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

BRIEF OF

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ALLIANCE OF FOREST OWNERS, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL PORK PRODUCERS COUNCIL, PUBLIC LANDS COUNCIL, AND TEXAS FARM BUREAU

IN OPPOSITION TO THE UNITED STATES' MOTION FOR TRANSFER PURSUANT TO 28 U.S.C. § 1407

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Pursuant to Rules 6.1(c) and 6.2(e) of the Rules of Procedure for the Judicial Panel on Multidistrict Litigation, Plaintiffs in S.D. Texas No. 3:15-cv-165—American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Leading Builders of America, Matagorda County Farm Bureau, National Alliance of Forest Owners, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Corn Growers' Association, National Mining Association, National Pork Producers Council, Public Lands Council, and Texas Farm Bureau—respectfully submit this Brief in Opposition to the Motion of the United States for Transfer Pursuant to 28 U.S.C. § 1407.

INTRODUCTION

The present motion for consolidation concerns ten lawsuits filed in eight district courts in Georgia, Minnesota, Oklahoma, North Dakota, Texas, and West Virginia. Each lawsuit was filed against the United States Environmental Protection Agency ("EPA") and Army Corps of Engineers ("Corps") challenging the Agencies' final rule defining "waters of the United States" within the meaning of the Clean Water Act. Transfer and consolidation in this administrative rule challenge, with its fixed record and undisputed facts, would be wholly inappropriate. The only purpose it would serve is to stifle the sort of legal percolation that ensures thorough deliberation on important legal questions.

"Where the issues in a case are primarily legal in nature . . . the Panel is nearly certain to conclude that transfer is not appropriate." Multidistrict Litig. Manual § 5.4. That exactly describes this case: As the government concedes, the lawsuits at issue here implicate a fixed administrative record. The essential facts necessary to resolve the merits of each lawsuit are therefore undisputed and "it is highly unlikely that there will be discovery" or many court appearances. Gov't Br. 9. Any discovery that does take place (for instance, to establish individual plaintiffs' standing) will be case-specific. Thus, the only issues that these ten lawsuits

have in common are "legal questions requiring little or no discovery." For that reason alone, the motion should be denied.

The government's primary argument in favor of consolidation is not that it would reduce the burdens of discovery on the parties and courts, but that there is a risk of inconsistent legal determinations by district courts, which it worries will make its job more difficult. But when it comes to cases like these, that is a reason to *deny* transfer, not to *grant* it: The courts of appeals and Supreme Court "rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved [legal] questions" because "[d]eliberation on [such] question[s] over time winnows" the issues, leaving the core of the dispute clearly presented for later appellate resolution. *California v. Carney*, 471 U.S. 386, 400-01 (1985). Granting the government's motion would squelch that important deliberative process.

If the Panel nonetheless finds transfer warranted, the government's request for transfer to the U.S. District Court for the District of Columbia should be denied. None of the original litigants filed in that court, and the government has not provided any persuasive reason to transfer to that court. The individual plaintiffs are located throughout the country, most far from the East Coast. Plaintiffs submit that these cases should be transferred to the Southern District of Texas, a court that is centrally and conveniently located, has the necessary resources and expertise to handle these cases, and where a plurality of plaintiffs have filed suit.

BACKGROUND

On June 29, 2015, EPA and the Corps published a final administrative rule entitled, "Clean Water Rule: Definition of 'Waters of the United States.'" 80 Fed. Reg. 37,054. The Rule purports to "clarif[y]" the Agencies' definition of "waters of the United States" within the meaning of the Clean Water Act ("CWA")—*i.e.*, the scope of the Agencies' jurisdiction under the CWA. Through the Rule, the Agencies have asserted jurisdiction over a staggering range of dry land and water features in ways that are inconsistent with the text of the CWA and violate

the U.S. Constitution. The plaintiffs in the actions pending in the Southern District of Texas have filed suit against the EPA; Regina McCarthy, in her official capacity as Administrator of the EPA; the Corps; Lieutenant General Thomas P. Bostick, in his official capacity as Chief of Engineers and Commanding General of the Corps; and Jo-Ellen Darcy, in her official capacity as Assistant Secretary of the Army for Civil Works. They allege that the Agencies' actions in promulgating the Rule were "arbitrary, capricious, an abuse of discretion," and "otherwise not in accordance with law" under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A); "contrary to constitutional right, power, privilege, or immunity" under 5 U.S.C. § 706(2)(B); "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" under 5 U.S.C. § 706(2)(C); and "without observance of procedure required by law" under 5 U.S.C. § 706(2)(D). They seek a declaration that the Agencies' actions violate the APA and that the Rule departs from the plain text of the CWA and violates certain provisions of the United States Constitution, including the Commerce Clause of Article I, Section 8 and the Due Process Clause of the Fifth Amendment. They also seek an order vacating the Rule and enjoining its implementation or application.

Plaintiffs filed their action in the Southern District of Texas on July 2, 2015. *Am. Farm Bureau Federation et al. v. EPA et al.*, No. 15-cv-165 (S.D. Tex.).[1] Three days earlier, the State

[1] Out of an abundance of caution and to preserve their rights, certain plaintiffs here also filed a protective petition for review of the Rule, initially in the U.S. Court of Appeals for the Fifth Circuit. Other parties, including many of those that have challenged the Rule in district court, filed similar petitions for review in a total of eight circuit courts of appeals. On July 27, 2015, the United States filed a notice with the Panel to consolidate those petitions pursuant to 28 U.S.C. § 2112(a). On July 28, 2015, the Panel consolidated the petitions in the Sixth Circuit. *See* Consolidation Order, Case MCP No. 135 (July 28, 2015). Subsequently, certain petitioners here refiled their petition in the Sixth Circuit; and plaintiff the National Association of Manufacturers intervened as respondent to all petitions in the Sixth Circuit in order to challenge that Court's jurisdiction under Section 509(b). Plaintiffs are firmly of the view that judicial review of the Rule is available only under the APA in the district courts. Nevertheless, "[c]areful lawyers must apply for judicial review [in the court of appeals] of anything even remotely resembling"

of Texas, other Texas government entities, and the States of Louisiana and Mississippi filed a separate action in the same court. *Texas v. EPA et al.*, No. 3:15-cv-162 (S.D. Tex.). Those two related actions are now pending before Judge George C. Hanks, Jr. Other parties have brought suit challenging the Rule in other district courts. To date, ten actions have been filed in eight district courts. On July 27, 2015, the government moved this Panel to transfer the cases to a court in which no party had then filed—the U.S. District Court for the District of Columbia.[2]

ARGUMENT

I. TRANSFER AND CONSOLIDATION WOULD NOT BE APPROPRIATE

Section 1407 provides that "[w]hen 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" when the Panel determines that transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). The government, as the moving party, bears the burden of demonstrating that those criteria are met. *See, e.g.*, *In re Best 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"). The government has failed to carry its burden here.

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an action reviewable under Section 509(b)(1), *see Am. Paper Inst., Inc. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989), even where they believe that jurisdiction properly lies elsewhere.

[2] On August 14, 2015 the Natural Resources Defense Council (NRDC) filed a case in the U.S. District Court for the District of the District of Columbia, well after the United States requested transfer to that court. By all appearances, NRDC's filing in D.C.C. is an attempt to manipulate the transfer process. Indeed, as NRDC makes clear in its complaint, it believes that the Rule is "well supported both legally and scientifically" (and, if anything, does not go far enough), and its challenges to the Rule are "narrow"; it also is asking the court to leave the Rule in place during the pendency of any litigation. *See* Compl. ¶¶ 4-5, No. 15-cv-1324 (D.D.C. Aug. 14, 2015). The Panel should not countenance post hoc gamesmanship of this sort.

A. The historical facts are settled

We begin with the most fundamental reason that consolidation should be denied: This is an administrative rule challenge with a fixed administrative record, in which there will be virtually no discovery and few court appearances.

While the statute permits transfer when there are common questions of fact pending in different courts, consolidation does not serve that purpose when the fact questions are undisputed. This includes cases such as this one, where the facts have already been found by an administrative agency and memorialized in an administrative record. "[D]istrict 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. v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996). Thus, as this panel recently explained, transfer is not warranted in cases that "will be decided on the administrative record," because discovery "will be minimal" and "motion practice will consist of motions regarding that record and summary judgment motions or petitions for review." *In re Lesser Prairie-Chicken Endangered Species Act Litig.*, No. MDL 2629, 2015 WL 3654675, at *1 (J.P.M.L. June 9, 2015).

The Government concedes that the essential facts necessary to resolve these cases are undisputed: "[T]he pending actions do not require discovery or other factual development" (Gov't Br. 6), and, "because it is highly unlikely that there will be discovery with regard to the merits of plaintiffs' claims, . . . there will be a decreased amount of travel" (Gov't Br. 9). Having admitted that much (as it must), the government has conceded away the only reasons that might justify a transfer: "eliminat[ing] duplicative discovery; prevent[ing] inconsistent pretrial rulings . . .; and conserv[ing] the resources of the parties, their counsel and the judiciary." *In re Walgreens Herbal Supplements Mktg. & Sales Practices Litig.*, No. MDL 2619, 2015 WL 3643508, at *3 (J.P.M.L. June 9, 2015). *See also In re Plavix Mktg., Sales Practices &*

Prods. Liab. Litig. (No. II), 923 F. Supp. 2d 1376, 1379 (J.P.M.L. 2013) (same); *In re Lead Contaminated Fruit Juice Prods. Mktg. & Sales Practices Litig.*, 777 F. Supp. 2d 1353, 1355 (J.P.M.L. 2011) (same); *In re Rye Select Broad Mkt. Prime Fund Sec. & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 648 F. Supp. 2d 1385, 1387 (J.P.M.L. 2009) (same).

When consolidation would not achieve those benefits, this Panel has regularly denied transfer. *See, e.g.*, *In re Medi-Cal Reimbursement Rate Reduction Litig.*, 652 F. Supp. 2d 1378, 1379 (J.P.M.L. 2009) (denying transfer where there was no concern about "duplicative and burdensome discovery leading up to the legal issues" in case); *In re Kissi*, 923 F. Supp. 2d 1367, 1369 (J.P.M.L. 2013) (denying transfer where "there is no threat of duplicative discovery or inconsistent pretrial rulings").

No doubt anticipating weakness on that score, the government falls back to arguing that these cases may present other "factual issues." Gov't Br. 4. First, it asserts that the various plaintiffs' challenges to the sufficiency of the evidence relied upon by the Agencies and the adequacy of the Agencies' notice and comment process will be complex and difficult. Second, it asserts that certain fact finding may be required to determine whether plaintiffs in these cases have standing or to adjudicate the preliminary injunction motions that have been filed in several of the district courts. Neither contention is persuasive.

The government's first argument is not really about fact finding at all—it is an argument that it would be wasteful for multiple district courts *to review* the same administrative record for completeness, sufficiency of the evidence, and adequacy of the notice and comment process. But this Panel has described "motions regarding th[e] record" as too "minimal" to ground consolidation. *Lesser Prairie-Chicken*, 2015 WL 3654675, at *1. And review of the administrative record to make legal determinations is not the same as fact finding and is not a reason for transfer.

The primary case that the government relies on for this point explains the difference: District courts in administrative rule challenges "do not duplicate agency fact-finding efforts" and instead "address a predominantly legal issue: Did the agency 'articulate a rational connection between the facts found and the choice made?'" *James Madison*, 82 F.2d at 1096 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys. Inc.*, 419 U.S. 281, 285 (1974)). True, the courts may need to "'resolve factual issues regarding the process the agency used in reaching [their respective] decision[s].'" Gov't Br. 6 (quoting *James Madison*, 82 F.2d at 1096). But "these facts are usually established by the administrative record or are otherwise undisputed." *James Madison*, 82 F.2d at 1096. Any additional fact-finding that might occur at the margins—a document here and there omitted from the administrative record, if even that—does not alter the primary roles of the agency or district court and thus does change the calculus here.

The government's second argument falls just as flat. Any factfinding necessary to evaluate a plaintiff's standing or for a preliminary injunction, would involve not common questions of fact, but instead fact questions unique to that plaintiff. Thus, these types of factual inquiries do not provide a basis for transfer to one court, but rather, support separate adjudication.

The few authorities cited by the government to support its arguments (Gov't Br. 7, 11) are inapplicable to the present proceeding. In *In re Butterfield Patent Infringement*, 328 F. Supp. 513 (J.P.M.L. 1970), the Panel ordered transfer because it would make the litigation more efficient and convenient to "consolidate[] *discovery depositions*." *Id.* at 514 (emphasis added). The government concedes that such a need is absent here. Gov't Br. 9. Similarly, *In re Operation of Missouri River System Litigation*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003), involved factual "questions concerning the conduct of the United States Army Corps of Engineers." *Id.* at 1379. The same cannot be said in this case.

The government also argues that in *Missouri River*, the plaintiffs had obtained conflicting injunctions that both required and prohibited the Corps from releasing more water into the Missouri river—ultimately prompting transfer by this Panel. Gov't Br. 9 n.5. But the government acknowledges that the present cases raise only facial challenges to the Rule, and so would not lead to the same convoluted outcome. *See* Motion by United States to Stay Proceedings, *Am. Farm Bureau Fed'n et al. v. EPA et al.*, No. 15-cv-165, Dkt. No. 13 (S.D. Tex. July 20, 2015) (describing the separate challenges as "facial challenges to the Clean Water Rule").

The government points to one instance in which this Panel transferred proceedings in a case involving an administrative record. Gov't Br. 7 (citing *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 588 F. Supp. 2d 1376 (J.P.M.L. 2008)). But that case raised concerns not present here. For one thing, the Panel expressly found a risk of "duplicative discovery" and "inconsistent pretrial rulings," and ordered transfer to "eliminate" those risks (*In re Polar Bear*, 588 F. Supp. 2d at 1377), which are not present in this case. For another, multiple *nongovernment* parties requested transfer and consolidation in that case. Here, the government *alone* seeks transfer exclusively for its *sole* benefit. That all other parties oppose consolidation is a strong indication that consolidation would achieve none of the benefits that Section 1407 is designed to ensure. *In re Property Assessed Clean Energy (Pace) Programs Litig.*, 764 F. Supp. 2d 1345, 1347 (J.P.M.L. 2011) (denying centralization in part because "the bulk of the parties—plaintiffs in all actions—oppose centralization"). And this Panel should be wary of enabling federal agencies to funnel rule challenges to forums of their own choosing.

B. Transfer and consolidation is inappropriate when actions "by and large raise strictly legal issues"

This Panel has repeatedly held that, "as a general rule," it will "decline to transfer . . . actions if they appear to present 'strictly legal questions . . . requir[ing] little or no discovery.'"

In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, 764 F. Supp. 2d 1352, 1353 (J.P.M.L. 2011) (quoting Transfer Order at 2, *In re Chinese–Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (J.P.M.L. June 15, 2010)).[3] This is such a case.

The reasons underlying that rule are well settled. The federal judicial system *benefits* from consideration of complex legal issues by multiple courts. Such multilateral consideration supplies the appellate courts (and ultimately the Supreme Court) with a variety of approaches and opinions on important questions. Thus, as the Supreme Court has explained, "allowing only one final adjudication" of a complex legal challenge "would deprive th[e] Court of 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 also Carney*, 471 U.S. at 400 ("To identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions."). As the Ninth Circuit has put it, the "ability to develop different interpretations of the law among circuits is considered a strength of our system" because "[i]t allows experimentation with different approaches to the same legal problem." *Hart v. Massanari*, 266 F.3d 1155, 1173 (9th Cir. 2001).

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[3] *See also, e.g.*, *In re LVNV Funding, LLC, Time-Barred Proof of Claim Fair Debt Collection Practices Act (FDCPA) Litig.*, No. MDL 2611, 2015 WL 1518661, at *1 (J.P.M.L. Apr. 2, 2015) ("Merely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization."); *In re Multijurisdiction Practice Litig.*, 52 F. Supp. 3d 1377, 1378 (J.P.M.L. 2014) ("[C]ommon legal questions are insufficient to satisfy Section 1407's requirement of common factual questions."); *In re ClearTalk-ZTE Arbitration Litig.*, 24 F. Supp. 3d 1374, 1375 (J.P.M.L. 2014) ("[T]he resolution of purely a legal issue or issues is generally insufficient to warrant centralization."); *In re Real Estate Transfer Tax Litig.*, 895 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012) ("Although movant seeks efficiencies through centralized treatment of this legal question, '[m]erely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization.'"); *In re Aegon USA, Inc., Supplemental Cancer Ins. Litig.*, 571 F. Supp. 2d 1369, 1370 (J.P.M.L. 2008) (denying centralization of seven actions where the key issue—the proper interpretation of insurance policies—was "legal rather than factual").

The government would have the Panel ignore those benefits, arguing that transfer and consolidation "will promote justice by avoiding inconsistent rulings on issues of . . . law." Gov't Br. 10. In the government's view, the Panel should order consolidation to *avoid* the sort of "experimentation" that is a "strength of our [legal] system" (*Hart*, 266 F.3d at 1173) because "federal and state agencies charged with implementing the Clean Water Act will be faced with the impossible task of attempting to comply with conflicting court orders" (Gov't Br. 11).

That is nonsense. As a matter of course, the government operates under the variable and often conflicting rulings of disparate district courts and circuit courts. To deal with that variability, the defendants in this action routinely turn to a policy of "non-acquiescence," according to which they abide judicial precedents only within the jurisdictions in which those precedents control. *See Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 737 (D.C. Cir. 1992) (referring to agency's "right to refuse to acquiesce" in decisions of circuit courts). As the D.C. Circuit has explained, even "'[a]fter one circuit has disagreed with its position, an agency is entitled to maintain its independent assessment of the dictates of the statutes and regulations it is charged with administering, in the hope that other circuits, the Supreme Court, or Congress will ultimately uphold the agency's position.'" *Nat'l Envtl. Dev. Ass'n v. EPA*, 752 F.3d 999, 1010 (D.C. Cir. 2014) (quoting *Indep. Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) (Rogers, J., dissenting)).

In a brief filed in the D.C. Circuit, EPA explained its position: "To compel an agency to follow the adverse ruling of a particular court of appeals would be to give that court undue influence in the intercircuit dialogue by diminishing the opportunity for other courts of proper venue to consider, and possibly sustain, the agency's position." Br. for Resp't at 31, *Nat'l Envtl. Dev. Ass'n v. EPA*, No. 13-103 (D.C. Cir. Dec. 6, 2013), 2013 WL 5765193. Thus, despite their protestations, complying with "conflicting court orders" would hardly present an "impossible task" for the Agencies; they do it all the time, supposedly for the purpose of fostering the very

judicial "dialogue" that they seek to suppress through the motion to consolidate they have filed here.

For all of those reasons, this Panel has repeatedly held that a desire to avoid a situation in which more than one federal court "decide[s] the same issue" is "not sufficient to justify Section 1407 centralization." *In re Medi-Cal Reimbursement*, 652 F. Supp. 2d at 1378; *see also* cases cited at pp. 8-9, *supra*. In fact, parallel proceedings are the norm in challenges to rule promulgations and other government actions. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012) (observing that multiple courts "heard challenges to the individual mandate"); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (identifying dozens of cases before the district courts, courts of appeals, and state courts and noting the importance of such parallel litigation helping "to explain and formulate the underlying principles this Court now must consider").

Against this backdrop, avoidance of potentially conflicting legal rulings provides no basis whatsoever for granting transfer and consolidation. If anything, it is a basis for denial.

C. Transfer would not serve Section 1407's purposes

Ultimately, transfer and consolidation would not benefit any party except the government, and even that benefit would be small. As the government fully acknowledges, there will be little if any need to coordinate documents or witnesses in discovery in these cases. Gov't Br. 9. As a result, pretrial motion practice and court appearances by counsel will be minimal. *Id.* While transfer may permit the government to file consolidated briefing addressing each plaintiff's claims in one court, rather than repurposing its briefs to address each plaintiff's claims in different courts, the prospect of having to file the similar briefs in eight courts instead of one is hardly "extremely inefficient and burdensome" (Gov't Br. 1), and any burden pales in comparison to the benefits of having multiple courts consider the very important legal issues the various plaintiffs present. This case is simply not the kind of "complex case" that Congress had

in mind when it enacted Section 1407, or which typically warrants transfer by this Panel. While the legal issues are challenging, those issues do not "depend on many disputed factual issues that will require complex discovery" or numerous court appearances. *In re Google Inc. Gmail Litig.*, 936 F. Supp. 2d 1381, 1382 (J.P.M.L. 2013).

The government resorts to arguing that "[c]entralizing the pending cases would pose no significant burden or inconvenience on the plaintiffs." Gov't Br. 1. That gets the burden backwards. It is the government that bears the burden of affirmatively showing that transfer will serve the "convenience of the parties and witnesses" or "promote the just and efficient conduct of such actions" (28 U.S.C. § 1407(a)), not our burden to show that transfer would not be inconvenient. For its part, the government has fallen distantly short of making the necessary showing.

II. IF THE PANEL FINDS TRANSFER APPROPRIATE, THE CASES SHOULD BE TRANSFERRED TO THE SOUTHERN DISTRICT OF TEXAS

If, despite all the reasons favoring denial, the Panel grants the government's motion to consolidate, it should deny the government's request for transfer to the U.S. District Court for the District of Columbia. None of the original actions subject to the government's motion were filed in that court. The government's arguments that it is a convenient court, because its own staff and some of plaintiffs' counsel[4] "reside" or "maintain offices in" that district (Gov't Br. 14-15), are wholly irrelevant. As the government acknowledges, discovery is very unlikely, and court appearances will be few. *See* Gov't Br. 9. Its only other argument—that the District Court for the District of Columbia has the capacity and expertise to handle a consolidated proceeding (Gov't Br. 13)—is hardly a ground for disregarding the telling fact that no plaintiff filed in that

[4] The government provides a list of such plaintiffs' counsel in footnote 9 to its brief. Gov't Br. 14 n.9. In fact, all but two of plaintiffs' counsel listed are counsel in a *single* action, *American Farm Bureau Federation et al. v. EPA et al.*, No. 15-cv-0165 (S.D. Tex.), and lead counsel in that action, Timothy S. Bishop, does not reside in Washington, D.C., but in Chicago, Ill. *See* perma.cc/LZH3-EDPE.

court until after the government filed this motion. *See supra*, note 2. It also is true of several of the other courts in which plaintiffs have actually filed suit in these cases.

More compelling reasons exist to transfer and consolidate these cases in the U.S. District Court for the Southern District of Texas. Two of the ten actions at issue have already been filed in that court, involving a plurality of the plaintiffs. And that court's judges have both the capacity and experience to handle this type of proceeding. The Southern District of Texas has handled numerous complex multidistrict litigation cases. *See* U.S. J.P.M.L.: MDL Statistics Report—Docket Type Summary as of July 15, 2015, at perma.cc/9U32-J52X (reflecting a total of 255 MDL cases, historically, in the Southern District of Texas). At present, courts in the Southern District are overseeing 37 MDL cases.

Because both plaintiffs' case and *Texas et al. v. EPA et al.*, No. 3:15-cv-162 (S.D. Tex.), are currently consolidated before Judge George C. Hanks, Jr., plaintiffs request transfer to Judge Hanks, who has experience with multidistrict litigation. Before his appointment to the federal bench, Judge Hanks served on the Texas State Judicial Panel on Multidistrict Litigation, authoring opinions in several cases. *See, e.g.*, *In re Standard Guar. Ins. Co.*, 339 S.W. 3d 398 (Tex. JPML 2009); *In re Delta Lloyds Ins. Co.*, 339 S.W.3d 384 (Tex. JPML 2008); see also *e.g.*, *In re Deep South Crane & Rigging Co.*, 339 S.W.3d 395 (Tex. JPML 2008); *In re Phyllis Tomasino Litig.*, 339 S.W.3d 378 (Tex. JPML 2008) (per curiam); *In re Ad Valorem Tax Litig.*, 287 S.W.3d 517 (Tex. JPML 2007); *In re Hurricane Rita Evacuation Bus Fire*, 216 S.W.3d 70 (Tex. JPML 2006); *In re Silica Prods. Liab. Litig.*, 216 S.W.3d 87 (Tex. JPML 2006); *In re Kone, Inc.*, 216 S.W.3d 68 (Tex. JPML 2005); *In re Vanderbilt Mortg. & Fin., Inc.*, 166 S.W.3d 12 (Tex. JPML 2005). Judge Hanks also has written in depth about the multidistrict litigation process. *See* G.C. Hanks, Jr., *Searching from Within: The Role of Magistrate Judges in Federal Multi-District Litigation*, 8 FED. CT. L. REV. 35 (2015).

Beyond that, Judge Hanks has already familiarized himself with the case and entered orders on the respective dockets. That Judge Hanks saw fit to stay proceedings pending this Panel's resolution of the government's motion to consolidate and transfer (like a number of other district courts) hardly disqualifies his court as the appropriate venue for transfer. And although these cases will be decided largely on the briefs, to the extent this Panel finds it relevant, the Southern District of Texas is in a geographically central location with ample lodging and easy access to two major airports in Houston that are serviced by major airlines with frequent flights from across the country. Accordingly, while the plaintiffs here strongly oppose any consolidation of these cases, if the Panel orders consolidation, it should send all of the actions to Judge Hanks in the Southern District of Texas.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Panel deny the Motion of the United States for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Consolidation of Pretrial Proceedings. In the alternative, Plaintiffs request that the actions be transferred to the U.S. District Court for the Southern District of Texas.

Dated: August 19, 2015

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