No. 13-1174

In the
Supreme Court of the United States

ELLEN GELBOIM, *et al.*,
Petitioners,
v.
BANK OF AMERICA CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber's members are frequently parties—as both plaintiffs and defendants—in consolidated cases, including multidistrict litigation ("MDL") proceedings instituted pursuant to 28 U.S.C. § 1407. In appropriate circumstances, MDLs and consolidations under Federal Rule of Civil Procedure 42 can promote judicial efficiency and streamline complex litigation by bringing together before a single district court judge multiple cases that present common legal and factual issues, thereby avoiding divergent rulings and duplicated efforts. Realization of these benefits, however, requires that the judge be afforded a degree of discretion and control over the litigation's progress that matches its size and complexity. The Chamber files this brief to explain why petitioners'

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the brief's preparation and submission. Counsel consented to the brief's filing in letters that are on file with the Clerk's office.

proposed rule—which would automatically "permit[] appeals from *all* decisions dismissing" complaints within larger consolidated proceedings, Pet. Br. 35–36 (emphasis added)—contravenes the policies and purposes underlying Section 1407 and Rule 42 and, if accepted, would thwart district judges' ability to manage complex cases. The Court should instead adopt a more flexible rule that gives a district judge discretion to determine when partial or piecemeal appeals would further—or hinder—the just and efficient resolution of the *entire* litigation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioners urge the Court to announce what they call a "clear, categorical" rule: No matter the number of constituent actions in a consolidation proceeding, the interrelationship of those actions, or the extent to which they have been consolidated, a litigant must always have the absolute right immediately to appeal a decision dismissing his complaint on the merits. Pet. Br. 35–36. Clarity, of course, is a good thing—especially when implementing jurisdictional statutes. And as explained below, respondents' proposed rule offers clarity, as well. The problem with petitioners' rule is not that it is *clear*, but that it is *rigid*. And at least in the novel MDL context, rigidity is a bad thing.

Petitioners' rigid rule rests (perhaps not surprisingly) on formalism: (1) Had their individual action *not* been consolidated as part of an MDL proceeding, petitioners say, they would have had a right under 28 U.S.C. § 1291 immediately to appeal the district court's order dismissing their complaint; (2) the "mere fact of consolidation" under 28 U.S.C. § 1407 does nothing to change that re-

sult; and (3) therefore, they must also have a right of immediate appeal within the MDL context. Pet. Br. 10. Petitioners' analysis ignores the realities of MDL litigation, the unique nature of consolidated actions, and the myriad ways in which consolidation can—and in the interest of systemic efficiency must—modify ordinary litigation procedures.

To be clear, the alternative to petitioners' proposal, which would require immediate appeals of every dispositive order within the context of an MDL, is *not* a rule that categorically forbids immediate appeals. To the contrary, the alternative is a rule—no less "clear" than petitioners', only less wooden—that vests discretion in the MDL judge, under Federal Rule of Civil Procedure 54(b) and 28 U.S.C. § 1292(b), to determine, in the context of the larger litigation, when an immediate appeal properly serves the policies of fairness, efficiency, and convenience that underlie Section 1407 and the MDL process.

That flexible approach is consistent not only with Congress's intent in establishing the MDL device, but also with the realities and challenges that attend often-sprawling consolidated litigations. And historical practice demonstrates that judges presiding over MDL proceedings have routinely used Rule 54(b) and Section 1292(b) to balance individual litigants' interests in prompt appellate review with broader systemic considerations—and frequently to permit immediate individual appeals.

Given that petitioners' unconditional rule is incompatible with the realities of complex litigation and unnecessary in light of alternative means of facilitating imme-

diate appeals, it is unsurprising that their position has attained almost no support in the courts of appeals. Indeed, the overwhelming majority rule in cases that have been consolidated for *all* purposes is that an order disposing of fewer than all of the claims and parties is not immediately appealable absent district-court certification. These decisions, which date back decades, are consistent with the final-judgment principle and the policies underlying it. The clear rule that they embrace should be extended to consolidated cases generally—including MDLs—not jettisoned entirely and without good reason, as petitioners urge.

ARGUMENT

I. Petitioners' Unyielding Approach To Determining Finality Is Incompatible With The Flexibility And Discretion Necessary To Effective MDL Case Management.

An MDL is not just a disaggregated collection—or as petitioners say, a "temporary coexistence," Pet Br. 11—of similar cases. Rather, as one court explained it, an MDL "is a special breed of complex litigation where the whole is bigger than the sum of its parts." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1232 (9th Cir. 2006).

An MDL's life cycle has three distinct phases. First, the MDL begins—or more precisely is preceded by—multiple separate, plaintiff-v.-defendant "actions" that are "pending in different [federal judicial] districts." 28 U.S.C. § 1407(a). Second, if those separate actions "involv[e] one or more common questions of fact," then the Judicial Panel on Multidistrict Litigation ("JPML")

may order that they be "coordinated" or (as here) "consolidated" before a single federal district judge for pretrial proceedings. *Id.* Finally, "at or before the conclusion of such pretrial proceedings," each action that has not "been previously terminated" (*i.e.*, resolved during the consolidated phase) "shall be remanded" to the judicial district "from which it was transferred." *Id.*

The parties here agree that individual cases come into an MDL separately and that if they leave they do so separately. Thus, as respondents say, a constituent action "stands alone before it is consolidated for pretrial proceedings under Section 1407"—*i.e.*, in the first phase described above—and it "again stands alone if remanded"—*i.e.*, in the third and final phase. Resp. Br. 32. The question that divides the parties is whether, during the second phase—when, as here, the constituent actions are consolidated—the cases remain wholly separate and divisible for appellate purposes, such that a litigant who suffers an adverse judgment *automatically* has an immediate right of review.

That is not a question that can (or should) be answered in the abstract or by resort to theoretical concepts. Rather, it must be answered by reference to the unique nature of MDL proceedings and the practical, on-the-ground realities of consolidated litigation.

A. To Meet the Unique Challenges of Consolidated Litigation, a Judge Tasked With Handling an MDL Needs Significant Management Flexibility.

The MDL device was born of pragmatic concerns—in particular, of a felt need for statutory authority ex-

pressly providing for the consolidation of often large and unwieldy cases that, in the absence of coordinated action, could "disrupt the functions of the Federal Courts." H.R. Rep. No. 90-1130, 1968 U.S.C.C.A.N. 1898, 1899 (Feb. 28, 1968). Congress created the MDL procedure in response to a specific litigation explosion, in which, "[f]ollowing the successful Government prosecution of electrical equipment manufacturers for antitrust law violations, more than 1,800 separate damage actions were filed in 33 Federal district courts." *Id.* That "wave of litigation threatened to engulf" the federal courts, and "[u]nless coordinated action was undertaken it was feared that conflicting pretrial discovery demands for documents and witnesses" would severely compromise the courts' ability to function fairly and efficiently. *Id.*

In response, an *ad hoc* committee of federal judges, operating under the auspices of the Judicial Conference of the United States, stepped in to "restore order to the litigation." *Id.* They did so by, among other things, (1) entering a series of "uniform pretrial and discovery orders," (2) scheduling and holding "[n]ational depositions" directed by a single "[l]ead counsel" on each side of the "*v.*", and establishing "[c]entral document depositories" to house the plaintiffs' and defendants' papers. *Id.* The committee judges deftly managed the sprawling cases, successfully bringing them to conclusion within a span of several years.

Recognizing that the management of those cases, while successful, "entirely depended on the voluntary agreement of all the parties as well as presiding judges," Congress sought to provide a firm statutory footing for future pretrial consolidation. *Id.* The fruit of Congress' labor was 28 U.S.C. § 1407, "[t]he objective of [which

was] to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions." *Id.*; *see also* John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tulane L. Rev. 2225, 2226 (2008) (tracing Section 1407's history and purpose). Since its establishment nearly 50 years ago, "[m]ultidistrict transfer under 28 U.S.C. § 1407 has continued to be an important part of complex litigation management," and it "remains one of the most effective tools for managing cases filed in multiple districts." David F. Herr, *Manual for Complex Litigation 4th* § 20.14, at 308 (2009); *see also* David F. Herr, *Multidistrict Litigation Manual: Practice Before the Judicial Panel on Multidistrict Litigation* § 1:1, at 3 (2014) (noting the "increasing importance [of the JPML] in the efficient handling of certain cases pending in more than one federal district").

Even more so today than in the pre-Section-1407 era, "administering cases in multidistrict litigation is different from administering cases on a routine docket." *In re PPA*, 460 F.3d at 1229. As the JPML recently emphasized, there is no "typical" MDL; rather, "[e]ach multidistrict litigation is unique." *In re Light Cigarettes Mktg. & Sales Practices Litig.*, 856 F. Supp. 2d 1330, 1332 n.2 (J.P.M.L. 2012). As of October 15, 2014, there were 281 active MDL dockets assigned to 212 different judges in 58 different federal judicial districts. U.S. J.P.M.L., *MDL Statistics Report—Distribution of Pending MDL Dockets by District*, *available at* http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-October-15-2014.pdf (visited Oct. 20, 2014). Those 281 MDL dockets account for a total of 397,069 constituent actions, 128,055 of which are currently pending. *Id.* Existing MDLs comprise as few

as one and as many as 8,500 cases and cover a whole host of subject matters, including antitrust, intellectual property, labor and employment, securities, product liability, and even terrorism. *Id.*

Given this variation, and in view of the enormous task that confronts a district judge assigned to manage an MDL, attention to on-the-ground practicalities is paramount. In particular, in order to achieve the efficiency that "Congress established MDL protocols to encourage," an "MDL court[] must be given greater discretion to organize, coordinate and adjudicate its proceedings" than a judge handling a typical one-on-one suit. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 496 F.3d 863, 867 (8th Cir. 2007) (citation omitted).

B. To Achieve the Benefits of Consolidation, the MDL Judge Is Empowered To Conduct the Proceeding, in Important Respects, as a Single Combined Case.

A common thread running through MDLs of every size and subject matter is that, in important respects, the MDL proceeds as a single combined case. Upon consolidation, "the jurisdiction of the transferor court ceases and the transferee court has exclusive jurisdiction" over all related actions. *Manual for Complex Litigation* § 20.131, at 301. The judge to whom the MDL is assigned will organize the multiple constituent cases under a single "master" docket number and will typically issue a series of "case management orders," applicable to all actions, establishing a uniform schedule for pleadings, discovery, motions, and the like. Often, the judge's "CMO" will require plaintiffs to file a single "master" com-

plaint—and defendants, a "master" answer—and will mandate rigorously coordinated discovery, pursuant to which plaintiffs and defendants must march in lockstep. The judge may, and often will, entertain motions and issue orders applicable to many—or even all—of the constituent cases. *See In re PPA*, 460 F.3d at 1231 (MDL judge can "decide all pretrial motions, including dispositive motions such as motions to dismiss [and] motions for summary judgment" (citations omitted)); *In re Food Lion, Inc., Fair Labor Standards Act Effective Scheduling Litig.*, 73 F.3d 528, 532 (4th Cir. 1996) ("In practice, . . . the vast majority of transferred cases are disposed of completely in the transferee court . . . .").

Why all the "oneness"? As the MDL statute says, "for the convenience of parties and witnesses," as well as "the just and efficient conduct of [the] actions." 28 U.S.C. § 1407(a); *accord, e.g.*, *In re Guidant Corp.*, 496 F.3d at 867 ("Congress established MDL protocols to encourage efficiency."). In particular, "[t]he objective of [MDL] transfer is to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, and the courts." *Manual for Complex Litigation* § 20.131, at 300. In short, the MDL process serves to minimize "piecemeal litigation" that increases costs and burdens for both litigants and courts. *Multidistrict Litigation Manual* § 3:3, at 22.

Of course, "administer[ing] the proceeding as a whole"—and thereby realizing the benefits that consolidated treatment offers—"necessarily includes keeping the parts in line." *In re PPA*, 460 F.3d at 1232. And keeping the parts in line necessarily requires a few adjustments to typical litigation procedures. To take the

most obvious example, although "[p]laintiffs normally may decide where to file their lawsuits," Section 1407 empowers the JPML to override plaintiffs' venue choices. *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 588 (6th Cir. 2013) (Sutton, J.). In particular, Section 1407 provides for transfer of individual actions "to any district," and with respect to any given case, the transferee court "need not be a proper venue," 15 Charles Alan Wright et al., *Federal Practice & Procedure* § 3862 (4th ed. 2014).

Perhaps nowhere is the unitary nature of the MDL process more evident (to both plaintiffs and defendants) than in discovery. One of the principal "objective[s] of transfer is to eliminate duplication in discovery." *Manual for Complex Litigation* § 20.131, at 300. Accordingly, "[i]mplicit in Section 1407 is the assumption that the transferee judge will . . . establish a national unified discovery program to avoid delay, repetition and duplication and to insure that the litigation is processed as efficiently and economically as possible." *In re PPA*, 460 F.3d at 1230 (citation and internal quotation marks omitted). Whatever benefits a unified discovery program may yield, however, come "at a price." *Vioxx Prods. Liab. Litig. Steering Comm. v. Merck & Co.*, Nos. 06-30378 & 06-30379, 2006 WL 1726675, at *3 (5th Cir. May 26, 2006) (per curiam). Put simply, "[c]onsolidated discovery of MDL litigation, with its huge aggregation of cases, sorely taxes the processes attending our traditional binary structure in civil cases." *Id.*

Finally, MDL litigants on both sides of the "*v.*" often forfeit the ability to insist on their own lawyers—and as a result, their own preferred case strategies. District judges presiding over MDLs frequently appoint lead

counsel, or "leadership group[s]," to "orchestrate pretrial litigation for all" similarly situated parties. *In re Genetically Modified Rice Litig.*, 764 F.3d 864, 866 (8th Cir. 2014) (rejecting challenge brought to fee awarded to designated lead plaintiffs' counsel). These lead attorneys, selected from among numerous lawyers representing parties to the case, effectively act as counsel for everyone; they "coordinate[] pretrial discovery, prepare[] for and conduct[] numerous depositions, appear[] before the district court at hearings and status conferences, select[] and prepare[] experts, and perform[] and assist[] with bellwether trials." *Id.*

These modifications of typical litigation procedures exist to serve Section 1407's purpose of maximizing judicial economy and the efficiency of the overall MDL. As explained below, the modest adjustment of an individual litigant's immediate-appeal rights contemplated here—and to be clear, in light of the remaining avenues of appellate review, it is indeed modest—is just another similar accommodation, which is likewise necessary to the realization of the benefits of MDL consolidation.

C. To Manage an MDL Efficiently and Fairly to All Parties, the Judge Must Have the Discretion To Allow—or Disallow—Immediate Appeals in Individual Constituent Cases.

As already explained, in order to manage a consolidated proceeding, "[t]he district court needs to have broad discretion to administer the proceeding *as a whole*, which necessarily includes keeping the parts in line":

> A district judge charged with the responsibility of "just and efficient conduct" of the multiplicity of actions in an MDL proceeding must have discretion to manage them that is commensurate with the task. The task is enormous, for the court must figure out a way to move thousands of cases toward resolution on the merits while at the same time respecting their individuality. . . . For it all to work, multidistrict litigation assumes cooperation by counsel and macro-, rather than micro-, judicial management because otherwise, it would be an impossible task for a single district judge to accomplish. Coordination of so many parties and claims requires that a district court be given broad discretion to structure a procedural framework for moving the cases as a whole as well as individually, more so than in an action involving only a few parties and a handful of claims.

In re PPA, 460 F.3d at 1231–32 (emphasis added).[2]

Just as the MDL process is predicated on functional, practical considerations, so too is the final-judgment rule. This Court has long recognized that "[f]or purposes of appellate procedure, finality . . . is not a technical concept of temporal or physical termination." *Cobbledick v. United States*, 309 U.S. 323, 326 (1940). Rather, it is a

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[2] *See also, e.g.*, *Freeman v. Wyeth*, 764 F.3d 806, 810 (8th Cir. 2014) (noting the "unique problems an MDL judge faces, especially when the MDL litigation involves hundreds of attorneys representing thousands of clients"); *In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1313 (Fed. Cir. 2011) ("In complex cases, and particularly in multidistrict litigation cases, the district court 'needs to have broad discretion to administer the proceeding.'" (quoting *In re PPA*, 460 F.3d at 1232)).

practical—even "intensely 'practical'"—notion. *Matthews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976). In some circumstances, of course, the Court has given 28 U.S.C. § 1291 "a practical rather than technical construction" as a means of expanding the right to immediate appeal. *E.g.*, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). In others, the Court has invoked practical considerations in the course of insisting on a more robust notion of finality and refusing immediate appeals. *See, e.g.*, *Cobbledick*, 309 U.S. at 325–26.

The point is that the Court has historically—and sensibly—privileged substance and function over form in assessing finality. Petitioners' proposed rule—which would "permit[] appeals from *all* decisions dismissing a complaint on the merits," no matter the degree to which actions have been consolidated, Pet. Br. 35–36 (emphasis added)—pays absolutely no heed to real-world practicalities. The rule is, by petitioners' own description, "categorical." *Id.* at 35.

In the unique circumstances presented here, a proper consideration of the pragmatic concerns that underlie MDL practice, and that have traditionally informed this Court's interpretation of the final-judgment rule, strongly favors respondents' position. The Court's reasoning in *Cobbledick* applies here precisely. There, in refusing to recognize appellate jurisdiction over appeals taken from orders declining to quash subpoenas requiring nonparties to appear before a grand jury, the Court emphasized that "from the very beginning" Congress has "forbidd[en] piecemeal disposition on appeal of *what for practical purposes is a single controversy*." 309 U.S. at 325 (emphasis added). Congress has done so, this Court said, not in pursuit of proper form but, rather, in pursuit

of a "policy" of sound "judicial administration"—and in particular, a policy against a "succession of separate appeals" in the course of a single litigation. *Id.* at 325–26. "To be effective," the Court continued, this "judicial administration" cannot be "leaden-footed"; it must maintain its "momentum," which "would be arrested by permitting separate reviews of the component elements in a unified cause." *Id.* at 325.

Cobbledick highlights a theme that runs throughout this Court's final-judgment jurisprudence—namely, that the finality inquiry does not focus, at least primarily, on an individual case or party. Rather, as the Court there emphasized, the finality requirement serves larger purposes—facilitating sound "judicial administration," ensuring "the effective conduct of litigation," and ultimately, "achieving a healthy legal system." *Id.* at 325–26.[3]

Focusing on the systemic (rather than purely individualistic) considerations that animate this Court's final-judgment cases underscores the problem with peti-

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[3] *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) ("The inquiry requires some evaluation of the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" (citation omitted)); *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964) ("And our cases long have recognized that whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that . . . it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality."); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (discussing "considerations that always compete in the question of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other").

tioners' rigid position, at least as applied in the unique MDL context. As explained above, an MDL proceeding is, in important respects—including venue, case management, and discovery—"for practical purposes . . . a single controversy." *Cobbledick*, 309 U.S. at 325. Granting every MDL litigant the automatic right to appeal the resolution of its individual, constituent action would fatally frustrate the MDL judge's ability to manage the "enormous" task that she confronts. *In re PPA*, 460 F.3d at 1231. As a practical matter, the judge would lose control of the proceedings every time she issued an order dispositive of even one constituent case (perhaps among thousands). The aggrieved individual litigant could then appeal immediately, even if the MDL judge believed that an immediate appeal would materially harm the remaining litigants or complicate the conduct of the overall proceeding. Withdrawing the judge's discretion to prevent the unnecessary balkanization of the MDL would threaten both her ability to move "the cases as a whole as well as individually," *id.* at 1232, and Congress's overriding goals of fairness, efficiency, and convenience. *See, e.g.*, *In re Fema Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873, 2010 WL 1410675, at *1 (E.D. La. Mar. 30, 2010) ("This is a massive MDL, and if the Court begins allowing piece-meal appeals of issues applicable to only certain few member cases just to determine the correctness of its Orders therein, progress of this matter will be impeded.").[4]

[4] There is also a risk that, by frustrating district judges' ability to manage their MDL dockets, petitioners' proposed rule might actually cause judges to deny meritorious dispositive motions. *Cf. In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 210, 223 (E.D.N.Y. 1979) ("In spite of these persuasive arguments for granting the Government's motion for summary judgment, more practical considera-

The MDL judge is uniquely situated to decide when an immediate appeal in a constituent case "will promote the just and efficient conduct" of the actions generally. 28 U.S.C. § 1407(a). Accordingly, rather than decreeing a wooden, one-size-fits-all rule allowing immediate appeals from every dispositive order in an MDL, the Court should leave the determination of finality to the sound discretion of the MDL judge. As explained in the next Part, judges handling complex MDLs have not hesitated to use their authority under Federal Rule of Civil Procedure 54(b) and 28 U.S.C. § 1292(b) to facilitate immediate appeals where consistent with the fair and efficient conduct of the larger litigation.

II. Because Rule 54(b) And Section 1292(b) Provide MDL Judges Ample Authority To Accelerate Appellate Review Where Appropriate, There Is No Need For An Unconditional Rule Authorizing Immediate Appeals From Every Dispositive Order In Every Constituent Case.

While the unique nature of MDL proceedings generally weighs against permitting immediate appeals of orders addressing only a subset of the claims at issue in the litigation, the final-judgment rule does not bar MDL litigants from seeking prompt appellate review. As in virtually any type of federal litigation, parties to MDLs can seek immediate review under both Federal Rule of Civil Procedure 54(b) and 28 U.S.C. § 1292(b), and district judges may authorize such appeals in appropriate circumstances.

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tions, looking to the posture of this complex multidistrict litigation, require that the motion be denied.").

In light of these two tried-and-true mechanisms, which provide MDL litigants ample opportunities for immediate appellate review, there is simply no need to decree the "categorical" rule that petitioners propose. And to be clear, review under Rule 54(b) and Section 1292(b) is not merely hypothetical; as demonstrated below, federal courts presiding over consolidated actions have repeatedly used both tools to authorize immediate appellate review. *Cf. Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (observing, in refusing to allow immediate appeals of orders requiring disclosure of attorney-client privileged information, that while other "discretionary review mechanisms do not provide relief in every case, they serve as useful 'safety valve[s]'").

A. MDL Judges Routinely Use Rule 54(b) To Enter Immediately Appealable Judgments in Consolidated Proceedings.

Federal Rule of Civil Procedure 54(b) authorizes district courts to enter partial final judgments for immediate appeal in either of two circumstances: (1) "[w]hen an action presents more than one claim for relief" and the court finally adjudicates one of those claims, and (2) "when multiple parties are involved" and the court finally adjudicates all of the claims by or against at least one party.

To "dispatch[]" a judgment for appeal in either circumstance, *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956), the district court need only "expressly determine[] that there is no just reason for delay." Fed. R. Civ. P. 54(b). This determination is for "good reason left to the sound judicial discretion of the district court," *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10

(1980), because it is "the one most likely to be familiar with the case and with any justifiable reasons for delay," *Mackey*, 351 U.S. at 437. "The timing of such a release" is also "vested by the rule primarily in the discretion of the District Court." *Id.*

Litigants have long used Rule 54(b) to secure immediate appellate review in multidistrict litigation. The massive MDL involving the allegedly defective implantation of orthopedic bone screws is illustrative. There, the JPML consolidated and transferred more than 2,800 individual actions from 60 federal districts to the Eastern District of Pennsylvania for pretrial purposes. In the course of the litigation, the district judge repeatedly entered partial final judgments authorizing immediate appeals to the Third Circuit under Rule 54(b). In one such appeal, for example, the Third Circuit reversed the district judge's preemption- and Rule 12(b) (6)-based dismissal of plaintiffs' claims against one defendant. *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 159 F.3d 817, 819–21 (3d Cir. 1998). This Court afforded the litigants further review on that same Rule 54(b) appeal, granting certiorari and reversing the Third Circuit's preemption holding. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). In another Rule 54(b) appeal from the same MDL proceeding, the Third Circuit reviewed the district judge's dismissal of conspiracy and concert-of-action claims alleged by thousands of plaintiffs. *In re Orthopedic Bone Screw Prods Liab. Litig.*, 193 F.3d 781, 784–788 (3d Cir. 1999).

Rule 54(b) was also employed in an antitrust MDL in the Northern District of Illinois comprising hundreds of separate lawsuits alleging that prescription drug manufacturers and wholesalers conspired to fix prices charged

to retail pharmacies. During the course of that sprawling litigation, the district judge handling the MDL certified, and the Seventh Circuit considered, several Rule 54(b) appeals. In one such appeal, the Seventh Circuit reversed the district judge's grant of partial summary judgment to one of the pharmaceutical-company defendants. *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 604–05 (7th Cir. 1999). In another Rule 54(b) appeal, the Seventh Circuit reversed the district judge's grant of partial summary judgment to the wholesaler defendants. *Id.* And in yet another Rule 54(b) appeal, the Seventh Circuit affirmed the district judge's partial summary judgment on certain claims against the wholesaler defendants, even though the liability of other defendants remained "unresolved" in the district court. *In re Brand Name Prescription Drugs Antitrust Litig.*, 288 F.3d 1028, 1030 (7th Cir. 2002).

These are just a couple of illustrative examples. Individual litigants have successfully sought and obtained immediate appellate review under Rule 54(b) in hundreds of MDL proceedings across all federal circuits. *See, e.g.*, *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, 751 F.3d 150, 155–56 (3d Cir. 2014) (reviewing partial judgment in Fosamax pharmaceutical MDL); *In re Family Dollar FLSA Litig.*, 637 F.3d 508, 510 (4th Cir. 2011) (reviewing partial summary judgment in Family Dollar FLSA MDL); *Mountain Bird, Inc. v. Goodrich Corp.*, 369 F. App'x 940, 941–42 (10th Cir. Mar. 23, 2010) (reviewing partial summary judgment in Cessna 208 Series MDL); *In re Peanut Crop Ins. Litig.*, 524 F.3d 458, 461 (4th Cir. 2008) (considering partial summary judgment in Peanut Crop Insurance MDL); *In re Gabapentin Patent Litig.*, 503 F.3d 1254, 1258–59 (Fed. Cir. 2007) (considering partial summary judgment in

pharmaceutical patent MDL); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 469–70 (9th Cir. 2007) (reviewing partial dismissal in Airline Deep Vein Thrombosis MDL); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007) (reviewing partial dismissal in South African Apartheid MDL), *aff'd*, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).[5]

As respondents have explained in detail, petitioners' assertion that Rule 54(b) is completely unavailable in MDL proceedings lacks merit. *See* Resp. Br. 33. The Federal Rules of Civil Procedure generally apply in MDL proceedings, *see* Fed. R. Civ. P. 81, and there is nothing in the language of Rule 54(b) in particular that could be read to exclude multidistrict litigation. Although Rule 54(b)'s "multiple-claims" provision authorizes entry of a final partial judgment "[w]hen *an action* presents more than one claim for relief," the term "action" is sensibly interpreted as referring to the entire consolidated litigation, not to the individual constituent cases consolidated within that litigation. What this Court once said about the term "party" applies to the

[5] At least four Rule 54(b) appeals were allowed in the MDL concerning the September 11th terrorist attacks. *See In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 79 (2d Cir. 2008) (reviewing dismissal of certain claims against seven of the defendants under the Foreign Sovereign Immunities Act), *abrogated by Samantar v. Yousuf*, 560 U.S. 305 (2010); *In re Terrorist Attacks on Sept. 11, 2011*, 714 F.3d 659, 665 (2d Cir. 2013) (reviewing dismissal of certain claims against 37 other defendants for lack of personal jurisdiction); *In re Terrorist Attacks on Sept. 11, 2011*, 714 F.3d 109, 111 (2d Cir. 2013) (reviewing dismissal of claims against two defendants for lack of jurisdiction); *In re Terrorist Attacks on Sept. 11, 2011*, 714 F.3d 118, 122 (2d Cir. 2013) (reviewing dismissal of claims against five other defendants for failure to state a claim upon which relief could be granted).

word "action," as well: it need not be taken to "indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002).

Moreover, even if the term "action" were given petitioners' proposed construction, it would not matter here because Rule 54(b)'s separate "multi-party" provision authorizes the entry of partial final judgment "when multiple parties are involved"—without using the term "action." Consequently, under either reading, petitioners could have (and should have) sought a Rule 54(b) judgment to appeal—just as hundreds of other MDL litigants have successfully done. (Notably, petitioners assert in their brief—echoing Rule 54(b)'s standard almost verbatim—that "there is no reason for delay" of their appeal. Pet. Br. 11.)

B. MDL Judges Routinely Use Section 1292(b) To Certify Interlocutory Appeals in Consolidated Proceedings.

In addition to invoking Rule 54(b), MDL litigants may also seek immediate appellate review of adverse district court orders under 28 U.S.C. § 1292(b). "[E]nacted to meet the recognized need for prompt review of certain nonfinal orders," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978), Section 1292(b) establishes a "two-tiered arrangement" for certifying an interlocutory appeal, *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995).

First, a district court must determine that the order "involves a controlling question of law as to which there is a substantial ground for difference of opinion" and that

"an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Second, if a district court certifies an order for immediate appeal under Section 1292(b), the court of appeals may, in its discretion, permit an appeal to be taken. *Id.* Notably, in considering the appeal, the court of appeals is not limited to the "controlling question of law identified by the district court," but may "exercise jurisdiction over any question that is included within the order that contains the controlling question of law." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204 (1996).

District judges presiding over MDLs have repeatedly certified, and the appellate courts have routinely accepted, Section 1292(b) appeals. *See, e.g.*, *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 526–28 (5th Cir. 2014) (reviewing denial of motion to dismiss, among other certified issues, in drywall MDL); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 848 (7th Cir. 2012) (en banc) (reviewing denial of motion to dismiss in potash MDL); *In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 465–67 (3d Cir. 2012) (considering grant of summary judgment to one defendant in labor and employment MDL); *W.R. Huff Asset Mgmt., Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 103–04 (2d Cir. 2008) (reversing denial of motion to dismiss plaintiff's claims for lack of standing in federal securities MDL); *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 304–05 (4th Cir. 2007) (reviewing denial of motion to dismiss for lack of antitrust standing in antitrust MDL); *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 290–92 (3d Cir. 2004) (reviewing denial of motion to dismiss in automotive-paint antitrust MDL); *In re Korean Air Lines Disaster of Sept. 1, 1983*,

829 F.2d 1171, 1172 (D.C. Cir. 1987) (R.B. Ginsburg, C.J.) (reviewing denial of plaintiff's motion for summary judgment in airline-disaster MDL), *aff'd*, *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989).

In sum, Rule 54(b) and Section 1292(b) substantially mitigate any claimed hardship resulting from a robust, and pragmatic, application of the final-judgment rule in multidistrict litigation. There simply is no compelling reason to adopt petitioners' rule automatically authorizing (and, in fact, requiring) immediate appeals from every dispositive order in every constituent case within an MDL proceeding.

III. Petitioners' Rule Would Abrogate Longstanding Circuit Precedent Without Any Valid Justification.

Given that petitioners' proposed finality rule is neither consistent with the effective management of complex litigation nor necessary in light of other avenues for appellate review, it should come as no surprise that their position has garnered almost no support among the courts of appeals. Although petitioners assert that "the majority of circuits would have permitted [their] appeal" in the particular circumstances of this case, Pet. Br. 36, that narrow characterization of the issue fails to capture the broader question before this Court: whether an order resolving the claims in one (but not all) of a group of consolidated cases is a "final decision[]" within the meaning of 28 U.S.C. § 1291 that may—indeed, must—be appealed immediately. "Just as Rule 42(a) enables district courts to consolidate cases for a variety of reasons, it permits various *degrees* of consolidation. Cases may be consolidated for discovery, for pre-trial proceedings, for

trial, or for all purposes." Jacqueline Gerson, Comment, *The Appealability of Partial Judgments in Consolidated Cases*, 57 U. Chi. L. Rev. 169, 173 (1990). The question before the Court asks what rule should apply to consolidated cases generally, not just to petitioners' own particular appeal.

Petitioners' narrow statement of the issue obscures the consensus that has developed among the courts of appeals that, at least where the cases have been consolidated for all purposes, an order disposing of one constituent action is *not* final and appealable. Although the circuits' formulations of their approaches to the issue have varied, they have been largely consistent on this basic point for more than 25 years: 10 deem such an order non-final and non-appealable in cases that have been fully consolidated "for all purposes,"[6] another reaches the

[6] Three circuits deem such orders non-final in all consolidated cases regardless of the scope of the consolidation. *Spraytex, Inc. v. DJS&T & Homax Corp.*, 96 F.3d 1377, 1382 (Fed. Cir. 1996); *Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987); *Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984). Seven more reach the same result in cases that have been consolidated "for all purposes." *Schippers v. United States*, 715 F.3d 879, 884 (11th Cir. 2013) ("[W]hen . . . cases are consolidated 'for all purposes' each case must be final in order for any of them to be appealed . . . ."); *Evans v. Akers*, 534 F.3d 65, 69 (1st Cir. 2008) ("[D]isposition of one case in a consolidated action is a final and appealable judgment *unless the cases were consolidated 'for all purposes*.'" (emphasis added; quoting *Global Naps, Inc. v. Verizon New England, Inc.*, 396 F.3d 16, 22 (1st Cir. 2005))); *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216 (D.C. Cir. 2003) ("[W]hen a district court consolidates cases . . . 'for all purposes,' an order deciding fewer than all the claims of all the parties cannot be appealed without a Rule 54(b) certification."); *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 711–712 & n.5 (8th Cir. 1996) (an order disposing of all claims in one of multiple consolidated lawsuits is not final and appealable if the "lawsuits were formally merged, for all purposes");

same result in all but "highly unusual circumstances,"[7] and another, without squarely resolving the issue, has indicated that consolidation "for all purposes" is at least an important factor weighing against finality.[8]

The courts have deemed such orders non-final for good reasons. A court of appeals wants to know that it can "deal with one appeal confident that the same problem will not recur in a later appeal in the same case"—*i.e.*, "to ensure that a single set of factual and legal questions come before the court of appeals but once." *Sandwiches, Inc.*, 822 F.2d at 709–10. Preventing seriatim appeals also preserves the district court's control over the consolidated litigation. "[T]he district court . . . made the original decision to consolidate," and it "is best able to assess the original purpose of the consolidation and whether an interim appeal would frustrate that pur-

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Bergman v. Atlantic City, 860 F.2d 560, 566 (3d Cir. 1988) ("[W]here two actions have been consolidated . . . for all purposes, . . . an order concluding one of the consolidated cases should not be considered final and appealable."); *Sandwiches, Inc. v. Wendy's Int'l, Inc.*, 822 F.2d 707, 709 (7th Cir. 1987) ("If the cases have been consolidated for all purposes, then the judgment does not cover all claims and parties, and no one may appeal unless the district court makes the findings required by Fed. R. Civ. P. 54(b)."); *Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir. 1982) (an order disposing of all claims in one of multiple consolidated lawsuits is not final and appealable "when the consolidation is clearly unlimited and the actions could originally have been brought as a single suit").

[7] *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988) (establishing a "strong presumption" that such an order is not appealable).

[8] *Eggers v. Clinchfield Coal Co.*, 11 F.3d 35, 39 (4th Cir. 1993). Only the Sixth Circuit has indicated that such an order is final for purposes of appeal. *See Kraft, Inc. v. Local Union 327, Teamsters, Chauffeurs, Helpers, & Taxicab Drivers*, 683 F.2d 131 (6th Cir. 1982).

pose." *Huene*, 743 F.2d at 704–05. In short, the rule follows directly from the policies underlying the final-judgment requirement: "forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy," *Cobbledick*, 309 U.S. at 325; avoiding "the expense and delays of repeated appeals," *McLish v. Rolf*, 141 U.S. 661, 665–66 (1891); and promoting a "healthy respect" for "the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation," *Mohawk Indus.*, 558 U.S. at 106. There is no indication that this sensible rule has caused significant hardship in practice in the overwhelming majority of circuits in which it has been applied.

While ignoring this near-uniform precedent, petitioners urge the Court to adopt a rule that would jettison it completely—again, a rule that would "permit[] appeals from *all* decisions dismissing a complaint on the merits," seemingly without respect to the degree to which cases have been consolidated. Pet. Br. 35–36 (emphasis added). When this Court is asked to abrogate years of circuit precedent on an issue that primarily concerns practice in the district and circuit courts, the party seeking the departure from current practice ought to bear the burden of persuasion.

Yet after proposing their new "categorical" rule, petitioners attempt to justify it by reference to the specifics of their own particular appeal. *See* Pet. Br. 36. As respondents explain, *see* Resp. Br. 13–15, petitioners' case and this appeal are not nearly as distinct from the remainder of the consolidated actions as petitioners contend. For instance, other plaintiffs have argued that their similar federal antitrust claims "materially differ" from petitioners' claims, and that issue remains pending

in the district court. *Id.* But more importantly, petitioners' assertions about the (perceived) unfairness in their own case fall far short of justifying the sea change in the law that they seek.

Moreover, there is no sound basis for applying a different rule of finality to cases that have been consolidated for all purposes than to those that have been consolidated only for pre-trial purposes.[9] The practical considerations that underlie the consensus view in the former category apply equally to the latter. That is so for at least three reasons. First, "consolidated cases" of all types "tend to be based on the same factual circumstances." *Spraytex, Inc.*, 96 F.3d at 1382. Indeed, even cases that are highly interrelated both factually and legally may be consolidated for pretrial purposes only, *see, e.g.*, *Firemen's Ins. Co. v. Keating*, 753 F. Supp. 1137, 1141 (S.D.N.Y. 1990), for any number of reasons within the discretion of the district court, such as to avoid prejudice to a party or prevent jury confusion, *see, e.g.*, *Pariseau v. Andodyne Healthcare Mgmt., Inc.*, No. Civ. A. 3:04-CV-630, 2006 WL 325379 (W.D.N.C. Feb. 9, 2006), or simply because district judges presiding over MDLs lack the statutory authority under 28 U.S.C. § 1407 to order consolidated trials. Accordingly, even in cases consolidated only for pretrial purposes, "appellate review of the total consolidated case serves the purposes of appellate efficiency" and "comports with the policies underlying the finality rule." *Spraytex, Inc.*, 96 F.3d at 1382.

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[9] *See, e.g.*, *Bergman*, 860 F.2d at 566 (holding that "where two actions have been consolidated for discovery and trial or for all purposes, . . . an order concluding one of the consolidated cases should not be considered final and appealable"—but adopting a "case-by-case approach" to the same issue in cases consolidated for pretrial purposes).

Second, distinguishing (for finality purposes) between cases that have been consolidated for trial and those that have been consolidated only for pretrial purposes places dispositive significance on a factor that is unlikely to have any consequence to the underlying litigation. Only about one percent of all federal civil cases actually proceed to trial.[10] Accordingly, the distinction would turn entirely on a hypothetical event—a consolidated trial—that is almost certain never to occur.

Finally, because judges in MDL proceedings lack statutory authority to order consolidation for trial,[11] a rule distinguishing between fully consolidated cases—in which decisions in constituent actions are not final—and partially consolidated cases—in which they would be—would mandate piecemeal appeals in the very context in which they are most likely to be disruptive. *See supra* Part I.

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Ultimately, petitioners' request for what they call a "categorical rule" bottoms on their view that "it is essential that the point at which a judgment is final be crystal clear because appellate rights depend upon it." Pet. Br.

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[10] *See, e.g.*, Marc Galanter and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, at 3, Pound Civil Justice Institute (2011), *available at* http://poundinstitute.org/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf (visited Oct. 20, 2014); *see also Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 150 (D. Mass. 2006) ("[M]any cases are transferred [to MDL proceedings] . . . , but few—very few—ever return for trial.").

[11] *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

35–36 & n.9 (quoting *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984))). But the distinction that petitioners seem to be suggesting—between the clarity of their proposed rule and the hopeless uncertainty of the alternative—is a false one. No one disputes that jurisdictional rules should be clear, straightforward, and easily administrable, for a whole variety of reasons. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010); Resp. Br. 22 n.7. But the need for a *clear* rule does not necessitate—or even favor—*petitioners'* rule, which would effectively overturn years of precedent in twelve circuits and suddenly require immediate appeals of a large class of orders that have heretofore been non-final and unappealable absent certification by the district judge. Respondents' proposed rule is no less clear than petitioners'—only less wooden and formalistic.

Clarity can be achieved simply by reaffirming the consensus position governing cases that have been consolidated for all purposes—no immediate appeal of a decision disposing of a constituent case absent the district judge's certification—and extending it to consolidated cases generally, including MDLs. That clear rule, quite unlike petitioners', has the added virtue of preserving district judges' case-management discretion, which has been the hallmark of the MDL process since its institution nearly a half-century ago.

CONCLUSION

For the reasons set forth above and in respondents' brief, the decision below should be affirmed.

Respectfully submitted,

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