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ADULT SUPERVISION? APPELLATE REVIEW, MANDAMUS, AND THE FEDERAL RULES IN MULTIDISTRICT LITIGATION

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ABSTRACT

When a disaster of nationwide importance is dropped into the lap of a single federal judge as a multidistrict litigation (MDL), we expect a lot. The judge is supposed to efficiently manage the litigation as a massive aggregate, perhaps toward a workable resolution, while also still treating the cases transferred to the MDL as individual entities, respecting the rights and interests of the parties on both sides of the v. Doing so is a constant balancing act. Typically, and appropriately in our view, the MDL judge should be the one striking that balance day to day—with very limited interference. Indeed, that is how the MDL regime was designed. But increasingly it appears that defense-side interests would like more appellate review, largely in order to police supposedly lawless MDL judges. A prime example of this was the Sixth Circuit's recent writ of mandamus against Judge Dan Polster in the gargantuan opioids MDL for, of all things, allowing plaintiffs to amend their complaint after a deadline in a case management order. In this Essay, we argue that this decision was wrong—both narrowly, as a matter of law, and broadly, as a matter of judicial policy. What's worse, the Sixth Circuit's opinion—and its implication that MDL judges ignore the Federal Rules of Civil Procedure—has gone viral, finding its way into briefs, opinions, and political materials intended to hamper judicial discretion in MDL. Here, we intend to counter this dangerous precedent—and narrative.

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INTRODUCTION

One might say that the Opioids multidistrict litigation (MDL) got off to a rocky start. Judge Dan Aaron Polster, to whom the Judicial Panel on Multidistrict Litigation had sent MDL 2804, more formally known as *In re National Prescription Opiate Litigation*, began with an unusual case management conference. There, Judge Polster announced his sincere intention to use the centralization before him of the pretrial proceedings of all of the nation's federal cases as an opportunity to broker a fast settlement.[1] Having lamented the enormous human costs of this national crisis, and Congress's failure to act to solve it, Judge Polster hoped to avoid the traditional litigation process altogether and instead prompt a collaboration under the auspices of his court.[2] Indeed, Polster's gambit appeared to be an attempt to do something entirely different from what we think of as adversarial civil litigation, even the more complex version of it developed by judges over the decades in massive cases of national scope.[3]

But what Judge Polster soon learned is that old habits die hard, though, including the insistence of parties on asserting their rights. So, perhaps unsurprisingly, the Opioids MDL quickly began to look much like the kind of MDL both scholars and the complex litigation bar have come to know well.[4] The usual features of such cases—developed over the last six decades through the innovations of individual transferee judges and revisions of the Manual for Complex Litigation—soon appeared: steering committees, coordinated discovery, consolidated pleading and motion practice, the use of special masters, tracking of cases, and scheduled bellwether trials.[5] And, like most

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1. Transcript of Proceedings at 3-5, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Jan. 12, 2018) ("[T]his is not a traditional MDL. It generally focuses on something unfortunate that's happened in the past, and figuring out how it happened, why it happened, who might be responsible, and what to do about it. What's happening in our country with the opioid crisis is present and ongoing. I did a little math. Since we're losing more than 50,000 of our citizens every year, about 150 Americans are going to die today, just today, while we're meeting.").

2. *See id.* at 4-6 ("[M]y objective is to do something meaningful to abate this crisis and to do it in 2018. . . . We've just got to plow through this . . . and if we can get some agreement on both sides that that's what we ought to do . . . .").

3. *Id.* at 5 ("I mean, I'm really—you know, if I've got to do it in a traditional way, and—I guess I'll have no choice. I'll admit failure and I'll say, [a]ll right. We've just got to plow through this, and, you know, if we can't accomplish something like what I've talked about then, you know, I'll talk to everyone.").

4. *See* Dan Polster, *Francis McGovern: Special Master Par Excellence*, 84 LAW & CONTEMP. PROBS. 11, 12 (2021).

5. *See id.* ("I voiced to the attorneys and parties at the very outset of the MDL that I didn't believe it was possible for plaintiffs, defendants, or the courts to try hundreds of these cases and that we all needed to work together to resolve the cases and to turn the curve of addiction and death downward. However, it soon became apparent that there needed to be an active litigation track in parallel with the settlement track. There were a number of potentially dispositive motions to dismiss that defendants wanted to file and have me decide.

MDLs where the facts and legal theories are complicated and the stakes enormous, the litigation has become protracted as it heads towards its fifth year, though several recent settlement agreements should be cause for optimism.[6]

Although his initial attempts to avoid litigation entirely did not succeed, Judge Polster has not exactly receded into the background or into the role of passive umpire. Having had to resort to the more traditional case management methods he had hoped to avoid, Judge Polster still has cut an assertive figure. Indeed, too assertive for some. The case management conferences have had a rather combative quality, and relations between the bench and bar have been strained.[7] For some critics of the coziness between repeat-player lawyers and judges in MDL, perhaps a little bit of tension is a good thing.[8] Here, though, things boiled over in a troubling way that we do not think is cause for celebration: a writ of mandamus granted by the Sixth Circuit against Judge Polster, via an opinion by Judge Raymond Kethledge for a unanimous panel.[9]

The subject of the writ of mandamus was revealingly technical—almost banal, at least for non-mavens of civil procedure. The Sixth Circuit effectively reversed Judge Polster's grant of leave to amend a complaint by two plaintiffs, Summit and Cuyahoga (Ohio) Counties, to add claims against several pharmacies.[10] The defendants argued that the amendments had come too late in the game—after a deadline for amendments set by Judge Polster in an earlier case management order—and would prejudice them.[11] Moreover, the defendants argued that Judge Polster impermissibly allowed these amendments without "good cause," as required by Rule 16(b) of the Federal Rules of Civil Procedure.[12]

This gambit was a long shot. Writs of mandamus are not exactly common as a general matter, much less in MDL, where transferee

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Further, I determined it was unlikely that there would be serious settlement discussions until the parties had engaged in discovery in a concrete case that was set for trial."). *See generally* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20 (2004).

6. *See generally MDL 2804*, U.S. DIST. CT. N. DIST. OF OHIO, https://www.ohnd.uscourts.gov/mdl-2804 [https://perma.cc/6RZV-RJSA] (last visited Jan. 14, 2023) (listing "Orders Pertaining to MDL 2804"); Jan Hoffman, *Walmart Agrees to Pay $3.1 Billion to Settle Opioid Lawsuits*, N.Y. TIMES (Nov. 15, 2022), https://www.nytimes.com/2022/11/15/health/walmart-opioids-settlement.html [https://perma.cc/N5TX-L8CT].

7. *See, e.g.*, Jan Hoffman, *Opioid Defendants Seek to Disqualify Judge Overseeing 2,300 Cases*, N.Y. TIMES (Sept. 14, 2019), https://www.nytimes.com/2019/09/14/health/ohio-opioid-lawsuit-judge.html [https://perma.cc/WYT4-GAEL].

8. *See, e.g.*, Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 70-72 (2017).

9. *See In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 846 (6th Cir. 2020).

10. *Id.* at 845-46.

11. *Id.* at 843.

12. *Id.* at 845.

judges enjoy significant discretion.[13] But supporting the defendants' attempt in amicus briefs were two defense-side interest groups who have been engaged in a public effort to restrict what they see as lawless behavior by MDL judges. These groups, the U.S. Chamber of Commerce (Chamber) and Lawyers for Civil Justice (LCJ), have for several years been supporting amendments to the MDL statute and new Federal Rules of Civil Procedure for MDL cases[14]—all of which would impose new strictures that would reduce the flexibility of MDL transferee judges, including increased court of appeals supervision through mandatory interlocutory review of many transferee-judge decisions.[15] These efforts have mostly failed—the statutory effort passed the House along party lines but failed in the Senate, and the effort to adopt Rules for MDL has narrowed significantly.[16] Here, however, was an

13. *See, e.g.*, *In re* Pfizer Inc. Sec., Derivative & "ERISA" Litig., 374 F. Supp. 2d 1348, 1349 (J.P.M.L. 2005) (noting that the Panel "leave[s] the degree of any coordination or consolidation to the discretion of the transferee judge"); Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1305-06 (2017) ("MDL judges are vested with tremendous discretion. They cannot be fired, and avenues for appellate review are severely limited.").

14. *See, e.g.*, LAWS. FOR CIV. JUST., COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES AND ITS MDL SUBCOMMITTEE, BETTER INFORMATION AND AN EARLIER START: HOW MDL JUDGES WOULD BENEFIT FROM A NEW TOOL FOR INFORMING ORGANIZATIONAL DECISIONS AND REDUCING THE DELAY BETWEEN COORDINATION AND INITIAL DISCOVERY WHILE PRESERVING JUDICIAL DISCRETION (2022), https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment_on_mdl_sketch_rule_draft_3-8-22.pdf [https://perma.cc/TZT9-BKLB]; LAWS. FOR CIV. JUST., REQUEST FOR RULEMAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES, RULES FOR "ALL CIVIL ACTIONS AND PROCEEDINGS": A CALL TO BRING CASES CONSOLIDATED FOR PRETRIAL PROCEEDINGS BACK WITHIN THE FEDERAL RULES OF CIVIL PROCEDURE (2017), https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_request_for_rulemaking_concerning_mdl_cases_8-10-17.pdf [https://perma.cc/DMG7-RH5G]; *Mass Tort Multidistrict Litigation*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, https://instituteforlegalreform.com/issue/mass-tort-multidistrict-litigation/ [https://perma.cc/V3SB-T7MN] (last visited Jan. 14, 2023); Letter from Lisa A. Rickard, President, U.S. Chamber Inst. for Legal Reform, to Bob Goodlatte, Chairman, Com. on the Judiciary, U.S. House of Representatives & John Conyers, Ranking Member, Com. on the Judiciary, U.S. House of Representatives (Feb. 14, 2017), https://www.uschamber.com/assets/documents/170214_ilr_hr985_fairnessinclassactionlitigation_goodlatte_conyers.pdf [https://perma.cc/8AYX-CTF7] (supporting the Fairness in Class Action Litigation Act of 2017); U.S. CHAMBER INST. FOR LEGAL REFORM, TWISTED BLACKJACK: HOW MDLS DISTORT AND EXTORT (2021), https://instituteforlegalreform.com/wp-content/uploads/2021/10/ILR-Briefly-MDL-FINAL.pdf [https://perma.cc/DK5Q-YFGA]; U.S. CHAMBER INST. FOR LEGAL REFORM, TRIALS AND TRIBULATIONS: CONTENDING WITH BELLWETHER AND MULTI-PLAINTIFF TRIALS IN MDL PROCEEDINGS 1-4 (2019), https://instituteforlegalreform.com/wp-content/uploads/2020/10/Contending_with_Bellwether_and_Multi-Plaintiff_Trials_in_MDL_Proceedings.pdf [https://perma.cc/4TZJ-FA87]; *see also* Jonathan Steinberg, *The False Promise of MDL Bellwether Reform: How Mandatory Bellwether Trial Consent Would Further Mire Multidistrict Litigation*, 96 N.Y.U. L. REV. 809, 835, 840 (2021).

15. *See, e.g.*, Fairness in Class Action Litigation Act of 2017 (FICALA), H.R. 985, 115th Cong. § 5 (2017) (proposing amendments to the MDL statute); *see also* Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87 (2018); Howard M. Erichson, *Searching for Salvageable Ideas in FICALA*, 87 FORDHAM L. REV. 19 (2018).

16. Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 108, 119 (2019); *see*

opportunity to push back on a judge's case management efforts in the most prominent MDL—and to send a signal to other MDL judges that the courts of appeals would now be paying attention.

Perhaps surprisingly, the defendants succeeded.[17] And they could not have hoped for more from the opinion issued by the Sixth Circuit. In it, Judge Kethledge held that Judge Polster's order allowing amendment of the complaints served to "distort or disregard the rules of law."[18] In so holding, Judge Kethledge repeated the talking points of those seeking reform of MDL, noting that "MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance."[19]

In this Essay, we argue that the Sixth Circuit's decision was wrong on both narrow and broad grounds. Most narrowly, the decision was just wrong under both the Federal Rules and Sixth Circuit precedent. The notion that the flexible case management policy underlying Rule 16 and the liberal amendment policy underlying Rule 15 would prevent a district judge from permitting amendment of a complaint to add claims against a defendant is questionable at best—even under the cases the Sixth Circuit itself cited, which suggest that a district court does in fact retain flexibility to do exactly what Judge Polster did. That the Sixth Circuit would grant the extreme remedy of a writ of mandamus in the context of an MDL, where judges' case management authority is thought to be at its apogee, and in *this* MDL, where any argument of prejudice on the part of these defendants was tenuous, is even more remarkable. In short, the Sixth Circuit should not have granted the writ. That alone, however, would not necessarily merit outsized attention.

What's more concerning about the Sixth Circuit's action is the writ's broader potential effects, and what it reveals about the tenuous nature of MDL's prominence. To begin with, the language of the opinion parrots language from the reform efforts of the Chamber and LCJ to the effect that MDL transferee judges ignore the Federal Rules of Civil Procedure: "Respectfully, the district court's mistake was to think it had authority to disregard the Rules' requirements in the Pharmacies'

ADVISORY COMM. ON CIV. RULES, AGENDA BOOK: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES OCTOBER 16, 2020, at 151 (2020), https://www.uscourts.gov/sites/default/files/2020-10_civil_rules_agenda_book_final.pdf [https://perma.cc/ZJ5H-EGTV] ("The subcommittee has recently had three issues pending before it. One of them—screening claims—is still under study, and awaiting further information. The second issue was whether to provide by rule for expanded interlocutory appellate review in MDL proceedings. On this issue, after much study, the subcommittee has come to a consensus that rulemaking should not be pursued at this time. The third issue—judicial supervision of the selection of leadership counsel and of settlement in MDL proceedings—remains under study.").

17. *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 846 (6th Cir. 2020).

18. *Id.* at 841.

19. *Id.* at 844.

cases in favor of enhancing the efficiency of the MDL as a whole."[20] Not only is there little support for this proposition as a general matter, it is recognizable as the rhetoric from these groups' political efforts.[21] That such language would be deployed in this opinion—under circumstances that aren't exactly earthshattering—suggests that the Court of Appeals, or at least Judge Kethledge, had a broader mission: to signal that appellate-court judges will be supervising MDL judges, and that those aggrieved by MDL judges' decisions should seek relief. And already, after only a year, the language from the court's opinion, borrowed from the reformers' briefs, has spread, almost virally throughout other opinions and briefs.[22]

Why is this a problem? If one is of the view that MDL judges *need* more supervision by the courts of appeals, perhaps the Sixth Circuit's action is all to the good.[23] But we think there are reasons for concern. First, the writ of mandamus is inconsistent with the design and history of the MDL statute, which points toward MDL judges' having the discretion to manage cases as dictated by their circumstances. This is very much in the DNA of the statute—which was crafted to insulate both the Judicial Panel on Multidistrict Litigation (JPML) and MDL judges from interference.[24] Indeed, the reason why we don't have special Federal Rules of Civil Procedure for MDL to begin with is because the drafters of the statute, and the Judicial Conference, wanted MDL judges to be able to respond to the particular circumstances of new cases as they arose; the Federal Rules of Civil Procedure applicable to all cases suffice.[25] The history of the statute, however, is of course not dispositive. But we think this freedom to innovate on the part of MDL judges is a good thing; were MDL judges to feel chilled in their attempts to respond to complex litigation by the oversight of courts of appeals on mandamus, that could potentially restrict their ability to solve the problems assigned to them. This does not mean that the courts of appeals have no role to play—interlocutory appeal, under 28 U.S.C. § 1292 and Federal Rule of Civil Procedure 23(f), remains available when needed. And were an MDL judge to act lawlessly, of

20. *Id.*

21. *See LCJ Urges MDL Reform*, LAWS. FOR CIV. JUST., https://www.lfcj.com/rules-for-mdls.html [https://perma.cc/8C92-QKQD] (last visited Jan. 14, 2023) ("It is widely known, however, that the FRCP do not govern key elements of procedure in many MDL cases, which now constitute [seventy] percent of federal civil cases. The reason is straightforward: the FRCP no longer provide practical presumptive procedures in MDL cases, so judges and parties are improvising.").

22. *See infra* note 147.

23. Indeed, MDL reformers have sought from both Congress and the Rules Committee, thus far unsuccessfully, mandatory interlocutory appeal from MDL judges' decisions.

24. Andrew D. Bradt, *The Stickiness of the MDL Statute*, 37 REV. LITIG. 203, 215 (2018).

25. *Id.* (noting that the drafters of the MDL statute "eliminate[d] the Rules Committee from MDL altogether" and "instead of a statute authorizing the rulemakers to implement an MDL statute, [they] drafted a statute that created the Judicial Panel on Multidistrict Litigation and gave *it* control over implementation").

course a writ of mandamus could be appropriate. For instance, review of Judge Polster's certification of a "negotiation class" under Rule 23(f) was wholly appropriate (regardless of whether one agrees with the results);[26] what was inappropriate, and frankly silly, was the Sixth Circuit's quotation during that review of Judge Kethledge's somehow obvious and tendentious observation that the Federal Rules of Civil Procedure apply in MDLs.[27]

Beyond the effects of the Sixth Circuit's opinion in this Opioids MDL (and we don't think Judge Polster seems terribly intimidated) and other MDLs, we also think this is an example of the assault on aggregate litigation through court decisions that Professors Stephen Burbank and Sean Farhang have observed in their work.[28] There, they describe how defense-side law reformers have achieved retrenchment of procedure designed to facilitate private enforcement of the substantive law through conservative legal decisions, after having failed to achieve such reforms through more open, democratic, and difficult processes, like legislation or amendments to the Federal Rules.[29] Here, too, having failed to amend the MDL statute or achieve broad reforms like mandatory interlocutory appeal through new Federal Rules, reformers turned their attention to the courts of appeals—and they found a receptive panel (and a feisty transferee judge) to move the ball forward. That the language of the Sixth Circuit's opinion—drawn from the reformers' own advocacy—has already spread throughout litigation is evidence that the process has begun.

Finally, an observation beyond doctrine and politics. As one of us has argued in prior work, MDL's power lies in its apparent split personality.[30] That is, what makes MDL work as a mechanism for mass dispute resolution is its ability to function simultaneously as a tightly knit aggregate litigation and as a collection of cases that do not lose their individual character. It is the ability to oscillate between the former, which serves the needs of the system for efficient resolution, and the latter, which ensures recognition of litigants' autonomy, that makes MDL palatable as a matter of due process.[31] This is why MDL

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26. *See In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 677 (6th Cir. 2020) (reversing district court's grant of motion for class certification).

27. *See id.* at 671.

28. *See, e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

29. *Id.* at 1-24.

30. Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1257-58 (2018).

31. Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1208 (2018) ("While it is difficult to paint with a broad brush to determine whether individual litigants are better or worse off in an MDL, there is one aspect of MDL that is clear, and which its creators understood well: its split personality as a temporary collection

has thrived while the mass-tort class action has failed—despite the two procedures working similarly as a practical matter. One reason the Sixth Circuit's opinion is so troubling is that it misses this point entirely in a way that threatens to upend this tenuous balance.

Of course, the Federal Rules of Civil Procedure apply to multidistrict litigation—no one has ever argued that they don't. But the defining characteristic of the Federal Rules of Civil Procedure is the discretion they afford the district judge—a discretion that has only grown within the rules as active case management has become the norm.[32] Within those rules, therefore, is the assumed ability of the district judge to choreograph the litigation to ensure both efficiency and fairness. That a particular case may involve coordinated or consolidated proceedings in an MDL does not defeat this power—it enhances it. An MDL transferee judge *applies* the Federal Rules of Civil Procedure within that aggregate context. To view the Federal Rules and the MDL statute as outside dialogue with one another not only restricts the judge's ability to fulfill the responsibility given to her by the JPML, it also suggests that the MDL's split personality cannot function—that it serves as only a set of individual cases that must be treated as apart from the group. And that approach risks the ability of MDL to serve its purpose.

Our Essay proceeds as follows: first, we will outline the procedural posture of the Opioids MDL at the mandamus stage; second, we will explain why we think the decision to grant the writ was incorrect on the question it decided; third, we will move on to describe why we think the writ may portend worse consequences than just a wrong decision on an amended complaint, namely because it is contradictory to the goals of the MDL statute and because it may lead to widespread changes to MDL through the process of case-by-case determinations rather than more deliberative legislative or rule-based reform; and fourth, we will close by arguing that the general approach to MDL embedded in the Sixth Circuit's opinion misconceives the purpose of the MDL statute.

I. THE PROCEDURAL POSTURE

A. The Opioids Litigation

The Opioids MDL likely needs little introduction, but some brief stage setting is nevertheless appropriate. Between 1999 and 2018, this

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of individual cases and a tightly consolidated unitary proceeding are the key to its success. The formal nature of MDL insulates it from the kinds of due process attacks that doomed the mass tort class action.").

32. Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 911, 923 (1987); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1983-84 (1989).

country's opioid epidemic claimed the lives of almost 450,000 people in the United States.[33] And since then, the severity of the crisis has only worsened.[34] In response, states, cities, counties, and other local entities from around the country have filed a deluge of litigation seeking to hold opioid manufacturers, distributors, and other supply chain organizations legally liable for the epidemic.[35] In December 2017, the Judicial Panel on Multidistrict Litigation (JPML) ordered the centralization of over one hundred of these pending actions from federal courts around the country into a multidistrict litigation before Judge Polster of the Northern District of Ohio.[36] From the beginning, Judge Polster understood the enormity of the litigation before him, stating during the court's first conference with counsel that "about 150 Americans are going to die today, just today, while we're meeting."[37] Since then, nearly 2,000 cases have been pending in the MDL,[38] with more cases being added regularly.[39]

The lawsuits aim to recover costs necessarily associated with addressing the ongoing public health epidemic.[40] Claims against the manufacturer defendants have focused on the fraudulent marketing of opioid drugs.[41] Generally, the plaintiffs allege that the manufacturer defendants understated the risks while misrepresenting the benefits of opioids.[42] And thus, the manufacturer defendants' marketing caused a significant increase in opioid usage and addiction.[43] As to the

33. *Health Topics—Opioid Overdose*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/policy/polaris/healthtopics/opioid/index.html [https://perma.cc/UNA4-4CXU] (last visited Jan. 14, 2023).

34. *See* Josh Katz et. al., *In Shadow of Pandemic, U.S. Drug Overdose Deaths Resurge to Record*, N.Y. TIMES (July 15, 2020), https://www.nytimes.com/interactive/2020/07/15/upshot/drug-overdose-deaths.html [https://perma.cc/JU5Y-A34X].

35. *See* Opinion and Order at 1-2, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Sept. 26, 2019); Transfer Order at 1, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (J.P.M.L. Dec. 12, 2017) ("These cases concern the alleged improper marketing of and inappropriate distribution of various prescription opiate medications into cities, states and towns across the country.").

36. *See* Opinion and Order, *supra* note 35, at 1-2; Transfer Order, *supra* note 35, at 1.

37. Transcript of Proceedings, *supra* note 1, at 4.

38. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING (2019), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-July-16-2019.pdf [https://perma.cc/Y3J8-9FK6].

39. *See, e.g.*, Transfer Order at 1, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (J.P.M.L. Oct. 1, 2020).

40. *See generally* Abbe R. Gluck et al., *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J.L. MED. & ETHICS 351, 353, 359-60 (2018).

41. *See* Opinion and Order Denying Mallinckrodt's Motion for Partial Summary Judgment at 1, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Sept. 3, 2019).

42. *See id.* at 1-4.

43. *See* Opinion and Order Denying Teva and Actavis Generic Defendants Motion for Summary Judgment Motion at 2-4, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Sept. 3, 2019).

distributor defendants, the plaintiffs generally allege that the distributors failed to legitimately and adequately monitor opioid orders by delivering outsized prescription orders, thus exacerbating the opioid epidemic.[44]

The pharmacy defendants have been sued as both distributors and dispensers. As dispensers, plaintiffs allege that pharmacies, such as Walgreens and CVS, failed in their duty to safeguard against diversion from their retail stores.[45] Although the pharmacy defendants knew of the importance of these obligations, the plaintiffs claim, defendants failed to erect and maintain effective policies and procedures to control diversion when filling prescriptions.[46] And as distributors, the pharmacy defendants allegedly failed to implement proper procedures to monitor shipment orders in the face of multiple red herrings.[47]

B. The Background for the Writ of Mandamus

As noted above, relations between Judge Polster and the defendants have been tense. Indeed, various defendants unsuccessfully sought mandamus against the judge several times before achieving success—on a relatively banal procedural issue, which we will summarize briefly here.

As an integral part of its case management strategy, the MDL court established "Tracks" to methodically address specific legal theories and parties. Track One addressed claims brought by the Ohio counties of Summit and Cuyahoga.[48] The court scheduled a Track One bellwether trial to adjudicate a subset of the counties' claims against a select group of defendants. But only ten hours before the October 21, 2019, trial was to begin, all but one of those defendants settled. Accordingly, the court severed the remaining claims against the lone remaining pharmacy defendant, Walgreens, and postponed the trial to a later date.[49]

Perhaps Judge Polster was frustrated by the lack of overall progress to that point—indeed, little had been accomplished over the

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44. *See* Opinion and Order at 5-6, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Apr. 3, 2020).

45. *See* Amendment by Interlineation at 1-2, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Nov. 20, 2019).

46. *Id.* at 8, 14.

47. *See* Opinion and Order Denying CVS's Motion for Summary Judgment at 1, 3, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Jan. 27, 2020).

48. *See* Case Management Order One at 6, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-02804 (N.D. Ohio Apr. 11, 2018).

49. The bellwether trial was narrowly diverted by a $260 million deal between Teva Pharmaceutical Industries Ltd., Cardinal Health, McKesson Corp., and AmerisourceBergen Drug Corp. and the counties of Cuyahoga and Summit. Walgreens Corp. was the only defendant not to settle with the counties. *See* Jeff Overley, *Opioid Trial Halted by Drug Cos.' 11th Hour $260M Deal*, LAW360 (Oct. 21, 2019, 8:27 AM), https://www.law360.com/articles/1196365/opioid-trial-halted-by-drug-cos-11th-hour-260m-deal [https://perma.cc/6W9S-77WN].

course of the first year when compared with the quick resolution he sought at the outset of the MDL: a one-off settlement and no bellwether trials. So, at a November 6, 2019, status conference, Judge Polster changed tack and presented what he viewed as the court's "guiding principles" for the MDL: the court was to (1) facilitate global settlements if parties were willing to negotiate one; (2) try a small number of focused streamlined cases; and (3) put the court's resources, including its team of special masters, to effective use.[50] But after opposing parties could not agree on a unified plan to proceed,[51] the court elected to schedule another bellwether trial between the two Ohio counties and the severed Track One pharmacy defendants.[52] By then, the Track One parties already had made substantial progress on discovery regarding the plaintiffs' claims against the pharmacy defendants as distributors.[53] Accordingly, the court determined that the next bellwether trial ("Track One-B") would address claims against the pharmacy defendants.[54]

But the bellwether trial would prove more efficient and effective if it included both distribution *and* dispensing claims against the pharmacy defendants—since those claims were alleged against those defendants in many cases in the MDL.[55] That is, while Summit and Cuyahoga Counties had alleged only distribution claims, many other plaintiffs within the MDL alleged both distribution and dispensing claims against the same pharmacy defendants.[56] Allowing the Ohio counties to amend their complaints could facilitate the efficient and central resolution of common issues within the MDL. Consequently, Judge Polster granted the counties' motion to amend the complaint to

50. Transcript of Status Conference at 4-5, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Nov. 7, 2019).

51. Initially, the court provided parties one week to meet and confer regarding a unified plan for how litigation should proceed. After collaboration between the parties failed following a one-week extension, the court issued its case management order. *See* Track One-B Case Management Order at 1-2, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Nov. 19, 2019).

52. *Id.* at 2-4.

53. Although adding dispensing claims would require some additional discovery, "much of the foundational discovery and virtually all of the discovery regarding Plaintiffs" already had been completed. *Id.* at 3.

54. *Id.* at 2-4.

55. *See id.*

56. *See, e.g.*, Short Form for Supplementing Complaint and Amending Defendants and Jury Demand, Cnty. of Lake v. Purdue Pharma, L.P. (*In re* Nat'l Prescription Opiate Litig.), No. 1:18-op-45032 (N.D. Ohio Mar. 18, 2019); Short Form for Supplementing Complaint and Amending Defendants and Jury Demand, Cnty. of Trumbull v. Purdue Pharma, L.P. (*In re* Nat'l Prescription Opiate Litig.), No. 1:18-op-45079 (N.D. Ohio Mar. 18, 2019).

add the claims.[57] In turn, the plaintiffs agreed to sever all claims except absolute public nuisance and civil conspiracy, as well as drop all but five defendants, to help advance the litigation efficiently.[58]

The pharmacy defendants opposed the motion to amend on the grounds that the plaintiffs had not articulated good cause for the amendments and that the defendants would be unduly prejudiced[59] under Federal Rule 16(b)(4), which provides that a pretrial scheduling order (like the one Judge Polster had issued early on in the litigation limiting the time for amendments to pleadings) "may be modified only for good cause and with the judge's consent."[60] Defendants objected first by claiming that pharmacy dispensing claims could not be added to the Track One complaints because dispensing issues were "purposefully deferred from CT1."[61] Because nothing prevented the plaintiffs from pleading dispensing claims earlier, the pharmacy defendants maintained that the plaintiffs could not show good cause as required under Rule 16(b) for delayed amendments.[62] In response, Judge Polster stressed the MDL court's purpose to "promote the just and efficient conduct of the litigation."[63] While additional discovery would ensue following the amended complaints, significant discovery had already been completed. The court concluded that avoiding duplicative discovery aligned with the purposes of MDL consolidation.[64]

Next, the pharmacy defendants objected that the plaintiffs' amendments would "severely prejudice" them.[65] The pharmacy defendants

57. *See* Track One-B Case Management Order, *supra* note 51, at 2-4.

58. *See* Plaintiffs' Revised Position Statement Regarding Continuing Litigation at 1-4, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Nov. 13, 2019).

59. Pharmacy Defendants' Follow-up Position Paper on Case Selection at 3, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Nov. 13, 2019); Pharmacy Defendants' Opposition to Plaintiffs' Motion for Leave to Amend at 2-3, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Nov. 12, 2019).

60. FED. R. CIV. P. 16(b)(4).

61. Pharmacy Defendants' Follow-up Position Paper on Case Selection, *supra* note 59, at 3; *see also* Motion to Dismiss Complaint by Pharmacy Defendants Walmart Inc., CVS Health Corp., Right Aid Corp., and Walgreens Boots Alliance, Inc. at 7, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804 (N.D. Ohio May 25, 2018) ("Plaintiffs make a handful of vague allegations that refer to some of the Moving Defendants in their role as dispensing pharmacies.").

62. Pharmacy Defendants' Opposition to Plaintiffs' Motion for Leave to Amend, *supra* note 59, at 2-3.

63. Track One-B Case Management Order, *supra* note 51, at 3.

64. *Id.*

65. The pharmacy defendants cite an earlier ruling by the court denying plaintiffs the opportunity to reopen discovery after making a "tactical decision" not to pursue discovery against the defendant, Noramco, because it would be "manifestly unfair." *See* Pharmacy Defendants' Opposition to Plaintiffs' Motion for Leave to Amend, *supra* note 59, at 3. However, the dynamics are easily distinguishable from those against the pharmacy defendants. Noramco is "unique among the defendants in that it alone is not a manufacturer, distributor, or retail pharmacy seller of prescription opioids." Nunc Pro Tunc Opinion and Order at 4, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804 (N.D. Ohio Aug. 15, 2019). According

characterized the plaintiffs' proposed amendments as plainly an eighteen-month undue delay.[66] Yet the court found to the contrary. Judge Polster determined that granting the plaintiffs leave to amend did not prejudice the pharmacy defendants whatsoever; rather, it lowered costs, especially so for the pharmacy defendants.[67] Nearly 2,500 cases in the MDL include dispensing-related claims, and the pharmacies would be responsible for discovery production regarding those claims in any bellwether trial where they are named defendants.[68] In other words, it was not a matter of *if*, but *when*.

The defendants subsequently moved to dismiss the new claims under Rule 12(b)(6), while their summary judgment motions on the earlier-filed claims were still pending. Before Judge Polster had the opportunity to rule on either set of motions, however, the defendants sought their writ of mandamus in the Sixth Circuit.[69] The pharmacy defendants asserted that the district court repeatedly "disregarded" the Federal Rules of Civil Procedure, instead following its own predilection.[70] Circuit court intervention was allegedly needed to enforce the fundamental principle that the Rules applied equally to all civil litigation, including MDLs.[71] The U.S. Chamber of Commerce and Lawyers

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to the court, allowing the plaintiffs to begin discovery on manufacturing and distributing claims that already had been developed against all other defendants would "unnecessarily delay" a subsequent trial, thus burdening the other defendants. *Id.* Contrarily, allowing additional dispensing claims against the pharmacy defendants would not delay the subsequent trial—the court would schedule a trial to allow both sides to conduct the necessary discovery. Track One-B Case Management Order, *supra* note 51, at 3-4.

66. Pharmacy Defendants' Opposition to Plaintiffs' Motion for Leave to Amend, *supra* note 59, at 7.

67. *See* Track One-B Case Management Order, *supra* note 51, at 3 n.4 ("The Pharmacy Defendants will not have to redo much of the discovery and depositions already taken of the Plaintiffs or the discovery relating specifically to the costs of implementing an abatement remedy.").

68. *See id.*

69. In his response to the sought writ of mandamus, Judge Polster explained as follows, noting that his intent was not to bar the defendants' motions, but instead, that similar motions had already been fully briefed and were before the court in other cases:

> [O]ther complaints with fully-briefed motions to dismiss currently pending before the undersigned contain claims that touch on the pharmacy defendants' dispensing practices, and the pharmacy defendants' motions to dismiss those claims have been or currently are being carefully considered.
>
> . . . .
>
> . . . [T]he MDL Court has already assessed [twenty-four] separate motions to dismiss, which attack every threshold legal issue of all of the different plaintiffs' various claims in nearly every conceivable way. That was the point of [Case Management Order 1]. Far from "flatly refus[ing] to entertain motions to dismiss," the undersigned simply declined to reconsider virtually-identical arguments.

Response from Honorable Dan A. Polster at 4-5, *In re* CVS Pharmacy, Inc., No. 20-3075 (6th Cir. Feb. 25, 2020).

70. *See* Petition for Writ of Mandamus at 18-21, *In re* CVS Pharmacy, Inc., No. 20-3075 (6th Cir. Jan. 17, 2020).

71. *Id.* at 18-22.

for Civil Justice, among others, fortified the pharmacy defendants' argument as amici curiae.[72] Both organizations characterized the district court as flouting the Rules; essentially, the mandamus was necessary simply because the Rules must also apply to MDLs.[73] Moreover, Lawyers for Civil Justice professed that a lack of oversight was a "systemic" problem that allowed for MDL judges to run rampant beyond the bounds of the Rules and was in need of correction.[74]

In response, Summit and Cuyahoga Counties, along with Judge Polster, maintained that the court was acting within its discretion. Tasked with promoting "the just and efficient conduct of such actions,"[75] the court's three challenged actions were well within its core discretionary authority to manage both this case and the MDL as a whole.[76]

C. *The Writ of Mandamus Is Granted*

The Sixth Circuit panel unanimously granted the pharmacy defendants' petition for writ of mandamus in an opinion by Judge Kethledge.[77] Throughout the opinion, the court hearkened back to a central premise that "MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance."[78] Indeed, right off the bat, the court's underlying message took its cue from the amicus briefs filed supporting the defendants: "The rule of law applies in multidistrict litigation under 28 U.S.C. § 1407 just as it does in any individual case."[79]

Judge Kethledge considered the district court's decision to allow the counties to amend their complaints as dispositive.[80] Upon reviewing the case history, Judge Kethledge opined that neither the plaintiffs nor Judge Polster even attempted to show the "good cause" required

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72. Brief of Lawyers for Civil Justice as Amicus Curiae in Support of Petitioners at 2-3, *In re* CVS Pharmacy, Inc., 956 F.3d 838 (6th Cir. 2020) (No. 20-3075) [hereinafter Lawyers for Civil Justice Amicus Brief]; Brief of Amici Curiae Chamber of Commerce of the U.S. and National Association of Chain Drug Stores Supporting Petitioners and in Support of Petition for a Writ of Mandamus at 1-3, *In re* CVS Pharmacy, Inc., 956 F.3d 838 (6th Cir. 2020) (No. 20-3075) [hereinafter Chamber of Commerce Amicus Brief].

73. Lawyers for Civil Justice Amicus Brief, *supra* note 72, at 2-3; Chamber of Commerce Amicus Brief, *supra* note 72, at 1-3.

74. Lawyers for Civil Justice Amicus Brief, *supra* note 72, at 3.

75. 28 U.S.C. § 1407(a).

76. *See* County of Summit and County of Cuyahoga's Opposition to Petition for Writ of Mandamus at 1-3, 11-14, *In re* CVS Pharmacy, Inc., 956 F.3d 838 (6th Cir. 2020) (No. 20-3075).

77. *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 838 (6th Cir. 2020).

78. *Id.* at 844.

79. *Id.* at 841.

80. *Id.* at 846 ("We will therefore grant the writ and order that the Counties' November 2019 amendments to their complaints be stricken. That relief renders the petition moot as to the other grounds on which the Pharmacies sought relief . . . .").

by Rule 16(b).[81] Instead, he concluded, the plaintiffs expressly chose not to bring dispensing claims against the pharmacy defendants during the course of Track One pretrial proceedings.[82] Judge Kethledge perceived this "voluntary relinquishment" as an outright waiver of the plaintiffs' dispensing claims against the pharmacy defendants.[83] Moreover, he found unpersuasive Judge Polster's finding of good cause to allow the amendment. According to Judge Kethledge, facilitating the central resolution of common discovery and legal issues within the MDL in hundreds of other MDL cases in congruence with § 1407 was insufficient under the requisite judicial "diligence" of Rule 16(b).[84] The district court had disregarded Rule 16(b)'s requirements as to the pharmacy defendants' individual cases in favor of the MDL generally. Essentially, Judge Polster's decision to grant the plaintiffs' motions to amend in their individual cases against the pharmacy defendants could be based exclusively on the specific case record—not other consolidated cases in the MDL.[85]

Next, Judge Kethledge disregarded the district court's finding that the pharmacy defendants were not prejudiced[86]—even though dispensing claims are at issue in many cases in the MDL. In other words, the pharmacy defendants will need to engage in future dispensing-related discovery production anyway. However, instead of focusing on the trivial amount of additional discovery required to move Track One-B forward with the added dispensing claims compared with restarting the whole discovery process, Judge Kethledge pushed back on the district court's supposed justification that all parties would be disadvantaged if dispensing claims were tried before "some other Court that does not have the expertise [the district court has] developed over the past two years."[87] The Supreme Court in *Lexecon* made clear that a transferee

81. *Id.* at 843-44.

82. *Id.*

83. *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 838 (6th Cir. 2020).

84. *Id.* at 844-45.

85. *Id.*

86. *See id.* at 845.

87. *Id.* at 845. It appears that Judge Kethledge was mistaken in his characterization of the district court's justification, quoting the district court's Track One-B management order out of context. In whole, the district court justified finding a lack of prejudice as follows:

> [C]ontrary to the Pharmacies' assertions, prejudice against the Pharmacies will likely be lessened by the allowance of additional discovery in CT1B. The Pharmacies' brief overlooks the fact that they *will* be required to produce this discovery in any case in this MDL in which they are named and the Court suggests be remanded to another district for a bellwether trial. Dispensing-related claims are at issue in many of the nearly 2500 cases in this MDL, and the Pharmacies will be responsible for producing discovery responsive to those claims. Thus, their argument amounts to the dubious assertion that the Pharmacies' interests will be better-served if dispensing related discovery is conducted at some later date in front of some other Court which does not have the expertise I have developed over the past two years.

Track One-B Case Management Order, *supra* note 51, at 3.

judge's authority is limited only to pretrial proceedings; the district courts' pointed desire to circumvent this limit along with the Rules, Judge Kethledge concluded, could not form the basis of Rule 16(b) "good cause."[88] A transferee judge must find efficiency within the Rules' limits, and Judge Polster's decision granting the plaintiffs leave to add dispensing claims was well outside those limits.[89] Thus, the court concluded that mandamus relief was warranted, especially given the district court's "persistent disregard of the federal rules."[90]

II. THE SIXTH CIRCUIT ERRED IN GRANTING THE WRIT

Our major concern with the Sixth Circuit's actions has to do with its underlying philosophy—that MDL judges do not faithfully apply the Federal Rules, to the detriment of defendants—and the ripple effects it already appears to be having throughout MDL cases around the country. But we also think, on the narrow issue in play, the writ was improperly granted. In short, the Sixth Circuit's decision, perhaps because it was more focused on sending a message to Judge Polster than the particulars of the specific legal question at bar, was just odd as a matter of application of the Federal Rules.

To begin with, writs of mandamus are appropriately rare generally, and specifically so when it comes to orders related to pleading.[91] Moreover, as every 1L plodding through the Rules knows, the policy of amendment under the Federal Rules is intentionally liberal. Indeed, while amendments to a complaint as of right are limited to twenty-one days after service or after service of a responsive pleading, a court should "freely give leave [to amend] when justice so requires."[92] Indeed, amendments can even be allowed at trial to conform to the evidence presented.[93] The Sixth Circuit, however, ignores Rule 15 and focuses instead on Rule 16 on pretrial orders. In the court's view, Rule 16's requirements that the court issue a scheduling order limiting the time for amending the pleadings and that such an order be modified "only for good cause and with the judge's consent" was dispositive.[94] It is correct that Rule 15's more lenient standard should be considered only after Rule 16's "good cause" requirement has been met, but typically requests to add claims are allowed so long as the plaintiff has acted

88. *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 844-46 (6th Cir. 2020) (citing Lexecon Inc. v. Milberg Weiss Bershad Hynes & Learch, 523 U.S. 26, 40 (1998)).

89. *Id.*

90. *Id.* at 845-46 (quoting John B. v. Goetz, 531 F.3d 448, 457 (6th Cir. 2008)).

91. 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3935.7 (3d ed.) (West 2022).

92. FED. R. CIV. P. 15(a).

93. FED. R. CIV. P. 15(b).

94. *See In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 843 (6th Cir. 2020) (citing FED. R. CIV. P. 16(b)).

diligently. Indeed, the committee note accompanying Rule 16 makes clear that "[s]ince the scheduling order is entered early in the litigation, this standard seems more appropriate than a 'manifest injustice' or a 'substantial hardship' test."[95] Moreover, Judge Polster can hardly be said to be holding on to cases in order to avoid their being tried anywhere else—to the contrary, he has remanded numerous cases for bellwether trials on other issues in the case.[96] The notion that he was relying only on the fact that the cases were before him as justification for keeping them was incorrect.[97]

More specifically, Rule 15(a)(2) provides that a party may amend either by stipulation or with leave of the court. Courts are encouraged to look favorably on such requests so as to decide on merits rather than on procedural niceties.[98] Thus, absent good reason to find otherwise, such as prejudice to the nonmoving party, a court should grant leave to amend.[99] And upon balancing all relevant factors, a trial court's decision to grant or deny a party's request for leave to amend falls entirely within its discretion.[100] Rule 16(b), on the other hand, requires a district court to issue a binding scheduling order limiting the time to amend the parties' pleadings. Thereafter, a schedule may be modified only with the judge's consent and for good cause.[101] Thus, if a party requests leave to amend after a scheduling order deadline (as Judge Kethledge deemed to be the case here),[102] the moving party must show

95. FED. R. CIV. P. 16 advisory committee's note to 1983 amendment.

96. Suggestions of Remand at 7-8, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804 (N.D. Ohio Nov. 19, 2019) (requesting the "immediate remand" of three cases—City and County of San Francisco, City of Chicago, and Cherokee Nation—and noting the court's intention to suggest remand of City of Huntington and Cabell County).

97. *See* D. Theodore Rave & Francis E. McGovern, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 LAW & CONTEMP. PROBS. 21, 41 (2021).

98. Foman v. Davis, 371 U.S. 178, 182 (1962) ("In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' ").

99. *Id.*; Head v. Jellico Hous. Auth., 870 F.2d 1117, 1123 (6th Cir. 1989).

100. *Foman*, 371 U.S. at 182 ("[T]he grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.").

101. FED. R. CIV. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent.").

102. Plaintiffs argued, albeit unsuccessfully, that Rule 16 was not "implicated here." *See* County of Summit and County of Cuyahoga's Opposition to Petition for Writ of Mandamus, *supra* note 76, at 15-18; *see also* Response from Honorable Dan A. Polster, *supra* note 69, at 1-3 (arguing that the MDL court's granting the motion to amend adheres to Rule 15, among other rules); Plaintiffs' Reply in Support of Plaintiffs' Motion for Leave to Amend at 1 n.1, 5-6, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804 (N.D. Ohio Nov. 14, 2019) ("As a threshold matter, Rule 16(b)(4) is not applicable here because no operative scheduling order is in place with respect to these claims or defendants. . . . The previous scheduling order . . . is moot and does not govern the proposed amendment."). Judge Kethledge did not address this argument in granting the defendants' petition.

"good cause" for failure to seek leave to amend before the deadline. Only then will a court consider whether an amendment is proper pursuant to Rule 15(a)'s liberal standard.[103]

While exactly what constitutes a "good cause" analysis under Rule 16(b) differs depending on the facts of a case, the standard centers around the timeliness of the amendment and reasons for untimely submission. To demonstrate good cause, the movant must show that the given reasons for tardiness warrant departure from the court's scheduling order deadline.[104] The Sixth Circuit requires a court's determination of good cause to include consideration of both "the diligence of the party seeking the extension" and "whether the opposing party will suffer prejudice by virtue of the amendment."[105] The primary measure of "good cause" is the moving party's diligence, while possible prejudice serves as a secondary, yet "important consideration."[106] Beyond that, district courts are afforded wide latitude in determining whether the moving party has adequately shown good cause under Rule 16(b)(4).[107] In fact, out of ninety-three circuit court cases reviewing district court decisions whether to amend scheduling orders surveyed over the last twenty years, *all but four* affirmed district court

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103. *See* Leary v. Daeschner, 349 F.3d 888, 909 (6th Cir. 2003) (explaining that a Rule 15(a) analysis is much more lenient than the analysis under Rule 16(b)(4)); Lower v. Albert, 187 F.3d 636 (6th Cir. 1999) (explaining that Rule 16 essentially prescribes the time by which any motion for leave to amend can be filed, while Rule 15 provides substantive guidance to the courts on deciding the motion to amend).

104. York v. Lucas Cnty., No. 3:13 CV 1335, 2015 WL 2384096, at *2 (N.D. Ohio May 19, 2015). Courts decide good cause following consideration of (1) the reason for the untimely move for leave to amend; (2) the potential prejudice to other parties granting leave; (3) the amendment's importance; and (4) the availability of a continuance to cure the prejudice. *Id.* (citing 3 MOORE'S FEDERAL PRACTICE ¶ 16.14[1][a] (3d ed. 2014)).

105. *Leary*, 349 F.3d at 906 (citing Inge v. Rock Fin. Corp., 281 F.3d 613, 625 (6th Cir. 2002)). The Advisory Committee on the Rules elaborated on the purpose behind Rule 16's modification limitation in its 1983 Amendment notes:

> [T]he court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension. Since the scheduling order is entered early in the litigation, this standard seems more appropriate than a "manifest injustice" or "substantial hardship" test.

FED. R. CIV. P. 16 advisory committee's note to 1983 amendment.

106. *Leary*, 349 F.3d at 906.

107. *Id.* at 909 ("Because the district court properly applied the governing law, we must conclude that it did not abuse its discretion."); *see also* Hoover Panel Sys., Inc. v. HAT Cont., Inc., 819 F. App'x 190, 200 (5th Cir. 2020) ("District courts have broad discretion in granting or denying leave to amend [under Rule 16(b)]."); Carroll v. Stryker Corp., 658 F.3d 675, 684 (7th Cir. 2011) ("We review a district court's denial of leave to amend the complaint for abuse of discretion and 'reverse only if no reasonable person could agree with that decision.'" (quoting Schor v. City of Chi., 576 F.3d 775, 780 (7th Cir. 2009))); Bylin v. Billings, 568 F.3d 1224, 1231 (10th Cir. 2009) ("[A]ppellate courts that have applied Rule 16 have afforded wide discretion to the district courts' applications of that rule."); 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 16.14[1][b] (Mathew Bender 3d ed. 2022).

"good cause" determinations under Rule 16(b)(4).[108] And, while a vast majority reviewed district court orders denying leave to amend, *only one* reversed a court's finding of good cause.[109] In other words, within the last twenty years, a lower court's finding of sufficient good cause in the context of an untimely motion for leave to amend has survived appellate-court scrutiny all but once.

As a general matter, it is difficult to even argue that the counties were not acting with appropriate diligence, or that the pharmacy defendants would be terribly prejudiced. As noted above, identical claims were asserted against the defendants by other plaintiffs in the MDL. And the counties were acting diligently in accordance with the district court's then-pertinent case management and scheduling orders. As soon as the court set out to create a new litigation track following a last-minute settlement that derailed what would have been the MDL's first bellwether trial, the plaintiffs agreed to temporarily forgo some claims so the court could construct a streamlined and narrowly tailored bellwether trial.[110] The court was prioritizing discovery and experts, sensibly, on a sequenced basis, and the plaintiffs argued that, accordingly, it was sufficiently diligent in following the court's track-related discovery plan and that they amended at the first practicable

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108. *See, e.g.*, Garza v. Lansing Sch. Dist., 972 F.3d 853, 879-80 (6th Cir. 2020) (affirming); Carrizo (Utica) LLC v. City of Girard, 661 F. App'x 364, 368 (6th Cir. 2016) (affirming); Ross v. Am. Red Cross, 567 F. App'x 296, 306-07 (6th Cir. 2014) (affirming); Salyers v. City of Portsmouth, 534 F. App'x 454, 460-61 (6th Cir. 2013) (affirming); Weaver v. Mateer & Harbert, P.A., 523 F. App'x. 565, 568 (11th Cir. 2013) (affirming); Newburgh/Six Mile Ltd. P'ship II v. Adlabs Films USA, Inc., 483 F. App'x 85, 94-95 (6th Cir. 2012) (affirming); Johnson v. Metro. Gov't of Nashville & Davidson Cnty., 502 F. App'x 523, 541 (6th Cir. 2012) (affirming); Com. Benefits Grp., Inc. v. McKesson Corp., 326 F. App'x 369, 376 (6th Cir. 2009) (affirming); Jones v. Garcia, 345 F. App'x 987, 990 (6th Cir. 2009) (affirming); Shane v. Bunzl Distrib. USA, Inc., 275 F. App'x 535, 536 (6th Cir. 2008) (affirming); Russell v. GTE Gov't Sys. Corp., 141 F. App'x 429, 437 (6th Cir. 2005) (affirming); Hill v. Banks, 85 F. App'x 432, 433 (6th Cir. 2003) (affirming); *Leary*, 349 F.3d at 909 (affirming); Inge v. Rock Fin. Corp., 281 F.3d 613, 626 (6th Cir. 2002) (reversing); Lower v. Albert, 187 F.3d 636, 1999 WL 551414, at *4 (6th Cir. 1999) (affirming). Cases from every other circuit are legion.

109. Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 718 (8th Cir. 2008) (finding reversible error where the district court granted defendant's untimely motion to amend its answer because no changed circumstance had occurred to show good cause). Two reversed the lower court in favor of the moving party seeking leave to amend. *Inge*, 281 F.3d at 625-26 (reversing and holding that plaintiff satisfied 16(b)(4)'s good cause requirement); Tex. Indigenous Couns. v. Simpkins, 544 F. App'x. 418, 421-22 (5th Cir. 2013) (reversing and holding plaintiff's failure to cite a cause of action as an outcome-determinative pleading error establishing good cause). The other remanded the matter back to the district court to exercise the court's "sound discretion" under the proper legal standard. United States *ex rel.* D'Agostino v. EV3, Inc., 802 F.3d 188, 195-96 (1st Cir. 2015) ("[T]he district court did not address [good cause] factors in any meaningful way, and none of them appears to *mandate* the denial of leave to amend. In the last analysis, the matter is one committed to the sound discretion of the district court, and the relator is entitled to have the district court exercise that discretion under the proper legal standard.").

110. *See* Plaintiffs' Revised Position Statement Regarding Continuing Litigation, *supra* note 58, at 3 ("Plaintiffs propose to sever all but their public nuisance and conspiracy claims and proceed to trial against the Defendants identified above on those two claims."); Transcript of Status Conference, *supra* note 50, at 4, 21, 30.

opportunity when such activity was no longer expressly or impliedly stayed. The district court agreed; it did not find the counties' diligence lacking in seeking the extension to file leave to amend. Rather, the court, understanding that the proposed amendment concerned a new case track as part of an exceptionally complex and evolving multidistrict litigation, found good cause.[111] And, after all, the JPML had from the outset explicitly recommended that the court establish different tracks for the different types of parties or claims.[112]

Judge Kethledge's view of the diligence requirement in a hyperliteral manner is misplaced. To him, a good cause finding was available only if the plaintiffs could not possibly have amended within the original deadline.[113] He would therefore have the court disregard the plain fact that the cases were part of a much broader aggregation as bellwethers within an MDL.[114] But litigation does not happen in a vacuum, and neither does a party's decision to amend. Circumstances change.[115] And, under the circumstances generated by the court's creation of a new, focused litigation track, the counties' actions were quite reasonable—or at least Judge Polster was well within his discretion in

111. Track One-B Case Management Order, *supra* note 51, at 2-3 ("There is good cause to allow Plaintiffs to pursue dispensing related claims against the Pharmacies."); *cf. In re* Caterpillar Inc., 67 F. Supp. 3d 663, 670-71 (D.N.J. 2014) (considering the fact that a bellwether case provided "guidance as to the remainder of the MDL" as a circumstance supporting good cause for leave to amend under 15(a)).

112. Transfer Order, *supra* note 35, at 3.

113. *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 843-44 (6th Cir. 2020). Judge Kethledge also opined that "the Counties' knowing and voluntary relinquishment of [dispensing] claims arguably amounts to an outright waiver of them." *Id.* at 843. Yet the pharmacy defendants never raised this argument at the trial-court level, let alone on appeal. Notwithstanding the fact that the parties had no opportunity to brief the matter whatsoever, generally, an argument raised only on appeal is waived. *See* Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 552 (6th Cir. 2008).

114. Judge Kethledge cites *In re Korean Air Lines Co.*, 642 F.3d 685, 700 (9th Cir. 2011), for the proposition that "the requirements for granting 'a motion to amend' in particular—'are the same as those for ordinary litigation on an ordinary docket.' " *See In re* Nat'l Prescription Opiate Litig., 956 F.3d at 844. The court, therefore, concluded that Judge Polster should have examined the counties' motion under a narrow lens, disregarding any MDL-related important contextual factors. But in *In re Korean Air Lines Co.*, the Ninth Circuit was concerned with the "total disregard for the normal standards of assessing . . . critical motions" by transferee judges. 642 F.3d at 700. Indeed, the court considered a motion to amend squarely within the context of the MDL. While the court reversed the lower court's order denying leave to amend for "total disregard" of the applicable legal standard, it nonetheless acknowledged that MDL judges retain broad administrative discretion. *Id.* at 699-702. To boot, the court explicitly recognized "room for some slight variations in approach to applying the standards for amendment" in a case that is part of an MDL. *Id.* at 700.

115. *See* Hartis v. Chi. Title Ins. Co., 694 F.3d 935, 948 (8th Cir. 2012) (holding that a court, in considering an untimely motion to amend, "may conclude that the moving party has failed to show good cause" if no "changed circumstance" exists after the scheduling deadline); Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 718 (8th Cir. 2008) (maintaining that defendant could not establish good cause for untimely amending its answer because "no change in the law, no newly discovered facts, or *any other changed circumstance*" had occurred after the filing deadline (emphasis added)).

finding so. Moreover, as detailed above, the Sixth Circuit's case law has not been as rigorous as Judge Kethledge would have us think with respect to the structures of Rule 16(b)(4).[116]

Further, while the plaintiffs' diligence is undoubtedly the primary consideration, it is not the only one. Other relevant factors, namely the "important consideration" of prejudice to other parties,[117] weigh heavily in favor of finding good cause to amend the scheduling order under 16(b)(4) and thus further vindicate Judge Polster's determination. Not only did Judge Polster consider and reject the pharmacy defendants' claims of prejudice—ironically, he concluded that allowing the plaintiffs to amend would save litigation costs not only generally, but for the pharmacy defendants in particular.[118] Compared with starting discovery from scratch with a new set of plaintiffs, additional focused discovery regarding the amended dispensing claims would hasten the resolution of critical legal issues—a good thing for all parties.[119] Besides, as previously explained, pharmacy defendants had to produce the dispensing-related discovery anyway; dispensing-related claims are at issue in "many of the nearly 2500 cases" in the MDL, and the pharmacy defendants are a focal point in many of those pending actions.[120] It is not as if they are party to merely one action among thousands of others in the mass litigation. Rather, they are central figures in the MDL, and context matters.[121] To argue that the above facts give rise to

116. The court's reliance on *Leary v. Daeschner*, 349 F.3d 888 (6th Cir. 2003), is not as airtight as presented. The opinion provides district court judges with discretion to find in favor of the nonmoving party under 16(b)(4)'s good cause standard, as opposed to the more lenient Rule 15 standard. But it does not suggest, however, that the "good cause" requirement is as strict as the court makes it out to be. In *Leary*, the lower court had *denied* the plaintiff leave to amend after declining to find good cause. The Sixth Circuit *declined to reverse* for abuse of discretion, opining that the defendant in the matter could "show prejudice by the fact that discovery will have to be reopened, years after it was closed, on the issue of damages if this amendment were permitted." *Id.* at 908-09. Besides, district courts in similar situations have found otherwise. *See, e.g.*, Carte v. Loft Painting Co., No. 2:09-cv-178, 2010 WL 4105536, at *5 (S.D. Ohio Oct. 18, 2010) (noting that despite the existence of previous summary judgment briefing and the need for additional briefing on the amended issues, the "little if any prejudice to [d]efendants" did not outweigh the court's interest in "justice and a fundamental desire to resolve disputes on their merits," and thus did not bar a good cause finding under Rule 16(b)(4)). Moreover, unlike the matter before Judge Polster, *Leary* was not an MDL bellwether. Instead, it concerned a single docket with a single defendant. A more apposite case would be *In re Korean Air Lines Co.*, 642 F.3d at 689. *See supra* note 114 and accompanying text.

117. *Leary*, 349 F.3d at 906 ("[An] important consideration for a district court deciding whether Rule 16's 'good cause' standard is met is whether the opposing party will suffer prejudice by virtue of the amendment.").

118. Track One-B Case Management Order, *supra* note 51, at 3.

119. *See id.* at 1-3.

120. *Id.* at 3.

121. *See In re* Urethane Antitrust Litig., 235 F.R.D. 507, 514-16 (D. Kan. 2006) (finding no prejudice and allowing plaintiffs to amend their complaint to change the class definition in an MDL four months after filing the consolidated amended complaint and more than a year after the complaint was originally filed); *see also In re* Phenylpropanolamine (PPA)

a "significant showing of prejudice" to the pharmacy defendants is disingenuous at best.[122] Accordingly, Judge Polster correctly concluded that the plaintiffs had established the requisite good cause to amend the scheduling order deadline under Rule 16(b)(4).[123] And once good cause existed, the court was surely within its discretion under Rule 15's more lenient standard.[124]

Yet, even if a tenable argument could be made against a finding of good cause, the court nonetheless acted reasonably in exercising its case management authority within its proper discretionary latitude.[125] The Sixth Circuit has made clear that a district court's decision to grant leave to amend is "afforded great deference" and will be disturbed only following the "definite and firm conviction that the trial court committed a clear error of judgment."[126] Effectively, Judge Polster must have abused his discretion by applying a patently incorrect legal standard or relying on clearly erroneous findings of fact.[127] Contrarily, however, the court—only after taking into consideration a full set of the parties' briefings on the matter—came to a reasonable

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Prods. Liab. Litig., 460 F.3d 1217, 1231-32 (9th Cir. 2006) (explaining that transferee judges require "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"); Bradt, *supra* note 31, at 1206 (expounding on the unique feature of MDL as "a procedural hybrid, combining aspects of individual and group litigation").

122. *See* Duggins v. Steak 'N Shake, Inc., 195 F.3d 828, 834 (6th Cir. 1999) (requiring that the court find "at least some significant showing of prejudice to the opponent" before denying plaintiff's untimely motion to amend (quoting Moore v. City of Paducah, 790 F.2d 557, 562 (6th Cir. 1986))).

123. The two other factors available for consideration under Rule 16(b)(4)—the importance of the amendment and the potential to mitigate any prejudice—do little to help the pharmacy defendants' cause. As for the amendment's importance, it was to be an integral part of the MDL's Track One-B bellwether trial and would thus help the court to "promote the just and efficient conduct of the litigation." Track One-B Case Management Order, *supra* note 51, at 1-3. And, as for the court's ability to mitigate any potential prejudice, Judge Polster amended the scheduling order deadlines to allow for more time for the parties to engage in additional discovery and further dispositive motions before trial. *Id.* at 2-5.

124. Grounds for denial of leave to amend are absent here. *See* Foman v. Davis, 371 U.S. 178, 182 (1962). First, no undue delay occurred, as the plaintiffs amended in response to the court and changing circumstances; thus, allowing leave to amend would expedite, not delay, litigation. Second, the amendment did not prejudice the opposing party because including the amended complaint as part of the bellwether would help pharmacy defendants achieve closure, and pharmacy defendants will need to address essentially the same dispensing-related discovery and complex legal issues in several actions sooner or later.

125. Beyond the discretion judges are normally afforded in deciding motions to amend under Rules 15 and 16, MDL transferee judges retain broad discretion to select and organize bellwethers for discovery, dispositive motions, and trial. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.36 (2004).

126. Leary v. Daeschner, 349 F.3d 888, 904 (6th Cir. 2003); *see also In re* Nat'l Prescription Opiate, Litig., 956 F.3d 838, 841 (6th Cir. 2020) (noting the broad discretion of MDL courts).

127. *See Leary*, 349 F.3d at 904.

conclusion.[128] It did not act in "total disregard" of the applicable rules, but, instead, it properly applied the prejudice and good cause standards in the context of both the cases at hand and the MDL as a whole.

What's more, a district court's order regarding a party's leave to amend is not ordinarily appealable until final judgment.[129] And, even once appealed, a circuit court is almost certain to affirm.[130] Success through mandamus relief is all the more unlikely.[131] This is especially so, given that the order at issue was appealable upon final judgment[132] and amounted to a discretionary ruling.[133] To wit, we could not find (nor could the pharmacy defendants or the court) a single mandamus order reviewing the merits of a court's decision granting or denying a party leave to amend. Mandamus is a drastic remedy that requires extraordinary circumstances[134] and is normally "reserved for

128. See Pharmacy Defendants' Opposition to Plaintiffs' Motion for Leave to Amend, *supra* note 59, at 2-3, 7-8, 11-13, as well as the counties' reply, Plaintiffs' Reply in Support of Plaintiffs' Motion for Leave to Amend, *supra* note 102, at 6-8, which explicitly mention and expound upon both Rule 16(b)(4)'s good cause standard and Rule 15's considerations.

129. Inge v. Rock Fin. Corp., 281 F.3d 613, 617 (6th Cir. 2022) (citing 28 U.S.C. § 1291).

130. *See* Leary, 349 F.3d at 909 ("Because the district court properly applied the governing law, we must conclude that it did not abuse its discretion."); Hoover Panel Sys., Inc. v. HAT Cont., Inc., 819 F. App'x. 190, 200 (5th Cir. 2020) ("District courts have broad discretion in granting or denying leave to amend [under Rule 16(b)]."); Carroll v. Stryker Corp., 658 F.3d 675, 684 (7th Cir. 2011) ("We review a district court's denial of leave to amend the complaint for abuse of discretion and 'reverse only if no reasonable person could agree with that decision.' " (quoting Schor v. City of Chi., 576 F.3d 775, 780 (7th Cir. 2009))); Bylin v. Billings, 568 F.3d 1224, 1231 (10th Cir. 2009) ("[A]ppellate courts that have applied Rule 16 have afforded wide discretion to the district courts' applications of that rule."); Steir v. Girl Scouts of the USA, 383 F.3d 7, 14 (1st Cir. 2004) ("While it would have been well within the discretion of the district court to allow the [16(b)(4)] motion, it was not an abuse of discretion to deny it."); Summers v. Mo. Pac. R.R. Sys., 132 F.3d 599, 604 (10th Cir. 1997) (establishing that "district courts are given wide latitude" in determining good cause under 16(b)(4), and reversal is warranted only for abuse of discretion because "total inflexibility is undesirable" (quoting Hull v. Chevron U.S.A., Inc., 812 F.2d 584, 588 (10th Cir. 1987))); *see also* 3 MOORE ET AL., *supra* note 107, § 16.16 (describing the abuse of discretion standard in the context of 16(b)(4) as being "not appellant friendly" and imparting a heavy burden on "a disgruntled litigant" to show abuse (quoting Tower Ventures, Inc. v. City of Westfield, 296 F.3d 43, 46 (1st Cir. 2002))).

131. *See* MOORE ET AL., *supra* note 107, § 16.16 ("[A]bsent . . . a patent and egregious abuse of the scheduling power, the likelihood of persuading an appellate court to intervene in a scheduling matter before the case goes to trial is almost nonexistent.").

132. *See* Barcume v. City of Flint, 830 F.2d 193, Nos. 87-1625, 87-1245, 86-1732, 1987 WL 44935, at *1-2 (6th Cir. Oct. 2, 1987) (unpublished table decision) ("The petition for a writ of prohibition/mandamus seeks review of the district court order that permitted plaintiffs to amend their complaint. A possible error regarding the granting or denying of leave to amend pleadings is not reviewable by mandamus; the alleged error is reviewable by way of direct appeal after entry of final judgment. Accordingly, the petition for a writ of prohibition/mandamus will be denied." (citations omitted)).

133. *See* Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980) (noting how a decision within the district court's discretion is rarely appropriate for consideration in a mandamus petition).

134. *In re* United States, 817 F.3d 953, 959 (6th Cir. 2016) (quoting Cheney v. U.S. Dist. Ct., 542 U.S. 367, 380 (2004)).

'questions of unusual importance necessary to the economical and efficient administration of justice' or 'important issues of first impression.' "[135] The issue before Judge Polster concerned neither.

As a general matter, in context, it is difficult to argue that the counties were not acting with appropriate diligence or that the defendants would be terribly prejudiced. As noted above, identical claims were asserted against the defendants by other plaintiffs in the MDL. And these plaintiffs were acting diligently according to the district court's then-pertinent case management orders. The court was prioritizing discovery and experts, sensibly, on a sequenced basis, and the plaintiffs, at least argued that, accordingly, it was sufficiently diligent to follow the court's track-related discovery plan and that they amended at the first practicable opportunity when such activity was no longer expressly or impliedly stayed. Moreover, the Sixth Circuit's case law has not been as rigorous as Judge Kethledge would have us think with respect to the structures of Rule 16(b)(4).[136] Ultimately, granting the writ on the narrow ground that Rule 16(b)(4) demands it is more questionable than not.

More generally, Rule 16 provides a great deal of flexibility to district courts in managing litigation, including "amending the pleadings if necessary or desirable."[137] The Rule also includes the general duty to consider "adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."[138] None of these aspects of Rule 16 are mentioned in the Sixth Circuit's opinion.

As a narrow, doctrinal matter then, we think the Sixth Circuit erred in granting the writ. Even on interlocutory appeal, a properly written opinion would have addressed the circuit's prior case law, the effect of Rule 15, and the interaction of the relevant provisions of Rule 16. Here, the circuit court did none of these things, and instead took the

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135. John B. v. Goetz, 531 F.3d 448, 457 (6th Cir. 2008) (quoting *In re* Perrigo Co., 128 F.3d 420, 435 (6th Cir. 1997)). The court weighs five factors in deciding whether writ of mandamus is proper, including whether:

> (1) the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems, or issues of law of first impression.

Id.

136. As noted, the court's reliance on *Leary v. Daeschner*, 349 F.3d 888 (6th Cir. 2003), is not as airtight as presented. *See supra* note 116 and accompanying text. In *Leary*—not an MDL—the court held that it was not an abuse of discretion for the district court to *deny* a motion to amend more than two years after the deadline set in the scheduling order (and one amendment had been allowed already). 349 F.3d at 907-09. The opinion does not suggest, however, that the "good cause" requirement is as strict as the court makes it out to be.

137. FED. R. CIV. P. 16(c)(2)(B); *see also* Shapiro, *supra* note 32, at 1975.

138. FED. R. CIV. P. 16(c)(2)(L).

opportunity to issue the far more drastic remedy of a writ of mandamus to reverse Judge Polster's order. This, respectfully, was both unwarranted and incorrect.

This is not to say, of course, that the issue of *how* the Federal Rules apply in MDL is not a challenging one. Where the individual character of the cases ends and the aggregated nature of the litigation begins is the central question of MDL.[139] MDL is not a magic wand that creates a class action out of individual cases, nor are the aggregating effects of MDL beyond reproach. But to suggest, as the Sixth Circuit does, that MDL does not affect the character of the cases within it, or how the Federal Rules operate, is willfully blind, especially when it comes to the sort of case management order at issue in this case. It is almost paradoxical that Rule 16's case management prerogatives would be scrutinized so strictly in the context of a bellwether trial within an MDL, which is designed to ensure district judges' case management powers reach their apogee.

Indeed, this flexibility on the part of transferee judges is in the DNA of MDL. The primary goal of the small group of judges who drafted the statute was to ensure that district judges be able to assert centralized judicial power to respond to nationwide controversies and successfully manage potential "litigation explosions" associated with those controversies. As those who know their history will remember, the reason why the Judicial Conference rejected the project of drafting Federal Rules of Civil Procedure for MDL when the statute was proposed was because judges recognized the need for procedure in these complex cases to be tailored to their particular circumstances.[140] The federal judges spearheading the MDL project—the same judges who developed the first Manual for Complex and Multidistrict Litigation—understood well the need to allow for innovation as complex litigation developed.[141]

In our view, there is not much to recommend the Sixth Circuit's more general position. It is obvious, of course, that the Federal Rules apply in MDL. It is also obvious that cases "retain their individual character" in the sense that there are formal aspects to the cases that are unaffected by their inclusion in an MDL—for instance, the applicable state law does not change by virtue of the transfer.[142] But that does not mean that MDL cases are exclusively a collection of atomized cases temporarily in one court. That would ignore the language of the

139. *See* Bradt & Rave, *supra* note 13, at 1264 (2017) ("At its core, MDL has a split personality, oscillating between being a set of temporarily consolidated individual cases and a solid aggregate litigated much like a class action.").

140. Bradt, *supra* note 24, at 214-16.

141. *See* Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 881 (2017).

142. Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 762 (2012).

MDL statute, which provides for "coordinated or consolidated pretrial proceedings" created for the purpose of ensuring "convenience of [the] parties and witnesses" and to "promote the just and efficient conduct of such actions."[143] The Sixth Circuit's conclusion suggests that the only thing that changes with the establishment of an MDL is the location of pretrial proceedings and the identity of the presiding judge. That is, of course, not the case—the whole idea of "coordinated and consolidated proceedings" is that the pretrial procedure be organized and managed in the group of cases together.

III. BROADER CONCERNS ABOUT MDL "REFORM" THROUGH MANDAMUS

Indeed, the Sixth Circuit's opinion was remarkably poor when it came to rigorous application of the Federal Rules it proclaimed itself so interested in protecting. Perhaps that's because the Sixth Circuit's action here had little to do with the sanctity of Rule 16(b)(4) or any real prejudice to the defendants in the case against them brought by the counties. Instead, the court's concern seems to be the behavior of Judge Polster particularly, and MDL judges more generally (hence the ad hominem reference to their "persistent disregard" of the rules). Even more generally, though, much rides on the Sixth Circuit's opinion of the idea that individual cases within the MDL "retain [their] individual character" and that the Federal Rules must apply to them as they would in any case, regardless of the existence of the MDL.[144] In the Sixth Circuit's view, any other conclusion would mean the Federal Rules of Civil Procedure do not apply in MDL cases.[145]

And perhaps that signal was the goal. It is undoubtedly the goal of the defendants' amici, who have been pressing this case to Congress and the Rules Committee for the past several years.[146] And Judge Kethledge's opinion may already be having the desired effect. Ripples following Judge Kethledge's opinion—and the rhetoric within—can be seen throughout the federal judiciary.[147] In the Sixth Circuit's own

143. 28 U.S.C. § 1407(a).

144. *In re* Nat'l Prescription Opiate, Litig., 956 F.3d 838, 841 (6th Cir. 2020).

145. *Id.* at 844.

146. *See* Bradt, *supra* note 15, at 89-90.

147. *See e.g.*, Oatly AB v. D's Nats. LLC, No. 1:17-CV-840, 2020 WL 2912105, at *2 (S.D. Ohio June 3, 2020) ("There is no question that D's Naturals' motion to amend its pleading is extremely untimely, considering that the deadline for seeking to amend pleadings expired on April 7, 2018, more than nineteen months before Defendant filed its motion. Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure, a Court's Calendar Order may be modified only for 'good cause.' In a recent published writ of mandamus in which it overturned a trial court's decision to allow amendment (coincidentally) nineteen months after the deadline for amendment, the Sixth Circuit stressed that trial courts have no discretion to amend scheduling orders in the absence of a showing of good cause under Rule 16."), *aff'd*, No. 1:17-CV-840, 2020 WL 5310272 (S.D. Ohio Sept. 4, 2020); Reply to Brief in Opposition at 4-5, Actavis Holdco, Inc. v. Conn., 141 S. Ct. 124 (2020) (No. 19-1010) ("The notion that

decision reversing Judge Polster's certification of a negotiation class action under Rule 23, Judge Clay concluded that Judge Polster had overstepped his authority by signing off on an inventive class action procedure that had no basis in the explicit text of the Federal Rules of Civil Procedure.[148] Citing Judge Kethledge's mandamus opinion, Judge Clay repeated the assertion that "the Federal Rules of Civil Procedure are 'binding upon court and parties alike, with fully the force of law.' "[149] The circuit court made clear that the district court did not have the discretion to devise a novel procedure not explicitly authorized by the "structure, framework, or language" of the Federal Rules.[150] Regardless of whether one agrees with the Sixth Circuit's conclusion on the negotiation class, the notion that where Judge Polster went wrong was a misplaced assumption that he was not bound by Rule 23 misses the mark.

What's most troubling about the Sixth Circuit's opinion, and its spread throughout MDL, is that it replicates a pattern of law reform identified in the work of Professors Stephen Burbank and Sean Farhang. In brief, Burbank and Farhang demonstrate that those who seek to tip the scales in favor of defendants in litigation procedure generally

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district courts have 'more than the usual discretion' in MDL cases is foreclosed by Congress's mandate that MDL rulings 'not [be] inconsistent with the Federal Rules of Civil Procedure.' . . . 'MDLs are not some kind of judicial border country,' where the Rules are 'hortatory.' *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020) ("[A]n MDL court must find efficiencies within the Civil Rules, rather than in violation of them.' *Id.* at 845." (citations omitted))); Brief for the States of Ohio, Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, Missouri, Montana, Oklahoma, South Carolina, Texas, Utah, and West Virginia as Amici Curiae Supporting the Petitioner at 2, *In re* Flynn, 973 F.3d 74 (D.C. Cir. 2020) (No. 20-5143) ("Recently, courts of appeals have been forced to issue writs of mandamus against district courts who arrogated to themselves, and then abused, immense power to which they had no valid claim. *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838 (6th Cir. 2020); *In re* Rutledge, 956 F.3d 1018 (8th Cir. 2020) . . . ."); Brief of the Appellant at 23, Hamer v. Livanova Deutschland GMBH, 994 F.3d 173 (3d Cir. 2021) (Nos. 20-1656, 20-1657) ("[A] party's rights in one case [cannot] be impinged to create efficiencies in the MDL generally. . . . Section 1407 refers to individual 'action' which may be transferred to a single district court, not to any monolithic multidistrict action created by transfer." (quoting *In re* Nat'l Prescription Opiate Litig., 956 F.3d at 845)); Defendant FCA US LLC's Memorandum in Support of Its Motion to Decertify at 11, *In re* FCA US LLC Monostable Elec. Gearshift Litig., No. 2:16-MD-02744 (E.D. Mich. May 18, 2020) ("The Sixth Circuit's recent decision in the opioids MDL makes clear that the issues class must be decertified. In that case, the court held that the ordinary rules of civil procedure apply to MDL actions just as they do to all other civil actions, and that the MDL statute does not expand a court's authority to decide issues embedded within the MDL cases, or to resolve those issues in a way that it otherwise could not." (citation omitted)); Notice of Motion and Motion to Dismiss California Subclass Claims for Failure to State a Claim and Other Subclass Claims for Lack of Subject-Matter Jurisdiction (Motion #4); Memorandum of Points and Authorities at 31, *In re* Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation, No. 19-md-02913 (N.D. Cal. May 29, 2020) ("An MDL is not a license to 'ignore[] basic Article III principles,' *Packaged Ice*, 2011 WL 6178891, at *9, or the Federal Rules of Civil Procedure. *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 844-45 (6th Cir. 2020) . . . .").

148. *See In re* Nat'l. Prescription Opiate Litig., 976 F.3d 664, 666-77 (6th Cir. 2020).

149. *Id.* at 671 (quoting *In re* Nat'l. Prescription Opiate Litig., 956 F.3d at 844).

150. *Id.* at 676.

fail in their efforts to do so in Congress, where they seek legislation, or in the Civil Rules Advisory Committee, where they seek new or amended Federal Rules of Civil Procedure.[151] Burbank and Farhang identify several reasons why such efforts fail, including institutional barriers to change, the difficulty in building a consensus, and the potential public backlash against such efforts.[152] As a result, reformers have turned to the courts to achieve their goals through judicial decisions as the path of least resistance. In the Supreme Court, conservative majorities have been able to swing the pendulum in favor of defendants in numerous areas of civil procedure, while the same result has been accomplished by even smaller numbers of judges in the courts of appeals.[153]

What the Sixth Circuit's grant of mandamus in the opioids litigation, and its spread, suggests is that the same story might play out here with respect to MDLs. Efforts of defense-side interests to recalibrate MDL procedure in their favor have thus far failed in Congress.[154] Moreover, what appeared to be a wide-ranging effort to develop Federal Rules of Civil Procedure for MDL appears to have mostly fizzled out; any reforms that the Rules Committee adopts are likely to be quite modest and perhaps confirm transferee judges' broad discretion.[155] This, in our view, is all to the good. But, as history has demonstrated, when efforts such as legislative or rule-based reform fail, those seeking retrenchment of procedural policy turn to the federal courts.[156] Efforts to limit judicial discretion in MDL may find a receptive audience in the same federal courts that have seen fit to restrict personal jurisdiction, heighten pleading hurdles, limit class certification, and promote arbitration.[157] Such opportunities in the appellate courts could well lead to

151. *See* BURBANK & FARHANG, *supra* note 28, at 217-21.

152. *Id.* at 219 (explaining that as a structural matter, legislation dismantling the private-enforcement regime is extremely difficult to achieve; as they say, "the institutional hurdles were simply too high").

153. *See id.* at 218-19.

154. Bradt & Rave, *supra* note 16, at 119.

155. *See* COMM. ON RULES OF PRAC. & PROC., STANDING COMMITTEE AGENDA BOOK: JUNE 7, 2022, at 731-38 (2022), https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf [https://perma.cc/2HS2-KJH3]; *see also* Richard Marcus, *Rulemaking's Second Founding*, 169 U. PA. L. REV. 2519, 2545-46 (2021) (noting that challenges to amending the Federal Rules and suggesting that "stickiness might be attractive to the extent that it impedes change from the Liberal Ethos . . . that was installed in the 1934-1970 era").

156. BURBANK & FARHANG, *supra* note 28, at 218 ("[A]lthough the counterrevolution largely failed in the elected branches and was only modestly successful in the domain of court rulemaking, it flourished in the federal courts. Having learned that retrenching rights enforcement by statute was politically and electorally perilous—and unlikely to succeed—the proponents of the counterrevolution pressed federal courts to interpret, or reinterpret, existing federal statutes and court rules to achieve the same purpose. They found a sympathetic audience in courts that were increasingly staffed by judges appointed by Republican presidents.").

157. *See* A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 359-66 (2010).

copycat opinions restricting MDL judges in case management, especially if the rhetoric of reform campaigns takes root as conventional wisdom—something the Sixth Circuit's opinion already seems to have accomplished.

Even the signal of increased scrutiny by the courts of appeals might have a chilling effect. MDL has been the source of much judicial innovation over the years. Some such innovations are good; some not so good—readers will disagree over which are which. But all experimentation will inevitably lead to some good practices and some that ought to be abandoned. One concern is that strict supervision by courts of appeals will tamp down such innovation by MDL judges, for fear that they will be "mandamused." After all, if the grant of a motion for leave to amend a complaint (and, we suppose, a pretrial scheduling order) can be the subject of an extraordinary writ, then an MDL judge would be warranted in thinking that her berth is narrow. The chilling effect may be even more pernicious when oversight is framed by the assumption that MDL judges are flouting the Federal Rules, and even the rule of law more generally.

IV. THE SIXTH CIRCUIT'S WORLDVIEW AS A THREAT TO MDL

Thus far, we have presented several problems with the Sixth Circuit's opinion: that it is wrong as a matter of procedural doctrine, both narrowly and broadly, and that it represents a potentially antidemocratic approach to procedural reform via judicial fiat. These concerns, candidly, represent a particular viewpoint: that the defendants' efforts to change MDL are bad policy. Some may also argue that increased appellate oversight of MDL judges can enhance the system's legitimacy. Reasonable people can disagree about that. Indeed, the literature criticizing MDL judges extends far beyond those whose self-interest aligns with doing so. That debate can and should be well ventilated.

From a more theoretical perspective, however, there is good reason to find the Sixth Circuit's approach alarming. What makes MDL work as a matter of due process is its ability to accomplish aggregation while also maintaining formal respect for the individual character of the cases within the consolidated pretrial proceedings. To be sure, this respect for the individuality of the MDL's component cases may be honored in the breach, particularly when the cases are ultimately settled, and their particularities must be smoothed over to accomplish a mass agreement. But, in the end, the core individuality of the cases remains: the substantive law applicable to a case cannot be altered by its transfer into an MDL, and the individual plaintiff has the right to insist on a remand to the transferor court for trial at the conclusion of pretrial proceedings. It is this core of litigant autonomy that permits the aggregation. While mass-tort class actions under Rule 23(b)(3) failed to

gain lasting traction due to the sacrifice of protections of individual plaintiffs, its constitutionally mandated right to notice and opt out notwithstanding, MDL has avoided due-process attack, in our view, largely because of the respect for litigant autonomy.[158]

MDL then truly does have a split personality. It is at once a tightly knit aggregation of cases that are treated as a group under the control of a single judge. That judge has enormous discretion to manage the cases as a unit. But the cases within it are formally distinct, and there are boundaries that the aggregation may not cross. That said, those boundaries do not inhibit the ability of the MDL to efficiently operate and proceed toward a resolution. The duality of MDL is what makes it work. In order for MDL to function as effectively as it does, both sides of the split personality must be recognized—and judges must understand how each aspect of MDL limits the other. If nothing else, as William James might put it, for MDL to survive, judges must have the will to believe that it can be both a unitary litigation and an aggregate of individual cases.

A central problem with the Sixth Circuit's opinion is that it focuses too much on the individualized side of MDL's identity. In the Sixth Circuit's view, the Federal Rules have no room to operate differently in MDLs versus one-on-one litigation. Setting aside whether the Federal Rules have baked into them the ability for the judge to adapt the rules to different kinds of cases—they do—the Sixth Circuit's view is in conflict with the defining characteristic of MDL: that the litigations are *both* a set of individual cases and an aggregate. That was the goal of Congress and the statute's drafters in providing MDL judges with the space to innovate in the myriad mass disputes likely to come the federal courts' way.[159]

The defect is with the Sixth Circuit's unyielding focus on the cases within the MDL as opposed to the group. The defendants' concerns in this case could not possibly have been these individual cases—thousands of plaintiffs could and did bring the identical claims in the complaints the Sixth Circuit ruled could not be amended. Ultimately, those claims could have been tried as part of a different bellwether. Forcing a different set of cases to be worked up for trial in the MDL imposes costs on everyone involved. Of course, the defendants' goals were not to avoid these claims altogether—that would be impossible; rather, their goal was to disrupt the advancement of the litigation as a whole and limit the power of the MDL judge. Prioritizing the individuality of the cases, as the Sixth Circuit did here, over the group, runs the risk of crippling MDL altogether.

158. *See* Bradt & Rave, *supra* note 30, at 1300-06.

159. Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U PA. L. REV. 1711, 1713-14 (2017).

CONCLUSION

The Federal Rules of Civil Procedure, by their nature, grant significant discretion to district judges, in cases simple and complex, because those judges are thought to be in the best position to effectively manage the litigation to a just outcome. Cases are different from one another in innumerable ways—the Rules trust judges to adapt to achieve efficiency and even-handedness. Perhaps in no case is this principle more important than in multidistrict litigation, which is, by *its* nature, inherently complex. Judges operate with flexibility by necessity because for MDL to achieve its purpose, adaptation and innovation are required. To a great degree, such freedom to innovate has been at the core of MDL's prodigious success over the last half a century. The root of this innovation is not, however, found only in the Federal Rules, but also in the structure of MDL itself, which was built to have play in the joints and limited appellate oversight. Our goal in this Essay is to remind readers that there are good reasons for all of this—and that those reasons counsel circuits courts to remember why they give deference to district judges to manage complex litigation in the first place.