No. 17-633

In The
Supreme Court of the United States

ENDO PHARMACEUTICALS INC.,

Petitioner,

v.

NEW HAMPSHIRE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Hampshire

BRIEF FOR RESPONDENT STATE OF NEW HAMPSHIRE IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment categorically forbids a state attorney general from retaining private counsel to assist in investigating potential claims on behalf of the State on terms that provide for a potential contingent fee if the investigation proceeds to litigation and recovery by the State, where the state attorney general maintains control of the investigation and makes all key decisions, including whether and how to proceed with litigation.

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INTRODUCTION

The federal Drug Enforcement Administration has labeled New Hampshire "ground zero" in the opioid epidemic.[1] The State had the second highest rate of death due to drug overdose in 2015, and the third highest rate of drug overdoses in 2016.[2] The societal impacts of the opioid crisis are not limited to deaths from drug overdoses. There were 2,067 opioid-related emergency department visits in 2015 – the highest number ever recorded in the State.[3] Health care costs related to opioid abuse in New Hampshire in 2014 exceeded $107 million.[4]

In response to the devastating effects of the opioid crisis on the State's residents, the New Hampshire Office of the Attorney General ("OAG" or "State")

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[1] Jennifer Crompton, *DEA official: NH 'ground zero' of opioid epidemic*, WMUR, Oct. 24, 2016, available at: http://www.wmur.com/article/dea-official-nh-ground-zero-of-opioid-epidemic/7158123 (last visited Jan. 15, 2018).

[2] *Drug Overdose Death Data*, Centers for Disease Control and Prevention, available at: https://www.cdc.gov/drugoverdose/data/statedeaths.html (last visited Jan. 15, 2018); Holly Hedegaard, M.D., Margaret Warner, Ph.D., and Arialdi M. Miniño, M.P.H., *Drug Overdose Deaths in the United States, 1999-2016*, Centers for Disease Control and Prevention, available at: https://www.cdc.gov/nchs/products/databriefs/db294.htm (last visited Jan. 15, 2018).

[3] *The Opiate/Opioid Public Health Crisis: Update on the State of New Hampshire's Comprehensive Response*, available at: https://www.dhhs.nh.gov/dcbcs/bdas/documents/state-response-opioid-crisis.pdf (last visited Jan. 15, 2018).

[4] Matrix Global Advisors, *Health Care Costs from Opioid Abuse, A State-by-State Analysis* 5 (April 2015).

initiated an investigation into the marketing practices of companies that manufacture opioid drugs, including Petitioner Endo Pharmaceuticals Inc. ("Endo"). OAG retained a private law firm, on a contingent-fee basis, to assist with this complex investigation and any resulting litigation. Endo challenged this retainer agreement as, *inter alia*, a violation of its due process rights under the Fourteenth Amendment.

The question presented by Endo's petition is quite narrow, has not divided lower courts, and is undeserving of this Court's attention. For decades, state attorneys general have supplemented limited governmental resources by retaining outside counsel – often on a contingent-fee basis – to assist in investigating and litigating claims on behalf of the states against well-funded corporate defendants who do harm to the states and their citizens. Courts have consistently concluded that this practice violates no constitutional principles, so long as the attorney general's office maintains supervisory authority over outside counsel and ultimate decision-making authority over the litigation. No decision by this Court points to a contrary conclusion.

This particular proceeding is even narrower than the usual circumstances involving state retention of outside counsel. To date, New Hampshire has not chosen to initiate any suit for damages against Endo or otherwise sought civil penalties against the company. The only issue before the Court, therefore, concerns the constitutionality of the State's reliance on private, contingent-fee counsel to assist in the

investigation of potential public claims – not, as Endo would have it, the *prosecution* of such claims. Pet. i.

Endo challenged the retention largely on state law grounds, though it did allege that the agreement violated due process. After New Hampshire courts rejected its state law arguments, Endo was left with only its federal constitutional claim to pursue. Although Endo stretches mightily to try to find precedent to support its due process argument, it cannot point to a single ruling by this Court that suggests a due process violation on these facts. Instead, court after court has rejected Endo's due process argument and upheld similar agreements between state attorneys general and outside counsel. The petition should be denied.

STATEMENT OF THE CASE

A. The Attorney General and Outside Counsel Explicitly State in the Retainer Agreement that the Attorney General Maintains Control Over the Conduct of the Investigation and Over Any Decision to Pursue Litigation.

In June 2015, OAG entered into an agreement with the law firm Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein") to retain the firm "to represent it in an investigation and litigation of potential claims regarding fraudulent marketing of opioid drugs." App. 62a. The State and Cohen Milstein entered into a second agreement in September 2015 that "supersedes the initial retainer agreement, executed June 15, 2015,

and is effective as of that date." App. 68a.[5] The September 2015 agreement is nearly identical to the June 2015 agreement, except that the September agreement clarifies that the retention of Cohen Milstein is "to assist [the Attorney General's office] in an investigation and litigation of potential claims regarding fraudulent marketing of opioid drugs." *Compare* App. 62a *with* App. 68a.

Numerous provisions in the retainer agreement affirm that OAG "will maintain control of the investigation and will make all key decisions, including whether and how to proceed with litigation, which claims to advance and what relief to seek." App. 72a. In particular, the agreement provides that "[a]ll work performed [by Cohen Milstein] in the investigative stage will be under the supervision of OAG and in a manner satisfactory to OAG." App. 69a. Moreover, "OAG will appear as lead counsel in all pleadings and shall retain control over any litigation decisions and settlement of the State's claims." App. 72a.

Such "control" is embodied in additional contractual provisions subjecting Cohen Milstein's work to State approval. For example,

- Cohen Milstein must "provide regular reports to OAG on the investigation, including summaries of documents and interviews." App. 72a.

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[5] In February 2017, Linda Singer left Cohen Milstein and joined Motley Rice LLC. The retainer agreement transferred with Ms. Singer to her new firm.

- "OAG will review and approve all key documents (such as civil investigative demands), and Cohen Milstein is responsible for providing these documents with sufficient advance time to allow for OAG's review and approval." App. 72a.
- "OAG will designate a point of contact who will supervise the investigation and who will be available directly to other parties in this Matter as needed." App. 72a.

The agreement also confirms that the State retains the ultimate authority over the outcome of the investigation: "When the initial investigation has been completed, OAG will determine, *in its sole discretion*, whether to move forward to litigation." App. 72a (emphasis added); *see also* App. 69a ("OAG will determine whether it wishes to proceed to litigation or other action in this Matter.").

The agreement does not provide for recovery to outside counsel if OAG decides not to proceed beyond an investigation. Rather, outside counsel receives a fee only in the event of a recovery following a settlement or judgment: "if there is no recovery pursuant to a judgment or settlement in connection with this litigation matter, no fee shall be due to Cohen Milstein hereunder." App. 70a. The fee terms in the agreement are authorized under legal ethics rules. *See, e.g.*, App. 52a (rejecting ethics challenge; *see also* Rule 1.5(c), Model Rules of Professional Conduct (providing for contingent fees).

Despite Endo's repeated arguments regarding the malign influence of campaign contributions from outside counsel, Pet. 3, 12-14, campaign contributions played no role in the selection of Linda Singer or Cohen Milstein as outside counsel. Endo did not raise this argument in the proceedings below – nor could it – given that the Attorney General is not an elected official in New Hampshire. Pursuant to Part 2, Article 46 of the New Hampshire State Constitution, the Governor appoints the Attorney General. Neither Linda Singer, Cohen Milstein nor Motley Rice made campaign contributions to the New Hampshire Attorney General or Governor or makes any contributions to Attorney General candidates or officeholders.

B. Endo Refuses to Comply with the State's Valid Subpoena.

The State issued a subpoena to Endo in August 2015 pursuant to N. H. Rev. Stat. Ann. § 358-A:8 (2009), which authorizes the Attorney General to issue subpoenas and subpoenas duces tecum to investigate the possible use of "unfair or deceptive act[s] or practice[s] in the conduct of any trade or commerce within" New Hampshire. *See also* N. H. Rev. Stat. Ann. §§ 358-A:2 (prohibiting unfair trade practices); 358-A:4 (providing for enforcement by the OAG's consumer protection and antitrust bureau). The subpoena sought, among other things, documents and information related to Endo's opioid sales volume in New Hampshire, Endo's plans and efforts to market opioids for chronic pain, representations made to prescribers

and consumers about the use of opioids for chronic pain, and Endo's role in causing health care providers to prescribe opioids to treat chronic pain. App. 3a.

The State's investigation was prompted by the devastating effects of the nation's opioid crisis on the State's residents – not by private counsel's financial concerns. The State was experiencing sharply increased rates of addiction, abuse, and overdose. In 2000, the State had approximately 50 overdose deaths. In 2013, that number grew to 192.[6] In 2014, the State had over 300 confirmed drug overdose deaths. *Id.* By the time of the December 11, 2015 hearing in this matter, there were more than 400 drug overdose deaths.[7]

The OAG has been actively involved in each aspect of the investigation. The OAG designated the Chief of the Consumer Protection Bureau, James Boffetti, to supervise Cohen Milstein's work and to lead the investigation. The New Hampshire Supreme Court held that, "[u]nder the plain terms of the agreement between the OAG and Cohen Milstein, the OAG retains direct authority over all aspects of the investigation."

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[6] *2015 New Hampshire Drug Overdose Deaths to Top 400; Double 2013*, New Hampshire Public Radio, Dec. 9, 2015, available at: http://nhpr.org/post/2015-new-hampshire-drug-overdose-deaths-top-400-double-2013#stream/0 (last visited Jan. 24, 2018).

[7] *The Opiate/Opioid Public Health Crisis: Update on the State of New Hampshire's Comprehensive Response*, available at: https://www.dhhs.nh.gov/dcbcs/bdas/documents/state-response-opioid-crisis.pdf (last visited Jan. 15, 2018).

App. 12a. And Mr. Boffetti has, in fact, been involved in "all aspects" of the investigation and serves as a point of contact with subpoena recipients. The OAG also reviews all key documents and attends witness interviews.

Endo initially indicated that it would comply with the State subpoena. App. 3a, 16a. It then backtracked and refused to produce any material, ostensibly based on its objection to the State's retention of outside counsel. *Id.*

C. The State Court Proceedings

OAG filed litigation in October 2015 to enforce its subpoena in New Hampshire state court. App. 3a. Endo counterclaimed and raised six arguments challenging the propriety of the State's retention of outside counsel. App. 3a-4a. Five of Endo's six arguments asserted that the retention violated state law provisions or common law. *Id.* The sixth argument asserted that the retention of outside counsel violated Endo's right to due process under both the New Hampshire and United States Constitutions. App. 4a.

The Superior Court of New Hampshire, Merrimack County, held that the State's retainer agreement was "*ultra vires* and void" because the OAG did not obtain legislative approval prior to the retention, in violation of the trial court's interpretation of a New Hampshire statute. App. 38a, 41a-42a. The Superior Court, however, rejected Endo's due process arguments, finding that Endo's argument "misses the

critical distinction between a private attorney who supplants a government attorney and one who assists." App. 57a. The Superior Court thus "agree[d] with the greater weight of judicial precedent finding no violation of due process by contingent-fee arrangements in certain civil litigation where the OAG supervises outside counsel and retains control over all critical decisions such that the outside counsel's personal interest is neutralized." App. 58a. Because the retainer agreement made clear that the OAG controls the representation and investigation, the Superior Court ruled that it did not violate due process. App. 58a-59a.

On appeal, the New Hampshire Supreme Court found that Endo lacked standing to raise the *ultra vires* challenge to the State's retainer agreement and reversed the Superior Court's finding in that regard. App. 8a. It affirmed the Superior Court determination that the retainer agreement was consistent with state ethics rules. App. 12a. Finally, the New Hampshire Supreme Court affirmed the Superior Court's ruling that the retention did not violate Endo's due process rights. The Supreme Court found that "[u]nder the plain terms of the agreement between the OAG and Cohen Milstein, the OAG retains direct authority over all aspects of the investigation." App. 12a. The Court rejected Endo's argument that this Court had "categorically barred" such retainer agreements, finding that Endo had "not demonstrated reversible error as to this issue." App. 13a-14a.

Counsel from the OAG represented the State as lead counsel on all briefing and conducted oral

argument in both the Superior Court and the New Hampshire Supreme Court.

On August 8, 2017, the State filed suit in state court against a different manufacturer of opioid drugs, Purdue Pharma L.P., Purdue Pharma Inc., and the Purdue Frederick Company Inc. ("Purdue").[8] Apart from Purdue, the State has not instituted any civil action for damages against any of the other opioid manufacturers that the State has investigated, including Endo.

REASONS FOR DENYING THE PETITION

Petitioner's specious due process argument does not merit review by this Court. The New Hampshire Supreme Court's rejection of that argument is entirely consistent with this Court's precedents. It is also consistent with the rulings of other courts which have uniformly upheld similar arrangements. Given this well-settled authority and the absence of any conflict among the lower state and federal courts, there is no need for this Court's intervention. Finally, even if the question presented were deemed to be worthy of review, this case would present a poor vehicle for addressing the question.

[8] *See State of N.H. v. Purdue Pharma L.P., et al.*, Case No. 217-2017-CV-00402, Merrimack County Superior Court.

I. THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT IS CONSISTENT WITH THIS COURT'S PRECEDENT.

None of the Supreme Court precedents Endo cites provide any basis for questioning the decision of the New Hampshire Supreme Court, let alone suggest that its holding has violated a "categorical rule" of due process. The New Hampshire Supreme Court rejected Endo's argument that this Court's case law categorically bars a contingent-fee arrangement with the State where the State retains ultimate control of the investigation and any litigation. Endo has now reframed its argument in the petition by asserting that this Court has held that due process requires a "categorical bar on any arrangement that could taint the neutrality of a government actor in the justice system." Pet. 17. Setting aside the fact that the contingent-fee arrangement has no bearing on the neutrality of the Attorney General's Office, the only government actor here, App. 12a, Endo's argument is "categorically" wrong. No decision of this Court makes such a holding; in fact, this Court has held that even criminal prosecutors "need not be entirely 'neutral and detached.'" *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 247-48 (1980).

Endo purports to find its "categorical" rule by cobbling together a mish-mosh of prior decisions involving judges, criminal prosecutors, this Court's supervisory authority over the federal courts, and even a case in which this Court found *no due process violation* where a government employee pursuing a civil enforcement action had a potential financial conflict.

The first two cases cited by Endo, *Tumey v. Ohio*, 273 U.S. 510 (1927), and *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972), concerned financial conflicts of interest involving judges, not attorneys representing the government. In *Tumey*, the municipal mayor, who presided over the mayor's court, personally received a portion of the criminal fines he imposed, 273 U.S. at 520-21, while in *Ward*, fines imposed by the mayor's court accounted for a substantial portion of municipal revenues, creating a conflict for the mayor-judge who not only imposed the fines but also was responsible for the village budget. 409 U.S. at 58-59.

In finding violations of due process, this Court repeatedly emphasized the importance of an impartial *adjudicator* in our legal system. In *Tumey*, for example, the Court first articulated the general rule that "*officers acting in a judicial or quasi judicial capacity* are disqualified by their interest in the controversy to be decided." 273 U.S. at 522 (emphasis added). The Court then declared that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, *the judge of which has a direct, personal, substantial pecuniary interest* in reaching a conclusion against him in his case." *Id.* at 523 (emphasis added); *see also id.* at 535 (defendant "had the right to have an *impartial judge*") (emphasis added).

The same was true in *Ward*. This Court began its analysis by observing that "[t]he issue turns . . . on whether the Mayor can be regarded as an *impartial*

judge under the principles laid down" in *Tumey*. 409 U.S. at 59 (emphasis added). The Court concluded that "the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court," thereby depriving the defendant of his entitlement to a "*neutral and detached judge*." *Id.* at 60, 62 (emphasis added).

While Endo contends that the *per se* rule requiring impartial judges applies with equal force to attorneys representing the State, this Court has explicitly rejected that analogy. In *Marshall v. Jerrico*, discussed in more detail below, this Court wrote:

> The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. . . . Prosecutors need not be entirely "neutral and detached." In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties.

446 U.S. at 248-49 (internal citations omitted).[9] "[T]he strict requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime." *Id.* at 250.

The third case on which Endo relies, *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), is likewise distinguishable, albeit on different grounds. *Young* involved a prosecution for criminal contempt for violation of an injunction, entered pursuant to settlement of civil litigation, prohibiting future infringement of the Louis Vuitton trademark on leather goods. When counsel for Vuitton approached the district court with evidence the injunction had been violated and sought to have the defendants prosecuted for criminal contempt, the district court appointed them as special counsel to prosecute the criminal contempt on behalf of the United States, rather than referring the matter to the U.S. Attorney's office for enforcement. After the defendants' ensuing conviction, they challenged the appointment of Vuitton's counsel as a violation of their right to an impartial prosecutor and this Court, in a

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[9] Indeed, though Endo does not mention it in its petition, the same village ordinance that gave the Mayor a financial interest in *Tumey* provided for the prosecuting attorney to "receive as compensation for legal services an amount equal to 10 per cent of the fine collected." 273 U.S. at 518. Yet, nowhere in the decision did the *Tumey* Court suggest that this financial interest of the prosecutor raised any due process concerns.

divided opinion, overturned the convictions. *Id.* at 789-93, 814.

This Court overturned the convictions in *Young* not because Vuitton's counsel had a financial interest in the outcome of the criminal contempt proceeding, but rather because of an inherent ethical conflict resulting from the lawyers' representation of two clients, Vuitton and the United States. As the Court explained, "In a case where a prosecutor represents an interested party, however, the ethics of the legal profession *require* that an interest other than the Government's be taken into account." *Id.* at 807 (emphasis in original); *see also id.* at 804 ("The concern that representation of other clients may compromise the prosecutor's pursuit of the Government's interest rests on recognition that a prosecutor would owe an ethical duty to those other clients."). This Court also found it significant that *Young*, unlike this case, involved a criminal prosecution: "It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters." *Id.* at 810. Most importantly, for present purposes, *Young* is distinguishable because the Court did not rule that the appointment of Vuitton's counsel as prosecutors violated due process; it instead based its ruling on this Court's supervisory authority over the federal courts, an

authority that is not at issue in this state court litigation. *Id.* at 809.[10]

The final case on which Endo relies, and the only one involving a purported financial conflict in civil enforcement, is *Marshall*. It is surprising that Endo points to that ruling in support of its "categorical bar," because *Marshall* held that the alleged conflict did *not* violate due process. 446 U.S. at 252.

Marshall involved § 16(e) of the Fair Labor Standards Act, 29 U.S.C. § 216(e), which provided that "sums collected as civil penalties for the unlawful employment of child labor are returned to the Employment Standards Administration ("ESA") of the Department of Labor in reimbursement for the costs of determining violations and assessing penalties." 446 U.S. at 239. A company assessed civil penalties for child labor violations challenged this provision as a violation of due process because it "created an impermissible risk and appearance of bias by encouraging the assistant regional administrator to make unduly numerous and large assessments of civil penalties." *Id.* at 241.

This Court rejected the due process challenge. Comparing the role of the assistant regional administrator of ESA to that of a civil plaintiff, the Court first ruled that the neutrality principles articulated in *Tumey* and *Ward* were inapplicable. *Id.* at 247-48 ("The

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[10] Only Justice Blackmun would have held that "the practice – federal or state – of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." *Id.* at 814-15 (Blackmun, J., concurring).

rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. . . . Prosecutors need not be entirely 'neutral and detached.'") (internal citation omitted). Indeed, the Court recognized that the government may have a legitimate interest in offering incentives to government lawyers to secure civil penalties, quoting *Tumey* for the proposition that the government "'may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people.'" *Id.* at 248-49 (quoting *Tumey*, 273 U.S. at 535). Finally, looking at the specific financial interests "alleged to impose bias" in *Marshall*, the Court found the risk of bias to be "exceptionally remote." *Id.* at 250. Thus, *Marshall* most certainly does not support a "categorical bar" against any lawyer for the government having a purported interest in the outcome of a case.[11]

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[11] Each of the precedents Endo cites involved an adjudication. Even fewer due process rights apply to parties, like Endo, who are challenging an investigation. *See Hannah v. Larche*, 363 U.S. 420, 440-41 (1960) ("[T]he requirements of due process frequently vary with the type of proceeding involved . . . [An investigation] does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property."). Standing alone, an investigation is powerless. Instead, a judicial or administrative proceeding is needed to affect a defendant's legal rights and heightened due process protections exist in those tribunals. *See SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742

Endo has thus failed to identify even a single case in which a personal interest of an attorney for the government – as opposed to a judge – has been held to violate due process. The "*per se* rule" it claims to find in this Court's precedent simply does not exist. Further, Endo offers no basis to question the neutrality of the OAG and its attorneys who maintain control and supervision over the investigation. The ruling of the New Hampshire Supreme Court herein, rejecting Endo's due process challenge, is wholly consistent with this Court's precedents.

II. COURTS HAVE CONSISTENTLY UPHELD CONTINGENT-FEE ARRANGEMENTS WHERE GOVERNMENT COUNSEL RETAINS SUPERVISORY AUTHORITY AND CONTROL OVER THE LITIGATION.

In stark contrast to the complete absence of Supreme Court case law in support of Endo's due process argument, stands a virtually uniform body of precedent upholding the decisions of government authorities to retain outside counsel on a contingent-fee basis to assist them in pursuing litigation on behalf of public entities. *See, e.g.*, *City & County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1135-36 (N.D.

(1984) (Due process "is not implicated . . . because an administrative investigation adjudicates no legal rights."); *Fitzgerald v. Hampton*, 467 F.2d 755, 764 (D.C. Cir. 1972) ("[T]he Supreme Court's decisions have consistently distinguished the due process requirements in administrative proceedings of a quasijudicial character from the due process requirements in proceedings which are purely investigative and fact-finding.").

Cal. 1997); *Sherwin-Williams Co. v. City of Columbus, Ohio*, No. C2-06-829, 2007 WL 2079774 (S.D. Ohio July 18, 2007); *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1243 (Md. 1998); *Cty. of Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842, 852-53 (Cal. Ct. App. 2008); *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 475-76 (R.I. 2008); *Cty. of Santa Clara v. Superior Court*, 235 P.3d 21, 41-42 (Cal. 2010); *Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp. 2d 733, 739-40 (E.D. Ky. 2013); *W. Va. ex rel. Discovery Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 630 n.20 (W. Va. 2013); *Int'l Paper Co. v. Harris Cty.*, 445 S.W.3d 379, 390-94 (Tex. App. 2013); *City of Chicago v. Purdue Pharma L.P.*, No. 14-CV-4361, 2015 WL 920719, at *4-*5 (N.D. Ill. Mar. 2, 2015). Endo's petition makes only passing reference to this extensive precedent, Pet. 28 & n.8, but it is significant because it highlights the utter absence of any conflict among the lower courts on the propriety of this practice.

The cited decisions all hold that there is no due process problem with a public entity hiring outside counsel on a contingent-fee basis to *assist* the public entity with civil litigation, so long as the outside counsel does not *supplant* the government's own lawyers. In other words, due process is satisfied so long as the actions of outside counsel are carried out – as they are under the retainer agreement in this case – under the oversight, direction and control of unbiased government lawyers. As the Supreme Court of California explained in *County of Santa Clara v. Superior Court*:

> [T]here is a critical distinction between an employment arrangement that fully delegates governmental authority to a private party possessing a personal interest in the case, and an arrangement specifying that private counsel remain subject to the supervision and control of government attorneys. Private counsel serving in a subordinate role do not supplant a public entity's government attorneys, who have no personal or pecuniary interest in a case and therefore remain free of a conflict of interest that might require disqualification.

235 P.3d at 36. In such a case, "the discretionary decisions vital to an impartial prosecution are made by neutral attorneys and the prosecution may proceed with the assistance of private counsel, even though the latter have a pecuniary interest in the case." *Id.* at 60. The Rhode Island Supreme Court put it similarly in *State v. Lead Indus. Ass'n, Inc.*:

> [T]here is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain *non-criminal* matters. Indeed, it is our view that the ability of the Attorney General to enter into such contractual relationships may well, in some circumstances, lead to results that will be beneficial to society – results which otherwise might not have been attainable. . . . [T]he Attorney General is not precluded from engaging private counsel pursuant to a contingent fee agreement in order to assist in certain civil

> litigation, so long as the Office of Attorney General retains *absolute and total control over all critical decision-making* in any case in which such agreements have been entered into.

951 A.2d at 475 (emphasis in original). "[A]s long as the required safeguards are in place, a government entity may engage contingent-fee counsel to assist in a civil prosecution without infringing on the defendant's due process rights." *Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp. 2d at 739. Each of the decisions cited above comes to this same conclusion.

In reaching this consistent result, these courts were guided by this Court's rulings in *Young* and *Marshall*. "We summarily reject [Petitioner's] contention that use of special assistant attorneys general violates its due process rights. The Petitioner has not cited to, nor have we found, *any* case that supports a due process violation claim through the use of special assistant attorneys general in the prosecution of civil cases. The two federal cases cited by Petitioner [*Marshall* and *Young*] do not stand for such a proposition." *West Virginia ex rel. Discovery Fin. Servs., Inc. v. Nibert*, 744 S.E.2d at 630 n.20. "[W]e do not read *Marshall* to support a blanket prohibition against the zealous pursuit of civil penalties by governmental entities using lawyers who have a financial stake in the outcome of the case." *Int'l Paper Co. v. Harris Cty.*, 445 S.W.3d at 389; *see also Philip Morris Inc. v. Glendening*, 709 A.2d at 1243 ("The Supreme Court . . . has held that due process does not necessarily preclude a prosecutor from

having a personal or financial interest in the outcome of a case seeking civil penalties.") (citing *Marshall*).[12]

Endo criticizes this extensive body of case law upholding public entity's retention of outside counsel on a contingent-fee basis, so long as government counsel maintains ultimate oversight and control over the litigation, repeatedly contending that government "control" of outside counsel is little more than a "fiction." Pet. 3, 22, 26. Endo offers no judicial support for this assertion, relying instead on a variety of opinion pieces and reports from self-serving corporate interests.

But this distinction between "supplanting" and "assisting" government counsel is far from fictional.[13] Indeed, as discussed earlier and below, Endo is unable to point to any evidence whatsoever that the OAG is

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[12] In a related context, defendants have attempted to argue that the *qui tam* provisions of the federal False Claims Act violate the due process clause of the Fifth Amendment by permitting financially interested relators to bring suit on behalf of the United States, often citing both *Marshall* and *Young*. Like the due process challenges to contingent-fee counsel, such arguments have been consistently rejected by the courts. *See, e.g.*, *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759-60 (9th Cir. 1993); *Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 771 (E.D. Pa. 2001) ("compensation a relator receives is an appropriate incentive and reward for aiding the Government").

[13] In fact, the distinction was first articulated by this Court in *Young* in rejecting the argument that Vuitton's counsel's greater knowledge of the violation of the injunction might justify their appointment as special prosecutors of the criminal contempt: "That familiarity may be put to use in *assisting* a disinterested prosecutor in pursuing the contempt action, but cannot justify permitting counsel for the private party to be in control of the prosecution." *Young*, 481 U.S. 806 n.17.

not exercising effective oversight and control over the present litigation. Government counsel has, *inter alia*, signed off on every important document and pleading; participated in every witness interview; and handled every oral argument. Both OAG and outside counsel have scrupulously adhered to the terms of their retainer and the boundaries set by existing precedent. That precedent clearly and uniformly establishes that private contingent-fee counsel may, consistent with due process, assist government lawyers in civil litigation on behalf of the State, so long as the litigation remains subject to the ultimate control of the government lawyers.

Endo argues that this Court should grant its petition because the question presented is "recurring and important." Pet. 10. New Hampshire agrees that government use of contingent-fee counsel is a recurring phenomenon, but that is at least in part because the law upholding the practice is so clear and well-established.

III. THIS CASE IS A POOR VEHICLE FOR CONSIDERING THE QUESTION PRESENTED.

Even if the question presented in Endo's petition was worthy of review, the present proceeding would be a very poor vehicle for addressing it for at least two separate reasons. First, because Endo chose to challenge OAG's retention of private counsel in response to the State's investigatory subpoena, no question

concerning the State's reliance on contingent-fee counsel in litigation to recover civil damages or penalties on behalf of the State is properly before the Court. Second, given Endo's failure to offer any factual basis to dispute that OAG has supervised and controlled the work of outside counsel in the investigation, this case does not present the Court with an opportunity to consider the constitutionality of a state's reliance on private, contingent-fee counsel who supplant government counsel, but only on those who assist them.

As discussed earlier, Endo challenged OAG's relationship with private counsel during the investigatory phase of these proceedings. To date the State has not chosen to initiate litigation against Endo and, at this point, it is entirely speculative whether it will ever do so. Therefore, the only relevant due process considerations properly before this Court are those applicable to a governmental investigation, not a civil enforcement proceeding. Endo asks the Court for a ruling on both "the investigation and prosecution of public claims," but the latter issue is not raised in this proceeding.

Similarly, Endo does not and cannot allege any failure of supervision by OAG in this case: to the contrary, the State's retainer agreement with outside counsel documents in detail outside counsel's subordinate role in assisting government counsel and the record demonstrates the dominant role played by OAG in these proceedings. Endo attempts to dismiss OAG's supervision and control as fictitious, but the record before this Court simply does not allow for the conclusion, as

Endo's Question Presented puts it, that the state has "outsourc[ed] the investigation" to private counsel.[14] Pet. i.

For both of these reasons, even if the Court were interested in addressing the due process implications of a state attorney general retaining private counsel on a contingent-fee basis to handle civil litigation for the State, this case would provide a particularly poor opportunity to address the purported concerns described in the petition.

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[14] Indeed, it is presumably because Endo lacks any factual basis to dispute OAG's supervision and control that it asserts a "categorical bar" to any public contingent-fee arrangement with private counsel.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

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