing disagreement between the circuits over the terms "civil action" or "case").

266. *Johnson v. Mitchell*, No. CIV S-10-1968, 2012 WL 1657643 (E.D. Cal. May 10, 2012).

267. See *Hill v. U.S. Air Force*, 795 F.2d 1067, 1070 (D.C. Cir. 1986) ("Because Section 1631 directs a court to transfer an 'action' over which it lacks jurisdiction, rather than an individual claim, we find that the District Court did not abuse its discretion in failing . . . to transfer Hill's claims . . ."); *supra* notes 156–61 and accompanying text (discussing the D.C. Circuit's views).

268. See *FDIC v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996) (affirming a district court's order that transferred some, but not all, of plaintiff's claims because the court effectively severed the problematic claims under Federal Rule of Civil Procedure 21 prior to transfer); *supra* notes 162–68 and accompanying text (discussing the Tenth Circuit's views on the circuit split).

269. See *D'Jamoos v. Pilatus Aircraft Ltd*, 566 F.3d 94, 110 (3d Cir. 2009) (permitting "transfer of all or only part of an action"); *supra* notes 171–75 and accompanying text (discussing the Third Circuit's view of the circuit split).

270. See *United States v. Cnty. of Cook, Ill.*, 170 F.3d 1084, 1088 (Fed. Cir. 1999) (holding that "§ 1631 allows for the transfer of less than all of the claims in a civil action to the Court of Federal Claims"); *supra* notes 176–87 and accompanying text (discussing the Federal Circuit's rationale for allowing severance and transfer of a partial action).

271. See *supra* Part III.A (discussing the circuit split in detail).

§§ 1631, 1404, and 1406 to include transfer of “claims.” This amendment would create consistency by allowing all district courts to transfer claims that are filed in an inconvenient or flawed forum. Such a change would serve the interests of justice, and it aligns with the purpose and intent of the existing venue transfer mechanisms. Additionally, an amendment is necessary because the existing common law and statutory transfer mechanisms cannot resolve the circuit split. While venue transfer rules have proven to be flexible and responsive to a variety of societal changes, the current split is a result of differing interpretations of statutory venue rules. A statutory change to clarify the scope and mechanism for venue transfer is the best means to resolve a difference of statutory interpretation. The historical values of fairness, justice, and flexibility noted above are best served by amending the current transfer statutes to reflect permissive transfer of claims within an action and detailing a clear process for severance and transfer.