BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re Clean Water Rule: Definition of "Waters of the United States"	MDL No. 2663 ORAL ARGUMENT REQUESTED

RESPONSE OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL FEDERATION OF INDEPENDENT BUSINESS; STATE CHAMBER OF OKLAHOMA; TULSA REGIONAL CHAMBER; PORTLAND CEMENT ASSOCIATION; WASHINGTON CATTLEMEN'S ASSOCIATION; CALIFORNIA CATTLEMEN'S ASSOCIATION; OREGON CATTLEMEN'S ASSOCIATION; NEW MEXICO CATTLE GROWERS ASSOCIATION; NEW MEXICO WOOL GROWERS, INC.; NEW MEXICO FEDERAL LANDS COUNCIL; COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH; DUARTE NURSERY, INC.; PIERCE INVESTMENT COMPANY; LPF PROPERTIES, LLC.; AND HAWKES COMPANY, INC. IN OPPOSITION TO THE UNITED STATES' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR CONSOLIDATION OF PRETRIAL PROCEEDINGS

Plaintiffs[1] respectfully submit this brief in opposition to the Motion of the United States for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Consolidation of Pretrial Proceedings ("Motion").

The Motion is a transparent attempt by the United States to preclude robust judicial review of the legality of its actions through procedural gamesmanship and forum shopping. The Panel should deny the Motion because the district court cases satisfy none of the requirements for transfer and consolidation—most glaringly, they have no common issues of *fact* to be resolved, only common issues of *law*. The United States seeks to avoid the risk of inconsistent rulings and the administrative burden of litigating in multiple jurisdictions, but neither is a basis for transfer and consolidation. Nonetheless, if the Panel decides to transfer and consolidate these cases, which it should not, the Southern District of Georgia would be the appropriate transferee court because that is where the litigation has advanced the furthest and where many of the plaintiffs have filed.

BACKGROUND

Between June 29, 2015 and July 15, 2015, ten lawsuits were filed in eight district courts in Georgia, Minnesota, North Dakota, Oklahoma, Texas, and West Virginia against the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps") (collectively, "Agencies"). The plaintiffs in these cases challenged the Agencies' final rule asserting broad authority to regulate the nation's waters through a revised definition of "waters of the United States" within the meaning of the Clean Water Act ("CWA"). *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053-37,127 (June 29, 2015) ("Final Rule"). The plaintiffs in these ten cases alleged, among other things, that

[1] The parties joining this opposition are the plaintiffs in *Chamber of Commerce v. EPA*, No. 15-cv-386 (N.D. Okla.)—Chamber of Commerce of the United States of America, National Federation of Independent Business, State Chamber of Oklahoma, Tulsa Regional Chamber, and

the Agencies had exceeded their power under the Clean Water Act, the Administrative Procedure Act ("APA"), and the U.S. Constitution, and that they had failed to comply with the Regulatory Flexibility Act ("RFA") during the rulemaking process.

Shortly after the complaints were filed, plaintiffs in several of these cases filed motions for a preliminary injunction. To date, the most procedurally advanced case is before Chief Judge Lisa Godbey Wood in the Southern District of Georgia. *See Georgia v. McCarthy*, No. 15-cv-79 (S.D. Ga.). Currently pending before Chief Judge Wood is the plaintiffs' motion for a preliminary injunction, which was fully briefed and argued at a hearing on August 12, 2015.

On July 27, 2015, the United States filed a motion with the Panel to transfer and consolidate these ten cases in the District Court for the District of Columbia ("D.D.C."). Although no case had been filed in the D.D.C. at the time, the United States informed the Panel that it knew that additional plaintiffs would soon be filing an action challenging the Final Rule in the D.D.C. *See* Brief in Support of the Motion of the United States for Transfer and Consolidation ("U.S. Br.") 4. Several weeks later, on August 14, 2015, the Natural Resources Defense Council ("NRDC") and three other environmental groups brought a challenge to the Final Rule in the D.D.C. *See NRDC v. EPA*, No. 15-cv-1324 (D.D.C.). Unlike every other lawsuit concerning the Final Rule filed to date, the plaintiffs in the D.D.C. case claimed that the Final Rule improperly protects *fewer* waters than required by the CWA.

ARGUMENT

The United States seeks to transfer and consolidate the ten actions challenging the Final Rule with the D.D.C. action filed a few days ago by the NRDC. The Panel should deny the Motion for three reasons. First, the fact that these cases raise common legal questions in different courts is actually desirable because it will promote robust judicial review of the Final Rule. Second, these cases raise primarily legal questions that will not require substantial fact

discovery outside the administrative record, so the plaintiffs' prerogative to select appropriate forums in which to sue outweighs the United States' interest in administrative efficiencies. Finally, even if the Panel were to find transfer and consolidation warranted, it should not transfer the cases to the D.D.C., but to the Southern District of Georgia, where the most procedurally advanced action is pending.

I. The United States' Motion Is a Blatant Attempt to Stifle Robust Judicial Review of the Final Rule.

Although it is couched in terms of efficiency and convenience, the United States' motion should be seen for what it is: a thinly disguised attempt to prevent robust judicial review of the Final Rule.

The validity of the Final Rule is without a doubt an issue of national importance. As the United States has recognized, the Final Rule is of "significant importance to states, local governments, tribes, the regulated community, environmental organizations, and the public." U.S. Br. 12. It is therefore "not surprising that there is a large number of challenges" to the Final Rule. *Id*. The validity of the Final Rule raises "complex[] interpretive issues" that may well be decided through "Supreme Court review." *Id*. Indeed, given the Supreme Court's prior interest in this issue, *see Rapanos v. United States*, 547 U.S. 715 (2006), and the confusion that decision has created, *see, e.g.*, *United States v. Cundiff*, 555 F.3d 200, 207-10 (6th Cir. 2009), it appears likely that these cases will eventually reach the Supreme Court.

Despite recognizing the significant issues at stake in these cases, the United States remarkably argues that these cases should receive *less* scrutiny from the federal courts. Transfer and consolidation, it believes, will serve the public by "avoid[ing] district and circuit splits." *Id*. But this approach is squarely at odds with Supreme Court precedent. The Supreme Court has long emphasized "the benefit it receives from permitting several courts of appeals to explore a

difficult question before this Court grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984); *see, e.g.*, *E.I. du Pont v. Train*, 430 U.S. 112, 135 n.26 (1977) ("This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals," as the "thorough, scholarly opinions written by some of our finest judges" helped "eliminat[e] the many subsidiary … arguments raised" and "vastly simplified our task."). When multiple courts examine a difficult question, it promotes the "thorough development of legal doctrine by allowing litigation in multiple forums." *Mendoza*, 464 U.S. at 163. Indeed, just last Term, the Supreme Court stressed the importance of having such robust review. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (identifying dozens of cases before the district courts, courts of appeals, and state courts on the issue of same-sex marriage and noting their importance in helping "to explain and formulate the underlying principles this Court now must consider").

The Courts of Appeals also recognize the important role they play in resolving issues of national importance. *See, e.g.*, *Gherebi v. Bush*, 352 F.3d 1278, 1304 (9th Cir. 2003) ("The Supreme Court has always encouraged the Courts of Appeals to resolve issues properly before them in advance of their determination by the Supreme Court, reasoning that having a variety of considered perspectives will aid the Court's ultimate resolution of the issue in question."); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (emphasizing that opinions from multiple circuits help develop "important questions of law" and the Supreme Court benefits from "decisions from several courts of appeals"); *Pub. Serv. Comm'n for N.Y. v. Fed. Power Comm'n*, 472 F.2d 1270, 1273 (D.C. Cir. 1972) ("While uniformity of approach is important, in the last analysis it is provided under our system by the Supreme Court. An additional focus at the intermediate level on an issue of national consequence is not necessarily an evil but may, on

the contrary, serve like a stereopticon to enhance depth perception."); *Atchison, Topeka & Santa Fe R.R. Co. v. Pena*, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring) ("Additional litigation may lead to a conflict among the circuits and review by the Supreme Court with the benefit of additional legal views that increase the probability of a correct disposition.").

Here, the pendency of multiple challenges to the Final Rule is not a *problem* to be fixed—it is a *benefit* of our judicial system. In the near future, the Final Rule will be examined by "thorough, scholarly opinions written by some of our finest judges." *E.I. du Pont*, 430 U.S. at 135 n.26. Courts considering the validity of the Final Rule may reach differing conclusions about the validity of the Final Rule. But even a circuit split would assist in the ultimate administration of justice by distilling the case for further appellate review. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012) (noting the widely different conclusions reached by the Fourth, Sixth, Eleventh, and D.C. Circuits concerning the constitutionality of the Affordable Care Act's individual mandate and that only the Fourth Circuit concluded that the individual mandate's penalty was a tax). Whatever the result, the litigation of these cases in different courts ensures that the Final Rule will receive more rigorous federal review and thus an "increase[d] probability of a correct disposition" than if the Panel consolidates the actions in the D.D.C. *Atchison, Topeka & Santa Fe R.R. Co*., 44 F.3d at 447 (Easterbrook, J., concurring).

By seeking to transfer and consolidate these cases, the United States is trying to short-circuit this process. While it might be an effective litigation strategy to "squelch the circuit disagreements that can lead to Supreme Court review," *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002), it is not a recipe for thorough decisionmaking. Consolidating these cases would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Mendoza*, 464 U.S. at 160. "Allowing

only one final adjudication would deprive [the Supreme Court] of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *Id*. Nothing would be gained by funneling litigation concerning this issue of national importance into a single court. *See Pub. Serv. Comm'n for N.Y.*, 472 F.2d at 1273 (rejecting motion to transfer review of the actions of the Federal Power Commission because "[s]uch issues of national concern have arisen—and may arise again—in a number of circuits, including the Third, Fifth, Ninth and Tenth, as well as our own" and the public would benefit from "additional focus" on the issues in these courts).

The United States bemoans the prospect of litigating similar issues in multiple forums. *See* U.S. Br. 10-13. But the government's legal arguments for the Final Rule will presumably not change depending on the forum. And the government regularly encounters situations in which it makes the same legal argument before different courts. The United States is far "more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues," both because of "the geographic breadth of government litigation and also, most importantly, because of the nature of the issues the government litigates." *Mendoza*, 464 U.S. at 159-60. Moreover, because "the proscriptions of the United States Constitution are so generally directed at governmental action, many constitutional questions can arise only in the context of litigation to which the government is a party." *Id*. at 160. Any concerns about efficiency thus are outweighed by the interest in ensuring robust review of government actions implicating constitutional rights. *See id.* The Panel has no interest in encouraging "[n]ationwide implementation of the decision of the first circuit to encounter a question." *Atchison, Topeka & Santa Fe R.R. Co.*, 44 F.3d at 447 (Easterbrook, J., concurring).

Under the government's reasoning, all federal challenges to the same agency actions should be transferred and consolidated into one district court, apparently the D.D.C. But this is not what Congress has prescribed. Congress requires certain challenges to agency action to be consolidated in one court of appeals, *see, e.g.*, *Prometheus Radio Project v. FCC*, 373 F.3d 372, 388-89 (3d Cir. 2004) (describing the process for transfer and consolidation of actions of the FCC), and it places specific issues solely in the hands of specialized courts, *see, e.g.*, *Gunn v. Minton*, 133 S. Ct. 1059, 1067 (2013) (noting that Congress "ensured uniformity [of patent law] by vesting exclusive jurisdiction over actual patent cases in the federal district courts and exclusive appellate jurisdiction in the Federal Circuit"). The fact that Congress chose not to require consolidation of these types of challenges to agency action is strong evidence that they should be adjudicated separately. *See, e.g.*, *McFarland v. Scott*, 512 U.S. 849, 861-62 (1994) ("Congress knows how to give courts the broad authority to stay proceedings of the sort urged by petitioner…. The absence of such explicit authority in the habeas statute is evidence that Congress did not intend federal courts to enter stays of execution in the absence of some showing on the merits."); *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 440 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute."). So too here, Congress did not express its intention for courts to transfer and consolidate all cases challenging the Final Rule.

Indeed, granting the Motion would likely bring a flood of requests to consolidate similar challenges to government actions, as there would be no principled way to limit the rationale to the district court cases here. For example, in 2013, multiple actions were filed in district courts across the country claiming that an IRS rule providing tax credits to individuals who purchased health insurance on the federal exchange was not authorized by the Affordable Care Act. *See*

Halbig v. Sebelius, 27 F. Supp. 3d 1 (D.D.C. 2014); *King v. Burwell*, 997 F. Supp. 2d 415 (E.D. Va. 2014); *Indiana v. IRS*, 38 F. Supp. 3d 1003 (S.D. Ind. 2014); *Oklahoma ex rel. Pruitt v. Burwell*, 51 F. Supp. 3d 1080 (E.D. Okla. 2014). Under the United States' reasoning, these regulatory challenges should all have been consolidated in the D.D.C. to ease the government's burden of litigating "nearly identical claims" in district courts "scattered across the country" and to avoid the possibility of "inconsistent rulings in the appellate courts." U.S. Br. 9-12.[2] But there would be no way to limit the United States' rationale to challenges to agency actions. For example, in 2012, multiple actions were filed across the country challenging the constitutionality of the Affordable Care Act. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2581 (2012). The same considerations of efficiency and fairness proffered by the government here would have applied to those cases as well. The Panel should not start down this slippery slope by setting a precedent under which difficult questions of national importance are resolved by the first court to review the issue.

II. The Actions Satisfy Neither the Statutory Nor Prudential Requirements for Transfer and Consolidation.

The MDL statute provides that "when civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The Panel will grant the transfer only if it determines that doing so would be "for the convenience of parties and witnesses" and would "promote the just and efficient conduct of such actions." *Id*. The moving party bears the burden of demonstrating the need for transfer and consolidation. *See In re Best*

[2] Transfer and consolidation in the tax credit cases could have had monumental consequences, as it would have eliminated the circuit split that occurred and thus possibly frozen in place the decision of the D.C. Circuit. *See Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014) (invalidating IRS regulation because the ACA did not authorize tax credits for insurance purchased on federally-facilitated health benefit exchanges), *judgment vacated following King v. Burwell*, 135 S. Ct. 2480 (2015).

Buy Co., 804 F. Supp. 2d 1376, 1379 (J.P.M.L. 2011) (denying transfer and consolidation because "the proponents of centralization have not met their burden of demonstrating the need for centralization"). Because the United States cannot satisfy this heavy burden, its motion to transfer and consolidate should be denied.

A. The District Court Cases Do Not Involve Common Questions of Fact.

The United States claims that transfer and consolidation is warranted because there will be "common factual issues" among the cases, including (1) "the sufficiency of the factual and scientific evidence relied upon by" the Agencies in promulgating the Final Rule; (2) whether the Agencies "failed to respond to comments submitted" by certain plaintiffs; and (3) the "sufficiency of the notice to the public of the proposed rule." U.S. Br. 4-8. But all of these are *legal* issues dressed up as factual disputes. "Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard *do not resolve factual issues*, but operate instead as appellate courts *resolving legal questions*." *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (emphasis added). As the United States recognizes, these matters will likely be resolved on motions for summary judgment. *See* U.S. Br. 11. And that would be fitting because summary judgment is "the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review." *Ernest K. Lehmann & Assocs. v. Salazar*, 602 F. Supp. 2d 146, 153 (D.D.C. 2009). "Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007).

The United States strains to recast these legal issues as factual disputes because it is hornbook law that "[t]he presence of common issues of law has no effect on transfer: it is neither a necessary nor sufficient condition for transfer." Multidistrict Litig. Manual § 5.4. "Where the issues in a case are primarily legal in nature, even though some fact issues may exist, the Panel is nearly certain to conclude that transfer is not appropriate." *Id.*; *see also, e.g.*, *In re Medi-Cal Reimbursement Rate Reduction Litig.*, 652 F. Supp. 2d 1378, 1378 (J.P.M.L. 2009) (denying transfer and consolidation where the actions "by and large, raise strictly legal issues"); *In re Real Estate Transfer Tax Litig.*, 895 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012) (denying transfer and consolidation because the dispute involves "primarily a *legal* question—*i.e.*, are the [parties] statutorily exempt from liability for real estate transfer taxes") (emphasis in original); *In re Multijurisdiction Practice Litig.*, 52 F. Supp. 3d 1377, 1378 (J.P.M.L. 2014) (finding that "common legal questions are insufficient to satisfy Section 1407's requirement of common factual questions"); *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico*, 764 F. Supp. 2d 1352, 1353 (J.P.M.L. 2011) ("We will, as a general rule, decline to transfer such actions if they appear to present 'strictly legal questions requiring little or no discovery.'"); *In re EPA Pesticide Listing Confidentiality Litig.*, 434 F. Supp. 1235, 1236 (J.P.M.L. 1977) (denying transfer and consolidation because "the predominant, and perhaps only, common aspect in these actions is a legal question of statutory interpretation"). This practice makes perfect sense: allowing different judges to rule on similar legal issues promotes the "thorough development of legal doctrine by allowing litigation in multiple forums." *Mendoza*, 464 U.S. at 163.

As the United States acknowledges, separate review of these cases would not lead to duplicative and burdensome discovery. *See* U.S. Br. 6, 9. Judicial review of the Final Rule will be confined to the administrative record, so there is unlikely to be any need for wide-ranging

discovery. *See, e.g.*, *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) ("[T]his case involves review of a final agency determination under the [APA]; therefore, resolution of th[e] matter does not require fact finding on behalf of this court. Rather, the court's review is limited to the administrative record."). Indeed, the United States itself has described these actions as "substantially similar facial challenges to the Clean Water Rule." Defs' Motion to Stay the Proceedings at 2, *Chamber of Commerce*, No. 15-cv-386 (Doc. 25). Thus, these cases are unlike those that are typically transferred and consolidated by the JPML. *See* 15 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3861 (4th ed.) (noting that the MDL statute grew out of courts' experience dealing with cases of "great[] complexity").

The United States relies heavily on a single case, *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 588 F. Supp. 2d 1376 (J.P.M.L. 2008), to support consolidation. But *In re Polar Bear* is inapposite because, unlike here, most of the parties in that case supported transfer and consolidation. *See id.* at 1376-77. Here, it appears that all or almost all plaintiffs in the original actions will oppose transfer and consolidation.[3] *See* Wright & Miller § 3863 ("[W]hen most or all of the nonmoving parties are opposed to MDL transfer, the Panel will probably deny the motion, especially if no nonmoving party supports consolidation."); *see, e.g.*, *In re Property Assessed Clean Energy (Pace) Programs Litig.*, 764 F. Supp. 2d 1345, 1347

[3] The D.D.C. case filed by the NRDC only a few days ago is the clear outlier. The NRDC is challenging the Final Rule despite recently declaring that "[i]t is nearly impossible to overstate the importance of the Clean Water Rule. The fate of nearly two million miles of streams and tens of millions of acres of wetlands hangs in the balance." NRDC Press Release, Feb. 3, 2015, www.nrdc.org/media/2015/150203c.asp. The NRDC's case is the classic example of an interest group challenging an agency action that it overwhelmingly supports in order to obtain a favorable venue and make the agency appear like an honest broker. These plaintiffs' views should receive little weight in the Panel's balancing of interests and cannot outweigh the overwhelming preference of the original plaintiffs.

(J.P.M.L. 2011) (denying centralization in part because "the bulk of the parties—plaintiffs in all actions—oppose centralization").

Even the Panel in *In re Polar Bear* acknowledged the unusual nature of its decision. *See* 588 F. Supp. 2d at 1377. The fact that the cases involve the same administrative record cannot satisfy the MDL statute's requirement that they share "common questions of fact," 28 U.S.C. § 1407(a), which typically means that there are issues of fact *in dispute* that must be *resolved by the factfinder*. *See, e.g.*, *In re Ford Motor Co. Speed Control Deactivation Switch Products Liab. Litig.*, 398 F. Supp. 2d 1365, 1366 (J.P.M.L. 2005) (granting consolidation over "putative class actions that share factual questions regarding whether certain Ford vehicles were equipped with defective or defectively-installed speed control deactivation switches"); *In re Zoloft (Sertraline Hydrochloride) Products Liab. Litig.*, 856 F. Supp. 2d 1347, 1348 (J.P.M.L. 2012) (granting consolidation where "all actions will share discovery relating to general medical causation; factual discovery will overlap concerning Pfizer's research, testing, and warnings; and expert discovery and *Daubert* motions will overlap to some degree"). Such overlapping factual disputes requiring extensive discovery and expert analysis are absent in this challenge to an agency action. *See In re Lesser Prairie-Chicken Endangered Species Act Litig.*, No. MDL 2629, 2015 WL 3654675, at *1 (J.P.M.L. June 9, 2015) (denying the United States' motion to consolidate challenges to an agency's listing of the Lesser Prairie-Chicken as "threatened" under the Endangered Species Act because "[d]iscovery, if any, will be minimal, as these cases will be decided on the administrative record. And motion practice will consist of motions regarding that record and summary judgment motions or petitions for review.").[4]

[4] The United States suggests that the possibility of multiple plaintiffs moving for preliminary injunctive relief and the possibility of "factual inquiries into the standing of parties" justifies transfer and consolidation. U.S. Br. 8-9. But the United States provides no support for

Finally, the United States' claim that the district court cases are all identical is false. Several of the cases raise claims not present in all actions, *see, e.g.*, *Chamber of Commerce*, No. 15-cv-386 (claiming that the United States violated the Regulatory Flexibility Act by failing adequately to review the Final Rule for its impact on small businesses and to consider less burdensome alternatives); and many plaintiffs have alleged distinct harms, *see, e.g.*, *id.* (identifying specific harms to small businesses); *Georgia*, No. 15-cv-79 (identifying harms to the States). Thus, transfer and consolidation would prejudice plaintiffs by shoehorning all of the cases and parties into a single action in a forum that none of the original plaintiffs chose.

B. Transfer and Consolidation of the Pending Cases Will Not Promote the Convenience of the Parties.

The Supreme Court has long stressed that "unless the balance [of considerations] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *see also Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir.1970) ("It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request, and that choice should not be lightly disturbed."). Such deference is required because "[t]he plaintiff is the master of his complaint and has the privilege of choosing his forum in the first instance." *Keys By Washington v. Konrath*, 1994 WL 75037, at *1 (N.D. Ill. Mar. 10, 1994). Plaintiffs in *Chamber of Commerce*, for example, filed suit in the Northern District of Oklahoma because the State Chamber of Oklahoma, the Tulsa Regional Chamber, and numerous members of National Federation of Independent Business are being harmed in that district. This Panel should view such decisions with deference.

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its assertion that a possible *procedural* similarity of cases is a "common issue of fact" that can support transfer and consolidation. Nor could it: inquiry into the standing and harms of *different plaintiffs* clearly does not present common issues of fact. In any event, such individualized questions would militate in favor of localized factfinding, not transfer and consolidation.

The United States claims it will face "a significant burden" if required to "litigate pretrial proceedings simultaneously in eight or more district courts scattered across the country." U.S. Br. 10. Respectfully, this supposed burden is overstated. As the United States has previously acknowledged, these cases "arise from the same agency rulemaking, involve the same administrative record for judicial review, and raise many of the same—if not identical—claims under the Administrative Procedure Act, the Clean Water Act, and the United States Constitution." Defs' Motion to Stay the Proceedings at 6, *Chamber of Commerce*, No. 15-cv-386 (Doc. 25). Aside from the administrative effort required to file separate (but substantially similar) papers in eight district courts, it is difficult to see how the United States will be burdened by having to litigate these legal arguments in different courts. Indeed, the United States' stay motions in the various districts were almost identical. *Compare, e.g.*, *Georgia*, No. 15-cv-79 (Doc. 34-1), *with Chamber of Commerce*, No. 15-cv-386 (Doc. 25). Of course, the United States may have to litigate certain factual issues in each case, most notably the particular harms that will befall particular plaintiffs absent a preliminary injunction; but consolidation will not reduce that obligation, as those are not *common* factual issues and will need to be litigated individually regardless of consolidation.

C. Transfer and Consolidation Will Not Promote the Just and Efficient Conduct of the Cases.

The United States' chief reason for wanting transfer and consolidation appears to be to avoid "the possibility of inconsistent decisions." U.S. Br. 10. But transfer and consolidation is not warranted "[m]erely to avoid [different] federal courts having to decide the same issue." *In re Medi-Cal*, 652 F. Supp. 2d at 1378; *see also In re Multijurisdiction Practice Litig.*, 52 F. Supp. 3d at 1378 ("Although plaintiffs seek efficiencies through centralized treatment of the disputed legal questions, [m]erely to avoid [different] federal courts having to decide the same

issue is, by itself, usually not sufficient to justify Section 1407 centralization."); *In re Real Estate Transfer Tax Litig.*, 895 F. Supp. 2d at 1351 (same). Although one of the Panel's "prime considerations is often the need to avoid inconsistent ruling on similar issues, … [u]sually, that consideration is bolstered by the concern for duplicative and burdensome discovery leading up to the legal issues." *In re Medi-Cal*, 652 F. Supp. 2d at 1378. Those concerns are not present here, where "very little discovery appears necessary prior to the joinder of the legal issues." *Id*.

In re Operation of the Mo. River Sys. Litig., 277 F. Supp. 2d 1378 (J.P.M.L. 2003), and *In re Tri-State Water Rights Litig.*, 481 F. Supp. 2d 1351 (J.P.M.L. 2007), are not to the contrary. Those cases involved review of federal actions against specific property: namely, the conduct of the Corps in connection with the flow of the Missouri and Apalachicola-Chattahoochee-Flint Rivers. These circumstances presented the unique possibility that the district courts could issue conflicting injunctions over the same body of water. Those concerns are not present in these facial challenges to the Final Rule. In addition, transfer and consolidation in those cases was "necessary in order to eliminate duplicative discovery," *In re Operation of the Mo. River Sys. Litig.*, 277 F. Supp. 2d at 1379; *In re Tri-State Water Rights Litig.*, 481 F. Supp. 2d at 1352, a situation the United States concedes does not exist here, *see* U.S. Br. 9.

III. Alternatively, the Cases Should Be Transferred to the Southern District of Georgia.

If the Panel determines that these cases should be transferred and consolidated—which it should not—it should not transfer the cases to the D.D.C., but to the Southern District of Georgia. Consolidation before Chief Judge Wood would be warranted for at least five reasons.

First, the case currently pending before Chief Judge Wood, *Georgia v. McCarthy*, No. 15-cv-79 (S.D. Ga.), is the most procedurally advanced of all of the pending cases concerning

the Final Rule. There, the plaintiffs[5] moved for a preliminary injunction, and Chief Judge Wood ordered an expedited briefing schedule on the motion, which was argued on August 12, 2015. In contrast, no activity has occurred in the D.D.C. other than the filing of a complaint.

As a consequence, the *Georgia* case is the most "procedurally advanced" case among the lawsuits challenging the Final Rule, which is a critical factor this Panel considers when choosing a forum for consolidation. *See, e.g.*, *In re Convergent Tel. Consumer Prot. Act Litig.*, 981 F. Supp. 2d 1385, 1387 (J.P.M.L. 2013) ("[A]s Judge Thompson is currently presiding over the most procedurally advanced action, he is in a particularly favorable position to structure this litigation so as to minimize delay and avoid unnecessary duplication of discovery and motion practice."); *In re L'oreal Wrinkle Cream Mktg. & Sales Practices Litig.*, 908 F. Supp. 2d 1381 (J.P.M.L. 2012) (consolidating actions in the District of New Jersey because although "[a]ll actions were filed within a short time period, … the action pending in this district is slightly more procedurally advanced").

Second, Chief Judge Wood has already devoted substantial resources to the case before her and thus likely has a better understanding of the issues in these cases than any other judge in the country. As a result of the preliminary injunction motion, Chief Judge Wood has "become thoroughly acquainted with the issues in the litigation and, therefore, [would be] in the best position to supervise these actions toward their most expeditious termination." *In re L.E. Lay & Co. Antitrust Litig.*, 391 F. Supp. 1054, 1056 (J.P.M.L. 1975); *cf. In re BRCA1- & BRCA2-Based Hereditary Cancer Test Patent Litig.*, 999 F. Supp. 2d 1377, 1380 (J.P.M.L. 2014) (consolidating cases in the District of Utah because "Judge Shelby has already … spent several days hearing both fact and expert testimony, as well as attorney argument, regarding pending preliminary

[5] The plaintiffs in *Georgia* are the States of Alabama, Florida, Georgia, Kansas, Kentucky, South Carolina, Utah, West Virginia, and Wisconsin.

injunction motions that raise infringement and invalidity issues likely to be common to all the actions"); *In re Bank of Am. Credit Prot. Mktg. & Sales Practices Litig.*, 804 F. Supp. 2d 1372, 1373 (J.P.M.L. 2011) (consolidating cases in the Northern District of California because the case there was the "most procedurally advanced action" and because Judge Thelton E. Henderson "has become familiar with the contours of this litigation by virtue of having ruled on defendants' motion to dismiss").

Third, the *Georgia* plaintiffs' motion for a preliminary injunction is still pending before Chief Judge Wood. The Panel, on "principles of comity," should be "reluctant to transfer any action that has an important motion under submission with a court." *In re L.E. Lay & Co. Antitrust Litig.*, 391 F. Supp. at 1056. Thus, the fact that the motion is still pending is all the more reason to consolidate the cases before Chief Judge Wood. *See id.* ("Since movant has a motion for a preliminary injunction *sub judice* in the Texas action, our selection of the Eastern District of Texas as the transferee district for this litigation allows the Texas court to rule on this motion and at the same time permits the parties to gain the benefits from coordinated or consolidated pretrial proceedings.").

Fourth, consolidation before Chief Judge Wood will allow the cases to be centralized before an experienced judge with significant Clean Water Act experience. In addition to the *Georgia* case, Chief Judge Wood has resolved multiple cases arising under the Clean Water Act. *See, e.g.*, *Jones Creek Investors, LLC v. Columbia Cty., Ga.*, 2015 WL 1541409 (S.D. Ga. Mar. 31, 2015); *Altamaha Riverkeeper, Inc. v. Rayonier, Inc.*, 2015 WL 1505971 (S.D. Ga. Mar. 31, 2015); *United States v. St Mary's Railway West, LLC*, 989 F. Supp. 2d 1357 (S.D. Ga. 2013). This relevant experience supports transfer and consolidation in Chief Judge Wood's court. *See In re Dollar Gen. Corp. Fair Labor Standards Act Litig.*, 346 F. Supp. 2d 1368, 1370 (J.P.M.L.

2004) (transferring actions because "the judge presiding over the action in the Northern District of Alabama has gained familiarity with the issues involved in the litigation through, *inter alia*, his certification of an opt-in collective action under the FLSA"). Indeed, even the United States recognizes Chief Judge Wood's expertise in this area. *See* U.S. Opp. to Mot. for P.I. at 1, *Georgia*, No. 15-cv-79 (Doc. 50) ("This Court is clearly familiar with the statute involved in this action.").

Fifth, Chief Judge Wood has the resources and capacity to handle a multidistrict action. There are currently no MDL cases pending before Chief Judge Wood or in the Southern District of Georgia.[6] Centralization before Chief Judge Wood thus would "permit the Panel to assign the litigation to a less-utilized district with an experienced judge who is not presently overseeing a multidistrict litigation." *In re Simply Orange Orange Juice Mktg. & Sales Practices Litig.*, 867 F. Supp. 2d 1344, 1345-46 (J.P.M.L. 2012); *see also In re: Wal-Mart ATM Fee Notice Litig.*, 785 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011) (same).

The United States offers a variety of insufficient reasons for why consolidation is appropriate in the D.D.C. First, it argues that the D.D.C. has the "resources and experience" to handle these actions because it regularly resolves matters involving administrative law and environmental statutes and has only five MDL matters pending before it. U.S. Br. 12-13. But cases involving agencies and the Administrative Procedure Act are not the sole province of the D.D.C. As noted above, Chief Judge Wood has substantial experience in cases involving the Clean Water Act. In addition, the D.D.C.'s multidistrict litigation caseload can hardly be described as "minimal." *Id.* at 13. Of the 94 federal district courts, the D.D.C.'s five MDL cases

[6] *See* MDL Statistics Report – Distribution of Pending MDL Dockets by District (July 15, 2015), www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-15-2015.pdf.

make it the 16th busiest district in the nation. *See supra* at 18 n.6. Chief Judge Wood, by contrast, has no MDL cases before her. *Id.*; *see also In re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practices Litig.*, 844 F. Supp. 2d 1380, 1381 (J.P.M.L. 2012) (transferring actions to the Southern District of Florida because it "is presiding over fewer MDL dockets than other proposed districts").

The United States also notes that the federal defendants all reside in the D.D.C., and "many of the plaintiffs and their counsel maintain offices in District of Columbia." U.S. Br. 15. But the United States clearly has the resources to litigate in all 50 States. Indeed, Congress specifically adopted 28 U.S.C. § 1391(e)—giving plaintiffs jurisdiction over federal officers in the various actions—in order to "provide nationwide venue for the convenience of individual plaintiffs in actions which are nominally against an individual officer but are in reality against the Government." *Stafford v. Briggs*, 444 U.S. 527, 542 (1980). Relying on the centrality of federal officers in the D.D.C. would override Congress's purpose of "broaden[ing] the venue of civil actions which could previously have been brought only in the District of Columbia." *Schlanger v. Seamans*, 401 U.S. 487, 490 (1971). Far greater weight should be given to the *plaintiffs'* forum choice than to the location of federal officers. *See supra* at 13-14.

The United States also suggests that the D.D.C. is the appropriate venue because a "substantial part of the decisions giving rise to the claims in the pending actions" occurred there. U.S. Br. 15. Even if true, the United States fails to explain how such a fact would matter here where there will be limited discovery and where judicial review will be based entirely on the administrative record. *See supra* at 11. Similarly, the United States' recognition that the D.C. Circuit is "well-equipped to handle any appeals in this litigation," U.S. Br. 15, is entirely immaterial. As demonstrated by various statutes that transfer and consolidate petitions for

review of agency action in one circuit court based on a judicial lottery, *see supra* at 7, every circuit court—including the Eleventh Circuit, in which the Southern District of Georgia resides—is fully capable of handling appeals of administrative agency actions.

Finally, it is possible that the United States will argue that the NRDC's recent lawsuit filed in the D.D.C supports consolidation there. But this case should be viewed with skepticism. The NRDC undoubtedly knew that the Panel is "extremely reluctant to select a district in which no related action is pending." *In re Air Crash Disaster Near Papeete, Tahiti*, *on July 22, 1973*, 397 F. Supp. 886, 887 (J.P.M.L. 1975); *see also In re Ownership of Longoria Bank Deposits Litig*., 431 F. Supp. 913, 916 (J.P.M.L. 1977) (same). The fact that the NRDC filed its case well after the other actions in order to challenge a rule it strongly supports suggests forum shopping. In any event, the NRDC's belated entry into the D.D.C. weighs against selection of this forum for consolidation.

CONCLUSION

For the foregoing reasons, the United States' motion to transfer and consolidate the district court actions in the D.D.C. should be denied. In the alternative, the Panel should transfer and consolidate the district court actions in the Southern District of Georgia.

Dated: August 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

In compliance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that copies of the foregoing were served on the following electronically via ECF on August 19, 2015:

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