NOTES

TO STAY OR NOT TO STAY: COMPETING MOTIONS IN THE SHADOW OF MULTIDISTRICT LITIGATION

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Multidistrict litigation (MDL) is a procedural mechanism by which the claims of hundreds or even thousands of alleged victims of the same or similar set of wrongs are consolidated before a single federal judge.[1] In other words, it is "something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies."[2] MDL criticism is legion. In more other words, MDLs are a "proverbial 'black hole,' taking in cases with virtually no hope of fair and efficient resolution,"[3] latent with "[s]ystemic pathologies" that call parties' consent to settlement into question,[4] a land where "the ordinary Federal Rules of Civil Procedure apply sporadically, if at all."[5] The list of criticisms goes on, and it is growing. Recent publicity surrounding *In re National Prescription Opiate Litigation*

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1 Thomas Metzloff, *The MDL Vortex Revisited*, JUDICATURE, Autumn 2015, at 36, 37; *see* Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 47 (2007).

2 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, 111 (2015).

3 George M. Fleming & Jessica Kasischke, *MDL Practice: Avoiding the Black Hole*, 56 S. TEX. L. REV. 71, 72 (2014).

4 Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 71 (2015).

5 Bexis, *The Need for Real MDL Rules Will Only Grow More Acute*, DRUG & DEVICE L. (Apr. 15, 2019), https://www.druganddevicelawblog.com/2019/04/the-need-for-real-mdl-rules-will-only-grow-more-acute.html [https://perma.cc/47Q8-VP4T].

(the "Opioid MDL"),[6] an MDL in the Northern District of Ohio involving thousands of claims against opioid manufacturers and distributors for their alleged involvement in the opioid crisis,[7] has triggered a fresh wave of scholarship and public interest in multidistrict litigation. What all this discourse misses is what lies just beyond the boundary of the aggregate proceeding—an issue silently stewing in the transferor courts that, by the time it reaches the Opioid MDL and comes to fruition, is at once at its most detrimental and most hidden by the haze of the MDL frenzy. This Note seeks to change that.

All over the country, plaintiffs are filing actions in state court, alleging boilerplate state law claims against opioid manufacturers and distributors, only to end up stuck in the Opioid MDL—a federal forum—where some have remained stranded for nearly four years. The typical procedure is this: After a case is filed in state court, defendants remove the action to federal court and contemporaneously file a notice of potential tag-along action with the Judicial Panel on Multidistrict Litigation ("JPML" or "Panel"). The Panel is tasked with determining whether to transfer and consolidate the action with an ongoing MDL, and the notice alerts the Panel to a case that might meet the transfer criteria. If the case shares "one or more common questions of fact" with the ongoing MDL—a notoriously "low bar"—then the Panel will issue a conditional transfer order tagging the action for transfer and consolidation.[8] Assuming plaintiff wishes to remain in the state court forum of her initial choosing, plaintiff files a motion to remand the action back to state court before the action is transferred on the ground that federal subject-matter jurisdiction is lacking. Immediately after, and sometimes before an action is even tagged by the Panel, defendants request a stay of proceedings.[9]

The motion to stay is a request that the judge sit tight and refrain from addressing plaintiff's motion to remand[10] given the claimed

6 *In re* Nat'l Prescription Opiate Litig., No. 17-md-02804 (N.D. Ohio filed Dec. 8, 2017).

7 *See* Transfer Order, *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 1375 (J.P.M.L. 2017) (transferring cases to the Northern District of Ohio).

8 Morris A. Ratner, Foreword, *"MDL Problems" – A Brief Introduction and Summary*, 37 REV. LITIG. 123, 123 (2018) (quoting 28 U.S.C. § 1407 (2018)).

9 This practice has become so commonplace that some law firms have put out practice guides detailing how best to achieve the ultimate goal of making it to the MDL. *See, e.g.*, Brandon D. Cox & Courtenay Youngblood Jalics, *Navigating the Muddy Waters of an MDL: Strategies to Get (and Keep) Your Case in Federal Court*, DRI: THE VOICE (Apr. 29, 2015), https://www.tuckerellis.com/news_publications/publications-759 [https://perma.cc/C4UL-6VGR].

10 More formally, a stay of proceedings "is defined as the act of stopping or arresting a judicial proceeding, by the order of a court or judge. It is a suspension of a case . . . ." 1A C.J.S. Actions § 308, Westlaw (database updated Aug. 2021) (internal footnote omitted).

likelihood that the action will soon be transferred to an ongoing MDL where all pending motions can be resolved by the MDL judge. The initial district judge must now grapple with dueling motions to remand or to stay, all in the shadow of likely MDL consolidation. If the judge grants the stay, the action will remain on the federal docket where the Panel is free to sweep plaintiff off to some faraway MDL forum. The JPML has made clear that it will neither assess jurisdictional issues nor block a transfer when remands are left unresolved.

More often than not, judges are granting the stay without regard for the merits of the remand or notwithstanding the recognition of a potentially fatal jurisdictional flaw. The JPML transfers plaintiff's action to a faraway MDL proceeding, and her remand is put on hold until the MDL judge eventually resolves it. Her remand might remain on hold for years. Plaintiff's claim is now one of potentially thousands—her remand motion likely one of tens of thousands of motions—pending before the single federal judge presiding over the MDL. And if plaintiff has the misfortune of ending up in the Opioid MDL, a substantial wait is certain. There, her remand will be met with the jurisdictional brick wall of a moratorium on all remand filings.

On December 14, 2017, the judge presiding over the Opioid MDL issued a "moratorium on all substantive filings" except those expressly authorized therein.[11] That moratorium prohibits nongovernmental parties from making motions regarding requests that their cause be remanded back to state court. As of September 9, 2021, nearly four years later, the moratorium still stands.[12]

What this means for our unlucky plaintiff, and any number of cases currently pending before the Opioid MDL, is that three judicial entities—the transferor judge, the JPML, and the MDL judge—have declined to address her jurisdictional argument. It means that any number of cases currently pending before the Opioid MDL may have spent nearly four years stranded before a federal court that does not have the power to ultimately decide the case and issue relief.

The harm of what will hereinafter be referred to as "the Opioid outcome," that is, the stranding of nonfederal cases in a federal MDL,

11 Response in Opposition to Motion for Leave to File Motion for Remand Procedure at 1, *In re* Nat'l Prescription Opiate Litig., No. 17-md-02804 (N.D. Ohio Aug. 10, 2020), ECF No. 3604.

12 This assertion is based on a review of publicly available court orders. *See MDL 2804 National Prescription Opiate Litigation*, U.S. DIST. CT. FOR THE N. DIST. OF OHIO, https://www.ohnd.uscourts.gov/mdl-2804 [https://perma.cc/FD8F-HDBB]. At least one court filing from a related case recently transferred and consolidated with the Opioid MDL confirms the persistence of the moratorium as of July 28, 2021. *See, e.g.*, Memorandum in Support of Plaintiffs' Emergency Motion to Remand at 11, Erie Cnty. Med. Ctr. Corp. v. Teva Pharms. USA, Inc., No. 21-cv-00826 (W.D.N.Y. July 28, 2021).

reaches every corner of the legal system. A plaintiff's Due Process rights are offended when she is stripped of her choice of forum and the opportunity to have her jurisdictional argument heard in a reasonable amount of time in the more local federal court her cause was originally removed to. It means that while she waits, she will have to comply with and bear the cost of an MDL judge's pretrial orders. Adding insult to injury is the risk that repeat defendants are taking strategic advantage of the opportunity to remove actions on the most loose of jurisdictional bases with an eye toward burying a claim in an MDL. This means more actions are removed to federal court, which means more removals, remands, and stays are added to the already overworked transferor judges' to-do lists. It means more cases aggregated in MDLs and more motion practice taxing the already overworked MDL judge. It means the MDL judge must resolve a jurisdictional issue that could have been resolved earlier, on a less crowded docket. It means the squandering of judicial resources.

This outcome sounds in doctrinal disaster for anyone familiar with the understanding of subject-matter jurisdiction as the foremost limitation on the power of a court. At the Supreme Court, in "law school classrooms, courtroom chambers, congressional buildings, and law offices," the term jurisdiction is "bandied about" as the ultimate limitation on judicial power.[13] Decades of Supreme Court jurisprudence insisting that subject-matter jurisdiction *is* judicial power, that in every case, the "first and fundamental question is that of jurisdiction"[14] and that "[w]ithout jurisdiction the court cannot proceed at all in any cause"[15] would seem to outright prohibit the Opioid outcome from occurring. Without jurisdiction, how can three federal judicial entities (the transferor judge, the JPML, and the transferee judge) have kept hold of an action for so long?

Enter, inherent authority. Inherent authority enables courts "to control and direct the conduct of civil litigation without any express authorization in a constitution, statute, or written rule of court."[16] Inherent authority is what authorizes courts to take steps toward assessing their own jurisdiction before it is verified, like by ordering jurisdictional discovery. It is what allows courts to circumvent the issue of subject-matter jurisdiction altogether in favor of some alternative

13 Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 620 (2017).

14 Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884).

15 Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 N.W. L. REV. 1207, 1207 (2001) (quoting *Ex parte* McCardle (*McCardle II*), 74 U.S. (7 Wall.) 506, 514 (1868)).

16 Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 GA. L. REV. 411, 428 n.68 (2020) (quoting Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1805 (1995)).

issue, like personal jurisdiction or forum non conveniens.[17] Inherent authority is the space between jurisdiction and power which might legitimize each step toward the Opioid outcome—which *might* transform what looks like judicial failure into the unfortunate reality of modern litigation.

But answering the question of whether it does is no simple task. The inherent power is notoriously broad and amorphous.[18] Questions surrounding its source and scope have "never been answered satisfactorily"[19] and have "bedeviled commentators for years."[20] As a result, "there is no clear standard establishing when courts may legitimately invoke their inherent powers."[21] What is more, the doctrine on inherent authority's ability to manage the process of ongoing litigation and the power's relationship to positive procedural law are the least developed and most convoluted subspecies of inherent authority doctrine.[22]

This Note attempts to bring just enough clarity to inherent authority doctrine to answer the question of whether and at what point something went wrong—whether any power beyond the blurry boundaries of inherent authority was exerted, or any of its convoluted doctrine misapplied—to produce the Opioid outcome. It contributes to the literature by (i) calling much needed attention to the possibility that any number of cases transferred to a multidistrict proceeding are improperly positioned on the federal docket—an issue not yet addressed by scholarship to date;[23] (ii) unearthing and investigating

17 *See* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 54 (2001).

18 *See* Cong. Rsch. Serv., *Art.III.S1.1.1.2.1.1 Inherent Powers of Federal Courts: Procedural Rules*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIII_S1_1_1_2_1_1/#ALDF_00003611 [https://perma.cc/H8P9-RLAB].

19 Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 738 (2001) ("Federal judges exercise massive powers that have not been granted specifically by the Constitution or an Act of Congress. What is the source and scope of such inherent authority? This fundamental constitutional question has never been answered satisfactorily."). Blurring the bounds of inherent authority further is the issue of how inherent authority interacts with positive procedural law, an issue that remains "perhaps the most vexing question today concerning the limits on a court's inherent authority to manage civil litigation." Meador, *supra* note 16, at 1817.

20 James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 SEDONA CONF. J. 613, 619 (2016) (quoting Eash v. Riggins Trucking, Inc., 757 F.2d 557, 561 (3d Cir. 1985) (en banc)).

21 Joseph J. Anclien, *Broader is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. SURV. AM. L. 37, 41–42 (2008). The Supreme Court itself has confessed that it "has never precisely delineated the outer boundaries of a district court's inherent powers." Dietz v. Bouldin, 136 S. Ct. 1885, 1891 (2016).

22 *See infra* notes 44–46 and accompanying text.

23 Only one piece could be identified that briefly discusses the jurisdictional issues posed by the Opioid MDL, or any MDL for that matter. That article does not mention the

the district court decisions and current approaches to inherent authority that have produced the Opioid outcome; (iii) concluding that those approaches are inconsistent with inherent authority doctrine; and (iv) proposing a solution that both corrects a systemic misapplication of law at the district court level and has the potential to prevent the Opioid result from ever accruing. Its central argument is that the opportunity and obligation to avoid the Opioid outcome arises at the point of the stay.

For district judges facing dueling motions to remand or stay an action pending likely MDL transfer, the threshold question before the court is which motion to address first. Should the judge resolve the motion to remand or the request to stay? This threshold question will hereinafter be referred to as "the ordering inquiry."

At present, many district judges are wholly overlooking the ordering inquiry. Failing to recognize it as a discrete and threshold issue, judges de facto resolve the stay first and apply the doctrine which would typically control—broad discretion. When judges do recognize the ordering inquiry, attempts to resolve it vary. But in every scenario, the stay and the factors used to decide it overshadow and ultimately decide the ordering inquiry. Given the wide breadth of discretion that governs stays, this means that requests to stay are overwhelmingly granted notwithstanding the existence of a potentially fatal jurisdictional issue that is decidedly left undecided.

This Note argues that the ordering inquiry must be identified and *treated* as the discrete and threshold issue that it is. As such, the appropriate doctrine for resolving the ordering inquiry is *not* the same doctrine which would apply to a motion to stay. Rather, this Note argues that what must guide the ordering inquiry is Supreme Court jurisprudence on jurisdictional resequencing—a body of caselaw not yet utilized even by the courts that recognize the ordering inquiry as a separate question from the stay. Jurisdictional resequencing doctrine is the subset of inherent authority doctrine that allows courts to resolve certain threshold issues before the issue of subject-matter jurisdiction.

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removal, remand, and stay process that precedes transfer, and suggests that the only solution to the MDL purgatory is "lifting the moratorium and beginning a quick, strategic remand procedure." Lana Levin, Shelly Sanford & Frank Guerra, *When MDL Judges Overreach: Opioid Cases, Without Jurisdiction, Held in Judicial Purgatory*, WATTS GUERRA (June 30, 2020), https://wattsguerra.com/when-mdl-judges-overreach-opioid-cases-without-jurisdiction-held-in-judicial-purgatory/ [https://perma.cc/TT49-2VHS]. While I do not disagree that lifting the mortarium may be wise (and possibly required), this Note undertakes a more thorough investigation of the mechanisms preceding the result and assesses those mechanisms in search of a doctrinal misstep. Moreover, I recommend an alternative solution here that resolves the problem when it first arises at the point of the stay. No literature could be found on the jurisdictional issues posed by the removal, remand, and stay process preceding MDL transfer.

Drawing on the work of Professors Idleman and Elliott, this Note argues that courts exercise the power of "jurisdictional resequencing"[24] when they choose to address the stay before the remand, and that the jurisdictional resequencing power cannot legitimately be exercised to address the stay first. Controlling Supreme Court jurisprudence, once properly identified and applied, forbids it. Having reached this conclusion, the Opioid outcome can be avoided from the outset without the need to resolve related issues regarding the JPML's transfer and MDL judge's moratorium.

This Note proceeds in three parts. Part I provides a basic overview of the inherent power, with an emphasis on the interaction between inherent power and jurisdiction. In Part II, it reintroduces the Opioid outcome and describes the mechanisms producing it by summarizing district courts' varied approaches to resolving competing motions to remand or stay. In Part III, it identifies the flaws of those approaches and proposes an alternative solution, applying jurisdictional resequencing doctrine to the ordering inquiry and concluding that the remand must go first.

I. FEDERAL JUDICIAL POWER

The judicial power is generally understood to at least encompass "the power to decide, in accordance with law, who should prevail in a case or controversy."[25] The power to render that decision "consists of applying pre-existing law to the facts in a particular case, then rendering a final, binding judgment."[26] Yet the Supreme Court has long recognized that the power of a federal court goes beyond that core adjudicatory authority of rendering judgment over established Article III Cases and Controversies.[27] Federal courts possess "inherent authority" to do something more.[28]

How much more—that is, the source and scope of inherent authority—is a question that has "bedeviled commentators for years."[29]

24 Idleman, *supra* note 17, at 3.

25 Young v. United States *ex rel.* Vuitton et Fils S. A., 481 U.S. 787, 816 (1987) (Scalia, J., concurring in judgment).

26 Pushaw, *supra* note 19, at 844.

27 Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 334 (2006) (citing Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1468–73 (1984)).

28 Barrett, *supra* note 27, at 335.

29 Francis & Mandel, *supra* note 20, at 619 (quoting Eash v. Riggins Trucking, Inc., 757 F.2d 557, 561 (3d Cir. 1985) (en banc)).

Inherent authority is nowhere precisely defined,[30] and "there is no clear standard establishing when courts may legitimately invoke their inherent powers."[31] At best, "certain general principles reflecting the current state of the law can be derived"[32] which by no means reflect calcified, longstanding doctrine.

A. Inherent Authority

Inherent authority is a power deriving from history and necessity[33] that enables courts "to control and direct the conduct of civil litigation without any express authorization in a constitution, statute, or written rule of court."[34] For example, federal courts rely on inherent authority "to do those things necessary to develop an accurate and relevant factual record—including such things as managing discovery, compelling testimony, appointing experts, and excluding and admitting evidence."[35] Inherent authority authorizes those actions because an accurate and relevant factual record is necessary to the execution of the core judicial function of adjudication.[36] In addition, inherent authority has long been understood to encompass those actions necessary to the preservation of the integrity of the court, enabling courts to thwart abusive or vexatious behavior through the issuance of sanctions and contempt orders.[37]

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30 Anclien, *supra* note 21, at 41–42. The Supreme Court itself has confessed that it "has never precisely delineated the outer boundaries of a district court's inherent powers." Dietz v. Bouldin, 136 S. Ct. 1885, 1891 (2016).

31 Anclien, *supra* note 21, at 41; Pushaw, *supra* note 19, at 822 (explaining that inherent authority is "not directly address[ed]" by "[t]he Constitution's words and legislative history" and is the outgrowth of "general principles of constitutional structure and theory and . . . early congressional and judicial precedent"). One oft-cited definition from Daniel Meador's influential article on the power describes it as "the power[] possessed by a court simply because it is a court; it is an authority that inheres in the very nature of a judicial body and requires no grant of power other than that which creates the court and gives it jurisdiction." Meador, *supra* note 16, at 1805.

32 Francis & Mandel, *supra* note 20, at 643.

33 Idleman, *supra* note 17, at 49–51 ("[T]here are essentially two benchmarks—history and necessity—by which one can measure the legitimate recognition of inherent powers."); see also Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) ("These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962))).

34 Meador, *supra* note 16, at 1805.

35 Barrett, *supra* note 27, at 335 (citing Pushaw, *supra* note 19, at 742).

36 *Id.* at 334–35.

37 *See* Meador, *supra* note 16, at 1805–06.

While early invocations of the power described it as limited by necessity in a strict sense (i.e., indispensability),[38] the necessity 'requirement' is doubtlessly a "phantom constraint."[39] It has never been "mentioned, much less applied, . . . in the context of inherent procedural authority."[40]

Instead, courts often employ inherent authority whenever it might be deemed "highly useful in the pursuit of a just result."[41] When an invocation of inherent authority is challenged, its legitimacy is tested using a mix of history—analogizing to previously approved of exercises of inherent authority—and necessity in a loose sense (i.e., convenience), with the weight given each factor, and the possibility that each could be sufficient standing alone, left unclear.[42] In practice, that lack of clarity translates to broad discretion.[43] As Professor Pushaw explains: "[F]ederal judges have repeatedly cited 'inherent powers' as a catch-phrase to rationalize a wide range of actions that are not essential to (indeed, that often seem antithetical to) the proper exercise of judicial authority."[44]

The Federal Rules of Civil Procedure almost never limit the breadth of this authority. Affording district judges more discretion

38 Pushaw, *supra* note 19, at 784–85, n. 256 ("[A]lthough federal judges are 'limited' by Article III, they can exercise those ancillary powers indispensable to fulfilling their enumerated ones (and develop a common law regarding those powers).").

39 Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 879 (2008); *see also* Anclien, *supra* note 21, at 41–42 ("The Supreme Court's jurisprudence is schizophrenic: it sometimes states that inherent powers are available only when they are indispensable to the discharge of the judicial power, yet it often authorizes their use in less pressing situations.").

40 Barrett, *supra* note 39, at 882. In Supreme Court Justice Amy Coney Barrett's influential 2008 article on procedural authority, Justice Barrett concludes that "the procedures [the Supreme Court] has approved as falling within [inherent] authority go far beyond what is strictly necessary to the decision of cases. To the extent that federal courts possess inherent procedural authority, no necessity limit applies to it." *Id.* (internal footnote omitted). The necessity limit, she says, functions only as a guide for the judiciary's authority to respond to contempt and otherwise impose sanctions without edging too near "Congress's exclusive power to define federal criminal jurisdiction." *Id.* at 881.

41 Eash v. Riggins Trucking, Inc., 757 F.2d 557, 563 (3d Cir. 1985) (en banc).

42 Idleman, *supra* note 17, at 49–51; *see also* Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 2 (2011) ("The nature of the inherent powers of federal courts—whether they are constitutional or not, whether Congress can curtail some or all of them, and how far they extend—has bedeviled courts and commentators for years." (internal footnote omitted)); Idleman, *supra* note 17, at 4–5 ("[U]ndertheorized and analytically undeveloped nature of the doctrine renders its future application uncertain, thereby inviting unpredictability, inconsistency, and even abuse."); Pushaw, *supra* note 19, at 739 ("The Court has never explained how the Constitution simultaneously limits federal courts (especially as compared to Congress), yet authorizes them to exercise broad and virtually unreviewable inherent authority.").

43 *See supra* note 42 and accompanying text.

44 Pushaw, *supra* note 19, at 738.

over procedure was one of the primary aims of the Federal Rules.[45] In light of this, the Court has repeatedly approved of the use of inherent authority to supplement the Federal Rules so long as the rules are not interpreted "to prohibit the particular exercise of inherent authority."[46] It is exceedingly rare that a rule is interpreted as prohibiting a particular exercise of inherent authority.[47] Instead, the rule is treated as either inapplicable or applicable but nevertheless permissive of the continued invocation of inherent authority as a supplemental source of procedural power.[48]

If a rule is interpreted to explicitly prohibit a particular exercise of inherent authority, decades' worth of unresolved and underdeveloped doctrine come into play. Both in academic discourse and across Supreme Court jurisprudence, there is a lack of consensus over Congress's power to control the use of inherent authority.[49] What is more, much of that dialogue is inapposite to inherent authority's use for case management.

> [T]he overwhelming majority of cases dealing with inherent judicial authority are those asserting either a semi-punitive power or the power to control those who serve the court. By comparison, the cases in which the Supreme Court has recognized an inherent power to prescribe procedural rules or otherwise manage the process of litigation are relatively few.[50]

As a consequence, "[t]he relationship between written procedural rules and inherent judicial authority is perhaps the most vexing question today concerning the limits on a court's inherent authority to manage civil litigation."[51] At this point, "[t]he analytical confusion surrounding claims of nonexpress judicial authority, including

45 *See id.* at 763 n.122 ("The reformers who led the movement for uniform Federal Rules of Civil Procedure successfully focused on enlarging the discretion of federal judges . . . .").

46 Meador, *supra* note 16, at 1817.

47 Inherent authority is off the table only when a federal rule is "clearly applicable" to the particular factual circumstance giving rise to the court's inclination to rely on inherent authority, *see* Barton, *supra* note 42, at 47–49, and when the rule clearly "mandate[s] a specific procedure *to the exclusion of others*." Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311, 320 (2010) (quoting G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989)); *see also* Thomas v. Arn, 474 U.S. 140, 148 (1985).

48 *See* Jordan, *supra* note 47, at 316–17 nn.25–26; Barton, *supra* note 42, at 53 (confirming that, in cases in which a congressional act applies and the Court nonetheless allows an exercise of inherent authority, "the Court is always careful to note that the decision either occupies space untrammeled by Congress or that congressional intent to displace inherent authority is unclear").

49 Francis & Mandel, *supra* note 20, at 619.

50 Barrett, *supra* note 39, at 846.

51 Meador, *supra* note 16, at 1817.

authority over procedure, . . . has persisted for so long that it would be difficult, if not impossible, to untangle."[52]

The lack of doctrinal certainty surrounding the potential for written rules to limit inherent authority, the historical practice of avoiding a conflict with the rules, and the broad discretion afforded by the low bar of history and pseudo-necessity has led to increased reliance on and an expansion of inherent authority. To list only a sampling, inherent authority now empowers courts to:

- "order[] consolidation of cases during or before trial";[53]
- hear a motion in *limine*;[54]
- "appoint persons unconnected with the court to aid judges in the performance of specific judicial duties";[55]
- order jurisdictional discovery to establish the court's jurisdiction over the matter;[56]
- stay proceedings pending the resolution of a separate cause raising related issues;[57]
- "rescind an order discharging a jury and recall the jurors for further deliberations where the court discovers an error in the jury's verdict";[58]
- "issue orders and sanction noncompliance with those orders";[59]
- "regulate the conduct of the members of the bar" by disbarment, suspension from practice, or reprimand (including monetary sanctions) "for abuse of the judicial process";[60]
- "dismiss a case for failure to prosecute";[61] and

52 Barrett, *supra* note 39, at 851.

53 Anclien, *supra* note 21, at 44–45.

54 Cong. Rsch. Serv., *supra* note 18.

55 *Ex parte* Peterson, 253 U.S. 300, 312 (1920).

56 S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 497 (2010) ("Jurisdictional discovery is not explicitly discussed in the Federal Rules of Civil Procedure. Instead, the practice of taking limited discovery to establish whether jurisdiction is proper has been judicially created through reliance on (1) the broad principles of discovery established in the Federal Rules of Civil Procedure in 1938 and expanded upon in subsequent years and (2) courts' inherent power to establish their own jurisdiction.").

57 Cong. Rsch. Serv., *supra* note 18; *see also* Landis v. N. Am. Co., 299 U.S. 248, 254 (1936).

58 Francis & Mandel, *supra* note 20, at 642 (citing Dietz v. Bouldin, 136 S. Ct. 1885, 1892, 1897 (2016)).

59 Strong, *supra* note 56, at 504.

60 Eash v. Riggins Trucking, Inc., 757 F.2d 557, 561–64 (3d Cir. 1985) (en banc).

61 *Id.* at 561.

- "declare[] attorneys who choose to be absent from docket call 'ready for trial,' even though this may lead ineluctably to the entry of a default judgment."[62]

The action of relevance here is the stay of proceedings. The seminal case recognizing a court's inherent authority to stay proceedings is *Landis v. North American Co.*[63] In *Landis*, the respondent sued to enjoin enforcement of a statute on the ground that it was unconstitutional.[64] The petitioner successfully moved to stay proceedings pending decision in another suit to restrain enforcement of that same statute until that parallel suit either rendered decision on the validity of the act or was terminated.[65] The issue before the Supreme Court was the lower court's power to stay proceedings.[66] The Court upheld the lower court's power to issue the stay, holding that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[67] Since *Landis*, the broad discretion courts possess to "control the progress of the cause so as to maintain the orderly processes of justice" has been reaffirmed time and again.[68] Nowadays, "[a] variety of circumstances may justify a district court stay,"[69] with factors like the balance of hardships, and economy of time, money, and effort guiding the stay inquiry.[70] While commonly issued "pending the resolution of a related case in another court," "[a] stay sometimes is authorized

62 *Id.* (quoting Williams v. New Orleans Pub. Serv., Inc, 728 F.2d 730, 732 (5th Cir. 1984)). This list is not comprehensive and, given the ongoing lack of clarity surrounding the doctrine, is likely to lengthen.

63 299 U.S. 248 (1936).

64 *Id.* at 249.

65 *Id.* at 250, 253.

66 *Id.* at 249.

67 *Id.* at 254. Though it had the power to issue the stay, the Court ultimately held that the lower court had exceeded the limits of its discretion regarding the duration of the stay. *Id.* at 258. It reversed judgment and remanded the case. *Id.* at 259.

68 Enelow v. N.Y. Life Ins. Co., 293 U.S. 379, 382 (1935); *see, e.g.*, Clinton v. Jones, 520 U.S. 681, 706–07 (1997) (affirming district court's "broad discretion to stay proceedings as an incident to its power to control its own docket" but holding that court abused that discretion); Rhines v. Weber, 544 U.S. 269, 277 (2005) (discussing power to stay proceedings in the context of post-conviction relief). "Inherent in the district court's power to control the disposition of civil matters appearing on its docket is the power to stay proceedings when judicial economy or other interests so require." Barker v. Kane, 149 F. Supp. 3d 521, 525 (M.D. Pa. 2016) (discussing power to stay civil proceeding pending resolution of related criminal proceeding).

69 Trujillo v. Conover & Co. Commc'ns, Inc., 221 F.3d 1262, 1264 (11th Cir. 2000).

70 *Id.* at 1265.

simply as a means of controlling the district court's docket and of managing cases before [it]."[71]

Inherent authority's versatility and breadth have led to increased reliance on inherent authority in the context of complex civil litigation. Because complex cases, like multidistrict proceedings and class actions, often pose unique challenges that traditional procedural and remedial frameworks are ill-equipped to manage, judges presiding over complex cases are particularly inclined to craft ad hoc rules that bring order to the docket.[72] To do so, they rely on inherent authority—citing it as a one-size-fits-all justification to "ensure the orderly, expeditious, and efficient administration of justice."[73] Judges in complex cases routinely rely on inherent authority to issue case management orders, appoint a counsel structure for aggregated proceedings, take an active role in supervising discovery, and require that parties attend pretrial conferences.[74]

The expansion of inherent authority in the context of complex civil litigation presents at least two unique difficulties. First, the stakes are high. An attempt to bring order to a complex case often has outcome-determinative effects that result in a judge taking on a less passive role than the American civil justice system is accustomed to.[75] In an effort to regain control over mass disputes, judges are "shed[ding] their . . . passive role of acting only at the behest of parties."[76] This raises concerns over Due Process impartiality and fairness,[77] and separation of powers.[78] If the critics' concerns are warranted and reliance on inherent authority comes at a great cost to the civil justice system, then the need for meaningful guidance and

71 *Id.* at 1264.

72 *See* JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND ITS ALTERNATIVES, 291–94 (2d ed. 2002).

73 Pushaw, *supra* note 19, at 760.

74 *Id.* at 763.

75 TIDMARSH & TRANGSRUD, *supra* note 72, at 8 ("Many of the purported solutions to complex litigation have required the abandonment of the passive, reactive judge of adversarial theory . . . .").

76 Pushaw, *supra* note 19, at 762 (criticizing modern exercises of inherent authority as going beyond the proper scope of the judicial power).

77 *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (criticizing modern case management); TIDMARSH & TRANGSRUD, *supra* note 72, at 289 ("The combination of broad inherent authority and a broad array of techniques to resolve litigation creates the risk that justice will vary substantially from courtroom to courtroom."); *see also supra* notes 2–5 and accompanying text. *But see* Meador, *supra* note 16, at 1819–20 (praising federal judges' efforts to improve efficiency through broad use of inherent powers).

78 *See* Pushaw, *supra* note 19, 783–84 ("[The Court] has never explained how its massive expansion of inherent authority can logically coexist with other basic constitutional principles it has long recognized.").

limitation whenever inherent authority is at play is crucial. Second, given the complexity and underdevelopment of inherent authority doctrine, particularly in light of the dubious interaction between inherent powers and positive procedural law, finding meaningful guidance and limitation is exceptionally difficult. Absent support from the academic community, district court judges are not likely to limit themselves when it comes to a power that puts almost anything on the table and promises greater control over litigants and cases that might otherwise spiral.

That is not to say that inherent authority is always employed as a means toward the end of expanding judicial power. On the other side of the ledger, inherent authority is a crucial tool for "ensuring that federal courts act *within* their limited and enumerated powers."[79] In this way, inherent authority permits an expansion of the means by which a court may reach a restraining end.[80] To achieve that end, inherent power authorizes actions which are necessary to "assess whether a particular dispute is, among other things, a justiciable case or controversy involving proper subject matter."[81] When inherent authority works toward a restraining end, it "operate[s] in the absence of verified subject-matter jurisdiction."[82] The next part of this Note more closely investigates the relationship between inherent authority and jurisdiction.

B. Jurisdiction and Restraining Inherent Authority

Because federal courts possess limited and enumerated powers, their jurisdiction is limited.[83] But what it means to be without jurisdiction is not so cut and dry.[84] At minimum, the absence of

79 Idleman, *supra* note 17, at 59 (emphasis added).

80 *See* Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725, 742–45 (2009). Though Elliott does not discuss inherent authority by name, her central thesis is that Justice Ginsburg's use of inherent authority in *Ruhrgas* was an exercise of judicial restraint, and that judicial restraint can explain what look like expansions of judicial power via inherent authority. *Id.*

81 Idleman, *supra* note 17, at 59.

82 *Id.* at 56.

83 *Id.* at 42 ("The federal judiciary, like the federal government as a whole, 'is one of delegated and limited powers.' What this means for the federal courts is that they 'are not courts of general jurisdiction,' but rather of limited jurisdiction, and 'have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.'" (internal citations omitted) (first quoting *Ex parte* Merryman, 17 F. Cas. 144, 149 (C.C. Md. 1861) (No. 9487); and then quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986)).

84 *Id.* at 56.

jurisdiction is not equivalent to the absence of judicial power.[85] Inherent authority is conclusive evidence of this—it allows a court to take limited action in the absence of subject-matter jurisdiction.[86] But this has not stopped the Supreme Court and lower federal courts from repeatedly using the terms "power" and "jurisdiction" interchangeably.[87]

The characterization of jurisdiction as power is the result of the misleadingly strong language in cases establishing the "jurisdiction first" approach.[88] The jurisdiction first approach is the Supreme Court's historical and (at least rhetorically) continued insistence that federal courts address and resolve issues of subject-matter jurisdiction before doing just about anything else.[89] Professor Fitzgerald explains that

> [a]s early as 1868, and as recently as 1999, the Supreme Court has always declared that subject matter jurisdiction . . . is an absolutely necessary precondition to the exercise of judicial power by Article III courts: "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[90]

The jurisdiction first approach is the heart of *Steel Co. v. Citizens for a Better Environment*.[91] In *Steel Co.*, the Court repudiated the practice of hypothetical jurisdiction, holding that an issue of subject-matter jurisdiction (in that case, standing) may not be ignored in favor of an easier resolution on the merits which would itself result in dismissal.[92]

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85 *Id.* at 47 (noting jurisdiction is "[m]ore than a mere synonym" for the judicial power).

86 *Id.* at 57.

87 Dodson, *supra* note 13, at 620–21. As Professor Dodson explains, the three most common ways that jurisdiction is characterized are "jurisdiction as basic power or authority, jurisdiction as a defined set of effects, and jurisdiction as positive law." *Id.* at 626–27. As recently as 2015 the Court invoked all three characterizations, putting clarification of the term on hold for the time being. *Id.* at 632–33 (citing United States v. Wong, 135 S. Ct. 1625 (2015)).

88 Fitzgerald, *supra* note 15, at 1207; *see also* Special Invs., Inc. v. Aero Air, Inc., 360 F.3d 989, 994–95 (9th Cir. 2004) (recognizing the jurisdiction first rule).

89 *See* Fitzgerald, *supra* note 15, at 1207; Dodson, *supra* note 13, at 623–24 (tracing the Court's treatment of jurisdiction and providing examples of the Court's strong language when describing jurisdiction as power). "[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception . . . . On every writ of error or appeal, the first and fundamental question is that of jurisdiction . . . ." *Id.* (alterations in original) (quoting Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884)).

90 Fitzgerald, *supra* note 15, at 1207 (internal citations omitted) (quoting *Ex parte* McCardle (*McCardle II*) 74 U.S. (7 Wall.) 506, 514 (1868)).

91 523 U.S. 83, 101 (1998).

92 *Id.* at 101–02, 109–10.

To do so, Justice Scalia said, would be to "offend[] fundamental principles of separation of powers."[93] In so reasoning, Justice Scalia reaffirmed the jurisdiction first approach through the equation of jurisdiction and power: "For a court to pronounce upon the [merits] . . . when it has no jurisdiction to do so is, *by very definition*, for a court to act ultra vires."[94] Over and over, the Court has reinforced the absolute nature of the jurisdictional inquiry: it is *the* threshold question in every federal case.[95]

But as inherent authority has expanded, the jurisdiction first approach has yielded.[96] This yielding is traceable to two subsets of inherent authority caselaw—both examples of inherent authority in a restraining sense.

First, the Supreme Court has recognized a "limited power over the parties to decide whether jurisdiction is proper."[97] This authority—often called "jurisdiction to determine its own jurisdiction"[98]—is an example of inherent power as a means to a restraining end.[99] Jurisdiction to decide jurisdiction allows a federal court to engage in a broad range of actions in service of its jurisdictional inquiry. Courts may "issue orders and sanction non-compliance with those orders,"[100] order jurisdictional discovery,[101] stay proceedings pending the resolution of a separate cause raising related issues,[102] pass on the constitutionality and applicability of statutes purportedly stripping the court of its jurisdiction,[103] and relatedly,

93 *Id.* at 94.

94 *Id.* at 101–02 (emphasis added).

95 *See* Idleman, *supra* note 17, at 24; Dodson, *supra* note 13, at 623.

96 *See* Sherri S. Rich, *The Yielding Jurisdictional Hierarchy: Removal Proceedings After* Ruhrgas AG v. Marathon Oil Co., FED. LAW., Aug. 2004, at 34, 35.

97 Strong, *supra* note 56, at 504 (2010).

98 *See, e.g.*, *id.*; United States v. Ruiz, 536 U.S. 622, 628 (2002) ("[I]t is familiar law that a federal court always has jurisdiction to determine its own jurisdiction."). Note how this phrasing appears to treat the first use of 'jurisdiction' as synonymous with power.

99 Idleman, *supra* note 17, at 57 ("[T]his protojurisdictional form of jurisdiction is ordinarily conceptualized as an inherent power, and rightly so given the absence of an empowering constitutional or statutory provision.").

100 Strong, *supra* note 56, at 504.

101 *Id.* at 497 ("Jurisdictional discovery is not explicitly discussed in the Federal Rules of Civil Procedure. Instead, the practice of taking limited discovery to establish whether jurisdiction is proper has been judicially created through reliance on (1) the broad principles of discovery established in the Federal Rules of Civil Procedure in 1938 and expanded upon in subsequent years and (2) courts' inherent power to establish their own jurisdiction.").

102 Landis v. N. Am. Co., 299 U.S. 248, 254 (1936).

103 Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2113 n.39 (2009) ("[R]esolving the 'threshold' jurisdictional question in jurisdiction-stripping cases necessarily involves resolving constitutional challenges to statutes purportedly precluding jurisdiction."); *see also, e.g.*,

"decide whether the affected litigants have substantive rights before deciding whether the physical or substantive preclusion of judicial review is constitutional,"[104] all in service of ultimately assessing whether the court has jurisdiction to issue relief.

The second category of actions a court may take before establishing its subject-matter jurisdiction are those related to the ordering of non-merits based issues. This body of caselaw empowers a court to resolve some alternative threshold issue before and in lieu of a challenge to the court's subject-matter jurisdiction, "sidestep[ping] entirely the subject-matter jurisdiction question."[105] In other words, it empowers a departure from the jurisdiction first approach. The power to depart from the jurisdiction first approach is what Professor Idleman calls the "jurisdictional resequencing" power.[106] As Idleman elucidates, "the prerogative of a court to resequence threshold inquiries is indeed a form of power, particularly when exercised against a background understanding, rooted in both precedent and theory, that courts should address subject-matter jurisdiction first."[107] The jurisdictional resequencing power is distinguishable from the power exerted when a choice is made either way and when the case is ultimately dismissed.[108] In other words, power is exerted when the question is asked—when the option to depart from the default of jurisdiction first is opened.

That opening is not always available. In the first case of the jurisdictional resequencing trilogy of *Steel Co.*, *Sinochem*, and *Ruhrgas*,[109] the Supreme Court established that jurisdictional resequencing is not available to reach and resolve even an easily resolved merits-based issue which would itself result in dismissal.

The only two Supreme Court-recognized threshold grounds upon which a court may resolve and dismiss a case before and without

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Torres de la Cruz v. Maurer, 483 F.3d 1013, 1018 (10th Cir. 2007) ("[A]s an Article III court, we have inherent jurisdiction 'to determine whether [a] jurisdictional bar applies.'" (quoting Latu v. Ashcroft, 375 F.3d 1012, 1017 (10th Cir. 2004)).

104 Vladeck, *supra* note 103, at 2113.

105 Idleman, *supra* note 17, at 3.

106 *Id.*

107 *Id.* at 40.

108 *Id.* at 40–45.

109 Fla. Wildlife Fed'n Inc. v. United States Army Corps of Eng'rs, 859 F.3d 1306, 1321 (11th Cir. 2017) (Tjoflat, J., concurring) ("The Supreme Court has addressed the federal courts' discretion to choose between available nonmerits grounds for dismissal on three occasions since 1998 in the so-called 'jurisdictional-sequencing trilogy' of *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), *Ruhrgas AG v. Marathon Oil Company*, 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999), and *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007).").

addressing its subject-matter jurisdiction are (i) personal jurisdiction and (ii) forum non conveniens. In *Sinochem International Co. v. Malaysia International Shipping Corp.*, the Court held that federal courts may dismiss a case for forum non conveniens before deciding an issue of personal jurisdiction.[110] In so holding, it made clear that its ruling applied to subject-matter jurisdiction as well.[111] Similarly, in *Ruhrgas AG v. Marathon Oil Co.*, the Court permitted the dismissal of an action for lack of personal jurisdiction before an issue of the court's subject-matter jurisdiction was addressed.[112]

Lower courts and legal academics have further developed the guidelines governing the jurisdictional resequencing power. In *Special Investments Inc. v. Aero Air, Inc.*, the Ninth Circuit limited *Ruhrgas*'s applicability to cases where deciding the personal jurisdiction issue would result in the end of the case.[113] Moreover, Professors Idleman and Heather Elliott each discern certain criteria from the jurisdictional resequencing trilogy for when resequencing is available.

According to Idleman, whether a court may exercise the jurisdictional resequencing power

> consists of two inquiries. The first is whether a court, for purposes of resequencing, may consider a given threshold issue equivalent to subject-matter or personal jurisdiction. If not, then the analysis is at an end: the court simply may not address the issue prior to these core jurisdictional questions. If the threshold issue can be considered equivalent, however, then a second inquiry examines whether the court should in fact resequence the issue and address it prior to subject-matter or personal jurisdiction in light of the specific legal and factual circumstances of the case.[114]

As for Idleman's first prong, an issue is equivalent to a core jurisdictional question when it is both an essential and constitutional aspect of an exercise of judicial power.[115] An issue is essential when it is "at the very least . . . a prerequisite to the exercise of judicial power."[116] An issue is constitutional when it "possesses a palpable constitutional dimension."[117]

Unlike Idleman, Elliott proposes a less formulaic approach to resequencing that does not require the precise kind of constitutional equivalence Idleman does. To Elliott, resequencing is primarily a doctrine of restraint that permits a court to "avoid treading on the

110 Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 423 (2007).
111 *Id.*
112 Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578 (1999).
113 Special Invs., Inc. v. Aero Air, Inc., 360 F.3d 989, 994–95 (9th Cir. 2004).
114 Idleman, *supra* note 17, at 11.
115 *Id.* at 12.
116 *Id.*
117 *Id.* at 13.

boundary of its power, when it would lack jurisdiction for another threshold reason."[118] Elliott argues that any complicated issue which requires a court to "determine the limits of its own power within our tripartite system of government"—be it a statutory or constitutional question of subject-matter jurisdiction—may be avoided through resequencing, so long as "no answer to that question is needed to dismiss the case."[119]

For the purposes of this Note, the points where Idleman and Elliott agree are crucial. First and foremost, both recognize that a departure from the jurisdiction first approach requires the invocation of the jurisdictional resequencing power. Second, each reinforce that the alternative issue must also be a prerequisite to the court's power over the case—the alternative issue must also have the potential to result in dismissal on some power-based grounds. As the final part of this Note explains, these points will prove exceptionally useful for prevention of the Opioid outcome. But first, the next part of this Note reintroduces the Opioid outcome by investigating the mechanisms and current approaches to competing motions that have produced it.

II. COMPETING MOTIONS AND THE OPIOID MDL

The Opioid MDL is a massive multidistrict proceeding currently pending in the Northern District of Ohio, encompassing more than 3036 pending actions.[120] The cases center around allegations that "(1) manufacturers of prescription opioid medications overstated the benefits and downplayed the risks of the use of their opioids and aggressively marketed . . . these drugs to physicians, and/or (2) distributors failed to monitor, detect, investigate, refuse and report suspicious orders of prescription opiates," thereby contributing to the nation's opioid crisis.[121] In the early stages of the litigation, the Opioid MDL court attempted to bring some order to the monstrous proceeding by issuing a case management order that put a "moratorium on all [substantive] filings" except those expressly authorized therein.[122] Excluded from authorization were motions

118 Elliott, *supra* note 80, at 743.

119 *Id.* at 743–44.

120 *MDL Statistics Report, Distribution of Pending MDL Dockets by Actions Pending*, JPML (Aug. 13, 2021), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-August-13-2021.pdf [https://perma.cc/H58W-KRC5].

121 *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1378 (J.P.M.L. 2017).

122 Minutes of Teleconference and Scheduling Order at 4, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N. D. Ohio Dec. 14, 2017), ECF No. 4. That order was extended on January 11, 2018. Minutes of Initial Pretrial Conference at 2, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N. D. Ohio Jan 11, 2018), ECF No. 70.

regarding remands.[123] The court solidifies its remand prohibition in a separate order "Regarding Remands," which clarifies that "the moratorium on all substantive filings shall *include all motions to remand*."[124] Since issuing these orders, Judge Polster has requested that the JPML remand select cases to other federal courts for strategic reasons alone.[125] There has been no mention of remanding actions to state court for lack of subject-matter jurisdiction.

While Judge Polster's moratorium has yet to face a direct challenge, the Sixth Circuit has weighed in on its permissibility in a related decision. In *In re CVS Pharmacy, Inc.*, the Sixth Circuit granted Opioid MDL petitioners' writ of mandamus, reversing Judge Polster's order allowing for certain claims to be amended after the deadline mandated by the Federal Rules of Civil Procedure.[126] In that same writ, petitioners challenged a portion of the moratorium—its prohibition on 12(b)(6) motions to dismiss. But because the Sixth Circuit granted relief on separate grounds, the challenge was not decided. However, the language of the Sixth Circuit's opinion casts doubt over the legitimacy of the moratorium: "Civil Rule 12(b) states that 'a party *may* assert' the defenses enumerated therein 'by motion,' which means that the district court may *not* refuse to adjudicate motions properly filed under that Rule."[127] Shortly after the Sixth Circuit's ruling, Judge Polster issued an order permitting *defendants* to "file individual motions to dismiss on jurisdictional grounds."[128] That order did not alter the moratorium as to plaintiffs' remands—as of September 9, 2021, the moratorium stands.[129]

Notwithstanding Judge Polster's ban on remands, the JPML persists in refusing to address jurisdictional issues at the point of transfer. In a recent transfer order, the Panel responded to the parties' transfer opposition as follows: "All parties opposing transfer in seven

123 Order Regarding Remands at 1, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N. D. Ohio Feb. 16, 2018), ECF No. 130.

124 *Id.* (emphasis added).

125 *See* Request for Expedited Hearing at 4–5, 7, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (J.P.M.L. Nov. 20, 2019), ECF No. 6242. The Court adopted a "hub-and-spoke" model for its remand suggestions. Under this model, the MDL proceedings would remain the hub of pre-trial proceedings aimed at achieving global settlement, while the "spokes"—the selected cases that would proceed to trial in other districts—informed the hub's settlement negotiations. The Court's order made clear that this strategy was adopted in furtherance of settlement. *See id.* at 5 ("[T]he Court asked the parties to submit proposals regarding limited, strategic remands of specific cases, in order to allow other federal judges to help resolve specific portions of the *Opiate* MDL in parallel.").

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

127 *Id.* at 846.

128 Track Three Case Management Order at 2, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio June 8, 2020), ECF No. 3329 (emphasis omitted).

129 *Supra* note 12 and accompanying text.

actions argue principally that federal jurisdiction is lacking over their cases. But opposition to transfer challenging the propriety of federal jurisdiction is insufficient to warrant vacating conditional transfer orders covering otherwise factually-related cases."[130]

With a moratorium poised to persist indefinitely and an unwavering a-jurisdiction stance from the JPML, the pressure and opportunity to avoid the Opioid outcome is on transferee judges' treatment of the dueling motions to remand or stay that precede MDL transfer. As the following details, courts have yet to come to a consensus over how to treat these motions.

A. Treatment of Competing Motions

The unique procedural posture that precedes MDL transfer often presents district judges with competing motions to remand for lack of subject-matter jurisdiction or stay proceedings. Presumably empowered by the broad and virtually unbounded managerial authority granted them via inherent authority, very few judges identify or adequately assess the ordering inquiry—the threshold question of which motion to address first. Instead, either the stay is de facto chosen and resolved first or, when the ordering inquiry is identified as a discrete issue, the ordering inquiry is resolved through the application of stay-like doctrine—discretionary considerations that weigh the balance of hardships, and economy of time, money and effort.[131]

One illustrative example is *Erie County Medical Center Corp. v. Teva Pharmaceuticals USA, Inc.* On May 11, 2021, the *Erie* plaintiffs filed a complaint in New York state court alleging tort claims like negligence and nuisance for the defendants' alleged contribution to the opioid epidemic.[132] On July 19, 2021, the defense removed the case to federal court.[133] On July 26, the JPML was notified of the potential Opioid tag-along case, and issued a conditional transfer order on July 29.[134] The day prior, on July 28, plaintiffs filed an emergency motion to remand to state court.[135] Six days later, on August 4, the defense filed a motion

130 Transfer Order at 2, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Oct. 3, 2018), ECF No. 2640.

131 *See* Landis v. N. Am. Co., 299 U.S. 248, 254 (1936); *see also* FED. R. CIV. P. 1.

132 Exhibit A at 2, Erie Cnty. Med. Ctr. Corp. v. Teva Pharms. USA, Inc., No. 21-cv-00826 (W.D.N.Y. July 19, 2021), ECF No. 1.

133 Notice of Removal at 2, *Erie Cnty. Med. Ctr. Corp.*, No. 21-cv-00826 (W.D.N.Y. July 19, 2021), ECF No. 1.

134 Text Order, *Erie Cnty. Med. Ctr. Corp.*, No. 21-cv-00826 (W.D.N.Y. Aug. 25, 2021), ECF No. 37.

135 Motion to Remand to State Court, *Erie Cnty. Med. Ctr. Corp.*, No. 21-cv-00826 (W.D.N.Y. Jul. 28, 2021), ECF No. 7.

to stay proceedings pending a final decision from the JPML on whether to transfer the case.[136] On August 25, in a paragraph-long text order, the judge presiding over the case granted the stay.[137] "After reviewing the parties' materials in support of and opposition to the motion to stay," the judge reasoned that a stay would "promote[] judicial economy and consistency" and that the "hardship [to Defendants]" if the stay were denied would "outweigh[] any prejudice that [the stay] could potentially inure to [Plaintiffs]."[138] Even though plaintiffs' motion to remand was filed first, the court did not so much as mention the threshold issue of which motion to decide first, jurisdiction or the jurisdiction first approach. It appears to have wholly overlooked the ordering inquiry, de facto choosing to resolve the stay first.

In another case tagged for and eventually transferred to the Opioid MDL, *City of Santa Fe*, when faced with dueling motions, the court responded by recognizing but nonetheless conflating the distinct inquiries of ordering and staying. In its order granting the stay, the court acknowledged its "discretion [to] stay proceedings pending an MDL transfer *without first* ruling on a pending motion to remand."[139] But this very acknowledgment reveals the court's failure to separate the ordering inquiry as distinct from the issue of the stay—immediately after acknowledging its discretion to stay proceedings before deciding the remand motion, the court states: "[T]he district court's 'power to stay "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."'"[140] The court offered no discussion as to why it chose to *order* the stay before the remand, or whether it considered the issue of ordering beyond its assertion that it possessed the power to *grant* the stay first. Moreover, the court vaguely referenced the remand's eventual resolution by the Opioid MDL as a reason for granting the stay, as opposed to a reason for addressing the stay first. The court did not address the jurisdictional arguments or the jurisdiction first approach.[141]

These examples are only two of the countless decisions completely overlooking the ordering inquiry or conflating it with the issue of the

136 Motion to Stay Proceedings Pending Transfer to Multidistrict Litigation, *Erie Cnty. Med. Ctr. Corp.*, No. 21-cv-00826 (W.D.N.Y. Aug. 4, 2021), ECF No. 23.

137 Text Order, *supra* note 134.

138 *Id.*

139 City of Santa Fe v. Purdue Pharma L.P., Civ. No. 19-1105, 2020 WL 671008, at *2 (D.N.M. Feb. 11, 2020) (emphasis added).

140 *Id.* (quoting Pace v. Merck & Co., Inc., No. CIV 04-1356, 2005 WL 6125457, at *1 (D.N.M. Jan. 10, 2005)).

141 *See id.* at *2–3.

stay.[142] To make matters worse, as more and more courts conflate the issues and grant the stay, the weight of authority on stays while jurisdictional issues are pending becomes a reason in and of itself for federal courts to "defer ruling on pending motions to remand . . . until after the [JPML] has transferred the case."[143] Defendants are able to persuade the court by essentially saying: "follow the crowd, grant the stay." Often, courts are successfully persuaded, "stating in relatively short orders that the judicial cooperation and consistency were their preeminent concerns."[144]

To be sure, not every court faced with this unique procedural context skirts the ordering issue altogether.[145] But even when courts grapple with the ordering issue, even when they ultimately elect to resolve the remand first, their responses are varied and misguided, and on the whole evidence a continued reliance on stay-like discretion to resolve the ordering issue.

For example, many of the courts that successfully recognize the ordering inquiry as a distinct and threshold issue rely on the three-step approach originally articulated in *Meyers v. Bayer AG* (the *Meyers* approach) to resolve it.[146] The first step of the *Meyers* approach is to give "preliminary scrutiny to the merits of the motion to remand."[147]

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142 *See* Dinwiddie Cnty., Va. v. Purdue Pharma, L.P., No. 19-CV-242, 2019 WL 2518130, at *2 (E.D. Va. June 18, 2019) (collecting cases); *see also, e.g.*, Bd. of Cnty. Comm'rs of Seminole Cnty. v. Purdue Pharma L.P., No. CIV-18-372, 2019 WL 1474397, at *1–2 (E.D. Okla. Apr. 3, 2019) (analyzing the ordering issue by applying stay factors and granting the stay); Bd. of Cnty. Comm'rs of Del. Cnty v. Purdue Pharma, L.P., No. 18-cv-0460, 2018 WL 5307623, at *1 (N.D. Okla. Oct. 26, 2018) (same).

143 Bd. of Cnty. Comm'rs of Pawnee Cnty. v. Purdue Pharma L.P., No. 18-CV-459, 2018 WL 5973752, at *2, *3 (N.D. Okla. Nov. 14, 2018) (alteration in original) (quoting Little v. Pfizer, Inc., No. C-14-1177, 2014 WL 1569425, at *3 (N.D. Cal. Apr. 18, 2014) (granting stay despite noting that "if the JPML does transfer this action, the plaintiff will likely endure some delay in the adjudication of its remand motion" given the "weight of authority" and history of courts granting stays despite pending remand motions in similar opioid-related cases).

144 *Dinwiddie Cnty.*, 2019 WL 2518130, at *2.

145 City of Las Vegas v. Purdue Pharma, L.P., No. 19-CV-2128, 2020 WL 223614, at *2 (D. Nev. Jan. 15, 2020) ("The first—and virtually dispositive—issue before the court is which motion it should consider first: the motion to remand or the motion to stay.").

146 Meyers v. Bayer AG, 143 F. Supp. 2d 1044, 1049–53 (E.D. Wis. 2001).

147 *Id.* at 1049. The *Meyers* approach has been overwhelmingly adopted by courts throughout the Seventh Circuit. *See, e.g.*, Nauheim v. Interpublic Grp. of Cos., Inc., No. 02-C-9211, 2003 WL 1888843, at *2, *6 (N.D. Ill. Apr. 16, 2003) (applying the *Meyers* approach, granting remand and denying stay as moot); Halperin v. Merck, Sharpe & Dohme Corp., No. 11 C 9076, 2012 WL 1204728, at *5 (N.D. Ill. Apr. 10, 2012) (same); Baker v. Air & Liquid Sys. Corp., Civ. No. 11-8, 2011 WL 499963, at *1 (S.D. Ill. Feb. 7, 2011) (same); Hildebrandt v. Johnson & Johnson, Civ. No. 09-863, 2009 WL 3349913, at *2–5 (S.D. Ill. Oct. 19, 2009) (same); Brown v. Bayer Corp., Civ. No. 09-760, 2009 WL 3152881, at *1–2 (S.D. Ill. Sept. 28, 2009) (same); Livingston v. Hoffmann-La Roche, Inc., No. 09 C 2611,

This first step occurs before the court considers whether to grant the stay. If an initial assessment suggests that federal subject-matter jurisdiction is lacking, the court should "promptly complete its consideration" of the motion to remand.[148] If, on the other hand, this assessment reveals a jurisdictional issue that is notably difficult, "the court's second step should be to determine whether identical or similar jurisdictional issues have been raised in other cases that have been or may be transferred to the MDL."[149] Only then, if the issue is both difficult and duplicative, should the court consider the merits of the stay. Under the *Meyers* approach, "if the stay motion is reached at all," the Court may still determine that deciding the motion to remand is the better of the two options.[150]

A few decisions that recognize the ordering inquiry but do not adopt the *Meyers* approach instead rely on general principles of judicial economy and decide, as a general rule, whether remands or stays should be resolved first. For example, in *Dunaway v. Purdue Pharma L.P.*, a case tagged for consolidation with the Opioid MDL, Judge Aleta Trauger from the Middle District of Tennessee concluded that jurisdictional issues should be assessed first. Judge Trauger based the decision on "the interests of judicial economy"[151] and the risk that "'[i]t would be a waste of judicial resources for [a] case to proceed' in the federal courts, if, ultimately, a federal court is not 'the appropriate court to consider plaintiffs' claims.'"[152] Decisions like Judge Trauger's are a minority when it comes to the Opioid MDL.

The *Meyers* approach and decisions like that of Judge Trauger in *Dunaway* are certainly a step in the right direction, and a far better response to competing motions than those cases that neglect the ordering issue altogether. But even these responses suffer numerous infirmities.

2009 WL 2448804, at *2–7 (N.D. Ill. Aug. 6, 2009) (same); Chicago Bd. Options Exch., Inc. v. Int'l Sec. Exch., LLC, No. 06 C 6852, 2007 WL 604984, at *3–4 (N.D. Ill. Feb. 23, 2007) (same); Rutherford v. Merck & Co., 428 F. Supp. 2d 842, 845–55 (S.D. Ill. 2006) (same); Board of Trs. of the Teachers' Ret. Sys. of Ill. v. WorldCom, Inc., 244 F. Supp. 2d 900, 902–03 (N.D. Ill. 2002) (applying the *Meyers* approach).

148 *Board of Trs. of the Teachers' Ret. Sys. of Ill.*, 244 F. Supp. 2d at 902–03 (quoting *Meyers*, 143 F. Supp. 2d at 1049).

149 *Meyers*, 143 F. Supp. 2d at 1049.

150 *Id.*

151 Dunaway v. Purdue Pharma L.P., 391 F. Supp. 3d 802, 809 (M.D. Tenn. 2019).

152 *Id.* (quoting Ohio v. U.S. Env't Prot. Agency, No. 15-CV-2467, 2015 WL 5117699, at *3 (S.D. Ohio Sept. 1, 2015)); *see also, e.g.*, City of Las Vegas v. Purdue Pharma, L.P., No. 19-CV-2128, 2020 WL 223614, at *3 (D. Nev. Jan. 15, 2020) (agreeing with the reasoning in *Dunaway* and addressing the remand first).

III. JURISDICTIONAL RESEQUENCING AND THE ORDERING INQUIRY

Each of the foregoing approaches to competing motions—whether the ordering inquiry is overlooked, resolved via the case-by-case assessment of the *Meyers* approach, or subject to the general rule in *Dunaway*—fail in consequence, theory, and application.

First is a failure in consequence: none have been uniformly adopted and none are likely to produce uniformity. Because each of the foregoing approaches are the creation of district courts, each carries little precedential weight on its own. However wise any one decision may be, other district courts are under no obligation to adopt it. As the number of decisions to grant the stay without regard for the ordering inquiry or assessment of the jurisdictional issue grows, it will only become less likely that an overworked district judge understanding themselves to be empowered by the virtually unbounded discretion of inherent authority will depart from the trend toward staying and side with *Meyers* or *Dunaway*.

Second and foremost is a failure in theory: each of these approaches apparently fail to appreciate the distinct nature of the *power* employed when the ordering decision is made. In other words, even where the *issues* of the ordering inquiry and the stay are recognized as distinct, it is assumed that because ordering and staying are each an invocation of inherent authority, the same breadth of discretion is available to resolve each. But just because a remand and a stay of proceedings are each "independently authorized . . . does not mean that the power to choose between them is invariably authorized as well, or that there are no extrinsic, extratextual limitations on the exercise of that power."[153]

City of Santa Fe and cases like it exemplify the supposition of equal power in their total blending of the ordering and stay inquiries. As for the *Meyers* approach, though it starts with an assessment of jurisdiction, it nonetheless remains a discretionary, case-by-case assessment predicated on the availability of the same breadth of discretion that governs stays. It instructs that courts "should" start with jurisdiction, not that they must, and permits courts to skirt complicated jurisdictional issues when doing so would avoid wasting judicial resources.[154] *Dunaway* similarly assumes that the same breadth of discretion governs the ordering inquiry—it is predicated on considerations of judicial economy and resource conservation, not a lack of power.[155]

153 Idleman, *supra* note 17, at 41.

154 *Meyers*, 143 F. Supp. 2d at 1048.

155 *Dunaway*, 391 F. Supp. 3d at 809.

These missteps are understandable given inherent authority's historically broad boundaries and frequent focus on judicial economy and resource conservation. But they nonetheless fail to appreciate that each invocation of inherent authority may be subject to different limitations—that the breadth of discretion may vary across invocations. If the breadth of the discretion for one invocation is narrower, then what a court ought to do becomes what it must do.

Relatedly, and third, is a failure in application: the ordering inquiry is not resolvable via the same breadth of discretion that guides a stay of proceedings. It is, in fact, narrower than the breadth of discretion applicable to stays. The jurisdictional resequencing trilogy of *Steel Co.*, *Ruhrgas*, and *Sinochem*, once properly identified as controlling and applied, restricts the discretion guiding the ordering inquiry to far less broad than the discretion available for the stay.[156]

The solution to the Opioid outcome, and the correct approach to resolving competing motions, is to (i) recognize the ordering inquiry for what it is—a threshold determination that must be made before the issue of the stay is reached, and (ii) resolve the ordering inquiry through the application of jurisdictional resequencing jurisprudence.

Jurisdictional resequencing jurisprudence makes clear that jurisdiction first is the rule, and a departure requires grounds for an exception. Thus, once a motion to remand is filed, the court's first and foremost duty to the jurisdictional issue is triggered and it must resolve the jurisdictional issue unless an exception warrants invocation of the jurisdictional resequencing power. The likelihood of MDL transfer alone does not change that—there is nothing in Supreme Court jurisprudence to suggest the inapplicability of the default rule to this context. To the contrary, it supports the opposite: that a rule of judicial power governs "an MDL court's decisions just as it does a court's decisions in any other case."[157] If the rule of law applies with equal force *in* an MDL, it presumably applies just as well in its shadow. In short, the ordering inquiry has already been answered in favor of the remand by the default rule of jurisdiction first. To reopen the ordering inquiry in any individual case is to assume the availability of

156 *See* Fla. Wildlife Fed'n Inc. v. United States Army Corps of Eng'rs, 859 F.3d 1306, 1321 (11th Cir. 2017) (Tjoflat, J., specially concurring).

157 *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 844 (6th Cir. 2020) (citing Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998)); *see also id.* at 841 ("Nothing in § 1407 provides any reason to conclude otherwise. Moreover, as the Supreme Court has made clear, every case in an MDL (other than cases for which there is a consolidated complaint) retains its individual character. That means an MDL court's determination of the parties' rights in an individual case must be based on the same legal rules that apply in other cases, as applied to the record in that case alone.").

jurisdictional resequencing, and to answer it in favor of the stay is to exert the jurisdictional resequencing power.

Because choosing to address the stay, or any other issue for that matter, before the remand requires exertion of the jurisdictional resequencing power, it is jurisdictional resequencing caselaw which should control the ordering inquiry. Jurisprudence on stays is inapposite. Jurisdictional resequencing is an exercise of inherent power in a restraining sense. However broad the inherent power may be, however broad a court's discretion to stay proceedings may be, invocation of that breadth is not warranted in the absence of subject-matter jurisdiction unless it is invoked as a means toward a restraining end. While exceptional circumstances may warrant a stay of proceedings pending the resolution of a parallel case raising related jurisdictional issues, stays granted under those circumstances are in *service* of the jurisdictional inquiry. It is improper to assume that either the docket-control stay jurisprudence not involving jurisdictional issues or caselaw permitting a stay of proceedings as an exercise of the court's jurisdiction to decide jurisdiction applies to an issue of ordering that arises when a stay of proceedings *competes* with a jurisdictional issue rather than serves the jurisdictional inquiry.

Once applied, jurisdictional resequencing jurisprudence reveals that resequencing is not available for competing motions to remand or stay in the shadow of multidistrict litigation. The jurisdictional resequencing trilogy dictates that the jurisdictional resequencing power can only be exercised when the alternative issue might also result in dismissal, and not just for any reason. Dismissal must be on power grounds—*Steel Co.* and its progeny support this.[158]

A stay pending MDL transfer does the opposite—it keeps the case in the hands of federal judges, locking the action on the federal docket so that the Panel may transfer it to another federal forum. The stay does not result in dismissal, nor does it restrain the federal judiciary to its Article III power over the matter.

Idleman and Elliot's frameworks each solidify the conclusion that the stay cannot precede a remand. Applying Idleman's framework, the remand must always be addressed first. A discretionary decision to stay proceedings is not equivalent to the subject-matter jurisdiction inquiry. It is neither an essential prerequisite to the exercise of judicial power, nor is it a matter of constitutional significance. In the realm of stays requested in the interest of achieving MDL aggregation, the ends sought to be achieved (judicial consistency, cooperation, and resource conservation) do not compare in their significance to the end sought to be achieved by the subject-matter jurisdiction inquiry—ensuring

158 *See Fla. Wildlife Fed'n Inc.*, 859 F.3d at 1321 (Tjoflat, J., specially concurring).

that the court does not surpass its limited and enumerated powers. Thus, resequencing is not available under the first prong of Idleman's test.[159] The first prong of the test is not discretionary—failure to establish equivalence puts an end to the inquiry.

Even under Elliott's more lenient reading of the resequencing caselaw, resequencing is not available. "[B]oth *Ruhrgas* and *Sinochem* permit resequencing *only* when the subject-matter jurisdiction question is appreciably more complicated than the other *threshold* question"[160]—a question which must provide the court with another reason that it lacks power over the case and can dismiss it.[161] The issue of whether to stay proceedings in the context of pending MDL transfer does not provide the court with an opportunity to dismiss the case. Thus, resequencing is not available.

CONCLUSION

Process matters. The ordering inquiry, its recognition as a discrete issue, and its resolution via the appropriate doctrine matter to the litigants who will end up stranded in a massive MDL if district courts' approaches do not change. The Opioid MDL provides an extreme example of this—how judges respond to the ordering inquiry might determine whether litigants spend years waiting to be sent right back to where they started. That time, the dignity and autonomy that is lost when a person's voice is made one among thousands, the difference between a realistic prospect of trial and never-ending settlement negotiations—that matters. This Note attempts to provide a solution, a solution that may come at the cost of judicial consistency, cooperation, and the benefits of aggregation. Future scholarship may conclude that those costs are not worth it, that jurisdictional resequencing doctrine need not apply or dictate the result proposed herein. Let there be future scholarship.

159 *See* Idleman, *supra* note 17.

160 Elliott, *supra* note 80, at 743 (emphasis added).

161 *See id.*