

NOTE

“LITIGATION IS NOT PING-PONG,” EXCEPT WHEN IT IS: RESOLVING THE WESTFALL ACT’S CIRCULARITY PROBLEM

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INTRODUCTION

Our judicial system generally encompasses the belief that for every meritorious claim, a court exists with jurisdiction to hear it. Likewise, it is axiomatic that if multiple courts have jurisdiction to hear that claim, there is a way to decide which court has the power to make a final, binding judgment on that claim.¹ This is so because we assume that a plaintiff will eventually receive a final disposition either granting or denying relief after a full and fair litigation of the issues. It seems antithetical to the justice system that an action could travel endlessly between state and federal court without any resolution. That situation, however, is not only a theoretical possibility but becomes reality when Congress enacts statutes without the rules of jurisdiction, remand, and reviewability in mind.

Imagine, for example, that Congress passes a statute entitling a defendant who commits a tort while wearing a blue shirt to have the United States defend the claim on his behalf. Under such a statute, a defendant who claims that he was wearing blue is entitled to either ask the United States to certify that his shirt was blue or have a court so decide. If the defendant's shirt was in fact blue, making the United States the proper defendant, the case must proceed in federal court.² On the other hand, if the shirt was not blue—meaning the individual defendant is a proper party—there is no federal jurisdiction, and the case must proceed in state court. If the statute grants neither the state nor federal court the *exclusive* right to determine the underlying jurisdictional fact—whether the shirt was blue—two courts could properly exercise jurisdiction, yet neither has the right to enter a final and binding decision.

A simple example demonstrates how the circularity problem arises. Paul, the plaintiff, is injured by David, the defendant, and sues David in state court. David argues that he was wearing a blue shirt and asks the United States to defend the suit. The United States declines, asserting that David was wearing purple. David asks the court to hold that his shirt was blue, thus introducing the United States as a defendant. Which court, state or federal, should answer this question? The

¹ Hence, Judge Richard Posner's recent statement that "[i]f at all possible, . . . a case should stay in the system that first acquired jurisdiction. It should not be shunted between court systems; litigation is not ping-pong." *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 807 (7th Cir. 2010) (analyzing the appropriate method of handling jurisdiction over claims removed under the Class Action Fairness Act where the class is ultimately not certified). In *Cunningham*, the Seventh Circuit acknowledged that its opinion does not extend to cases in which "after the case is filed it is discovered that there was no jurisdiction at the outset." *See id.* The ramifications of such a scenario, in the context of the Westfall Act, are addressed herein.

² *See* U.S. CONST. art. III, § 2 (establishing federal jurisdiction if the United States is a party).

United States can remove the case to federal court for that court to decide whether it has jurisdiction (i.e., whether David's shirt was blue).³ If the federal court decides that the shirt was purple, then the court has no jurisdiction over the underlying tort and must remand the case to state court.⁴ The federal court's decision, however, is merely jurisdictional. When David becomes the defendant in state court for the second time, he can again ask the state court to answer the jurisdiction question. At that point, the United States becomes the defendant *again* and removes *again*. Herein lies the circularity problem: the case can travel between federal and state court indefinitely. Appeal provides no solution because the federal court's remand for lack of subject matter jurisdiction is unreviewable.⁵ By drafting a statute without regard to jurisdiction, remand, and reviewability, Congress has created the circularity problem.

Differences between blue and purple shirts aside, however, this problem arises in actual cases⁶ brought under statutes like the Westfall Act.⁷ This Note will first explain the origins of the circularity problem. It will then analyze the four scenarios that the Westfall Act creates as well as four possible outcomes to those scenarios. Ultimately, it will present two workable but imperfect solutions: (1) applying *Carnegie-Mellon University v. Cohill*⁸ to require a lower standard of jurisdictional proof, and (2) making the first decision of scope of employment binding (despite the decision's unreviewability). These solutions are imperfect because they conflict with two established sets of Supreme Court precedent that make the Westfall Act and statutes like it⁹ a seemingly intractable problem: the first indicates that a re-

³ See 28 U.S.C. § 1346(a)(2) (2006); *id.* § 1441(a).

⁴ See *id.* § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

⁵ See *id.* § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . .").

⁶ See, e.g., *Foster v. Hill*, No. 08 C 1164, 2008 WL 4442605 (N.D. Ill. Sept. 29, 2008). *Foster* has traveled between state and federal court for six years and will be the vehicle through which this Note will explore the circularity problem.

⁷ Federal Employees Liability Reform and Tort Compensation Act of 1988, 102 Stat. 4563 (codified as amended at 28 U.S.C. §§ 1346(b), 2671–80) (providing that the only remedy against an employee of the federal government acting within the scope of his employment is against the government). The statute is commonly called the Westfall Act because it superseded the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). See Daniel A. Morris, *Federal Employees' Liability Since the Federal Employees Liability Reform & Tort Compensation Act of 1988 (The Westfall Act)*, 25 CREIGHTON L. REV. 73, 73 (1991). The Westfall Act's jurisdictional procedures result in the circularity problem, but these complications are not limited to this statute. See, e.g., 16 U.S.C. § 831c-2 (2006) (granting federal jurisdiction in civil suits involving employees of the Tennessee Valley Authority, a federal agency).

⁸ 484 U.S. 343 (1988).

⁹ See, e.g., 16 U.S.C. § 831c-2.

mand order for lack of subject matter jurisdiction is unreviewable,¹⁰ and the second indicates that an unreviewable decision cannot be binding.¹¹ These two “rules,” in conjunction with the Westfall Act, create an untenable situation. This Note aims to present a clear analysis of this seemingly intractable problem in hopes that a clear presentation of the problem and a discussion of potential solutions can lead to a satisfactory resolution. This Note ultimately argues that Congress should reexamine the Westfall Act with these scenarios and outcomes in mind, but absent such a perfect resolution, the imperfect solution of making the first decision binding is preferable.

Although this Note will use *Foster v. Hill*¹² and the Westfall Act to analyze the circularity problem, discussion of this problem and its possible solutions extends to other scenarios arising under the Westfall Act (as well as to other statutes written in a way that makes a question of federal jurisdiction depend on a merits-based inquiry). Part I of this Note presents a background explanation of the Westfall Act, the scenarios arising under it, and 28 U.S.C. § 1447(d). Part II presents the possible outcomes under the Westfall Act. Part III suggests specific congressional solutions to the circularity problem.

I

REMAND ORDERS, THE WESTFALL ACT, AND THE INFINITE JURISDICTIONAL LOOP

A. *Foster v. Hill*

*Foster v. Hill*¹³ demonstrates that this circularity problem is not merely theoretical. The factual circumstances of the case provide an interesting background to the circularity problem that the Westfall Act creates. On March 5, 2002, Kirk Hill attacked James Foster in a gym locker room at the Great Lakes Naval Base because Hill believed that “Foster was Somali warlord General Mohammed Farah Aidid, that ‘Aidid’ was there to kill him, and that he was authorized to use force against ‘Aidid’ in accordance with his SEAL training and under the Rules of Engagement he operated under while in Somalia.”¹⁴ The military was aware of Hill’s mental condition, as he was undergoing

¹⁰ See 28 U.S.C. § 1447(d).

¹¹ See *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 647 (2006) (citing *Standefer v. United States*, 447 U.S. 10, 23 (1980) (“[C]ontemporary principles of collateral estoppel . . . strongly militat[e] against giving an [unreviewable judgment] preclusive effect.”)); see also RESTATEMENT (SECOND) OF JUDGMENTS § 28(1) (1982); RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tentative Draft No. 3, 1976).

¹² No. 08 C 1164, 2008 WL 4442605 (N.D. Ill. Sept. 29, 2008).

¹³ *Id.*

¹⁴ Brief of Defendant-Appellant at 6, *Foster v. Hill*, No. 06-2651 (7th Cir. Sept. 7, 2006).

outpatient psychiatric treatment while stationed at the Naval Base.¹⁵ During that time, the Navy assigned him to “Temporary Assigned Duty to assist in leading sailors in stretching and exercises.”¹⁶

On March 1, 2004, Foster filed an action against Hill in the Circuit Court of Cook County, Illinois for assault and battery.¹⁷ Little did he know that an odd and little-recognized statutory gap would lead to his suit cycling between state and federal court for the next four years.¹⁸ To understand the nature of Hill’s problem, how it arose, and how the district court attempted to resolve it, it is necessary to understand how the Westfall Act and 28 U.S.C. § 1447(d) interact.

1. *The Westfall Act*

The Westfall Act, which amended the Federal Tort Claims Act,¹⁹ grants federal employees who commit torts while acting in the scope of their federal employment immunity from suit.²⁰ The statute achieves this result through two possible mechanisms. First, it allows the Attorney General to certify that a defendant-employee was acting within the scope of her employment.²¹ The Attorney General certification subsection—28 U.S.C. § 2679(d)(2)—explains the procedural mechanism by which state and federal courts must handle a claim that the Attorney General has certified.²² If the Attorney General so certifies, the United States is substituted as a defendant and, pursuant to 28 U.S.C. § 2679(d)(4) and § 1346(b), the case must be removed to the federal court.²³ Even if the federal district court later determines that the defendant-employee was not acting pursuant to her scope of employment and dismisses the United States as a defendant, the court

¹⁵ See *id.* at 14–15.

¹⁶ *Id.* at 5–6.

¹⁷ See *Foster*, 2008 WL 4442605, at *1.

¹⁸ See *id.* (describing the case’s lengthy procedural history).

¹⁹ See Federal Tort Claims Act, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671–80 (2006)).

²⁰ See 28 U.S.C. § 2679(d)(1). Congress promulgated the Westfall Act so governmental employees could perform duties within the scope of their employment without fear of personal liability. See *Morris*, *supra* note 7, at 82. The Act benefits the government by encouraging employees to actively pursue their employment duties without fear of being sued for those actions. The Act also benefits the employee by providing two opportunities for a scope-of-employment certification—one by the Attorney General pursuant to 28 U.S.C. § 2679(d)(2) and one by a court pursuant to subsection (d)(3) if the Attorney General refuses to certify. See 28 U.S.C. § 2679(d)(2)–(3).

²¹ See 28 U.S.C. § 2679(d)(2). Once the employee provides his supervisor with “all process served upon him or an attested true copy thereof,” the supervisor gives that information to the Attorney General, who can then make a certification. *Id.* § 2679(c).

²² The statute provides that the Attorney General will defend a suit brought against an employee if the “defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose.” *Id.* § 2679(d)(2).

²³ See *id.* §§ 1346(b)(1), 2679(d)(4).

retains jurisdiction over the suit²⁴ because the Attorney General's certification "conclusively establish[es] scope of office or employment for purposes of removal."²⁵ Thus, this method of removal creates a final jurisdictional result; the case cannot be remanded and must proceed in federal court for its duration.

If the Attorney General refuses to certify that the employee was acting within the scope of her employment, the defendant-employee may alternatively petition a court, state or federal, for certification.²⁶ If the defendant-employee petitions the state court to make this certification, the Attorney General has two options. First, she may permit the state court to make the certification decision; if the state court certifies that the defendant-employee was acting within the scope of her federal employment, then the Attorney General must remove the case to federal court.²⁷ Alternatively, the Attorney General may remove the case to federal court for the *sole purpose* of deciding the scope-of-employment question.²⁸ Thus, the Attorney General ultimately chooses which court decides the relevant scope-of-employment question.²⁹

2. 28 U.S.C. § 1447(d)

Another provision of the United States Code is relevant to removal under the Westfall Act: 28 U.S.C. § 1447(d). This section states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."³⁰ The statute seeks to avoid the delay caused by interrupting a case to litigate jurisdictional issues related to removal and remand.³¹ The Supreme Court, however, has interpreted § 1447(d) "to cover less than its words alone suggest."³² The Court announced as early as 1976 that

²⁴ See *Osborn v. Haley*, 549 U.S. 225, 242 (2007) (interpreting § 2679(d)(2) as prohibiting a district court from remanding a case even if it dismisses the United States as a party).

²⁵ 28 U.S.C. § 2679(d)(2).

²⁶ See *id.* § 2679(d)(3).

²⁷ See *id.* (stating that "the action or proceeding *may* be removed" (emphasis added)); *id.* § 1346(b)(1) (requiring a tort action brought against the United States to proceed in federal court).

²⁸ See *id.* § 2679(d)(3) (indicating that removal by the Attorney General is permissive and *requiring* a district court to remand the case if it finds that the defendant-employee was not acting within the scope of her employment).

²⁹ See *id.*

³⁰ *Id.* § 1447(d).

³¹ See *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (stating that the apparent purpose of § 1447(d) is to achieve "speed and simplicity"); see also 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & JOAN E. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 3740 (4th ed. 2009) ("In general, the purpose of the ban on review is to spare the parties interruption of the litigation and undue delay in reaching the merits of the dispute, solely to contest a decision disallowing removal.").

³² *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 229 (2007).

§ 1447(d) “should be read *in pari materia* with § 1447(c),”³³ meaning that the bar on reviewing remand orders should extend only to those remands based on the grounds specified in § 1447(c)³⁴—cases “removed improvidently and without jurisdiction.”³⁵ Congress has since amended the statute such that the Court now interprets § 1447(c) to include both improper removal and lack of subject matter jurisdiction as justifications for remand.³⁶ As a result, § 1447(d) now precludes appellate review of remands based on either of those grounds.³⁷

3. *The Foster Problem*

In isolation, either of these two statutes is sensible: the Westfall Act provides government employees with immunity if they act within the scope of their employment and § 1447(d) ensures finality and avoids delay. As *Foster v. Hill* demonstrates, however, the interaction between these statutes can cause significant problems.³⁸ The problem in *Foster* arose when Hill, who as a naval officer was a federal employee, requested that the Attorney General certify, pursuant to the Westfall Act, that Hill was acting within the scope of his employment when he attacked Foster.³⁹ After the Attorney General refused to do so, Hill petitioned the state court to make the certification.⁴⁰ As a result, on October 26, 2005, the government removed the action to federal court for the first time, and on May 17, 2006, the federal district court determined that Hill was *not* acting within the scope of his employment.⁴¹ Accordingly, the federal court remanded the case to state court.⁴²

At this point, the case took a strange turn. On December 10, 2007, Hill *again* petitioned the state court for a scope-of-employment certification and the Attorney General *again* removed the action to federal court, where the district court *again* determined that Hill was not acting within the scope of his federal employment and *again* re-

³³ *Id.* (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345–46 (1976)).

³⁴ *See id.*

³⁵ *Id.* (quoting *Thermtron Prods., Inc.*, 423 U.S. at 342).

³⁶ *See id.* at 229–30 (discussing the Court’s interpretation of § 1447(d) under the 1988 amendment to § 1447(d) and noting, with regard to the 1996 amendment, that “[the Court] will assume for purposes of this case that the amendment was immaterial to *Thermtron’s* gloss on § 1447(d)”).

³⁷ *See id.* (citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711–12 (1996); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127–28 (1995)).

³⁸ *See Foster v. Hill*, No. 08 C 1164, 2008 WL 4442605, at *1 (N.D. Ill. Sept. 29, 2008) (noting that it was third time the court had “addressed the issue of remand” and summarizing the case’s procedural history in multiple courts).

³⁹ *See id.* at *1–4; Brief of Defendant-Appellant at 16–17, *Foster v. Hill*, No. 06-2651 (7th Cir. Sept. 7, 2006).

⁴⁰ *See Foster*, 2008 WL 4442605, at *1.

⁴¹ *Id.* at *1–2.

⁴² *Id.*

manded the case to state court.⁴³ Hill, who by now was familiar with how this case would operate if it returned to state court, appealed the federal district court's remand order.⁴⁴ On appeal, the Seventh Circuit construed the district court's order—which did not specify the basis for remand—as one for lack of subject matter jurisdiction and held that the remand order was, therefore, unreviewable.⁴⁵

After the Seventh Circuit denied review, the case once again returned to state court.⁴⁶ Hill then made a *third* petition for scope-of-employment certification in state court, the government removed, and on September 29, 2008, the district court ruled on the issue for a third time.⁴⁷ In that opinion the district court made the same scope-of-employment determination and again remanded the case to state court.⁴⁸

Although the district court's holding remained unaltered, its third opinion appeared to respond to the Seventh Circuit's opinion⁴⁹ by attempting to clarify the basis for remand.⁵⁰ The district court explained that it had decided the scope-of-employment issue on the merits and remanded the remainder of the case for lack of subject matter jurisdiction after determining that Hill was not acting within the scope of his employment.⁵¹ Despite this attempt to make its decision reviewable by splitting its holding into two separate decisions (one on the merits and one on jurisdiction), the court's explanation reiterated its reasoning from its May 17, 2006 ruling⁵² and was ultimately insufficient to make the case reviewable.⁵³

In an attempt to differentiate Foster's case from the more typical removed case over which the federal court lacks jurisdiction *at the time of removal*, the district court explicitly stated that it had subject matter

⁴³ *Id.* at *2.

⁴⁴ *See Foster v. Hill*, 497 F.3d 695, 695 (7th Cir. 2007).

⁴⁵ *Id.* at 698–99.

⁴⁶ *See Foster*, 2008 WL 4442605, at * 2.

⁴⁷ *Id.* at *2–3.

⁴⁸ *Id.* at *3–4.

⁴⁹ *See id.* at *2–4.

⁵⁰ *See id.* at *2 (“We make it clear that there was no defect in the removal, and that at the time of removal the court had subject matter jurisdiction and the court made a decision relating to the merits of an issue properly before the court pursuant to the Westfall Act. However, once we made our determination on the issue of scope of employment, which was properly before the court, we no longer had subject matter jurisdiction and the Westfall Act mandated that we remand the case.”).

⁵¹ *See id.* at *3–4. The court properly reasoned that if Hill was not acting within the scope of his employment, the United States could not be a party, and if the United States was not a party, there was no federal jurisdiction.

⁵² *See id.* at *3 (“[W]e conclude, for the same reasons stated in our May 17, 2006 ruling, that Hill was not acting within the scope of his employment when he struck Foster.”).

⁵³ *See infra* note 57 and accompanying text.

jurisdiction each time the government removed the case.⁵⁴ Such an attempt to make the case reviewable fails because lack of subject matter jurisdiction is the only ground on which the court could have remanded the case.⁵⁵ Although the court's position that its ruling consisted of two decisions—one deciding the scope-of-employment issue on the merits and another remanding the remainder of the case for lack of subject matter jurisdiction—was a reasonable attempt to provide the Seventh Circuit with jurisdiction over the appeal, that reasoning is inconsistent both with the Seventh Circuit's precedent and the manner in which other circuits have dealt with the same issue.⁵⁶

⁵⁴ See *Foster*, 2008 WL 4442605, at *3 (“Unlike a typical case . . . where the court remands the action because at the time of the removal the court did not have subject matter jurisdiction, in the instant case we had subject matter jurisdiction at the time of removal, but once we made a determination on a limited issue and found that Hill was not acting within the scope of his employment, we are mandated by the Westfall Act to remand the instant action.”).

⁵⁵ If a court decides that a plaintiff does not meet the threshold scope-of-employment requirement, the United States is no longer a proper party and, therefore, no basis for federal jurisdiction exists. As such, the court must remand for lack of subject matter jurisdiction. See *id.*; see also 28 U.S.C. § 2679(d)(3) (2006) (granting the plaintiff a right to petition the court for certification); *infra* note 56.

⁵⁶ A circuit split currently exists regarding whether the scope-of-employment question in the Federal Tort Claims Act (FTCA) is jurisdictional (such that courts decide the question under a Federal Rule of Civil Procedure (FRCP) 12(b)(1) standard) or merits-based (such that courts must assume jurisdiction and then decide the case on a FRCP 12(b)(6) or FRCP 56 standard). See *CNA v. United States*, 535 F.3d 132, 143 (3d Cir. 2008) (“A split among our sister courts of appeals has emerged on the proper procedure for handling situations in which jurisdiction is intertwined with the merits.”). Although this circuit split is beyond the scope of this Note, I briefly address it here to demonstrate why the district court in *Foster* could not both properly decide the scope-of-employment issue on the merits and remand for lack of subject matter jurisdiction. The Third Circuit takes the approach that scope of employment is a jurisdictional question, decided under a FRCP 12(b)(1) standard. See *id.* at 143–44. The Fifth Circuit, on the other hand, holds that a court may apply a lower standard of jurisdictional proof, assume jurisdiction over the case, and then decide the scope-of-employment question on the merits. See *Montez v. Dep't of Navy*, 392 F.3d 147, 150 (5th Cir. 2004); see also *Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007) (discussing the circuit split).

Pursuant to either approach, the district court in *Foster* could not have properly decided the scope-of-employment issue on the merits and then remanded for lack of subject matter jurisdiction. Under the Third Circuit's approach, for instance, the scope-of-employment issue is jurisdictional and, therefore, properly decided under a FRCP 12(b)(1) standard. Thus, the district court could only have remanded the case for lack of subject matter jurisdiction and could not have made a separate merits-based decision on scope of employment—a jurisdictional question. The Fifth's Circuit's approach is different in that it takes the view that scope of employment is an issue in which jurisdiction is intertwined with the merits. As such, that approach allows the district court to apply a lower standard of jurisdictional proof, assume jurisdiction, and decide the case on the merits. See *Montez*, 392 F.3d at 150. Even under that reasoning, the district court in a case like *Foster* cannot decide the scope-of-employment issue on the merits and then dismiss for lack of subject matter jurisdiction because, by deciding the scope-of-employment issue on the merits, the court would have implicitly assumed jurisdiction, meaning it could not then decide to deny jurisdiction in the same case. Although this circuit split is relevant in its own terms, its application to the present issue is only instructive insofar as it demonstrates the district court's

Because the court could not have properly decided the scope-of-employment issue on the merits *and then* remanded the case to the state court, the district court's decision to remand is effectively unreviewable because the only basis for such a remand is lack of subject matter jurisdiction.⁵⁷ Because it remanded the case and indicated that the remand was for lack of subject matter jurisdiction, § 1447(d) prevented the appellate court from reviewing the decision.

B. Four Possible Scenarios Arising from the Westfall Act

As *Foster* demonstrates, combining the Westfall Act with a prohibition on reviewing remand orders can produce strange results. Unfortunately, *Foster* explores only *one* of the two ways these statutes can produce vexing jurisdictional issues. As discussed above, the Westfall Act gives the Attorney General the option of certifying that a defendant-employee was acting within the scope of her employment; if the Attorney General declines to do so and the defendant-employee petitions a court to make the decision, then the Westfall Act gives the Attorney General authority to decide which court will rule on the issue.⁵⁸ As a result, four possible scenarios could arise under 28 U.S.C. § 2679(d)(3), each originating with a plaintiff who sues a government employee in state court. In each scenario, the defendant-employee petitions the Attorney General to certify that the underlying tort occurred while she was acting within the scope of her employment, the Attorney General refuses to certify, and the defendant-employee petitions the state court to certify the scope-of-employment issue. Although the first two scenarios create no procedural difficulties, the third and fourth produce the untenable circularity problem that this Note aims to resolve.

Scenario 1. The Attorney General chooses not to remove the case from state court. The state court denies the defendant-employee's petition, and the case proceeds as a tort action in state court with the original plaintiff and defendant as the parties. This scenario is not problematic.

Scenario 2. The Attorney General removes to federal court before the state court rules on the petition for certification. The federal court then affirmatively certifies scope of employment. At that point, the United States becomes the party defendant pursuant to

inability to provide the Seventh Circuit with jurisdiction to review its remand order by splitting its decision into two parts.

⁵⁷ If the district court's only aim were to make the decision reviewable, it could have applied a lower standard of proof for scope of employment as it related to jurisdiction, assumed jurisdiction, and then decided the case on the merits. See *Montez*, 392 F.3d at 150. This approach, however, would have been disingenuous considering the court's previous decisions.

⁵⁸ See *supra* notes 21–29 and accompanying text.

§ 2679(d)(4), and the case proceeds in federal court with the original plaintiff and the United States as the parties. Like Scenario 1, no problem arises.

Scenario 3. The Attorney General chooses not to remove the case from state court. The state court grants the defendant's petition, certifying that she acted within the scope of her employment. As a result, "the United States [is] substituted as the party defendant" and the "action . . . proceed[s] in the same manner as any action against the United States filed pursuant to [28 U.S.C. §] 1346(b)."⁵⁹ Because § 1346(b)(1) gives federal courts exclusive jurisdiction over "civil actions on claims against the United States," the case must proceed in federal court.⁶⁰

Unlike Scenarios 1 and 2, this situation creates problems. Because Federal Rule of Civil Procedure 12(h)(3) mandates dismissal of any action in which the federal court lacks subject matter jurisdiction,⁶¹ the federal court must independently review its own jurisdiction *even if* the state court previously concluded that a basis for federal jurisdiction exists. Thus, if the case in which the United States is the party defendant is removed to the district court, the district court must itself examine whether it has jurisdiction over the case. This examination requires the court to look again to the scope-of-employment issue, as the court has no jurisdiction over the underlying state-based tort claim if the employee was not acting within the scope of her employment.

Such an examination of scope of employment could have two results. Either the district court agrees that the employee was acting within the scope of her employment (in which case the United States is a proper party and the district court has jurisdiction) or the district court concludes that the employee was not so acting (in which case the United States is an improper party). The former presents no problem; however, in the latter situation, the district court must dismiss the United States as a party unless the case presents some other basis for federal jurisdiction.⁶² Here, the circularity problem arises.⁶³

⁵⁹ 28 U.S.C. § 2679(d)(3)–(4); *see id.* § 1346(b)(1).

⁶⁰ *See id.* § 1346(b)(1).

⁶¹ FED. R. CIV. P. 12(h)(3).

⁶² *See* U.S. CONST. art III, § 2 (illustrating the limited jurisdiction of federal courts); 28 U.S.C. §§ 1331, 1332, 1367, 1441 (same); FED. R. CIV. P. 12(h)(3) (same).

⁶³ After the district court dismisses the United States as a party, it no longer has subject matter jurisdiction over the case and must remand to state court. 28 U.S.C. § 2679(d)(3). But if the defendant-employee then petitions the state court for a scope-of-employment certification (a reasonable request because nothing in the Westfall Act prevents doing so and the state court may be predisposed to rule in the defendant's favor based on its previous decision), the state court could certify again, consistent with its previous decision, and the case must be removed to federal court again. This would create the same circularity problem present in *Foster*.

Scenario 4. Prior to the state court issuing a decision on the scope-of-employment issue, the Attorney General removes to the district court. The district court denies the defendant's petition, refusing to certify scope of employment, and remands to state court.⁶⁴ Such a remand on the basis of lack of subject matter jurisdiction⁶⁵ is unreviewable.⁶⁶ This is the *Foster v. Hill* scenario.

Again, this situation creates a potential circularity problem. When the case returns to state court, nothing prevents the defendant from again petitioning the state court to certify the scope-of-employment issue. If the state court reexamines the issue and certifies that the defendant was acting within the scope of her employment, then the state court has effectively contradicted the federal court. At that point the United States would be substituted as a party, and the case must be removed to federal court. Having already decided that it does not have jurisdiction, the district court would have to remand the case back to state court. Such is the untenable circularity problem that arises under 28 U.S.C. § 2679(d)(3), the problem that this Note attempts to resolve.

II

SCENARIOS 3 AND 4 AND THEIR OUTCOMES

As explained above, Scenarios 3 and 4 create circularity problems that could continue indefinitely. The potential for the circularity problem exists within the Westfall Act⁶⁷ because the statute does not clearly delineate which court, state or federal, should decide the scope-of-employment issue, enabling those courts to issue contradictory orders and opinions. The state court could hold that the employee was acting within the scope of her employment, which requires that the case proceed in federal court. The federal court could, in that same case, decide that the employee was not acting within the scope of her employment, stripping the federal court of its jurisdiction and requiring remand to state court.⁶⁸ The case could thus continue to cycle indefinitely between federal and state court with the state court finding that the federal court has exclusive jurisdiction and

⁶⁴ *Id.* ("If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding *shall* be remanded to the State Court." (emphasis added)).

⁶⁵ See *supra* note 55 and accompanying text.

⁶⁶ See 28 U.S.C. § 1447(d) (generally prohibiting review of a federal court's remand for lack of subject matter jurisdiction); *Foster v. Hill*, 497 F.3d 695, 696–97 (7th Cir. 2007); *infra* notes 99–104 and accompanying text.

⁶⁷ The situation could also result from any similarly drafted statute that permits both a federal and state court to decide an issue that is both jurisdictional and relevant to the merits.

⁶⁸ See 28 U.S.C. § 2679(d)(3).

the federal court later holding that it does not have jurisdiction. Similarly, the circularity problem could arise as it did in *Foster*, where the Attorney General removes to federal court each time the defendant petitions the state court (but before the state court decides the scope-of-employment issue) such that the federal court repeatedly makes the same decision, finding the defendant-employee did not act within the scope of her employment and then remanding the case as the Westfall Act requires.⁶⁹

Congress could not have intended to create an endless loop between federal and state courts when it drafted the Westfall Act. Not only does such a loop create an untenable jurisdictional conundrum, but it also results in a significant waste of judicial resources by allowing two courts to repeatedly make the same determinations in the same case. There are four possible outcomes to this circularity problem, only two of which are reasonable solutions.

A. Outcome 1: Looping Between State and Federal Court

The first possible outcome contemplates that neither court exclusively decides the scope-of-employment issue. In this situation, the statute vests either court with the power to certify scope of employment. Thus, the defendant-employee may petition the state court to certify that she was acting within the scope of her federal employment; the Attorney General may remove the case so that a federal court decides the certification issue, and the federal court can refuse to so certify. After the federal court remands the case, the state court may decide that the defendant-employee actually was acting within the scope of her employment. Under the Westfall Act, this state-court determination would require that the United States be substituted as a party defendant and, therefore, mandate removal to federal court.⁷⁰ After the case returns to federal court, that court must examine its own jurisdiction—a determination that depends on whether the defendant acted within the scope of her federal employment.⁷¹ At this point, however, the federal court has already determined that the defendant was *not* acting within the scope of her federal employment and is bound by that determination. The loop thus restarts because the district court must dismiss the United States for being an improper party, eliminating the basis for federal jurisdiction.

This outcome parallels Scenario 4. Because Congress did not vest the power to make the scope-of-employment decision in either state or federal court, both have equal authority to make such a decision. Because the statute does not limit the number of times the defendant

⁶⁹ See *Foster v. Hill*, No. 08 C 1164, 2008 WL 4442605, at *1 (N.D. Ill. Sept. 29, 2008).

⁷⁰ 28 U.S.C. § 1346(b)(1); *id.* § 2679(d)(4).

⁷¹ See *supra* note 61 and accompanying text.

can petition for a scope-of-employment determination,⁷² if a federal court remands a Westfall Act case to a state court after refusing to certify that the defendant-employee was acting within the scope of her federal employment, the defendant can petition again for a scope-of-employment determination. Because the state court could potentially make a decision contrary to the Attorney General's certification, the Attorney General can, and reasonably would, again remove the case to the federal court.

Congress could not have intended to create a continuous loop between state and federal court in this manner. Not only does this outcome waste significant judicial resources by requiring two courts to continue hearing the same issues in the same case but it also harms the parties by preventing the court from granting any relief to a plaintiff—exactly what has happened to the plaintiff in *Foster*.⁷³ This reading of the statute is therefore not viable because it perpetuates the circularity problem rather than alleviating it.

B. Outcome 2: The Federal Court's Decision Is Binding

A second solution to the circularity problem involves reading the statute to vest the power to make the scope-of-employment decision solely in the federal court. This interpretation solves the circularity problem as long as the federal court is the first to decide the scope-of-employment issue. If the Attorney General removes the case to federal court immediately upon the defendant's petition, no circularity problem arises because the statute would require the federal court's decision to bind the state court. In that situation, if the federal court determined that the employee was acting within the scope of her office or employment, then the United States would become the party defendant, and the case would proceed in federal court.⁷⁴ If the federal court determined that the employee was *not* acting within the scope of her employment, then the court would deny the defendant's petition and remand to state court. As long as the federal court's decision binds the state court in this instance,⁷⁵ no further circularity problem arises because the state court would apply the federal court's scope-of-employment decision and proceed with the case as a typical tort action where the original plaintiff and defendant are the parties.

This outcome presents a problem, however, if the Attorney General does not remove the case as soon as the defendant petitions for a scope-of-employment certification. If the Attorney General exercises

⁷² See 28 U.S.C. § 2679(d).

⁷³ *Foster*, 2008 WL 4442605, at *1, *5.

⁷⁴ See 28 U.S.C. § 1346(b)(1); *id.* § 2679(d)(3)–(4).

⁷⁵ There is some question as to whether such a decision would be binding on the state court. See *infra* note 89 and accompanying text.

her discretion and allows the case to remain in state court, that state court can then decide the issue. If the state court concludes that the employee was not acting within the scope of her employment, the case proceeds as a typical tort action in state court. If, however, the state court decides that the employee was acting within the scope of her employment, then the United States must be substituted as a party. Consequently, the case must be removed to federal court.⁷⁶

This removal is problematic if the statute itself vests ultimate power in the federal court to determine the scope-of-employment issue. After the case entered federal court, the district court would re-examine whether the defendant-employee acted in the scope of her employment. Essentially, this process results in a federal court sitting as an appellate court over the state courts—a hierarchy our judicial system considers improper.⁷⁷ This result also necessitates a tremendous waste of judicial resources because the statute permits the Attorney General to leave a case in state court for a decision regarding the scope of employment⁷⁸ only to require removal of the case (provided the state court certifies scope of employment) for federal-court determination of the same issue. Congress could not have intended for a case to travel such a pointless journey through the judicial system. Therefore, reading the statute to vest ultimate authority in the federal court, while permitting the Attorney General discretion as to removal prior to a scope-of-employment determination, is antithetical to the statute's language and purpose.

C. Outcome 3: Apply the *Cohill* Doctrine

Another resolution to the circularity problem is to require a federal court to apply a lower standard of proof for the jurisdictional scope-of-employment determination.⁷⁹ If the federal district court determines that the employee was acting within the scope of her employment under this lower standard of proof, the court could assume

⁷⁶ See 28 U.S.C. § 1346(b)(1); *id.* § 2679(d)(3)–(4).

⁷⁷ See, e.g., *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) (“[L]ower federal courts exercise no appellate jurisdiction over state tribunals”); see also *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 296 (1970) (“[L]ower federal courts possess no power whatever to sit in direct review of state court decisions.”); Gary Thompson, Note, *The Rooker-Feldman Doctrine and the Subject Matter Jurisdiction of Federal District Courts*, 42 RUTGERS L. REV. 859, 859–60 (1990) (indicating that the *Rooker-Feldman* doctrine “stands for the proposition that federal district courts do not have jurisdiction to review the judgments of state courts”).

⁷⁸ The statute grants the Attorney General the discretion to remain in state court for a scope-of-employment decision because it speaks in permissive terms. 28 U.S.C. § 2679(d)(3) (“[T]he action or proceeding *may* be removed without bond by the Attorney General” (emphasis added)).

⁷⁹ See Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1006–08 (2006) (discussing standard-of-proof difficulties that arise when jurisdictional issues overlap with the merits of a case).

jurisdiction and decide the case on the merits, thereby preventing any remand and effectively eliminating the circularity problem. *Carnegie-Mellon University v. Cohill*⁸⁰ allows the district court to retain jurisdiction over purely state-law claims even if it determines on the merits—after determining under a lower standard of proof that the employee was acting within her scope of employment—that the employee was not acting within the scope of her employment and subsequently dismisses the United States as a party. In *Osborn v. Haley*,⁸¹ the Supreme Court supported this application of *Cohill* to the Westfall Act, holding that the district court could, and should, retain jurisdiction over the purely state-law claims that remained after the district court disagreed with the Attorney General’s certification and denied substitution of the United States as a party.⁸² In *Osborn*, the Supreme Court examined the jurisdictional issue that would arise if the district court decided that the employee was not acting within the scope of her employment. The Court stated that the

question [of lacking a federal question basis for court’s subject matter jurisdiction] would arise only if, after full consideration, the District Court determines that Haley in fact engaged in the tortious conduct outside the scope of his employment charged in Osborn’s complaint. At that point, however, little would be left to adjudicate, at least to Haley’s liability.⁸³

The Court then indicated that the lack of subject matter jurisdiction would not be a judicially resolvable problem at that point

[b]ecause a significant federal question (whether Haley has Westfall Act immunity) would have been raised at the outset, the case would “aris[e] under” federal law, as that term is used in Article III. Even if only state-law claims remained after resolution of the federal question, the District Court would have discretion, consistent with Article III, to retain jurisdiction.⁸⁴

The Court’s analysis in *Osborn*, in conjunction with *Cohill*, presents a workable solution to the Westfall Act’s circularity problem. Although the *Osborn* Court based its decision on the differences between 28 U.S.C. § 2679(d)(2) and § 2679(d)(3), the Court’s analysis of the district court’s ability to retain jurisdiction after analyzing the entire case on the merits and deciding that the defendant did not act within the scope of her employment applies to cases arising under § 2679(d)(3). The differences between § 2679(d)(2) and (3) are ap-

⁸⁰ 484 U.S. 343 (1988).

⁸¹ 549 U.S. 225 (2007).

⁸² See *id.* at 245.

⁸³ *Id.* at 244.

⁸⁴ *Id.* at 244–45 (citing *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 493 (1983) and *Carnegie-Mellon Univ.*, 484 U.S. at 350–51).

propriately considered by applying a lower standard of proof to the threshold scope-of-employment issue for jurisdictional purposes.⁸⁵ Applying the lower standard of proof to the scope-of-employment question for the purpose of determining jurisdiction allows the court not only to fully examine the merits of the case, but also to dismiss actions that assert Westfall Act immunity in laughable claims. Such a solution means that federal courts will likely examine more Westfall Act claims; however, this resolution is beneficial because it solves the circularity problem without the district court assuming jurisdiction—so long as a lower standard of proof is met—and then dismissing the case on the merits if it decides the defendant-employee did not act within the scope of her employment. Such a decision on the merits would then be fully reviewable by the appellate court.

The problem with using the *Cohill* doctrine to solve the circularity problem is twofold. First, it resolves only Scenario 4 and does not address the problem of Scenario 3. Second, it requires stretching Supreme Court precedent and reading the Westfall Act in a way that Congress did not intend. Although *Osborn* held that the district court should retain jurisdiction even if it disagreed with the Attorney General's scope-of-employment determination, it did so based on a logical reading of the statute. The differences between § 2769(d)(2) and (d)(3) are significant in that the former explicitly states that the Attorney General's certification "shall conclusively establish scope of office or employment for purposes of removal."⁸⁶ Subsection (d)(3) has no similar provision, and although this outcome suggests that the district court *could* still remand if the initial examination of jurisdiction proved that the defendant-employee did not act within the scope of her employment, allowing a lower standard of proof would essentially read a clause similar to that of § 2679(d)(2) into § 2679(d)(3). Such a reading would significantly increase the number of purely state-law based tort cases the federal courts would hear, which is not something Congress intended. Although such a reading would solve the circularity problem, the statutory language does not support it.

D. Outcome 4: The First Scope-of-Employment Decision Controls

Congress could not have intended to create an infinite loop between federal and state court, nor could it have intended to waste valuable judicial resources by requiring the state court to make a non-binding scope-of-employment decision that the federal court would then reexamine. Thus, the only plausible reading of the Westfall Act

⁸⁵ See Clermont, *supra* note 79, at 1006–08.

⁸⁶ 28 U.S.C. § 2679(d)(2) (2006) (emphasis added).

is that the first decision on scope of employment—whether made by a state or federal court—controls for that case. This reading of the statute is sensible because the Westfall Act permits, but does not require, the Attorney General to remove the case to federal court if a defendant-employee petitions for a certification.⁸⁷ Such discretion means that Congress contemplated that either the federal or state court *could* decide the scope-of-employment issue.

Most importantly, this reading eliminates the circularity problem. If the first scope-of-employment decision is binding, then no further looping can occur. If, for example, a state court decides the defendant-employee acted within the scope of her employment and this decision binds the federal court (even if solely for the purposes of jurisdiction), then remand to state court is impossible. Similarly, if the federal court makes the first decision regarding scope of employment and that decision binds the state court, then removal is impossible.

The difficulty with this solution is the actual ability of either a state court or a federal court to bind the other, whether prior to removal or after remand. Varying perspectives exist on whether a state-court decision can bind a federal court⁸⁸ and whether a federal-court decision can bind a state court.⁸⁹ To whatever extent a federal court's decision can bind a state court, the decision must be final, and to be final it must be reviewable.

⁸⁷ See *id.* § 2679(d)(3).

⁸⁸ See 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478.4 (2d ed. 2002); see also *Payne v. Churchich*, 161 F.3d 1030, 1037 (7th Cir. 1998) (“In the context of removal, once the case is in federal court, the state court orders issued prior to removal are not conclusive but remain binding until they are set aside.”). In a single lawsuit, law of the particular case—in the form of orders and judicial rulings—limits relitigation of an issue; law of the case is not a binding limitation on the court's power, but “merely expresses the practice of courts generally to refuse to reopen what has been decided.” *Id.* at 1037 n.8 (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)); see also *Pareto v. FDIC*, 139 F.3d 696, 699 n.1 (9th Cir. 1998) (explaining that law of the case “does not require a district judge to follow an erroneous legal ruling of another trial judge”).

⁸⁹ See *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 647 (2006) (“While the state court cannot review the decision to remand in an appellate way, it is perfectly free to reject the remanding court's reasoning”); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586–87 (1999) (explaining that comity and cooperation between state and federal courts are “essential to the federal design”); see also Colin E. Wrabley, *Applying Federal Court of Appeals' Precedent: Contrasting Approaches to Applying Court of Appeals' Federal Law Holdings and Erie State Law Predictions*, 3 SETON HALL CIR. REV. 1, 17–23 (2006) (discussing the impact of federal court of appeals' precedent on state courts).

1. *Reviewability: A Prerequisite to Finality*a. *Rules of Reviewability and Finality*

A federal district court's decision is final and binding only if it is reviewable; a non-reviewable decision cannot bind a state court.⁹⁰ Section 1447(d), however, makes it difficult for a district court's remand order to be considered a final decision because it prohibits appellate review of those orders.⁹¹

The reviewability of remand orders causes courts great difficulty. As recently as May 2009, the Supreme Court struggled with the issue. In *Carlsbad Technology, Inc. v. HIF Bio, Inc.*,⁹² the Court recounted the history of the prohibition of appellate review of remand orders. Although that opinion focused on remands of state-law claims when a federal court declined to exercise supplemental jurisdiction (a situation very different from one arising under the Westfall Act, which involves original, rather than supplemental jurisdiction), the background the Court provided and an analysis of its current perspective is essential to understanding this prohibition and the manner in which it creates the circularity problem.

In *Carlsbad Technology* the Court had an opportunity to reexamine its precedent involving § 1447(d).⁹³ The case originated when HIF Bio, Inc. filed a complaint alleging violations of both state law and the Racketeer Influenced and Corrupt Organizations Act (RICO),⁹⁴ a federal law. The case was removed pursuant to 28 U.S.C. § 1441(c),⁹⁵ but when the district court found that HIF Bio had not raised a valid RICO claim, it dismissed the RICO charges and declined to exercise supplemental jurisdiction over the remaining state-law claims.⁹⁶ The court, therefore, remanded the case back to state court.⁹⁷ On appeal, the Federal Circuit stated that the remand was for lack of subject matter jurisdiction and refused to review the district court's decision pursuant to § 1447(c) and § 1447(d).⁹⁸

Section 1447(d) does not specify which of the district court's remand orders are reviewable. Instead, it merely states that "[a]n order remanding a case to the State court from which it was removed is not

⁹⁰ See *Kircher*, 547 U.S. at 647; see also *supra* notes 10–11 and accompanying text.

⁹¹ See 28 U.S.C. § 1447(d).

⁹² 129 S. Ct. 1862 (2009).

⁹³ See *id.*

⁹⁴ See *id.* at 1865; see also 18 U.S.C. §§ 1961–68 (2006).

⁹⁵ Section 1441(c) permits the removal of an action from state court if a separate claim that gives rise to federal question jurisdiction under 28 U.S.C. § 1331 is joined with an "otherwise non-removable claim[]." 28 U.S.C. § 1441(c); see *id.* § 1331.

⁹⁶ See *Carlsbad Tech., Inc.*, 129 S. Ct. at 1865.

⁹⁷ See *id.*

⁹⁸ See *id.*

reviewable on appeal or otherwise.”⁹⁹ The Supreme Court consistently has interpreted § 1447(d) as prohibiting review of remand orders for lack of subject matter jurisdiction.¹⁰⁰ Although four justices questioned this operation of § 1447(d) in the Court’s most recent decision on this topic (albeit for different reasons and desiring different outcomes), the Court continues to hold that remands for lack of subject matter jurisdiction are unreviewable.¹⁰¹

b. *The Role of Reviewability in Foster*

Because the Supreme Court continues to hold that § 1447(d) prohibits appellate review of remand orders for lack of subject matter jurisdiction, the district court in *Foster* had to overcome that problem in order to make its decision final. The only way to make its decision final, however, was to assert that its remand was not for lack of subject matter jurisdiction—precisely what the district court in *Foster* attempted to do. Understandably seeking a final resolution to the case (and not wanting to continue rehearing the same case and redeciding the same issue), the district court’s third opinion partially responded to the Seventh Circuit, which had declined review on the basis of § 1447(d).¹⁰²

⁹⁹ 28 U.S.C. § 1447(d).

¹⁰⁰ See *supra* Part I.A.2.

¹⁰¹ See *Carlsbad Tech., Inc.*, 129 S. Ct. at 1865–66. Justice John Paul Stevens concurred but elaborated that if he were writing on a clean slate—that is, if *Thermtron* had not been decided as it had—he would read the text of § 1447(d) literally and prohibit appellate review of *all* remand orders. See *id.* at 1868 (Stevens, J., concurring). Justice Antonin Scalia concurred but noted that “*Thermtron* was questionable in its day and is ripe for reconsideration in the appropriate case.” *Id.* at 1868 (Scalia, J., concurring). He referred to the jurisprudence of § 1447(d) as a “mess—entirely of [the Court’s] own making” and argued for reconsideration of *Thermtron*. *Id.* at 1869. Justice Stephen Breyer, joined by Justice David Souter, also concurred, noting that the Court’s § 1447(d) jurisprudence causes undesirable results by allowing appellate review of a decision that would “rarely involve[] major legal questions, and that (even if wrong) . . . [would] not often have major adverse consequences” while simultaneously prohibiting appellate review of remand orders in cases “present[ing] a difficult legal question . . . [that] (if wrong) [would have] potentially serious adverse consequences.” *Id.* at 1869 (Breyer, J., concurring). Justice Breyer further called for legal scholarship reexamining § 1447(d) “with an eye toward determining whether statutory revision is appropriate.” *Id.* at 1869–70.

A rule that prohibits appellate review of *all* remand orders would only exacerbate the circularity problem addressed in this Note, unless courts also revised the rule that an unreviewable decision is not binding. The Justices who argued against allowing appellate review of a remand order did not discuss the implications of such a rule on the circularity problem. There has been a plethora of legal scholarship examining the benefits and drawbacks of § 1447(d), and those discussions will not be recounted herein. *E.g.*, Deborah J. Challenger & John B. Howell, III, *Remand and Appellate Review When a District Court Declines to Exercise Supplemental Jurisdiction Under 28 U.S.C. § 1367(c)*, 81 TEMP. L. REV. 1067, 1075–89 (2008) (discussing the relationship between § 1447(c) and § 1447(d) and their implications for supplemental jurisdiction).

¹⁰² *Foster v. Hill*, No. 08 C 1164, 2008 WL 4442605, at *4 (N.D. Ill. Sept. 29, 2008).

In that opinion, the district court in *Foster* stated that its remand was not for lack of subject matter jurisdiction because it “had jurisdiction at the outset of [the] case to adjudicate Hill’s scope of employment,”¹⁰³ and after it adjudicated that issue on the merits, its “adjudication on the scope of employment issue resulted in the court losing jurisdiction to deal further with the merits of the case since the Government was not substituted as a party.”¹⁰⁴ Essentially, the court divided its ruling into two parts—one deciding the scope-of-employment issue on the merits and the other remanding the remainder of the case for lack of subject matter jurisdiction. Although this division was a reasonable attempt to provide the Seventh Circuit with jurisdiction over the appeal, it was inconsistent with Supreme Court precedent¹⁰⁵ as well as decisions from other circuits dealing with the scope-of-employment issue.¹⁰⁶ This inconsistency exists because a remand order under § 2679(d)(3) could have no basis other than lack of subject matter jurisdiction.¹⁰⁷

The district court’s dual opinion is contrary to the Supreme Court’s decision in *Kircher v. Putnam Funds Trust*.¹⁰⁸ In *Kircher*, the Supreme Court unified the competing precedent from the Seventh Circuit and the Second and Ninth Circuits over reviewability of a remand order issued pursuant to the Securities Litigation Uniform Standards Act of 1998 (SLUSA).¹⁰⁹ Those circuits divided on the issue of whether the court should properly characterize the remand order as one for lack of subject matter jurisdiction or as “an order remanding a case over which the court once had adjudicatory authority but no longer does.”¹¹⁰ SLUSA gave the district court jurisdiction to determine whether the statute’s preclusion provision destroyed state claims.¹¹¹ If the court held that the provision did not destroy these state claims, the district court would then have to remand the action.¹¹² The Seventh Circuit held that if the action was properly removed, then the remand order was reviewable because the “district

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 644 (2006) (“[If a district court remands for lack of subject matter jurisdiction, it does so] because its adjudicatory power has been exercised and its work is done. But its adjudicatory power is simply its authority to determine its own jurisdiction to deal further with the case.” (citing *United States v. Shipp*, 203 U.S. 563, 573 (1906))).

¹⁰⁶ See *supra* note 56 (describing the circuit split regarding the scope-of-employment question).

¹⁰⁷ See *supra* note 55 and accompanying text.

¹⁰⁸ 547 U.S. 633 (2006).

¹⁰⁹ See Stephen J. Cowen, Comment, *Appellate Review of SLUSA Remands After CAFA*, 73 U. CHI. L. REV. 321, 326–32 (2006) (describing the circuit split in detail).

¹¹⁰ *Id.* at 325.

¹¹¹ See *id.* at 324.

¹¹² See *id.*

court had subject matter jurisdiction to determine whether SLUSA actually preempted the state law claims.”¹¹³ After it made that decision, it “‘had nothing else to do: dismissal and remand [were] the only options.’”¹¹⁴ The Seventh Circuit reasoned that having only those two options did not mean that the district court lacked “adjudicatory competence” but rather that it had completed its work and lacked jurisdiction over the remainder of the claim.¹¹⁵

The district court’s reasoning in *Foster* was similar. It focused on the proper removal of the case and noted that it properly had jurisdiction at the time of removal.¹¹⁶ *Kircher*, however, foreclosed the possibility that such a rationale could permit the appellate court to review a remand order.¹¹⁷ The Supreme Court in *Kircher* fully recounted the Seventh Circuit’s argument:

As the Court of Appeals put it, once the District Court had made that substantive decision of no preclusion in this case, it was time for the court to bow out, not because it had lacked “adjudicatory competence” to begin with but because it had completed its work: “Once a court does all that the statute authorizes, there is no adjudicatory competence to do more. That is not the ‘lack of subject-matter jurisdiction’ that authorizes a remand. Otherwise every federal suit, having been decided on the merits, would be dismissed ‘for lack of jurisdiction’ because the court’s job was finished.” This remand, the court concluded, was therefore not for want of jurisdiction, and review was not barred by § 1447(d).

To satisfy itself that its decision made “practical sense,” the court proposed that the Act reserves to the Federal Judiciary the exclusive authority to make the preclusion decision. Treating remand orders in this context as immunized from appeal by § 1447(d) would thus mean that “a major substantive issue in the case [would] escape review,” since it would not be open to resolution in the state court subject to review by this Court.¹¹⁸

The Court then vacated the Seventh Circuit’s decision because the only ground on which the district court could have remanded was for lack of subject matter jurisdiction, which would have resulted in § 1447(d) precluding appellate review.¹¹⁹ The Court explained that Congress’s policy “opposes ‘interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction

¹¹³ *Id.* at 331.

¹¹⁴ *Id.* (quoting *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 849–50 (7th Cir. 2004)).

¹¹⁵ *Kircher*, 373 F.3d at 850.

¹¹⁶ *See Foster v. Hill*, No. 08 C 1164, 2008 WL 4442605, at *3–4 (N.D. Ill. Sept. 29, 2008).

¹¹⁷ *See, e.g., Kircher v. Putnam Funds Trust*, 547 U.S. 633, 639 (2006).

¹¹⁸ *Id.* at 639 (internal citations omitted).

¹¹⁹ *See id.*

of the district court to which the cause is removed.’”¹²⁰ Ultimately, the Court rejected the Seventh Circuit’s view that the district court’s decision to remand was based on a substantive ruling after which the court remanded for lack of subject matter jurisdiction over the remainder of the case.¹²¹

The Supreme Court’s decision in *Kircher* prevents a district court’s decision to remand pursuant to § 2679(d)(3) from being reviewable as long as § 1447(d) prohibits appellate review of remand orders.¹²² That remand is unreviewable because *Kircher* prevents a district court from successfully claiming that it was not exercising its jurisdiction to determine jurisdiction but was, instead, examining the scope-of-employment issue on the merits and then “bowing out” of the case because it lacked jurisdiction to deal with the remaining claims.¹²³ The district court is almost certainly correct that the scope-of-employment issue was properly before it because the Westfall Act permits the government to remove a case from state court for determination of that issue.¹²⁴ However, the scope-of-employment question was properly before the court *only* for the purpose of determining its own jurisdiction over the case, just as the preclusion issue was properly before the district court in *Kircher* for the same limited purpose. Proper removal does not preclude a subsequent remand order from being based on lack of subject matter jurisdiction, nor does it make § 1447(d) inapplicable.¹²⁵

The district court in *Foster* also noted that its remand was not for lack of subject matter jurisdiction because it was not made pursuant to § 1447(c).¹²⁶ This argument, however, neither negates applicability of § 1447(d) nor makes the remand order reviewable because, according to both *Things Remembered, Inc. v. Petrarca*¹²⁷ and *Kircher*, basing a remand on a statute other than the general removal statute does not

¹²⁰ *Id.* at 640 (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)).

¹²¹ *See id.* at 644 (“[T]he district court’s order comes because its adjudicatory power has been exercised and its work is done. But its adjudicatory power is simply its authority to determine its own jurisdiction to deal further with the case.”).

¹²² *See id.* at 639.

¹²³ *Compare id.* (relinquishing jurisdiction after “complet[ing] its work”), with *Foster v. Hill*, No. 08 C 1164, 2008 WL 4442605, at *2 (N.D. Ill. Sept. 29, 2008) (relinquishing jurisdiction after examining the scope-of-employment issue).

¹²⁴ *See Foster*, 2008 WL 4442605, at *4; *see also* 28 U.S.C. § 2679(d)(3) (2006) (allowing plaintiffs to petition the court for certification of the scope-of-employment question).

¹²⁵ *See Kircher*, 547 U.S. at 639 (“This remand . . . [was] not for want of jurisdiction, and review was not barred by § 1447(d).”).

¹²⁶ *See Foster*, 2008 WL 4442605, at *4 (“[W]e emphasize that we are expressly remanding this action based solely upon the mandate in Section 2679(d)(3) and not because of lack of subject matter jurisdiction at the time of removal.”).

¹²⁷ 516 U.S. 124, 128 (1995) (noting that, regardless of the statute pursuant to which it is ordered, a remand to state court is not reviewable).

remove that order from the scope of § 1447(d).¹²⁸ Because of that precedent, remands made pursuant to statutory mandates other than § 1447(c) are not immune from the rule that a remand for lack of subject matter jurisdiction is not reviewable on appeal.¹²⁹

2. *A Problem Without a Solution: Three Theoretical, but Ultimately Unworkable, Ways to Make the Scope-of-Employment Decision Reviewable*

As briefly discussed above, one solution to the circularity problem is to consider the federal district court's scope-of-employment decision binding on the state court when the federal court first issues the decision. In *Ruhrgas AG v. Marathon Oil Co.*, the Supreme Court explained that a federal court's dismissal for lack of personal jurisdiction "may preclude the parties from relitigating the very same personal jurisdiction issue in state court."¹³⁰ The Court also indicated in dicta that a decision on subject matter jurisdiction could preclude the parties from relitigating that issue in state court.¹³¹ On the other hand, authority exists for the proposition that a nonreviewable jurisdictional determination by a federal court does not bind a state court.¹³² Making the § 2679(d)(3) remand reviewable would, therefore, be one way to make the federal court's scope-of-employment decision controlling; by binding the state court with that decision, the Westfall Act's circu-

¹²⁸ See *id.* ("Absent a clear statutory command to the contrary, we assume that Congress is 'aware of the universality of th[e] practice' of denying appellate review of remand orders when Congress creates a new ground for removal." (quoting *United States v. Rice*, 327 U.S. 742, 752 (1946))); see also *Kircher*, 547 U.S. at 648 (holding that a remand order for lack of subject matter jurisdiction pursuant to 15 U.S.C. § 77p(c) (2006) is unreviewable).

¹²⁹ See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128–29 (1995) (holding that a remand order based on one of the grounds of § 1447(c) is unreviewable, regardless of whether the remand is pursuant to § 1441 or another statute). "Section 1447(d) applies 'not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under *any other statutes*, as well.'" *Id.* at 128 (quoting *Rice*, 327 U.S. at 752); see also *Fed. Sav. & Loan Ins. Corp. v. Frumenti Dev. Corp.*, 857 F.2d 665, 667 (9th Cir. 1988) (citing *Rice*, 327 U.S. at 742, and holding that § 1447(c) precluded review of a remand order even though it was made "pursuant to a special statute creating federal subject matter jurisdiction and granting a right to remove a case from state court where federal interests were implicated").

¹³⁰ 526 U.S. 574, 585 (1999).

¹³¹ See *id.* ("Issue preclusion in subsequent state-court litigation, however, may also attend a federal court's subject-matter determination.").

¹³² See *Kircher*, 547 U.S. at 646–47 (explaining that "what a state court could do in the first place it may also do on remand" and arguing that collateral estoppel does not apply to unreviewable decisions); *Foster v. Hill*, 497 F.3d 695, 698 (7th Cir. 2007) ("We are well aware of the odd procedural posture that this result will create as the case goes forward. The case will now return to state court. But because the parties have been prevented by statute from any appellate review of the district court's scope of employment decision, issue preclusion cannot be invoked in the state court on the question of whether Hill was acting within the scope of his employment when he attacked Foster." (citations omitted)).

larity problem would be solved. The problem, though, lies in making the federal court's scope-of-employment determination reviewable. Statutory exceptions, mandamus, and the *Waco* doctrine are three ways in which a decision to remand can become reviewable, but none of those effectively solve the Westfall Act's circularity problem.

Statutory Exceptions. The Court permits explicit statutory exceptions to § 1447(d) if Congress expressly overrides § 1447(d)'s prohibition on appellate review of remand orders.¹³³ Such an exception, however, must be unequivocal in the statutory language. The Court found that an exception applied in *Osborn v. Haley*,¹³⁴ which dealt with the Westfall Act. In that case, the Court found that § 2679(d)(2) made an Attorney General's certification for scope of employment conclusive for purposes of removal.¹³⁵ The Court argued that the anti-shuttling provision of § 2679(d)(2) indicated Congress's explicit intention to override § 1447(d)'s prohibition on appellate review.¹³⁶ Section 2679(d)(3) contains no similar anti-shuttling provision, and the Court in *Osborn* specifically distinguished the two sections of the Westfall Act, indicating that the statutory exception to § 1447(d) recognized by *Osborn* does not control in a situation arising under § 2679(d)(3).¹³⁷

Mandamus. A writ of mandamus is utilized to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so,"¹³⁸ but "appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide."¹³⁹ Although this writ may be available for "remands not authorized by § 1447(c),"¹⁴⁰ mandamus does not apply to remands for which § 1447(d) prohibits review because "mandamus is the 'or otherwise' of which § 1447(d) speaks."¹⁴¹ Courts differ as to whether a remand order that is not covered by § 1447(d) is a final order (and thus appealable) or an interlocutory order (and thus reviewable only through a writ of mandamus).¹⁴² In the Westfall Act context, however,

¹³³ See, e.g., *Osborn v. Haley*, 549 U.S. 225, 239–41 (2007).

¹³⁴ *Id.*

¹³⁵ See *id.* at 241–43.

¹³⁶ See *id.* at 244 ("[O]f the two antishuttling commands, § 1447(d) and § 2679(d)(2), . . . [the latter] controls.").

¹³⁷ See *id.* at 241–42.

¹³⁸ *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) (citation omitted).

¹³⁹ *Id.*

¹⁴⁰ *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992).

¹⁴¹ *Id.*; see also 28 U.S.C. § 1447(d) (2006) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . .").

¹⁴² *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712–13 (1996) (holding that there could be an appeal under § 1291 and that the *Thermtron* holding that a remand order is not a final judgment would not apply in a situation where § 1447(d) does not preclude

§ 1447(d) bars review. A writ of mandamus thus does not apply to these cases.

The Waco Doctrine. In the 1934 decision of *City of Waco v. United States Fidelity & Guaranty Co.*, the Supreme Court held that a substantive order included in a decree containing several orders—one of which was a remand—could be subject to appellate review, thereby removing it from § 1447(d)'s general prohibition on the reviewability of remand orders.¹⁴³ In that case, the order dismissing a party, which preceded remand, was reviewable because “in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause.”¹⁴⁴ The *Waco* Court, and a later Ninth Circuit decision that applied its reasoning,¹⁴⁵ focused on the conclusive nature of the decision on the parties.¹⁴⁶ Those courts allowed review because “hold[ing] otherwise would deprive [the party] of its right to appeal a substantive determination of contract law.”¹⁴⁷

This doctrine provides, at best, questionable justification for making remand under § 2679(d)(3) reviewable because (1) the Supreme Court, in dicta, has called the continuing validity of the *Waco* doctrine into question,¹⁴⁸ and (2) if the scope-of-employment decision is merely jurisdictional under § 2679(d)(3), then it is not a decision on another issue that conclusively adjudicates the rights of the parties under *Waco*. This exception could, however, potentially apply in Scenario 3, in which the state court decides scope of employment and substitutes the United States as a party prior to removal.¹⁴⁹

In the Westfall Act context, the district court could seemingly enter a decree with two separate orders: one dismissing the United States as a party and the other remanding the case to the state court.

review of the remand order); 15A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3914.11 (2d ed. 1992).

¹⁴³ See *Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140, 143–44 (1934); see also Thomas C. Goodhue, Note, *Appellate Review of Remand Orders: A Substantive/Jurisdictional Conundrum*, 91 IOWA L. REV. 1319, 1325–27 (2006) (chronicling how the *Waco* doctrine became established law in federal circuit courts).

¹⁴⁴ *Waco*, 293 U.S. at 143.

¹⁴⁵ See *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984).

¹⁴⁶ See *Waco*, 293 U.S. at 143; *Pelleport Investors, Inc.*, 741 F.2d at 277.

¹⁴⁷ *Pelleport Investors, Inc.*, 741 F.2d at 277.

¹⁴⁸ See *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 645 n.13 (2006) (“Without passing on the continued vitality of [*Waco*] in light of § 1447(d), we note that on its own terms it is distinguishable.”).

¹⁴⁹ See *supra* text accompanying notes 59–64. In Scenario 3, the Attorney General does not remove prior to the state court’s determination of scope of employment. The state court certifies scope of employment and substitutes the United States as a party. The case is then removed to the federal court with the United States as a party defendant, giving the federal court a party to dismiss.

The former could be a separate order that conclusively determines the scope-of-employment issue, which would enable appellate review.¹⁵⁰ This solution, however, still requires a significant waste of judicial resources because it requires both the state and federal court to decide the scope-of-employment issue in the same case. Furthermore, although the *Waco* exception may enable review of the district court's decision to dismiss the United States as a party, it does not enable review of the remand itself.¹⁵¹ As a result, this "solution" creates a difficulty whereby the parties can appeal the decision to dismiss the United States but the state court would remain bound by a federal trial court's decision that essentially reviewed its own determination.

III

TWO IMMOBILE POINTS CREATE AN UNTENABLE DILEMMA REQUIRING A CONGRESSIONAL SOLUTION

This Note has demonstrated that the only reasonable judicial solution to the circularity problem is to read the Westfall Act as making the first court's scope-of-employment decision final and binding. Unfortunately, two competing doctrines of Supreme Court jurisprudence make this solution unlikely until one of them changes. First, the command of *Kircher* dictates that an unreviewable decision cannot bind a coordinate court.¹⁵² Second, the jurisprudence surrounding § 1447(d) indicates that a remand order for lack of subject matter jurisdiction is unreviewable.¹⁵³ Because a remand pursuant to § 2679(d)(3) can only be for lack of subject matter jurisdiction, that order cannot be reviewable.¹⁵⁴ Ultimately this remand issue causes the Westfall Act's intractable circularity problem. The solution is evasive—one of these principles must yield to the other in the context of the Westfall Act. Support exists for the persistence of both independently: it is unfair to bind parties to a judgment that they had no opportunity to appeal and it is logical that the courts do not encourage interruptions to litigation solely to review jurisdictional questions.

¹⁵⁰ See *Waco*, 293 U.S. at 143–44 (finding that an order of dismissal preceding an order of remand was reviewable given its conclusive effect on the parties); see also *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 236 (2007) (finding that no separate order existed for the Court to review but implicitly supporting *Waco*'s application to a situation in which a court issues two separate orders).

¹⁵¹ The fact that the reviewed order necessarily affects remand does not mean that the appellate court bypasses § 1447(d) to review a remand order. See *Waco*, 293 U.S. at 143–44 (“A reversal cannot affect the order of remand”); see also *Powerex Corp.*, 551 U.S. at 236 (cautioning that the *Waco* doctrine does not permit an appeal if there is no order separate from the remand order (citing *Kircher*, 547 U.S. at 645–46 n.13)).

¹⁵² See *Kircher*, 547 U.S. at 647.

¹⁵³ See *supra* notes 30–36 and accompanying text; see also *supra* Part II.D.1.

¹⁵⁴ See *id.*

Ultimately, this Note cannot argue that one of these doctrines should yield to the other in all situations. The inherent problems demonstrate the potentially unfortunate outcomes of statutes drafted without keeping these two long-standing rules in mind.¹⁵⁵ The best solution, therefore, is that Congress revisit the Westfall Act and other similarly drafted statutes with both rules—*Kircher's* requirement of reviewability for a decision to bind parties and § 1447(d)'s general prohibition on appellate review of remand orders for lack of subject matter jurisdiction—in mind. Fortunately, congressional precedent exists for such drafting, as legislators have demonstrated that they are acutely aware of both the general prohibition on the reviewability of remand orders and ways in which statutory language can override that prohibition.¹⁵⁶

Adding a clause to the Westfall Act similar to those in the statutes that override § 1447(d)'s prohibition on appellate review is one avenue through which Congress could address the Westfall Act's circularity problem—but it is not the only one. Another congressional solution to the circularity problem is to amend the statute in such a way as to elucidate which court had the ultimate responsibility for determining the scope-of-employment issue on the merits. Congress could amend § 2679(d)(3) as follows:

In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding *shall* be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in

¹⁵⁵ The Westfall Act is not the only statute drafted in this way. The SLUSA at issue in *Kircher* created the potential for a similar problem because its language intertwined the merits-based and jurisdictional facts. See *Kircher*, 547 U.S. at 642–43. Ultimately, *Kircher* resolved that particular problem, but the statutory failure to acknowledge issues of reviewability and remand had originally created the problem in *Kircher*.

Similarly, 16 U.S.C. § 831c-2 (2006), regarding the Tennessee Valley Authority's responsibility to defend suits brought against its defendant employees acting within the scope of their employment, reads almost identically to the Westfall Act, creating the potential for the same circularity problem that arose in *Foster*. Other scope-of-employment-related statutes create a circularity problem similar to that which arose before *Osborn* because the statutes do not render the Attorney General's certification conclusive for purposes of removal. *E.g.*, § 22 U.S.C. 2702(c) (2006); 38 U.S.C. § 7316(c) (2006); 42 U.S.C. § 5055(f)(3) (2006). *But see* 42 U.S.C. § 233(p)(4)(B) ("The certification of the Attorney General . . . shall conclusively establish such facts for purposes of jurisdiction pursuant to this subsection.").

¹⁵⁶ *E.g.*, 25 U.S.C. § 610(c) (2006) ("The United States shall be an indispensable party to, and may be joined in, any such proceeding involving trust land with the right to remove the action to the United States district court for the district in which the land is situated, according to the procedure in section 1446 of title 28, and the United States shall have the right to appeal from any order of remand entered in such action."); 30 U.S.C. § 816(a)(1) (2006) ("Upon the filing of the record after such remand proceedings, the jurisdiction of the court shall be exclusive and its judgment and degree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28.").

which it is pending *for the purpose of making a final decision, on the merits, regarding whether the defendant-employee was acting within the scope of his employment.* If, in considering the petition, the district court determines, *on the merits*, that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.¹⁵⁷

These changes would clarify that the federal district court is the *one and only* court with jurisdiction to determine the scope-of-employment issue on the merits. This explicit statutory language would effectively eliminate the circularity problem. Either of these solutions is workable, and both are preferable to the current state of the statute, which creates the potential for further *Foster*-like circularity problems.

CONCLUSION

This Note has presented, through *Foster v. Hill*, an examination of a circularity problem created by the interaction between the Westfall Act and 28 U.S.C. § 1447(d). Although I have used *Foster* and the Westfall Act as vehicles to explore this issue, the problem and its solutions apply much more broadly. When Congress drafts statutes without keeping the doctrines of reviewability, remand, and jurisdiction in mind, the result is quite possibly a collision of two immobile Supreme Court precedents—one that states that a remand order for lack of subject matter jurisdiction is unreviewable, and another that dictates that an unreviewable decision cannot be binding. When Congress drafts statutes that require a federal court to undertake a preliminary factual determination to decide its jurisdiction and does not provide a solution to the inevitable reviewability problem, it creates the potential for a case to travel indefinitely between state and federal court the way that *Foster* has since 2004.

The solution is not easy. In the absence of a congressional amendment of the statute, the courts must make a decision that upholds one of these rules and denigrates the other. The most likely outcome in the Westfall Act context is to forgo *Kircher* and allow courts to create federal common law that makes the first scope-of-employment decision binding. This solution is, admittedly, imperfect. But, without that solution or a statutory revision, cases can continue to travel an infinite loop between federal and state courts without any relief for either the plaintiff or the justice system.

¹⁵⁷ 28 U.S.C. § 2679(d)(3) (2006) (proposed alterations in italics).

