No. 19-278

IN THE

Supreme Court of the United States

PFIZER, INC. AND GREENSTONE LLC,
Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AND THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JOHN H. BEISNER
Counsel of Record
JESSICA D. MILLER
JORDAN M. SCHWARTZ
ZACHARY W. MARTIN
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com

Additional counsel listed on inside cover

Additional counsel

H. SHERMAN JOYCE
LAUREN S. JARRELL
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 682-1168

PETER TOLSDORF
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W.
Suite 700
Washington, D.C. 20001
(202) 637-3100

JAMES C. STANSEL
MELISSA B. KIMMEL
THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA
950 F Street, N.W.
Washington, D.C. 20004
(202) 835-3400

ALAN J. LAZARUS
DRINKER BIDDLE & REATH LLP
Four Embarcadero Center 27th Floor
San Francisco, CA 94111-4180
(415) 591-7551

Attorneys for Amici Curiae The American Tort Reform Association, The National Association of Manufacturers, The Pharmaceutical Research and Manufacturers of America and the Product Liability Advisory Council

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STATEMENT OF INTEREST[1]

The American Tort Reform Association ("ATRA") is the only national organization exclusively dedicated to reforming the civil justice system. The organization is a nationwide network of state-based liability reform coalitions backed by 135,000 grassroots supporters. ATRA's membership is diverse and includes nonprofits, small and large companies, as well as state and national trade, business and professional associations.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici curiae states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, amici curiae state that petitioners and respondents have consented to the filing of this brief and that amici curiae timely notified counsel of record of their intent to file this brief.

Amici have also filed a brief in support of the related petition for certiorari to the United States Court of Appeals for the Ninth Circuit, seeking review of the federal courts' determination that they lacked subject matter jurisdiction over these cases. *See Pfizer Inc. v. Adamyan*, No. 18-1578.

manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association of the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate public policies encouraging the discovery of life-saving and life-enhancing new medicines. PhRMA's member companies are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives, and have led the way in the search for new cures.

The Product Liability Advisory Council ("PLAC") is a non-profit association with more than 80 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

ATRA, the NAM, PhRMA and PLAC have a strong interest in this case because their members are increasingly forced to defend against suits brought in states to which neither the plaintiffs, their claims nor the defendants have any meaningful con-

nection. These suits are frequently brought in a handful of fora well-known for plaintiff-friendly procedural law, judges and jury pools. This Court's landmark personal-jurisdiction ruling in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), has mitigated some of this abuse. However, amici remain concerned that the harsh forfeiture rule manufactured by the California Superior Court, summarily endorsed by the California Court of Appeal and implicitly countenanced by the California Supreme Court's failure to grant review will spur further forum-shopping and provide California (and potentially other state) courts with a clear blueprint for evading the dictates of *Bristol-Myers*. In addition, the participation of amici is desirable because their unique perspective and expertise can help elucidate the profound real-world public-policy consequences of the novel forfeiture rule that is the subject of the petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant the petition and reverse, or summarily reverse, the California courts' rulings in this proceeding, which improperly sanctioned the exercise of personal jurisdiction over New York-based Pfizer [2] with respect to nearly 4,000 cases, even though the plaintiffs' claims arose outside California. As the California Superior Court itself recognized, hauling the out-of-state pharmaceutical company into court to defend against claims in California under these circumstances would clearly flout "the principles of *Bristol-Myers*," Pet. App. 8, which made clear

[2] Petitioners Pfizer Inc. and Greenstone LLC are referred to as Pfizer, collectively, in the petition. Amici do the same here.

that state courts cannot exercise personal jurisdiction over out-of-state defendants in these circumstances. 137 S. Ct. at 1782. Nonetheless, the Superior Court chose to evade the clear limitations established by this Court in that seminal decision by approving a rule of forfeiture, purportedly fashioned under federal law, that is unmistakably at odds with more than a century of precedent from this Court and others. This evasion of precedent adds to a growing list of California rulings that have sought to circumvent the clear command of *Bristol-Myers*.[3]

The present case is a strong candidate for summary reversal, or at the very least for consideration on the merits, for two reasons.

First, the petition presents this Court with a prime opportunity to swiftly correct a patently erroneous interpretation of federal law. As amply demonstrated in the petition, the so-called "federal" forfeiture rule applied by the courts below is contrary

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[3] *See, e.g.*, *People ex rel. Becerra v. Native Wholesale Supply Co.*, 37 Cal. App. 5th 73, 84 (2019) (finding 2011 personal jurisdiction ruling to be law of the case notwithstanding intervening decisions in *Bristol-Myers* and *Walden v. Fiore*, 571 U.S. 277 (2014)); *Coordination Proceeding Special Title Rule 3.550 v. Janssen Pharm., Inc.*, No. JCCP 4775, 2018 Cal. Super. LEXIS 3259, at *21-36 (Aug. 1, 2018) (finding personal jurisdiction arguments forfeited for failure to raise them prior to *Bristol-Myers*, notwithstanding acknowledgement that such arguments would have been futile under then-existing California precedent); *Coordination Proceeding Special Title Rule 3.550c v. DePuy Orthopaedics, Inc.*, No. CGC-11-509600, 2017 Cal. Super. LEXIS 551, at *11 (Nov. 1, 2017) (exercising personal jurisdiction over non-California-based defendants with respect to claims arising out of injury suffered in Connecticut by a Connecticut resident allegedly caused by a product manufactured in the United Kingdom by an Indiana corporation).

to more than a century of precedent from both this Court and other federal courts holding that a defendant does *not* forfeit a personal jurisdiction defense by removing a case to federal court and litigating subject matter jurisdiction first. By holding to the contrary, the courts below not only contravened those legions of authorities, but also resurrected a mirror image of the "unyielding jurisdictional hierarchy" squarely rejected in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999). The clear import of *Ruhrgas* is that there is *no* inflexible standard governing the order in which jurisdictional motions are made and decided. If left undisturbed, the California courts' rulings would effectively nullify *Ruhrgas* and compel defendants in California's courts to litigate personal jurisdiction before subject matter jurisdiction in *every* removed case, lest they be later held to have forfeited the former defense.

Second, the erroneous forfeiture standard applied by the California courts below would also have serious ramifications for the American civil justice system. Most notably, the strict requirement that defendants litigate personal jurisdiction prior to, or at the latest simultaneously with, questions of subject matter jurisdiction would unnecessarily burden the court system and unfairly disadvantage out-of-state defendants. The rule applied by the California courts is grossly inefficient and could precipitate needless jurisdictional motion practice given that an out-of-state defendant's decision to assert a personal jurisdiction defense in the first place might largely turn on whether it prevails on the logically antecedent question of federal subject matter jurisdiction. The inefficiencies wrought by the California courts' approach to forfeiture would be especially acute in

the context of multidistrict litigation ("MDL") proceedings, in which MDL courts have personal jurisdiction to oversee cases during *pre*-trial proceedings regardless of the jurisdiction in which the claims arose. Personal jurisdiction questions tend to be case-specific and thus may not be generally applicable to the broader universe of cases pending in an MDL proceeding, often making it more efficient to address other, cross-cutting issues first. Nonetheless, the rule embraced by the California courts would force MDL judges to prioritize discrete and case-specific personal jurisdiction issues over more broadly applicable questions such as subject matter jurisdiction, preemption, the admissibility of expert evidence and the appropriate management of common discovery, undermining the very purpose of multidistrict litigation, which is to "promote the just *and efficient*" resolution of claims. 28 U.S.C. § 1407(a) (emphasis added).

In addition, the forfeiture rule endorsed by the California courts in this proceeding would unfairly prejudice defendants by requiring that, in *every* case, they litigate personal jurisdiction before (or, at the latest, in tandem with) subject matter jurisdiction. This is bad policy because a defendant's decision to assert a personal jurisdiction defense may well be informed by whether it will have to defend against the claims at issue in a state or federal forum. Nonetheless, the forfeiture rule in question would compel defendants (like amici's members) to decide whether to raise a personal jurisdiction defense *before* they know the forum in which they would be consenting to litigate should they decline to pursue it.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION AND REVERSE BECAUSE THE CALIFORNIA SUPREME COURT'S REFUSAL TO REVIEW SIGNALS APPROVAL OF THE TRIAL COURT'S ERRONEOUS RULING ON AN IMPORTANT, RECURRING ISSUE OF FEDERAL LAW.

The Court should grant the petition because the conclusion reached by the California trial court, summarily affirmed by the Court of Appeal and implicitly approved by the California Supreme Court's failure to grant review – i.e., that petitioners forfeited their personal jurisdiction defense in state court by litigating the question of subject matter jurisdiction in federal court – contravenes well-established federal law. As petitioners explain, this conclusion runs directly contrary to the rulings of this Court and other federal courts, and it would eviscerate the flexibility for courts and parties "to choose among threshold grounds for denying [an] audience to a case on the merits." *Ruhrgas*, 526 U.S. at 585.

First, and as detailed in the petition, in an effort to circumvent the straightforward holding of this Court's decision in *Bristol-Myers*, the California courts embraced a "federal" rule of forfeiture that cannot be squared with any federal authority addressing the question of waiver under analogous circumstances.

The Superior Court acknowledged that the exercise of personal jurisdiction in California over New York-based Pfizer with respect to thousands of cases with no connection to California would violate "the

principles of *Bristol-Myers*." Pet. App. 8. It nonetheless reasoned that in light of the extensive federal litigation in the MDL proceeding, the petitioners "had more than enough time to litigate their defense of lack of personal jurisdiction." Pet. App. 12. But that time was primarily spent removing the case and subsequently defending the propriety of that removal – i.e., whether the MDL court had subject matter jurisdiction.

As this Court has repeatedly reiterated for more than a century, "the theory that a defendant, by filing . . . a petition for removal . . . necessarily waives the right to insist . . . the state court had not acquired jurisdiction [over] his person, is inconsistent with the terms, as well as with the spirit" of the removal statute. *Goldey v. Morning News of New Haven*, 156 U.S. 518, 523 (1895); *see also, e.g.*, *Emp'rs Reinsurance Corp. v. Bryant*, 299 U.S. 374, 376 (1937) ("[o]btaining . . . removal from the state court into the federal court did not operate as a general appearance" and the court "plainly was without personal jurisdiction"); *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 409 (1929) (rejecting contention that "by removal of the case to the federal court, objection to jurisdiction over the person" had been forfeited). The federal courts have uniformly held that this rudimentary principle applies even if the defendant extensively litigates subject matter jurisdiction, or even in certain circumstances the merits, following removal. *See, e.g.*, *R. H. Hassler, Inc. v. Shaw,* 271 U.S. 195, 199-200 (1926) (removal followed by litigation on the merits up through trial did not forfeit personal jurisdiction defense); *Flowers v. Aetna Cas. & Sur. Co.*, 163 F.2d 411, 415 (6th Cir. 1947).

For example, in *Flowers*, subject matter jurisdiction was litigated for years following removal, eventually reaching all the way to this Court. *See* 163 F.2d at 413. Nevertheless, the circuit court, relying on the principle that removal does not waive a challenge to personal jurisdiction, concluded that defendants retained the right to challenge "the validity of jurisdiction over the person" once subject matter jurisdiction had finally been resolved. *Id.* at 415. As the court of appeals explained, "after removal the party securing it has the same right to invoke the decision of the United States Court on the validity of jurisdiction over the person of the defendants that he has to ask its judgment on the merits." *Id.*

The same principle should apply in this case, which even the California trial court recognized is governed by "federal procedural law." Pet. App. 8. The fact that petitioners removed this case, and then engaged in protracted litigation attempting to establish subject matter jurisdiction, cannot, under the federal precedent described above, preclude them from now challenging personal jurisdiction. Rather, only by fashioning an entirely new rule out of whole cloth could the California courts find a way around the "principles of *Bristol-Myers*." Pet. App. 8.

The primary case on which the courts below relied, *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58 (2d Cir. 1999), is not to the contrary and offers no support for their position. The California courts erroneously construed *Hamilton* to stand for the sweeping proposition that personal jurisdiction objections can be forfeited whenever the defendant could have filed a motion challenging personal jurisdiction at an earlier time after removal. Pet. App. 9-11. But *Hamilton* clearly states that removal coupled with "the passage

of time alone is generally *not* sufficient to indicate forfeiture of a procedural right." 197 F.3d at 61 (emphasis added). Rather, that case turned on at least two additional facts: (i) the removing defendant engaged in case-specific "merits discovery," including taking the deposition of the individual plaintiff; and (ii) the defendant did not "raise the personal jurisdiction issue [until] the eve of trial." *Id.* at 61, 62.

Here, by contrast, no such case-specific "merits" discovery was conducted in these cases, which remained stayed during *the entire time they were pending in federal court*. Nor did Pfizer – which asserted the personal jurisdiction defense in its answers – wait until the eve of trial to lodge its objection. Simply put, the facts of these cases bear no resemblance to those at issue in *Hamilton*.

The California courts nonetheless attempted to pigeonhole the disparate facts of these cases into the unique factual scenario presented in *Hamilton* by concluding that Pfizer had "acceded to the jurisdiction of the [California] court[s] by seeking a ruling on the merits of the California cases before the [MDL] court." Pet. App. 12-13. In so doing, they misconstrued both the record of these cases, and, more importantly, the pertinent MDL context in which that record developed. *Id.* Although Pfizer did file an omnibus motion for summary judgment, it expressly acknowledged the possibility that the MDL court would "defer[] ruling on summary judgment" in the California cases and merely reserved its right to renew its arguments at a later time *after a finding of subject matter jurisdiction in these cases*. Pet. App. 52. As the petition cogently explains, such a *conditional* waiver of personal jurisdiction is hardly novel and cannot be construed as abrogating a defendant's

rights where – as here – the condition (i.e., a finding of subject matter jurisdiction) went unfulfilled. Pet. 24.

Such a conclusion is all the more warranted in light of the MDL context in which Pfizer's omnibus motion for summary judgment was filed. The multi-district litigation statute "authoriz[es] the federal [MDL] court[] to exercise nationwide personal jurisdiction" "over *pre*trial proceedings," such as motions for summary judgment. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987) (emphasis added) (citation omitted); *see also Manual for Complex Litigation (Fourth)* § 22.36 (2004) (noting MDL court's authority to enter summary judgment but not to try cases). While that power technically derives from the authority "that the transferor judge would have had in the absence of transfer," *In re "Agent Orange"*, 818 F.2d at 163 (quoting *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (per curiam)), to insist that a party consent to the personal jurisdiction of the transferor forum by dint of conducting omnibus pretrial proceedings in the transferee MDL court would be to elevate form over substance in the extreme. After all, the purpose of an MDL proceeding is to resolve cross-cutting issues that apply equally to all cases regardless of the forum that ultimately has jurisdiction to try them. Personal jurisdiction does not truly become relevant until the litigation reaches the case-specific stage, frequently after remand to the transferor courts. Illustrating the point, had these California cases been filed in a proper forum, the vast majority of them would still have ended up before the same MDL judge, at the same time.

In short, the applicable federal precedent governing forfeiture, the underlying record and the unique MDL posture that characterized these California cases for several years all make clear that the California courts' finding of forfeiture was patently erroneous.

Second, the forfeiture rule created by the California courts would impose a strict hierarchy in which personal jurisdiction *must* be litigated before (or, at the latest, simultaneously with) subject matter jurisdiction in every case: the same inflexible result this Court emphatically rejected in *Ruhrgas*. In *Ruhrgas*, the court below had determined that "district courts must decide issues of subject-matter jurisdiction first, reaching issues of personal jurisdiction 'only if subject-matter jurisdiction is found to exist.'" 526 U.S. at 582 (citation omitted). In reversing that determination, this Court held that both subject matter jurisdiction and personal jurisdiction are "'essential element[s] of . . . jurisdiction . . .' without which the court is 'powerless to proceed to an adjudication'" of the merits. *Id.* at 584 (citation omitted). Therefore, neither is more "fundamental," *id.* (citation omitted), than the other, and no "unyielding jurisdictional hierarchy" compels consideration of one before the other, *id.* at 578. Still, despite the absence of any hard-and-fast hierarchy, this Court observed that, in most cases, federal courts should still resolve subject matter jurisdiction before turning to personal jurisdiction, out of "both expedition and sensitivity to state courts[]." *Id.* at 587-88.

The forfeiture rule sanctioned by the California courts below would produce a mirror image of the "unyielding . . . hierarchy" rejected in *Ruhrgas*. By finding that Pfizer had forfeited its personal jurisdiction defense through federal court litigation

overwhelmingly dedicated to the question of subject matter jurisdiction, the courts below effectively required Pfizer to litigate personal jurisdiction before – or simultaneously with – subject matter jurisdiction, on pain of forfeiting the right to raise the former. This is entirely contrary to the flexible scheme authorized by *Ruhrgas* and its progeny. Indeed, dictating that personal jurisdiction be litigated before subject matter jurisdiction as a matter of course makes even less sense than the opposite requirement that the Court rejected in *Ruhrgas*. While that case evinced a flexible approach to the sequencing of jurisdictional questions, it still acknowledged that courts should usually address subject matter jurisdiction first.

In sum, in an effort to evade *Bristol-Myers*, the California courts flouted well-settled federal law, and turned the flexible jurisdictional inquiry this Court has embraced on its head. For this reason alone, the petition should be granted.

II. THE COURT SHOULD GRANT THE PETITION AND REVERSE BECAUSE THE CALIFORNIA COURTS' APPROACH TO FORFEITURE WOULD HAVE ADVERSE CONSEQUENCES FOR THE CIVIL JUSTICE SYSTEM.

The Court should also grant the petition because the forfeiture rule fashioned by the California courts is contrary to sound public policy. If allowed to stand, such a rule would undermine the efficient management of civil litigation, particularly in MDL proceedings, and would prejudice defendants.

First, requiring defendants to litigate personal jurisdiction at the outset of a civil lawsuit, prior to or

simultaneously with subject matter jurisdiction, would result in unnecessary and inefficient delay. The ubiquitous nature of civil litigation has created a backlog of civil lawsuits, leading to a "[r]ecord number of pending actions" and delays across the country. Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, Wall Street J., Apr. 6, 2015 ("Civil suits . . . are piling up . . . leading to long delays in cases . . . ."). As legal commentators have lamented, unnecessary motion practice has further increased litigation costs and delays. *See* Victor Marrero, *The Cost of Rules, The Rule of Costs*, 37 Cardozo L. Rev. 1599, 1602, 1632 (2016) (noting that "litigation abuse, cost, and delay has arisen in recent years" and attributing a large part of it to "premature, avoidable, unproductive, or otherwise unnecessary" motion practice).

The California courts' approach to forfeiture *threatens* to exacerbate this dynamic by spawning a multiplicity of personal jurisdiction motions in courts across the country that might end up being for naught. After all, and as elaborated *infra*, the decision to press a personal jurisdiction defense frequently turns on whether the claims at issue will proceed in state or federal court – a reality laid bare by the instant petition. *See* Pet. 24 (Pfizer stated "prospectively that it would waive its personal jurisdiction objections on the condition that subject matter jurisdiction were established"). In other words, resolving the propriety of a defendant's removal of a lawsuit to federal court in its favor often obviates the need for protracted and expensive personal jurisdiction motion practice in the first place. However, under the stringent forfeiture rule developed by the California courts, parties and courts would have to expend time and resources on personal

jurisdiction questions as soon as a case is removed – irrespective of the implications a ruling on subject matter jurisdiction would have for the logically subsequent question of whether to maintain a personal jurisdiction challenge. Such a requirement would unnecessarily increase litigation costs and encumber an already over-burdened court system.

Needless to say, these costs and burdens would be especially debilitating in MDL proceedings, which Congress expressly established to "promote the just and *efficient*" resolution of complex litigation. 28 U.S.C. § 1407(a) (emphasis added). As this Court has recognized, multidistrict litigation is intended to "save the time and effort of the parties, the attorneys . . . and the courts." *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 135 S. Ct. 897, 903 (2015) (quoting *Manual for Complex Litigation (Fourth)* § 20.131). In order to accomplish this task, the MDL court is supposed to expeditiously adjudicate "matters common among [the] cases." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, MDL No. 1407, 2004 U.S. Dist. LEXIS 18937, at *10 (W.D. Wash. Sept. 3, 2004). Such matters – for example, whether a plaintiff has fraudulently joined a non-diverse defendant to defeat diversity – often overlap with other subject matter jurisdiction issues raised in pending motions to remand in an MDL proceeding. *See Nielsen v. Merck & Co.*, No. C07-00076 MJJ, 2007 U.S. Dist. LEXIS 21250, at *5 (N.D. Cal. Mar. 15, 2007) (MDL court should resolve motion to remand because "there are presently dozens of cases already in the MDL originating from California . . . that involve the same jurisdictional issue -- the fraudulent joinder of these same pharmaceutical distributor defendants"). As a result, an MDL court should, in particular, resolve

issues of subject matter jurisdiction "promptly" to avoid "unnecessary and prejudicial delay." *Manual for Complex Litigation (Fourth)* § 22.36. The same is true with respect to various other cross-cutting pretrial motions, the resolution of which would advance – rather than hinder – the course of an MDL proceeding. *See In re Proton-Pump Inhibitor Prods. Liab. Litig.*, 261 F. Supp. 3d 1351, 1354 (J.P.M.L. 2017) ("Centralization will facilitate a uniform and efficient pretrial approach to this litigation, eliminate duplicative discovery, prevent inconsistent rulings on *Daubert* and other pretrial issues, and conserve the resources of the parties, their counsel, and the judiciary.").

Requiring defendants – and therefore MDL courts – to prioritize the adjudication of personal jurisdiction instead would undermine the efficiency that multidistrict litigation is intended to promote. MDL proceedings can frequently include hundreds, if not thousands, of individual cases, transferred from dozens of, if not all 50, forum states. Under the California courts' forfeiture rule, defendants would be required to flood MDL courts with every conceivable personal jurisdiction challenge in all of these cases as soon as possible, lest they be prevented from raising the issue later.[4] Such motions, which would implicate case-specific issues about the nexus between the particular "defendant, the forum, and the litigation," *Walden v. Fiore*, 571 U.S. 277, 284 (2014)

[4] This profound impact on MDL proceedings would occur even if California state court remains the only jurisdiction to follow the purportedly "federal" rule of forfeiture crafted below. California is the most populous state and a popular venue for filing cases that are ultimately centralized in federal MDL proceedings.

(citation omitted), would crowd out questions of subject matter jurisdiction, as well as other cross-cutting issues such as preemption, the admissibility of expert evidence under *Daubert* and most importantly, the oversight of common discovery. These issues would all be left waiting to be addressed while the parties briefed, and the court adjudicated, endless personal jurisdiction motions of little pertinence to the broader claims pool that would only "slow down the MDL process." *In re PPA*, 2004 U.S. Dist. LEXIS 18937, at *10-12 ("[T]he motions require a case-specific analysis not appropriate for an MDL court . . . .") (citation omitted).

Such an approach is neither required by law nor likely to have any practical benefits. Whereas an MDL court must assure itself of subject matter jurisdiction before taking any binding action on the merits in a given case, *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), the issue of personal jurisdiction remains essentially irrelevant for as long as a case is pending in an MDL proceeding. As already discussed, the MDL court has, by statute, nationwide personal jurisdiction over the *pre*trial matters that it adjudicates. *See In re "Agent Orange"*, 818 F.2d at 163. The MDL process could not function otherwise. And the question whether a particular transferor court had personal jurisdiction over a particular case is only of academic concern with respect to pretrial proceedings, since all federal cases are heard in the same MDL court, regardless of the forum in which a case was initially filed or to which it was initially removed. Because the rule crafted below would, nevertheless, push this issue to the forefront of MDL litigation – thereby delaying the

resolution of far more generally applicable pretrial motions – this Court should reject it.

Second, the forfeiture rule applied below would also unfairly prejudice defendants on multiple levels. As a threshold matter, the rule would hamper defendants' ability to effectively litigate their position on subject matter jurisdiction and personal jurisdiction. With respect to any lawsuit for which there is a remotely colorable personal jurisdiction defense, the defendant would have no choice but to move to dismiss the action upon removing it to federal court. In many of those cases, the plaintiffs will have already filed motions to remand challenging the defendant's theory of removal. Given limited time and resources, the defendants in those cases would then face a Hobson's choice: prioritize their personal jurisdiction briefing at the expense of their subject matter jurisdiction briefing or vice versa. Neither choice is fair or practical in light of the fundamental jurisdictional issues that would be raised in those briefs. In short, the simultaneous and disjointed nature of the jurisdictional motion practice envisioned by the California courts' approach to forfeiture would make it all the more difficult for defendants to effectively press their jurisdictional arguments.

More fundamentally, however, the rigid rule employed below would deny defendants the opportunity to make an informed and meaningful choice with regard to a constitutionally-based defense. Personal jurisdiction is "a matter of" defendants' "individual liberty." *Ruhrgas*, 526 U.S. at 584 (citation omitted). Like any other individual right, a defendant "may insist that the limitation be observed, or [it] may forgo that right, effectively consenting to the court's exercise of adjudicatory authority." *Id.* But this

supposed choice is rendered entirely illusory when a defendant does not know the "adjudicatory authority" to which it is purportedly deciding to "consent[]."

A rule like the one imposed by the California courts requiring defendants to file a personal jurisdiction motion either before or simultaneously with litigating subject matter jurisdiction would have precisely that effect. Defendants would have to decide whether to consent to trial in a particular forum state without knowing whether the case is to be adjudicated by the federal or state courts of that forum. The difference could well be significant. For example, and as the *conditional* waiver proffered by Pfizer illustrates, it is entirely possible that an out-of-state defendant would be more willing to forgo a personal jurisdiction defense if federal subject matter jurisdiction had been established than if it had not. This reality is well-established in federal jurisprudence; indeed, both the Constitution, *see* U.S. Const. art. III, § 2, and the U.S. Code, *see* 28 U.S.C. § 1332, assume that federal courts will be free from bias against out-of-state defendants that might affect the state courts of the same forum. *See, e.g.*, *Guaranty Tr. Co. of N.Y. v. York*, 326 U.S. 99, 110-11 (1945) (citing *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809)) ("Diversity jurisdiction is founded on assurance to nonresident litigants of courts free from susceptibility to potential local bias."). Yet, under the California courts' rule, a defendant that declines to immediately challenge personal jurisdiction because it expects the federal court ultimately to exercise subject matter jurisdiction would be required, if the federal court declines jurisdiction, to "submit[] to the coercive power of a *State* [court] that may have little legitimate in-

terest in the claims in question." *Bristol-Myers*, 137 S. Ct. at 1780 (emphasis added).

In sum, a personal jurisdiction defense protects "the individual liberty" of defendants, and before they raise it, they are entitled to know, and weigh, the consequences of doing so. The forfeiture rule fashioned in the California courts would abrogate that right and, for this reason too, the Court should grant the petition and reverse.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

H. SHERMAN JOYCE
LAUREN S. JARRELL
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 682-1168

JOHN H. BEISNER
Counsel of Record
JESSICA D. MILLER
JORDAN M. SCHWARTZ
ZACHARY W. MARTIN
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

PETER TOLSDORF
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
(202) 637-3100

JAMES C. STANSEL
MELISSA B. KIMMEL
THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA
1950 F Street, N.W.
Washington, D.C. 20004
(202) 835-3400

ALAN J. LAZARUS
DRINKER BIDDLE & REATH LLP
Four Embarcadero Center, 27th Floor
San Francisco, CA 94111-4180
(415) 591-7551

Attorneys for Amici Curiae The American Tort Reform Association, The National Association of Manufacturers, The Pharmaceutical Research and Manufacturers of America and the Product Liability Advisory Council

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