No. 21-1121

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE: STATE OF NEW MEXICO, et al.,
Petitioners

On Petition for Writ of Mandamus to the
U.S. Judicial Panel on Multidistrict Litigation
(MDL No. 2873 (2:18-mn-02873-RMG (D.S.C.)))

ANSWER FROM THE UNITED STATES AND THE UNITED STATES DEPARTMENT OF THE AIR FORCE

JEAN E. WILLIAMS
Acting Assistant Attorney General
BRIAN C. TOTH
REBECCA JAFFE
Attorneys
Environment & Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 305-0258
rebecca.jaffe@usdoj.gov

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GLOSSARY

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	Environmental Protection Agency
JPML	Judicial Panel on Multidistrict Litigation
MDL	Multidistrict litigation
PFAS	Per- and polyfluoroalkyl substances
PFOA	Perfluorooctanoic acid
PFOS	Perfluorooctane sulfonate
RCRA	Resource Conservation and Recovery Act

INTRODUCTION

The State of New Mexico brought suit in the United States District Court for the District of New Mexico to challenge the Air Force's efforts to address contamination at Cannon and Holloman Air Force Bases from aqueous film-forming foam used for firefighting. The Judicial Panel on Multidistrict Litigation (JPML) transferred New Mexico's suit to a multidistrict litigation proceeding (MDL) addressing contamination from the use of this firefighting foam. New Mexico objects to the transfer order, contends that the MDL violates its state sovereignty, and seeks mandamus relief in the form of an order directing the JPML to remand its case back to the District of New Mexico.

The Court should deny New Mexico's mandamus petition because the State has failed to demonstrate its "clear and indisputable" entitlement to the writ. The JPML's transfer order does not violate New Mexico's sovereignty because the State is subject to the rules of venue and jurisdiction that Congress has prescribed. New Mexico has no right to insist on litigating its case in one particular federal venue (the District of New Mexico) where Congress has specified another venue (the MDL). Moreover, the district court has inherent authority and discretion to manage the MDL, and its exercise of that authority and discretion does not warrant mandamus. Finally, mandamus would be inappropriate because the Comprehensive Environmental Response, Compensation, and Liability Act

(CERCLA) provides that no federal court has jurisdiction over any suit challenging ongoing response actions, like those the Air Force is conducting at Cannon and Holloman.

STATEMENT OF THE ISSUES

1. Whether the multidistrict litigation statute, 28 U.S.C. § 1407, is a reasonable exercise of Congress' authority over the courts, thus precluding any argument that the JPML's transfer of this action under that statute infringes state sovereignty.

2. Whether the district court's management of the multidistrict litigation has been within its sound discretion and has not amounted to a judicial usurpation of power, thus showing that mandamus relief is not warranted.

3. Whether it would be inappropriate for the Court to grant mandamus when it lacks jurisdiction over the lawsuit under CERCLA.

STATEMENT OF THE CASE

A. Statutory background

1. The multidistrict litigation statute, 28 U.S.C. § 1407

The multidistrict litigation statute, 28 U.S.C. § 1407, "furnish[es] statutory authority" for pretrial consolidation and coordination when multiple cases involving common questions of fact are filed in different judicial districts. H.R. Rep. 90-1130, 1968 U.S.C.C.A.N. 1898, 1899 (Addendum at 2–3). Congress

passed the statute after a "wave of litigation" regarding electrical equipment manufacturers "threatened to engulf the courts" and "disrupt [their] functions" by imposing "conflicting pretrial discovery demands for documents and witnesses" in many suits filed across the Nation. *Id.* To remedy that situation, Congress enacted "desirable improvements in judicial administration" to "assure uniform and expeditious treatment in the pretrial procedures in multidistrict litigation." *Id.* at 1901.

Section 1407 created the JPML, which consists of seven circuit and district judges, four of whom must concur to transfer an action. 28 U.S.C. § 1407(d). After providing notice, the JPML may transfer civil actions involving one or more common questions of fact to any other judicial district for coordinated or consolidated pretrial proceedings. 28 U.S.C. § 1407(a), (c). It makes such transfers after determining that transfer will be for the convenience of parties and witnesses and will promote the just and efficient conduct of the actions. 28 U.S.C. § 1407(a). "A transfer under Section 1407 is, in essence, a change of venue for pretrial purposes. . . . [T]he transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor judge would have had in the absence of transfer." *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976). At or before the conclusion of pretrial

proceedings, the JPML remands the transferred actions to the districts from which they were transferred. 28 U.S.C. § 1407(a).

Review of a JPML order transferring a case to another judicial district is permitted only by extraordinary writ. 28 U.S.C. § 1407(e). Any petition for such a writ must be filed in the court of appeals having jurisdiction over the transferee district (here, the District of South Carolina). *Id*.

2. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

CERCLA's goals include "prompt and effective cleanup of hazardous waste sites." *S.C. Dep't of Health & Env't Control v. Com. & Indus. Ins. Co.*, 372 F.3d 245, 251 (4th Cir. 2004). Whenever a "hazardous substance" is released or whenever there is a release of any "pollutant or contaminant" that may present an imminent and substantial danger to public health, CERCLA authorizes the United States (in this circumstance, the Department of Defense) to act.[1] 42 U.S.C. § 9604(a)(1). It authorizes "response" actions, which include "removals" or "remedial actions." 42 U.S.C. § 9601(25). Removals are "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of

[1] The President delegated response authority under CERCLA to the Department of Defense when releases are on or came from Department of Defense facilities. *Superfund Implementation*, Executive Order 12580, 52 Fed. Reg. 2923 § 2(d) (Jan. 23, 1987) (delegating CERCLA authority to the Secretary of Defense); 42 U.S.C. § 9615 (giving the President authority to delegate CERCLA duties and powers).

hazardous substances" or "other actions as may be necessary to prevent, minimize, or mitigate damage." 42 U.S.C. § 9601(23). Remedial actions are "consistent with permanent remedy" and are "taken instead of or in addition to removal actions." 42 U.S.C. § 9601(24). Both removals and remedial actions may include providing alternative water supplies. 42 U.S.C. § 9601(23), (24).

CERCLA also authorizes the Department of Defense to undertake "investigations, monitoring, surveys, testing, and other information gathering . . . to identify the existence and extent of the release or threat." 42 U.S.C. § 9604(b)(1). In addition, the United States "may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as . . . necessary or appropriate to plan and direct response actions." *Id.*

Congress wanted CERCLA responses to occur "as quickly as possible and without interruption by citizen suits." *Pollack v. U.S. Dep't of Def.*, 507 F.3d 522, 525 (7th Cir. 2007). To prevent litigation from interfering with the clean-up of hazardous waste sites, Congress mandated that "[n]o Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action." 42 U.S.C. § 9613(h) (CERCLA § 113(h)). In other words, "[t]o insulate cleanup plans from collateral attack, § 113(b) of [CERCLA] provides federal district courts with 'exclusive original jurisdiction over all controversies arising under'

[CERCLA], and § 113(h) then strips such courts of jurisdiction 'to review any challenges to removal or remedial action.'" *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1346 (2020) (quoting 42 U.S.C. §§ 9613(b), (h)).

B. Factual background

Perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA) are part of a family of chemicals called per- and polyfluoroalkyl substances (PFAS). N.M. App. 753. In 1970, the United States Air Force began using firefighting foam containing PFOS and PFOA for extinguishing fires and for firefighting trainings. *Id.* at 753. This foam currently is the best mechanism for fighting petroleum fires. *Id.* at 753. In 2009, the Environmental Protection Agency (EPA) issued provisional health advisories for PFOS and PFOA and, in 2016, it issued lifetime health advisories for PFOS and PFOA. *Id.* at 754. The advisories are non-regulatory, informal guidance that recommend maximum lifetime exposure levels for PFOS and PFOA. *Id.*

In 2010, the Air Force began evaluating potential PFOS and PFOA releases from its use of firefighting foam nationwide. *Id.* at 754. In 2015, the Air Force investigated at Cannon and Holloman Air Force Bases in New Mexico to identify locations where firefighting foam may have been released and possible migration pathways. *Id.* at 761, 766. It sampled residential wells near Cannon and provided alternative water supplies (bottled water and, eventually, filtration systems) where

it detected PFOS and PFOA above the EPA's health advisory levels. *Id.* at 764–65. Alternative supplies were not required at Holloman because there are no domestic water supply wells near the base. *Id.* at 767–68. As of summer 2020, the Air Force had spent $10,715,333 and $1,194,000, respectively, on PFOS- and PFOA-related response actions at Cannon and Holloman. *Id.* at 754.

The Air Force is conducting remedial investigations—which determine the scope of firefighting foam releases and the response actions necessary to address risks—based on a "worst first" prioritization approach, first addressing sites that pose greater risks to public safety, human health, or the environment. *Id.* at 756, 758. Cannon's remedial investigation has begun,[2] and Holloman's remedial investigation is scheduled to receive funding in fiscal year 2022. N.M. App. 757. Even though the Air Force does remedial investigations at different times based on its prioritization approach, it takes immediate action (as it did at Cannon) wherever it learns that drinking water has PFOS or PFOA above the EPA's health advisory levels to ensure that drinking water meets those levels. *Id.* at 754–55.

In 2016, the Department of Defense issued a policy requiring all branches of the military to prevent firefighting foam releases during maintenance, testing, and

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[2] Documents noting that the Air Force has begun the Cannon remedial investigation are available here: https://www.cannon.af.mil/Environmental/. The Court may take judicial notice of undisputed information on federal government websites. *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 276 n.4 (4th Cir. 2018).

training activities. *Id.* at 756. The Air Force now uses a newly-formulated firefighting foam that has only trace amounts of PFOS and PFOA. *Id.* It has also retrofitted firefighting vehicles to prevent foam discharge during equipment testing and training. *Id.* In addition, the Air Force no longer uses firefighting foam for training purposes and has limited its use to emergencies. *Id.* It further treats any emergency uses of firefighting foam as hazardous-waste spills requiring immediate clean-up. *Id.* Finally, the Department of Defense is funding research to identify and test PFAS-free foam. *Id.*

C. Proceedings below

1. New Mexico's suit

In 2019, the State of New Mexico and the New Mexico Environment Department (collectively, New Mexico) sued the United States and the United States Air Force in the United States District Court for the District of New Mexico alleging failure to contain PFAS contamination from the use of firefighting foam at Cannon and Holloman. *Id.* at 8–9, 17, 20, 29. New Mexico asserted claims under the New Mexico Hazardous Waste Act, N.M. Stat. Ann. § 74-4-13, and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(1)(B). *Id.* at 37–39.

New Mexico moved for a preliminary injunction against the Air Force seeking expedited discovery; water, soil, and wildlife sampling; voluntary blood

tests for residents; and alternative drinking water sources. *Id.* at 42–43. The United States opposed the preliminary injunction and moved to dismiss New Mexico's complaint for lack of jurisdiction because it was a prohibited challenge to the Air Force's ongoing response actions under CERCLA and because the United States had not waived sovereign immunity for New Mexico's state law claim. *Id.* at 420, 434–35. The district court did not rule on the motions.

2. In re Aqueous Film-Forming Foams Products Liability Litigation

In 2018, the JPML transferred 75 suits to the District of South Carolina for coordinated pretrial proceedings. *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 357 F. Supp. 3d 1391, 1392 (J.P.M.L. 2018). All the suits involve allegations that firefighting foam was used at airports, military bases, or certain industrial locations and contaminated groundwater and drinking water supplies with PFOS and PFOA. *Id.* at 1394. Almost all the cases named the same group of firefighting foam manufacturers as defendants. *Id.* The JPML concluded that the actions involved common issues including the toxicity of PFOS and PFOA, their effects on human health, their propensity to migrate in groundwater supplies, manufacturers' knowledge about their dangers, and manufacturers' warnings about proper use and storage of firefighting foam. *Id.* There are now over a thousand cases in the MDL. *See In re Aqueous Film-Forming Foams Prod. Liab. Litig.,* No. 2:18-mn-2873 (D.S.C.).

Sovereign plaintiffs in the MDL include Guam, Michigan, New Hampshire, New Jersey, New York, the Northern Mariana Islands, Ohio, Vermont, and the Washington State Department of Corrections. N.M. App. 933. More states and territories are expected to file similar lawsuits and join the MDL. *Id.* at 934. Some of the sovereign plaintiffs assert claims against the United States, including claims that the United States' use of firefighting foam containing PFAS violated the Federal Tort Claims Act, RCRA, and state statutes. *Id.* at 946. The district court has established a Plaintiffs' Executive Committee, *id.* at 367, which includes a designated state/sovereign counsel, *id.* at 731.

3. Transfer of the New Mexico case to the MDL

In a joint status report filed in the MDL in January 2020, the parties identified New Mexico's case as potentially related litigation that was not part of the MDL. *Id.* at 614. The United States stated in the status report that the case did not belong in the MDL because there were no tort or product-liability claims and therefore the case did not pose any risk of creating inconsistent judgments. *Id.* at 615. In addition, the United States noted that the cross-motions to dismiss and for a preliminary injunction were fully briefed, and moving the case to the MDL would be disruptive and waste judicial resources. *Id.* at 615.

At the direction of the MDL judge, the United States filed a notice of potential tag-along action[3] with the JPML and stated, "[a]t this point, the United States is not taking a position as to whether inclusion of this matter in the MDL litigation is warranted." *Id.* at 629. The JPML entered a conditional order[4] transferring the *New Mexico* case to the MDL. *Id.* at 6. New Mexico objected and then moved to vacate the transfer order, arguing that its claims were not against manufacturers or distributors, the claims and defenses in its suit were inconsistent with those in the MDL, and its suit involved different factual questions. *Id.* at 675. The United States did not respond to the conditional transfer order and thus was deemed to acquiesce to it. *Id.* at 1 (citing JPML Rule 6.1(c)).

On June 2, 2020, the JPML denied New Mexico's motion to vacate the transfer order. It noted that New Mexico's case shares common factual questions with the cases in the MDL, including claims about groundwater contamination

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[3] The JPML defines a "tag-along action" as a suit "which involves common questions of fact with . . . actions previously transferred to an existing MDL, and which the [JPML] would consider transferring under Section 1407." JPML Rule 1.1(h). The JPML Rules are located here: https://www.jpml.uscourts.gov/rules-procedures.

[4] When the JPML Clerk learns of a potential tag-along action, he "may enter a conditional order transferring that action" to the MDL. JPML Rule 7.1(b). The Clerk waits seven days before sending the conditional transfer order to the transferee court to allow any party opposing the transfer to object. JPML Rule 7.1(b)–(c). In that circumstance (which occurred here), the JPML will then adjudicate whether it should transfer a particular case to the MDL. *See* 28 U.S.C. § 1407(c).

from firefighting foam use at military bases. *Id.* Several actions already in the MDL will have similar discovery relating to the use of firefighting foam at Air Force bases and the United States' defenses to liability. *Id.* While most of the MDL suits concern product-liability claims against manufacturers, several cases involve environmental claims by States and governmental entities. *Id*. In addition, at least four actions in the MDL allege that the Air Force's use of firefighting foam at Cannon Air Force Base contaminated water supplies. *Id.* at 2. Transfer of New Mexico's case to the MDL will allow for coordinated discovery with those other actions. *Id*. Furthermore, transfer is unlikely to place significantly greater costs on New Mexico because pretrial discovery for Cannon and Holloman can take place in New Mexico, case-specific witnesses are unlikely to have to travel to South Carolina, and New Mexico's counsel already represents another State (Vermont) in the MDL. *Id*.

The JPML regarded New Mexico's argument that transfer to the MDL would infringe its sovereignty as "curious, given that the State filed its action in federal court, asserted a federal cause of action, and names exclusively federal government defendants." *Id.* at 3. "Having done so, the State will not be heard to argue that only certain federal procedural rules and statutes are applicable." *Id*. Moreover, "the plain language of Section 1407 applies to all civil actions." *Id*.

4. New Mexico's motion for leave to file its preliminary injunction motion

After its case was transferred to the MDL, New Mexico moved for leave to file a preliminary injunction motion (as the MDL's case management orders require). All the other parties opposed New Mexico's motion. The Plaintiffs' Executive Committee stated that PFAS had been detected at "myriad sites around the country," and thus the contamination at Cannon and Holloman bases "is not compelling to warrant the relief sought at this time." *Id.* at 729. New Mexico's claims test "many of the same core facts and legal theories applicable to the many cases in the MDL," and the Plaintiffs' Committee did not support "prioritizing one party's claims over another." *Id.* Instead, it noted the importance of the discovery process, general liability issues, and establishment of a bellwether trial process. *Id.* at 731.

The United States opposed New Mexico's request to file its preliminary injunction motion, arguing that New Mexico's challenge is prohibited by CERCLA—a defense also at issue in other MDL cases—because the Air Force is undertaking CERCLA response actions to address PFOS and PFOA releases at Cannon and Holloman. *Id.* at 735–36, 746.

The Defense Coordination Committee (which, like the Plaintiffs' Executive Committee, was also established by an order from the district court, *id.* at 376–77) opposed New Mexico's motion for leave to file its preliminary injunction motion

because the motion raised contested issues about the toxicity of PFAS and its effects on human health that are common to all cases in the MDL. *Id.* at 789, 791. Because the toxicity of PFAS is "hotly disputed," the Defense Committee argued, the district court should not decide that issue "on a meager record in the context of one plaintiff's request for preliminary relief against one defendant." *Id.* at 791–792. The Defense Committee also noted that New Mexico's motion raised issues related to CERCLA and to Cannon that are common to several other MDL cases. *Id.* at 792–93.

On September 3, 2020, the district court denied New Mexico's request to file its preliminary injunction motion. At that time, there were 750 cases in the MDL. *Id.* at 861. The parties were engaging in discovery subject to protocols ordered by the district court, and adhering to the protocols was necessary to ensure that discovery was "efficient and consistent." *Id.* "Allowing New Mexico, and each of the thousands of plaintiffs in this MDL, to conduct motion practice . . . would derail a centralized proceeding . . . and impede each plaintiff's opportunity to participate in an organized proceeding and efficient resolution." *Id.* Accordingly, the district court declined to consider whether New Mexico would prevail on its claims, as the preliminary injunction analysis would require. *Id.*

5. New Mexico's mandamus petition

On February 1, 2021—five months later—New Mexico petitioned this Court for mandamus ordering the JPML to vacate its order transferring its case to the MDL. Pet. 1. New Mexico did not contend that its lawsuit lacked common questions of fact with the other cases in the MDL. It argued that the transfer order impaired its ability to protect the public and environment, interfered with its sovereignty, and seized the State's control of its case. Pet. 1, 3–4.

The Court directed the United States to respond to the petition. ECF No. 10.

SUMMARY OF ARGUMENT

1. By arguing that the JPML's transfer order infringes on its sovereignty, New Mexico contends that it has a sovereign right to litigate its suit solely in the United States District Court for the District of New Mexico, instead of the MDL in the District of South Carolina. It has no such right. The Constitution vests Congress with full authority to "constitute" the lower federal courts, which necessarily includes the authority to prescribe their jurisdiction and establish venue rules. Exercising that authority, Congress enacted the MDL statute to ensure coordinated pretrial proceedings when cases involving similar factual issues are filed in different judicial districts. The statute protects the courts from being engulfed by waves of litigation. New Mexico's invocation of its sovereign status and its police powers does not supersede Congress' constitutional authority to

construct the lower federal courts and establish rules of venue and jurisdiction as it deems necessary.

The benefits of multidistrict litigation and coordinated pretrial proceedings are no less important when sovereigns are parties. The firefighting foam MDL—which presently consists of over a thousand cases, including ten cases filed by sovereigns (and more expected to join)—exemplifies the situation Congress sought to address with the MDL statute. New Mexico's case shares common factual questions with the other cases in the MDL, and the JPML's transfer order does not warrant mandamus relief.

2. The district court has inherent authority and broad discretion to manage the MDL. New Mexico complains that the district court would not allow it to proceed with its preliminary injunction motion and that it entered case management orders appointing lead counsel and providing for common benefit fees. But all of those orders were case-management decisions within the district court's sound discretion that enabled the court to manage the MDL in an orderly, efficient fashion. None of the orders amounted to a judicial usurpation of power that would warrant the drastic remedy of mandamus.

3. CERCLA bars any challenges to ongoing remedial or removal actions, and thus the Court lacks jurisdiction over New Mexico's suit. Although the district

court has not yet reached this issue, the lack of jurisdiction is another reason why mandamus is inappropriate.

STANDARD OF REVIEW

"Mandamus is a 'drastic' remedy that must be reserved for 'extraordinary situations.'" *Cumberland Cty. Hosp. Sys., Inc. v. Burwell*, 816 F.3d 48, 52 (4th Cir. 2016) (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976)). Courts provide mandamus relief "only when (1) petitioner 'ha[s] no other adequate means to attain the relief [it] desires'; (2) petitioner has shown a 'clear and indisputable' right to the requested relief; and (3) the court deems the writ 'appropriate under the circumstances.'" *In re Murphy-Brown, LLC*, 907 F.3d 788, 795 (4th Cir. 2018) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004)).

ARGUMENT

I. Section 1407 is a valid exercise of Congress' authority, and the transfer order under that Section does not warrant mandamus.

New Mexico's argument that the JPML's transfer order infringes its sovereignty, Pet. 21–27, is tantamount to an argument that it has a sovereign right to pursue its lawsuit solely in the venue of its choosing—the District of New Mexico, where it originally filed suit—rather than the MDL in the District of South Carolina. *See* Pet. 18 (contending that the "unique nature of the State's role" requires that its claims "proceed where they were filed"). But that argument is incorrect. The MDL statute is a valid exercise of Congress' authority to create

rules of jurisdiction and venue for the lower federal courts. Nothing in the JPML's transfer of New Mexico's case under that statute infringes New Mexico's sovereignty. Accordingly, New Mexico has shown neither "'a clear and indisputable' right to the requested relief" nor that the writ is "'appropriate under the circumstances.'" *In re Murphy-Brown,* 907 F.3d at 795 (quoting *Cheney*, 542 U.S. at 380–81).

Section 1407 is a proper exercise of Congress' power to create and prescribe rules of jurisdiction and venue for the lower federal courts. Article I, Section 8 of the Constitution provides: "Congress shall have the power to . . . constitute tribunals inferior to the Supreme Court." Relatedly, Article III, Section 1 states: "The judicial power of the United States, shall be vested . . . in such inferior courts as the Congress may from time to time ordain and establish." Because the Constitution vests Congress with discretionary authority to establish the lower federal courts, that authority necessarily includes the power to prescribe rules for those courts' jurisdiction and venue. The judicial power of the lower federal courts depends "entirely upon the action of Congress, who possess the sole power of creating the tribunals . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Palmore v. United States*, 411 U.S. 389, 401 (1973) (quoting *Cary v.*

Curtis, 3 How. 236, 245 (1845)). Congress is thus empowered to pass statutes that are "'conducive to the due administration of justice' in federal court," and are "'plainly adapted' to that end." *Jinks v. Richland Cty., S.C.*, 538 U.S. 456, 462 (2003) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 414–415 (1819)).

New Mexico's reliance on the Tenth Amendment is misplaced. Pet. 22. That Amendment reserves to the States those "powers not delegated to the United States by the Constitution." But as already discussed, the power to "constitute [inferior] tribunals" and, by necessary implication, prescribe their rules of jurisdiction and venue, *is* delegated to Congress. U.S. Const. Art. I, § 8. It is not among those powers "reserved to the States." The MDL statute—enacted under Congress' plenary authority over the Courts—does not alter the constitutional balance between the States and the federal government, contrary to New Mexico's assertions. Pet. 25–26.

Congress passed the MDL statute to prevent the judiciary from being "engulf[ed]" by a "wave of litigation" that would consume its resources and those of the parties through "conflicting pretrial discovery demands for documents and witnesses." H.R. Rep. 90-1130, 1968 U.S.C.C.A.N. 1898, 1899 (Addendum at 2). In passing 28 U.S.C. § 1407, Congress provided for pretrial consolidation and coordination when multiple cases involving common questions of fact are filed in different districts. *Id.* at 1900. It shaped federal jurisdiction and venue in these

cases to allow for the efficiencies, such as uniform pretrial and discovery orders and centralized document management, that multidistrict litigation can achieve. *Id.* at 1899.

Neither the Constitution nor Congress guarantees New Mexico a right to litigate its suit *solely* in the judicial district of its choosing, the District of New Mexico. Instead, Congress has the constitutional authority to determine the jurisdiction and venue for suits in federal court. New Mexico does not—and cannot—dispute that its suit shares common factual questions with the cases in the MDL, including claims about groundwater contamination from firefighting foam use at military bases in general, and at Cannon Air Force Base in particular. N.M. App. 1–2. The JPML's transfer order therefore does not warrant mandamus.

Insofar as New Mexico argues that its sovereign status exempts it from multidistrict litigation, Congress has not limited Section 1407 in that way. If Congress had wanted to exempt sovereigns from multidistrict litigation, it could have done so, as it chose to exempt certain antitrust lawsuits. *See* 28 U.S.C. § 1407(g) ("Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws."). In the same vein, New Mexico's invocation of its police powers, Pet. 22–24, does not supersede or diminish Congressional authority to legislate the jurisdiction and venue of the federal courts.

New Mexico contends that because Section 1407 is silent about its application to States, it must be construed to avoid affecting the balance between federal and state authority. Pet. 24–25. As already explained, however, New Mexico does not have a sovereign right to litigate a federal case solely in the venue of its own choosing. Moreover, New Mexico's argument that the statute must expressly state that it *applies* to cases brought by States inverts the normal canon of statutory interpretation that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman v. Maretta*, 569 U.S. 483, 496 (2013) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980)). Because Congress explicitly enumerated an exception for certain antitrust actions, 28 U.S.C. § 1407(g), the Court should not imply another exception for sovereigns. Moreover, as discussed above (pp. 2–3, 19–20), the intent behind the MDL statute was to prevent waves of litigation from engulfing the courts, and exempting sovereigns from the statute's application would contravene that intent.

The benefits of coordinated pretrial proceedings are no less significant when sovereigns are litigants, and multidistrict litigation often involves sovereigns. In fact, the JPML "has transferred state enforcement actions to MDLs involving cases brought by private litigants with some regularity." *In re Generic Pharm. Pricing*

Antitrust Litig., MDL No. 2724, 2017 WL 4582710, at *1–*2 (J.P.M.L. Aug. 3, 2017) (transferring suit filed by 40 states because "there will be significant overlap in the factual and legal issues presented by the actions currently in the MDL and the State Action"); *see also In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig.*, 582 F. Supp. 2d 1373 (J.P.M.L. 2008) (centralizing claims brought by Illinois and California attorneys general with actions brought by private claimants).

The firefighting foam cases present the exact situation that Congress sought to address with Section 1407. There are now over a thousand cases in the MDL, including ten cases filed by sovereigns with more sovereigns expected to join, N.M. App. 933–34, and the presiding judge is implementing an orderly discovery process for all of those cases, *id.* at 861. Without the MDL, this "wave of litigation" could "engulf the courts." H.R. Rep. 90-1130, 1968 U.S.C.C.A.N. 1898, 1899 (Addendum at 2).

Section 1407 is a valid exercise of Congress' power over the Courts. The JPML's transfer of New Mexico's case to the MDL under that statute does not warrant the drastic remedy of mandamus.

II. The district court's management of the MDL does not warrant mandamus.

New Mexico complains that the district court did not allow it to proceed with its preliminary injunction motion and that it entered various case management

orders to manage the litigation. Pet. 11, 16–18. Decisions about how to manage the complex, coordinated action before the district court, however, are committed to its sound discretion. New Mexico is not entitled to the drastic, extraordinary remedy of mandamus when the district court exercised its discretion. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) ("Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" (quoting *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978))). In cases such as this one, "in which the matter at hand is entrusted to the discretion of the district court," mandamus is warranted only when there is an abuse of discretion that "amount[s] to a 'judicial usurpation of power.'" *In re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir. 1984) (quoting *Allied Chem.*, 449 U.S. at 35); *see also In re Beard*, 811 F.2d 818, 826 (4th Cir. 1987) ("A writ of mandamus will not issue when all that is shown is that the district court abused its discretion."). The district court's case management decisions here have not been an abuse of discretion and have not been a "judicial usurpation of power." *In re Ralston Purina*, 726 F.2d at 1005 (quoting *Allied Chem.*, 449 U.S. at 35).

"[D]istrict courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (acknowledging "the power inherent in every court to control

the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants").

This discretion is even more important in the MDL context. "[A] district court needs to have broad discretion in coordinating and administering multi-district litigation." *In re Showa Denko K.K. L-Tryptophan Prod. Liab. Litig.-II*, 953 F.2d 162, 165 (4th Cir. 1992); *see also In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d 1217, 1231 (9th Cir. 2006) ("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."); *Dzik v. Bayer Corp.*, 846 F.3d 211, 216 (7th Cir. 2017) ("District courts handling complex, multidistrict litigation 'must be given wide latitude with regard to case management' in order to achieve efficiency." (quoting *In re Asbestos Prod. Liab. Litig. (No. VI)*, 718 F.3d 236, 247 (3d Cir. 2013))).

A district court's authority and discretion to manage an MDL does not diminish in the face of arguments about state sovereignty. The Fifth Circuit denied a mandamus petition asserting that a district court's management of an MDL violated the State of Louisiana's sovereignty, just as New Mexico asserts here. The Fifth Circuit held that "a district court has inherent authority and discretion to consolidate and manage complex litigation, particularly when serving as the

transferee court in a multidistrict proceeding." Order at 2, *In re State of Louisiana*, No. 11-30178 (5th Cir. Apr. 11, 2011) (Addendum at 6).

None of New Mexico's challenges to the district court's management of the MDL warrant mandamus. New Mexico complains that the district court denied its motion for leave to file its preliminary injunction motion. Pet. 16–18, 29–30. But none of the parties supported New Mexico's motion. The Plaintiffs' Executive Committee did not support "prioritizing one party's claims over another." *Id.* at 729. The Defense Coordination Committee emphasized that the toxicity of PFAS is "hotly disputed," and should not be decided "on a meager record in the context of one plaintiff's request for preliminary relief against one defendant." *Id.* at 791–792. And the United States noted that New Mexico's claims raised issues about CERCLA and Cannon that were common to other cases. *Id.* at 745–47.

The district court noted that the parties were engaging in discovery subject to agreed-upon, court-approved protocols and the MDL proceedings were centralized, organized, and efficient. N.M. App. 861. It reasonably declined to determine at that time "whether New Mexico would prevail on the merits of its claims, as the preliminary injunction analysis would require." *Id.* That decision was not an abuse of the district court's discretion and not a judicial usurpation of power. In an MDL proceeding, "[c]oordination 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." *In re Phenylpropanolamine*, 460 F.3d at 1231–32.

New Mexico also complains that the district court "has entered a series of Case Management Orders that subjects New Mexico to the control of plaintiffs' co-lead counsel" and provides for common benefit fees and costs. Pet. 11–12. But in an MDL, "[t]he multiplicity of suits requires that the district court be allowed to combine procedures, appoint lead counsel, recognize steering committees of lawyers, limit and manage discovery, etc. to minimize expense to all litigants and to provide judicial efficiency." *In re Showa Denko K.K. L-Tryptophan*, 953 F.2d at 165; *see also Manual for Complex Litigation, Fourth*, § 14.215 (2004) (Addendum 23) (noting that courts may appoint lead and liaison counsel and directing courts to "define designated counsel's functions, determine the method of compensation, . . . and establish the arrangements for their compensation"). The district court's case management orders are not "exceptional circumstances, amounting to a judicial usurpation of power" that "justify the invocation of this extraordinary remedy." *Allied Chem.*, 449 U.S. at 35.

New Mexico claims that it is not challenging the district court's broad discretion in case management, "but rather the JPML's order that ignored the implications that the MDL court's orders would have on the State's sovereign powers." Pet. 12 n.11. But as explained above (pp. 17–22), New Mexico has no

sovereign right to litigate its suit outside of the MDL. The district court's management of the MDL—which is committed to its discretion—cannot violate a sovereign right to be exempt from the MDL because no such right exists. Even if any of the district court's actions created some clear and indisputable right to mandamus (and none of them do), the appropriate remedy would be an order directed to the MDL court addressing the specific actions about which New Mexico complains, not an order removing New Mexico from the MDL altogether. *Cf. In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 846 (6th Cir. 2020) (granting mandamus petitions and remanding with instructions to MDL court to strike certain amended complaints). New Mexico has no clear and indisputable right to have its case transferred out of the MDL.

III. Mandamus is inappropriate because no federal court has jurisdiction over New Mexico's suit.

In the alternative, the Court should deny New Mexico's mandamus petition because, under CERCLA, there is no jurisdiction over this case in any federal court and thus mandamus sending the case back to the district court of New Mexico would be inappropriate. CERCLA's jurisdictional bar applies to other cases in the MDL, N.M. App. 746–47, and the district court declined to adjudicate any merits issues in New Mexico's case before the centralized discovery process concluded, *id.* at 861. Although the Court need not adjudicate this merits issue now, the United States notes the lack of jurisdiction as another reason that mandamus would

be inappropriate. *See In re Murphy-Brown,* 907 F.3d at 795 ("Courts provide mandamus relief only when . . . the court deems the writ 'appropriate under the circumstances.'" (quoting *Cheney*, 542 U.S. at 380–81)).

"Congress intended to prevent time-consuming litigation which might interfere with CERCLA's overall goal of effecting the prompt cleanup of hazardous waste sites." *Cannon v. Gates*, 538 F.3d 1328, 1332 (10th Cir. 2008) (quoting *United States v. City & Cty. of Denver*, 100 F.3d 1509, 1514 (10th Cir. 1996)). To accomplish that goal, Congress passed CERCLA Section 113(h), which mandates that "[n]o Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action." 42 U.S.C. § 9613(h). CERCLA thus "insulate[s] cleanup plans from collateral attack" through Section 113(h) by "strip[ping] . . . courts of jurisdiction 'to review any challenges to removal or remedial action.'" *Atl. Richfield Co.*, 140 S. Ct. at 1346 (quoting 42 U.S.C. § 9613(h)).

Section 113(h)'s "jurisdiction strip applies, even if the Government has only begun to 'monitor, assess, and evaluate the release or threat of release of hazardous substances.'" *Cannon*, 538 F.3d at 1334 (quoting *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 239 (9th Cir. 1995)); *see also Razore*, 66 F.3d at 239 (concluding that the preparation of a remedial investigation/feasibility study report triggered Section 113(h)); *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1014, 1023

(3d Cir. 1991) (holding that Section 113(h) applied because the agency had communicated its *intent* to conduct a remedial investigation/feasibility study).

New Mexico's suit challenges the adequacy of the Air Force's ongoing response actions at Cannon and Holloman. "A suit challenges a response action if it would, for example, 'dictate specific remedial actions and . . . alter the method and order for cleanup.'" *Giovanni v. United States Dep't of Navy*, 906 F.3d 94, 104 (3d Cir. 2018) (quoting *Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1072 (11th Cir. 2002)). New Mexico's complaint seeks "[i]mmediate injunctive relief requiring the abatement of ongoing violations" of the New Mexico Hazardous Waste Act and RCRA. N.M. App. 40. In its preliminary injunction motion, New Mexico sought sampling of water wells, surveys of wildlife, and alternative drinking water supplies. *Id.* at 42–43, 860.

The Air Force is already responding to the PFOS and PFOA releases at Cannon and Holloman by, inter alia, conducting investigations, sampling wells, and providing alternative drinking water supplies wherever PFOS and PFOA exceed the EPA health advisory levels. *Supra* pp. 6–8. These actions are CERCLA removal and remedial actions, 42 U.S.C. § 9601(23)–(24), and thus Section 113(h) bars New Mexico's suit. CERCLA Section 113(h) likewise bars New Mexico's claim under the New Mexico Hazardous Waste Act because "§ 113(h) addresses state law challenges to cleanup plans in federal court." *Atl.*

Richfield Co., 140 S. Ct. at 1351. And Section 113(h) also bars New Mexico's RCRA citizen suit claim. "Congress drafted § 113(h) just two years after enacting the RCRA citizen suit provision, and yet it did not except RCRA from the sweep of § 113(h)." *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 879 (D.C. Cir. 2014). "Congress did not intend to afford RCRA citizen suits special protection from the preemptive sweep of § 113(h)." *Id.* at 880; *see also Cannon*, 538 F.3d at 1336 (affirming dismissal of RCRA citizen suit based on Section 113(h)); *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, 999 F.2d 1212, 1217–18 (8th Cir. 1993) (concluding that the court "lack[ed] subject matter jurisdiction" because plaintiffs' claims "although couched in terms of a RCRA violation, challenge a [CERCLA] removal action").

Because there is no jurisdiction over New Mexico's suit, mandamus is inappropriate and should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the mandamus petition.

Respectfully submitted,

s/ *Rebecca Jaffe*
JEAN E. WILLIAMS
Acting Assistant Attorney General
BRIAN C. TOTH
REBECCA JAFFE
Attorneys
Environment & Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 305-0258
Rebecca.jaffe@usdoj.gov

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90-7-3-21449

STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument is necessary but would be pleased to appear if the Court would find it useful.

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Rule 32(f), this document contains 6,972 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

s/ *Rebecca Jaffe*
REBECCA JAFFE

Counsel for the United States

ADDENDUM

H.R. REP. 90-1130, H.R. Rep. No. 1130, 90TH Cong., 2ND Sess. 1968, 1968 U.S.C.C.A.N. 1898, 1968 WL 4929 (Leg.Hist.)

***1898** P.L. 90-296, COURTS-- MULTIDISTRICT LITIGATION-- TRANSFER

Senate Report (Judiciary Committee) No. 90-454,
July 27, 1968 (To accompany S. 159)
House Report (Judiciary Committee) No. 90-1130,
Feb. 28, 1968 (To accompany S. 159)
Cong. Record Vol. 113 (1967)
Cong. Record Vol. 114 (1968)
DATES OF CONSIDERATION AND PASSAGE
Senate Aug. 9, 1967, Apr. 10, 1968
House Mar. 4, 1968

The House Report is set out.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

HOUSE REPORT NO. 90-1130

Feb. 28, 1968

THE Committee on the Judiciary, to whom was referred the bill (S. 159) to provide for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The bill adds a new section 1407 to title 28, United States Code, to provide judicial machinery to transfer, for coordinated or consolidated pretrial proceedings, civil actions, having one or more common questions of fact, pending in different judicial districts.

LEGISLATIVE HISTORY

A predecessor measure, H.R. 8276, introduced upon the request of the Judicial Conference of the United States, was the subject of hearings in the last Congress (‘Judicial Administration,‘ hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., second sess., Serial No. 21). Senate hearings were held on a similar measure, S. 3815, in the

89th Congress and on S. 159 in the present Congress ('Multidistrict Litigation,' hearings before Subcommittee on Improvements in Judicial Machinery, Senate Committee on the Judiciary, 89th Cong., second sess.; 90th Cong., first sess., pts. 1 and 2). S. 159 passed the Senate on August 9, 1967, without objection.

***1899** STATEMENT

S. 159 was originally drafted by the Coordinating Committee for Multiple Litigation of the U.S. District Courts, established by the Judicial Conference of the United States and its enactment is recommended by the Conference.

The bill is based on the experience of the Coordinating Committee in supervising nationwide discovery proceedings in the electrical equipment cases which flooded the Federal courts in the early 1960's.

Following 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. This wave of litigation threatened to engulf the courts. Unless coordinated action was undertaken it was feared that conflicting pretrial discovery demands for documents and witnesses would disrupt the functions of the Federal courts. Through the consent and cooperation of all parties and the numerous presiding judges and the labors of the Coordinating Committee joint pretrial proceedings were conducted. The procedures worked successfully and today all of the electrical cases have been finally disposed of. The steps taken by the Coordinating Committee to restore order to the litigation are outlined in the Senate Report on S. 159 (S.Rep. 454) as follows:

1. The Coordinating Committee recommended a schedule of pretrial discovery proceedings and a series of uniform pretrial and discovery orders covering common issues of fact. This recommended schedule was accepted by the district courts involved and, after consultation with the lawyers for the parties, the judges of the district courts entered the uniform orders.

2. National depositions were held, attended by large numbers of plaintiffs' and defendants' counsel. Lead counsel, chosen by the lawyers for the plaintiffs and defendants, propounded questions on behalf of all the parties. Other attorneys present, however, were given the opportunity to ask additional questions to protect their particular interests. Arrangements were made for the additional deposition of any witness if the need arose.

3. Central document depositories were established, one for plaintiffs and another for defendants. Close to 1 million documents were filed at the depositories, and made available for copying by the parties. This arrangement minimized inconvenience and expense.

The purpose of S. 159 is to furnish statutory authority for the kind of pretrial consolidation and coordination successfully implemented in the electrical cases but which, in that situation, entirely depended on the voluntary agreement of all the parties as well as presiding judges.

The objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions. The committee believes that the possibility for conflict and duplication in discovery and ***1900** other pretrial procedures in related cases can be avoided or minimized by such centralized management. To accomplish this objective the bill provides for the transfer of venue to an action for the limited purpose of conducting coordinated pretrial proceedings. The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes.

Existing law is inadequate for such pretrial consolidation, since under 28 U.S.C. 1404(a) transfer is restricted to a district where the action 'might have been brought.' Moreover, the present statute does not permit or provide for transfer of related cases for pretrial purposes only. Under the Federal Rules of Civil Procedure (rule 42(a)), consolidation for pretrial purposes is authorized only when multiple actions are pending in a single district court.

The proposed new section 1407 establishes a Judicial Panel on Multidistrict Litigation which is empowered to: (i) initiate transfer proceedings and hold hearings thereon; (ii) transfer civil actions for consolidated pretrial proceedings; (iii) assign a judge or judges to conduct such proceedings and request the Chief Justice to make intercircuit assignments for this purpose; (iv) act as and designate other judges or deposition judges in any district, and (v) remand transferred actions to the districts from which they were transferred.

By the term 'pretrial proceedings' the committee has reference to the practice and procedure which precede the trial of an action. These generally involve deposition and discovery, and, of course, are governed by the Federal Rules of Civil Procedure. See, e.g., rule 16 and rules 26-37. Under the Federal rules the transferee district court would have authority to render summary judgment, to control and limit pretrial proceedings, and to impose sanctions for failure to make discovery or comply with pretrial orders.

To qualify for pretrial transfer under the proposed section 1407, civil actions would have to meet certain general requirements: first, they must involve one or more common questions of fact; second, they must be pending in more than one district, and third, pretrial consolidation must promote the 'just and efficient conduct' of such actions and be for 'the convenience of parties and witnesses.' It is expected that such transfer is to be ordered only where significant economy and efficiency in judicial administration may be obtained. The types of cases in which massive filings of multidistrict litigation are reasonably certain to occur include not only civil antitrust actions but also, common disaster (air crash) actions, patent and trademark suits, products liability actions and securities law violation actions, among others.

As noted earlier, the Judicial Conference of the United States recommends enactment of this legislation. The Department of Justice also supports the bill. At hearings in the 89th Congress on a predecessor measure, this committee was advised of the opposition of the section of antitrust law of the American Bar Association. Subsequently, however, the ***1901** section altered its position and now recommends enactment of S. 159. On February 20, 1968, the house of delegates of the American Bar Association adopted the recommendations and it now urges approval of the measure.

The committee believes that the legislation will provide desirable improvements in judicial administration and will assure uniform and expeditious treatment in the pretrial procedures in multidistrict litigation. It accordingly recommends favorable consideration of S. 159.

SECTIONAL ANALYSIS

The bill would add a new section 1407 to chapter 87 of title 28, United States Code.

Subsection (a) of the proposed section 1407 authorizes the transfer of civil actions, pending in different districts, that share one or more common questions of fact upon a determination by the Judicial Panel on Multidistrict Litigation, created by the bill, that transfer would be for the ‘convenience of the parties and witnesses‘ and will promote the ‘just and efficient conduct‘ of the actions transferred. If only one question of fact is common to two or three cases pending in different districts there probably will be no order for transfer, since it is doubtful that transfer would enhance the convenience of parties and witness, or promote judicial efficiency. It is possible, however, that a few exceptional cases may share unusually complex questions of fact, or that many complex cases may share a few questions of fact. In either of these instances substantial benefit may accrue to courts and litigants through consolidated or coordinated pretrial proceedings.

Likewise, a number of factors should be weighed in the selection of a transferee district: the state or its docket, the availability of counsel, sufficient courtroom facilities, etc. These factors do not lend themselves to precise measurement. Consequently, the committee believes that the informed discretion of the judiciary is the best method for resolving questions as to when and where cases should be transferred for pretrial.

The subsection further authorizes the panel to separate any claim, crossclaim, counterclaim, or third party claim unrelated to the questions common to the transferred actions and to remand such claims prior to the remand of the remainder of the action. The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings. The experience of the Coordinating Committee was limited to pretrial matters, and

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-30178

In re: STATE OF LOUISIANA,

Petitioner

Petition for Writ of Mandamus
to the United States District Court
for the Eastern District of Louisiana
USDC No. 2:10-MD-2179

Before WIENER, PRADO, and OWEN, Circuit Judges.

PER CURIAM:

The State of Louisiana ("Louisiana") petitions for a writ of mandamus directing the district court in the Deepwater Horizon multidistrict litigation ("MDL") to amend several of its pretrial orders relating to case management. Louisiana argues that the current case-management structure infringes its sovereignty, violates Louisiana law, and creates an irremediable conflict of interest, and it seeks a separate litigation "track" for governmental claims. We deny the petition.

The writ of mandamus is a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (citation omitted). Accordingly, the writ may issue only if (1) the petitioner has no other adequate means to attain the desired relief; (2) the

petitioner has demonstrated a right to the issuance of a writ that is clear and indisputable; and (3) the issuing court is satisfied that the writ is appropriate under the circumstances. *Id.* at 380–81 (citations omitted).

"These hurdles, however demanding, are not insuperable." *Id.* at 381. In certain circumstances, it may be proper to issue the writ "to restrain a lower court when its actions would . . . result in the intrusion by the federal judiciary on a delicate area of federal–state relations." *Id.* (citations and internal quotation marks omitted). Nonetheless, "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam) (citation omitted).

We have long held that a district court has the inherent authority and discretion to consolidate and manage complex litigation, particularly when serving as the transferee court in a multidistrict proceeding. *See In re Air Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1012–16 (5th Cir. 1977) (holding that an MDL transferee court has managerial power that is "especially strong and flexible in matters of consolidation," and that the court's managerial power necessarily includes the authority to appoint lead or liaison counsel and to compensate them for their work). This discretion is firmly grounded in the Federal Rules of Civil Procedure, particularly Rules 16, 26, 37, 42, and 83, which contain numerous grants of authority that supplement a district court's inherent power to manage litigation. Indeed, Rule 16(c) expressly authorizes district courts to adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."

FED. R. CIV. P. 16(c)(2)(L). Moreover, as the Judicial Panel for Multidistrict Litigation has recognized in this very case, "[t]he transferee judge has broad discretion to employ any number of pretrial techniques—such as establishing separate discovery [or] motion tracks—to address any differences among the cases and efficiently manage the various aspects of this litigation." *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mex., on Apr. 20, 2010*, 731 F. Supp. 2d 1352, 1355 (J.P.M.L. 2010) (citation omitted).*

In this case, the district court has evaluated the nature and scope of the various claims, and has determined that they share common fact issues and require the same discovery with respect to the liability phase of the litigation. Accordingly, the district court has decided to (1) consolidate and organize the relevant claims into "pleading bundles" rather than separate litigation tracks; (2) bifurcate the liability and damages phases of the litigation; (3) schedule a liability trial for early 2012; (4) appoint lead, liaison, and coordinating counsel; and (5) promulgate pretrial procedures for common discovery efforts leading up to the liability trial. All of these decisions are committed to the discretion of the district court, and therefore it is not appropriate for us to second-guess them on a petition for a writ of mandamus.

To the extent that Louisiana argues that specific provisions in certain pretrial orders ("PTOs") unlawfully infringe its sovereignty, violate Louisiana law, or create a conflict of interest, we find that Louisiana's concerns are not worthy of mandamus at this time. Mandamus is not proper when there are other adequate means to attain the desired relief. *Cheney*, 542 U.S. at 380–81.

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* *See also* MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.1, .13, .22, .3 (2004) (outlining the powers and responsibilities of an MDL transferee judge).

The district court has stated on the record that it does not intend to infringe Louisiana's sovereignty. Further, the court, when specifically asked to do so, has exempted Louisiana from certain PTO provisions, and it has indicated that it is open to entertaining future motions regarding the applicability of other PTO provisions. In other words, the district court has made it clear that it will grant any relief that is due to Louisiana on an order-by-order basis. Louisiana has not demonstrated that this procedure will cause it irreparable harm, and thus we find that it is not entitled to mandamus at this time.

PETITION DENIED.

Manual for Complex Litigation, Fourth

Federal Judicial Center 2004

Cite as

Manual for Complex Litigation,

Fourth, § _____

or

MCL 4th § _____

Manual for Complex Litigation, Fourth

Federal Judicial Center 2004

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Contents

14.213 Maintaining Adequate and Comprehensible Records

Complete time records are critical when fees are based on a lodestar and are advisable in any large litigation. Such records may be used as a cross-check on the percentage-of-fund method. Sometimes, however, these records may be too voluminous for effective judicial analysis. The judge should address this issue early in the case by directing counsel to develop record-keeping procedures to facilitate review.[570] Counsel should maintain contemporaneous records that show the name of the attorney, the time spent on each discrete activity, and the nature of the work performed. Consider recommending that attorneys use computer programs to facilitate analysis of billings and of fee requests. Agreed-on forms of summaries may be used to achieve similar results.

14.214 Submission of Periodic Reports

Some judges require periodic reports in anticipation of an award at the end of the litigation (it may be necessary to submit some of the information under seal or *in camera*).[571] This practice encourages lawyers to maintain records adequate for the court's purposes and enables the court to spot developing problems. Periodic review of time charges sometimes leads the judge to establish a tentative budget for the case, acceptable billing ranges for attorneys, or at least limits on recoverable fees for particular activities.

14.215 Compensation for Designated Counsel

Lead and liaison counsel may have been appointed by the court to perform functions necessary for the management of the case but not appropriately charged to their clients. Early in the litigation, the court should define designated counsel's functions, determine the method of compensation, specify the records to be kept, and establish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions. Guidelines should cover staffing, hourly rates, and estimated charges for services and expenses.

570. For a discussion of various approaches that judges use to accomplish this goal, see Hirsch & Sheehey, *supra* note 466, at 103–05. *See also* Judicial Regulation, *supra* note 525, at 30–32.

571. *See* Hirsch & Sheehey, *supra* note 466, at 104–05.