

MANDAMUS MADNESS IN THE FIFTH CIRCUIT: THE AFTERMATH OF
IN RE JPMORGAN

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I. INTRODUCTION

On March 12, 2019, the Honorable Keith P. Ellison of the United States District Court for the Southern District of Texas, Houston Division issued a memorandum “to respond to some misleading and inaccurate statements” made by a panel of the Fifth Circuit Court of Appeals.¹ Judge Ellison recognized that he “ha[d] not had to issue any other writing like this one” in his almost twenty years on the bench, but did so because an “appellate judge mischaracterized the trial record so significantly and, it appears, willfully.”² Judge Ellison “hoped that the panel can achieve a higher degree of accuracy and candor” if it were involved in the case further.³ What could a Fifth Circuit judge have done to make the even-tempered, avuncular Judge Ellison write such biting words?

Two months earlier, Judge Jerry Smith of the Fifth Circuit authored an opinion denying a writ of mandamus in the case of *In re JPMorgan Chase & Co.*, despite having found that “[Judge Ellison] erred in ordering that notice [of a pending Fair Labor Standards Act collective action] be given to [employees who are unable to join the action because of binding arbitration agreements].”⁴ But Judge Smith and the panel went a step further than just indicating their tentative views on the substantive issue underlying the petition for writ of mandamus, as is common.⁵ Judge Smith stated that, even

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¹Memorandum and Order at 1, *Rivenbark v. JPMorgan Chase & Co.*, 340 F. Supp. 3d 619 (S.D. Tex. 2019) (No. 4:17-CV-03786).

²*Id.* at 5.

³*Id.* at 1.

⁴*In re JPMorgan Chase & Co.*, 916 F.3d 494, 504 (5th Cir. 2019).

⁵*See infra* Section IV.

though the petitioner did not establish “a clear and indisputable right to a writ of mandamus,” the Court’s musings were now “a holding on these legal issues” and “binding precedent throughout the Fifth Circuit.”⁶

Thus, by naming the court’s dicta a “holding,” despite not contributing to the decision to deny the writ, Judge Smith claimed to bind the Fifth Circuit. At the same time that the panel denied the writ, finding that the petitioner was not entitled to it, the panel also gave a direct order to the trial court going forward.⁷ And, to dispel any concern that this practice exceeded the court’s power, Judge Smith indicated that the practice was not only within the court’s authority but also common.⁸

So, is this practice really as unremarkable as Judge Smith suggested? Should parties in federal court now just petition the Fifth Circuit for a writ of mandamus whenever they feel the trial court made even the most minor of errors? After all, even if they cannot show they are entitled to the writ, the court may very well still issue a “binding” holding in their favor.

This article will give a brief overview of the use of the writ of mandamus in federal appellate courts, then describe what made Judge Smith’s opinion in *JPMorgan* so unorthodox given mandamus jurisprudence. Further, this article will examine the authorities cited by Judge Smith as support for *JPMorgan*’s unusual disposition, then argue that *JPMorgan* represents a serious and concerning power grab by the Fifth Circuit.

II. OVERVIEW OF WRIT OF MANDAMUS

“Mandamus” derives from Latin and means “we command.”⁹ Mandamus grants a higher court supervisory authority to command an inferior court, tribunal, public official, board, corporation, or person to perform a particular duty required by law.¹⁰ Its purpose is to enforce and execute an established

⁶ *JPMorgan*, 916 F.3d at 504.

⁷ *Id.*

⁸ *Id.* at 504 n.24.

⁹ 52 AM. JUR. 2D *Mandamus* § 1; see also *State ex rel. Moore v. Bd. of Elections for Hocking Cty.*, 203 N.E.2d 493, 494 (4th Dist. 1964) (“[Mandamus,] according to Webster, is originally derived from the Latin verb of *mandare*, meaning to enjoin.”).

¹⁰ 52 AM. JUR. 2D *Mandamus* § 1; see also *Peke Res., Inc. v. Fifth Judicial Dist. Court In & For Cty. of Esmeralda*, 944 P.2d 843, 848 (Nev. 1997) (“A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station.”); *Plum Creek Dev. Co., Inc. v. City of Conway*, 512 S.E.2d 106, 111 (S.C. 1999) (“By issuing a writ of mandamus, the trial judge orders a public official to perform a ministerial duty.”).

right or to enforce the performance of a duty, not to adjudicate rights.¹¹ While originally a creature of common law, appellate courts' authority to issue writs of mandamus has since been codified by Congress: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."¹²

Traditionally, American appellate courts recognized two types of mandamus—supervisory and advisory.¹³ Supervisory mandamus corrects the "established bad habits" of the lower courts,¹⁴ while advisory mandamus permits review of novel and important legal questions.¹⁵ Today, however, there is not necessarily a clear distinction between the two types. For example, a new and important legal issue initially warranting advisory mandamus could become a repeated error justifying supervisory mandamus. In contrast, if a lower court has a habit "bad" enough to warrant supervisory mandamus, it may be due to lack of guidance from the courts of appeals on a new issue.¹⁶

The United States Supreme Court has clarified that the writ is rarely warranted, stating that it is "a drastic and extraordinary remedy reserved for really extraordinary causes"¹⁷ and that it "is not a substitute for appeal."¹⁸ Some occasions justifying the Supreme Court's issuance of a writ of

¹¹ See *Carroll v. Hobbs*, 442 S.W.3d 834, 836 (Ark. 2014).

¹² 28 U.S.C. § 1651(a) (2012); see also *Chandler v. Judicial Council of Tenth Circuit of U.S.*, 398 U.S. 74, 86 (1970) (interpreting the statute to say that the authority to issue a writ of mandamus "can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction.").

¹³ Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 357–58 (2012); see also *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973) (describing the evolution of the two types of mandamus).

¹⁴ Gugliuzza, *supra* note 13, at 357 (quoting 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3934.1 (2d ed. 2011)); see also *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259–60 (1957) (wherein the Supreme Court first explicitly recognized supervisory mandamus).

¹⁵ Gugliuzza, *supra* note 13, at 358; see also *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (wherein the Supreme Court first explicitly recognized advisory mandamus).

¹⁶ Gugliuzza, *supra* note 13, at 360.

¹⁷ *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004); see also *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) ("This Court repeatedly has observed that the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations."); *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976) ("[T]he fact still remains that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy.") (internal citations omitted).

¹⁸ *In re Chesson*, 897 F.2d 156, 159 (5th Cir. 1990).

mandamus include when a lower court's action threatens the separation of powers by embarrassing the executive branch and when the federal judiciary intrudes upon "a delicate area of federal-state relations."¹⁹ Aside from these types of drastic situations, appellate courts have historically preferred to leave parties only with the traditional appeals process when they feel aggrieved.²⁰ In sum, federal courts of appeals will use mandamus to settle "important, usually undecided, issues that are likely to arise again in future cases and for which post-judgment review would be inadequate, inefficient, or impossible."²¹ Therefore, the standards for issuing a writ of mandamus are extremely high.

Three conditions must be satisfied for the appellate court to issue the writ: (1) "the party seeking issuance of the writ must have no other adequate means to attain the relief he desires;"²² (2) "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is 'clear and indisputable,'"²³ and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."²⁴

¹⁹ *Cheney*, 542 U.S. at 381.

²⁰ Some commentators have suggested that the existence of permissive interlocutory appeal in 28 U.S.C. § 1292(b) moots the need for mandamus review entirely. *See, e.g., Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 635 (1975). Indeed, at least one Circuit Court has required parties to explain why they are unable to seek permissive interlocutory appeal under 28 U.S.C. § 1292(b) as a prerequisite to seeking mandamus relief. *See e.g., In re Briscoe*, 448 F.3d 201, 212 n.7 (3d Cir. 2006) ("On the record before us, it seems sufficiently clear that the District Court would have refused to certify an interlocutory appeal . . . thus leaving such review an impractical avenue for petitioners to pursue.") (denying the petition for writ of mandamus on other grounds). The Fifth Circuit has expressed somewhat schizophrenic views as to whether such a showing is required. *See In re 2920 ER, L.L.C.*, 607 F. App'x. 349, 353 (5th Cir. 2015) (holding that "because [the petitioner] 'could have obtained review of the district court's order through an ordinary [interlocutory] appeal, mandamus is not available'" (quoting *Calderon v. U.S. Dist. Court for Cent. Dist. of Cal.*, 137 F.3d 1420, 1422 (9th Cir. 1998)); *In re El Paso Elec. Co.*, 77 F.3d 793, 795 (5th Cir. 1996) (denying mandamus review because the petitioner had not attempted to secure certification for appeal under § 1292(b)); *but see In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 288 (5th Cir. 2015) (stating that Section 1292(b) is not an adequate substitute for mandamus).

²¹ *Gugliuzza*, *supra* note 13, at 360.

²² *Cheney*, 542 U.S. at 380.

²³ *Id.* at 381.

²⁴ *Id.*

A. *No adequate relief by appeal*

The first of these conditions—that there must be no other adequate way to obtain relief—is meant to ensure that “the writ will not be used as a substitute for the regular appeals process.”²⁵ An error by the trial court, no matter how obvious, that does not drastically change the course of trial is not one that is suited for remedy by a writ of mandamus.²⁶ That is because such an error could be remedied through the regular appeals process.²⁷ For example, Fifth Circuit precedent has recognized that a district court’s error in ordering the discovery of privileged documents would not be remediable on ordinary appeal,²⁸ that the ordinary appeals process was inadequate to review a district court’s denial of a motion to dismiss for *forum non conveniens*,²⁹ and the denial of a motion to transfer venue.³⁰ In contrast, the Fifth Circuit has held that mere expense of increased time and money never

²⁵*Id.* at 380–81; see also *In re Jankovic*, 738 F. App’x. 268, 270 (5th Cir. 2018) (“Mandamus may not serve as a substitute for the appeals process”); *In re* 2920 ER, L.L.C., 607 F. App’x. 349, 352 (5th Cir. 2015) (“the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process”).

²⁶*In re Avantel, S.A.*, 343 F.3d 311, 317 (5th Cir. 2003) (“[M]andamus is an appropriate means of relief if a district court errs in ordering the discovery of privileged documents, as such an order would not be reviewable on appeal”).

²⁷*Id.*

²⁸*Id.*

²⁹*In re Lloyd’s Register N. Am., Inc.*, 780 F.3d 283, 288 (5th Cir. 2015). *Forum non conveniens* is a common-law doctrine allowing a court to dismiss a case over which it has jurisdiction “if trial in a foreign forum would ‘best serve the convenience of the parties and the ends of justice.’” *Halo Creative & Design Ltd. v. Comptoir Des Indes Inc.*, 816 F.3d 1366, 1369 (Fed. Cir. 2016) (quoting *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947)).

³⁰*In re Volkswagen of Am., Inc.*, 545 F.3d 304, 318–19 (5th Cir. 2008). In fact, the Fifth Circuit has indicated that the denial of all procedural forum-related motions (i.e., motion to dismiss for *forum non conveniens*, motion to transfer venue, and motion to remand based on the presence of a forum-state defendant) would not be remediable on appeal because of the harmless-error rule, and are therefore subject to mandamus review. See *id.* (“[A] petitioner ‘would not have an adequate remedy for an improper failure to transfer the case by way of an appeal from an adverse final judgment because [the petitioner] would not be able to show that it would have won the case had it been tried in a convenient [venue].’”) (quoting *In re Nat’l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003); see also *In re Beazley Ins. Co.*, 09-20005, 2009 WL 7361370, at *3 (5th Cir. May 4, 2009) (finding that, despite being “technically” reviewable on appeal, the denial of a motion to remand based on the presence of a forum-state defendant is appropriate for mandamus review).

satisfies the no-adequate-remedy-by-appeal requirement.³¹ In sum, even if the district court has erred in some way, mandamus is still inappropriate unless the error cannot be remedied on ordinary appeal.

B. Clear and indisputable error

Next, the petitioner must demonstrate that her right to the writ is “clear and indisputable.”³² According to the Fifth Circuit, to meet this high standard, the petitioner must show more than that the trial court just “misinterpreted the law, misapplied it to the facts, or otherwise engaged in an abuse of discretion.”³³ Even the Circuit’s recognition that the district court committed reversible error is not enough to issue the writ.³⁴ As a sister court of appeals has put it, “the ordinary mistakes which may attend exercises of discretion are not grist for the mandamus mill.”³⁵

Instead, mandamus as relief is limited to only “clear abuses of discretion that produce patently erroneous results.”³⁶ The Fifth Circuit has explained that a “clear abuse” has taken place when the district court “clearly exceeds the bounds of judicial discretion.”³⁷ For example, this threshold is met when the district court “grant[s] or den[ies] a motion to dismiss without written or oral explanation” or where, in ruling on a motion to dismiss for *forum non conveniens*, it “fails to address and balance the relevant principles and

³¹ See, e.g., *Lloyd’s Register*, 780 F.3d at 288–89 (“Even though the defendant may be required to engage in a costly and difficult trial and expend considerable resources before the court enters an appealable judgment, those unrecoverable litigation costs are not enough to make this means of attaining relief inadequate. There has to be a greater burden, some obstacle to relief beyond litigation costs that renders obtaining relief not just expensive but effectively unobtainable.”) (internal citations omitted); *In re Occidental Petroleum Corp.*, 217 F.3d 293, 295 n.8 (5th Cir. 2000) (“[O]rdinarily the inconvenience, lost time, and sunk costs of such further proceedings as could have been avoided by correcting the trial judge’s error are not considered the kind of irremediable harm that will satisfy the stringent requirements for issuing a writ of mandamus.”) (quoting *Maloney v. Plunkett*, 854 F.2d 152, 154–55 (7th Cir. 1988)); *Plekowski v. Ralston-Purina Co.*, 557 F.2d 1218, 1220 (5th Cir. 1977) (“Expense and inconvenience, without more, do not justify the issuance of mandamus”).

³² *Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004).

³³ *Lloyd’s Register*, 780 F.3d at 290.

³⁴ *Id.*

³⁵ *In re Bushkin Assocs., Inc.*, 864 F.2d 241, 245 (1st Cir. 1989).

³⁶ *Lloyd’s Register*, 780 F.3d at 290 (quoting *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008)).

³⁷ *Id.*

factors” of the doctrine of *forum non conveniens*.³⁸ This threshold was also met when the district court “gave undue weight to the plaintiffs’ choice of venue, ignored [Fifth Circuit] precedents, misapplied the law, and misapprehended the relevant facts” in denying a transfer of venue.³⁹ And a district court always reaches a “patently erroneous result” when it misapplies the law.⁴⁰ In short, mandamus is not a means by which the Fifth Circuit is meant to correct all potentially erroneous orders by the district court.⁴¹

C. *Appropriate under the circumstances*

And finally, even if the appellate court concludes that the petitioner has managed to overcome the high hurdles of the first two conditions, issuance of the writ is still discretionary.⁴² The appellate court must consider that the writ’s issuance is “appropriate under the circumstances.”⁴³ The Fifth Circuit has elaborated: “Writs of mandamus are supervisory in nature and are particularly appropriate when the issues also have an importance beyond the immediate case.”⁴⁴ The Fifth Circuit has, for example, found this requirement met when an appeal regarding the same issue was already pending before it, and there had been new guidance on the issue from the Supreme Court.⁴⁵ The condition has also been met when the Fifth Circuit feels that district courts have been applying its nuanced precedent in “less than perfect” ways,⁴⁶ and when the case raises an “issue [] not specific to this case but [] relevant for a variety of similar cases that have arisen or may arise in the district courts of this circuit.”⁴⁷ Therefore, generally, when a case presents an extremely unique situation not likely to arise again, the Fifth Circuit has traditionally used its discretion to deny mandamus relief.

³⁸ *Id.*

³⁹ *Volkswagen*, 545 F.3d at 309.

⁴⁰ See *Lloyd’s Register*, 780 F.3d at 291–94 (finding that the district court’s failure to enforce a valid forum-selection clause was patent error); see also *In re Gee*, 19-30353, 2019 WL 5274960, at *3 (5th Cir. Oct. 18, 2019) (“[I]f the district court has violated a non-discretionary duty, the petitioner necessarily has a clear and indisputable right to relief”).

⁴¹ *Lloyd’s Register*, 780 F.3d at 290.

⁴² *Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004).

⁴³ *Id.*

⁴⁴ *Volkswagen*, 545 F.3d at 319.

⁴⁵ *Lloyd’s Register*, 780 F.3d at 294.

⁴⁶ *In re Itron, Inc.*, 883 F.3d 553, 568 (5th Cir. 2018).

⁴⁷ *In re Ford Motor Co.*, 591 F.3d 406, 416–17 (5th Cir. 2009).

III. WHAT WAS DIFFERENT ABOUT *JPMORGAN*?

JPMorgan came on petition for writ of mandamus to the Fifth Circuit after the district court granted conditional class certification to call-center employees' claims of violations of the Fair Labor Standards Act and other state laws.⁴⁸ The defendant-employer, Chase, contended it needed such a writ to direct the district court to exclude from notice of the action any employees who had waived their rights to participate in a collective action.⁴⁹ To determine whether such a writ was warranted, the Fifth Circuit analyzed each of the three conditions described above, but not in the typical order of analysis.⁵⁰

Judge Smith started with the condition that does usually come first: "that the error presented is truly 'irremediable on ordinary appeal.'"⁵¹ The court held that Chase "easily" met this condition because "[o]rders of conditional certification cannot be appealed under the collateral order doctrine" and because Chase "will have no remedy after a final judgment because the notice issue will be moot once Chase has provided the required contact information and notice has been sent to putative collective members."⁵²

Next, rather than determining whether the petitioner's right to the writ was clear and indisputable, the court analyzed whether it felt issuance of the writ was appropriate under the circumstances.⁵³ This was unusual because, as discussed previously, this condition is a discretionary one: if *both of the other two conditions* are met, it is a chance for the court to use its prudence to determine whether it is appropriate to issue the writ.⁵⁴ However, Judge Smith, in just six sentences, determines that "[m]andamus relief would be especially appropriate here" because "[w]hether notice of a collective action

⁴⁸ 916 F.3d at 497.

⁴⁹ *Id.*

⁵⁰ *Id.* at 497–98.

⁵¹ *Id.* at 499 (quoting *Depuy*, 870 F.3d at 352–53).

⁵² *Id.* at 499. The collateral-order doctrine is an exception to the final-judgment rule that allows for appellate review of interlocutory orders when such order "conclusively determine[s] the disputed question"; "resolve[s] an important issue completely separate from the merits of the action"; and is "effectively unreviewable" after final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The Fifth Circuit has held that conditional-certification orders do not fall within the collateral-order exception to the final-judgment rule. *See Baldrige v. SBC Commc'ns, Inc.*, 404 F.3d 930, 932 (5th Cir. 2005).

⁵³ *JPMorgan*, 916 F.3d at 499.

⁵⁴ *Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004).

may be sent to Arbitration Employees is an increasingly recurring issue” that had yet to be determined by any court of appeals.⁵⁵

Only then does the court turn to whether the Chase’s right to the writ is clear and indisputable.⁵⁶ To determine this, the court begins an analysis of the substantive law surrounding the issue of whether district courts can require notice of a pending FLSA collective action to employees who are unable to join the action.⁵⁷ After this analysis, the court states: “we *hold* that district courts may not send notice to an employee with a valid arbitration agreement unless the record shows that nothing in the agreement would prohibit that employee from participating in the collective action.”⁵⁸ In a footnote, the court then justifies this “holding” by stating the court does so as part of its “supervisory authority to ‘settle [a] new and important problem[.]’”⁵⁹ The court seems to forget that precedent dictates such “supervisory authority” is appropriate *only when the writ is granted*.⁶⁰

If this were not enough, the court then went on to state that the district court did err when it ordered such notice, even going so far to suggest the district court—or, specifically, Judge Ellison—made an endorsement on the merits too prematurely and of having lacked respect for “judicial neutrality.”⁶¹ Judge Smith even accused Judge Ellison of “us[ing] [his] discretion to facilitate the notice process merely to stir up litigation.”⁶²

Despite having found what appears to be, from the language and tone of the court’s opinion, clear abuse of discretion, the court still held that the district court did not “*clearly and indisputably* err, as is required for a writ of mandamus.”⁶³ This is because the court says, many other district courts had made the same erroneous application of case law that Judge Ellison had.⁶⁴

⁵⁵ *JPMorgan*, 916 F.3d at 499–500.

⁵⁶ *Id.* at 500.

⁵⁷ *See id.* at 500–04.

⁵⁸ *Id.* at 501 (emphasis added).

⁵⁹ *Id.* at 501 n.12 (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964)). The Court makes no mention of the fact that the Court in *Schlagenhauf* was simply stating that the Court of Appeals had such a power under “special circumstances” when the petition for the writ of mandamus is on multiple grounds. *Schlagenhauf*, 379 U.S. at 111.

⁶⁰ *See supra* Section II.

⁶¹ *JPMorgan*, 916 F.3d at 503–04.

⁶² *Id.* at 504 (internal citations omitted).

⁶³ *Id.* (emphasis in original) (internal citations omitted).

⁶⁴ *Id.* Such “errors” by district courts are unsurprising given that they had been entirely unguided by the Court of Appeals. The substantive issue at hand in *JPMorgan* was one of first

Therefore, the court denied the defendant's petition for the writ of mandamus.⁶⁵

The Fifth Circuit denied the defendant-petitioner, Chase, the relief it requested. In colloquial terms, most would then infer that Chase "lost" at the court of appeals. But did it? While it apparently failed to achieve the exact relief it requested—the writ of mandamus—it seems that Chase was still able to achieve the exact result it sought. The Fifth Circuit, while ostensibly restraining itself by declining to issue the writ, still "issue[d] this published opinion as a holding on these legal issues," called its opinion "binding precedent," and directed the district court to "revisit its decision in light of this opinion."⁶⁶ The court again invoked its "supervisory authority" to issue such an opinion despite declining to issue the writ.⁶⁷ Therefore, on the substantive issue, despite being denied the writ of mandamus, there is no doubt that Chase was actually the "winner" here.

IV. DO THE CASES CITED IN *DEPUY* SUPPORT THE DISPOSITION OF *JPMORGAN*?

At the very end of his opinion in *JPMorgan*, Judge Smith cites to a previous opinion he authored less than two years prior in order to provide credence to the procedure of declining to issue the writ, yet issuing a "binding" opinion.⁶⁸ In that case, *In re Depuy Orthopaedics, Inc.*, the defendant asked the Fifth Circuit to issue a writ of mandamus to order the district court to cease conducting bellwether trials in a multi-district litigation proceeding due to an alleged lack of personal jurisdiction.⁶⁹ The panel denied the writ because the petitioners had "not shown that they [had] no other adequate means to attain the relief they [sought]," yet the panel still "request[ed] the district court to vacate its ruling."⁷⁰

The court in *Depuy* clearly anticipated that such a procedure may raise eyebrows and, in a footnote, string-cited numerous cases to demonstrate that

impression when it reached the Fifth Circuit, so it makes sense that, if Judge Ellison did err, such error was not "clear and indisputable." See *Arbitration/Employment Litigation*, 31 BUS. TORTS REP. 158, 159 (2019) (*JPMorgan* "[a]ddress[ed] an issue of first impression on a procedural matter of growing import in class litigation").

⁶⁵ *JPMorgan*, 916 F.3d at 504.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 504 n.24.

⁶⁹ 870 F.3d 345, 347 (5th Cir. 2017).

⁷⁰ *Id.* at 348.

it did not “exceed[] its proper role in ruling on pending issues but nonetheless denying mandamus.”⁷¹ The panel claimed that such cases showed “that this court has routinely held, sometimes in published opinions, that a district court erred, despite stopping short of issuing a writ of mandamus.”⁷² While it may be true that previous courts had found error without concluding such error warranted issuance of the writ of mandamus, had the court ever declined to issue the writ, yet issued a binding holding that constituted precedent for the Fifth Circuit, as it did in *JPMorgan*?

As it turns out, the answer to that question is “no.” None of the cases cited by the court in *Depuy* (and subsequently also cited in *JPMorgan*) actually go as far as the court did in *JPMorgan*. While the cited decisions did deny mandamus while still opining on the substantive issue at hand, none went so far as to call their musings a “holding” or “binding precedent.” For example, the court in *In re Dean* stated: “The decision whether to grant mandamus is largely prudential. We conclude that the better course is to deny relief, confident that the district court will [reconsider its position]”⁷³; the court in *In re United States* stated: “we conclude that the district court abused its discretion . . . Nevertheless, we find it unnecessary to issue a writ of mandamus because we are confident that the able district judge will reconsider his orders”⁷⁴; and the court in *In re U.S. Department of Homeland Security* stated: “The district court erred” but still declined to issue the writ because it was “confident that in making its determinations, the [district] court will [reconsider its position].”⁷⁵

Similarly, the strongest language used by the other cases cited in *Depuy* includes: “conclude”⁷⁶; “trust” that the district court will rethink its position⁷⁷; calling its opinion a “determination”⁷⁸; “invit[ing] the district court to consider anew”⁷⁹; “confiden[ce]” that the district court will heed the

⁷¹ *Id.* at 347 n.4.

⁷² *Id.*

⁷³ *In re Dean*, 527 F.3d 391, 396 (5th Cir. 2008).

⁷⁴ *In re United States*, No. 07-40629, 2007 U.S. App. LEXIS 30793 at *1–2 (5th Cir. July 19, 2007).

⁷⁵ *In re U.S. Dep’t of Homeland Sec.*, 459 F.3d 565, 571 (5th Cir. 2006).

⁷⁶ *In re Kleberg Cty.*, 86 F. App’x 29, 34 (5th Cir. 2004); *In re Stone*, 986 F.2d 898, 905 (5th Cir. 1993); *Landmark Land Co., Inc. v. Office of Thrift Supervision*, 948 F.2d 910, 913 (5th Cir. 1991).

⁷⁷ *Kleberg*, 86 F. App’x at 34.

⁷⁸ *In re Avantel, S.A.*, 343 F.3d 311, 324 (5th Cir. 2003).

⁷⁹ *Id.*

Fifth Circuit's "decision"⁸⁰; and "confiden[ce] that the able district court will vacate its order. . . in light of this opinion."⁸¹

While these are all strong pronouncements that would be undoubtedly difficult for a district court to, on remand, completely ignore, they are all similarly restrained. None use the potent language of "holding" or "binding precedent" as used in *JPMorgan*.⁸² The cases cited by *Depuy* all include the court's thoughts on the substantive legal issues without issuing the writ of mandamus; however, they at least leave the door open for the possibility that the district court judge could still disregard such thoughts as merely dicta of the Fifth Circuit.

One may be tempted to dismiss such a distinction, on the grounds that no district court judge would ever disregard such pronouncements, despite lacking the semantic label of "holding." In fact, Judge Costa, in his *Depuy* concurrence made such a point.⁸³ Judge Costa criticized Judge Smith's majority opinion for contemplating the merits of the case, despite not finding the issuance of the writ of mandamus warranted.⁸⁴ He expressed that "in addressing the merits, the majority opinion renders meaningless the direct appeal it ends up recognizing as the proper remedy."⁸⁵ Judge Costa then asked, "After being told by a court of appeals that it reached a 'patently erroneous' result, what district court is going to go forward with the trial Petitioners are trying to prevent?"⁸⁶ Imagine Judge Costa's (and, likely, Judge Smith's) surprise when the district court in question did exactly that. Despite the majority concluding—but, importantly, not holding—that the district court should not continue in conducting bellwether trials, the district court went on to conduct them anyway.⁸⁷

⁸⁰ *Stone*, 986 F.2d at 905.

⁸¹ *Landmark Land*, 948 F.2d at 913.

⁸² *In re JPMorgan Chase and Co.*, 916 F.3d 494,504 (5th Cir. 2019).

⁸³ *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 354 (5th Cir. 2017) (Costa, J., concurring).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See, e.g., *In re Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liab. Litig.*, No. 3:11-MD-2244-K, 2017 WL 4122625 (N.D. Tex. Sept. 18, 2017); *In re Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liab. Litig.*, No. 3:11-MD-2244-K, 2017 WL 9807462 (N.D. Tex. Sept. 18, 2017); *In re Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liab. Litig.*, No. 3:11-MD-2244-K, 2017 WL 9807463 (N.D. Tex. Sept. 18, 2017); *In re Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liab. Litig.*, No. 3:11-MD-2244-K, 2017 WL 9807464 (N.D. Tex. Sept. 19, 2017) (all demonstrating that the district court continued to conduct bellwether trials after the Fifth Circuit indicated it thought it would be inappropriate).

This demonstrates why the difference between the language used in *Depuy* and the cases to which it cited, and the language used in *JPMorgan* is so much more than just a semantic difference. Previous precedent, while establishing a somewhat troubling practice of opining on the merits of the case despite declining to issue the writ, at least allowed for the *possibility* that the trial court could disregard the Fifth Circuit’s opinion as dicta—a possibility that, at least in the case of *Depuy*, is very real. This is important because, if a court of appeals does not feel the writ of mandamus is warranted, then any musings on the merits of the case necessarily are not operative to that decision. Such musings, then, are, by definition, dicta. However, Judge Smith, in *JPMorgan*, labels what is inescapably dicta, a “holding.”

V. THIS NEW PRACTICE REPRESENTS AN ENORMOUS POWER GRAB BY THE FIFTH CIRCUIT.

Despite Judge Smith’s insistence that the procedure in *JPMorgan* is routine, even quotidian, this new practice actually represents an enormous power grab by the Fifth Circuit. Given that the writ of mandamus is meant to be such an extraordinary remedy reserved for only the most egregious and patent mistakes by the district court,⁸⁸ it is entirely inappropriate for an appellate court to decide and pronounce holdings on the merits of cases, despite concluding that the writ is unwarranted. The “holding” in *JPMorgan* represents a seizure of power by Judge Smith’s panel in three main ways: first, the opinion binds the district court despite mandamus being unwarranted, undermining its authority; second, the opinion binds future Fifth Circuit panels on the substantive legal issues raised; and third, and perhaps most concerning, the opinion binds future panels on the issue of whether a panel has the authority to issue a “binding opinion” even where it does not grant the petitioner’s relief.

First, *JPMorgan* represents a serious lack of respect for and deference to trial courts. The Fifth Circuit, out of one side of its mouth, admits that in some way, the district court’s error was not grave enough to issue the writ and formally rectify it. Yet, out the other side of its mouth, the panel still insists on pronouncing a “holding” admonishing the district court for its error and directing its actions going forward. This not only micromanages district courts’ decision-making by using the mandamus process in an overly paternalistic way, but it also undermines district judges’ authority by completely transforming the appeals process.

⁸⁸ See *supra* Section II.

The final-judgment rule ensures that a party does not waste the court's time and expense appealing every interlocutory order by the district court.⁸⁹ It guards against the interruption of court proceedings, prevents piecemeal litigation, protects district judges' use of discretion, and promotes an efficient judicial system.⁹⁰ And, to ensure the rule is not too rigid, Congress has enshrined not only categorical exceptions to the final-judgment rule, but also the possibility of permissive interlocutory appeal.⁹¹ Despite this careful consideration by Congress and establishment of this specific appellate scheme, however, *JPMorgan*, signals to parties within the Fifth Circuit that they can now circumvent it entirely by petitioning for a writ of mandamus even for the most minor of errors by the district court. Parties who know they are unable to demonstrate they are entitled to the writ will be undeterred, using the precedent of *JPMorgan* to argue that they may nonetheless get a favorable holding that binds the district court.

Second, the panel in *JPMorgan* has bound future panels on the substantive FLSA issues raised through what would normally be considered dicta. The term "dicta" refers to "statements in a judicial opinion that are not necessary to support the decision reached by the court."⁹² Typically, such statements, because they are inessential to the holding, are given less consideration by the judges. Therefore, dicta hold less authority than the actual holding of the opinion.⁹³ And this is regardless of what a judge names his dicta: "[a] judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'"⁹⁴ Using this view, Judge Smith's expressions on the FLSA issue in *JPMorgan* are undoubtedly dicta—they are "assertion[s] in a court's

⁸⁹ See 28 U.S.C. § 1291 (2012).

⁹⁰ Hannah M. Smith, Note, *Using the Scientific Method in the Law: Examining State Interlocutory Appeals Procedures That Would Improve Uniformity, Efficiency, and Fairness in the Federal Appellate System*, 61 CLEV. ST. L. REV. 259, 262–64 (2013).

⁹¹ See 28 U.S.C. § 1292(a)–(b) (2012).

⁹² Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994).

⁹³ Dorf, *supra* note 92; see also *Cohens v. Virginia*, 19 U.S. 264, 399–400 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.").

⁹⁴ *United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring).

opinion of a proposition of law which do[] not explain why the court's judgment goes in favor of the winner."⁹⁵ Judge Smith's determinations about the FLSA do not explain why the writ of mandamus was denied, so "the court's judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question."⁹⁶ Therefore, they are entitled to respect and can guide future courts and parties, but they cannot bind.⁹⁷ However, at the end of *JPMorgan* Judge Smith waves his magic wand to turn dicta into a holding. Despite not finding the requisite conditions to issue the writ, Judge Smith binds the entire Fifth Circuit, failing to "limit [the court's] exercise of judicial authority to concrete disputes that arise out of the adversary process."⁹⁸ This essentially, then, amounts to an advisory opinion, the issuance of which even first-year law students know is not the proper role of the court.⁹⁹

Perhaps most significantly though, and in a sort of meta-binding, *JPMorgan* establishes that *one panel* can bind *a later panel* through what would normally be considered dicta. Judge Smith and the rest of the *JPMorgan* panel decided this without the issue having been raised, without reading briefing on the issue, and without hearing any oral argument on the issue.¹⁰⁰ A mandamus panel can now deny a writ of mandamus, send the case back down to the district court, and if the case comes back up again (on appeal or mandamus), the next panel is now bound by the previous panel's musings, despite that panel not having granted mandamus relief. While this procedural posture may seem uncommon, it was no doubt what Judge Smith

⁹⁵ Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256 (2006).

⁹⁶ *Id.*

⁹⁷ *Id.* at 1253.

⁹⁸ Dorf, *supra* note 92, at 1997.

⁹⁹ *See, e.g.,* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("The federal courts established pursuant to Article III of the Constitution do not render advisory opinions.") (internal citations omitted). This principle is commonly referred to as the "case-or-controversy" requirement. *See, e.g.,* *Muskrat v. United States*, 219 U.S. 346, 356 (1911) ("[Judicial power] does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.").

¹⁰⁰ Pet. for Writ of Mandamus at iii–iv, *In re JPMorgan Chase Bank, N.A.*, 916 F.3d 494 (2019) (No. 18-20825) (Table of Contents demonstrating that the parties did not address whether the Fifth Circuit could bind the parties with dicta); Surreply in Opposition to Pet. for Writ of Mandamus at ii, *In re JPMorgan Chase Bank*, 916 F.3d 494 (2019) (No. 18-20825) (same).

had in mind when he called his decision in *JPMorgan* a “holding”—it was the exact procedural posture of *Depuy*.¹⁰¹

In *Depuy*, the mandamus petitioner complained of Judge Kinkeade of the Northern District of Texas conducting bellwether trials in multi-district litigation proceedings.¹⁰² The panel’s opinion, authored by Judge Smith, expressed that it was inappropriate to continue the bellwether trials because the defendants had not clearly and unequivocally waived their personal jurisdiction objections, and even went so far as to state that “the MDL court clearly abused any discretion it might have had and, in doing so, reached a ‘patently erroneous’ result.”¹⁰³ However, a majority of the panel found that “petitioners have the usual and adequate remedy of ordinary appeal,” so issuance of the writ was unwarranted.¹⁰⁴ Instead, the panel “request[ed] the district court to vacate its ruling on waiver and to withdraw its order.”¹⁰⁵ Despite this strong language from the panel, when the case returned to Judge Kinkeade, he apparently regarded the “request” as merely dicta and continued with the bellwether proceedings.¹⁰⁶

Judge Kinkeade went ahead and tried the cases, which resulted in a \$1 billion jury verdict against the defendants.¹⁰⁷ When the defendants appealed, their main argument was, again, that the MDL court had lacked personal jurisdiction.¹⁰⁸ A major issue in that petition, then, was whether the panel hearing the appeal was bound by Judge Smith’s previous finding that Judge Kinkeade had erred when he set the cases for trial, despite that finding being within a denial of a writ of mandamus.¹⁰⁹ The parties briefed the issue and

¹⁰¹ *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345 (5th Cir. 2017).

¹⁰² *Id.* at 348–50.

¹⁰³ *Id.* at 352.

¹⁰⁴ *Id.* at 353.

¹⁰⁵ *Id.* at 348.

¹⁰⁶ *See supra* Section IV. And, as discussed previously, by all definitions, the request was merely dicta. Judge Smith’s musings that Judge Kinkeade had erred by setting the MDL proceedings for trial did not “explain why the court’s judgment goes in favor of the winner”—i.e., why the court denied the petition for the writ of mandamus. Leval, *supra* note 94 at 1256.

¹⁰⁷ Principal and Response Brief for Defendants-Appellees-Cross-Appellants at 1, *In re Depuy Orthopaedics, Inc.*, Nos. 17-10020, 17-10017, 17-10018, 17-10019, 17-10021, 17-10022, 17-10831, 17-10834, 17-10832, 17-10833, 17-10830, 17-10828 (5th Cir. filed September 29, 2017), 2017 WL 4351155, 2.

¹⁰⁸ *Id.* at 20 (Argument heading “The District Court Did Not Have Personal Jurisdiction Over Defendants”).

¹⁰⁹ *Id.* at 2, 22 (“The earlier panel’s analysis of the dispositive personal-jurisdiction question in Defendants’ favor is sufficient to resolve this appeal and to reverse the judgment below;” “The

much of the oral argument centered on it. Before the panel could decide the appeal, though, Judge Smith authored the *JPMorgan* opinion, and, without briefing, resolved it.¹¹⁰ In doing so, he truncated any debate on the issue, made sure the second *Depuy* panel was bound by his finding that Judge Kinkeade erred, and ensured that Judge Kinkeade (and any other Fifth Circuit judges) could no longer regard his dicta as just that.

It is no wonder, then, that Judge Ellison reacted so strongly to the *JPMorgan* opinion.¹¹¹ His findings and words had been twisted and mutilated by Judge Smith in the apparent pursuit of a vendetta against Judge Kinkeade for his perceived disobedience.¹¹² In order to achieve the major power-grab by the Fifth Circuit that the *JPMorgan* opinion represents, Judge Smith had essentially sacrificed Judge Ellison. Judge Smith used a completely unrelated case—*JPMorgan*—to settle the score in the case about which he was still resentful—*Depuy*.

Regardless of the motivations behind the panel opinion in *JPMorgan*, though, the court no doubt expanded its appellate authority enormously, and with concerning consequences. The Fifth Circuit must correct course and

Court’s previous determination that the district court lacked personal jurisdiction is controlling here.”); Response and Reply Brief of Plaintiffs-Appellants/Cross Appellees at 24, *In re Depuy Orthopaedics, Inc.*, Nos. 17-10017, 17-10018, 17-10019, 17-10020, 17-10021, 17-10022, 17-10031, 17-10034, 17-10032, 17-10033, 17-10030, 17-10028 (5th Cir. filed December 1, 2017), 2017 WL 6496238, 24. (“Defendants rely heavily on certain findings regarding their *Lexecon* waiver made by a prior panel in a related mandamus proceeding involving different plaintiffs. But this Court is not bound by those findings.”) (internal citations omitted).

¹¹⁰Oral argument in *Depuy* on whether the panel was bound by the previous panel’s personal jurisdiction findings was held June 7, 2018. Judge Smith issued the *JPMorgan* opinion on February 21, 2019. *See In re JPMorgan Chase & Co.*, 916 F.3d 494, 494 (5th Cir. 2019). Determination of the issues in dispute having been foreclosed, the *Depuy* panel then granted the parties’ joint motion to dismiss their appeal on March 15, 2019, before any opinion was issued.

¹¹¹*See supra* Section I; *see also* Memorandum and Order at 1, *Rivenbark v. JPMorgan Chase & Co.*, 340 F. Supp. 3d 619 (S.D. Tex. 2019) (No. 4:17-CV-03786).

¹¹²For example, Judge Smith criticized Judge Ellison for prematurely concluding that the defendant had violated the FLSA, stating, “The court opined that it ‘doesn’t seem to me unfair to give plaintiffs notice that they may have been victims of this illegality.’” *JPMorgan*, 916 F.3d at 503. However, Judge Smith had left off the beginning of Judge Ellison’s quote, which actually read: “**Take the argument that plaintiffs make at face value. If JPMorgan Chase has engaged in a long-running illegality**, it doesn’t seem to me unfair to give plaintiffs notice that they have been victims of this illegality.” Memorandum and Order at 1, *Rivenbark v. JPMorgan Chase & Co.*, 340 F. Supp. 3d 619 (S.D. Tex. 2019) (No. 4:17-CV-03786) (emphasis added). With the inclusion of the beginning part of the quote, it is clear the Judge Ellison was offering a hypothetical. Judge Smith’s characterization as prematurely deciding the merits is at least negligent, and at worst, willfully misleading and highly disingenuous.

clarify that dicta in denials of writs of mandamus are not binding precedent. Otherwise, district courts' power will be substantially undermined, the final-judgment rule will become meaningless as parties use the mandamus procedure to appeal any error during the trial, and Fifth Circuit panels will be free to make law and decide substantive issues even when such pronouncements are unwarranted.