No. 20-3075

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE CVS PHARMACY, INC.; OHIO CVS STORES L.L.C.; DISCOUNT DRUG MART, INC.; GIANT EAGLE, INC.; HBC SERVICE COMPANY; RITE AID OF MARYLAND, INC. D/B/A MID-ATLANTIC CUSTOMER SUPPORT CENTER; RITE AID OF OHIO, INC.; RITE AID HDQTRS. CORP.; WALGREEN CO.; WALGREEN EASTERN CO.; AND WALMART INC.

Petitioners-Defendants

On Appeal from the United States District Court
for the Northern District of Ohio, Eastern Division
Case No. 1:17-md-2804

BRIEF OF LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

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CORPORATE DISCLOSURE

Pursuant to Sixth Circuit Rule 26.1, *Amicus Curiae* Lawyers for Civil Justice, makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome?

No.

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STATEMENT OF THE INTEREST[1]

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. LCJ's primary purpose is to advocate for fairness and balance in the administration of civil justice, often by proposed changes to the Federal Rules of Civil Procedure through the Rules Enabling Act process and through the filing of amicus curiae briefs in cases involving the interpretation and application of the Federal Rules of Civil Procedure to issues in civil litigation. Since its founding in 1987, LCJ has become a leading voice on federal rule reform. LCJ has submitted written comments related to the Civil Rules Advisory Committee's work to develop potential amendments to the rules and filed amicus briefs on issues related to the rules and their interpretation. LCJ has also urged the adoption of clear, uniform rules that would apply to MDL litigation benefiting all stakeholders by providing the same fairness, clarity, and certainty that the Federal Rules of Civil Procedure are intended to assure for other civil cases.

[1] LCJ certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, has made a monetary contribution to the preparation or submission of this brief.

LCJ has expertise on the Federal Rules of Civil Procedure, and the policies and procedures currently governing MDLs based on its own policymaking efforts and the research that underlies its views, and on the collective experience of its members who are involved in multidistrict litigation in the federal courts under the federal rules as currently written. LCJ has a deep knowledge of and interest in the process of civil litigation and how the rules, and a correct interpretation of the rules, can assure a just, inexpensive, and speedy outcome to lawsuits and can avoid litigation abuses. LCJ also has deep knowledge of the current status of multidistrict litigation, which has been a subject of its study in recent years.

Petitioners urge this Court to issue a writ of mandamus to correct three rulings of the district court that do not conform to the requirements of the federal rules. In each case, the district court made a series of rulings under the apparent belief that an MDL exception exists that allows a transferee district court to alter the ordinary constraints, tests, and framework embodied in the rules and precedent applying them. No MDL exception is embodied in the federal rules, the MDL statute, or past precedent. The issues raised by the district court's orders lie at the heart of LCJ's rule-of-law concerns. Accordingly, LCJ has simultaneously filed a motion for leave to file this brief

along with the proposed amicus brief in support of petitioners. LCJ believes that this brief will assist the Court in resolving the issues presented.

ARGUMENT

MANDAMUS IS REQUIRED BECAUSE NO MDL EXCEPTION EXISTS TO PERMIT A DISTRICT COURT TO IGNORE OR FLOUT THE FEDERAL RULES OF CIVIL PROCEDURE, NO OTHER ADEQUATE MEANS OF REVIEW EXISTS, AND GUIDANCE IS NEEDED TO CORRECT SYSTEMIC PROBLEMS IN THIS AND OTHER MDLS

A. A district court handling multidistrict litigation is bound by the Federal Rules of Civil Procedure

Each of the district court's challenged rulings reflects the district court's view that its decisions need not be bound by the parameters of a single case, that the rules do not apply in the same manner in the MDL context, and that defendants in one case can be forced to defend against amended complaints, be precluded from bringing an early motion to dismiss, and required to engage in discovery far beyond the needs of the case being litigated because of the possibility of this being useful for other future cases. None of this is contemplated or authorized by 28 U.S.C. § 1407 or the Federal Rules of Civil Procedure.

The petitioners challenge three district court decisions. First, the district court permitted (indeed suggested) that two Ohio counties file amended complaints raising entirely new legal theories after the close of discovery and

on the eve of trial without consideration of Rule 15 and 16, which require a balancing of good cause against prejudice to the defendants from undue delay. Second, the district court denied the defendants their right to file motions to dismiss as specifically allowed under Rule 12(b). Third, the district court refused to limit the scope of discovery to relevant information proportional to the needs of the case, as required under Rule 26.

The district court repeatedly reasoned that because the rulings were not made in the context of a single case, but an MDL, they were permissible and appropriate. For example, when explaining that nationwide discovery was appropriate although not relevant to the two Ohio counties' claims, the district court stated that "in the context of an MDL, [the defendants'] objections lose much of their import." (Track One-B Case Management Order, RE 2940, Page ID # 430083.) The district court predicated its broad discovery ruling on the fact that the such "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 these claims." *Id*. On reconsideration, the district court reiterated that defendants in suits brought by two Ohio counties must nonetheless "continue to roll out national data, which will be available for future trials of MDLs…." (Order on Reconsideration Regarding the Scope of Discovery in Track One-B, RE 3055, Page ID # 477519-477520.) In the district

court's view, "the undersigned has 'inherited' discovery jurisdiction from over 2000 transferred cases from across the country; together, this jurisdiction clearly supports a national geographic scope." (*Id.* at Page ID # 477520.) The district court announced that it would "not receive additional motions to dismiss on distributing claims." (*Id*. at Page ID # 430084.) The district court's explanation for allowing the belated amendment and additional discovery was also predicated on its belief that it had more expertise to conduct bellwether trials than another district court to which the cases might be remanded and that since dispensing-related claims were at issue in many other cases in the MDL, the Pharmacies would have to produce the discovery eventually. (Track One-B Case Management Order, RE 2940, Page ID # 430083.) Nowhere did the district court identify the specific cases entitled to discovery under Rule 26, and then explain how its order coordinated the discovery in those separate MDL cases with that required here.

1. Congress did not create an MDL exception to the federal rules

Congress passed 28 U.S.C. § 1407 in 1968 to permit coordinated pretrial proceedings when "civil actions involving one or more common questions of fact" were pending in different districts. 28 U.S.C. § 1407(a). The idea was to transfer these actions to one district if a judicial panel on multidistrict litigation determined that this made sense "for the convenience of parties and

witnesses" and to "promote the just and efficient conduct of such actions." *Id.* At the conclusion of these more efficient pretrial proceedings, the actions would be transferred back to the districts from which they came unless the matter had previously been terminated. *Id.* Congress specifically required that MDL proceedings adhere to the Federal Rules of Civil Procedure:

> The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

28 U.S.C. § 1407(f). The language could not be clearer: Congress did not intend, nor employ language to create, an MDL exception to the Federal Rules of Civil Procedure.

The legislative history for 28 U.S.C. § 1407 supports that interpretation. The House Judiciary Committee explained that the purpose of the legislation was "to provide centralized case management under court supervision of pretrial proceedings to assure their just and efficient conduct. Multidistrict Lit Man § 2.3. In addition, the House of Representatives Report made clear that the transferee court would be governed by the federal rules:

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

H.R.Rep. No. 1130 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1900; see also Multidistrict Litigation: Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary, 89th Cong. 13 (1966) (testimony of Dean Neal) ("[T]he cases concerned would be brought within the control of a single district and so the very same powers provided by the Federal Rules of Civil Procedure should permit all of the same kinds of steps to be carried out by the presiding district judge.").

Indisputably, Congress intended the federal rules to continue to govern cases transferred to a single district under the statute. This is clear from both the text and the legislative history.

2. The text of the federal rules sets forth their scope, which includes "all civil actions" and contains no exception for MDLs

The Federal Rules of Civil Procedure were adopted with great fanfare to provide a uniform and transparent system of procedure to govern civil actions. Rule 1 specifies the scope of the rules:

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.

Fed. R. Civ. P. 1. MDLs in general, and this MDL in particular, is comprised of civil actions and proceedings pending in a United States district court. Although Rule 81 contains various exceptions to the applicability of the

federal rules for particular proceedings, no MDL exception exists. Fed. R. Civ. P. 81.

The district court in these actions is therefore irrefutably bound by the federal rules just as much as any district court in any other civil action in the country. In the relatively rare circumstance in which appellate courts have addressed the question, they have repeatedly so held. See *e.g.*, *In re Refrigerant Compressors Antitrust Litigation,* 731 F.3d 586, 592 (6th Cir. 2013); *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 700 (9th Cir. 2011); *In re Sch. Asbestos Litigation*, 977 F.2d 764, 793-94 (3rd Cir. 1992).

3. The district court's orders ignore or flout the rules governing discovery, leave to amend a complaint, and a defendant's right to move for dismissal at the outset of an action

Despite this, Judge Polster has repeatedly predicated his rulings on the special context of an MDL proceeding, issuing orders that either ignore or flout controlling federal rules. Discretion regarding case management does not extend without limits. It is bounded by the parameters of the federal rules. Petitioners have explained in detail the procedural context in which the district court made the three rulings as to which review is sought. (Petition for Writ of Mandamus, pp. 4-15.) In each of them, the district court issued an order that based its decision (to grant leave to amend, to allow discovery, to deny defendants the right to file a motion to dismiss) on its concerns about

the MDL rather than applying the rule as it would have applied in a single case. (See Petition for Writ of Mandamus, pp. 17-26.) The district court specifically said about its decision to allow the plaintiffs to amend their complaint:

> The Pharmacies allege that Plaintiffs should not be able to amend their Complaint to include dispensing-related claims because Plaintiffs did not articulate good cause for doing so and because, if allowed, Pharmacies would be unduly prejudiced. The Pharmacies' point would be better taken in the context of a single case. However, in the context of an MDL, their objections lose much of their import.

(Track One-B Case Management Order, RE 2940, Page ID # 430082-430083.) The district court found good cause for a belated amendment because dispensing-related claims are at issue in many of the cases in the MDL. The district court's implicit underlying concern appears to have been that any future bellwether trials in these other MDLs would need to be tried in the transferor jurisdictions, which in Judge Polster's view, would "not have the expertise I have developed over the past two years." (Track One-B Case Management Order, RE 2940, Page ID # 430083.) Judge Polster reasoned that Pharmacies would *eventually* need to produce discovery responsive to dispensing claims. In a footnote, the district court conceded that the addition of these new claims would likely require the defendants to redo discovery. (*Id.* at Page ID # 430083, n. 4.) But the district court minimized this prejudice to

the defendants suggesting that "[t]he 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." *Id*. The analysis flouts longstanding precedent regarding limits to leave to amend created by Rules 15 and 16.

In addition, after allowing the two Ohio counties to amend their complaints to raise entirely new dispensing claims, the district court refused to allow petitioners to file motions to dismiss, which could avoid the need for discovery on those claims. Contrary to Rule 12, the district court held that it would consider challenges to the legal sufficiency of the amended complaints only after the close of discovery in a motion for summary judgment. The district court has no authority to rewrite Rule 12, which requires such motions "be made before a responsive pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b).

The district court also ordered nationwide discovery without conducting the requisite proportionality analysis under Rule 26. The district court's analysis was not focused on the discovery "relevant to any party's claim or defense and proportional to the needs of *the case*." Fed. R. Civ. P. 26(b)(emphasis added). The district court ignored proportionality but allowed the discovery on the basis of the volume of litigation considering the

number of cases transferred to the MDL. Thus, in violation of the proportionality analysis required by Rule 26 and in contradiction to the goals of 28 U.S.C. § 1407 (to reduce litigation burdens by coordinating discovery), the district court ordered nationwide discovery in cases in which the claims were limited to two counties in Ohio. Since the rule speaks of proportionality to the needs of the "case," the district court's failure to analyze the claims and defenses in any case or group of cases to determine whether the standard was met violated the rule.

B. Petitioners satisfy the factors that this Court examines to determine whether mandamus is required

The common law writ of mandamus against a lower court is codified at 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* Traditionally, this writ has been used in aid of appellate jurisdiction to confine a lower court to a lawful exercise of its powers. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). The writ is employed in those "drastic circumstances" in which a lower court issues orders "amounting to a judicial 'usurpation of power,'" *Will v. United States*, 389 U.S. 90, 95 (1067), or a "clear abuse of discretion." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953).

The role of mandamus is to "confine the lower court to the sphere of its discretionary power." *Will*, 389 U.S. at 103 (1967).

This Court has applied the framework adopted in *Bauman v. United States District Court*, 557 F.2d 650, 654 (9th Cir. 1977) to analyze whether the petitioners have met the burden necessary to obtain mandamus. *In re Benedictin Products Liability Litigation*, 749 F.2d 300, 303-305 (6th Cir. 1984). See also *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1078-1080 (6th Cir. 1996)(adopting framework from *Benedictin*). The five steps in the framework are: 1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief needed; 2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; 3) whether the district court's order is clearly erroneous as a matter of law; 4) whether the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; 5) whether the district court's order raises new and important problems, or issues of law of first impression. The factors are cumulative and should be balanced; they may not all point to the same conclusion. *In re Benedictin Products Liability Litigation*, 749 F.2d 300, 304 (6th Cir. 1984). The absence of any factor is not controlling. *Id.*

1. Petitioners lack any other adequate means to attain the relief sought

Because interlocutory appellate jurisdiction is unavailable except in highly limited circumstances, mandamus is needed here. Under 28 U.S.C. § 1291, appellate jurisdiction exists only for final judgments, that is, those that end the litigation on the merits and leave nothing for the court to do but execute the judgment. While 28 U.S.C. § 1292 provides some limited exceptions, they are largely unhelpful in the MDL context because the proceedings are statutorily limited to pretrial proceedings. Nor does the collateral order doctrine provide help here since it has been increasingly narrowly defined. See generally Andrew Polis, *The Need for Non-discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1644, 1652 (2011).

Mandamus provides an important safety valve where, as here, a litigant has no practical effective alternative. *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 380-381 (2004); *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1178 (6th Cir. 1996). Without this safety valve, defendants are left to the *in terroram* effect of erroneous rulings and faced with potentially ruinous litigation, huge costs and delay, and a push by the

courts to settle the litigation without ever being able to have the merits of the claims decided.

2. Petitioners will be prejudiced in a manner uncorrectable in a later appeal

Petitioners explain that appellate relief at the time of a final order is not an adequate means to obtain relief here. First, the expensive and intrusive discovery that the district court ordered will already have been completed. Second, the threats to the privacy interests of patients whose records will have been shared and the increased risks from those disclosures cannot be undone. Third, this litigation is likely to continue for years, and petitioners who might have been successful on motions to dismiss will not be able to turn back time to end litigation at the outset if they are correct and their motions should have been granted. (See also, Petition for Mandamus, pp. 29-30.)

3. The district court's order is clearly erroneous as a matter of law

The notion that multidistrict litigation is not bound by the federal rules is clearly erroneous. It flies in the face of unambiguous language in both Rule 1 and of 28 U.S.C. § 1407. As this Court held in *In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993), although district courts have inherent power to manage their dockets, "[t]hat power, however, must be exercised in harmony with the

Federal Rules of Civil Procedure." *Id.* citing *Hanna v. Plummer,* 380 U.S. 460, 471 (1965).

The district court rulings do not undertake the analysis required to grant a party the right to amend a complaint. The district court announced, even before the two counties had filed any motion for leave to amend their complaint, that an amendment would be allowed. The district court granted the motion, not because the counties demonstrated good cause for an untimely amendment and not because the counties showed that an amendment would not unduly prejudice the petitioners. The district court's rationale was predicated on its belief that the amendments would allow it to use the cases for test trials, which would otherwise occur in other courts due to the district court's lack of jurisdiction. The district court then ordered nationwide discovery of highly confidential patient-specific information despite the plaintiffs' limitation of their claims to two Ohio counties. And the district court finally flatly disregarded Rule 12's requirement that a motion to dismiss be brought before a responsive pleading if one is required.

4. The district court's orders reflect a persistent disregard for the constraints imposed by the federal rules

The district court has repeatedly disregarded the constraints imposed by the federal rules on the basis of the court's perception of the "needs" of the

MDL. Nothing in the rules or in 28 U.S.C. § 1407 empowers a district court to do so. Yet, time and time again, the district court has acted without reference to these rules, and has adopted an analytical framework that focuses on the status of the case as part of an MDL. The district court's decisions are apparently predicated on the notion that an MDL exception exists to permit the court to grant and withhold relief because of the court's belief that it may further the MDL as a whole. This is inconsistent with the text of Rules 1, 12, 15, 16, and 26, as well as precedent interpreting them.

5. The district court's order raises new and important issues

The district court's orders reflect an expansive interpretation of its powers on the basis of its status as a transferee judge pursuant to 28 U.S.C. § 1407. Each of the three rulings challenged by petitioners raise important issues about when leave to amend may be permitted, the scope of permissible discovery, and the right to move for dismissal when a claim is first raised. Because MDLs are statutorily limited to pretrial proceedings, and the decisions made as part of those pretrial proceedings are rarely the subject of appeal after a final judgment, little guidance exists for litigants or transferee district courts. Thus, mandamus is particularly important.

C. Mandamus is also required because the district court's rulings reflect systemic problems that require correction by this Court

In 1968, Congress enacted 28 U.S.C. § 1407 to permit a newly-created judicial panel on multidistrict litigation to transfer actions pending in any federal district court to any other federal district court for pretrial proceedings. The purpose was to avoid conflicting rulings, prevent duplication of discovery on common issues, avoid overlapping or conflicting class claims to class representation, and advance judicial economy.

Congress intended – and specifically said – that multidistrict litigation would be conducted in conformity with the federal rules. 28 U.S.C. § 1407(f). That decision makes sense. When those rules first took effect in 1938, Second Circuit Judge Martin Manton lauded them as a "consistent, comprehensive" effort to:

> … establish a uniform system throughout the country; they raise federal practice to the position of a real body of jurisprudence; they seek to eliminate needless delays in the disposition of cases; they free the courts and practitioners from the confusion which often resulted from the application of state rules of practice to federal litigation; they are clearly and concisely phrased, and seem to cover every situation which might ordinarily arise in the court of a law suit.

1 JUDGE MARTIN MANTON, "FOREWORD," MOORE'S FEDERAL PRACTICE: A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE (1938). But increasingly, MDL transferee courts have adopted procedures and practices that ignore or even contradict

the clear text of the rules. See *e.g.*, *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685907 (6th Cir. 2003). They often do so under the guise of case management or in an effort to pursue settlement, believing that their obligation is to exhaust all means of settlement. See *e.g.*, *In re Patenaude*, 201 F.3d 135, 139-40 (3rd Cir. 2000)(district court "resisted motions to remand cases back to transferor courts unless the claimant was seriously ill or dying and all avenues of settlement were exhausted").

From the outset of this opioid MDL, the district court announced its intention to tackle the opioid crisis, that is "to do something meaningful to abate this crisis and to do it in 2018." (Transcript of 1/12/18 Proceedings, RE 71, Page ID # 462.) Whatever the merits of attempting to resolve litigation or to coordinate proceedings to save costs, transferee courts are obligated to confine their discretion within the boundaries of the federal rules. It is questionable whether an MDL is intended or permitted to be a vehicle for a transferee judge to embark on a wide-ranging effort to abate a "national crisis." And such efforts, in this and other MDLs, can come at a high cost to the interests of the parties in controlling their own litigation and can end up costing far more than the litigation costs would have been for separate suits. See *e.g.*, Martin H. Redish and Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural*

Collectivism, 95 B.U. L. REV. 109 (2015)(describing the potential injury to autonomy interests and violations of due process that can arise from multidistrict litigation's departure from the norms of transparent adversary-based litigation). As one past chair of the judicial panel on multidistrict litigation recognized, the parties can be dragged into litigation of a scope far beyond their own cases in a court far from where the cases were originally filed:

> Imagine you are minding your own business and litigating a case in federal court. Opening your mail one day, you find an order – from a court you've never heard of – declaring your case a 'tag-along' action and transferring it to a district court clear across the country for pretrial proceedings. Welcome to the world of multidistrict litigation.

Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation,* 16 ME.B.J. 16, 16 (2004).

And then imagine that once you are litigating in that faraway district court, you find that the normal rules don't apply, you can't get appellate review and relief in a timely manner, and you are forced to defend yourself in an *ad hoc* universe in which the court's critically important decisions are untethered to the rules.

Some litigants and transferor judges defend broad discretion arguing it is necessary to deal with the variations in the kinds of MDLs that are being handled. But judicial discretion is not, and ought not be, unlimited. Justice Frankfurter long ago explained that "judicial judgment is involved in an empiric process in the sense that results are not predetermined or mechanically ascertainable." *Irvine v. California*, 347 U.S. 128, 147 (1954)(Frankfurter, J., dissenting). But the use of such judgment is very different from "conceiving the results as *ad hoc* decisions in the opprobrious sense of *ad hoc*." *Id.* Justice Frankfurter's distinction demonstrates why review is urgently needed in this case. An exercise of judgment in applying rules for one case does not mean that a judge can make an *ad hoc* decision separately from all the other cases:

> Empiricism implies judgment upon variant situations by the wisdom of experience. *Ad hocness* in adjudication means treating a particular case by itself and not in relation to the meaning of a course of decisions and the guide they serve for the future. There is all the difference in the world between disposing of a case as though it were a discrete instance and recognizing it as part of the process of judgment, taking its place in relation to what went before and further cutting a channel for what is to come.

Id. Discretion and judgment in applying rules to variant situations is consistent with the rule of law. But disposing of a case without reference to past and future decisions under the rules cannot be squared with judicial

decision-making under the rule of law. District courts handling multidistrict litigation are required to make their decisions in conformity with the federal rules.

But little case law currently exists to make clear how those rules are to be applied in the context of an MDL. Decades after MDLs began, the paucity of precedent leaves litigants and district courts adrift in a sea of *ad hoc* decisions. The lack of precedent deprives the courts of the guidance that this and other appellate courts can give so that this case is not only decided in accord with the rules but also cuts a channel for what is to come in this and in other cases pending in MDLs. The lack of precedent also deprives lawyers and litigants of the normal transparency, predictability, and consistency that has long been a hallmark of the Federal Rules of Civil Procedure and the American justice system.

At the end of 2018, MDL cases constituted nearly 52% of the pending civil caseload in federal courts. See https://www.jpml.uscourts.gove/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2018.pdf. According to the Judicial Panel on Multidistrict Litigation, at the end of 2018, 156,511 actions were pending in 48 transferee district courts. *Id.* Given these enormous numbers, the guidance of this Court is even more warranted. Thus, the petition should be granted.

RELIEF

WHEREFORE, Amicus Curiae Lawyers for Civil Justice respectfully requests this Court to grant petitioners a writ of mandamus and the relief set forth in their petition.

PLUNKETT COONEY

BY: */s/ Mary Massaron*

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Dated: January 24, 2020

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CERTIFICATE OF COMPLIANCE

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

MARY MASSARON, being first duly sworn, certifies and states the following:

1. She is a shareholder with the firm Plunkett Cooney, and is in principal charge of the above-captioned cause for the purpose of preparing the attached brief on appeal;

2. The brief on appeal prepared by her office complies with the type-volume limitation;

3. Plunkett Cooney relies on the word count of their word processing system used to prepare the brief, using Cambria size 14 font; and

4. The word processing system counts the number of words in the brief as 4,926.

Dated: January 24, 2020

/s/ Mary Massaron
MARY MASSARON

CERTIFICATE OF SERVICE

MARY MASSARON, attorney with the law firm of PLUNKETT COONEY, being first duly sworn, deposes and says that on the 24th day of January, 2020, she caused a copy of this document to be served upon all parties of record, and that such service was made electronically upon each counsel of record so registered with the United States Court of Appeals for the Sixth Circuit, and via U.S. Mail to any counsel not registered to receive electronic copies from the court, by enclosing same in a sealed envelope with first class postage fully prepaid, addressed to the above, and depositing said envelope and its contents in a receptacle for the U.S. Mail.

PLUNKETT COONEY

BY: */s/ Mary Massaron*

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