

THE CASE FOR APPELLATE REVIEW OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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INTRODUCTION	2246
I. BACKGROUND OF THE JPML AND ITS APPELLATE REVIEW	2251
II. THE CASE FOR EXPANDED APPELLATE REVIEW OF THE JPML	2256
<i>A. MDL Centralization Is De Facto Dispositive</i>	2259
1. Pressure to Settle	2261
2. Denial of Economies of Scale.....	2264
<i>B. Clarifying Issues of Law and Ensuring Uniformity</i>	2269
1. Accusations of the JPML Exceeding Its Authority	2270
2. Disagreements About Commonality in Patent Cases.....	2272
3. Disagreements About Efficiency in Cases Involving the SEC	2273
<i>C. Improving Accuracy</i>	2275
<i>D. Promoting Due Process</i>	2276
III. THE ARGUMENTS AGAINST EXPANDED APPELLATE REVIEW	2278
<i>A. Favoring Defendants</i>	2279
<i>B. Judicial Economy</i>	2281
<i>C. Relative Expertise</i>	2283
<i>D. Finding a Court</i>	2285
IV. A POSSIBLE SOLUTION	2286
<i>A. The Policy Proposal</i>	2286
<i>B. Avoiding the Problems with Appellate Review</i>	2289
1. Saving Judicial Resources	2290
2. Respecting Expertise	2292
<i>C. Capturing the Benefits of Appellate Review</i>	2297
CONCLUSION	2298

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Abstract: The Judicial Panel on Multidistrict Litigation (JPML) determines if cases pending in different district courts throughout the country should be centralized into a multidistrict litigation (MDL). This Article is the first to argue that the JPML should be subject to appellate review. MDLs are incredibly important. Over half of all federal civil cases are currently centralized into MDLs, and MDLs touch on pressing issues such as the opioid crisis and climate change. Because of this, the JPML's decisions can have significant consequences. Despite these consequences, these decisions cannot be appealed. MDLs have received significant attention in recent years, and we are currently in a golden age of scholarship on MDLs. But very little has been written on the JPML itself, and no one has argued in favor of appellate review of the JPML. Despite the lack of attention, appellate review of the JPML is important. Like class certification, which is appealable, MDL centralization is essentially dispositive in many cases. Additionally, appellate review of the JPML would further important goals such as clarifying the law, ensuring correct outcomes, and promoting due process. There are, however, reasons to be cautious about expanding appellate review. In this Article, I argue for appellate review of the JPML, address the drawbacks, and present a specific policy proposal for expanding appellate review of the JPML that captures the benefits of appellate review while avoiding the pitfalls.

INTRODUCTION

Multidistrict litigation (MDL) takes up a substantial portion of the federal docket. By a recent count, there are currently 326,539 cases centralized into MDLs, representing a majority of the civil cases pending on the federal docket.¹ Cases centralized into MDLs range from disputes involving a few litigants

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¹ *First MDL-Specific Rule Set for December Implementation*, RULES 4 MDLs (Apr. 25, 2025), <https://www.rules4mdls.com/copy-of-first-mdl-specific-rule-appro> [<https://perma.cc/4J6U-ED8K>] (explaining that, after excluding social security cases and non-death penalty prisoner cases, 67.8% of all federal civil cases are part of MDLs); see also Charles Silver & Geoffrey P. Miller, *The Quasi-*

to some of the most impactful cases in the federal courts such as the opioid, Volkswagen clean diesel, and BP oil spill cases.² Despite their numbers and importance, up until the last decade or so, MDLs received little academic attention.³

One topic that has almost completely avoided attention is appellate review of the Judicial Panel on Multidistrict Litigation (JPML).⁴ The JPML is a panel of seven district and circuit judges appointed by the Chief Justice of the United States that is charged with deciding motions to centralize cases to form an MDL.⁵ In short, the JPML determines if an MDL will be created. Due to the number and importance of MDLs, the JPML possesses immense power over the federal court system.⁶

Despite the importance of the JPML's decisions, those decisions are not subject to meaningful appellate oversight.⁷ Surprisingly, there has been very little written on this matter.⁸ Recently, Professor Robert Klonoff argued against expanding appellate review of the JPML.⁹ But he was unable to cite a single

Class Action Method of Managing Multi-District Litigations: Problems and a Proposal, 63 VAND. L. REV. 107, 108 (2010) (referring to MDLs as “[t]he preferred way of handling mass tort lawsuits in the federal courts”).

² See MDL Statistics Report—Distribution of Pending MDL Dockets by District, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Jan. 2, 2024), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_Litigations_By_District-January-2-2024.pdf [<https://perma.cc/S6C5-WJEX>] (listing these cases as well as all other pending MDLs and providing statistics about MDLs). Some scholars have even argued that significant public law cases challenging government actions could be centralized into MDLs. See generally Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 NW. U. L. REV. 85 (2018) (arguing that the MDL statute allows such centralization, but that it is unwise). If this were to begin occurring, it would further elevate the importance of MDLs.

³ See generally Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017) (arguing that greater attention should be paid to MDLs).

⁴ Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1332 (2020). Professor Clopton notes that despite significant attention paid to MDLs and MDL reforms, the “nearly unconstrained authority” of the JPML “has received relatively little attention.” *Id.* (“None of the proposed rule changes or statutory amendments addressed the JPML’s role. Other than an occasional jab at the Panel for selecting the same judges as transferees, scholars rarely have focused on the Panel’s consolidation and assignment decisions.” (footnotes omitted)); *id.* at 1341–42 (“The JPML has its own system of rules, but its decisions are not subject to meaningful review individually or collectively. . . . Perhaps this should change.” (footnotes omitted)).

⁵ 28 U.S.C.A. § 1407(a), (d) (West 2022).

⁶ See *supra* notes 1–2 and accompanying text (showing that MDLs represent nearly seventy percent of federal civil litigation, including some very high profile cases).

⁷ 28 U.S.C.A. § 1407(e) (“No proceedings for review of any order of the panel may be permitted except by extraordinary writ There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.”); see *infra* notes 55–60 and accompanying text (explaining the dearth of meaningful oversight).

⁸ *Supra* note 4 and accompanying text.

⁹ See Robert Klonoff, *The Judicial Panel on Multidistrict Litigation: The Virtues of Unfettered Discretion*, 89 UMKC L. REV. 1003, 1014–18 (2021).

scholar or practitioner arguing in favor of greater appellate review.¹⁰ This is not to say there is no interest in this area. In another article, Professor Zachary D. Clopton suggested that we consider reforms to the JPML and mentioned the lack of appellate review as one possible target, although he stopped short of affirmatively endorsing expanded appellate review.¹¹ This Article takes that extra step and provides the first argument in favor of appellate review of the JPML.

Looking to an adjacent area, there is significant interest in reforming MDLs themselves, including by expanding appellate oversight of decisions made in MDLs after centralization has occurred.¹² Various changes have been discussed in the MDL Subcommittee of the Advisory Committee on Rules of Civil Procedure.¹³ Most notably, there was a recent failed push to have the Advisory Committee expand interlocutory appeals of MDLs.¹⁴ Similarly, a bill that would have expanded appellate review of MDLs was passed by the House of Representatives in 2017, although it never received a vote in the Senate.¹⁵ These proposals did not come out of nowhere. Commentators have long called for expanding interlocutory appeals in MDLs.¹⁶

¹⁰ See *id.* at 1004 (“Since November 2017, the MDL Subcommittee has been examining numerous possible reform proposals, urged primarily by the defense bar and various academics. Interestingly, however, there has been virtually no focus on reforming the JPML’s decision-making process. Instead, the focus has been entirely on reforms addressed to the MDL judges assigned to handle the cases.”).

¹¹ Clopton, *supra* note 4, at 1301 (calling for “renewed attention to the JPML”); *id.* at 1341–42 (questioning whether the lack of appellate review “should change”); see also Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2281 (2008) (noting that “[g]iven the potentially comparable importance of decisions to transfer [cases into an MDL and decisions to certify a class], an argument for some form of review might be made,” but not making the argument); cf. Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1237 (2018) (arguing that “courts of appeal should remain attentive to the JPML’s actions and be prepared to act as more than a rubber stamp,” but cautioning that “[d]eparting from the current mandamus remedy may not be necessary”).

¹² ROBERT H. KLONOFF, *FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL* 353–81 (2020) (providing examples of proposed reforms).

¹³ Clopton, *supra* note 4, at 1311–12 (discussing the creation and role of the MDL Subcommittee). Although not appellate review related, proposed Federal Rule of Civil Procedure 16.1, which deals primarily with issues of case management in MDLs, was recently transmitted to Congress by the Supreme Court. See U.S. SUP. CT., CONGRESSIONAL RULES PACKAGE 2025, at 00001, 00109–13 (Apr. 23, 2025), https://www.uscourts.gov/sites/default/files/document/2025_congressional_package_final.pdf [<https://perma.cc/KR28-B63T>] (submitting package for consideration and providing text of proposed Rule 16.1).

¹⁴ See ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES 33–34 (Apr. 23, 2021), https://www.uscourts.gov/sites/default/files/2021-04-23_civil_agenda_book_with_supplemental_materials.pdf [<https://perma.cc/Y3WQ-Q3PK>] (reporting that the Subcommittee on Multidistrict Litigation considered and rejected changes that would allow for more interlocutory appeals in MDLs).

¹⁵ See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 105(k) (2017) (proposing to expand appellate review of interlocutory orders in MDLs); see also Clopton, *supra* note 4, at 1313–14 (discussing the bill).

¹⁶ See KLONOFF, *supra* note 12, at 355–59 (calling this “[p]erhaps the most prominent reform proposal” and compiling various versions of this proposal); see, e.g., Andrew S. Pollis, *The Need for*

It is important to distinguish these proposals for MDL-review from my proposal for JPML-review before going forward. Proposals for MDL-review advocate for greater opportunities for interlocutory appellate review once cases have been centralized into an MDL.¹⁷ By contrast, my proposal concerns appellate review of the JPML itself and the process by which cases are centralized into an MDL. In other words, the appeals under the MDL-review proposals would consider issues arising within the MDLs once they have been created, whereas appeals under my proposal would address whether the JPML made the correct decision in creating (or not creating) an MDL in the first place. To draw an analogy, my proposal is akin to Federal Rule of Civil Procedure 23(f) which allows for appellate review of class certification decisions,¹⁸ and the other proposals are more akin to expanding appellate review of decisions on motions that occur after class certification. Contrary to my proposal, proposed changes to the MDL system have thus far ignored the JPML altogether.¹⁹

This lack of attention to the JPML is likely due to the fact that MDLs themselves have only become prominent and started receiving significant attention in the last decade.²⁰ Despite the new attention on MDLs, there has been little scrutiny of the JPML itself and no one has yet argued in favor of expanded appellate review of it.²¹ This lack of attention may be due to the fact that the JPML's decisions are often viewed as purely procedural rather than substantive²²—a view that conceals the true power of the JPML to affect the substances of the cases it centralizes.²³ In this Article, I attempt to change that lack of

Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation, 79 FORDHAM L. REV. 1643, 1685 (2011) (arguing that certain decisions made within MDLs should be appealable as of right).

¹⁷ See *supra* notes 13–16 and accompanying text.

¹⁸ See FED. R. CIV. P. 23(f).

¹⁹ See Clopton, *supra* note 4, at 1332 (observing that “[n]one of the proposed rule changes or statutory amendments addressed the JPML’s role”).

²⁰ See, e.g., Gluck, *supra* note 3, at 1710 (calling for more “theoretical and doctrinal analysis” of MDLs); Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 831–32 (2017) (“One of the central stories in current procedural law is the recent and rapid ascendance of federal multidistrict litigation, or, as it is commonly known, MDL. As the class action has declined in prominence, MDL has surged With MDL’s growth has come attention from scholars As recently as a decade ago, it would have been reasonable to say that multidistrict litigation . . . was a second banana to the class action, which had long demanded the lion’s share of public and scholarly attention.”).

²¹ Clopton, *supra* note 4, at 1332 (explaining that the “nearly unconstrained” ability of the JPML to centralize and transfer cases into MDLs has “received relatively little attention”).

²² See 2 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 6:45 (6th ed. 2025) (explaining that the JPML’s “authority to consolidate cases for pre-trial purposes” is “generally viewed as procedural in nature and lacking any particular substantive content”); see also Marcus, *supra* note 11, at 2279 (noting a similar view).

²³ See RUBENSTEIN, *supra* note 22, § 6:45 (explaining that the belief that the JPML makes only procedural decisions “masks” the Panel’s power to substantively affect cases); see also Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 15 (2021) (noting that centralization into an MDL is “usually . . . dispositive”).

attention by offering the first argument in favor of expanding appellate review of the JPML itself.

To that end, I engage in a dialectic approach, providing arguments in favor of appellate review while also providing and accepting arguments that caution against it. I conclude by embracing a limited form of appellate review of the JPML which achieves the benefits of full appellate review while mitigating counterarguments or rendering them inapplicable.

This Article proceeds in four parts. In Part I, I provide background information about the JPML to contextualize my later arguments.²⁴ I discuss the Panel's composition, its power to centralize cases into MDLs, and some of the practical realities of that process. I pay special attention to explaining the status quo of appellate review—or, more accurately, the lack of appellate review—of the JPML. Currently, decisions to centralize cases are only reviewable via writ of mandamus, a type of review that is “virtually never” granted, and decisions not to centralize are not even reviewable in that limited way.²⁵

In Part II, I provide the arguments for expanding appellate review of the JPML.²⁶ Section A argues that centralization decisions are essentially dispositive actions, functionally ending the case in many instances.²⁷ This argument does two things. First, it operates as an independent argument for review by appealing to the belief that appellate review should be available for dispositive decisions. A similar argument carried the day in allowing for appellate review of class certification decisions.²⁸ Second, it raises the stakes of the remaining three arguments by showing the importance of the JPML's centralization decision. Sections B through D argue that appellate review of the JPML harmonizes the law of the JPML by resolving intra-Panel disputes, helps ensure accurate outcomes by scrutinizing the work of the JPML, and advances due process values by giving litigants another—and in some ways first—chance to be heard.²⁹

In Part III, I provide arguments against appellate review of the JPML.³⁰ I respond directly to some, but not all, of those arguments in this Part. The remaining arguments have independent validity and are addressed by my policy proposal in Part IV.

²⁴ See *infra* Part I.

²⁵ KLONOFF, *supra* note 12, at 145 (explaining that attempts to seek a writ of mandamus are “virtually never successful”); 28 U.S.C.A. § 1407(e) (West 2022) (explaining that decisions to centralize can be reviewed by “extraordinary writ” and that denials of centralization cannot be appealed at all).

²⁶ See *infra* Part II.

²⁷ See *infra* Part II.A.

²⁸ See FED. R. CIV. P. 23 advisory committee's note to 1998 amendment (explaining that appeals of class certifications are justified because denials and grants of centralization may be dispositive for either party).

²⁹ See *infra* Part II.B–D.

³⁰ See *infra* Part III.

In Part IV, I provide my policy recommendation.³¹ The most important part of my proposal is allowing appeals from the JPML but only if a member of the Panel certifies the question as deserving review and the reviewing court accepts the appeal. This approach captures the benefits of appellate review by leaving it as an option in cases where there are disagreements within the Panel and in other cases that the Panel finds especially difficult. On the other hand, my proposal avoids the problems of appellate review by limiting the number of appeals to a very manageable number and respecting the expertise of the JPML. I also provide other policy recommendations in this Part. Specifically, I argue that mandamus should remain available as a fail-safe and that exclusive appellate and mandamus jurisdiction over the JPML should be vested in a single appellate court.

I. BACKGROUND OF THE JPML AND ITS APPELLATE REVIEW

In this Part, I provide background information about the JPML as necessary context. In particular, I discuss the composition of the JPML and its power to centralize cases into MDLs. I note that, despite centralization being limited to pretrial proceedings only, the vast majority of cases centralized into MDLs are terminated there. Most importantly, I explain that these essentially dispositive centralization decisions are effectively unreviewable.

The JPML is a panel of seven district and circuit court judges appointed by the Chief Justice of the United States that is charged with reviewing motions to centralize cases to form an MDL.³² Judges appointed to the JPML tend to have experience with complex litigation³³ and are chosen by the Chief Justice due to their “impeccable credentials and expertise.”³⁴ Although the statute establishing the JPML provides no guidance on how long judges may sit on the Panel, Chief Justice Rehnquist adopted a practice that has persisted of appointing Panel members to staggered seven-year terms.³⁵

The JPML possesses the power to order the centralization of “civil actions involving one or more common questions of fact [that] are pending in different districts.”³⁶ By statute, centralization is appropriate when the JPML determines that it “will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”³⁷ The underlying rationale for

³¹ See *infra* Part IV.

³² 28 U.S.C.A. § 1407(a), (d) (West 2022).

³³ Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 434 (2013).

³⁴ Klonoff, *supra* note 9, at 1017.

³⁵ John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2227 (2008); KLONOFF, *supra* note 12, at 39.

³⁶ 28 U.S.C.A. § 1407(a).

³⁷ *Id.*

centralization is to “avoid duplication of discovery, . . . prevent inconsistent pretrial rulings, and . . . conserve the resources of the parties, their counsel and the judiciary.”³⁸

Importantly, centralization is, by statute, for “pretrial proceedings” only.³⁹ After pretrial proceedings, the cases are to be remanded back to the district from which they were transferred.⁴⁰ Although it is required by statute, this remand is rarely exercised in practice—only one percent of cases are actually remanded.⁴¹ Because of this, remand from an MDL has been called a “fiction” by various scholars.⁴² Instead of ending in the required remand, an MDL often becomes a “‘black hole,’ into which cases are transferred never to be heard from again.”⁴³

In addition to ordering centralization, the Panel is also empowered to select both the district where the cases will be transferred⁴⁴ and the judge who will oversee pretrial proceedings.⁴⁵ The selection of judge and district is unguided by the statute and left solely to the discretion of the JPML.⁴⁶

³⁸ *About the Panel*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <https://www.jpml.uscourts.gov/about-panel> [<https://perma.cc/7EP9-CWMD>]; see also Gluck, *supra* note 3, at 1696–97 (noting that MDLs promote access to the courts). Cf. Bruce Hay & David Rosenberg, “Sweetheart” and “Black-mail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1383–89 (2000) (discussing similar normative arguments for class actions). These arguments from the class action context are broadly applicable to MDLs. See *infra* Part II.A.2 (discussing the economy of scale benefits of both types of litigation).

³⁹ 28 U.S.C.A. § 1407(a).

⁴⁰ *Id.*; see also *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40–41 (1998) (emphasizing that § 1407(a) requires remand and invalidating a practice where transferee judges would assign centralized cases to themselves for trial under 28 U.S.C. § 1404 which provides for change of venue).

⁴¹ Elizabeth Chamblee Burch & Abbe R. Gluck, *Plaintiffs’ Process: Civil Procedure, MDL, and a Day in Court*, 42 REV. LITIG. 225, 228 (2023) (“Over the past few decades, MDLs have exerted a gravitational pull such that judges have resolved 99% of cases themselves rather than sending them home as the statute envisions.”).

⁴² Gluck & Burch, *supra* note 23, at 72 (discussing the “fiction of remand”); 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, 1297 (2018) (describing the “fiction” of temporary transfer to the MDL court); see also Gluck, *supra* note 3, at 1673 (“[I]t is the worst-kept secret in civil procedure that the MDL is really a *dispositive*, not pretrial, action.”).

⁴³ Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008).

⁴⁴ 28 U.S.C.A. § 1407(a); see also Elizabeth Cabraser, *The JPML Hearing: A Plaintiff’s Perspective*, 89 UMKC L. REV. 827, 827 (2021) (“[The JPML] decide[s] whether, where, and to whom to transfer federal cases sharing common questions of fact.”).

⁴⁵ 28 U.S.C.A. § 1407(b).

⁴⁶ KLONOFF, *supra* note 12, at 109–10 (“Although the statute provides criteria for transfer, it provides no guidance on the selection of the transferee district and judge Nor do the Federal Rules of Civil Procedure or the JPML Rules address the issue Ultimately, the Panel exercises its discretion in each case”) (citation omitted); Clopton, *supra* note 4, at 1335 n.186 (“[The statute] empowers the JPML to select a district and judge for no good reason.”). In this Article, I am not concerned with appellate review of the JPML’s selection of district or judge. It is true that such decisions are important and may be subject to criticism. See Gluck & Burch, *supra* note 23, at 11 (“The JPML’s

In making their cases for or against centralization, parties submit briefs to the Panel and deliver oral arguments.⁴⁷ Due to the vast number of MDLs and prospective MDLs, the JPML is busy. The Panel holds approximately six hearings per year, all while the members maintain their normal dockets.⁴⁸ In these hearings the Panel is presented with between fifteen and twenty motions to centralize, and two to seven attorneys usually present arguments per motion.⁴⁹ In total, fifty to seventy lawyers deliver arguments in a single two-and-a-half-hour session.⁵⁰ Arguments are often limited to two minutes or less.⁵¹ About two weeks after the hearing, the Panel issues its decision.⁵² These decisions are generally brief and “conclusory,”⁵³ even in complicated and difficult cases.⁵⁴

The most important aspect of JPML procedure for the purpose of my argument is that these centralization decisions are not subject to meaningful appellate oversight. Decisions by the JPML are not appealable by normal means. Decisions denying centralization cannot be reviewed through any means and are thus subject to no oversight whatsoever.⁵⁵ Decisions granting centralization

choice of forum can have major significance for the parties, affecting everything from which lawyers will control the proceeding to what common law will apply to matters of federal law and procedure.”); Cabraser, *supra* note 44, at 831 (“[T]he identity of the transferee judge to whom the management of the litigation is to be entrusted is, as in the nature of all complex litigation, decisive. It may not be decisive as to outcome, and of course advocates studiously avoid making ‘merits’ arguments to the Panel.”); Clopton, *supra* note 4, at 1332 (noting the “occasional jab at the Panel for selecting the same judges as transferees”); Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713, 1738–39 (2019) (mentioning the common critique that MDL judges are disproportionately white and finding it to be true in the context of large MDLs). But the lack of statutory standards would make appellate review difficult. By contrast, a reviewing court can judge the Panel’s decision to centralize or not using set criteria laid out in § 1407. See 28 U.S.C.A. § 1407(a). No such criteria exist for the selection of judge or district. See Klonoff, *supra* note 9, at 1014 (“While there are at least nominal criteria for deciding whether to centralize—i.e., the existence of common questions of fact and the advancement of convenience and efficiency—there are *no* criteria whatsoever in the statute or the JPML’s rules regarding the selection of the district court and judge.”). This is not to say there is not an argument for appellate review of district and judge selection—one could even argue for set criteria against which an appellate court could review a decision. It is just not the argument this Article is making.

⁴⁷ KLONOFF, *supra* note 12, at 46–47.

⁴⁸ See Heyburn, *supra* note 35, at 2235 (discussing the JPML’s oral arguments and noting that they are held every two months); Klonoff, *supra* note 9, at 1017 (“[T]he members of the JPML are all sitting federal judges with their own caseloads . . .”).

⁴⁹ Heyburn, *supra* note 35, at 2235–36 (explaining that these oral arguments feature “fifteen to twenty § 1407 motions for creation of a new MDL, with between two and seven (or, on rare occasions, more) attorney appearances per motion”).

⁵⁰ *Id.* at 2236.

⁵¹ Cabraser, *supra* note 44, at 830.

⁵² John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIG. 26, 27 (2012).

⁵³ Klonoff, *supra* note 9, at 1006.

⁵⁴ See KLONOFF, *supra* note 12, at 49 (discussing a three-page opinion issued in a case where there was “substantial disagreement among the parties”).

⁵⁵ See 28 U.S.C.A. § 1407(e) (West 2022) (“There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.”).

can only be reviewed via extraordinary writ (specifically, a writ of mandamus),⁵⁶ and mandamus petitions seeking review of the JPML's decisions are "virtually never successful."⁵⁷ As the Supreme Court has explained, the bar for a writ of mandamus is very high, requiring "really extraordinary causes"⁵⁸ that "amount[] to a judicial 'usurpation of power.'"⁵⁹ In fact, a writ of mandamus directed to the JPML has only been issued once and not even to reverse centralization.⁶⁰ In the one case where it was granted, it was to require the JPML to retransfer cases to the MDL court after the JPML had remanded those cases back to the courts in which they were originally filed.⁶¹ In other words, it was to reverse a remand.

In 2025, in *Uber Technologies, Inc. v. United States Judicial Panel on Multidistrict Litigation*, the United States Court of Appeals for Ninth Circuit confronted an attempt to reverse a centralization decision of the JPML via mandamus.⁶² There, the JPML had centralized seventy-nine actions alleging that Uber failed to adequately address sexual misconduct and assaults by drivers before Judge Breyer in the Northern District of California.⁶³ Uber sought a writ of mandamus from the Ninth Circuit, arguing that centralization was inappropriate under § 1407 and that waivers signed by the plaintiffs precluded centralization.⁶⁴ In rejecting Uber's petition, the court emphasized the "highly deferential" nature of mandamus review.⁶⁵ As the court put it, "[m]andamus will not issue merely because the petitioner has identified legal error. Rather, mandamus will issue only if we are left with a 'firm conviction' that the [JPML] misinterpreted the law . . . or committed a 'clear abuse of discretion.'"⁶⁶ This deference, the court reasoned, was "particularly appropriate" due to the structure of the JPML and the fact that it is insulated from normal appel-

⁵⁶ *Id.* ("No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code."). Pre-hearing motions are also reviewable by extraordinary writ. *Id.*

⁵⁷ KLONOFF, *supra* note 12, at 145; *see also id.* at 151–54 (providing examples of decisions denying mandamus).

⁵⁸ *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)).

⁵⁹ *Id.* (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)).

⁶⁰ Klonoff, *supra* note 9, at 1014; *see Uber Techs., Inc. v. U.S. Jud. Panel on Multidistrict Litig.*, 131 F.4th 661, 668 (9th Cir. 2025) ("[W]e are unaware of a single instance in the more than 50 years that the JPML has existed where an appellate court has reversed a JPML order granting centralization."); *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, 712 F. Supp. 3d 1394, 1396 n.2 (J.P.M.L. 2024) ("It appears that no writ overturning centralization or inclusion of a tag-along action in an MDL has ever issued.") *mandamus denied*, *Uber Techs., Inc.*, 131 F.4th 661.

⁶¹ *See In re Food Lion, Inc., Fair Labor Standards Act "Effective Scheduling" Litig.*, 73 F.3d 528, 533 (4th Cir. 1996) (ordering that the JPML retransfer cases back to the transferee court).

⁶² 131 F.4th 661.

⁶³ *Id.* at 666–67.

⁶⁴ *Id.* at 667–69, 672.

⁶⁵ *Id.* at 668 (quoting *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2021)).

⁶⁶ *Id.* (alteration in original) (citation omitted).

late review by statute.⁶⁷ Ultimately, the court concluded that it should not “be the first” to reverse an order of the JPML granting centralization.⁶⁸

The limit to mandamus review and the practical impossibility of successfully petitioning for mandamus make the JPML “essentially unreviewable”⁶⁹ and provide it with “unfettered discretion.”⁷⁰ Thus, the practical status quo of appellate review of the JPML is no appellate review.

In addition to the federal system, twenty-four states have their own MDL systems.⁷¹ These “state MDLs” differ from each other and the federal system in many ways, including the actor tasked with determining whether an MDL should be created, the standard that must be met to create the MDL, and issues related to the management of the MDL.⁷² Interestingly, they also differ in whether they allow appellate review and what type they allow.⁷³ Some states, like the federal system, only allow review via mandamus.⁷⁴ Other approaches include: having no review whatsoever, not even by mandamus;⁷⁵ allowing discretionary appeals but only from decisions to centralize and not decisions denying centralization;⁷⁶ and allowing appeals through the normal means.⁷⁷ So

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Klonoff, *supra* note 9, at 1018.

⁷⁰ *Id.* at 1003.

⁷¹ See Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. 1649, 1658 (2021) (classifying states by whether they authorize MDLs and which type they authorize).

⁷² See *id.* at 1656–76 (creating a “taxonomy” of different approaches to MDLs used in various states). On the issue of the actor tasked with deciding whether an MDL should be created, states take various approaches including: using a dedicated panel like the JPML, placing the decision in the hands of the supreme court, allowing a single judge to create an MDL, and others. See *id.* at 1668.

⁷³ See *id.* at 1674–75 (discussing various approaches to appellate review).

⁷⁴ Texas takes this approach, though it allows for mandamus review of orders both allowing and denying centralization. See *id.* at 1674; TEX. GOV’T CODE ANN. § 74.163(a) (West 2023) (“The judicial panel on multidistrict litigation must operate according to rules of practice and procedure adopted by the supreme court under Section 74.024. The rules adopted by the supreme court must . . . (4) provide for appellate review of certain or all panel orders by extraordinary writ.”); TEX. R. JUD. ADMIN. 13.9(a) (“An order of the MDL Panel, including one granting or denying a motion for transfer, may be reviewed only by the Supreme Court in an original proceeding.”).

⁷⁵ New York takes this approach. Clopton & Rave, *supra* note 71, at 1674; N.Y. COURTS, LITIG. COORDINATING PANEL PROCS. E(3) (“The determinations of the Panel are purely administrative in nature. Hence, no appeal lies therefrom and none is provided for in Section 53.1.”); see also N.Y. COMP. CODES R. & REGS. tit. 22, § 53.1 (2024) (establishing the Litigation Coordinating Panel, the New York equivalent of the JPML).

⁷⁶ Virginia takes this approach. Clopton & Rave, *supra* note 71, at 1674; VA. CODE ANN. § 8.01-267.8(A) (West 2022) (“The Court of Appeals, in its discretion, may permit an appeal to be taken from an order of a circuit court although the order is not a final order where the circuit court has ordered a consolidated trial of claims joined or consolidated pursuant to this chapter.”).

⁷⁷ Indiana takes this approach. The Indiana MDL statute itself is silent on the issue of appellate review. See IND. R. TRIAL P. 42(D); see also Clopton & Rave, *supra* note 71, at 1693–96 (describing Indiana’s MDL procedure and noting that it was created by Rule 42(D)). The Court of Appeals of Indiana, however, has shown a willingness to review both decisions granting and denying consolidation. See *Kindred v. Ind. Dep’t of Child Servs.*, 136 N.E.3d 284, 291–92 (Ind. Ct. App. 2019) (review-

even though the federal MDL system does not currently allow appeals, one can imagine a similar system with more robust appellate review.

In the federal system, once the Panel centralizes cases, those cases become part of an MDL and most likely stay a part of it until they are resolved in the transferee court.⁷⁸ Interestingly, both Congress and the Subcommittee on Multidistrict Litigation recently considered, but ultimately rejected, expanding appellate review of interlocutory orders *within* MDLs.⁷⁹ Although none of the proposals addressed the JPML itself, they show a possible appetite for expanded appellate review over the MDL process writ large.

II. THE CASE FOR EXPANDED APPELLATE REVIEW OF THE JPML

Answering the question of whether decisions of the JPML should be appealable requires addressing the predicate question of why we have appeals at all.⁸⁰ Scholars have identified a few principle purposes of appellate review including clarifying the law and providing uniformity, improving the accuracy of outcomes, and promoting process-based values and legitimacy.⁸¹ I discuss

ing a decision to deny consolidation); *City of New Haven v. Allen Cnty. Bd. of Zoning Appeals*, 694 N.E.2d 306, 313 (Ind. Ct. App. 1998) (reviewing a decision to consolidate). Although appeals are available, the standard of review is very deferential to the court ordering consolidation. *See Kindred*, 136 N.E.3d at 292 (“The decision to consolidate actions is purely discretionary and will be overturned only when a manifest abuse of discretion is established.” (quoting *In re Paternity of Tompkins*, 518 N.E.2d 500, 507 (Ind. Ct. App. 1988))). Professors Clopton and Rave seem to suggest that California similarly allows appeals through normal means. *See Clopton & Rave, supra* note 71, at 1674 (“The California rule provides that any court with jurisdiction under the usual statutes may review a coordination decision.”). But recent case law in the state suggests that centralization is only reviewable via mandamus, like in the federal system. *See CAL. CIV. PROC. CODE* § 404.6 (West 2021) (“Within 20 days after service upon him or her of a written notice of entry of an order of the court under this chapter, any party may petition the appropriate reviewing court for a writ of mandate to require the court to make such order as the reviewing court finds appropriate.”); *Doe v. Google, Inc.*, 268 Cal. Rptr. 3d 783, 801 (Ct. App. 2020) (“[A]lthough plaintiffs are correct that section 404.6 does not explicitly say so, we hold that section 404.6 is the exclusive method for appellate review of coordination orders.”).

⁷⁸ *See supra* notes 41–43 and accompanying text. For a comprehensive explanation of the MDL process itself, see KLONOFF, *supra* note 12, at 173–293.

⁷⁹ ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 14, at 33–34 (reporting that the Subcommittee on Multidistrict Litigation considered and rejected changes that would allow for more interlocutory appeals in MDLs); Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 105(k) (2017) (proposing to expand appellate review of interlocutory orders in MDLs); *see also* Clopton, *supra* note 4, at 1313–14 (discussing the bill).

⁸⁰ *Cf.* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1175 (1990) (“Any defense of interlocutory appeals must start by arguing the case for appeals in general.”).

⁸¹ *See* Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 771 (2006) (describing “(1) increasing the probability of a correct judgment; (2) providing uniformity of result; and (3) increasing litigants’ sense that their dispute has been fully and fairly heard” as “three of the basic goals of appellate review”); J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 434–35 (1994) (describing error correction, uniformity, and satisfying “the public’s demand for

these values in greater depth in the remainder of this Part, but, for now, it suffices to say that appeals promote important values. They do so, however, at a cost. Appeals take time and resources.⁸² If every adverse decision were immediately appealable, courts could grind to a halt.⁸³

Our judicial system balances these competing values with the final judgment rule.⁸⁴ The Supreme Court has called a final judgment “one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”⁸⁵ While there are many exceptions to this rule, generally, only final judgments are appealable.⁸⁶ Where our system departs from the final judgment rule, it is often because those decisions are in some way *de facto*—even if not *de jure*—final.⁸⁷ For example, concerns that decisions regarding class certification could be essentially dispositive helped lead to the enactment of Federal Rule of Civil Procedure 23(f), which expanded appellate re-

justice” as the “core reasons for permitting appeals in our common-law system”); Solimine, *supra* note 80, at 1175 (“Appeals, by providing at least one more layer of decisionmaking, serve a number of values: they further the goal of rendering correct factual and legal decisions, and they permit law to be developed in a way applicable to all geographically dispersed federal courts. Moreover, appeals provide a *fairer* way of reaching decisions—fairer to the individual litigant who otherwise would be forever bound by the decision of one unreviewable judge.”); *see also, e.g.*, Adam Steinman, *Rethinking Standards of Appellate Review*, 96 IND. L.J. 1, 9 (2020) (referring to “law clarification” and “error correction” as “two of the key roles that appellate courts play”); Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 63, 63 n.54 (2010) (noting that “[m]ost discussions of the functions of appellate courts suggest that there are two functions: error correction and law declaration” and also discussing process values); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 69 (1985) (“Why do we have appeals in the first place? Among the more compelling answers to that question are that appellate courts exist to correct errors; to develop legal principles; and to tie geographically dispersed lower courts into a unified, authoritative legal system.”); Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 618 (1974) (noting that “[a]ny appellate court has at least three distinct functions” including error correction, maintaining consistency of lower court decisions, and lawmaking).

⁸² See Bryan Lammon, *Manufactured Finality*, 69 VILL. L. REV. 271, 276–77 (2024) (noting the costs of appeals); Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 356 (2010) (same); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1547–48 (2000) (same); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 89 (1975) (same).

⁸³ See Solimine & Hines, *supra* note 82, at 1548 (“The filing of many such appeals could cause considerable disruption to the conduct of the trial proceedings, and flood appellate courts with additional work.”); Redish, *supra* note 82, at 89 (“If parties could take up on appeal each disputed ruling by a lower court as it was handed down, the case could drag on indefinitely.”).

⁸⁴ Lammon, *supra* note 82, at 276–77 (discussing this balancing); Petty, *supra* note 82, at 356 (same); Solimine & Hines, *supra* note 82, at 1547–48 (same).

⁸⁵ *Catlin v. United States*, 324 U.S. 229, 233 (1945); *see* Solimine & Hines, *supra* note 82, at 1547 (explaining that this description is how a “final judgment is traditionally defined”).

⁸⁶ See Lammon, *supra* note 82, at 276 (“[A]ppellate review normally must wait until everything has been resolved.”).

⁸⁷ See Petty, *supra* note 82, at 355 (grouping the “major judicially-crafted exceptions to the final judgment rule” into the categories of “effective finality, practical finality, and partial effective finality”).

view of class certification decisions.⁸⁸ Tracking this rationale, courts of appeals look to whether a grant or denial of class certification is essentially dispositive in determining whether to take an appeal under Rule 23(f).⁸⁹

In sum, appeals promote values but have costs. We balance those competing considerations by generally not allowing appeals until a final judgment, but once we have a final judgement, the benefits of appeals are typically thought to outweigh the drawbacks.

With that being said, in this Part, I present four arguments in favor of expanded appellate review of the JPML. In Section A, I argue that centralization decisions by the JPML are often de facto final or dispositive.⁹⁰ This is because centralization places immense pressure on the parties to settle and because denials of centralization prevent parties from accessing the economies of scale they may need to pursue their claims.⁹¹ This argument serves two purposes. First, it provides an independent argument for appellate review by appealing to our intuitive sense that dispositive orders ought to be subject to appellate oversight. In other words, it is based on the heuristic that, once you have a final judgment, the arguments for appellate review win out over the associated costs. Second, it raises the stakes of my three remaining arguments by showing the importance of centralization decisions.

In the remaining Sections, I go back to first principles and explain how appellate review of the JPML would promote the values that animate the case

⁸⁸ FED. R. CIV. P. 23 advisory committee's note to 1998 amendment ("[S]everal concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.").

⁸⁹ See RUBENSTEIN, *supra* note 22, § 7.44 (discussing this and compiling cases); FED. R. CIV. P. 23 advisory committee's note to 1998 amendment (explaining that permission to appeal interlocutory decisions under the Rule 23(f) "is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation"). Even before the adoption of Rule 23(f), courts of appeals would sometimes immediately review certain class certification decisions that seemed potentially dispositive under the "death knell doctrine." See Solimine & Hines, *supra* note 82, at 1552–54 (discussing the doctrine); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (same), *superseded by rule on other grounds as stated in Microsoft Corp. v. Baker*, 582 U.S. 23 (2017). That is, until the Supreme Court put an end to the practice. See *Coopers & Lybrand*, 437 U.S. at 477 ("Accordingly, we hold that the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291.").

⁹⁰ See *infra* Part II.A.

⁹¹ This is not to say that certain centralization decisions are, as a matter of law, final judgments or that they fall within one of the exceptions to the final judgment rule. Cf. Petty, *supra* note 82, at 360–93 (discussing exceptions to the final judgment rule). Because the JPML's governing statute clearly states that it cannot be appealed, such an argument would be futile. See 28 U.S.C.A. § 1407(e) (West 2022).

for appeals in general. In Section B, I argue that appellate review would serve a crucial lawmaking function by harmonizing and clarifying the law of the JPML.⁹² This would make the centralization process more predictable and consistent. Under the status quo there is essentially no mechanism to resolve disputes between the judges on the JPML. The same disputes may fester and recur without ever being finally decided. To illustrate this, I provide the first comprehensive survey of disagreements on the JPML, revealing crucial areas where the law of the JPML has been unsettled. Expanding appellate review could have resolved these disputes and ensured consistency and predictability.

In Section C, I argue that appellate review could improve accuracy in the centralization process.⁹³ Importantly, to accept this argument one need not doubt the expertise or skill of the JPML. The JPML is an expert panel and must be given due respect. Nonetheless, a reviewing court can act as a partner to the JPML, helping it perform its function and reducing errors. This is true even if the JPML possesses greater expertise than the court that would be reviewing its decisions.

Finally, in Section D, I argue that appellate review would advance the due process rights of the parties involved in the centralization process by providing them with an additional chance to be heard.⁹⁴ This is especially important because commentators have raised important due process concerns with aggregate litigation in general, and MDLs in particular.

A. MDL Centralization Is De Facto Dispositive

In this Section, I argue that decisions by the JPML are often de facto dispositive. By this, I mean that JPML decisions, despite ostensibly not addressing the merits, often dictate the final outcome of a case. This is because centralization can place immense pressure on the parties to settle and because the denial of centralization can deprive plaintiffs of the economies of scale that make their suits practicable. Defendants in an MDL also enjoy these economies of scale, and denials of these economies can be similarly harmful.

Establishing centralization decisions as de facto dispositive does two things. First, it supports an independent policy argument for reviewability of the JPML by appealing to our intuitive belief that dispositive decisions should be subject to appellate oversight.⁹⁵ These intuitive beliefs are codified in the

⁹² See *infra* Part II.B.

⁹³ See *infra* Part II.C.

⁹⁴ See *infra* Part II.D.

⁹⁵ See Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 641–42 (1971) (“Even if constitutional, unreviewable discretion offends a deep sense of fitness in our view of the administration of justice. We are committed to the practice of affording a two-tiered or three-tiered court system, so that a losing litigant may obtain at least one chance for review of each significant ruling made at the trial-court level.”). Many have made even broader claims about the intuitive desire for appeals. See, e.g., Henry J. Friendly, *Indiscretion About*

final judgment rule of 28 U.S.C. § 1291 which allows appeals from district courts, and in Federal Rule of Civil Procedure 23(f) which allows for appellate review of class certification decisions.⁹⁶ In fact, the argument that centralization into an MDL is de facto dispositive echoes the rationales for the adoption of Rule 23(f). The advisory committee that adopted Rule 23(f) justified the decision by looking to both the pressure certification places on parties to settle and the fact that denying certification may terminate a prospective class action by denying necessary economies of scale.⁹⁷ Using these same arguments to justify appellate review of MDL centralization is appropriate because, despite the differences between class actions and MDLs,⁹⁸ they are similar with regard to the pressures they place on litigants⁹⁹ and the economies of scale they introduce.¹⁰⁰ Additionally, the differences that do exist, including that MDLs lack some of the procedural safeguards of class actions and that defendants benefit from economies of scale in MDLs more than in class actions, may actually make these arguments stronger in the MDL context.¹⁰¹

Second, regardless of the independent argument that dispositive rulings should be reviewable, noting that these decisions are essentially dispositive helps establish the stakes of, and give greater weight to, my other arguments for appellate review of the JPML. More specifically, having clear law is important in general, but it is even more important if dispositive issues are being

Discretion, 31 EMORY L.J. 747, 756 (1982) (“Our judicial system takes as a given the desirability of appellate review.”); Dalton, *supra* note 81, at 62 (“The right to appeal at least once without obtaining prior court approval is nearly universal . . . [T]he right has become, in a word, sacrosanct.” (footnotes omitted)); Kelso, *supra* note 81, at 433 (“The underlying sentiment that there is (or must be) a higher authority which may be consulted to correct injustice has been ingrained in formal, governmental dispute-resolution systems throughout recorded history.”).

⁹⁶ 28 U.S.C. § 1291 (2018); FED. R. CIV. P. 23(f).

⁹⁷ FED. R. CIV. P. 23 advisory committee’s note to 1998 amendment (“[S]everal concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.”).

⁹⁸ See Silver & Miller, *supra* note 1, at 113 (noting that MDLs and class actions are similar in that both aggregate many individual claims, but that they differ in multiple respects including that MDLs do not need to meet the requirements of Rule 23 and that MDLs lack representative plaintiffs and class counsel); see also Gluck, *supra* note 3, at 1695–98 (noting that judges with substantial MDL experience emphasized to Professor Gluck that many MDLs could not be certified as class actions due to their individual elements).

⁹⁹ See *infra* Part II.A.1.

¹⁰⁰ See *infra* Part II.A.2. Although he did not make the argument, Professor Richard L. Marcus has observed that the similarity of MDLs to class actions may itself justify appellate review of the JPML’s centralization decisions. See Marcus, *supra* note 11, at 2281 (“Given the potentially comparable importance of decisions to transfer [cases into an MDL and decisions to certify a class], an argument for some form of review might be made . . .”).

¹⁰¹ See *infra* notes 117, 149–153 and accompanying text.

decided under that law; error reduction is always important, but it is even more important to reduce dispositive errors;¹⁰² and due process is important in all aspects of a proceeding, but it is especially critical in proceedings that finally vindicate or terminate rights.¹⁰³

1. Pressure to Settle

MDLs place immense pressure on all parties to settle. This pressure is well documented in the literature and can come from plaintiffs' lawyers, defendants,¹⁰⁴ and even the judge herself.¹⁰⁵ Because of this pressure, when cases are centralized into an MDL, individual plaintiffs begin to lose control. A survey of MDL plaintiffs found that less than half knew basic facts about their settlement such as how much money they were likely to receive, even though such disclosures are required by ethics rules.¹⁰⁶ Perhaps unsurprisingly, nearly

¹⁰² Cf. FED. R. CRIM. P. 52(a) (when reviewing a decision, "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded"); Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1209 (1995) ("The mission of the appellate courts in evaluating claims of harmless error should be to address significant errors and ensure fundamental fairness.").

¹⁰³ Cf. *Mathews v. Eldridge*, 424 U.S. 319, 341 (1976) ("[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process.").

¹⁰⁴ Cf. Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1739 (2017) (explaining that "the organized plaintiffs' bar understands that there are potential gains from global settlement" and that defendants perceive MDLs as facilitating settlement); ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 14, at 34 ("MDLs are perceived on both sides as settlement vehicles. A lot of work goes into them, but they nearly always settle.").

¹⁰⁵ See KLONOFF, *supra* note 12, at 223 ("Most MDL judges view their job as attempting, whenever possible, to dispose of the cases so that they are not remanded to the transferor courts. Some judges have been clear about this objective, noting early on their goal of achieving a global settlement."); Stephen R. Bough & Anne E. Case-Halferty, *A Judicial Perspective on Approaches to MDL Settlement*, 89 UMKC L. REV. 971, 973–74 (2021) (noting that many MDL judges see their role as "identifying" and "removing" "[o]bstacles to settlement"); Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 35–36 (2019) (noting that MDL judges use unique procedural devices such as "Lone Pine Orders" to encourage settlement); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011) (arguing that "by endorsing the concept of the quasi-class action," MDL judges have broadened their own authority and "become complicit in allowing private parties to accomplish the very backdoor settlements that the Supreme Court and federal courts have disallowed for decades" and that this model "represents an ultimate, cynical expression of an aggregate claims-resolution model that enables self-interested actors to resolve claims in the actors' best interests rather than the interests of injured claimants"); Amy L. Saack, Note, *Global Settlements in Non-Class MDL Mass Torts*, 21 LEWIS & CLARK L. REV. 847, 851–52 (2017) ("Judges encourage settlement between the parties, and cases are rarely remanded to the court from which they were transferred."); Silver & Miller, *supra* note 1, at 124 (arguing that MDL judges "want[] a global settlement at all costs").

¹⁰⁶ Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1904 (2022).

three-quarters of survey respondents were “extremely dissatisfied” with the “settlement process’s fairness.”¹⁰⁷

In *re National Prescription Opiate Litigation*, an MDL centralized by the JPML in 2017, provides an example of judicial pressure to settle.¹⁰⁸ From the very beginning, the judge in the case encouraged the parties to settle and avoid trial.¹⁰⁹ This is not unique to this judge or this MDL. Instead, many MDL judges “are intensely focused on settlement.”¹¹⁰ As one MDL judge put it, “[i]t’s the culture of transferee courts. You have failed if you transfer it back.”¹¹¹ In fact, the *Manual for Complex Litigation* actively encourages judges “to make the most of [their] opportunity and facilitate the settlement of the . . . cases.”¹¹² This intense focus on settlement—and success in achieving that settlement—has contributed to the perception that MDLs are a “black hole” for litigation.¹¹³

The problems associated with pressure to settle are well documented in the class action literature.¹¹⁴ Such concerns helped justify the adoption of Rule 23(f) to allow greater appellate review of class action certification decisions,¹¹⁵ and courts frequently cite this pressure when deciding to accept class certification appeals under Rule 23(f).¹¹⁶ The pressure to settle is arguably even more vindictive in the MDL context, as MDLs lack the procedural safeguards against problematic settlements that class actions possess, such as the require-

¹⁰⁷ *Id.* at 1903.

¹⁰⁸ 290 F. Supp. 3d 1375 (J.P.M.L. 2017).

¹⁰⁹ See Gluck & Burch, *supra* note 23, at 25 (noting that the judge “told the parties, with surprising candor, that he planned to seek an early settlement and did not want to preside over trials”).

¹¹⁰ *Id.* at 16; DeLaventura v. Columbia Acorn Tr., 417 F. Supp. 2d 147, 152 (D. Mass. 2006) (“[I]t is almost a point of honor among transferee judges acting pursuant to Section 1407(a) that cases so transferred shall be settled rather than sent back to their home courts for trial. This, in turn, reinforces the unfortunate tendency to hang on to transferred cases to enhance the likelihood of settlement.”); see also Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 427 (1982) (discussing the desire of “managerial judges” to settle cases).

¹¹¹ Gluck, *supra* note 3, at 1673 (alteration in original).

¹¹² MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).

¹¹³ See Fallon et al., *supra* note 43, at 2329–30; see also Bradt & Rave, *supra* note 42, at 1297 (“[T]he idea that an MDL transfer is somehow temporary and limited is little more than a fiction.”).

¹¹⁴ See Hay & Rosenberg, *supra* note 38, at 1377–78, 1378 nn.2–5 and accompanying text (explaining the pressure to settle on both plaintiffs and defendants and compiling sources arguing that pressure plays a significant role in class action settlements).

¹¹⁵ See FED. R. CIV. P. 23 advisory committee’s note to 1998 amendment (providing its rationale for adopting Federal Rule of Civil Procedure 23(f), which allows discretionary appellate review of decisions granting or denying class certification, including that certifying a class “may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability”).

¹¹⁶ See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 741 n.68 (2013) (compiling cases in which an appellate court cited settlement pressure as a reason to grant review).

ment that counsel negotiating the settlement adequately represent all plaintiffs.¹¹⁷

Another possible increase in the pressure to settle compared to class actions comes from the judge. Although both MDL and class action judges may desire settlement for the sake of judicial economy and resolving the case,¹¹⁸ MDL judges may be even more inclined to prefer settlement so they can maintain control over the ultimate outcome of the MDL.¹¹⁹ As one commentator explained, when judges act in a managerial role over cases, they may become more invested in resolving them.¹²⁰ Regardless of whether settlement occurs in a class action, the judge maintains control of the case because it stays in their court. In the MDL context, the judge's control is supposed to be temporary.¹²¹ Thus, final control of the resolution of a case—a case the judge has invested significant time into and likely cares deeply about—is conditioned on pretrial resolution.¹²² This may incline an MDL judge to put even more pressure on the parties to settle compared with a similar judge in a similar class action. The pressure argument for appellate review thus has even greater force in the MDL context than in the class action context, where the argument is already seen as having substantial weight and justifying appellate review.

A final source of pressure comes from the location of the transferee court.¹²³ If plaintiffs have very small claims, it may not be worth it for them to pursue those claims if substantial travel costs would be required due to the location of the transferee court.¹²⁴ Similarly, it may not be worth it for some

¹¹⁷ See Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 71 (2017) (“But even these safeguards [to self-dealing settlements] crumble in non-class, multidistrict proceedings [U]nlike class settlements that require judges to ensure that they are fair, reasonable, and adequate, judges have little say in ‘private’ global deals that leaders design.”); see also Mullenix, *supra* note 105, at 391 (“The deployment of MDL jurisdiction, with the quasi-class action fiction engrafted onto MDL procedure, has stripped away protections afforded by class action requirements. Mass litigation actors may now settle complex cases largely unconstrained by law.”); Bradt, *supra* note 104, at 1740 (“[T]he safeguards against these problems in Rule 23 worked out by the Advisory Committee in 1966 do not exist in non-class aggregations.”).

¹¹⁸ Cf. Resnik, *supra* note 110, at 427 (discussing the desire to move cases).

¹¹⁹ See 28 U.S.C.A. § 1407(a) (West 2022) (“Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated”).

¹²⁰ Resnik, *supra* note 110, at 427.

¹²¹ See 28 U.S.C.A. § 1407(a) (stating that transfer is reserved for pretrial proceedings only).

¹²² See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 32–33, 40 (1998) (discussing and invalidating the practice where transferee judges would assign centralized cases to themselves for trial under 28 U.S.C. § 1404); Gluck, *supra* note 3, at 1695 (“The biggest difference between the class action and the MDL is that you can’t really *try* the MDL” (quoting an MDL judge)).

¹²³ Cf. Bradt, *supra* note 11, at 1232–34 (proposing to require that the transferee court in nationwide MDLs be placed in a “major metropolitan area” to avoid inconvenience to plaintiffs and defendants).

¹²⁴ See Burch & Gluck, *supra* note 41, at 249–50 (providing the example of an MDL that required a plaintiff to make a “2600-mile-round trip . . . for an unsuccessful in-person mediation”).

small defendants to travel in order to defend small claims. As Judge Weigel observed in his dissenting opinion in the JPML's 1970 decision in *In re Butterfield Patent Infringement*:

The defendants are engaged in small optical businesses. The individual damage claims against most of them are relatively small. To increase, by transfer for pretrial, the defendants' litigation costs will be to impose substantial pressure on them to settle even if their position on the merits seem stronger than that of the plaintiff.¹²⁵

These pressures have mostly been considered from a theoretical rather than empirical perspective. The exact percentage of MDLs that settle is unclear.¹²⁶ A study of seventy-three products liability MDLs that were pending in May of 2013 found that of those which had been resolved by May of 2018, approximately eighty percent were settled.¹²⁷ Ninety-nine percent of MDLs are resolved in the transferee court.¹²⁸ But that resolution can occur via settlement *or other dispositive actions*.¹²⁹ Regardless of the exact number used, it is safe to say that many MDLs are resolved through settlement. These results should be expected in light of the theoretical concerns about the pressure to settle.

2. Denial of Economies of Scale

In the same way that erroneous centralization may bring about a case's unwarranted demise, denials of centralization can also end cases prematurely. Denial ends a case by denying parties access to crucial economies of scale. This too is a classic argument in favor of appellate review of class certification

¹²⁵ 328 F. Supp 513, 517 (J.P.M.L. 1970) (Weigel, J., dissenting). The majority addressed this issue and pointed to the economies of scale that could be gained via centralization. *Id.* at 514 ("We think, however, that this fear [of increased costs] is more fanciful than real. Experience has shown that where, as here, common questions of fact exist in a large number of cases, it is not only expedient, but less expensive for each individual defendant to join in the selection of lead counsel to handle the consolidated discovery depositions. Thus, all defendants receive the benefit of the consolidated depositions without the necessity of engaging individual local counsel in the transferee court and without the necessity of extensive travel by their own local counsel."). Thus, both the majority and dissent believed that the decision to centralize had significant economic consequences for defendants. No matter who was right, the decision to centralize or not imposes costs on some defendants that may force them to settle. It is thus dispositive for them one way or the other.

¹²⁶ See KLONOFF, *supra* note 12, at 243 ("[B]ecause many non-class settlement agreements are confidential, there is often no way to know conclusively whether the cases were resolved through dispositive pretrial motions, voluntary dismissals due to settlement, or some other basis.").

¹²⁷ ELIZABETH CHAMBLEE BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* 223–24 (2019). Although this data only pertains to product liability cases, the author notes that the scope of the data and its consistency with prior findings means it is likely to translate outside of the product liability sphere. *Id.* at 226.

¹²⁸ Burch & Gluck, *supra* note 41, at 244.

¹²⁹ Gluck & Burch, *supra* note 23, at 16.

decisions.¹³⁰ By allowing multiple plaintiffs with small individual claims to aggregate those claims, plaintiffs gain access to the economies of scale that defendants routinely enjoy.¹³¹ By litigating claims collectively, plaintiffs can avoid the costs associated with duplicative discovery and other redundant costs of litigation. For those with claims that are not economical to litigate individually, the denial of these benefits essentially ends their suit. Therefore, denial of class certification is de facto dispositive for those claims and should thus be an appealable order.

These same economies of scale are also very valuable in an MDL. Ninety-five percent of all cases that come before the JPML for potential centralization involve products liability claims.¹³² Generally, in such cases, the same product injured the entire group of consumers, which makes economies of scale possible.¹³³ Although plaintiffs in an MDL are not as unified as those in a class,¹³⁴ some costs, like discovery, are shared.¹³⁵

The JPML itself recognizes the importance of these economies of scale. A standard line in the JPML's centralization orders is: "[c]entralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel, and the judiciary."¹³⁶ This in turn mirrors the language of §

¹³⁰ See FED. R. CIV. P. 23 advisory committee's note to 1998 amendment ("[S]everal concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation.").

¹³¹ Cf. Hay & Rosenberg, *supra* note 38, at 1383 (explaining that the "central rationale" for aggregating claims in the class action context is that "it enables plaintiffs to exploit the 'economies of scale' the defendant already naturally enjoys from treating separate claims as a single litigation unit," both in small claims cases and in any case "involving numerous claims for damages" (emphasis omitted)).

¹³² BURCH, *supra* note 127, at 10. Because products liability MDLs tend to contain so many cases, these cases tend to be concentrated in comparatively few proceedings (aggregations of cases to form a potential MDL). See *id.* (explaining how one products liability MDL containing 11,000 actions was just one proceeding). Still, product liability proceedings take up over a third of the JPML's docket, making them the most common proceeding. *Id.*

¹³³ See, e.g., *id.* at 11 (noting in reference to cases centralized into an MDL about injuries caused by Bayer's birth control product YAZ or Yasmin that although the medical history and experience of every plaintiff was unique, "Bayer's conduct was uniform").

¹³⁴ See Burch & Gluck, *supra* note 41, at 236 (explaining that the lack of requirement for predominance in MDLs, as compared to class actions, allow "MDLs to host a variety of loosely related cases whose parties' aims and desires might align on some matters and differ on others").

¹³⁵ See Fallon et al., *supra* note 43, at 2330 (noting that MDLs avoid "duplicative discovery"); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2149 (2000) (noting that the MDL process was adopted, in part, to reduce "the burdens on litigants of repeated exchanges over the same disputed factual materials").

¹³⁶ As of September 16, 2025, a search of this phrase on Westlaw returns eighty-nine reported decisions by the JPML. See, e.g., *In re Clearview AI, Inc., Consumer Priv. Litig.*, 509 F. Supp. 3d 1368, 1369 (J.P.M.L. 2020); *In re Uber Techs., Inc., Data Sec. Breach Litig.*, 304 F. Supp. 3d 1351, 1353 (J.P.M.L. 2018); *In re Payless Shoesource, Inc., Cal. Song Beverly Credit Card Act Litig.*, 609

1407(a) which establishes that transfer is appropriate when it will further the “efficient” resolution of cases.¹³⁷

Thus, MDLs, like class actions, reduce the cost of litigation and allow some plaintiffs whose claims would not be economically viable individually to bring them as part of an MDL.¹³⁸ Simply put, without centralization, some individuals with meritorious claims could be denied access to the courts.¹³⁹ Therefore, the denial of MDL centralization, like the denial of class treatment, is a de facto dispositive order for these borderline claims and ought to be reviewable.¹⁴⁰

A possible counterargument is that the actions that make up an MDL, unlike those that make up a class action, necessarily start out as individual actions.¹⁴¹ In order for the JPML to centralize individual actions, there must first be individual actions to be centralized. This objection does not deny that centralization into an MDL gives plaintiffs access to economies of scale not enjoyed individually. Rather, it argues that those economies of scale are enjoyed by plaintiffs bringing actions *that are independently viable*.¹⁴² Plaintiffs undoubtedly want these economies of scale, but unlike in the class context, they are not necessary for their actions to be brought and the denial of these economies of scale is not dispositive of the claims that make up an MDL.

Although this objection is certainly true for many actions that make up a would-be MDL, it is not true for all of them. There are three distinct groups of plaintiffs for which denial of MDL centralization is a de facto dispositive ac-

F. Supp. 2d 1372, 1372 (J.P.M.L. 2009). The JPML’s website itself also lists this same purpose. *About the Panel*, *supra* note 38 (“The purposes of this transfer or ‘centralization’ process are to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary.”).

¹³⁷ See 28 U.S.C.A. § 1407(a) (West 2022) (emphasis added).

¹³⁸ ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 14, at 34 (“In practice, . . . the existence of an MDL can lead to more cases against a defendant because there is less of a hurdle to additional plaintiffs joining . . .”). As many judges who handle MDLs explained to Professor Gluck in her study, without centralization into an MDL, “it would be simply too expensive for individuals to mount such cases alone or to find representation.” Gluck, *supra* note 3, at 1696.

¹³⁹ Burch & Gluck, *supra* note 41, at 230.

¹⁴⁰ In addition to the harms to individual plaintiffs from not being able to bring a case, there are often times significant societal consequences as well. *Cf.* BURCH, *supra* note 127, at 31–32 (noting that “people died” as a result of it being uneconomical to bring lawsuits against GM for faulty ignition switches).

¹⁴¹ *Cf.* Martin H. Redish & 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, 113 (2015) (drawing this distinction between class actions and MDLs).

¹⁴² This argument is also at least partially applicable to class actions. Not all class actions consist of claims for thirty dollars. Some consist of claims that would certainly be economically viable as individual suits. *See, e.g.,* *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 492 (7th Cir. 2012) (reversing a denial of class certification even though suits were likely economically viable individually). Additionally, many judges interviewed by Professor Gluck noted that some cases that were centralized into MDLs would not have been brought absent the MDL process. Gluck, *supra* note 3, at 1676.

tion: 1) plaintiffs who mistakenly believe that their claim is economical individually; 2) plaintiffs filing in anticipation of MDL centralization; and 3) plaintiffs filing directly into an MDL.

The first group is made up of plaintiffs who mistakenly believe that their claim is economical to bring individually. These plaintiffs may be mistaken for any number of reasons. Plaintiffs may have underestimated their potential costs or correctly estimated them but been faced with unforeseeably complex or costly discovery or any number of other difficulties. Regardless of the exact reason, these plaintiffs have filed a lawsuit but are likely to abandon it because, even if they win, they will not receive enough money to cover the expenses of litigation.¹⁴³ Nevertheless, an MDL can be a saving grace. If their actions are centralized, they will be able to share those excess costs with other plaintiffs, giving them a positive value claim that is worth pursuing.¹⁴⁴ Consequently, for these plaintiffs, MDL centralization is *de facto* dispositive of their claim.

Next are the plaintiffs filing in anticipation of MDL centralization. These plaintiffs know that they have a negative value claim if litigated individually, even if just barely. But they also know that claims like theirs are likely to be centralized into an MDL and that if they could access the economies of scale associated with an MDL, they would have a positive value claim. Thus, they file their claim and hope that it is centralized. If it is not centralized, they will have a negative value claim that they will likely abandon.¹⁴⁵ For these plaintiffs, MDL centralization is also *de facto* dispositive.

The final group—plaintiffs who file directly in an MDL—is similar. These plaintiffs know that their claim is uneconomical if filed individually, but economical if filed as part of an MDL. These plaintiffs wait for claims similar to theirs to be centralized, then file their claim directly into the MDL in order to access its economies of scale.¹⁴⁶ It is hard to say that a denial of centralization is dispositive for these claims in the traditional sense because the claims have not yet been brought at the time of the order. Yet, their willingness to bring their claims in the first place hinges on a decision of the JPML.¹⁴⁷ These

¹⁴³ See Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1279 (2006) (explaining how new information can alter the expected value of a plaintiff's claim and their willingness to pursue that claim).

¹⁴⁴ See *supra* notes 135–137 and accompanying text (discussing the economies of scale available to plaintiffs in MDLs).

¹⁴⁵ See Grundfest & Huang, *supra* note 143, at 1279 (explaining how the resolution of uncertainty can drastically influence the value of a claim); cf. Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. APP. PRAC. & PROCESS 283, 290 (2022) (“[I]f class certification is denied, all that remains are the named plaintiffs’ small claims. These plaintiffs face an incentive to abandon their negative-value claims or settle them for relatively small amounts, even if they might prevail on the merits.”).

¹⁴⁶ See Fallon et al., *supra* note 43, at 2352–53 (noting the possibility of cases being filed directly into an MDL and that this happens often enough that such cases are one of the “traditional sources” of cases selected for bellwether trials).

¹⁴⁷ Cf. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 321–22 (2013) (“As a

plaintiffs may not provide as strong of a case as those mentioned above, but they still push in the direction of viewing centralization orders as de facto dispositive.

For some plaintiffs in a would-be MDL, like some in a would-be class, the decision to centralize or not is a de facto dispositive motion in their case. Because MDL plaintiffs are less unified as a class leading to weaker economies of scale and because the actions that make up an MDL are more likely to be individually viable than those that make up a class action, the centralization decision is probably dispositive for fewer plaintiffs.¹⁴⁸ Nonetheless, for some, centralization is dispositive. This shows that the economies of scale argument for appellate review of class certification decisions also supports appellate review of the JPML's centralization decisions. But the argument is somewhat less forceful in this context.

Although it may be weaker for plaintiffs, the economies of scale argument is stronger for MDL defendants than class defendants. Unlike in the class action context, MDL defendants may derive economies of scale from centralization.¹⁴⁹ Prospective MDLs may include a variety of defendants of varying sizes. For example, defendants in the opiates litigation included “two dozen opioid manufacturers, distributors, and retailers to pain foundations and societies, pill-mill doctors, and individual defendants like members of the Sackler family (who own Purdue Pharma).”¹⁵⁰ Although many of these defendants, such as the manufacturers, are incredibly well-resourced, others, such as individual doctors, may not be. Similarly, recall the defendants from *In re Butterfield Patent Infringement* who were “engaged in small optical businesses.”¹⁵¹ For these defendants in a potential MDL, centralization may allow them to

result [of barriers to class certification], many cases will not be pursued because they are not economically viable on behalf of individual class members, most particularly those having negative-value claims. The result leaves broad-based harms unredressed.”).

¹⁴⁸ For example, you probably won't see MDLs made up of claims for thirty dollars like the hypothetical class action discussed by the Seventh Circuit in *Carnegie v. Household International, Inc.* 376 F.3d 656, 661 (7th Cir. 2004) (“The more claimants there are, the more likely a class action is to yield substantial economies in litigation. It would hardly be an improvement to have in lieu of this single class action 17 million suits each seeking damages of \$15 to \$30 The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.”).

¹⁴⁹ See Hay & Rosenberg, *supra* note 38, at 1383 (noting that in class actions, defendants “naturally enjoy[]” the benefits of economies of scale regardless of if a class is certified) (emphasis omitted); D. Theodore Rave & Francis E. McGovern, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 LAW & CONTEMP. PROBS. 21, 35 (2021) (listing “well-rehearsed” arguments for aggregation mechanisms despite their bottleneck effects, including that they “create[] economies of scale for plaintiffs, defendants, and courts alike”).

¹⁵⁰ Gluck & Burch, *supra* note 23, at 24.

¹⁵¹ 328 F. Supp 513, 517 (J.P.M.L. 1970) (Weigel, J., dissenting).

share the costs of things such as discovery with their more well-resourced co-defendants, similar to how plaintiffs share resources.¹⁵²

Without such resource sharing, some under-resourced defendants may be unable to mount a meaningful defense and be forced to settle to avoid the costs of litigation. Even well-resourced defendants can benefit from centralization. For example, centralization may limit duplicative discovery and save defendants the expense of having to litigate cases at the same time in different locations.¹⁵³ Thus, for both plaintiffs and defendants, MDL centralization grants access to crucial economies of scale and other efficiencies that may be necessary or at least helpful to pursue litigation. Without these benefits, parties may be forced to settle or abandon their cases, thus bringing a premature end to otherwise meritorious claims. Expanded appellate review would provide a safeguard against this.

B. Clarifying Issues of Law and Ensuring Uniformity

A principal purpose of appellate review is to clarify the law and provide uniformity.¹⁵⁴ This provides guidance to lower courts, predictability to litigants, and consistency between cases.¹⁵⁵ And although appellate review is generally thought to promote these values by harmonizing conflicts between different lower courts,¹⁵⁶ harmonization is also important to resolve disputes that occur *within a single* lower court.¹⁵⁷ Just as uniformity values are harmed when different courts reach opposing conclusions, those values may also be harmed when the same court contradicts itself over time due to changing membership or some members convincing others.¹⁵⁸

Disagreements on issues of law can and have arisen on the JPML.¹⁵⁹ Moreover, because similar types of questions often recur before the JPML,

¹⁵² This may be part of what causes plaintiffs and defendants to often agree that centralization is proper. See Williams & George, *supra* note 33, at 436 (“Parties often agree that transfer and consolidation is appropriate”); cf. Gluck & Burch, *supra* note 23, at 23 (noting that some defendants in the opiates litigation wanted centralization and some did not).

¹⁵³ See Gluck, *supra* note 3, at 1683, 1698 (discussing the MDL’s power to limit duplicative discovery and noting that MDLs save defendants “the burden of litigating simultaneously in multiple fora”).

¹⁵⁴ See, e.g., Robertson, *supra* note 81, at 771 (discussing uniformity); Steinman, *supra* note 81, at 11 (discussing clarification).

¹⁵⁵ See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 850–52 (1994) (noting that “[u]niform judicial interpretation” ensures “[p]redictability” and “[e]qual treatment under the law” and discussing the value of predictability and equal treatment).

¹⁵⁶ See Friendly, *supra* note 95, at 758 (explaining that appellate review can provide consistency across a judicial system).

¹⁵⁷ Cf. Helen Wilson Nies, *Dissents at the Federal Circuit and Supreme Court Review*, 45 AM. U. L. REV. 1519, 1519–23 (1996) (discussing the role of the Supreme Court in resolving internal disputes on the United States Court of Appeals for the Federal Circuit).

¹⁵⁸ See Caminker, *supra* note 155, at 852 (noting the importance of equal treatment under the law across one court over time and multiple courts at the same time).

¹⁵⁹ See *infra* Part II.B.1–3 (reviewing disagreements between JPML judges on matters of law).

these issues are likely to stick around and never reach a definitive resolution because there is no authoritative voice to resolve them.¹⁶⁰ Furthermore, due to the changing membership of the JPML and the Panel's limited respect for its own precedent, the JPML may upend uniformity by changing its own decision on disputed issues.¹⁶¹

In this Section, I survey three areas where disagreements have occurred between members of the JPML and may occur again. I focus on these three case studies because they show a diverse range of issues about which the members of the JPML may disagree and because, unlike some one-off disagreements that occurred on the Panel,¹⁶² they recurred multiple times before eventually subsiding. These disagreements could have been resolved by appellate review.

The fact that disagreements eventually subsided does not mean the Panel achieved the values of uniformity and predictability. At a minimum, these values were not achieved when the disagreements were ongoing. Moreover, nothing is stopping these issues from recurring again because they were never decided by a court above the JPML. Finally, there is a societal value in having legal issues definitively resolved by a "single authoritative voice."¹⁶³ Without appellate review, that voice remains unheard.

1. Accusations of the JPML Exceeding Its Authority

Perhaps most seriously, on multiple occasions, members of the Panel have raised concerns about the JPML going beyond its statutory authority. This is especially dangerous due to the immense power that the JPML has over the federal judicial system.¹⁶⁴

Take the JPML's 1970 decision in *In re Butterfield Patent Infringement*.¹⁶⁵ There, the Panel centralized thirty-two patent infringement actions in the Northern District of Illinois¹⁶⁶ over the objections of every defendant appearing at the hearing.¹⁶⁷ The Panel noted that centralization was appropriate, in part, because it would allow all of the cases to possibly be disposed of on a

¹⁶⁰ See *infra* Part II.B.1–3 (providing examples of recurring issues on the JPML).

¹⁶¹ See KLONOFF, *supra* note 12, at 48 (“[B]asing an argument on prior Panel orders . . . is likely to be ineffective.”); cf. Bradt, *supra* note 11, at 1215–19 (cataloging the varied and sometimes contradictory factors that the JPML considers in selecting the transferee district and judge).

¹⁶² See, e.g., *In re Amino Acid Lysine Antitrust Litig.*, 910 F. Supp. 696, 702 (J.P.M.L. 1995) (Nangle, J., dissenting) (arguing that cases should have been centralized into a single MDL instead of three separate ones); *In re CBS Licensing Antitrust Litig.*, 328 F. Supp. 511, 513 (J.P.M.L. 1971) (Weigel, J., dissenting) (arguing that the Panel was going against its own precedent).

¹⁶³ Caminker, *supra* note 155, at 854.

¹⁶⁴ See *supra* notes 1–2 and accompanying text (explaining the number and types of cases currently centralized into MDLs).

¹⁶⁵ 328 F. Supp. 513 (J.P.M.L. 1970).

¹⁶⁶ *Id.* at 514–15.

¹⁶⁷ *Id.* at 514 n.1.

motion for summary judgment.¹⁶⁸ Importantly, by statute, the JPML does not have the power to determine the merits of the cases it reviews for centralization.¹⁶⁹ The JPML acknowledged this limitation, writing, “[w]e of course intimate no opinion on the merits of any such motions. Nevertheless, the possibility of summary disposition certainly lurks in the background.”¹⁷⁰

A member of the Panel, Judge Wiegel, disagreed in dissent. He argued that:

[T]he majority opinion places great weight on the possibility that a motion for summary judgment by defendants could terminate the litigation. To the extent that the majority opinion relies upon that possibility, it treads dangerously close to making an assessment on the merit. Such an assessment would transcend the limited powers vested in the Panel by Congress. Those powers relate solely to the transfer and remand of actions consolidated for pretrial proceedings. The statute will be searched in vain for any provision empowering the Panel to adjudicate upon the merits. That power of adjudication remains in the appropriate United States courts.¹⁷¹

This is, of course, a very serious accusation that goes to the heart of the JPML’s power. If Judge Weigel was correct, an appellate court could have reviewed this decision and prevented the JPML from overstepping its statutory bounds. This is especially concerning because the JPML has continued to use the possibility of efficient disposition of cases via summary judgment to help justify centralization.¹⁷²

This is not the only area where a judge has accused the Panel of overstepping its statutory bounds. In *In re Equity Funding Corp. of America Securities Litigation* in 1973, the JPML centralized cases related to fraud by Equity Funding in the Central District of California.¹⁷³ This decision was issued in a four to three vote with Judge Wisdom penning a dissent joined by Judges Weinfeld and Weigel.¹⁷⁴ In addition to concerns about “economy and efficien-

¹⁶⁸ *Id.* at 514.

¹⁶⁹ KLONOFF, *supra* note 12, at 88.

¹⁷⁰ *In re Butterfield*, 328 F. Supp. at 514.

¹⁷¹ *Id.* at 518 (Weigel, J., dissenting) (footnote and citation omitted).

¹⁷² See, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.* (No. II), 437 F. Supp. 3d 1365, 1366 (J.P.M.L. 2020) (“Moreover, most, if not all, actions will involve common pretrial motions, including motions for summary judgment. Centralization, therefore, will provide efficiencies and limit inconsistent rulings.”); *In re Onglyza (Saxagliptin) & Kombiglyze XR (Saxagliptin & Metformin) Prods. Liab. Litig.*, 289 F. Supp. 3d 1357, 1358–59 (J.P.M.L. 2018) (“If defendants are convinced that plaintiffs’ claims regarding heart failure or other injuries lack scientific support, then centralization affords them a single forum in which to seek summary judgment, which might be applied to other similar cases.”).

¹⁷³ 375 F. Supp. 1378, 1380–81 (J.P.M.L. 1973).

¹⁷⁴ *Id.* at 1392 (Wisdom, J., dissenting).

cy” of centralization, the dissenters challenged the majority’s fidelity to the statutory criteria set by § 1407.¹⁷⁵

In determining that the actions should be centralized, the majority held that “[t]he facts of the primary fraud underlie and undergird each action. This fact alone augurs for the transfer of all of the litigation to a single district under Section 1407.”¹⁷⁶ Judge Wisdom accused the majority of using a “but for” test under which the cases were centralized simply because they “would not have occurred but for” the fraud.¹⁷⁷ He strongly condemned this approach as contravening the Panel’s governing statute: “This is an exercise of judicial power that finds no support in Section 1407 or in our previous decisions Transfer of non-fraud actions for consolidation or coordination with the fraud actions in the ‘but for’ forum ignores the statutory standards and will defeat the purposes of Section 1407.”¹⁷⁸ Looking at the House Reports associated with the passage of § 1407, Judge Wisdom determined that the appropriate way to decide whether centralization was warranted was not a but for test but a balancing test that weighed the existence of common questions of fact against considerations of justice, economy, and efficiency.¹⁷⁹

This case presented an intense and very clear disagreement.¹⁸⁰ This would have been a prime opportunity for appellate review to resolve the issue of the proper test. Instead, we are left with the JPML using a test that possibly exceeds its statutory authority.

2. Disagreements About Commonality in Patent Cases

In a series of patent cases the JPML again ordered centralization over the dissent of Judge Weigel,¹⁸¹ who argued that the cases did not share sufficient “common questions of fact” to justify the “troubles and inconveniences” of an MDL.¹⁸² One contemporary commentator succinctly described the disagreement

¹⁷⁵ *Id.* at 1392, 1399–1400; 28 U.S.C.A. § 1407(a) (West 2022).

¹⁷⁶ 375 F. Supp. at 1384 (majority opinion).

¹⁷⁷ *Id.* at 1398 (Wisdom, J., dissenting). *But see id.* at 1389 (Becker, J., concurring) (arguing that Judge Wisdom mischaracterized the majority’s approach).

¹⁷⁸ *Id.* at 1399–1400 (Wisdom, J., dissenting).

¹⁷⁹ *Id.* at 1393 (“[T]he relevance of a shared fact may initiate the measuring process, but the scales must weigh heavily (‘significantly’) in favor of transfer in terms of a just, economical, and efficient administration of the transferred cases.”).

¹⁸⁰ *See id.* at 1389 (Becker, J., concurring) (responding to the dissent and noting its “unusual rhetoric”).

¹⁸¹ *See In re Carrom Trademark Litig.*, 322 F. Supp. 1016 (J.P.M.L. 1971) (per curiam); *In re Willingham Pat. Litig.*, 322 F. Supp. 1019 (J.P.M.L. 1971) (per curiam); *In re Embro Pat. Infringement Litig.*, 328 F. Supp. 507 (J.P.M.L. 1971) (per curiam). One of the cases discussed above, *In re Butterfield Patent Infringement Litigation*, also falls within this category. *See* 328 F. Supp. 513 (J.P.M.L. 1970).

¹⁸² *In re Embro*, 328 F. Supp. at 509 (Weigel, J., dissenting). Although Judge Weigel did not give reasons for his dissents in *In re Carrom* and *In re Willingham*, he explained in his *In re Embro* dissent that he was dissenting for the same reasons that he did so in those cases. *Id.*

between the majority and Judge Weigel as being over whether the “essential question” in these cases was patent validity or patent infringement, which impacted whether the cases would be better served by centralized or local discovery.¹⁸³ This again presented a question of law ripe for appellate review: Should patent disputes be centralized simply because they share a common question of patent validity? Had Judge Weigel’s position been vindicated by appellate review, parties could have avoided the “troubles and inconveniences” he warned of.¹⁸⁴ Due to the lack of review, this issue was not resolved.

3. Disagreements About Efficiency in Cases Involving the SEC

Disputes between members of the Panel again arose in a series of cases where the Securities and Exchange Commission was a party. In 1972, in *In re National Student Marketing Litigation*, the Panel centralized private actions against National Student Marketing Corporation for violations of federal securities laws with an action brought by the SEC.¹⁸⁵ In dissent, Judge Weinfeld argued that centralizing the SEC action with the private action was inappropriate for two reasons: first, as a rule, SEC actions for injunctive relief should not be centralized with private actions, and second, the SEC case was ready to go to trial, so it should not be centralized with slower moving cases.¹⁸⁶

On the first point, Judge Weinfeld argued that there were policy reasons to avoid combining SEC actions seeking immediate injunctive relief for the public with private lawsuits where delays were inherent.¹⁸⁷ Because of that, he argued that SEC actions should usually be exempt from centralization and that such an exemption would be consistent with § 1407.¹⁸⁸ On the contrary, Judge Weigel argued in his concurrence that such an exemption would violate the Panel’s statutory directive and contravene the will of Congress.¹⁸⁹

¹⁸³ John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. CHI. L. REV. 588, 594–95 n.36 (1972) (“The Panel has transferred several dockets of patent infringement cases in which the defendants have challenged the validity of the patent. The majority has found that the common factual question of patent validity alone justifies transfer, but the dissenters argue that the essential question in the cases is patent infringement, which is more suited to local discovery in the districts in which the actions were brought.”).

¹⁸⁴ *In re Embro*, 328 F. Supp. at 509 (Weigel, J., dissenting).

¹⁸⁵ 368 F. Supp. 1311, 1313 (J.P.M.L. 1972).

¹⁸⁶ *Id.* at 1319–20 (Weinfeld, J., dissenting).

¹⁸⁷ *Id.* at 1319.

¹⁸⁸ *Id.* at 1320 (arguing that the legislative history of the law was silent on the matter, so there was no reason that the JPML could not use its equitable powers to create an exemption); 28 U.S.C.A. § 1407(a) (West 2022).

¹⁸⁹ *In re Nat’l Student*, 368 F. Supp. at 1319 (Weigel, J., concurring) (“Under his dissent, my brother Judge Weinfeld would, in effect, jettison the majority’s case-by-case method of determination on standards expressed in the statute in favor of giving special treatment to SEC cases based largely, if not solely, upon the nature and motivation of the government agency. Perhaps this is desirable, but it is for Congress, not this court, to make that decision. There is no legislative history to suggest any such legislative decision. On the contrary, the fact that Congress limited exemptions of government

This issue did not go away after this case. In three more cases involving SEC actions, Judge Weinfeld continued to argue that SEC actions should usually be exempt from centralization.¹⁹⁰ He also at times expressed general skepticism regarding the propriety of centralizing government actions with private ones.¹⁹¹ Thus, these cases again presented an important issue on the interpretation of § 1407 that could have been resolved by an appellate court: Should certain cases brought by the SEC (and perhaps other government bodies) be presumptively immune from centralization? The resolution of this question would have potentially sped up cases brought by the SEC (and possibly other governmental entities) by avoiding “the delays that are inherent in private litigations.”¹⁹² It would have at least settled the issue and prevented it from becoming a recurring question on the Panel.¹⁹³

On the second point of Judge Weinfeld’s dissent, he argued that the SEC case should not be centralized with the other cases because it was close to trial.¹⁹⁴ This raises an important question about the application of § 1407: How much weight should be given to the fact that cases are moving toward trial at different speeds? This issue also recurred, both in the SEC cases¹⁹⁵ and other

actions to those for injunctive relief under the antitrust laws (§ 1407(g)) strongly implies that Congress intended to exclude other exceptions. *Expressio unius est exclusio alterius*.”).

¹⁹⁰ See *In re Republic Nat’l-Realty Equities Sec. Litig.*, 382 F. Supp. 1403, 1407 (J.P.M.L. 1974) (Weinfeld, J., dissenting in part) (“I would not coordinate or consolidate the SEC action with the other actions for the reasons set forth in my dissent in *In re National Student Marketing Litigation*.”) (citation omitted); *In re Caesar’s Palace Sec. Litig.* 385 F. Supp. 1256, 1259 (J.P.M.L. 1974) (Weinfeld, J., dissenting in part) (same); *In re Franklin Nat’l Bank Sec. Litig.* 393 F. Supp. 1093, 1096 (J.P.M.L. 1975) (Weinfeld, J., dissenting in part) (same).

¹⁹¹ See *In re Uranium Indus. Antitrust Litig.*, 458 F. Supp. 1223, 1233 (J.P.M.L. 1978) (Weinfeld, J., concurring in part and dissenting in part) (“Moreover, [Tennessee Valley Authority] is an arm of the federal government that serves the public interest and it should not be caught in the crossfire of the conflicting positions of the private litigants.”).

¹⁹² See *In re Nat’l Student*, 368 F. Supp. at 1319 (Weinfeld, J., dissenting).

¹⁹³ Over fifty years after the issue first arose, Congress determined that government antitrust actions should not be subject to centralization. See 28 U.S.C.A. § 1407(g) (West 2022) (“Nothing in this section shall apply to any action in which the United States or a State is a complainant arising under the antitrust laws.”); see also Jaclyn Phillips et al., *New Year, New Venue Law: Newly Passed Law Means State Attorneys General Can Avoid Having Their Antitrust Cases Consolidated in Multidistrict Litigation*, WHITE & CASE (Jan. 17, 2023), <https://www.whitecase.com/insight-alert/new-year-new-venue-law-newly-passed-law-means-state-attorneys-general-can-avoid> [<https://perma.cc/UEG5-D4WT>] (discussing this change). Although this shows that Congress can resolve disputes on the JPML, it also shows the limits of that approach. Congress took fifty years to act, and the new provision only resolved the narrow issue related to antitrust actions without addressing the broader questions related to the propriety of centralizing other types of government actions with private ones or considering how close a case is to resolution when deciding centralization. See 28 U.S.C.A. § 1407(g).

¹⁹⁴ *In re Nat’l Student*, 368 F. Supp. at 1320 (Weinfeld, J., dissenting).

¹⁹⁵ *Id.* at 1319–20; see also *In re Republic Nat’l-Realty*, 382 F. Supp. at 1407 (Weinfeld, J., dissenting in part) (noting that he was dissenting for the same reasons as in *In re National Student Marketing*); *In re Caesar’s Palace*, 385 F. Supp. at 1259 (Weinfeld, J., dissenting in part) (same); *In re Franklin*, 393 F. Supp. at 1096 (Weinfeld, J., dissenting in part) (same).

cases involving both governmental and private parties.¹⁹⁶ Here too, appellate review would have provided guidance. If the reviewing court vindicated Judge Weinfeld's point, it would have prevented the Panel from slowing down cases that were headed to trial, thus promoting judicial economy and the interests of the parties.¹⁹⁷ Even if a reviewing court affirmed the majority, it would have settled this issue and prevented it from recurring.

C. Improving Accuracy

A key benefit and goal of the appellate process is improving the accuracy of final outcomes.¹⁹⁸ This improvement operates through a variety of mechanisms. Most obviously, a reviewing court can correct error by overturning an erroneous lower court decision.¹⁹⁹ But in addition, the possibility of review may also indirectly reduce errors that occur in the first place by encouraging the initial court to take more care in reaching the initial decisions.²⁰⁰ A similar argument was made by proponents of Rule 23(f).²⁰¹ Based on this reasoning, appellate review of the JPML is desirable because it would improve the accuracy of final decisions.

One response to this rationale for expanding appellate review of the JPML is that the JPML is an expert panel and likely possesses more expertise than the reviewing court.²⁰² On this view, a reviewing court is more likely to

¹⁹⁶ See, e.g., *In re Uranium Indus.*, 458 F. Supp. at 1233 (Weinfeld, J., concurring in part and dissenting in part) (dissenting from centralization because "the [Tennessee Valley Authority] actions will be able to proceed toward trial more expeditiously if they are allowed to proceed separately from the Illinois action in a district other than the Northern District of Illinois"); *In re Pro. Hockey Antitrust Litig.*, 369 F. Supp. 1117, 1118 (J.P.M.L. 1974) (Weinfeld, J., dissenting) (dissenting from an order because two cases that were centralized were "ripe for trial").

¹⁹⁷ See *In re Pro. Hockey*, 369 F. Supp. at 1118–19 ("In the circumstances, a transfer would not be 'for the convenience of parties [nor] . . . promote the just and efficient conduct' of such action as required by 28 U.S.C., section 1407.") (alterations in original).

¹⁹⁸ See, e.g., Kelso, *supra* note 81, at 434–35 n.6 (discussing the goals of error correction and error reduction); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 381 (1995) (discussing appeals as a means of error correction); Dalton, *supra* note 81, at 69 (same).

¹⁹⁹ See Steinman, *supra* note 81, at 15 ("Perhaps the most direct function that appellate courts serve is to correct errors by trial courts.").

²⁰⁰ See Shavell, *supra* note 198, at 391 (explaining that the possibility of appeal may increase the accuracy of trial court decisions because judges will take more care in deciding cases); ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 3 (1941) ("But review does more than correct unfairnesses and mistakes. That determinations may be reviewed is a preventive of unfairness and a stimulus not to make mistakes.").

²⁰¹ See Solimine & Hines, *supra* note 82, at 1565 ("[Some] supporters [of Rule 23(f)] argued that the presence of a realistic interlocutory appeal opportunity would encourage more careful district court decision making.").

²⁰² See Klonoff, *supra* note 9, at 1018 ("The JPML has vast experience deciding whether to create an MDL and to whom the cases should be assigned. It is highly unlikely that a randomly selected three-judge appellate panel, entrusted with the task of second-guessing the JPML's decisions, would bring comparable experience to bear on the issues.").

introduce rather than correct error.²⁰³ As an initial matter, it is worth noting that this argument only applies to error *correction*, not error *reduction*. Regardless of the relative expertise of the courts at issue, the possibility of review will encourage the lower court to take more time with its decision and ensure that it is well reasoned enough to withstand scrutiny by an inexperienced reviewing court.

Additionally, contrary to this potential counterargument, the error correction rationale does not require that the reviewing court be better skilled or possess greater expertise than the court being reviewed.²⁰⁴ Instead, as Judge Friendly has explained, various structural aspects of appellate review make error correction likely regardless of the relative expertise of the courts involved.²⁰⁵ For example, appellate judges are generally given more time to deliberate and make their decisions.²⁰⁶ This would be especially true in the JPML context due to the immense time pressures faced by the JPML.²⁰⁷ Additionally, the reviewing court can benefit from the work done in earlier stages of the litigation. The JPML's decision will focus the reviewing court on the precise issues in dispute.²⁰⁸ Similarly, counsel will have more of an opportunity to refine their arguments and focus in on those issues.²⁰⁹ Finally, regardless of expertise, one member of the reviewing court may "bring an entirely fresh insight" to the case.²¹⁰ These structural advantages would provide a reviewing court with the chance to correct some errors made by the JPML, regardless of the reviewing court's lack of expertise in MDL centralization as compared to the JPML.

D. Promoting Due Process

Appellate review serves important due process and participation goals as well. In general, appellate review is thought to further the values of "individual dignity and participation in the justice system."²¹¹ Importantly, these benefits accrue regardless of whether appeals increase accuracy or whether an individual litigant is ultimately successful in their appeal.²¹² Instead of being out-

²⁰³ See Steinman, *supra* note 81, at 16–18 (discussing a scenario where a less accurate appellate court reviews a more accurate trial court).

²⁰⁴ Cf. Friendly, *supra* note 95, at 757 ("My belief in the general desirability of at least one appellate review does not reflect a view that an appellate judge is inherently more able than a trial judge.").

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See *supra* notes 48–51 and accompanying text (explaining the time constraints on the JPML).

²⁰⁸ Cf. Friendly, *supra* note 95, at 757 ("In many cases the trial judge's opinion will help to focus the controversy.").

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1272 (2013).

²¹² See *id.* ("[T]he instrumental importance of error correction may be subsidiary to the process values of participation, dignity, and trust: even when litigants lose their appeal on the merits, empirical research has shown that the mere fact of being heard promotes a sense of procedural fairness and leaves people feeling better about the outcome."); Oldfather, *supra* note 81, at 63 n.54 (discussing the importance of process values, which may be satisfied "not because the litigant has won—in other

come-dependent, these benefits come from an individual's sense of being heard by the justice system.²¹³

Such participatory benefits of appeals are especially important in the context of aggregate litigation where an individual's ability to participate in their own case may be severely curtailed. For example, one commentator has argued that appeals are necessary in the class action context in order to ensure due process because an individual litigant may otherwise be unable to participate in their own case.²¹⁴ Similar arguments can be made in the MDL context. Empirical research has shown that individual litigants often do not feel heard when their cases are centralized into an MDL,²¹⁵ and many commentators have argued that MDLs run roughshod over due process rights.²¹⁶ Some have even gone so far as to argue that MDLs so limit an individual's ability to have their "day in court" that they are unconstitutional.²¹⁷

Of course, appellate review of the JPML would not allow greater participation once a case is centralized into an MDL, but it would allow for greater participation in the MDL process as a whole, from initial aggregation to final disposition. Moreover, greater due process protections in the process by which MDLs are formed may help assuage concerns about the MDL process itself.²¹⁸ In other words, if a given procedure limits due process rights, it is preferable, even if not perfect, that the initial process for putting litigants into that procedure has robust due process protections. This parallels the class action rationale. Appellate review of class certification does nothing to ensure due process is respected once a class is certified, but it does add to the aggregate due process protections of the entire system.²¹⁹

Importantly, regardless of whether one believes that MDLs have due process shortcomings or if appellate review of the JPML could do anything to remedy those shortcomings, appeals serve an important function even where the initial decision and process provide adequate due process protections. Scholars have argued that appeals promote due process regardless of whether

words, not because the litigant perceives an error to have been corrected—but because the litigant comes away from the process feeling that he or she was given an audience"); *see also* Dalton, *supra* note 81, at 101 (noting that the author is "moved by the claim that participation is meaningful in itself" when considering the arguments for appeals as of right).

²¹³ Robertson, *supra* note 211, at 1272–74.

²¹⁴ Dalton, *supra* note 81, at 104–05 (noting that "appeal affords dissatisfied absentees their first real opportunity to take issue with proceedings ostensibly litigated on their behalf").

²¹⁵ *See* Burch & Williams, *supra* note 106, at 1894–95 (discussing the marginalization of MDL litigants).

²¹⁶ *See* Gluck, *supra* note 3, at 1674 n.14 (compiling critiques of the MDL process).

²¹⁷ Redish & Karaba, *supra* note 141, at 133–34.

²¹⁸ *Cf.* Bradt, *supra* note 11, at 1173–74 (noting that the lack of appellate review of the JPML's choice of transferee district heightens due process concerns about MDLs).

²¹⁹ *See* Dalton, *supra* note 81, at 104–05 (arguing for appellate review of class certification due to the participatory problems with class actions).

the initial decision was procedurally suspect.²²⁰ Appeals advance an individual's right to participate in their case even if they were able to participate meaningfully the first time around.

Appeals may vindicate different participatory values than the original hearing itself by granting an individual a forum in which to express their grievances with the *initial court*, rather than the *opposing party*.²²¹ The initial disposition, on the other hand, only allows a litigant to express their grievances against the opposing party.²²² Thus, participation in the initial decision cannot fully make up for a lack of appellate review. Even if one does not accept this division of participatory values, on a more general level, appeals provide more participation, and participation is valuable.²²³ Of course, the right to participate is not "unbounded" or "a trump," but it is a point in favor of greater appellate review, even if it must be balanced against other arguments.²²⁴

Beyond the personal benefits of appellate review to individual litigants, proponents argue that review furthers important institutional values by promoting trust in the justice system and furthering "institutional legitimacy."²²⁵ This seems especially important in the JPML context due to the number of cases involved in MDLs²²⁶ and the fact that the JPML process, at least from the outside, may not appear to provide robust due process protections due to the short time in which cases are heard and the conclusory nature of the decisions.²²⁷ Providing appellate review could therefore help legitimize a major process that increasingly touches more and more cases, many of which have widespread societal consequences.²²⁸

III. THE ARGUMENTS AGAINST EXPANDED APPELLATE REVIEW

In this Part, I consider four potential arguments against expanded appellate review of the JPML. Although I do not find any of the arguments dispositive, some inform how appellate review should best be implemented.

²²⁰ See, e.g., Robertson, *supra* note 211, at 1223 (arguing that the Supreme Court should "recogniz[e] a *nondiscretionary* constitutional right to appeal" (emphasis added)).

²²¹ *Id.* at 1273–74.

²²² *Id.*

²²³ Dalton, *supra* note 81, at 100–01.

²²⁴ See *id.* at 101.

²²⁵ Robertson, *supra* note 211, at 1271–72 (discussing the role of appeals in ensuring "institutional legitimacy"); see also Kelso, *supra* note 81, at 446 (arguing that there would be a drop in public confidence if appeals as of right were eliminated).

²²⁶ See *supra* note 1 and accompanying text (discussing the number of federal civil cases currently centralized in MDLs).

²²⁷ See *supra* notes 48–54 and accompanying text (explaining the time constraints on the JPML and its brief and conclusory opinions even in complex cases).

²²⁸ See *supra* notes 1–2 and accompanying text (discussing the number and types of cases centralized into MDLs, including the opioid, Volkswagen clean diesel, and BP oil spill cases).

In Section A, I present and respond to the potential argument that appellate review of MDL centralization could disproportionately benefit defendants.²²⁹ Opponents of expanding appellate review of class certification and expanding interlocutory appeals of MDLs both worried that those proposals would benefit defendants over plaintiffs. Thus, it seems possible that similar arguments would be levied against my proposal. Ultimately, I argue that this critique is unconvincing.

In Section B, I address the argument that appellate review would take up significant judicial resources and be too costly from a judicial economy perspective.²³⁰ This argument is not as strong as it may seem on its face because parties may often forgo appellate review. Additionally, such review may actually *promote* efficiency. And while I acknowledge this argument has some force, I argue that judicial economy is best addressed by limiting appellate review in some way, rather than prohibiting it altogether. I provide this limit in the policy proposal I forward in Part IV.

In Section C, I discuss the problem of relative expertise between the specialist JPML and generalist court of appeals.²³¹ This argument suggests that it is unwise to allow the expert JPML to be reviewed by a generalist court of appeals. Although I argue that error correction does not rely on appellate courts possessing more expertise than the courts they are reviewing, I acknowledge that this argument is powerful, and I seek to address it in my policy proposal in Part IV.

Finally, in Section D, I note that expanded appellate review of the JPML would create the possibility of contradictory rulings binding the JPML because the Panel sits in different circuits.²³² This problem is a logical consequence of expanding appellate review while also using the current rules regarding jurisdiction for mandamus to determine which court of appeals has jurisdiction over appeals. Like the critiques in Sections B and C, this critique is forceful and must be addressed via my policy proposal in Part IV.

A. Favoring Defendants

Opponents of expanded appellate review of the JPML may worry that such a process would favor defendants. Similar arguments were made against the adoption of Rule 23(f) to expand appellate review of class certification decisions.²³³ Objectors worried that Rule 23(f) would primarily be used to appeal grants of class certification, which would disproportionately benefit defend-

²²⁹ See *infra* Part III.A.

²³⁰ See *infra* Part III.B.

²³¹ See *infra* Part III.C.

²³² See *infra* Part III.D.

²³³ FED. R. CIV. P. 23(f).

ants.²³⁴ Some commentators in the years since the adoption of Rule 23(f) have argued that these concerns have come true in practice.²³⁵

Appellate review of the JPML is disanalogous in at least two important respects. First, there is no reason to believe that appellate review would primarily be used to challenge grants of centralization rather than denials of centralization. In fact, those seeking to challenge denials of centralization have more to gain via expanded appellate review because the current mandamus system prevents denials of centralization from ever being reviewed but allows for limited review of decisions to centralize.²³⁶

Second, even if appellate review is disproportionately used to review decisions to centralize or decisions to deny centralization, that would not mean that it favors defendants over plaintiffs or vice versa. Unlike in the class action context where plaintiffs almost universally favor certification and defendants almost universally oppose it,²³⁷ MDL centralization is often supported by both plaintiffs and defendants.²³⁸ Additionally, as I have argued above, both plaintiffs and defendants may sometimes prefer centralization to access economies of scale,²³⁹ and sometimes oppose centralization to avoid pressure to settle.²⁴⁰

²³⁴ *Id.*; see Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), a Good Rulemaking*, 69 TENN. L. REV. 97, 104 (2001) (“A strident and sizeable group of objectors [to the adoption of Rule 23(f)] contended that Rule 23(f) was a defendant-favoring provision that did little to advance the plaintiff’s situation.”).

²³⁵ Klonoff, *supra* note 116, at 741 (“with respect to appellate court review pursuant to Rule 23(f), defendants have benefited more from Rule 23(f) than have plaintiffs” because “[o]ut of the 209 Rule 23(f) appeals accepted [from November 30, 1998 through May 31, 2012], 144 (or about 69 percent) were appeals by defendants after the grant of class certification, whereas only 65 (31 percent) were appeals by plaintiffs after the denial of class certification. Of the 144 appeals by defendants, defendants were successful in 101 cases (a 70 percent reversal rate). Of the 65 appeals by plaintiffs, plaintiffs prevailed in only 26 cases (or 30 percent of the time). Thus, even when plaintiffs convinced the appellate court to grant review, they lost in the majority of cases”) (footnote omitted).

²³⁶ See 28 U.S.C.A. § 1407(e) (West 2022) (stating that denials of these motions cannot be reviewed, even via mandamus).

²³⁷ See FED. R. CIV. P. 23 advisory committee’s note to 1998 amendment (assuming that plaintiffs would want to appeal denials of class certification and defendants would want to appeal grants); Klonoff, *supra* note 116, at 741 (showing empirically that over a fourteen-year period all accepted appeals of denials of class certification were filed by plaintiffs and all accepted appeals of grants of class certification were filed by defendants).

²³⁸ See Williams & George, *supra* note 33, at 436 (noting that “[p]arties often agree that transfer and consolidation is appropriate” even as “they just as often sharply disagree about *where* and in front of *whom*”); see also Clopton & Bradt, *supra* note 46, at 1727 (noting that most districts in which cases are centralized were supported by both plaintiffs and defendants).

²³⁹ See *supra* Part II.A.2; see also Bradt & Rave, *supra* note 42, at 1300–01 (“Consolidation of a mass tort in MDL presents attractive opportunities to plaintiffs, defendants, and the courts. Most importantly, federal MDL offers the possibility of a complete resolution of all related claims. Although all sides may prefer other alternatives—defendants may prefer no aggregation at all and plaintiffs may prefer the leverage that comes with class certification—MDL may be a middle ground on which all sides begrudgingly agree.”); Gluck, *supra* note 3, at 1696–98 (discussing ways that centralization benefits both plaintiffs and defendants).

²⁴⁰ See *supra* Part II.A.1.

These concerns cut across party lines in MDLs in ways that they often do not for class actions. Because MDLs often involve multiple defendants,²⁴¹ economies of scale are made available on both sides of the “v,” whereas, in the class action context, because there is often only one defendant, economies of scale are “naturally enjoy[ed]” by the defendant.²⁴² Similarly, in a class action, pressure is often seen as emanating from the plaintiffs onto the defendant.²⁴³ In the MDL context, both plaintiffs and defendants face pressure to settle—sometimes from the judge herself—and the legal mechanisms to check that pressure in the class action context are largely absent.²⁴⁴

Additionally, arguments in favor of expanded interlocutory review of MDLs were primarily made by the defense bar and opposed by the plaintiffs’ bar.²⁴⁵ Even advocates of expanded interlocutory appellate review conceded that it would benefit defendants in particular, but they justified this by arguing it was necessary to “level the playing field” because the current lack of review allegedly disproportionately benefits plaintiffs.²⁴⁶ These proposals, by expanding appellate review to cover denied motions for summary judgment or motions to dismiss, by their very structure would have benefited defendants over plaintiffs.²⁴⁷ For the reasons mentioned above, there is no reason that the structure of appellate review of the JPML would have this same effect.

B. Judicial Economy

Perhaps the primary concern with expanded appellate review of the JPML is its potential effect on judicial economy.²⁴⁸ One may worry that allowing decisions by the JPML to be reviewed would slow down both the pace of the particular cases involved in the potential MDL and the judicial system writ large

²⁴¹ See, e.g., Gluck & Burch, *supra* note 23, at 24 (discussing the many defendants in the opiates MDL).

²⁴² Hay & Rosenberg, *supra* note 38, at 1383 (emphasis omitted).

²⁴³ See, e.g., FED. R. CIV. P. 23 advisory committee’s note to 1998 amendment (“[S]everal concerns justify expansion of present opportunities to appeal. . . . An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”).

²⁴⁴ *Supra* note 117 and accompanying text.

²⁴⁵ COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MEETING MINUTES 50 (Jan. 5, 2021), https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf [<https://perma.cc/3BQ5-DN8F>] (“The defense bar has strongly favored an increased opportunity for interlocutory appellate review, particularly for mass tort MDLs. The plaintiffs’ bar has strongly opposed it . . .”).

²⁴⁶ See John H. Beisner & Jordan M. Schwartz, *MDL Imbalance: Why Defendants Need Timely Access to Interlocutory Review*, U.S. CHAMBER INST. FOR LEGAL REFORM 13 (2019) (“Affording defendants who lose a dispositive motion with an immediate right to appeal would effectively level the playing field with plaintiffs, who are able to appeal the grant of any such motion as soon as it is entered.”).

²⁴⁷ See *id.*

²⁴⁸ Klonoff, *supra* note 9, at 1014 (“[T]here are strong arguments for not allowing review of a decision denying MDL treatment—including the burdens placed on appellate courts and the delays in the underlying litigation that such appellate challenges would necessarily cause.”).

by taking up the time of appellate courts. In fact, some have argued that the mere threat of appellate review would slow down the JPML's process by forcing the Panel to write longer decisions.²⁴⁹ Similar judicial economy arguments were made against allowing appellate review of class certification decisions²⁵⁰ and allowing more expansive appeals of interlocutory orders in MDLs.²⁵¹ These points are especially important in the MDL/JPML context because a primary goal of the MDL system is judicial efficiency.²⁵²

As an initial point, this argument may not be as powerful as it seems at first glance. As discussed above, plaintiffs and defendants often agree on questions of centralization.²⁵³ Thus, it seems unlikely that appellate review will be rampant. This is partially supported by the fact that parties rarely seek mandamus.²⁵⁴ Of course, it is very possible that currently parties may not even bother petitioning for mandamus because it is so unlikely to be granted but would take greater advantage of a normal appeals process that provided a more realistic chance at reversal if one were created.²⁵⁵ But it is also possible that parties who wanted to take another bite of the apple would do so with whatever means are available, and that it is simply rare that parties want that second bite.

Additionally, appellate review may actually promote overall judicial economy. A primary purpose of the JPML is the conservation of judicial resources. Often, when centralization decisions are contested, the issue is whether centralization would promote or hinder judicial economy and thus whether

²⁴⁹ *Id.* at 1017.

²⁵⁰ See, e.g., Miller, *supra* note 147, at 322 ("Even when an attempt to block class certification does not succeed, the very elaborate Rule 23 process called for by recent decisions imposes significant additional cost and delay, particularly when interlocutory appellate review of a certification decision is sought and especially when it is granted.").

²⁵¹ ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 14, at 33–34 (reporting that the Subcommittee on Multidistrict Litigation considered and rejected changes that would allow for more interlocutory appeals in part because "any delays caused by interlocutory appeals would not be worth it"); COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 245, at 50 (discussing the concern of committee members and judges that expanding interlocutory review would increase delays in MDLs).

²⁵² Martin I. Kaminsky, *The Judicial Panel on Multidistrict Litigation: Emerging Problems and Current Trends of Decision*, 23 SYRACUSE L. REV. 817, 822 (1972) ("Although the non-appealability of the Panel's determination seems harsh on its face, Panel proceedings would undoubtedly bog down in the appellate courts if appeal were more readily available. This would completely frustrate the policy of expedited and efficient conduct of pre-trial discovery which underlies section 1407."); see Clifton, *supra* note 4, at 1334 ("MDL consolidation is centrally justified by efficiency."); Resnik, *supra* note 135, at 2149 (noting that the MDL process was designed to address concerns "about waste and inefficiency").

²⁵³ Williams & George, *supra* note 33, at 436; *supra* note 238 and accompanying text.

²⁵⁴ See KLONOFF, *supra* note 12, at 151 (explaining that mandamus has only been sought in a few cases).

²⁵⁵ See *supra* notes 56–61 and accompanying text (discussing the rarity of mandamus being granted).

the cases should be centralized pursuant to § 1407.²⁵⁶ Thus, assuming that appellate review would increase accuracy, it may also save judicial resources by ensuring centralization where it is appropriate and denying it where it is not.²⁵⁷ Appellate review could also promote Panel-side judicial economy by definitively resolving disagreements that arise between members of the JPML and obviating the need to relitigate those issues each time they arise.²⁵⁸

It is also worth noting that judicial economy is not the only goal of the judicial process. Other goals such as ensuring predictability, correct outcomes, and due process must be respected as well.²⁵⁹ If resource efficiency in deciding cases was all that mattered, many important procedural rights could be tossed aside. This is not to say that judicial economy should be ignored. It should be taken very seriously, especially when addressing a process meant to improve it. It simply must not be elevated above other values. Nonetheless, I take concerns about judicial economy very seriously; they may just not be as worrying as they seem at first glance. A key aspect of my policy proposal discussed in Part IV is that it attempts to further mitigate any concerns about appellate review harming judicial economy.²⁶⁰

C. Relative Expertise

Due to the hierarchical, pyramid-like structure of the federal judiciary, circuit judges may be able to develop an expertise vis-à-vis district judges in an area of law that is frequently appealed.²⁶¹ If an issue is often appealed from various districts in a circuit, those circuit judges will potentially deal with the issue more often than any particular district judge, allowing them to develop an expertise.²⁶² Unfortunately, no similar development of expertise can easily oc-

²⁵⁶ 28 U.S.C.A. § 1407(a) (West 2022); *see, e.g., supra* Part II.B.2 (discussing debates in patent cases about if centralization would promote or hinder judicial economy).

²⁵⁷ *See supra* Part II.C (making the argument that appellate review would increase accuracy). Even if one contests, as a general matter, that appellate review would improve accuracy, my proposal is specifically designed so that appellate review will improve accuracy where it is used. *See supra* Part II.C; *infra* Part IV.B.2.

²⁵⁸ *See supra* Part II.B (discussing disagreements that have arisen on the JPML and been reargued multiple times); *cf.* Caminker, *supra* note 155, at 827 (discussing how following precedent can promote judicial economy by alleviating the need for the initial court to decide every issue anew); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921) (“[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”).

²⁵⁹ *See supra* Part II.B–D (discussing how these values would be promoted by appellate review).

²⁶⁰ *See infra* Part IV.B.1.

²⁶¹ *Cf.* Edward K. Cheng, *The Myth of the Generalist Judge*, 61 *STAN. L. REV.* 519, 540 (2008) (empirically finding that certain appellate judges write a disproportionately large number of opinions in certain legal areas).

²⁶² Appellate courts, of course, are also thought to have expertise over trial courts in questions of law generally. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 *COLUM. L. REV.* 939, 940 (2011) (“The trial court, which

cur in the context of appellate review of the JPML. All orders granting or denying centralization into an MDL are handled in the first instance by the JPML. Therefore, no single circuit court can hear more centralization cases than the JPML itself.

Professor Klonoff has argued that decisions of the JPML should not be appealable because of the JPML's expertise.²⁶³ Unlike the generalist district and circuit courts, the JPML is designed to be an expert panel. The Chief Justice of the Supreme Court hand-selects judges to serve on the JPML based on their experience.²⁶⁴ Because of this initial expertise coupled with the experience gained from its exclusive jurisdiction, the JPML will always be the federal court system's expert on MDL centralization. It may, therefore, seem unlikely that appellate review will serve much of a purpose in helping the JPML reach the correct result in a given case.

One may worry, of course, that due to the truncated nature of the hearings and volume of cases, the members of the Panel may not have the time to adequately use their expertise. But others have noted that Panel members tend to "come well prepared."²⁶⁵ A former chair of the JPML has noted that judges know how to budget their limited time and discuss the most complicated dockets at length.²⁶⁶

As I argued above, appeals can serve an important error correction role even when the court being reviewed possesses more expertise than the reviewing court.²⁶⁷ Nonetheless, I acknowledge that some may not be convinced by this argument and that there is something odd about a "randomly selected three-judge appellate panel . . . second-guessing" the seven experts on the JPML.²⁶⁸ Therefore, in fashioning my policy proposal in Part IV, I acknowledge this concern and seek to limit appellate review in such a way that solves the problem of relative expertise.

hears the witnesses and makes the record, is assumed to have superior competence to resolve questions of fact; the reviewing court is presumed to have superior competence to resolve questions of law.").

²⁶³ Klonoff, *supra* note 9, at 1018 ("It is highly unlikely that a randomly selected three-judge appellate panel, entrusted with the task of second-guessing the JPML's decisions, would bring comparable experience to bear on the issues.").

²⁶⁴ *Id.* at 1017; Williams & George, *supra* note 33, at 434.

²⁶⁵ Cabraser, *supra* note 44, at 831 ("The Panel Judges come well prepared, having actually read the briefs and submissions, and . . . are intent on reaching an informed consensus as to transfer, or denial of transfer, and/or the district court—and transferee judge—to whom an MDL docket will be assigned.").

²⁶⁶ Heyburn, *supra* note 35, at 2235 (noting that the judges "devote[] considerable discussion to the more complex and difficult dockets").

²⁶⁷ See *supra* Part II.C.

²⁶⁸ Klonoff, *supra* note 9, at 1018; see also Marcus, *supra* note 11, at 2281 ("The makeup of the Panel creates a puzzle for arranging review of its decisions . . . [I]t would be odd for review of the Panel's decisions to lie with a three-judge panel of a court of appeals."); *Uber Techs., Inc. v. U.S. Jud. Panel on Multidistrict Litig.*, 131 F.4th 661, 668 (9th Cir. 2025) ("It would be anomalous for a three-judge panel from a single circuit to override the judgment of . . . [the JPML] in all but the most extreme circumstances.").

D. Finding a Court

A final problem with expanded appellate review is that it would be difficult to determine the appropriate circuit court to review the JPML's decisions because the Panel does not always sit in the same circuit.²⁶⁹ Section 1407(e) attempts to resolve this problem by basing mandamus jurisdiction on the location of the transferee district or the JPML, depending on the type of action for which review is being sought.²⁷⁰

A possible approach to appellate review would be to essentially keep this system. Appeals of orders granting centralization would be heard in the circuit court having jurisdiction over the transferee district, and appeals of orders denying transfer would be heard in the circuit court having jurisdiction over the district in which the Panel happens to be sitting.

A problem with this approach is the potential for contradictory rulings.²⁷¹ If, for example, some circuits are especially in favor of centralization into an MDL and others are especially hostile, scenarios could arise where the Panel is bound by circuit precedent to centralize when sitting in one circuit but prevented from centralizing in the same circumstances sitting in another circuit. The same scenario could arise in the transferee circuit. One could even imagine a scenario in which the circuit precedent of the circuit in which the Panel is sitting demands centralization, but the precedent of the circuit of the ideal transferee district prevents it. Thus, the Panel would be forced to choose a different transferee district than the most ideal candidate in order to avoid reversal by the transferee circuit.

²⁶⁹ See Catherine D. Perry, *Proceedings Before the Judicial Panel on Multidistrict Litigation*, 89 UMKC L. REV. 835, 836 (2021) (explaining that the JPML rotates around the country for hearings).

²⁷⁰ See 28 U.S.C.A. § 1407(e) (West 2022) ("Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district.").

²⁷¹ Cf. Christopher Paul Nofal, *How the JPML Can Benefit from the Federal Circuit and Vice-Versa*, 52 IDEA 379, 395–96 (2012) (making a similar argument about the problems of splitting mandamus review of the JPML between the circuit courts). Similar points have long been made to argue in favor of a unified tax court of appeals. See, e.g., Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1154–55 (1944) (explaining that the lack of unified appellate review prevents the Treasury from taking a definitive position on unsettled questions and creates delays and confusion in tax administration); H. Todd Miller, Comment, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228, 233–34 (1975) (arguing that the lack of a single appellate court for tax appeals would reduce confusion by creating consistent interpretations of law across the country). The Tax Court, like the JPML in our hypothetical, can be reviewed by multiple courts of appeals, creating the possibility of contradictory rulings binding the same court. See Miller, *supra*, at 233–34 (discussing these difficulties); see also Leandra Lederman, *Restructuring the U.S. Tax Court: A Reply to Stephanie Hoffer and Christopher Walker's The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 1, 2 (2014) (discussing appellate review of the Tax Court).

Of course, the Supreme Court could endeavor to fix a circuit split such as this.²⁷² But until that happens, the problems discussed above could cause substantial difficulties for the JPML. Even after a specific circuit split is addressed, a general attitude of favorability or hostility toward the JPML could cause the Panel itself to engage in a form of forum shopping. If the Panel knows that a certain circuit is especially deferential to it, it is possible that it could choose to sit in that circuit and transfer cases to districts within that circuit. This forum shopping could lead to JPML hearings and MDLs that are not the most convenient for the parties, thus harming judicial economy and the very purpose of centralization.²⁷³ Additionally, this forum shopping could undermine allowing appellate review in the first place, as the JPML would be encouraged to only interact with those circuits that utilize their powers of appellate review over the JPML the least.

In short, the problem of finding a court cannot be countered in the abstract. It must be addressed by a specific policy proposal aimed to solve it. I provide such a proposal in the next Part.

IV. A POSSIBLE SOLUTION

Given the benefits and potential drawbacks to expanded appellate review of JPML decisions, appellate review of the JPML should be expanded but tailored to avoid or mitigate possible harms. In this Part, I give my prescriptive proposal of how to do that. Section A sets forth the contours of my policy proposal and the changes that should be made to § 1407(e).²⁷⁴ Section B explains how those changes avoid or mitigate the problems associated with expanded appellate review remaining from Part III.²⁷⁵ Finally, Section C explains how this proposal still captures the benefits of appellate review discussed in Part II.²⁷⁶

A. The Policy Proposal

To provide meaningful yet limited appellate review, § 1407(e) should be amended in the following three ways. First, and I assume most controversially, appellate review of JPML decisions granting or denying centralization should be appealable if a) *a single member* of the Panel participating in the decision certi-

²⁷² But see Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing Out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 990 (2020) (noting the “increase in the number of unresolved ‘circuit splits’” as a result of increasing appellate court caseloads and reduced caseloads at the Supreme Court).

²⁷³ See 28 U.S.C.A. § 1407(a) (West 2022) (establishing that centralization is to be used when it is for the “convenience of parties and witnesses”).

²⁷⁴ See *infra* Part IV.A.

²⁷⁵ See *infra* Part IV.B.

²⁷⁶ See *infra* Part IV.C.

fies the decision as worthy of appellate review;²⁷⁷ and b) the court of appeals agrees to take the case. This approach is modeled on 28 U.S.C. § 1292(b) which allows for discretionary appeals of otherwise non-appealable interlocutory decisions in typical district court cases.²⁷⁸ This is the most consequential of my proposals and the one I devote much of the remainder of this Part to defending.

Second, mandamus review should remain as a redundant safeguard as it does in the § 1292(b) context.²⁷⁹ On the off chance that there is a “really extraordinary”²⁸⁰ Panel order that “amount[s] to a judicial ‘usurpation of power,’”²⁸¹ mandamus review should remain available to review that order, even if no member of the Panel certifies the decision as deserving review. The change here is that mandamus review should be expanded to be available in both cases granting *and denying* centralization.²⁸² This change should be implemented because decisions denying centralization can terminate cases in ways similar to how orders to centralize can.²⁸³ Due to the rarity of mandamus (which will probably be even rarer with more typical means of appellate review available as an alternative), I imagine that this proposal is not very controversial. It will not harm judicial economy because, if history is any guide, mandamus will be sought rarely and granted even more rarely.²⁸⁴ And it will not threaten the expertise of the JPML because mandamus is reserved for “really extraordinary causes”²⁸⁵ and not used to “second-guess[]”²⁸⁶ the JPML on contested issues.

²⁷⁷ Although it may seem odd to allow a single member of a panel to make such a decision, it is not wholly without precedent. *Cf.* FED. R. APP. P. 34(a)(2) (providing for oral argument in an appeal if a single member of a three-judge panel requests it).

²⁷⁸ See 28 U.S.C. § 1292(b) (2018) (“When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order . . .”).

²⁷⁹ See *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2003) (noting that mandamus review is not available to require the district court’s certification of a question under § 1292(b) because making it available would defeat “[t]he whole point of § 1292(b),” which is “to create a dual gatekeeper system for interlocutory appeals,” but that it is still available to address the “underlying problem” or issue sought to be resolved under § 1292(b)); Adam N. Steinman, *Appellate Jurisdiction and the Emoluments Litigation*, 53 AKRON L. REV. 659, 673–75 (2019) (discussing the interplay between mandamus and interlocutory appeals under § 1292(b)).

²⁸⁰ *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)).

²⁸¹ *Id.* at 371 (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)).

²⁸² See 28 U.S.C.A. § 1407(e) (West 2022) (“There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.”).

²⁸³ See *supra* Part II.A (discussing how both denials and grants of centralization can terminate cases).

²⁸⁴ See KLONOFF, *supra* note 12, at 151 (explaining that mandamus has only been sought in a few cases); *supra* notes 56–61 and accompanying text (discussing the rarity of mandamus being granted).

²⁸⁵ *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. at 259–60).

²⁸⁶ See Klonoff, *supra* note 9, at 1018.

Third, exclusive appellate and mandamus jurisdiction of the JPML should be vested in a single court of appeals. Although it does not matter which one for our purposes, I will assume for the remainder of this Part that such appeals would go to the United States Court of Appeals for the Federal Circuit.²⁸⁷ The Federal Circuit is a logical choice because its jurisdiction is already based on subject matter, not geography.²⁸⁸ Additionally, one other commentator has already argued for vesting the Federal Circuit with exclusive *mandamus* jurisdiction over the JPML and argued that doing so could prove beneficial for both parties.²⁸⁹ By placing appellate and mandamus jurisdiction in a single court, the problems associated with split appellate review are avoided, most notably the problem of contradictory rulings.²⁹⁰ In light of the substantial concerns with split appellate review, I do not expect many objections to this proposal.²⁹¹

To summarize, § 1407(e) should be amended in three ways:²⁹²

²⁸⁷ The United States Court of Appeals for the District of Columbia Circuit would also be a logical choice considering its existing non-geographical jurisdiction over some administrative law issues. See generally Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence & Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131 (2013) (discussing the court's special jurisdiction over questions of administrative law). The specific court does not matter much for this proposal, and the reader should feel free to substitute their preferred court.

²⁸⁸ See 28 U.S.C. § 1295 (2018) (establishing the jurisdiction of the Federal Circuit over specific types of claims based on their subject matter).

²⁸⁹ See Nofal, *supra* note 271, at 412 ("The instant proposal trades time-splitting mandamus for exclusive Federal Circuit mandamus. With one court of appeals to advise and supervise the JPML, the Panel's decisions would be subject to meaningful appellate review."). Another commentator has proposed giving the United States Court of Appeals for the Third Circuit exclusive mandamus jurisdiction over the JPML and exclusive appellate jurisdiction over interlocutory appeals in MDLs. See Mary Anna Brand, Note, *The Goose, the Gander, and the Gaps in Between: Procedural and Appellate Disparities in Multidistrict Litigation*, 42 REV. LITIG. 317, 335–36 (2023).

²⁹⁰ See *supra* Part III.D.

²⁹¹ One could potentially make a percolation argument in favor of split appellate review. See Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMU L. REV. 505, 539 (2013) (arguing that the lack of percolation in patent law caused by the exclusive jurisdiction of the Federal Circuit has been detrimental to the development of patent law). However, given the fact that appellate review of the JPML will likely be fairly infrequent under my proposal, see *infra* Part IV.B.1, and the fact that, in a split appellate review scenario, the JPML could be incentivized to strategically avoid circuits with unfavorable law, see *supra* notes 272–273 and accompanying text, it does not seem like split review will create many opportunities for percolation. Therefore, the significant drawbacks to split appellate review of the JPML are likely to outweigh the benefits of the limited percolation that could occur in such a scenario. See *supra* Part III.D. In any event, the value of percolation is itself disputed. See Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 365–66 (2021) (discussing some of the arguments for and against percolation). Wading into this broader debate is beyond the scope of this Article.

²⁹² Although these proposals are designed to be adopted in concert, they would still be beneficial if adopted independently. One possible exception is adopting the first without the third. Depending on how much weight one places on the concern of split review, it may be unwise to adopt the first proposal without giving one court exclusive appellate jurisdiction.

1. Appellate review should be available if a) *a single member* of the Panel participating in the decision certifies the decision as worthy of appellate review; and b) the court of appeals agrees to take the case.
2. Mandamus review should remain and be made available for denials of centralization as well as grants.
3. Exclusive appellate and mandamus jurisdiction should be vested in a single court of appeals, potentially, the United States Court of Appeals for the Federal Circuit.

This approach is novel and does not fully mirror any of the state approaches to appellate review of MDL creation, but I have tailored it to capture the benefits of appellate review while avoiding the drawbacks.²⁹³ Approaches that have no appellate review or appellate review only via mandamus suffer from the same problems as the current federal approach.²⁹⁴ Approaches that only allow review of centralization ignore the fact that failures to centralize are also deserving of review due to their potentially dispositive nature.²⁹⁵ Finally, approaches that allow unconstrained appellate review would fail to adequately address the problems of judicial economy and relative expertise which my proposal aims to resolve.²⁹⁶

The remainder of this Part is devoted to discussing the merits of my proposal, in particular, the first proposed change. Section B explains how the changes avoid most of the problems associated with broad appellate review of the JPML, and Section C explains how this proposal captures the benefits of appellate review.

B. Avoiding the Problems with Appellate Review

Returning to the problems with appellate review presented in Part III, the potential problem of favoring defendants is meritless,²⁹⁷ and the problem of finding a court is straightforwardly solved by vesting exclusive appellate and mandamus review of the JPML in the a single court of appeals, such as the Fed-

²⁹³ See *supra* notes 73–77 and accompanying text (discussing state approaches).

²⁹⁴ For states that use this approach, see *supra* notes 74–75 and accompanying text. For the problems, see *supra* Part II.

²⁹⁵ For states that use this approach, see *supra* note 76 and accompanying text. For the problems, see *supra* Part II.A.

²⁹⁶ For states that use this approach, see *supra* note 77 and accompanying text. For the problems, see *supra* Part III.B–C. Here, I am only speaking in terms of the ideal type of appellate review for the federal system. This is not to say that my proposal is superior to those approaches when used within those states. Different state systems are structured differently leading to different approaches that influence the type of appellate review. For example, centralization decisions in Indiana MDLs are made by a single trial judge, not an expert panel. See IND. R. TRIAL P. 42(D); see also Clopton & Rave, *supra* note 71, at 1693–96 (discussing Indiana’s MDL system). Therefore, Indiana does not run into the problem of relative expertise, thus leading to more liberal appellate review potentially being justified.

²⁹⁷ See *supra* Part III.A.

eral Circuit.²⁹⁸ I will now explain how this proposal further mitigates the concern about judicial economy²⁹⁹ and solves the problem of relative expertise.³⁰⁰

1. Saving Judicial Resources

The primary purpose of requiring certification by a member of the JPML and acceptance by the Federal Circuit is that it will drastically limit the number of appeals and thus mitigate any concerns about judicial economy. This proposal is modeled on § 1292(b), which also requires question certification by the lower court.³⁰¹ As scholars have observed, § 1292(b) appeals are relatively rare.³⁰² And although it seems that my proposal will allow enough appeals to have practical implications,³⁰³ it does not seem that such appeals will be common enough to have a significant impact on judicial economy.

The initial universe of cases in which a party may seek an appeal is relatively circumscribed vis-à-vis the total pool of cases before the JPML because parties often agree on the proper outcome.³⁰⁴ For that subset of cases where a party would want to appeal a decision from the JPML, this proposal provides two gatekeepers to prevent a flood of appellate review. First, the judges on the JPML act as gatekeepers by deciding if a question should be certified for appellate review. If we assume that dissenting members of the JPML would have been willing to certify the issue they dissented on for review, we can conclude that, because such dissents are uncommon, the Panel will only rarely certify appeals.

Westlaw's database of JPML decisions includes every published decision that the Panel has ever issued, for a total of 2,066 published decisions.³⁰⁵ Of

²⁹⁸ See *supra* Part III.D.

²⁹⁹ See *supra* Part III.B.

³⁰⁰ See *supra* Part III.C.

³⁰¹ See 28 U.S.C. § 1292(b) (2018).

³⁰² LINDA J. SILBERMAN, ALLAN R. STEIN & TOBIAS BARRINGTON WOLFF, *CIVIL PROCEDURE THEORY AND PRACTICE* 1100 (5th ed. 2017). Between October 1, 2013, and June 30, 2019, courts of appeals granted 280 appeals under § 1292(b). Emery G. Lee III, Jason A. Cantone & Kristin A. Garri, *Permissive Interlocutory Appeals, 2013–2019*, FED. JUD. CTR. 2 (Feb. 2020), <https://www.fjc.gov/sites/default/files/materials/13/Permissive%20Interlocutory%20Appeals,%202013%E2%80%932019.pdf> [<https://perma.cc/E3M5-QBZJ>]. As a comparison, for the twelve-month period ending March 31, 2019, nearly fifty thousand total cases were filed in the courts of appeals. *Federal Judicial Caseload Statistics 2019*, U.S. CTS., <https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2019> [<https://perma.cc/UN6X-P9CL>] (showing 47,977 filings in the regional courts of appeals and 1,478 in the Federal Circuit).

³⁰³ See *infra* Part IV.C (explaining how my proposal allows appeals of the most difficult and disputed issues).

³⁰⁴ See Williams & George, *supra* note 33, at 436 (noting that “[p]arties often agree that transfer and consolidation is appropriate” even as “they just as often sharply disagree about *where* and in front of *whom*”).

³⁰⁵ *Judicial Panel on Multidistrict Litigation Cases*, WESTLAW PRECISION, <https://1.next.westlaw.com/Browse/Home/Cases/JudicialPanelonMultidistrictLitigationCases> [<https://perma.cc/ELV4-KGMJ>]

these decisions, a judge dissented in only nineteen, less than one percent.³⁰⁶ It seems likely that judges will sometimes be willing to certify a question in a case even if they were not willing to dissent.³⁰⁷ However, to even reach a certification rate of once a year, we would have to assume that judges are willing to certify questions at triple the rate that they are willing to dissent.³⁰⁸ In short, it seems unlikely that enough cases would be certified by the JPML to meaningfully harm judicial economy. Moreover, the JPML can target certification to contested issues, the resolution of which will allow it to decide future cases more quickly and with less conflict, thus promoting long term judicial economy.³⁰⁹ Many of the dissents on the JPML repeated issues that had been brought up in previous dissents. Appellate resolution of these issues would likely prevent future dissents and attempts to seek appellate review because the issue would have already been settled by the appellate court.

Even if question certification were rampant, that is only half the battle. Under my proposal, the Federal Circuit, or whatever court of appeals it may be, has discretion over whether to take up the appeal. Thus, the appellate court acts as a second gatekeeper that can prevent too many cases from being appealed.³¹⁰ Empirical work on the usage of § 1292(b) has shown that only about half of questions certified by district courts are accepted for review by the cir-

(select “Advanced” hyperlink; under “Document Fields” select “change date” and filter search results by all dates after “01/01/1950”) (search performed on Sep. 18, 2025).

³⁰⁶ As of September 16, 2025, a search for the term “dissent!” in Westlaw’s database of reported JPML decisions returned twenty-four cases (I used the root extender to capture instances of “dissenting,” “dissents,” etc.). Of these twenty-four, a Panel member actually dissented in only nineteen. In the remaining five cases, there was no dissent, but the word “dissent” (or a version of it) appeared in either the majority opinion or a concurring opinion.

³⁰⁷ See, e.g., *In re ‘East of the Rockies’ Concrete Pipe Antitrust Cases*, 302 F. Supp. 244, 256 (J.P.M.L. 1969) (Weigel, J., concurring) (noting his concerns with the majority’s approach, but concluding they were not weighty enough to justify dissenting). Although not significant enough to justify a dissent, perhaps Judge Weigel’s concerns would have convinced him to certify the issue for appellate review.

³⁰⁸ Westlaw’s database goes back to 1968, when the JPML was first created. In its fifty-four years of coverage, there have only been nineteen reported cases with dissents. *Judicial Panel on Multidistrict Litigation Cases*, WESTLAW PRECISION, <https://1.next.westlaw.com/Browse/Home/Cases/JudicialPanel onMultidistrictLitigationCases> [<https://perma.cc/HHZ3-SQHK>].

³⁰⁹ Cf. Solimine, *supra* note 80, at 1199 (“[A] number of the district judges [certifying questions under § 1292(b)] explicitly stated that appellate review would clarify the law and aid in the resolution of other pending cases raising similar issues.”).

³¹⁰ I do not attempt to answer how the Federal Circuit should utilize this power. If it gives more weight to the fact that grants or denials of centralization can be de facto dispositive motions, perhaps it will take cases where that is the case. On the other hand, if the Federal Circuit focuses more on the types of cases discussed in Section II.B of this Article, perhaps it will be more likely to take an appeal when there is clear disagreement amongst Panel members. See *supra* Part II.B; cf. FED. R. CIV. P. 23 advisory committee’s note to 1998 amendment (“Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.”).

cuit court.³¹¹ This further reduces the potential number of appeals. Additionally, in the unlikely event that concerns over judicial economy prove true, the Federal Circuit could simply accept fewer certified questions from the JPML in order to lighten its load.³¹²

Finally, this proposal also directly responds to concerns about appellate review requiring the JPML to issue significantly longer opinions (placing more time pressure on the Panel).³¹³ By conditioning appellate review on question certification by a member of the JPML itself, Panel members will likely be aware when a case will possibly be subject to appellate review. A Panel member could simply notify the other members that they intend to certify a question and the judge writing the opinion could write a more in-depth opinion *in that particular case*.³¹⁴ Because Panel members would have advance notice of the possibility of appellate review, there would be no need to prospectively write longer opinions in order to guard against the possibility of appellate review in every case. Because it seems such certifications will be rare, longer opinions will only need to be written in a few cases.

2. Respecting Expertise

As an initial matter, it is important to note that error correction and reduction can occur even when the reviewing court lacks expertise as compared to the court being reviewed.³¹⁵ Additionally, respecting expertise is not the *sine qua non* of the judicial system. Instead, it is one value to be balanced against others.³¹⁶ Differences in expertise exist throughout the court system and are not seen to justify abdication of review. For example, appellate courts commonly review trial court findings of fact. These differences in expertise are generally understood to justify deference to the findings of the trial court, not wholesale denial of review.³¹⁷

Nonetheless, the problem of relative expertise is weighty and deserving of careful consideration.³¹⁸ My policy proposal mitigates this problem by doing three things. First, it maintains respect for the JPML's expertise by condition-

³¹¹ See Lee, et al., *supra* note 302, at 2 (noting that from October 1, 2013 to June 30, 2019 fifty-two percent of certified questions under of § 1292(b) were accepted by the courts of appeals).

³¹² Cf. *id.* (noting that courts of appeals range from accepting twenty percent of § 1292(b) appeals to sixty-seven percent).

³¹³ See Klonoff, *supra* note 9, at 1017.

³¹⁴ Cf. *Uber Techs., Inc. v. U.S. Jud. Panel on Multidistrict Litig.*, 131 F.4th 661, 667 (9th Cir. 2025) (noting that the JPML “issued a supplemental order responding” to a petition for a writ of mandamus to further explain “the rationale for its decision”).

³¹⁵ See *supra* Part II.C.

³¹⁶ Cf. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 402 (2024) (explaining that due to their expertise, agencies’ interpretations of statutes may have the “power to persuade,” even “if lacking power to control” (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

³¹⁷ See Friendly, *supra* note 95, at 759 (discussing deference to trial court determinations of fact).

³¹⁸ See *supra* Part III.C (discussing the problem of relative expertise).

ing review on certification by a member of the Panel. Second, it fosters expertise in the reviewing court by having all appeals from the JPML go to a single court. And third, it recognizes that the JPML handles some matters where the Federal Circuit may actually have more expertise than the JPML.

a. Respecting the Expertise of the JPML

By conditioning appellate review on question certification by a member of the JPML, this proposal respects the Panel's expertise by only allowing appellate review in the hard cases where a Panel member asks for it. In doing so, this proposal avoids the most worrying possibility of appellate review: a generalist appellate court reversing a decision that the experts on the JPML all strongly agree on.³¹⁹ Moreover, this approach gives the JPML ultimate control over the possibility of review. By asking for appellate review, a Panel member would implicitly acknowledge that this question goes beyond their expertise and is worthy of being looked at by another court.³²⁰ The JPML still controls the system and can ultimately decide whether an appeal will be possible. Although only a single member is required to certify a question, if an issue is clear and within the JPML's expertise, then the majority of the Panel should be able to convince the member or members who are on the fence to not certify a question.³²¹ This consent requirement makes appellate review more collaborative and less adversarial. It also relies on the expertise of the JPML to flag potential issues where it believes it could benefit from appellate oversight. This could focus review on areas where the reviewing court may actually be better positioned to reach the correct decision.³²² This limited appeals process is meant to assist the JPML, not usurp its power.

b. Fostering Expertise in the Federal Circuit

In addition to respecting the expertise that the JPML already possesses, this proposal would allow the Federal Circuit to develop its own expertise. By vesting exclusive appellate jurisdiction in the Federal Circuit, the judges on the Federal Circuit would have an opportunity to develop an expertise in prospective MDLs like that possessed by the JPML. Although the Federal Circuit

³¹⁹ Cf. Klonoff, *supra* note 9, at 1017 (cautioning against appellate review of the JPML in part because so many decisions are unanimous).

³²⁰ See Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 LAW & CONTEMP. PROBS. 157, 159 (1984) (arguing that if the initial judges in a system are trusted they can play a greater role in flagging issues for interlocutory appeal).

³²¹ Cf. Heyburn, *supra* note 35, at 2235 (noting that the JPML already has a culture of having "discussions [that] invariably lead to a consensus about the best course of action").

³²² See Steinman, *supra* note 81, at 21–24 (modeling a scenario where a reviewing court that is overall less accurate than the court it is reviewing can still improve net accuracy by focusing its review in specific areas where the reviewing court's accuracy is higher than usual or the initial court's accuracy is lower than usual).

would only hear a small subset of JPML cases, there is still reason to believe it would be able to develop its own expertise. Judges stay on the Federal Circuit longer than they stay on the JPML. Judges are appointed to the Federal Circuit for life,³²³ and the average tenure for a current non-senior status judge on the Federal Circuit is over seventeen years.³²⁴ By contrast, judges on the JPML are generally appointed for just seven-year terms.³²⁵ So even though they would hear far fewer cases per year than the JPML, Federal Circuit judges may develop their own expertise through their longer tenure.

Additionally, JPML judges have their attention split by having to deal with every aspect of the centralization decision, whereas Federal Circuit judges would only need expertise in the narrower areas where appeals occur.³²⁶ It seems that appeals would most likely occur in fairly discrete areas where Panel members disagree.³²⁷ Federal Circuit judges would not need to develop the same broad expertise that JPML members have, but instead just expertise in those areas of MDL centralization that are frequently appealed.

Three other changes could also be made to foster expertise on the Federal Circuit. First, the President could look to a nominee's experience with MDLs and complex litigation when appointing individuals to the Federal Circuit, as the Chief Justice currently does with the JPML.³²⁸ Thus, the Federal Circuit would have at least a few members with a pre-existing expertise in addition to developing an expertise over time.

Second, all appeals from the JPML could be heard en banc. This would allow all Panel members to gain experience with these types of cases and exchange ideas with one another, learning from each other's expertise. And although this heightens concerns about judicial economy,³²⁹ such appeals would be rare.³³⁰ This limited number of potential appeals both mitigates the concerns about judicial economy and heightens the potential need for universal en banc

³²³ 28 U.S.C.A. § 1407(d) (West 2022) (“The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States.”).

³²⁴ See *Judge Biographies*, U.S. CT. OF APPEALS FOR THE FED. CIR., <https://www.cafc.uscourts.gov/home/the-court/judges/judge-biographies/> [<https://perma.cc/E3MT-E5H8>] (calculations done by author; accurate as of July 17, 2025 and exclude senior judges as they hear fewer cases and do not participate in en banc decisions).

³²⁵ Heyburn, *supra* note 35, at 2227 (explaining the seven-year terms); Klonoff, *supra* note 12, at 39 (same).

³²⁶ Cf. Friendly, *supra* note 95, at 757 (“In many cases the trial judge’s opinion will help to focus the controversy.”).

³²⁷ See *supra* Part II.B (discussing examples of cases where Panel members disagreed).

³²⁸ See Klonoff, *supra* note 9, at 1017 (explaining the process for assigning judges to the JPML); Williams & George, *supra* note 33, at 434 (discussing “[t]he norm of appointing panelists with complex litigation experience”).

³²⁹ See *supra* Part III.B (discussing these concerns).

³³⁰ See *supra* Part IV.B.1 (explaining that appeals would be reserved for the most difficult cases and would be limited by multiple rounds of gatekeeping).

review in order to get experience. Universal en banc review would also avoid the potential awkwardness of a panel of three judges reversing a panel of seven.³³¹

Third, members of the Federal Circuit could be appointed to the JPML to gain experience and expertise. Appointment to the JPML is open to both district and circuit court judges.³³² Although a Federal Circuit judge should not hear appeals from the JPML while sitting on the Panel, once their JPML tenure is over, they could bring their hands on experience back to the Federal Circuit. This would create further expertise on the Federal Circuit.

c. Acknowledging the Relative Expertise of the Federal Circuit

The Federal Circuit may also have expertise in areas where the JPML lacks it. Thus, appellate review may actually promote respect for judicial expertise in these areas. Although the JPML has expertise in prospective MDLs and in complex litigation generally, it does not follow that the Panel has expertise in every aspect of the cases that come before it. The Federal Circuit can help fill in these gaps with its own preexisting expertise. For example, conflicts on the JPML have arisen on pure issues of statutory interpretation.³³³ The JPML has no specific expertise in this area. By contrast, circuit courts likely have this expertise because they are routinely called on to review district courts' statutory interpretation.³³⁴

Patents provide another example more specific to the Federal Circuit.³³⁵ Patent cases are routinely before the JPML.³³⁶ The Federal Circuit, as the federal court system's expert on patent law, could help develop law in this area and lend its expertise.³³⁷ Specifically, questions have arisen before the Panel

³³¹ See Klonoff, *supra* note 9, at 1018 (objecting to such a scenario); Marcus, *supra* note 11, at 2281 ("The makeup of the Panel creates a puzzle for arranging review of its decisions . . . [I]t would be odd for review of the Panel's decisions to lie with a three-judge panel of a court of appeals.").

³³² 28 U.S.C.A. § 1407(d) (West 2022).

³³³ See *supra* Part II.B.1 (discussing disagreements between Panel members about whether they had exceeded their own statutory authority).

³³⁴ Cf. Merrill, *supra* note 262, at 940 ("[T]he reviewing court is presumed to have superior competence [over trial courts] to resolve questions of law.").

³³⁵ This is the one point where my argument is specific to the Federal Circuit. This single point of pre-existing Federal Circuit expertise, however, should not be seen as requiring that exclusive jurisdiction over the JPML be placed in the Federal Circuit for my proposal to work. One could plausibly argue that a regional court of appeals with a more diverse docket would have broader expertise to draw on in its review of JPML's decisions, and that such diverse experience would outweigh the Federal Circuit's specific expertise in the area of patents. What matters for my proposal is that exclusive appellate review of the JPML is placed in a single court, whatever court that may be.

³³⁶ See Paul M. Janicke, *The Judicial Panel on Multidistrict Litigation: Now a Strengthened Traffic Cop for Patent Venue*, 32 REV. LITIG. 497, 499, 517 (2013) (noting that in 2012 the JPML addressed eighty-eight patents cases across seventeen proceedings and that this reflects the growing number of patent cases before the Panel and the increasingly important role of the Panel in patent litigation).

³³⁷ See 28 U.S.C. § 1295(a)(1) (2018) (establishing the exclusive patent jurisdiction of the Federal Circuit).

regarding the degree of commonality that should be required in patent cases to justify centralization.³³⁸ This disagreement turns on whether the cases should be transferred solely because they shared the “common factual question of patent validity,” or whether the Panel should deny transfer because the cases all turned on the question of patent infringement, which would be better answered through local discovery.³³⁹ Here, the Federal Circuit could use its experience with the realities of adjudicating the merits of patent disputes to help determine if centralization would be beneficial to the resolution of the cases or just cause “troubles and inconveniences.”³⁴⁰

In sum, this proposal respects the expertise of the JPML. It also allows the Federal Circuit to develop its own expertise to compliment and supplement the JPML’s. In Professor Klonoff’s argument against appellate review of the JPML, he contended, “[i]t is highly unlikely that a randomly selected three-judge appellate panel, entrusted with the task of second-guessing the JPML’s decisions, would bring comparable experience to bear on the issues.”³⁴¹ I agree, but my approach is not the worst-case scenario that he describes. The panel would not be “random,” but would instead be from a circuit with exclusive appellate jurisdiction over the JPML and its own expertise in MDL centralization. Moreover, the panel would not be “second-guessing the JPML’s decisions,” but, instead, assisting the JPML in reaching the correct outcome and only when the JPML requests such assistance. As a final note, the reviewing court would be aware of its own limitations and the JPML’s expertise. Thus, it would likely give due deference to that expertise.³⁴²

³³⁸ *Supra* Part II.B.2.

³³⁹ Cooney, *supra* note 183, at 594–95 n.36 (“The Panel has transferred several dockets of patent infringement cases in which the defendants have challenged the validity of the patent. The majority has found that the common factual question of patent validity alone justifies transfer, but the dissenters argue that the essential question in the cases is patent infringement, which is more suited to local discovery in the districts in which the actions were brought.”).

³⁴⁰ *In re Embro Pat. Infringement Litig.*, 328 F. Supp. 507, 509 (J.P.M.L. 1971) (Weigel, J., dissenting).

³⁴¹ Klonoff, *supra* note 9, at 1018.

³⁴² See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991) (“Any expertise possessed by the district court will inform the structure and content of its conclusions of law and thereby become evident to the reviewing court.”); *FedEx Ground Package Sys., Inc. v. U.S. Jud. Panel on Multidistrict Litig.*, 662 F.3d 887, 891 (7th Cir. 2011) (denying mandamus relief because the JPML acted within its discretion and explaining that “[t]he JPML brings to bear decades of experience with more than a thousand MDL proceedings”); RICHARD A. POSNER, *HOW JUDGES THINK* 114 (2008) (“But other rulings, such as deciding whether the plaintiff in a particular case was negligent, can vary among judges without unsettling the law. So those rulings are not reversed unless the appellate court is pretty confident that they are wrong, and that confidence—and hence how searching appellate review will be—will vary with the court’s assessment of its own competence relative to that of the lower court or agency that made the ruling.”); cf. David F. Hamilton, *Reflections on Judging in the Federal Courts*, 56 IND. L. REV. 233, 244 (2023) (Judge Hamilton explaining that “[t]he appellate courts’ role with MDLs is to ensure legal rights and duties are not thrown overboard in the interests of pragmatism, but to leave as much room as reasonably possible for the district judges to do their stuff and see those huge cases toward resolution”). The precise level of deference and standard of review (*e.g.*, *de novo*,

C. Capturing the Benefits of Appellate Review

This proposal captures the benefits of appellate review by allowing appellate review in the most difficult and contested cases, where such review is most warranted. This approach allows for clarifying issues of law upon which the JPML is divided.³⁴³ If a judge is willing to dissent from a decision, I imagine they would be willing to certify a question for appellate review. This seems especially true in cases where the dissenter believes, for example, that the majority's decision misunderstands or exceeds the Panel's statutory authority.³⁴⁴

Even in cases where there has not been a formal split via a dissent, one of the judges may still be willing to certify a question because it presents a difficult issue.³⁴⁵ This is the entire premise of § 1292(b).³⁴⁶ A judge may believe they arrived at the correct answer (hence why they arrived at it), but nonetheless want appellate review because the question is thorny. Thus, this proposed reform would likely see the JPML invite appellate review in cases where the Panel is split as well as in difficult cases that still resulted in a unanimous decision.³⁴⁷

This approach does not give every case a chance at appellate review,³⁴⁸ which means some parties will still suffer from being on the adverse side of *de facto* dispositive motions without a chance at review.³⁴⁹ But the purpose of this approach is not just to give every litigant another bite at the apple. By requir-

substantial evidence, abuse of discretion) that the appellate court should employ in reviewing particular types of JPML decisions is an interesting question that is beyond the scope of this Article. *Cf.* Marcus, *supra* note 11, at 2281 (“[T]he question of standards for . . . review [of the JPML] would be perplexing.”).

³⁴³ See *supra* Part II.B (discussing such divisions).

³⁴⁴ *In re Equity Funding Corp. of Am. Sec. Litig.*, 375 F. Supp. 1378, 1399–1400 (J.P.M.L. 1973) (Wisdom, J., dissenting) (arguing that the majority's “but for” test “finds no support in Section 1407”); *In re Butterfield Pat. Infringement*, 328 F. Supp. 513, 518 (J.P.M.L. 1970) (Weigel, J., dissenting) (arguing that to the extent that the Panel considered a potential decision on the merits when determining whether to centralize cases, it “transcend[ed] the limited powers vested in the Panel by Congress”).

³⁴⁵ *Cf. In re ‘East of the Rockies’ Concrete Pipe Antitrust Cases*, 302 F. Supp. 244, 256 (J.P.M.L. 1969) (Weigel, J., concurring) (noting his concerns with the majority's approach, but concluding they were not weighty enough to justify dissenting).

³⁴⁶ See 28 U.S.C. § 1292(b) (2018); see also Solimine, *supra* note 80, at 1199 (“[A] number of the district judges [certifying questions under § 1292(b)] explicitly stated that appellate review would clarify the law and aid in the resolution of other pending cases raising similar issues.”).

³⁴⁷ *Cf. Heyburn, supra* note 35, at 2235 (“[O]ver the past two decades, nearly every one of those decisions has been unanimous. The straightforwardness and unanimity of the Panel's decisions are not because every decision is easy, and this dynamic is not a result of the complete absence of differences among the Panel members.”). It is also possible that the dearth of dissents is because some members of the Panel subscribe to the view once articulated by Justice Holmes that dissents are “useless and undesirable,” especially given the nature of the JPML, the lack of appellate review, and the relatively short opinions. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

³⁴⁸ See *supra* Part IV.B.1 (discussing how appellate review would be reserved for the most challenging and divisive questions).

³⁴⁹ See *supra* Part II.A (explaining how grants or denials of centralization can be dispositive for both plaintiffs and defendants).

ing certification from the JPML, this approach preserves appellate review for the hard cases where appellate review is most likely to be beneficial for the parties because the case could presumably go either way. For these parties, appellate review is very meaningful practically.³⁵⁰ Additionally, allowing appellate review gives litigants another way for them to make their voices heard in an area that often sidelines them.³⁵¹

Finally, although the limited nature of my approach prevents appellate review from being available every time a litigant may want it, the system I propose fully preserves appellate review to resolve disagreements on the JPML and clarify the law. It seems likely that any judge who would be willing to write a dissent would also be willing to certify a question for review. Thus, despite the limited nature of this approach, it fully captures the benefits of resolving disagreements and providing guidance to the JPML.³⁵² These disagreements sometimes go to the very heart of the JPML's power.³⁵³ Thus, appellate review may be justified simply because it would allow the reviewing court to ensure that the JPML is not overstepping its statutory bounds.³⁵⁴

CONCLUSION

This Article is hopefully the first piece in a longer conversation about appellate review of the JPML. There are strong arguments in favor of and against expanding appellate review of the JPML. This proposal aims to strike an appropriate balance between preserving the benefits of expanded appellate review and mitigating the harms. I imagine that others may come to different conclusions about the appropriate balance and perhaps propose different solutions.

As a final comment, my proposed amendments to § 1407 (and expanded appellate review of the JPML in general) may be practically viable. There is certainly momentum for MDL reform as indicated by the Supreme Court's recent

³⁵⁰ See *supra* Part II.A.

³⁵¹ See *supra* Part II.D (discussing how appellate review promotes due process values and increases satisfaction with the justice system even when unsuccessful); Burch & Williams, *supra* note 106, at 1894–95 (discussing the marginalization of MDL litigants); cf. Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 372 (1996) (“In short, these empirical studies conclude that, for litigants in individual cases, process matters; both plaintiffs and defendants describe themselves as caring about it, independent and distinct from the outcome.”).

³⁵² See *supra* Part II.B (discussing recurrent disputes on the JPML and how appellate review could have resolved them).

³⁵³ See *supra* Part II.B.1 (providing examples of disputes on the JPML about the Panel's statutory authority).

³⁵⁴ See Clopton, *supra* note 4, at 1341–42 n.217 (noting that even if a decision is not ultimately reversed, appellate review “could affect JPML behavior or generate useful conversation”); cf. Bradt, *supra* note 11, at 1237 (explaining that “[w]hile the current JPML does a fine job . . . there still needs to be a plausible check on egregious JPML action,” but noting that “[d]eparting from the current mandamus remedy may not be necessary”).

transmittal of proposed Rule of Civil Procedure 16.1 to Congress.³⁵⁵ Although Rule 16.1 mostly deals with case management, there is also an appetite for greater appellate involvement in the MDL process as indicated by the proposals in the MDL Subcommittee³⁵⁶ and a bill passed by the House,³⁵⁷ both of which would have allowed for greater appellate review of some MDLs (but not the JPML).

Although these proposals failed, that was possibly due to their partisan nature. The MDL reforms discussed by the Subcommittee were favored by the defense bar and opposed by the plaintiffs' bar.³⁵⁸ The bill passed by the House was similarly supported by the defense bar.³⁵⁹ Because my proposed amendments would provide possible benefits to both plaintiffs and defendants, both sides could likely support them.³⁶⁰ Perhaps support from both bars could lead to bipartisan support in Congress, satisfying the desire for MDL reform and appellate court involvement with an option more palatable than past proposals.

³⁵⁵ See *supra* note 13 and accompanying text (discussing proposed Federal Rule of Civil Procedure 16.1).

³⁵⁶ See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 245, at 50–52 (discussing the proposals).

³⁵⁷ See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 105(k) (2017) (proposing to expand appellate review of interlocutory orders in MDLs).

³⁵⁸ See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 245, at 50 (“The defense bar has strongly favored an increased opportunity for interlocutory appellate review, particularly for mass tort MDLs. The plaintiffs’ bar has strongly opposed it . . .”).

³⁵⁹ KLONOFF, *supra* note 12, at 353 (explaining that the bill was a product of “[t]he defense bar’s efforts”).

³⁶⁰ See *supra* Part III.A.

