No. 19-

IN THE
Supreme Court of the United States

MAZIE SLATER KATZ & FREEMAN, LLC,

Petitioner,

v.

COMMON BENEFIT FEE AND COST COMMITTEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

QUESTION PRESENTED

A personal injury multi-district litigation ("MDL") in federal court generated an estimated $550 million for a "common-benefit fund" to pay plaintiff attorneys' fees and expenses, in addition to the fees already earned on their own cases. Some 94 plaintiff law firms filed applications seeking an equitable apportionment of the fund. The District Court ordered all appellate rights waived, and the allocation decisions were made by the Common Benefit Fee and Cost Committee ("FCC"), composed of eight attorney representatives of the applicant law firms and a retired state-court judge, all appointed by the District Court with no notice. Predictably, the FCC's members awarded themselves nearly two-thirds of the fund, while refusing to disclose to non-member firms the time entries and expense documentation purportedly justifying the extraordinary allocation. The District Court permitted no discovery, held no evidentiary hearing, and in a conclusory six-page opinion approved the FCC's admitted self-dealing while summarily rejecting the objections with no fact finding or analysis. The Fourth Circuit dismissed Petitioner's appeal in a single-sentence decision with no explanation.

The question presented is: Whether federal courts must implement a process that comports with due process to determine the fee and expense allocation of common-benefit funds in multidistrict litigation and other mass actions, to ensure that the decisions are transparent, legally valid, and fair and reasonable, particularly when they are based upon recommendations made by court-appointed fee committees composed of self-interested plaintiffs'

lawyers with severe conflicts of interest because they stand to receive the fees and expenses at issue.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption of the Petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states that it has no parent corporation and is not owned in any part by a publicly held company.

DIRECTLY RELATED PROCEEDINGS

Anderson Law Offices v. Common Benefit Fee and Cost Committee, Nos. 19-1849, 19-1850, 19-1851, 19-1853, 19-1855, 19-1856, 19-1857, United States Court of Appeals for the Fourth Circuit. Judgment Entered Sept. 23, 2019. Petition for Writ of Certiorari pending in this Court as No. 19-791.

Bernstein Liebhard LLP v. Common Benefit Fee and Cost Committee, No. 19-1892, United States Court of Appeals for the Fourth Circuit. Judgment Entered Sept. 23, 2019.

Kline & Specter, P.C. v. Common Benefit Fee and Cost Committee, No. 19-1224(L), United States Court of Appeals for the Fourth Circuit. Dismissed June 14, 2019, rehearing and rehearing en banc denied July 15, 2019.

In re C. R. Bard, Inc., Pelvic Repair System Products Liability Litig., No. 2:10-md-02187, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

In re American Medical Systems, Inc., Pelvic Repair System Products Liability Litig., No. 2:12-

md-02325, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

In re Boston Scientific Corp. Pelvic Repair System Products Liability Litig., No. 2:12-md-02326, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

In re Ethicon, Inc. Pelvic Repair System Products Liability Litig., No. 2:12-md-02327, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

In re Coloplast Corp., Pelvic Support Systems Products Liability Litig., No. 2:12-md-02387, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

In re Cook Medical, Inc., Pelvic Repair System Products Liability Litig., No. 2:13-md-02440, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

In re Neomedic Pelvic Repair System Products Liability Litig., No. 2:14-md-02511, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

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The order of the United States Court of Appeals for the Fourth Circuit dismissing Petitioner's appeal (Pet. App. 1a-5a) was issued on October 9, 2019 and is unpublished. The Memorandum Opinion and Order entered by the United States District Court for the Southern District of West Virginia overruling all objections and approving Respondent's common-benefit fee allocations (*id.* at 6a-13a) was issued on July 25, 2019 and is unpublished.

JURISDICTION

The Fourth Circuit denied Petitioner's timely petition for rehearing en banc on November 5, 2019. Pet. App. 14a-18a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Title 28 United States Code, Section 1407, provides, in relevant part:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded

> by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated. Provided, however, that the panel may separate any claim, cross-claim, counterclaim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

28 U.S.C. 1407(a).

STATEMENT OF THE CASE

This petition presents an important issue of federal law that is the subject of a circuit split and raises key concerns about the integrity of procedures implemented by the federal judiciary: Whether federal judges, when allocating so-called "common-benefit" attorney's fees and expenses in multi-district litigation proceedings (MDLs), must adopt procedures that guarantee due process; ensure that allocation decisions are transparent, jurisprudentially sound, fair, and reasonable; closely scrutinize the recommendations of court-appointed plaintiffs' fee committees; and provide for independent judicial fact-finding. The concerns about the integrity of the judicial process in this context are similar to the concerns expressed by the Chief Justice, Justice Alito, Justice Kavanaugh, and other Justices regarding cy pres awards in *Marek v. Lane*, 134 S. Ct. 8 (2013) (opinion of Roberts, C.J., respecting the denial of certiorari), and *Frank v. Gaos*, No. 17-961.

In this case, the District and Circuit Courts abdicated their responsibilities. The Fourth Circuit

dismissed Petitioner's appeal and denied any appellate review of a District Court order rubber-stamping an estimated $550 million fee award by the court-appointed Common Benefit Fee and Cost Committee ("FCC"), consisting of eight attorney representatives of the applicant law firms and a retired state-court judge. Predictably, the committee members awarded themselves nearly two-thirds (59%) of the funds, while refusing to disclose to competing fee applicants the time entries, expense documentation, and other documents purportedly justifying the one-sided allocation. The District Court had imposed an appellate waiver in the order structuring the common-benefit process, permitted no discovery, held no evidentiary hearing, and in a conclusory six-page opinion approved the FCC's apparent self-dealing without meaningfully addressing any of the objections. This startling lack of due process and extraordinary result is contrary to decisions in the First, Third, and Fifth Circuits, where precedent requires searching judicial review of MDL and other mass action common-benefit fee awards. The question presented involves an important issue of federal law as to which this Court's plenary review is amply warranted.

A. Background of the MDL System

In 1968, Congress created the United States Judicial Panel on Multidistrict Litigation, which has the power to transfer civil actions "pending in different districts" to a single federal district court for coordinated or consolidated pretrial proceedings when doing so "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). *See Gelboim v. Bank of America Corp.*, 574 U.S. 405, 135

S.Ct. 897, 903 (2015) (citing H.R. Rep. No. 1130, 90th Cong., 2d Sess., 2 (1968)). Transfer under § 1407 aims to "eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, and the courts." Manual for Complex Litigation § 20.131 (4th ed. 2004). Although the MDL process plays a useful role in facilitating the management and disposition of related actions filed in various federal courts, particularly mass torts and other complex cases, this Court has established important limits to MDL power and has made clear it is a purely procedural tool. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (federal district court conducting pretrial proceedings pursuant to multidistrict litigation statute has no authority to invoke change-of-venue statute to assign transferred case to itself for trial).

MDLs represent an important category of federal civil litigation. There are currently 190 MDLs pending in the federal district courts, encompassing 497,802 total actions.[1] The decline of class actions has "put increasing pressure on other mechanisms of aggregation," and "the most prominent … is federal multi-district litigation."[2] "The emergence of the MDL process … has made it the preferred procedural vehicle to dispose of mass

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[1] Available at https://www.jpml.uscourts.gov/ pending-mdls-0.

[2] J. Maria Glover, "Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation," 5 J. Tort. L. 1, 2-3 (2014).

torts."[3] Estimates suggest that *one-third* of all pending federal civil cases are part of an MDL.[4]

MDL transferee courts exercise broad case-management powers with respect to the federal cases before them. For example, MDL transferee courts frequently appoint a group of lawyers to serve as a "steering" committee or as coordinating counsel for a particular group of parties before it.[5]

MDL courts also frequently enter orders creating "common-benefit funds" to pay attorney fees and expenses for work performed for the benefit of all MDL plaintiffs. Those orders typically operate by imposing an assessment or tax (5% here) on all settlements or judgments obtained by firms with plaintiffs in the MDL, so that a portion of each individual plaintiff's recovery is taken away from the plaintiff (and that plaintiff's counsel) and deposited in the "common-benefit fund," to be allocated at a later date by the court according to its assessment of the benefits conferred by various law firms on the population of MDL plaintiffs. Common-benefit assessments also often extend to *state court* settlements and judgments obtained by law firms

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[3] Duke Law School, Center for Judicial Studies, MDL Standards and Best Practices xi (2014) (hereafter, "Duke Law School, Best Practices").

[4] *See* Martin H. Redish & Julie M. Karaba, "One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism," 95 B.U. L. Rev. 109, 118 & n. 57 (2015); Duke Law School, Best Practices, *supra* note 3, at x ("In 2014, these MDL cases made up 36% of the civil case load [in federal courts]. In 2002, that number was 16%.").

[5] *See, e.g.*, *In re Diet Drugs (Phentermine/ Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 582 F.3d 524, 547 (3d Cir. 2009).

representing plaintiffs in the federal MDL, even though the state-court proceedings are not part of the federal MDL. The federal MDL court thus leverages its power over the plaintiffs firms before it in the federal proceeding to assess a portion of their recoveries in state-court actions as well.

"Common-benefit" fee awards to plaintiff law firms can amount to tens of millions of dollars and in some cases, as here, hundreds of millions of dollars. Accordingly, they present an enormously lucrative opportunity for plaintiffs' lawyers.

Small groups of plaintiffs' attorneys sometimes turn MDLs into a cottage industry, awarding themselves astronomical attorneys' fees to be paid by parties other than their clients. Fee committee members sometimes contribute little in the way of actually trying cases or winning jury verdicts, but may nevertheless succeed in lobbying federal courts to appoint them to well-paid roles in the MDL. In effect, they ask the MDL court to award them millions of dollars in attorney's fees as a result of their favored appointments, to be paid by someone else, via multi-million-dollar common-benefit fee-shifting orders.

B. Background of the Pelvic Mesh MDL

This petition arises from the consolidation of seven product liability MDLs in the Southern District of West Virginia (the Hon. Joseph Goodwin) involving pelvic organ prolapse and stress urinary incontinence repair devices ("pelvic mesh" devices). The pelvic mesh MDL grew to include more than 104,800 cases naming seven mesh manufacturer defendants, representing the largest product liability MDL in United States history. Pet. App. 23a. The

defendants have spent more than $7 billion to date to resolve pelvic mesh cases.

The District Court entered orders establishing a five percent (5%) assessment upon the gross monetary recovery in every pelvic mesh case to create a common-benefit fund. *Id.* at 26a. The first tranche of this fund includes more than $350 million, and according to estimates the overall fund will likely grow to exceed $550 million.

To distribute this fund, the District Court entered an order on January 15, 2016 appointing nine individuals to serve as a Common Benefit Fee and Cost Committee ("FCC"). *Id.* at 26a-27a. The committee is composed of eight plaintiffs' lawyers, and one powerless non-attorney. Daniel J. Stack, a retired Missouri state-court judge whose contemporaneous common-benefit fee recommendations in another MDL have been sharply criticized by the Chief Judge of the Southern District of Illinois, was appointed to effectively participate as a member of the FCC as "external review specialist." In *In re Syngenta Mass Tort Actions*, 2019 WL 3887515 (S.D. Ill. Aug. 19, 2019), the Court invalidated and reduced by tens of millions of dollars a proposed allocation by Judge Stack awarding disproportionate sums to a lawyer (Clayton Clark) who was also one of the leaders of the pelvic mesh FCC.

C. The Extensive Benefits Bestowed By Petitioner on the MDL

Petitioner (the Mazie Slater firm) filed the first pelvic mesh case in the United States against Ethicon/Johnson & Johnson (collectively "J&J") in New Jersey state court in March 2008 and tried the

first pelvic mesh case in the country against J&J, in New Jersey state court in January and February, 2013. (CA4 No. 19-1943, Dkt. 11, at 1.) The trial resulted in an $11.1 million verdict, including $7.76 million in punitive damages, which was affirmed on appeal. *Gross v. Gynecare*, 2016 WL 1192556 (N.J. App. Div. Mar. 29, 2016), *cert. denied*, 228 N.J. 430 (2016). Mazie Slater subsequently obtained pelvic mesh verdicts against J&J of $12.5 million and $15 million, and against C.R. Bard for $68 million, and settled numerous other pelvic mesh cases around the United States during trial and on the eve of trial. (CA4 No. 19-1943, Dkt. 11, at 1 & n.1.)

Adam Slater of Mazie Slater was appointed co-lead counsel for the J&J and C.R. Bard consolidated pelvic mesh litigations in New Jersey (state-court equivalent of a federal MDL), led the J&J litigation nationally, successfully argued appeals including *Gross*, and played an instrumental role in the overall pelvic mesh litigation. (CA4 No. 19-1943, Dkt. 11, at 1-2.) For example, Mr. Slater:

- compelled and conducted the depositions of the editors of the New England Journal of Medicine in Massachusetts, resulting in key evidence undermining a pelvic mesh article that was pivotal to J&J's defense (32 Mass. L. Rptr. 304 (Sup. Ct. 2014));

- conducted depositions of 40 corporate witnesses, more than any other attorney in the entire pelvic mesh litigation and almost 20% of the total taken (CA4 No. 19-1943, Dkt. 11, at 2);

- questioned more trial witnesses (93) in bellwether trials than any other attorney (*id.*); and

● tried the first J&J Prolift trial in the MDL (*Bellew v. Ethicon*) in March 2015, for no fee, establishing key testimony and evidence and winning many important rulings that benefitted plaintiffs across the litigation before the case settled at the conclusion of the plaintiff's case. (*Id.*)

Mazie Slater was also the first and only firm to successfully oppose J&J's trial motion (in both New Jersey and Pennsylvania) to exclude evidence of its destruction of tens of thousands of pages of relevant documents. (*Id.*)

Mazie Slater was not in the MDL or a member of the FCC. Before the District Court entered its order appointing the FCC, Adam Slater negotiated with Henry Garrard, the chairman of the FCC, with regard to whether Mazie Slater would agree to pay a common-benefit assessment on its cases and in return receive a common-benefit allocation. (*Id.* at 3.) As part of that process, the New Jersey state court judge overseeing more than 10,000 consolidated pelvic mesh cases brought against J&J and C.R. Bard in New Jersey, spoke directly to Judge Goodwin of the Southern District of West Virginia. (*Id.*) As a result of those discussions, Judge Goodwin directed Mr. Garrard and the FCC to provide assurance that Mr. Slater would be given a role in the FCC in exchange for Petitioner's agreement to participate in the common-benefit assessment process. (*Id.*) Mr. Garrard outlined that agreement in a February 1, 2016 email to Mr. Slater:

> Adam – I discussed with the Court your role, assuming you come into the assessment process in the MDL. I raised the idea of you being an adjunct non voting member of the FCC. . . .

> Below is what I was informed by the Court.
>
> "Regarding the involvement of Adam Slater in the FCC, Judge Goodwin expects that Adam will be the unofficial New Jersey liaison and, in that role, he will be invited frequently to participate where appropriate. This is consistent with the overall goal of transparency in the process of making fee recommendations for ultimate consideration and decision by Judge Goodwin."
>
> I hope this gives you enough comfort. If so, I will write you the letter I told you I would. I will be happy to discuss this, if you want.
>
> Henry

Pet. App. 182a. These were material terms, as Mr. Garrard confirmed: "I hope this gives you enough comfort." *Id.*

Once Mr. Slater indicated that this agreement was acceptable, Mr. Garrard wrote to Mr. Slater to confirm the balance of the agreement, in a February 16, 2016 letter stating in relevant part:

> I have discussed your letter of 1/21/16 that was sent to me concerning common benefit issues with the Fee and Compensation Committee. *The agreements we reached on the telephone are affirmed by the FCC*.
>
> Specifically, we agree that the [time and expense] records of which you have given me samples will be acceptable

> and that you do not need to reconfigure them.
>
> As I said on the phone, your leadership in the New Jersey consolidated matters is certainly a factor that will be considered in any recommendation concerning payment of fees and expenses to you.
>
> The "$100,000" that you have paid in for the New Jersey litigation will be reimbursed in the same manner as the amounts that have been paid in by PSC members in the MDL litigation.
>
> . . .
>
> *Obviously, all of these agreements are contingent on your cases coming into the MDL and being assessed, which I believe you have indicated to me you intend to do.*
>
> *I hope that this letter comports with what you and I previously agreed to and if not, please let me know.*
>
> *I appreciate the working relationship that we have established.*

Pet. App. 183a-84a (emphases added). The agreement between Petitioner and the FCC did not contain an appellate waiver preventing Petitioner from seeking appellate review of the FCC's fee and expense allocation decision.

The FCC failed to meet its obligations under its agreement with Petitioner. Among other things, the FCC never invited Adam Slater to appear and to function as an adjunct non-voting member of the

FCC or as the unofficial New Jersey liaison to the FCC. (CA4 No. 19-1943, Dkt. 11, at 6.) Instead, the FCC shut Mr. Slater out of the process, knowing that he would have demanded transparency and fairness.

On March 12, 2019, the FCC issued its final written recommendation regarding the allocation decision in this case, awarding its member firms nearly two-thirds (59%) of the fund, while refusing to disclose to non-member firms the time entries and expense documentation, or any other documents purportedly justifying the extraordinary allocation. This opaque procedure, untethered to any reasonable concept of due process, transparency, or objective measurement of fees, predictably resulted in the five leaders of the FCC awarding themselves $207 million of the first $350 million to be distributed, or $41.4 million per firm. That amounted to 59% or nearly two-thirds of the entire common-benefit fund. The FCC recommended a comparatively unjustifiable fee allocation of $6,020,000.00 (1.72% of the common-benefit fund) to Petitioner.

The FCC failed to offer any objective methodology to calculate or even loosely cross-check and justify the egregious disparity in the fee awards for fairness and reasonableness, because they could not. In fact, a simple cross-check of the gross effective hourly rates yielded indefensible results: The effective hourly rates for the FCC firms averaged some $783.02 (with the highest rates at $913.00, $847.00, and $772.00 for FCC firms), while non-members received average hourly rates of only $268.22, with no explanation of the startling discrepancy. Petitioner's fee award translated into facially inadequate hourly rates of $202.00 for the 29,752 hours submitted and $309.00 for the 19,482

hours accepted by the FCC (after arbitrarily invalidating 10,000 hours). Neither the District Court nor the Fourth Circuit acknowledged any of these objective measures or attempted to explain the disparities.

D. The Decisions In This Case

The court-appointed "external review specialist," former Judge Daniel Stack, reviewed the FCC's common-benefit allocation process and submitted recommendations to the District Court. Judge Stack made only minor adjustments to the FCC's proposal after clearing them with the FCC, even though he recognized that "[i]n some instances, certain members of Plaintiffs' Leadership did limited work, and in some instances, no substantive work contributing to the common benefit of the litigation at all." Pet. App. 46a. Judge Stack repeatedly stated that the allocation decisions were "subjective" in nature (*id.* at 39a, 40a, 41a, 48a) and asserted that "it is not the FCC's or my obligation to demonstrate why any particular time submission was *not* considered for the common benefit." *Id.* at 38a (emphasis in original).

Judge Stack stated that he received the materials submitted by Petitioner as part of its objection to the FCC's proposed allocation decision. *Id.* at 51a. Yet Judge Stack made no mention of the FCC's agreement with Petitioner, the massive contributions by Petitioner, or the merits of the objections. He recommended no change in the FCC's proposal regarding Petitioner.

Judge Stack admitted his lack of objectivity. He told Petitioner that he was not acting as a neutral in the process. *Id.* at 174a. Rather, he said

he was acting on behalf of the fee committee. *Id.* Accordingly, he would not recommend an increase to the fees or expenses that the fee committee had awarded to any firm, unless the fee committee were to first approve and agree to pay that amount. *Id.*

Judge Stack described the fee-award process as a "nightmare," disclosing to Petitioner that the FCC had added more than 9,000 hours to the submission of one of its members, Riley Burnett, and awarded another attorney more than $4 million in fees despite his failure to make any submission of billable time. *Id.* at 173a-77a. Judge Stack stated that another FCC firm claimed large numbers of hours to re-review documents that had already been reviewed. *Id.* at 175a. Judge Stack cited FCC member Motley Rice as an example of a law firm that had "padded" its time submissions with thousands of empty hours to re-review documents, commenting that they do this "in every litigation." *Id.* Yet Judge Stack rubber-stamped the FCC's award of $49 million in fees to that law firm. Judge Stack said that he "was sickened" and "very angry" that another FCC firm had pressured FCC chairman Henry Garrard for $10 million in additional fees, threatening that otherwise it would refuse to sign the FCC's preliminary written recommendation for the common-benefit allocation. *Id.* at 174a-75a. Yet Judge Stack declined to alter the relevant portion of the FCC's recommendation.

The District Court denied all objections to Judge Stack's recommendations, with no analysis or fact-finding. It permitted no discovery, held no evidentiary hearing, and failed to address meaningfully Petitioner's objections or indeed any of the objections to the FCC's decision. The District Court did not acknowledge or attempt to rationalize

Petitioner's pioneering role in the pelvic mesh litigation and the enormous benefits it conferred on other plaintiffs. Nor did the District Court address the FCC's brazen failure to follow the District Court's own directive to involve Petitioner on a substantive level in the process. Instead, the District Court summarily stated: "Having considered each of their objections, I find that they are entirely without merit. All of the remaining objections are **DENIED**." Pet. App. 11a.

The Fourth Circuit dismissed Petitioner's appeal in a single-sentence decision with no explanation or opportunity for oral argument: "Upon review of submissions relative to this motion to dismiss, the Court grants the motion." *Id.* at 5a. The Fourth Circuit denied Petitioner's timely petition for rehearing en banc on November 5, 2019. *Id.* at 14a-18a.

REASONS FOR GRANTING THE PETITION

The First, Third, and Fifth Circuits have all held that district court judges overseeing MDLs and other mass actions must implement objectively fair procedures to determine the fee and expense allocations of common-benefit funds. In particular, those circuits have required close judicial supervision of the decisions of court-appointed fee committees regarding common-benefit funds in multidistrict litigation, to ensure that the decisions are transparent, legally valid, and fair and reasonable, especially since they are made by self-interested, conflicted plaintiffs' lawyers who direct massive awards to themselves.

In this case, the Fourth Circuit created a split with those circuits by denying review of the District

Court's order rubber-stamping the FCC's self-interested fee and expense allocation. Here, the District Court refused to permit any discovery into the documents considered by the FCC, not even production of the time sheets at the heart of the fee awards, even though they had been submitted to the court for in camera review. In the First, Third, and Fifth Circuits, the common-benefit fee awards would have received close judicial scrutiny, and the outcome in this case would have been different.

The question presented is important for safeguarding federal judicial integrity. To comport with due process, the common-benefit process must be transparent, and the District Court must exercise robust oversight and independent fact-finding. The District Court cannot vest unfettered control in the hands of, and cannot blindly accept the recommendations of, the attorneys who have the most to gain. Yet the Fourth Circuit summarily dismissed the appeal in this case, without analyzing the District Court's failure to institute a fair, transparent process – despite being presented with a disturbing record including undisputed evidence of self-dealing and falsification of key records perpetrated by attorneys who awarded themselves the lion's share of the fund.

In addition, the Fourth Circuit ignored the fact that the same special master (former state-court Judge Daniel Stack) recently had been reversed by a different district court for similarly biased recommendations in another MDL. *In re Syngenta Mass Tort Actions*, 2019 WL 3887515 (S.D. Ill. Aug. 19, 2019). Remarkably, Judge Stack awarded groups containing the same plaintiffs' lawyer (Clayton Clark) more than $100 million in attorney's fees in two MDLs litigated at the same time, even

though the lawyer was found to have improperly overbilled in at least one of the proceedings. The Fourth Circuit did not even question how the same special master came to be in position to give more than $100 million to the same lawyer across two litigations occurring at the same time, especially in light of damning findings by the Chief Judge of the Southern District of Illinois. These are not wholly separate events, but rather a clear pattern of related improper conduct across multiple MDLs. The question presented warrants this Court's plenary review.

I. The Fourth Circuit's Decision Conflicts With Precedent in the First, Third, and Fifth Circuits.

Precedent in the First, Third, and Fifth Circuits requires close judicial scrutiny of MDL common-benefit fee awards.

In *In re Nineteen Appeals Arising Out Of The San Juan Dupont Plaza Hotel Fire Litigation*, 982 F.2d 603, 614-15 (1st Cir. 1992), the First Circuit recognized "the public interest in the integrity of court proceedings" and reversed the district court's approval of a $36 million fee award to the plaintiffs' steering committee, out of an overall $66 million MDL common-benefit award. The First Circuit recognized that there was an "intramural dispute" among the attorneys "motivated . . . by profit." *Id.* at 607. The members of the plaintiffs' steering committee ("PSC") favored a large common-benefit award because "a large [common-benefit] award stood to benefit [steering committee] members who had few clients." *Id.* "Despite this adversariness, however, [the district court] severely limited the [non-PSC members'] participation throughout the

fee-determination process. For instance, the judge's ground rules barred any non-PSC members from testifying at the hearing. Moreover, the [non-members] were told that they had to file their objections to the insurgents' fee proposal on a one-page form designed by the court." *Id.* The district court refused to permit the non-members to examine witnesses or to offer oral argument. *Id.* at 608. The First Circuit held that these restrictions violated due process: "[t]o be blunt, the protocol that governed the hearing hogtied the [non-members], severely restricting their ability to participate in the fee-determination process." *Id.* at 613. "Such miserly process is certainly not sufficient to meet constitutional minima," and "the court was not free to construct a set of ground rules that largely ignored the [non-members'] substantial stake in the controversy," or to displace "the Due Process Clause." *Id.* at 613, 614, 615.

The District Court's fee-awarding procedure in this case was even less transparent and less fair than in the *San Juan Dupont Plaza Hotel* litigation. Here, the District Court permitted no discovery and held no evidentiary hearing at all. The District Court refused to grant objectors access to the FCC time sheets at the heart of the fee awards, even though they had been submitted to the Court for in camera review. Accordingly, had this case arisen in the First Circuit, the District Court's fee-approval order would have been reversed. *See also Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 544, 545 (9th Cir. 2016) (quoting *San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d at 614, for the proposition that "when a judge constructs a process for setting fees, the process must contain at least the procedural minima that the Due Process Clause requires," and

vacating fee award where district court used *ex parte*, *in camera* submissions to support its fee order without granting opposing party access to those submissions: "the district court's use over Defendants' objection of ex parte, in camera submissions to support its fee order violated Defendants' due process rights").

The Third Circuit has also required close judicial scrutiny of MDL common-benefit fee awards. In *In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, 582 F.3d 524 (3d Cir. 2009), some 72 law firms requested "common benefit" fees. Unlike here, the district court conducted a close examination of the claims of counsel:

> • the district court required all law firms to submit verified copies of their contemporaneously-maintained time records to a court-appointed auditor;
>
> • the requesting attorneys were also ordered to file a 30-volume compendium of the fee requests and supporting documents with the district court;
>
> • any party or objector was allowed to review the compendium, to propound discovery, and to take depositions of lead counsel claiming entitlement to fees;
>
> • following discovery, the district court held a two-day hearing;
>
> • the district court then required the auditor to submit a report, allowed supplemental compendiums of times sheets to be filed, and held three

> additional hearings on the issue of fee-shifting;

Id. at 533-38. On appeal, the objectors argued the court's process was not sufficiently thorough or transparent. *Id.* at 538. The Third Circuit rejected the challenge based on the robust procedures implemented by that district court, procedures that are entirely absent here: public filing of the compendiums, discovery afforded those subjected to fee-shifting due process, a hearing, and the district court's meaningful review of the award. *See id.* at 541 ("trial courts must engage in robust assessments . . . when evaluating a fee request," and "that occurred here") (citation and internal quotation marks omitted). The District Court's common-benefit award in this case would not pass muster under Third Circuit precedent.

Similarly, the decision in this case conflicts with Fifth Circuit precedent. In *In re High Sulfur Content Gasoline Prods.*, 517 F.3d 220, 235 (5th Cir. 2008), the Fifth Circuit reversed a district court's fee award that relied heavily on the recommendations of court-appointed lead counsel and did not allow judicial review, audit, or testing of the lead counsel's fee request. The Fifth Circuit held that "the appointment of a committee does not relieve a district court of its responsibility to closely scrutinize the attorneys' fee allocation, especially when the attorneys recommending the allocation have a financial interest in the resulting awards. Here, the district court abdicated its responsibility to ensure that the individual awards recommended by the Fee Committee were fair and reasonable." *Id.* at 227.

The Court of Appeals explained:

> [O]ur precedents do not permit courts simply to defer to a fee allocation proposed by a select committee of attorneys, in no small part, because "counsel have inherent conflicts." *In re Diet Drugs Products Liab. Litig.*, 401 F.3d 143, 173 (3d Cir. 2005) (Ambro, J., concurring). As Judge Ambro noted, "They make recommendations on their own fees and thus have a financial interest in the outcome. *How much deference is due the fox who recommends how to divvy up the chickens?" Id.*
>
> Here, members of the Fee Committee "had a direct conflict of interest: they were suggesting to the District Court how to proceed on matters near and dear—dividing a limited fund among themselves and other firms. *Such a direct conflict of interest strongly suggests that affording substantial deference is inappropriate."* Although the proposed allocation "may ultimately be fair, *careful attention must be paid to the procedures by which the allocation is set." If a district court "chooses to rely on the recommendations of a committee of interested attorneys, it then becomes necessary to scrutinize more closely those recommendations."*

Id. at 234-35 (emphasis added); *see also id.* at 235 (Reavley, J., concurring) ("Any dispute about the

allocation must be resolved by the court after full and fair hearing, . . . explaining its decision for all and for our review").

In addition, in *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1005 (5th Cir. 1977), the Fifth Circuit vacated a fee award and remanded to enable the district court to conduct a "hearing in the full sense of the word" and enter findings of fact and conclusions of law from which the court of appeals could determine whether the award constituted a fair and just enrichment of the plaintiffs' committee. *Id.* at 1021. The District Court decision in the instant case falls far below that standard.

This circuit split warrants this Court's review. Divisions of authority on important points of jurisdiction and administration are particularly disruptive in the context of multi-district litigation. In an ordinary circuit split, parties potentially subject to a particular rule of law may predict how it will be interpreted based on the circuit in which they are litigating. But federal MDLs consolidate cases from all over the country in a particular district court, and it is impossible for parties to predict in which circuit that court will be located. Here, the FCC's fee recommendations would have received close judicial scrutiny in the First, Third, and Fifth Circuits, and there is no reasonable justification for according different and outcome-determinative treatment based solely on the happenstance that the pelvic mesh MDLs were consolidated in the Southern District of West Virginia.

II. The Question Presented Is An Important Question Of Federal Law.

The question presented is important both quantitatively and qualitatively. Common-benefit fee assessments are the rule in MDL litigation.[6] There

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[6] *See, e.g.*, *In re Kugel Mesh Hernia Patch Products Liability Litig.*, No. 1:07-md-01842-ML-LDA, MDL No 07-1842 (D.R.I. Nov. 19, 2009) (imposing 12% assessment on thousands of claims); *In re Zyprexa Prods. Liab. Litig.*, 424 F.Supp.2d 488 (E.D.N.Y 2006), 2007 WL 2340789 (E.D.N.Y. 2007) (30,000 cases in state and federal court; 1% and 3% assessments); *In re Vioxx Prods. Liab. Litig.*, MDL 1657, Pretrial Order No. 19 (E.D. La. 2005) (thousands of lawsuits; 3% withheld; court increased withholding to 4-8% for attorneys signing agreement late); *In re Clearsky Shipping Corp.*, 2003 WL 1563820 (E.D. La. 2003) (1,500 cases; 4% withheld although counsel proposed 10% withholding); *In re Bextra & Celebrex Mktg. Sales Practices & Prods. Liab. Litig.*, 2006 WL 471782 (N.D. Cal. 2006) (1,800 cases with 4% withheld, but 8% withheld late signers); *In re Gel Breast Implants Prods. Liab. Litig.*, MDL 926, Pretrial Order No. 13 (N.D. Ala. 1993) and Pretrial Order No. 13A (N.D. Ala. 1999) (1,778 actions with 4% withheld); *In re Bausch & Lomb Contact Lens Solution Prods. Liab. Litig.*, 2008 WL 2330571 (D.S.C. May 21, 2008) (400 cases with 6% withheld); *In re Baycol Prods. Liab. Litig.*, 2002 WL 32155266 (D. Minn. 2002) (1,253 actions with 6% withheld); *In re St. Jude Med. Inc., Sitzone Heart Valves Prods. Liab. Litig.*, 2002 WL 1774232 (D. Minn. 2002) (two proposed classes included 10,535 and 1,000 individuals with 6% withheld); *In re Propulsid Prods. Liab. Litig.*, 2001 WL 34134864 (E.D. La. 2001) (several thousand cases and 28 class actions from 30 states; 6% and 4% withheld); *In re Diet Drugs Prods. Liab. Litig.*, 553 F.Supp.2d 442 (E.D. Pa. 2008) (105,000 suits and 130 class actions; 6% withheld); *In re Avandia Mktg., Sales Practices & Products Liab. Litig.*, MDL 1871, 2012 WL 6923367 (E.D. Pa. Oct. 19, 2012) (4,000 cases in state and federal court with 6.25% withheld); *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, MDL 2011, 2010 U.S. Dist. LEXIS 22361, 9-10 (S.D.Ill. Mar. 8, 2010) (thousands

are currently 190 MDLs pending in the federal district courts, encompassing 497,802 total actions and representing perhaps one-third of all federal litigation.

The issue is also important qualitatively. A plaintiffs' MDL fee committee is a court-appointed entity acting with the imprimatur of the federal judiciary. When a court-appointed committee of plaintiffs' lawyers makes an evidently self-interested decision involving fees worth tens of millions or hundreds of millions of dollars in a way that is not transparent, jurisprudentially sound, or fair and reasonable, it jeopardizes the integrity of the federal judiciary. That risk is compounded when the federal courts rubber-stamp such a decision, rather than subjecting it to close review.

Members of this Court have expressed justified concern about judicial orders in the mass litigation context that might compromise court integrity. In *Marek v. Lane*, 134 S. Ct. 8 (2013), the Chief Justice, in a separate opinion respecting the denial of certiorari, noted the need in an appropriate case "to address more fundamental concerns

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of cases in state and federal court with 6% withheld); *In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on April 20, 2010*, MDL 2179, 2011 WL 6817982 (E.D.La. Dec. 28, 2011), amended 2012 WL 37373 (E.D.La. Jan. 4, 2012), and amended and superseded on reconsideration, 2012 WL 161194 (E.D.La. Jan. 18, 2012) (6% withheld); *In re Oral Sodium Phosphate Solution-Based Prods. Liab. Action*, MDL 2066, Order Regarding Common Benefit Fees and Expenses, at 3 (N.D.Ohio, Aug. 2, 2010) (4% assessment for MDL cases); *In re Fosamax Prods. Liab. Litig.*, MDL 1789, CMO 17 ¶ 3(f)(3), (S.D.N.Y. Apr. 28, 2011) (9% assessment for non-MDL cases utilizing common-benefit work product).

surrounding the use of such [cy pres] remedies in class action litigation." *Id.* at 9.

In *Frank v. Gaos*, the Chief Justice asked, "[W]ould you agree that the district court should never be the one suggesting possible recipients of the funds of a settlement he has to approve?" No. 17-961, *Frank v. Gaos*, Tr. Oral Arg. 50 (Roberts, C.J.). Justice Kavanaugh explained, "[T]here is the appearance, as the district court said in the hearing, the appearance of favoritism and alma maters of -- of counsel." *Id.* at 56. Justice Kavanaugh focused on "[t]he appearance problem here, which has happened in many cases," and he cited "the appearance of favoritism and collusion." *Id.* at 59, 61. Justice Alito added, "The attorneys get money, and a lot of it." *Id.* at 63.

Concerns about the "appearance problem," "favoritism," and "collusion" – as well as concerns about the integrity of the judicial process more broadly – are at their zenith in the context of MDL fee allocation decisions. MDL fee committees are self-interested entities, with attorneys awarding fees and expenses to themselves, with staggering amounts of money at stake. Further, many MDL fee committees are plagued by conflicts of interest. Leadership decisions driven by ancillary motivations such as common-benefit fee awards are at cross-purposes with the rationale for their appointment – vindication of the rights of the litigants. Attorneys who obtain coveted fee committee appointments, knowing they can profit handsomely from their position, with no need to justify such awards based on merit, undercut the integrity of the judicial process, and subvert the interests of the primary stakeholders: the litigants and the Court. For example, as occurred here, the incentive to maximize

settlements for the individual plaintiffs is reduced when massive common-benefit fee awards are promised based on the sheer volume of cases filed, regardless of the justice achieved for individuals.

This case illustrates the dangers. Here, the FCC members will receive nearly two-thirds of a common fund estimated at more than $550 million. They were compensated at an average hourly rate of $783.02, while non-members received only $268.22, with no possible explanation for the startling discrepancy. The same special master awarded a group containing the same plaintiffs' lawyer (Clayton Clark) more than $100 million in attorney's fees in two MDLs litigated at the same time, even though the lawyer was found to have improperly overbilled in at least one of the proceedings. In *In re Syngenta Mass Tort Actions*, 2019 WL 3887515 (S.D. Ill. Aug. 19, 2019), a different district court severely criticized Judge Stack (the "external review specialist" here) for presenting a "subjective analysis" that was "incongruent" with controlling orders, rested on "tenuous presumptions," suffered from a "failure to seriously consider whether work actually inured to the benefit of the plaintiffs," and accepted time submissions from Clayton Clark (a member of the FCC in the instant case) that were "grossly excessive." *Id.* at *3, *7. The *Syngenta* court concluded: "Ultimately, the Report and Recommendation fails to carefully evaluate the benefit of the work behind the hours, which dilutes the contributions of some applicants while significantly inflating the value of others." *Id.* at *6. The *Syngenta* court also criticized Judge Stack for defending his allocation against objections, given his "purportedly neutral roles in these proceedings." *Id.* at *5 n.4. The *Syngenta* court criticized (and

reversed the application of) "a totally unprecedented methodology that runs counter to common benefit principles." *Id.* Virtually the same unverifiable "methodology" was used here, applying no formula, objective factors, or cross-check.

Yet the District Court permitted no discovery, held no evidentiary hearing, and in a six-page opinion approved the FCC's apparent self-dealing without addressing any of the objections. The Fourth Circuit dismissed Petitioner's appeal in a single-sentence decision with no explanation. In contrast, the Ninth Circuit recently recognized in the analogous class action context: "the district court must show it has explored comprehensively all factors, and must give a reasoned response to all non-frivolous objections. . . . to ensure the substantive fairness of the settlement." *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liab. Litig.*, 895 F.3d 597, 612-13 (9th Cir. 2018).

The Fourth Circuit's abdication of judicial responsibility is not consistent with this Court's decisions. This Court has recognized that plaintiffs can be compelled to pay "common benefit" fees only when the "benefit can be traced with some accuracy" and the fees of recovery have been "shifted with some exactitude to those recovering." *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81 (1980); *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 264-65 (1975).

These principles counsel in favor of close scrutiny of MDL fee allocations, particularly when performed by self-interested plaintiffs' lawyers serving on court-appointed committees. Section 1407 contains no provision authorizing MDL courts

to deviate from the American Rule (that parties bear their own attorney's fees and expenses), which "provides the starting point" in any analysis of attorney's fees. *Peter v. Nantkwest, Inc.*, 140 S.Ct. 365, 372 (2019). Indeed, when reviewing the limited grant of authority in Section 1407, this Court refused to afford district courts additional power under the statute beyond pretrial matters. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998). A district court's fee allocation decisions are thus undertaken without any express statutory authority and without the protections of any statutory guidelines that might reduce the dangers of abuse.

Accordingly, many authorities have recognized the need for close judicial scrutiny of fee committee allocations. The Federal Judicial Center's Manual on Complex Litigation, for example, recommends "exacting judicial review" of fee requests. Manual for Complex Litigation § 14.231 (4th ed. 2004). It contemplates that specific evidence in support of the fee request will be presented to the court (and tested by the parties), and that the court will hold a hearing, before a fee distribution occurs:

• "Exacting judicial review of fee applications, burdensome though it may be, is necessary to discharge the obligation to award fees that are reasonable and consistent with governing law." *Id.* at § 14.231. The MCL notes that "[i]n common-fund litigation," a judge may have a "special" obligation where counsel have a conflict of interest. *Id.*

• "Due process may require affording claimants a meaningful opportunity to be heard concerning competing applications for fees payable from a common fund." *Id.* at § 14.232.

• "In advance of any fee-award hearing, counsel should submit time and expense records, to the extent not previously submitted with the motion in manageable and comprehensible form, to encourage parties to reach agreements where possible and to streamline the hearing." *Id.* at § 14.223;

• "The direct testimony of witnesses in support of the application can be in the form of declarations, with the witnesses available at the hearing for cross-examination if requested." *Id.*

• Discovery "may be advisable where attorneys making competing claims to a settlement fund designated for the payment of fees." *Id.* at § 14.224. "With appropriate guidelines and ground rules, the materials submitted should normally meet the needs of the court and other parties. If a party or an objector to a settlement requests clarification of material submitted in support of the fee motion, or requests additional material, the court should determine what information is genuinely needed and arrange for its informal production." *Id.*

The process in the instant case fails to meet the standards set by the Federal Judicial Center. *See also* Barbara J. Rothstein & Catherine R. Borden, Federal Judicial Center, Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges 16 (2011) ("You [the district court judge] have an independent duty to review fees and specifically determine if they are reasonable, applying traditional legal tests."); Hon. Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 La. L. Rev. 371, 381 (2014) ("The total amount of the common benefit fund should be reasonable under the circumstances,

and the method for distributing it should be fair, transparent, and based on accurately recorded data."); Duke Law School, Best Practices, *supra* note 3, at 55 (2014) ("Before any distributions are made from the fund, the transferee judge may decide to provide an opportunity for all parties to be heard and to seek appropriate information."); *id.* at 60 ("Establishing an allocation process that is transparent will help create a fair and open environment for all interested attorneys to perform work for the common benefit of all claimants and create a factual record for the eventual applications for common benefit fees."); *id.* at 62 ("During adjudication of both the interim and final fee awards, the transferee judge should permit objections and allow objectors to take limited discovery, if necessary.").

Similarly, the United States has taken the position that courts reviewing fees in mass litigation "should not be paper tigers. Lower courts need to conduct rigorous numerical analyses of feasibility and determine fees based on actual relief to the class, not, as here, based on an inflated percentage or multiplier. Meaningful limits are necessary to align incentives and deter abuse of the class action device." No. 17-961, *Frank v. Gaos*, Tr. Oral Arg. 25-26. Counsel for the Government warned that "lower courts are not being very rigorous." *Id.* at 26. *See also* Brief for the United States as Amicus Curiae Supporting Neither Party in No. 17-961, *Frank v. Gaos*, 2018 WL 3456069, * 29 (urging "close judicial scrutiny of attorney's fees").

III. This Case Is An Appropriate Vehicle To Review The Question Presented.

The fact that the Fourth Circuit proceeded by way of a one-sentence order is not a reason to deny review. To the contrary: the Fourth Circuit's rubber-stamp of the District Court's rubber-stamp demonstrates the lack of meaningful review afforded by the courts below – which is a pillar of Petitioner's argument in this case. The complete absence of meaningful review by either the District Court or the Court of Appeals makes this case the ideal vehicle to decide the question presented. This is especially true in light of the prominence of this massive MDL and the sheer amount of the fees at issue, since it is likely that other courts and fee committees will see a failure to grant review as a green light to perpetuate and expand the indefensible practices seen here.

In any event, this Court has made clear that "the fact that the Court of Appeals' order under challenge … is unpublished carries no weight in [the Court's] decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987) ("The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished."). This Court has often granted certiorari to review "nonprecedential" decisions and summary affirmances. *See, e.g.*, *Holster v. Gatco, Inc.*, 130 S. Ct. 1575 (2010) (reviewing summary affirmance); *Wilkins v. Gaddy*, 559 U.S. 34 (2010) (summary affirmance); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (unpublished decision).

Previous certiorari petitions have addressed the issue of common-benefit fees, demonstrating the recurring nature of the controversy. However, prior

petitions did not pose the precise question presented here.[7]

For example, No. 19-791, *Anderson Law Offices v. Common Benefit Fee and Cost Committee* (pending), is largely limited to the enforceability of a common-benefit order requiring waiver of appeal

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[7] *See also* No. 18-301, *Chieftain Royalty Co. v. Nutley*, *cert. denied*, Nov. 13, 2018 ("Whether common-fund fee awards are governed in diversity cases by state or federal law."); No. 16-804, *Law Offices of Steven M. Johnson, P.C. v. Plaintiffs' Advisory Committee*, *cert. denied*, Feb. 21, 2017 ("whether a federal court hearing multidistrict litigation has subject-matter jurisdiction to impose liability for costs on plaintiffs and their attorneys who have never appeared in the federal court action, in order to compensate counsel in the federal litigation"); No. 15-704, *Girardi Keese Law Firm v. Plaintiffs' Advisory Committee*, *cert denied*, Feb. 29, 2016 ("The question presented is whether a federal court has subject-matter jurisdiction to force state court plaintiffs who have never appeared in federal court to surrender proceeds from their state court settlements to compensate counsel in federal court litigation."); No. 15-703, *Bass v. Authors Guild, Inc.*, *cert. denied*, April 18, 2016 ("1. What work is eligible for common benefit fees and how, by whom and on what basis should such fees be awarded or a fee award be allocated? 2. Was the allocation of fees that was made in this case properly affirmed by the Court of Appeals or should it have been set aside on due process grounds, under Article III, as contrary to law and equity, or as an abuse of discretion?"); No. 14-786, *Phipps Group v. Downing*, *cert. denied*, Feb. 20. 2015 ([1] "Despite the American Rule, which requires parties to bear their own attorney's fees, do federal courts presiding over mass litigation that has been consolidated into multidistrict proceedings have the authority to order fee-shifting amongst the parties? [2] If fee-shifting is allowed in multidistrict proceedings, '[h]ow much deference is due the fox who recommends how to divvy up the chickens?' In other words, if fee-shifting is appropriate, what guidelines govern the request by court-appointed lead plaintiffs' counsel for attorney's fees?").

rights as a condition for receiving a common-benefit fee award. *See* Petition in No. 19-791 at i ("The central question posed in this appeal is as follows: Whether federal district courts possess the authority to require appeal rights to be waived as a condition for receiving an award available under law.").

The instant Petition is not limited to the issue of the enforceability of an appellate waiver provision. Rather, this Petition (unlike the Petition in No. 19-791) involves the broader question of the duty of federal courts to closely supervise the fee and expense allocation decisions of court-appointed fee committees, which necessarily encompasses the district court's imposition of an appellate waiver at the outset to shield its own decisions from appellate scrutiny.

Indeed, Petitioner participated in the common-benefit process based on a separate, stand-alone agreement with the FCC containing no appellate waiver provision. Moreover, even if the Fourth Circuit's decision had rested on a determination of appellate waiver, the enforceability of such a waiver provision is an issue worthy of this Court's review in the course of resolving the broader question presented. Federal courts have a duty to closely supervise the fee and expense allocation decisions of court-appointed fee committees, and appellate waiver provisions imposed by the decision-making district court eviscerate that duty by shielding decisions from appellate review. Such take-it-or-leave-it provisions leave attorneys with no effective choice; an MDL common-benefit process is the only game in town for attorneys with cases consolidated into an MDL – as well as (potentially thousands of) additional state court cases as to which MDL firms may have an interest, all of which

are typically assessed for the common benefit pursuant to an MDL court's orders. No plaintiffs' attorney or firm has the meaningful choice of opting out of the MDL common-benefit process or refusing to agree to an appellate-waiver provision imposed by the decisionmaker. The unilateral imposition of an appellate waiver by a district court is thus inconsistent with this Court's recognition, even "in the civil area," that "we do not presume aquiescence in the loss of fundamental rights." *Fuentes v. Shevin,* 407 U.S. 67, 94 n.32 (1972) (citation and internal quotation marks omitted). "[I]n the civil no less than the criminal area, courts indulge every reasonable presumption against waiver." *Id.* (citation and internal quotation marks omitted).

And the use of a forced appellate waiver in the common benefit arena is not isolated but rather is illustrative of a disturbing trend. Unlike here, when recently presented an appellate waiver in a private-litigation-wide settlement agreement in another MDL, the Fifth Circuit correctly refused to dismiss the appeal and ordered that the appellate waiver provision be evaluated with the other merits issues. *In Re: Chinese-Manufactured Drywall Products Liability Litigation*, No. 19-30187 (5th Cir. May 21, 2019) ("IT IS ORDERED that appellee's opposed motion to dismiss the appeals is CARRIED WITH THE CASE.").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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