UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 19-3398

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OHIO
CASE NO. 1:19-OP-45206
(UNDER LEAD CASE NO. 1:17-MD-02804)

IN RE NATIONAL PRESCRIPTION OPIATE LITIGATION

AMANDA HANLON, *ET AL.*,
Plaintiffs-Appellants,

v.

PURDUE PHARMA L.P., *ET AL.*,
Defendants-Appellees.

PETITION FOR REHEARING *EN BANC*

COOPER LAW FIRM, LLC
Celeste Brustowicz
1525 Religious Street
New Orleans, LA 70130
Telephone: 504-399-0009
Email: cbrustowicz@sch-llc.com

MARTZELL, BICKFORD & CENTOLA
Scott R. Bickford
338 Lafayette St.
New Orleans, LA 70130
Tel: 504-581-9065
Fax: 504-581-7635
Email: SRB@MBfirm.com

Attorneys for Plaintiffs-Appellants

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INTRODUCTION

Plaintiffs-Appellants Amanda Hanlon and Amy Gardner filed the underlying action, seeking injunctive relief to protect the interests of unborn children at risk for opioid-related neonatal abstinence syndrome ("NAS"). The district court refused their request for leave to move for a preliminary injunction, which was designed to address the immediate need for protective measures. Hanlon and Gardner appealed from that refusal under 28 U.S.C. § 1292(a)(1) and *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) . They asserted that the district court's order had the practical effect of denying them injunctive relief that could lead to "serious, perhaps irreparable consequence[s]." *See id*.

On November 18, 2019, a divided panel of this Court dismissed their appeal for want of appellate jurisdiction, finding that the order on appeal is a non-appealable case-management order. (11/18/19 Order.[1]) Hanlon and Gardner now petition the Court, under Fed. R. App. P. 35, for rehearing en banc.

[1] "11/18/19 Order" refers to the Order entered in this action on November 18, 2019 (R.E. 22-2), attached as Exhibit A.

The majority opinion conflicts with the Supreme Court's decisions in *Abbott v. Perez*, --- U.S. ---, 138 S. Ct. 2305 (2018), and *Carson*. Those decisions emphasize that an order that effectively denies a motion for preliminary injunction is immediately appealable, regardless of the label attached to it, *Abbott*, 138 S. Ct. at 2319, if the result "might" lead to "'serious, perhaps irreparable, consequences.'" *Carson*, 450 U.S. at 84 (quoting *Balt. Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)); *see also Abbott*, 138 S. Ct. at 2319 (reviewing order that "threatened" immediate harm). This Court, in *Graves v. Mahoning County*, 534 Fed. App'x 399 (6th Cir. 2013) , applied that doctrine to recognize appellate jurisdiction over an order, like the order in this case, staying litigation. The contrary result here requires "consideration by the full court . . . to secure and maintain uniformity of the court's decisions." *See* Fed. R. App. P. 35(b)(1)(A).

The Court should therefore hear this case en banc, vacate the panel decision, and proceed to a decision on the merits.

BACKGROUND

I. MS. HANLON AND MS. GARDNER WANT SIMPLE INJUNCTIVE RELIEF TO PREVENT OPIOID-RELATED NAS.

This appeal arises out of a multidistrict litigation ("MDL") consisting of claims brought by over 2,400 public entities including cities, counties, and Native American tribes. *See In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 923 (6th Cir. 2019).[2] The political-subdivision plaintiffs seek to "recover from Defendants the costs of life-threatening health issues caused by the opioid crisis." *Id*. There are also 87 cases brought by individuals representing the interests of NAS babies and their families.

President Trump has declared the opioid epidemic a "national emergency." *Id*. But our political institutions have failed to act in a comprehensive way to prevent opioid use during pregnancy. It has been over two years, for example, since the Government Accountability Office

[2] The Court's June 2019 opinion recounts approximately 1,300 consolidated cases in the MDL. The number is now over 2400. *See* Judicial Panel on Multidistrict Litigation, *MDL Statistics Report - Distribution of Pending MDL Dockets by District* at 3, https://tinyurl.com/uebuwq7 (last visited Nov. 25, 2019).

reported the need for federal action to address opioid-related NAS,[3] but the Department of Health and Human Services is "still finalizing an implementation plan" to address the issue.[4] Only six states mandate hospital reporting of NAS in newborns.[5] Meanwhile, another baby is born with opioid-related NAS every fifteen minutes.[6] That's about a hundred every day.

Hanlon and Gardner brought this action to fill the void.[7] They are not local governments. They are real people affected by the opioid crisis and

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[3] U.S. Government Accountability Office, *Newborn Health: Federal Action Needed to Address Neonatal Abstinence Syndrome*, Oct. 4, 2017, at 1-2, https://www.gao.gov/assets/690/687580.pdf (last visited Nov. 24, 2019).

[4] U.S. Government Accountability Office, *Comments to Newborn Health: Federal Action Needed to Address Neonatal Abstinence Syndrome*, https://tinyurl.com/yxmxxjc4 (last visited Nov. 24, 2019).

[5] Centers for Disease Control and Prevention, Shahla M. Jilani, Meghan T. Frey, Dawn Pepin, Tracey Jewell, Melissa Jordan, Angela M. Miller, Meagan Robinson, Tomi St. Mars, Michael Bryan, Jean Y. Ko, Elizabeth C. Ailes, Russell F. McCord, Julie Gilchrist, Sarah Foster, Jennifer N. Lind, Lindsay Culp, Matthew S. Penn, Jennita Reefhuis, *Evaluation of State-Mandated Reporting of Neonatal Abstinence Syndrome – Six States, 2013–2017*, Jan. 11, 2019, https://tinyurl.Com/Y4ormmqc (last visited Nov. 24, 2019).

[6] National Institute on Drug Abuse, *Dramatic Increases in Maternal Opioid Use and Neonatal Abstinence Syndrome*, https://tinyurl.com/z936x7x (last visited Nov. 24, 2019) [hereinafter *Dramatic Increases*].

[7] *See* 3/26/19 Declaration of Amanda Hanlon, RE 7-17, PageID ## 1445-46.

fearful of its future devastating impact on women and unborn children The harm they seek to address is "irreparable," as the panel majority recognized. (11/18/19 Order at 3.[8]). And they seek to address that harm with a remedy the local governments have not sought: injunctive relief designed specifically to prevent NAS in unborn children. They want a preliminary injunction that would prevent Defendants[9] from dispensing prescription opioids "without first receiving notice/proof of a negative pregnancy test." (Motion for Preliminary Injunction, RE 2-1, PageID # 44.)

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[8] In their July 1, 2019, response to the Clerk's show-cause order in this appeal, Hanlon and Gardner provided a detailed explanation of the irreparable harm. They do not include that detail here because of word-count constraints, but the existence of irreparable harm from NAS is not in dispute. (*See* 11/18/19 Order at 3.)

[9] "Defendants" refers to the named defendants in the underlying action: Teva Pharmaceutical Industries, Ltd.; Teva Pharmaceuticals Usa, Inc.; Cephalon, Inc.; Johnson & Johnson; Janssen Pharmaceuticals, Inc.; Ortho-McNeil-Janssen Pharmaceuticals, Inc., n/k/a Janssen Pharmaceuticals, Inc.; Janssen Pharmaceutica Inc., n/k/a Janssen Pharmaceuticals, Inc.; Endo Health Solutions Inc.; Endo Pharmaceuticals, Inc.; Allergan PLC, f/k/a Actavis PLC; Watson Pharmaceuticals, Inc., n/k/a Actavis, Inc.; Watson Laboratories, Inc.; Actavis LLC; and Actavis Pharma, Inc., f/k/a Watson Pharma, Inc. Ms. Hanlon and Ms. Gardner also pleaded claims against Purdue Pharma L.P., Purdue Pharma, Inc., and The Purdue Frederick Company, Inc.; these claims are stayed under 11 U.S.C. § 362(a). (*See* Notice of Suggestion of Bankruptcy and Automatic Stay of Proceedings, RE 2609 in Case No. 1:17-CV-2804, PageID # 41491.)

II. THE DISTRICT COURT, WITHOUT ACKNOWLEDGING THE IRREPARABLE HARM, REFUSED TO CONSIDER THE MOTION FOR A PRELIMINARY INJUNCTION.

The district court presiding over the MDL issued a case-management order that forbid, in all consolidated cases, the filing of "any motion not expressly authorized by this Order absent further Order of this Court or express agreement of the parties." (Case Mgmt. Order One, RE 232 in Case No. 1:17-CV-2804, PageID # 1094.) The District Court characterized its order as a "moratorium" on future filings (Order, RE 8, PageID # 1448), effectively staying Hanlon and Gardner's action—and their right to seek preliminary injunctive relief—indefinitely. Rather than permit Hanlon and Gardner to prosecute their request for urgently needed relief, the district court chose instead to proceed with other cases, brought by local governments, that seek no injunctive relief directed toward NAS prevention.

In compliance with the district court's case-management order, Hanlon and Gardner moved for leave to file the preliminary injunction they seek in this action. (Motion for Leave, RE 2, PageID ## 39-42.) They accompanied their motion for leave with the proposed motion for preliminary injunction, supporting memorandum, and extensive supporting

evidence establishing every element of the test for a preliminary injunction.[10] The exhibits included numerous peer-reviewed studies, legislative history, a declaration from Ms. Hanlon (RE 7-17, PageID ## 1440-47), and a declaration from an expert in pediatric medicine. (RE 6-10, PageID ## 915-18.)

The district court denied the motion for leave, effectively denying the preliminary injunction. (Order, RE 8, PageID # 1448.) It invoked the "moratorium" it had placed on unauthorized MDL filings and its "limited resources." (*Id.*) The district court appears to have ignored the extensive evidence of irreparable harm that the motion for preliminary injunction was crafted to prevent; it simply concluded that it would "not consider additional motions at this time." (*Id.*) Importantly, there is no other case in the MDL in which a plaintiff has sought the preliminary-injunctive relief that

[10] Mot. for Prelim. Injunction, RE 2-1, PageID ## 39-42; Mem. in Support of Mot. for Prelim. Injunction, RE 2-2, PageID ## 47-60; Statement of Undisputed Material Facts, RE 2-3, PageID ## 61-75; Supporting Exhibit List, RE 2-4, PageID ## 76-83; First Mot. for Leave to Supplement with Exhibits, RE 4, PageID ## 97-384; Second Mot. for Leave to Supplement with Exhibits, RE 5, PageID ## 387-701; Third Mot. for Leave to Supplement with Exhibits, RE 6, PageID ## 702-1202; Fourth Mot. for Leave to Supplement with Exhibits, RE 7, PageID ## 1203-1447.

Hanlon and Gardner moved for leave to pursue.

III. THE PANEL MAJORITY, IN CONTRAVENTION OF APPOSITE CONTROLLING AUTHORITY, DISMISSED THIS APPEAL.

Hanlon and Gardner filed this appeal. They did not appeal from the district court's general case-management order. Rather, they appealed from the subsequent order specifically denying their motion for leave to move for a preliminary injunction. On May 29, 2019, the Court issued a show-cause order questioning its jurisdiction over this appeal and inviting briefing on the jurisdictional issue. Hanlon and Gardner timely responded.

On November 18, 2019, a divided panel of the Court issued an order dismissing the appeal. (11/18/19 Order.) The majority did not dispute that prenatal opioid exposure causes "irreparable" harm to unborn children. (*Id*. at 3.) But the majority concluded that "the practical effect of the district court's order was not to refuse Hanlon and Gardner a preliminary injunction but rather to defer consideration of its merits." (*Id*. at 2.) The majority also concluded that Hanlon and Gardner could not invoke the undisputed irreparable harm as a basis for appellate jurisdiction because neither plaintiff alleges she is pregnant. (*Id*. at 3.)

In a dissenting opinion, Judge Thapar responded to both aspects of the majority's reasoning:

> First, [the majority] blends the threshold inquiry of appellate jurisdiction with other issues that belong downstream of that threshold inquiry. . . . [T]hose points go either to the merits of the proposed injunction or to the plaintiffs' standing. They don't go to this court's power to hear an appeal. . . . What matters for appellate jurisdiction is simply whether the plaintiffs have *alleged* an irreparable consequence, not whether they actually merit relief. . . .
>
> The court's second misstep is overlooking the time-sensitive nature of preliminary relief. Since the whole point of a preliminary injunction is its immediacy, "not now, but maybe later" is just another way of saying "no."

(*Id*. at 5 (Thapar, J., dissenting).)

The majority concluded that, "[a]t base, it seems that Hanlon and Gardner's interlocutory appeal is an attempt to circumvent the district court's case-management order." (*Id*. at 3 (majority opinion).) But the dissent emphasized the Supreme Court's recent admonition "what matters here is substance, not labels." (*Id*. at 5 (Thapar, J., dissenting) (quoting *Abbott,* 138 S. Ct. at 2320.) The dissent explained that the focus on the district court's case-management order undercuts the *Abbott* admonition: "There's no rule of law that puts all case-management orders in one bucket and all appealable orders in another bucket." (*Id*. at 5-6.)

LAW AND ARGUMENT

EN BANC REVIEW IS NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS.

28 U.S.C. § 1292(a)(1) confers appellate jurisdiction over "[i]nterlocutory orders of the district courts of the United States . . . refusing . . . injunctions . . . ." When, as here, a district court issues an order that "has the practical effect" of refusing an injunction, the order is immediately appealable under § 1292(a)(1) if refusing the appeal "might have a 'serious, perhaps irreparable, consequence'" and if the order can be "'effectually challenged'" only by immediate appeal,. *See Carson*, 450 U.S. at 84 (quoting *Balt. Contractors*, 348 U.S. at 181); *see also Graves*, 534 Fed. App'x at 403.

The Court should grant en banc review because the panel majority deviated from the Supreme Court's holdings in *Abbott* and *Carson* and this Court's prior decision in *Graves* in two fundamental ways.

A. The Panel Majority, in Contravention of *Abbott* and *Graves*, Focused Improperly on the Label Attached to the Order, Rather Than on the Imminent Harm to Unborn Children.

The panel majority held that the district court's refusal to entertain Hanlon and Gardner's motion was only a temporary "case-management order" and that the district court would eventually hear their motion "in due course." (11/18/19 Order at 3.) That holding contradicts the clear

admonition in *Abbott* that "the label attached to an order is not dispositive." 138 S. Ct. at 2319. The *Abbott* Court recognized the "valuable purpose" served by the practical-effect rule, recognizing that without an immediate appeal, "harmful conduct may be allowed to continue." *Id*. at 2319. Thus, when time is of the essence—as it nearly always is for any successful motion for preliminary injunction—the delay operates as a denial. (*See also* 11/18/19 Order at 5 (Thapar, J., dissenting) (district court "made clear that it would do nothing to change the status quo for the indefinite future").

For the same reason, the panel majority's decision also conflicts with this Court's holding in *Graves*. There, the plaintiffs sought preliminary-injunctive relief to curtail allegedly unconstitutional police practices. The district court stayed the action "until resolution of [parallel] state criminal proceedings," 534 Fed. App'x at 402, and the plaintiffs appealed, arguing that the stay was in practical effect a denial of their request for injunctive relief. As in this case, the stay was only temporary, but the Court nevertheless exercised appellate jurisdiction because the stay "had the effect of denying the injunction." *Id*. at 402.

Here, the panel majority held that deferring consideration of injunctive relief does not operate as a denial. But that holding undercuts the very

purpose of the *Carson* rule, because it forecloses the availability of immediate relief to forestall immediate harm. "When a court's case-management plan includes ignoring emergency requests for preliminary relief, that's when the *Carson* doctrine comes into play." (11/18/19 Order at 6 (Thapar, J., dissenting).)

It is true that district courts enjoy the discretion to manage their dockets, and part of that management may involve issuing a stay. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). But that discretion gives way to the needs of the case when the stay is "of indefinite duration in the absence of a pressing need." *Id.* at 255. The Court admonished that "[o]nly in ***rare circumstances*** will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id.* (emphasis added). And, importantly, the *Landis* admonishment applies even when the stayed action seeks only monetary damages; the concern is obviously higher when, as here, the stayed action seeks urgent injunctive relief.

This Court has similarly cautioned that "a court must tread carefully in granting a stay of proceedings, since a party has a right to a determination of its rights and liabilities without undue delay." *Ohio Envtl. Council v. U.S.*

Dist. Ct., 565 F.2d 393, 396 (6th Cir. 1977). And "even if the reasons for the stay are proper, the stay itself 'is immoderate and hence unlawful unless so framed in its inception that its force will be spent within ***reasonable limits***, so far at least as they are susceptible of prevision and description.'" *Id.* (quoting *Landis*, 299 U.S. at 257) (emphasis added).

There is no question that the district court has a herculean task in managing this large MDL. But every case within the MDL retains its separate identity. *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 (2015). Managing the cases requires prioritizing those that require immediate attention. But the moratorium in this case is indefinite, and the district court has given no indication of when, if ever, it will permit a full consideration of the merits of the requested preliminary injunction. These are precisely the circumstances the *Carson* rule, as applied by *Abbott* and *Graves*, was designed to address. In holding otherwise, the panel majority deviated from these controlling authorities. The rule allows no exception for MDL management; to the contrary, it is one of the few vehicles for interlocutory appeal of important district-court rulings in the context of an MDL. *See generally* Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1643 (2011).

B. The Panel Majority, in Contravention of *Carson* and *Graves*, Conflated the Jurisdictional Test with the Merits of the Requested Relief.

The panel majority also deviated from controlling authority—*Carson* and *Graves*—by concluding that Hanlon and Gardner would suffer no serious, perhaps irreparable, consequence.[11] The law permits no such conclusion at this stage; the cases instead ask only if the denial or relief "might" lead to such a consequence. *See Carson*, 450 U.S. at 84 ("the District Court's order ***might*** thus have the 'serious, perhaps irreparable, consequence' of denying the parties their right to compromise their dispute on mutually agreeable terms" (emphasis added)). Indeed, in *Graves* the court found "that the district court's order ***might*** have serious consequences" merely by virtue of the plaintiffs' inability "to seek relief for widespread alleged constitutional violations," with no discussion of whether the named plaintiffs would themselves suffer future unconstitutional arrests. *See* 534 Fed. App'x at 403 (emphasis added).

In holding that Hanlon and Gardner had alleged only speculative

[11] The panel majority agreed that the "harms flowing from prenatal opioid exposure are irreparable." (11/18/19 Opinion at 3.) The

harm, the panel majority cited *Gillis v. U.S. Department of Health & Human Services*, 759 F.2d 565, 567–68 (6th Cir. 1985). (*See* 11/18/19 Order at 3.) But *Gillis* says nothing to support the panel majority's conclusion.[12] To the contrary, *Gillis* explains that the Supreme Court in *Carson* distinguished two prior decisions—*Switzerland Cheese Association v. E. Horne's Market*, 385 U.S. 23 (1966), and *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)—"on [the] basis that in those cases no preliminary injunction was sought nor irreparable harm ***alleged***." *Gillis*, 759 F.2d at 568 (emphasis added).

Here, by contrast, Hanlon and Gardner sought a preliminary injunction and repeatedly alleged irreparable harm. (*See* Compl. ¶¶ 5-6, 95, RE 1, PageID ## 3-4, 33; Mem. in Support of Mot. for Prelim. Injunction at 8-9, RE 2-2, PageID ## 54-55; Hanlon Aff. ¶ 46, RE 7-17, PageID ## 1445.) Hanlon is herself raising an NAS baby born to a family friend. (Hanlon Aff. ¶¶ 5-26, RE 7-17, PageID ## 1440-44.) Her affidavit recounts in great detail

[12] Indeed, the cited passage from *Gillis*, which Hanlon and Gardner themselves included in their response to the show-cause order, makes clear that the *Carson* test concerns itself with the need for immediate relief. The inquiry, *Gillis* held, "'turn[s] on the fact that characteristically, preliminary relief must be granted promptly to be effective.'" *Gillis*, 759 F.2d at 568 (quoting 16 Charles A. Wright, Arthur R. Miller, Edward H. Cooper & Eugene Gressman, Federal Practice and Procedure § 3924, at 70 (1977)).

the harm she is attempting to prevent for other woman and unborn children. (*See generally id*.)

Of course, to prevail on the merits, Hanlon and Gardner will have to do more than *allege* irreparable harm, they will have to *prove* it. *E.g.*, *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014). But the district court has refused to give them that chance. The very point of this appeal is to get that chance; whether they succeed or fail on remand does not go to "this court's power to hear an appeal." (*See* 11/18/19 Order at 5 (Thapar, J., dissenting).)

CONCLUSION

Over 15,000 more babies were born with opioid-related NAS while this appeal has been pending.[13] The Court should hear this case en banc and proceed to a panel decision forthwith.

[13] *See Dramatic Increases*, *supra* note 6.

Dated: December 2, 2019

Respectfully submitted,

/s/ Celeste Brustowicz
Celeste Brustowicz
COOPER LAW FIRM, LLC
1525 Religious Street
New Orleans, LA 70130
Telephone: 504-399-0009
Email: cbrustowicz@sch-llc.com

/s/ Scott R. Bickford
Scott R. Bickford
MARTZELL, BICKFORD & CENTOLA
338 Lafayette St.
New Orleans, LA 70130
Tel: 504-581-9065
Fax: 504-581-7635
Email: SRB@MBfirm.com

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(a) because it contains 3,354 words, as determined by the word-count function of Microsoft Word 2016, excluding the cover page, table of contents, table of authorities, and certificates.

I further certify that this petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Book Antiqua font.

/s/ Scott R. Bickford
Scott R. Bickford

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 2nd day of December, 2019, to all counsel of record via email.

/s/ Scott R. Bickford
Scott R. Bickford

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No. 19-3398

UNITED STATES COURT OF APPEALS
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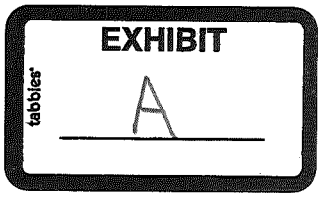
PURDUE PHARMA L.P., et al.,

Defendants-Appellees.

ORDER

Before: GILMAN, GIBBONS, and THAPAR, Circuit Judges.

Plaintiffs Amanda Hanlon and Amy Gardner appeal an order denying their motion for authorization to move for a preliminary injunction in this multidistrict litigation ("MDL") challenging the actions of prescription opiate manufacturers and distributors. The clerk ordered Hanlon and Gardner to show cause why their interlocutory appeal should not be dismissed for lack of jurisdiction. In response, Hanlon and Gardner contend that, because the district court's order has the practical effect of denying a preliminary injunction and will result in irreparable harm to unborn babies, 28 U.S.C. § 1292(a)(1) and *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), vest this court with jurisdiction over their appeal. Alternatively, Hanlon and Gardner ask us to construe their appeal as a petition for a writ of mandamus. Defendants reply, arguing that the district court's order is not injunctive in nature because it does not address the substance of Hanlon



and Gardner's claims and does not threaten "serious" or "irreparable" consequences. Hanlon and Gardner move for leave to further respond and tender their response.

Generally, our jurisdiction is limited to appeals from "final decisions of the district courts." 28 U.S.C. § 1291. A party may, however, appeal "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions." *Id.* § 1292(a)(1). This exception includes orders that have the "practical effect" of denying an injunction if the order also threatens "serious, perhaps irreparable, consequence[s]" and can be "effectually challenged" only by immediate appeal. *Carson*, 450 U.S. at 84 (quoting *Balt. Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)). In determining whether an order has the threshold "practical effect" of denying an injunction, we focus on the nature and substance of the order, not its label. *Cooey v. Strickland*, 588 F.3d 921, 922 (6th Cir. 2009). Nevertheless, we approach § 1292(a)(1) "somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders." *Switz. Cheese Ass'n v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966).

Here, the practical effect of the district court's order was not to refuse Hanlon and Gardner a preliminary injunction but rather to defer consideration of its merits. The district court declined to entertain Hanlon and Gardner's request for preliminary injunctive relief "at this time," No. 19-op-45206, DE 8, Order Den. Leave, Page ID 1448, referring back to an earlier case-management order that placed a temporary "moratorium" on all substantive filings, No. 17-md-02804, DE 4, Scheduling Order, Page ID 27. As the Supreme Court has made clear, however, an order that merely "postpone[s]" consideration of a party's request for injunctive relief is not the same as one that "foreclose[s]" future consideration of its merits, *Carson*, 450 U.S. at 87 n.12, or itself "touch[es] on the merits," *Switz. Cheese Ass'n*, 385 U.S. at 25. The order in this case concerns only the timing of Hanlon and Gardner's request for preliminary relief and neither addresses its merits nor precludes later consideration of the same. *See Gulfstream Aerospace Corp. v.*

Mayacamas Corp., 485 U.S. 271, 279 (1988). There is no reason to believe that the merits of Hanlon and Gardner's request will not be considered in due course.

The district court's order is also unlikely to cause Hanlon and Gardner irreparable harm. To be sure, the alleged physical, psychological, and financial harms flowing from prenatal opioid exposure are irreparable. *See, e.g.*, No. 19-op-45206, DE 1, Compl., Page ID 1, 9–12. Hanlon and Gardner, however, do not allege that they themselves—as opposed to members of the putative class—are likely to suffer those harms. Although the complaint states that both are "capable of becoming pregnant," Hanlon and Gardner do not allege that they are pregnant, plan to become pregnant, or are currently taking opioids. *Id.* at 3–4. Such speculative harm falls short of the requisite "serious, perhaps irreparable, consequences" of denying Hanlon and Gardner "prompt[]" relief. *See Gillis v. U.S. Dep't of Health & Human Servs.*, 759 F.2d 565, 567–68 (6th Cir. 1985) (first quoting *Carson*, 450 U.S. at 84, and then quoting 16 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3924 (3d ed. 1977)).

At base, it seems that Hanlon and Gardner's interlocutory appeal is an attempt to circumvent the district court's case-management order. A panel of this court already upheld the same case-management order and, although that appeal arose in a different procedural posture and involved different facts, the panel's order was animated by similar concerns about the district court's ability to manage "the conduct [and] progress of litigation." *City of Jacksonville v. Purdue Pharma L.P.* (*In re National Prescription Opiate Litigation*), No. 18-4054, slip op. at 3 (6th Cir. Feb. 13, 2019) (quoting *Gulfstream Aerospace Corp.*, 485 U.S. at 279). To that end, at least in the MDL context, allowing appeal from a denial of leave to move for a preliminary injunction would undermine the "congressional policy against piecemeal appeals" and hamstring a district court's ability to manage such litigation. *Switz. Cheese Ass'n*, 385 U.S. at 25.

Hanlon and Gardner alternatively ask that we construe their interlocutory appeal as a petition for a writ of mandamus. Although we have the authority to do so, we will exercise that authority only "if there is a harm that could not be remedied on appeal after final judgment." *Howe v. City of Akron*, 557 F. App'x 402, 405 (6th Cir. 2014). As discussed above, Hanlon and Gardner are currently unable to demonstrate that they would suffer irreparable harm absent immediate judicial intervention, and their motion for a preliminary injunction will be considered upon the district court's lifting of its moratorium. Hanlon and Gardner will have a meaningful opportunity for appellate review once the district court reaches the merits of their request. Accordingly, mandamus relief would be inappropriate at this time.

The motion for leave to file further response to the show-cause order is granted and the appeal is dismissed for lack of jurisdiction.

THAPAR, J., dissenting.

The district court issued an order refusing to consider the plaintiffs' motion for a preliminary injunction. Because the order had the practical effect of refusing the injunction itself, this court has appellate jurisdiction. I respectfully dissent from the court's contrary conclusion.

The plaintiffs allege a "serious, perhaps irreparable, consequence" from the lack of an injunction: the lifelong effects of opioid exposure on unborn children. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (cleaned up). And the failure to grant their injunction *now* isn't effectively reviewable in the future—neither when the district court agrees to consider the motion (whenever that may be) nor during a later appeal. *Id.* After all, by that point, some number of unborn children will have been exposed to what the plaintiffs allege are unsafe levels of prescription opioids. No court will be able to rewind the clock and undo their injuries.

The court's order makes two missteps. First, it blends the threshold inquiry of appellate jurisdiction with other issues that belong downstream of that threshold inquiry. True, the plaintiffs haven't alleged harm to *themselves*. Also true, the harms they allege may be "speculative" or "unlikely." But those points go either to the merits of the proposed injunction or to the plaintiffs' standing. They don't go to this court's power to hear an appeal. What matters for appellate jurisdiction is simply whether the plaintiffs have *alleged* an irreparable consequence, not whether they actually merit relief. *See id.* at 85, 89. And if we lack appellate jurisdiction, then the plaintiffs' standing isn't before us either.

The court's second misstep is overlooking the time-sensitive nature of preliminary relief. Since the whole point of a preliminary injunction is its immediacy, "not now, but maybe later" is just another way of saying "no." *Gillis v. U.S. Dep't of Health & Human Servs.*, 759 F.2d 565, 568 (6th Cir. 1985); *see also Carson*, 450 U.S. at 88–89 (noting that the timing of relief matters). Consider what happened here. The plaintiffs believe that certain ongoing medical practices are negligent and will cause serious harms. They tried to move for a preliminary injunction to restrain those practices. The district court could have granted leave, taken the motion under consideration for an appropriate time, and ultimately disposed of the motion in a short, simple order. Instead, it issued an order telling the plaintiffs they weren't even allowed to file their motion until further notice. [R. 8, Pg. ID 1448.] With that order, the court made clear that it would do nothing to change the status quo for the indefinite future. If that's not the practical equivalent of a denial, what is?

This court sees it differently, viewing the order on appeal as an adjunct to a "case management order." But as the court acknowledges, what matters here is substance, not labels. *Abbott v. Perez*, 138 S. Ct. 2305, 2320 (2018). There's no rule of law that puts all case-

management orders in one bucket and all appealable orders in another bucket. And there's no reason an order under a case-management plan can't have the practical, as-applied effect of refusing an injunction. When a court's case-management plan includes ignoring emergency requests for preliminary relief, that's when the *Carson* doctrine comes into play.

That doesn't mean parties can always appeal when a district court fails to dispense relief on demand. No one is entitled to the impossible and that includes instantaneous rulings. The demands of briefing, research, and deliberation mean that even the speediest district court takes *some* time to decide a motion. So defining a reasonable time is a matter of degree.

Still, a district court can sit on a motion for too long. And when that happens, the remedy can't be an appeal, because there's no appealable order. *See* 28 U.S.C. § 1292(a)(2). Instead, the remedy for unreasonable delay is a mandamus petition to compel a ruling. *See, e.g.*, *In re Hijazi*, 589 F.3d 401, 409 (7th Cir. 2009). That's no easy road, since it requires showing a *clear* abuse of discretion. *In re Univ. of Mich.*, 936 F.3d 460, 466 (6th Cir. 2019). And as the court's order rightly emphasizes, district courts have wide discretion when it comes to managing their dockets.

Some district-court actions may blur the line between the denial of an injunction (which is appealable) and delay in deciding a request for an injunction (which isn't appealable but can be challenged through mandamus). But one simple question will usually do the trick: Is the request for injunctive relief still pending before the court? If the answer is yes, it hasn't been denied. But if the answer is no because of a district-court order, that order is almost always appealable.

That lens makes this an easy case. The district court issued an order that fully disposed of the plaintiffs' motion (though not on the merits). The order didn't leave the motion to hang in the air; it threw it out of court. The plaintiffs then appealed from that order. Whether their appeal has any merit is downriver of this court's power to hear it. Because the district court's order effectively

refused a request for an injunction, I would hold that we have appellate jurisdiction and allow the case to proceed to merits briefing. Thus, I respectfully dissent from the court's order dismissing this appeal.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk