2015 WL 7713601 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

THE GIRARDI KEESE LAW FIRM, Petitioner,
v.
PLAINTIFFS' ADVISORY COMMITTEE, et al., Respondents.

No. 15-704.
November 24, 2015.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petition for Writ of Certiorari

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***i** QUESTION PRESENTED

Petitioner represented thousands of plaintiffs in lawsuits against GlaxoSmithKline LLC, the maker of the drug Avandia. Literally thousands of those suits were filed and litigated in California state court, with just 25 brought in federal court and subsequently transferred to a single district court for consolidated or coordinated pretrial proceedings pursuant to 28 U.S.C. §1407. After years of litigation, petitioner successfully negotiated a global settlement, both for its roughly 4,000 state court clients and for its 25 federal court clients. Shortly thereafter, the steering committee appointed to manage the consolidated federal pretrial proceedings asked the federal district court to enter an order requiring GlaxoSmithKline to deposit 7% of the settlement proceeds for each of petitioner's *state court* clients into a fund designed to benefit the federal court steering committee. Evincing a remarkably federal-court-centric view of our federal system, the district court acquiesced, and the Third Circuit affirmed, holding - in direct conflict with the Fourth, Eighth, and Ninth Circuits - that a federal district court has jurisdiction to dictate the distribution of state court settlement proceeds to the detriment of thousands of state court plaintiffs who have never stepped foot in federal court.

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.

***II PARTIES TO THE PROCEEDING**

Petitioner, the Girardi Keese Law Firm, was respondent to a motion for order to show cause in the district court and appellant in the Third Circuit. Respondent Plaintiffs' Advisory Committee was movant in the district court and appellee in the Third Circuit. Respondent GlaxoSmithKline LLC was defendant in the district court and appellee in the Third Circuit.

***III CORPORATE DISCLOSURE STATEMENT**

The Girardi Keese Law Firm is a partnership. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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*1 PETITION FOR WRIT OF CERTIORARI

This case involves a blatant federal court incursion on the jurisdiction and autonomy of the state courts. For decades, courts of appeals have held that a federal district court managing multi-district litigation must respect the fundamental division of authority between state and federal courts, and cannot yield to the temptation to impermissibly dictate the terms of state court litigation in service of managing the federal court litigation. More particularly, courts of appeals have confirmed the seemingly obvious point that a federal court cannot force plaintiffs in related state court litigation to contribute to a fund established to compensate counsel in the federal court litigation. The reasons for that heretofore-unanimous line of authority are self-evident: A district court does not have jurisdiction over state court plaintiffs, much less over the settlement of their state court cases. To allow a district court to impose obligations on state court plaintiffs thus not only would violate settled limits on the jurisdiction of federal courts, but also would intrude upon the authority of state courts to manage the litigation and settlement of the cases before them. Accordingly, while a district court is certainly free to work with state courts to encourage and facilitate cooperation among federal and state court plaintiffs, it has always been understood to lack the power to dictate how state court cases may be litigated or settled.

Until now. The decisions below broke from that well-established authority and yielded to the temptation to dictate state court settlements in order ***2** to facilitate the compensation of lead counsel in the federal court litigation. In direct conflict with decisions stretching almost as far back as the federal multi-district litigation statute itself, the Third Circuit allowed a district court to order the payment of proceeds from thousands of state court settlements into a fund administered to compensate the plaintiffs' steering committee in the federal cases before it.

Not surprisingly, the court of appeals did not ground this novel decision in any statutory grant of authority that even arguably extended to state court litigants who have never stepped foot in federal court. Instead, the court held that the district court had "ancillary jurisdiction" to order a federal court defendant to redirect settlement proceeds belonging to state court litigants to federal court lawyers because the district court had "incorporated" into one of its earlier orders a private agreement between the state court litigants' law firm (*i.e.*, petitioner) and the steering committee that purportedly provided for common-benefit

fund assessments in both federal and state court cases. Never mind that petitioner plainly did not represent the state court plaintiffs in federal court. And never mind that a contract between petitioner and the steering committee could not somehow provide federal court jurisdiction over a state court case or state court plaintiffs who have never stepped foot in federal court. The court of appeals nonetheless blessed this jurisdictional bootstrap by allowing a district court to accomplish in two steps what it plainly cannot accomplish in one: By incorporating into one of its orders a private agreement containing terms that it lacks jurisdiction to impose, a court somehow grants itself the power to ***3** then enforce what would otherwise be ultra vires commands.

The decision below thus manages to endorse not one, but two, utterly indefensible propositions. Not only does it allow a federal court to dictate the terms on which state court cases may settle, but it also allows a federal court to expand its jurisdiction at will through the simple expedient of incorporating into its orders agreements containing terms that the court could not impose directly. Each of those propositions is so obviously contrary to the bedrock principles that we have both state and federal courts in this country and that the latter have limited jurisdiction that a decision embracing either would justify this Court's intervention. But taken together, they all but compel it. Indeed, left standing, the decision below will serve as a roadmap both for intrusion on the authority and autonomy of state courts and for circumvention of the bedrock rule that federal courts are courts of limited jurisdiction.

OPINIONS BELOW

The opinion of the Third Circuit is not yet reported but is reproduced at App.1-16. The relevant orders of the district court are unpublished but are reproduced at App. 19-49.

JURISDICTION

The Third Circuit issued its opinion on July 2, 2015, and denied a timely petition for rehearing on July 27, 2015. On October 6, 2015, Justice Alito extended the time for filing this petition to November 24, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

*4 CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the U.S. Constitution and 28 U.S.C. §1407 are reproduced at App.50-55.

STATEMENT OF THE CASE

A. Statutory Background

In an effort to improve the management of the increasingly complex litigation filed in or removed to federal courts, in 1968, Congress created the United States Judicial Panel on Multidistrict Litigation ("MDL Panel"). The MDL Panel 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). If the MDL Panel does decide to transfer cases to a single court for centralized pretrial proceedings, any case that remains pending at the conclusion of those proceedings "shall be remanded … to the district from which it was transferred." *Id.* Needless to say, while the MDL Panel and a transferee court can play a useful role in facilitating litigation filed in various *federal* courts, nothing purports to empower either the panel or a transferee court to assume jurisdiction over cases in state courts, even where doing so would be highly efficient. Instead, the statute respects the basic division of authority between state and federal courts that underlies our federal system.

An MDL transferee court has broad case-management powers with respect to the federal cases before it. For example, an

MDL transferee court can ***5** appoint a group of lawyers to serve as coordinating counsel for a particular group of parties before it. *See, e.g., In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.,* 582 F.3d 524, 547 (3d Cir. 2009). These groups, sometimes called "steering committees," work to coordinate the discovery process and other pretrial proceedings. Typically, parties and their counsel can utilize a steering committee's work-product in exchange for a payment into a common-benefit fund. *See id.*

Of course, not all cases involving common questions of fact are, or can be, brought in or removed to federal court. Accordingly, it is not at all uncommon for complex litigation to "involve[] related cases brought in both federal and state courts." Fed. Judicial Ctr., Manual for Complex Litigation §20.31, at 229 (4th ed. 2004). As noted, common sense, constitutional limits, and respect for federalism all prevent the federal courts from directly asserting jurisdiction over state court cases. At the same time, over the years, federal and state courts have identified many ways in which they can work together to facilitate cooperation between parallel state and federal proceedings. For example, federal and state courts often coordinate on the parameters of discovery, the sharing of information, and the allocation of fees. *See id.* §20.313, at 235-38. Federal and state courts also have developed joint plans for compensating steering committees that perform work that benefits parties across all cases. This model has proven effective in a number of complex litigation proceedings spanning state and federal courts. *See, e.g., In re Heparin Prods. Liab. Litig.,* No. 1:08-60000, ECF No. 45 (N.D. Ohio Nov. 6, 2008).

***6** But while there are many ways in which federal and state courts can exercise their parallel jurisdiction to encourage and facilitate cooperation, Congress did not (and presumably could not) simply empower federal MDL courts to exercise jurisdiction over related cases filed in state court and not removed to federal court. *Cf.* U.S. Const. art. III, §2, cl. 1. Instead, section 1407 is "merely procedural and does not expand the jurisdiction of the district court to which the cases are transferred." *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II,* 953 F.2d 162, 165 (4th Cir. 1992): *see also* App.8. A district court managing a collection of MDL cases filed in or removed to federal court thus has no jurisdiction over related cases filed in state court; instead, the court's jurisdiction is confined to the federal court cases that are part of the MDL proceeding. That is a necessary consequence of the bedrock rule that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 377 (1994).

Applying those principles, courts of appeals have long held that federal courts do not have the power to require state court plaintiffs to contribute to federal common-benefit funds. *See Showa Denko,* 953 F.2d at 165-66; *In re Genetically Modified Rice Litig.,* 764 F.3d 864, 874 (8th Cir. 2014); *Hartland v. Alaska Airlines,* 544 F.2d 992, 1001 (9th Cir. 1976). While federal courts may encourage state court plaintiffs to do so, and work with state courts to facilitate that result, they lack jurisdiction to order the payment of proceeds from a state court plaintiff's settlement of its state court case into a federal common-benefit fund, and they cannot leverage their jurisdiction over distinct federal cases involving a common lawyer or defendant ***7** to force payments by state court plaintiffs who have never stepped foot into federal court.

B. Proceedings Below

This petition arises out of the settlement of roughly 4,000 lawsuits filed against GlaxoSmithKline by individuals represented by Girardi Keese alleging that GlaxoSmithKline's prescription drugs Avandia, Avandamet, and Avandaryl (collectively, "Avandia") increase the risk of heart failure. Almost all of those thousands of lawsuits (all but 25 to be exact) were pursued in California state court, where they were developed and litigated as part of a Judicial Council of California Coordination Proceeding, which is essentially a state law analogue to the federal MDL regime. Girardi Keese played a lead role in those coordinated state court proceedings, expending more than $14 million conducting discovery, developing experts, and litigating pretrial issues on behalf of its state court plaintiffs. App.23.

In addition to its nearly 4,000 state court cases, Girardi Keese also represented clients in 25 lawsuits against GlaxoSmithKline in federal court. In 2007, those 25 cases were consolidated by the MDL Panel and transferred (along with thousands of others filed by different lawyers) to the Eastern District of Pennsylvania for coordinated pretrial proceedings. Shortly afterward, the transferee court appointed a steering committee - the PSC - to coordinate the plaintiffs and their counsel.[1] One of the PSC's ***8** responsibilities was to create work-product that could potentially benefit the MDL plaintiffs. Concerned about ensuring that plaintiffs who used that work-product would contribute to the costs of developing it, the PSC crafted an "Attorney Participation Agreement" that it required all counsel who were not on the PSC to sign in order to gam access to its work-product.

[1] In April 2008, a Girardi Keese attorney was appointed as a member of the PSC. After that attorney left the firm in early 2009, Girardi Keese had no representation on the PSC, but continued to represent 25 federal MDL plaintiffs.

By its terms, the Attorney Participation Agreement was not limited to cases pending in federal court, but instead applied "to each and every claim, case, or action arising from the use of Avandia in which the [non-PSC counsel] has a financial interest, whether the claim, case, or action is currently filed in *state or federal court*, or is *unfiled*, or is on a tolling agreement." App.45 (emphasis added). For each claim covered by the agreement, non-PSC counsel agreed to allow GlaxoSmithKline to hold back 7% of the claimants' gross monetary recoveries. *Id.* The agreement further provided that, of the 7% assessment, 4% would be deducted from attorney's fees and 3% from the clients' portion of the recoveries. *Id.* In the event the defendant or its counsel failed to hold back the assessment, the agreement provided that the non-PSC counsel would be responsible for depositing the required funds. App.45-46.

Girardi Keese signed an Attorney Participation Agreement with the PSC in May 2009. At the time, that agreement was not incorporated into either the federal court or any state court proceedings. It was ***9** simply a private agreement between private parties, to be enforced in accordance with applicable state and federal law. Three months later, however, at the PSC's request, the federal MDL court entered an order containing terms similar to the Attorney Participation Agreement - including a requirement that each "Participating Counsel" must ensure that an assessment is paid "on all filed and unfiled cases or claims in state or federal court." App.30. The court's order also "incorporated" as an exhibit a form version of the Attorney Participation Agreement. *Id.*

After several years of litigation, in 2012, Girardi Keese successfully negotiated a global settlement for all of its clients, both state and federal. The settlement, which provided relief to thousands of individuals with claims against GlaxoSmithKline, contained carefully negotiated terms regarding total payments to the claimants, the allocation of attorney's fees and costs, and the release of claims.

After Girardi Keese's clients agreed to that settlement, the Plaintiffs' Advisory Committee ("PAC")[2] asked the federal court to issue an order requiring Girardi Keese to "show cause why its entire inventory of settled Avandia cases should not be subject to" the district court's pretrial order purporting to require every claimant, state and federal alike, to pay into the common-benefit fund. App.19. The district court acquiesced in the PAC's request for a show-cause order and, over Girardi Keese's objection, proceeded to order GlaxoSmithKline ***10** to deposit 7% of the settlement proceeds of each of Girardi Keese's clients - including thousands of state court plaintiffs who never appeared in federal court - into the federal common-benefit fund. App.25. The district court offered no theory as to how it could exercise jurisdiction over the state court settlement proceeds of state court plaintiffs who were total strangers to the federal court proceedings.

[2] The district court terminated the PSC in 2012 and subsequently created the Plaintiffs' Advisory Committee, which sought compensation for the PSC.

C. The Third Circuit's Decision

Girardi Keese appealed the district court's order, arguing that a federal court lacks subject-matter jurisdiction to order the surrender of a state court plaintiff's settlement proceeds into a common-benefit fund administered by a federal court. The Third Circuit affirmed.

The Third Circuit first rejected the PAC's argument that it lacked subject-matter jurisdiction to entertain the appeal because the district court's order was not a "final decision[]" for purposes of 28 U.S.C. §1291. The court held that the order is "an appealable, final order" because "the fee assessment has been reduced to a definite amount," all cases of Girardi Keese's clients "have been settled," and the district court has decided how much and from which cases settlements will be withheld. App.7-8.

Turning to the question of the district court's jurisdiction, the Third Circuit acknowledged that the MDL statute, 28 U.S.C.

§1407, " 'does not expand the jurisdiction of the district court to which the cases are transferred.' " App.8 (quoting *Showa Denko,* 953 F.2d at 165). The court also recognized that an MDL transferee court's jurisdiction "'is limited to cases and controversies between persons who are properly ***11** parties to the cases transferred.' " *Id.* (quoting *Showa Denko,* 953 F.2d at 165-66). And the court also accepted that "had the District Court simply ordered the firm, as total strangers to the litigation, to contribute to the common benefit fund from the settlement of its clients' state-court cases, it would have exceeded its jurisdiction." App.9. But although those same principles have led every other circuit that has considered the issue to conclude that a district court lacks jurisdiction to order the withholding of proceeds from a state court settlement, *see Showa Denko,* 953 F.2d 162; *Genetically Modified Rice,* 764 F.3d 864; *Hartland,* 544 F.2d 992, the Third Circuit nonetheless concluded that the district court had jurisdiction to do just that.

According to the Third Circuit, the district court had the power to dictate the terms of those state court settlements not because it had any jurisdiction over the state court plaintiffs who brought those cases, but because it had "ancillary jurisdiction" to "enforce the contract Girardi Keese made with the [PSC]." App. 9-10. In the Third Circuit's view, "[b]ecause a district court has jurisdiction to determine whether one of its orders has been violated," it necessarily also has "ancillary jurisdiction" to "adjudicate whether an agreement incorporated into a court order has been breached" - even if the agreement contains terms that the court lacks jurisdiction to impose directly. App.10. In other words, in the Third Circuit's view, a district court may use an agreement between the lawyers for parties to a federal case pending before it to acquire subject-matter jurisdiction over cases and controversies brought by different parties in different courts.

***12** In response to Girardi Keese's argument that subject-matter jurisdiction may not be created by agreement of the parties (let alone their lawyers), *see, e.g., Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982), the Third Circuit claimed that "[t]he agreement itself is *not* the source of the District Court's authority," and that its authority instead "arose from its responsibilities to appoint and supervise a coordinating committee of counsel," App.14 (emphasis added). In the Third Circuit's view, "[b]ecause it was within the District Court's power to issue an order governing how to compensate the Steering Committee for its work," it was also within that court's power to incorporate into its order and then enforce an agreement purportedly dictating the terms on which state court cases may settle. *Id.* Accordingly, the Third Circuit affirmed the district court's order requiring GlaxoSmithKline to withhold 7% of the settlement proceeds of *all* of Girardi Keese's clients, including state court clients whose cases had proceeded exclusively in state court.

REASONS FOR GRANTING THE PETITION

The decision below works an alarming expansion of federal court jurisdiction at the expense of the autonomy and independence of state courts. Few principles of constitutional law are more fundamental than the precept that federal courts are courts of limited jurisdiction and the corollary that many important disputes may be resolved only in state court. When cases involving common questions of fact proceed in both federal and state court simultaneously, it is no doubt tempting for one court to try to superintend proceedings in the other through ***13** fiat, rather than cooperation, in the name of efficiency. But our Constitution places certain values above efficiency. Federalism and respect for the dignity of state court proceedings are among those core values. In the decision below, the Third Circuit lost sight of those bedrock principles and created a circuit split in the process.

According to the Third Circuit, a *federal* court may order plaintiffs in *state* court proceedings to surrender proceeds from their *state* court settlements into a common-benefit fund administered by a *federal* court. In other words, according to the decision below, a *federal* court may dictate the terms on which *state* court cases may settle. That untenable conclusion has been rejected by every other circuit to confront the question. And with good reason, as nothing in the MDL statute even purports to give federal courts the constitutionally suspect power to exercise jurisdiction over state court proceedings or the state court plaintiffs who initiated them. Instead, it has long been settled law that an MDL court's jurisdiction is confined to the federal cases pending before it; the extent to which state court cases may be coordinated with those federal court cases is a question to be addressed by comity and cooperation, not a federal court order. The Third Circuit's contrary conclusion is impossible to reconcile with decisions from the Fourth, Eighth, and Ninth Circuits holding that an MDL court lacks the authority to order state court settlement proceeds diverted into a federal common-benefit fund. Neither the federal court's authority over distinct cases involving the common defendant nor its authority over a lawyer with both federal court and state court clients can change that fundamental ***14** reality. The federal court has no authority over state court plaintiffs who have never stepped foot in federal court and cannot dictate the terms of their settlement of state court cases.

To make matters worse, the Third Circuit reached that unprecedented conclusion without identifying any *statutory* authority supporting the district court's exercise of jurisdiction over state court proceedings (because there is none). It instead espoused a boundless conception of "ancillary jurisdiction." Relying on the notion that a federal court has ancillary jurisdiction to enforce an agreement that has been incorporated into one of its orders, the court concluded that the district court *gave itself* the power to seize proceeds from state court settlements by incorporating into one of its orders an agreement in which the state court plaintiffs' counsel purportedly agreed to that result. Thus, according to the Third Circuit, a district court may create jurisdiction out of whole cloth by incorporating into one of its orders an agreement containing terms that the court lacks the power to impose directly, then claiming "ancillary jurisdiction" to enforce those otherwise ultra vires terms.

That utterly circular logic would convert the narrow doctrine of ancillary jurisdiction into an exception that swallows the rule that federal courts are courts of limited and defined jurisdiction. It has long been settled law that federal courts do not have the power to create jurisdiction by judicial decree or by consent of the parties. And they certainly do not have the power to create jurisdiction *over state court proceedings and parties* by decree or consent - let alone by the purported consent of *someone other than* ***15** the state court parties. Yet here, the Third Circuit concluded that the district court acquired jurisdiction to dictate the settlement rights of state court plaintiffs by unilaterally incorporating into one of its orders an agreement to which the state court plaintiffs were not even parties. Whatever the limits on a federal court's ancillary jurisdiction may be, this blatant, non-consensual bootstrap surely exceeds them. A federal court cannot leverage its authority over a lawyer who represents clients in both federal and state courts to create jurisdiction over the state court case of a state court plaintiff who has never stepped foot in federal court.

The decision below is all the more unfortunate because it employs brute force where comity and cooperation are both constitutionally required and practically sufficient. The complexities of coordinating pretrial discovery across federal and state court litigation are hardly unique to this case. Federal courts have been dealing with that dynamic and resisting the temptation to dictate the terms of state court proceedings for decades, and state courts have proven themselves more than up to the task of working with federal courts to encourage and facilitate cooperation among the parties to their respective cases - including when it comes to compensating counsel whose efforts benefit parties in both systems. Federal courts thus not only have no authority, but no need, to run roughshod over jurisdictional limits to manage complex multi-jurisdiction litigation efficiently and effectively.

Yet that is precisely what the decision below empowers courts to do. Indeed, left standing, the ***16** decision below will encourage direct orders in lieu of the cooperative approach that has held sway in the Fourth, Eighth, and Ninth Circuits. That result is particularly unfortunate because the circuit to which an MDL case is transferred is a matter of happenstance. Thus, while it would be intolerable to have any circuit adopt an approach fundamentally at odds with the Constitution's basic allocation of authority between state and federal courts, it is particularly untenable to have different approaches in the circuits when a suit filed anywhere in the country could end up before an MDL transferee court in the Third Circuit applying this misguided test. The Court should grant certiorari to address this jurisdictional overreach and untenable dynamic.

I. The Decision Below Is Egregiously Wrong And Conflicts With The Decisions Of Every Other Circuit To Resolve The Question Presented.

A. The MDL Statute Does Not Empower District Courts to Exercise Jurisdiction Over State Court Cases or Plaintiffs.

"Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger v. Harris,* 401 U.S. 37, 43 (1971). The "reasons for this longstanding public policy against federal court interference with state court proceedings … are plain": It is a product of the "vital consideration … of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a ***17** continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 43-44. As those principles reflect, when federal courts interfere with state court proceedings, they are interfering with nothing less than the "integrity, dignity, and residual sovereignty of the States." *Bond v. United States,* 131 S. Ct. 2355, 2364 (2011).

Consistent with that "longstanding public policy," Congress carefully crafted the federal MDL statute to ensure that it does not empower federal courts to interfere with related litigation that was brought in state rather than federal court. Section 1407 does not give the MDL Panel any power to transfer state court cases to a district court managing an MDL proceeding; it instead authorizes the transfer only of cases that are already "pending in different districts" pursuant to an independent grant of subject-matter jurisdiction. 28 U.S.C. §1407(a). Nor does the transfer of cases pursuant to section 1407 "expand the jurisdiction of the district court to which the cases are transferred." *Showa Denko,* 953 F.2d at 165. Section 1407 instead simply authorizes the court to take such actions as are within the scope of its existing jurisdiction to coordinate pretrial proceedings in those federal cases. In short, section 1407 does not expand federal court jurisdiction at all, let alone expand it to reach state court cases or the plaintiffs who bring them.

Applying those settled principles, courts have long held that a district court does not have the power to compel state court plaintiffs to surrender proceeds from their state court settlements into a common- ***18** benefit fund used to finance representation in an MDL proceeding. Indeed, courts have been rejecting that argument for almost as long as section 1407 has been on the books. The first case to consider the issue arose out of a 1971 plane crash that led to lawsuits in both federal and state court. *See Hartland,* 544 F.2d at 993-94. The district court coordinating pretrial proceedings in the federal cases pursuant to section 1407 ordered *all* claimants - including plaintiffs in state court cases and claimants who had filed no lawsuit at all - to contribute part of their settlement proceeds to a common-benefit fund established to compensate lead counsel for the MDL proceeding. *Id.* at 993. One of the state court plaintiffs and one of the claimants who settled out of court appealed, and the Ninth Circuit had little trouble concluding that the district court's attempt to impose obligations on claimants over whom it had "not even a semblance of jurisdiction" was a blatant "usurpation of power." *Id.* at 1001.

The Fourth Circuit reached the same conclusion on nearly identical facts in *Showa Denko*, where a district court likewise imposed a common-benefit fund assessment on every case that settled, including "actions venued in state courts, untransferred federal cases, and unfiled claims in which any MDL defendant is a party or payor." 953 F.2d at 164. As the Fourth Circuit explained, because "[c]laimants who have not sued and plaintiffs in state and untransferred federal cases have not voluntarily entered litigation before the district court nor have they been brought in by process[,] [t]he district court simply has no power to extend the obligations of its order to them." *Id.* at 166. Nor could the district court get around that constraint ***19** by ordering a common *defendant* to ensure that the assessment was paid in cases over which the court lacked jurisdiction. *See id.* Either way, the Fourth Circuit concluded, the district court would be exercising jurisdiction that it does not have. Although the court acknowledged "that a district court needs to have broad discretion in coordinating and administering multi-district litigation," it concluded that a district court's discretion still necessarily remains constrained by the bedrock rule that its jurisdiction is "limited to cases and controversies between persons who are properly parties to the cases transferred." *Id.* at 165-66.

Most recently, the Eighth Circuit reached the same conclusion in *Genetically Modified Rice*, a case in which lead counsel for the plaintiffs in MDL proceedings challenged the district court's holding that it lacked jurisdiction to order state court plaintiffs to contribute to the common-benefit fund established to compensate lead counsel for their work. *See* 764 F.3d at 873-74. The Eighth Circuit not only agreed with the Ninth and Fourth Circuits that "[t]he district court properly ruled … that it did not have jurisdiction to order holdbacks from state-court plaintiffs' recoveries," but also again rejected the argument that the district court could skirt that constraint by ordering assessments to be "withheld by [the defendant] (a party before the district court) or paid by the plaintiffs' counsel (some of whom represent clients in the MDL)." *Id.* at 874. Although the court did not dispute that "the state-court plaintiffs' counsel benefited from the MDL leadership group's work," it found lead counsel's complaints about the "equity" of ***20** that arrangement "insufficient to overcome limitations on federal jurisdiction." *Id.*

As these decisions reflect, there is nothing novel about the notion that a federal MDL proceeding might function more efficiently or equitably if a district court could force *all* claimants - not just parties to the cases before it - to contribute to a common-benefit fund when they settle. But the MDL statute was not designed as a constitutionally dubious effort to give federal courts the power to dictate the terms on which parties to state court litigation may settle their claims. Rather, it was a much more modest effort to deal efficiently with the cases within the federal courts' traditional jurisdiction. Of course, that does not mean that district courts may not work with state courts to encourage and facilitate cooperation across state and federal cases in complex litigation; in fact, they can and do. *See, e.g.*, Manual for Complex Litigation, §20.313, at 235-38; *In re Genetically Modified Rice Litig.,* No. 4:06-MD-1811, 2010 WL 716190, at *9 (E.D. Mo. Feb. 24, 2010); Part II, *infra.* But it does mean that a district court must work to achieve those goals in a manner consistent with the rule that an MDL proceeding does not imbue a court with jurisdiction over cases or controversies that are not pending before it. To conclude

otherwise would eviscerate settled limits on federal court jurisdiction - and, worse still, do so at the expense of the autonomy and independence of state courts.

***21 B. The Decision Below Is Irreconcilable With Those Fundamental Constitutional Principles and the Decisions That Have Faithfully Applied Them.**

The decision below marks a dramatic departure from those long-settled principles. In direct conflict with the Fourth, Eighth, and Ninth Circuits, the Third Circuit concluded that a federal district court *can* order the surrender of proceeds from a state court settlement to finance a federal common-benefit fund. In other words, the Third Circuit concluded that an MDL proceeding somehow empowers a federal district court to dictate the terms on which state court cases may settle. The court did not even try to identify anything in section 1407 - or any other federal statute, for that matter - that empowers federal courts to work such an egregious intrusion on the power of state courts to manage their own cases. Instead, the court concluded that the district court successfully *gave itself* that power, by first incorporating into one of its orders an agreement that purported to dictate settlement terms in state court proceedings, and then claiming "ancillary jurisdiction" to enforce that agreement. The Third Circuit suggested that this dynamic created a situation that its sister circuits had not confronted. But, in reality, the Third Circuit has authorized courts to do in two steps what is plainly verboten in at least three other circuits. And its novel concept of "ancillary jurisdiction" is as dangerous as it is mistaken, as it provides a roadmap for skirting limits on the subject-matter jurisdiction of federal courts. ***22** The Third Circuit began by purporting to accept the premise that section 1407 "does not expand the jurisdiction of the district court to which the cases are transferred" or grant that court jurisdiction over anything other than "cases and controversies between persons who are properly parties to the cases transferred." App.8. The court likewise purported to accept the premise that "had the District Court simply ordered … total strangers to the litigation[] to contribute to the common benefit fund …, it would have exceeded its jurisdiction." App.9. Yet the court then proceeded to affirm the district court's order even though that is precisely what it does.

And make no mistake; that is in fact what the order does. While the order may be styled as an order against Girardi Keese, it does not order *Girardi Keese* to contribute to the common-benefit fund. Indeed, the order's principal obligation runs not against Girardi Keese, but against GlaxoSmithKline (the common defendant across state and federal court cases). The order directs GSK to "hold back a 7% assessment on the gross recovery" for each state court plaintiff represented by Girardi Keese. App.25. The order further directs GSK to "deposit the 7% assessment in the Avandia Common Benefit Fund." *Id.* Lest there be any doubt that state court plaintiffs' oxen are being gored, even though they have no direct relationship with the federal litigation, the order specifies that the 7% holdback shall consist of 4% deducted from the portion that each plaintiff owes Girardi Keese as attorney's fees and 3% directly from the plaintiff's own ***23** recovery.[3] In other words, it orders GlaxoSmithKline (and Girardi Keese as a backstop) to ensure that Girardi Keese's state court clients - persons over whom the district court "had not even a semblance of jurisdiction," *Hartland,* 544 F.2d at 1001 - surrender a portion of their state court settlements into a fund established by a *federal court* to compensate counsel for *federal court* plaintiffs for their work in *federal court* proceedings. That is exactly what the Fourth, Eighth, and Ninth Circuits have held a district court lacks jurisdiction to do.

[3] Of course, the order is equally problematic for Girardi Keese, not only because it directly impacts Girardi Keese's attorney's fees, but also because it forces Girardi Keese to serve as a vehicle for effectuating an order directly impacting the rights of its clients that the district court had no jurisdiction to enter. Moreover, while part of the 7% withholding may come from proceeds dedicated to payment of the state court plaintiffs' attorneys fees, either way, those funds are still coming directly out of state court settlements over which the district court lacks jurisdiction.

That the district court's order uses Girardi Keese and GSK as the vehicles for reaching the state court plaintiffs and their settlement proceeds does not distinguish it in the slightest from *Hartland, Showa Denko*, or *Genetically Modified Rice.* Each of those cases specifically rejected the argument that a district court can get around its lack of jurisdiction over state court cases and state court plaintiffs by ordering state court settlement proceeds "withheld by [the defendant] (a party before the district court) or paid by the plaintiffs' counsel (some of whom represent clients in the MDL)." *Genetically Modified Rice,* 764 F.3d at 874; *see also Showa Denko,* 953 F.2d at 164; ***24** *Hartland,* 544 F.2d at 1001. That conclusion is eminently correct, as a federal court cannot use its *personal* jurisdiction over the common defendant or its supervisory authority over the common lawyers to claim *subject-matter* jurisdiction "over separate disputes" and separate parties in state court. *Genetically Modified Rice,* 764 F.3d at 874. Subject-matter jurisdiction is about a federal court's power over cases and controversies;

common defendants or shared counsel are no substitute for a dispute in federal, as opposed to state, court.

Implicitly recognizing these problems, the Third Circuit tried to re-characterize the question as whether the district court had "jurisdiction to enforce the contract Girardi Keese made with the [PSC]" regarding contributions to the common-benefit fund. App.9-10. In the Third Circuit's view, the purported "incorporation" of that contract into one of the district court's earlier orders somehow imbued the district court with "ancillary jurisdiction" to adjudicate the terms on which the state court plaintiffs' state court cases could settle.[4] That boundless conception of "ancillary jurisdiction" finds absolutely no support in this Court's cases.

[4] The Third Circuit's conclusion that the agreement in question was "incorporated" into the district court's pretrial order is itself highly suspect. The district court never incorporated the agreement *between Girardi Keese and, the PSC* into its order. It just incorporated a "form agreement" that was not even identical to the one that Girardi Keese signed - and did so solely at the behest of the PSC. App.11.

To be sure, "the doctrine of ancillary jurisdiction … recognizes federal courts' jurisdiction ***25** over some matters (otherwise beyond their competence) that are incidental to other matters properly before them," including a court's jurisdiction "to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen,* 511 U.S. at 378, 380. And as part of that ancillary jurisdiction, a federal court may well have authority to enforce an agreement that it has incorporated into one of its orders - for example, an agreement between two instate parties already before the court on a federal question - even if disputes arising out of the agreement would otherwise belong in state court. *See id.* at 381.

But nothing in the concept of "ancillary jurisdiction" allows a federal court to self-generate jurisdiction over disputes between parties who not only have not appeared in federal court, but are actively engaged in state court litigation. Instead, whatever the precise limits of "ancillary jurisdiction," the ancillary jurisdiction exercised by federal courts has to be truly ancillary, *i.e.*, "*incidental* to other matters *properly before them.*" *Id.* at 378 (emphasis added). There is nothing incidental about dictating settlement terms to parties in state court litigation who have never appeared in federal court.

Indeed, courts have repeatedly held that while a district court has ancillary jurisdiction to resolve "disputes concerning costs and fees *for the case that invoked federal subject matter jurisdiction,*" it does not have jurisdiction - ancillary or otherwise - to resolve disputes "regarding costs or fees on another matter." 13 Charles A. Wright, Arthur R. Miller et al., Federal Practice & Procedure §3523.2 (3d ed. 2008) (emphasis ***26** added). A court cannot get around that jurisdictional constraint by "incorporating" into one of its orders an agreement purporting to govern the settlement of a matter not before it, then claiming "ancillary jurisdiction" to enforce that agreement. And it certainly cannot do so in an effort to assert jurisdiction over the settlement of *state court* claims brought by *state court* plaintiffs who "have not voluntarily entered the litigation before the district court," have not "been brought in by process," *Showa, Denko,* 953 F.2d at 166, and are not even parties to the agreement that the court claims empowers it to adjudicate their settlement rights.

Even the Third Circuit seemed to recognize that a district court cannot create subject-matter jurisdiction out of whole cloth by claiming the power to enforce an agreement containing terms that do not even pertain to "matters properly before" it. The court thus was adamant that the agreement between Girardi Keese and the PSC was *not* "the source of the District Court's authority" to order the withholding of proceeds from state court settlements. App.14. Instead, in the Third Circuit's view, "the District Court's authority over this dispute arose from its responsibilities to appoint and supervise a coordinating committee of counsel." *Id.* "The agreement was simply incorporated into an order the District Court was empowered to issue." *Id.* But the question is not whether the district court had the power to enter an order "fashion[ing] some way of compensating the attorneys who provide class-wide services." App.10. Of course it did. The problem is, that authority is plainly limited to compensating services provided to the cases *in federal court.* And that authority just as plainly does not extend to ***27** dictating the compensation of attorneys for the cases that remained in state court. Whatever the scope for cooperation between the state and federal courts in circumstances where work-product is employed in both proceedings, the district court here clearly jumped the tracks in attempting to dictate the terms of state court settlements. Neither the federal court's authority over common defendants or common lawyers nor any vague notion of ancillary jurisdiction can make up for the fact that the federal court's limited authority simply does not extend to state court cases or state court litigants.

Indeed, the whole point of *Hartland, Showa Denko*, and *Genetically Modified Rice* is that a district court's "responsibilities to appoint and supervise a coordinating committee of counsel" do *not* include the power to compel the surrender of state court

settlement proceeds. That is so whether the court tries to compel their surrender directly, through common counsel or a common defendant, or by incorporating an agreement regarding the rights of state court plaintiffs into one of its orders and then claiming jurisdiction to enforce it. In short, no matter what mechanism a district court may try to employ, the appropriate distribution of state court settlement proceeds remains a question for state courts alone. The Third Circuit's felt-need to disavow reliance on the agreement as the source of the district court's jurisdiction thus succeeded only in crystalizing the conflict between its decision and the decisions of its sister circuits.

Ultimately, however, whether the Third Circuit's decision reflects an impossibly broad theory of ***28** ancillary jurisdiction or an impossibly broad theory of a district court's power to coordinate pretrial MDL proceedings is beside the point. Either way, the decision marks an egregious intrusion on the authority of state courts to manage state court litigation. It is bad enough for a federal court to attempt to exert jurisdiction over parties who "have not voluntarily entered the litigation before" it or "been brought in by process." *Showa Denko,* 953 F.2d at 166. For a federal court to claim jurisdiction not just over total strangers to the litigation, but over proceedings that those total strangers have brought *in state court*, "is nothing less than an unconstitutional usurpation of state judicial power." Wright & Miller, §3522.

II. Left Standing, The Decision Below Will Lead To Untenable And Wholly Unjustified Results.

The Third Circuit's plain disregard of bedrock principles of federalism and limited federal court jurisdiction, and the clear conflict the decision below creates with every other court of appeals to resolve the question presented, are reasons enough for this Court's review. But the decision also creates a clear roadmap for federal courts to evade constraints on their subject-matter jurisdiction - not just in MDL proceedings, but in proceedings of all stripes. Indeed, if the doctrine of ancillary jurisdiction really is so boundless as to permit the creation of jurisdiction by judicial decree so long as a court adds an outside agreement to the mix, then there are no limits on what a district court can achieve other than the court's creativity and the consent of the parties before it. And ***29** even if the decision below is read as more narrowly confined to the powers of MDL courts, it still empowers a district court to enter all manner of orders that pose "the very real potential of interfering with … proceedings in state court, raising questions of conflict with the policy of comity between federal and state courts" that this Court has recognized. *Showa Denko,* 953 F.2d at 166.

That is not a result that this Court should tolerate. This Court has repeatedly emphasized the importance of allowing state courts to conduct their business without interference from federal courts, and has developed numerous doctrines designed to do just that. *See, e.g., Younger,* 401 U.S. 37; *Middlesex Cty. Ethics Comm'n, v. Garden State Bar Ass'n,* 457 U.S. 423 (1982); *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943); *R.R. Comm'n v. Pullman Co.,* 312 U.S. 496 (1941). As those decisions reflect, "proper respect for state functions" is not just a "longstanding public policy," *Younger,* 401 U.S. at 43-44; it is a constitutional necessity. The decision below thus not only undermines Congress' ability to set the bounds of federal courts' subject-matter jurisdiction, but also undermines the basic constitutional division of federal and state power.

That the Third Circuit's decision sanctions such an untenable result is all the more unfortunate because there is absolutely no practical justification for the district court's jurisdictional overreach. The challenges of coordinating mass litigation across state and federal courts are nothing new. *See, e.g.*, William W. Schwarzer et al., ***30** *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts,* 78 Va. L. Rev. 1689, 1690 (1992). And as district courts have demonstrated time and again, they have ample means of meeting those challenges through cooperation and comity rather than through brute force and the usurpation of state court jurisdiction. Indeed, state courts have proven themselves ready, willing, and able to work with federal courts to coordinate pretrial proceedings and administer common-benefit funds.

For example, one simple solution courts have worked together to achieve is entry of a joint common-benefit order that may be enforced by whichever court has jurisdiction over a particular case. *See, e.g., Heparin Prods. Liab. Litig.,* ECF No. 45; *Genetically Modified Rice,* 2010 WL 716190, at *9 (encouraging parties "to seek orders for participation [in the common-benefit fund] from the appropriate state courts"). That approach has the obvious virtue of allowing federal courts to manage federal cases and state courts to manage state cases, which is exactly what comity requires. To be sure, a federal court and a state court may not always *agree* on the manner in or extent to which plaintiffs should be required to pay common-benefit fund assessments. But that hardly empowers a federal court to cut the state court out of the picture. After all, federal courts have no more power to dictate how state courts manage their cases than Congress has to dictate how states regulate. *Cf. New York v. United States,* 505 U.S. 144 (1992).

In addition to being both unjustified and unnecessary, the interference with state court proceedings that the decision below sanctions is likely counterproductive in the long run. It creates ***31** unnecessary friction between state and federal courts managing complex litigation, as state courts may be reluctant to work with federal courts if they cannot be confident that those courts will respect their jurisdiction. *See* Manual for Complex Litigation, §20.311, at 232 ("Reciprocity and cooperation create trust and mutual respect so that attempts to coordinate are not perceived as attempts to dominate."). And it has the potential to erect barriers to cooperation between lawyers, who may be reluctant to work with other lawyers in MDL proceedings if doing so may expose their state court clients to federal court jurisdiction. It also puts state court litigants at risk of having to monitor not only their own cases, but all cases involving their adversaries and co-counsel, just to ensure that they do not become subject to unforeseen common-benefit assessments without their knowledge - let alone their consent.

Finally, the decision below creates not only a split among the circuits, but also a particularly untenable split given the nature of MDL litigation. Litigation that is transferred to a district court in the Third Circuit for MDL proceedings will now proceed under different rules than litigation that is transferred to a district court in another circuit. But the selection of a transferee court is a matter of happenstance under the MDL statute. A federal court action filed in California could just as easily be transferred for coordinated pretrial proceedings to a district court in Philadelphia as to one in the Fourth, Eighth, or Ninth Circuit. The MDL Panel generally makes assignment decisions based on a variety of factors, such as the availability of judges experienced in complex litigation. *See id.* §20.131, at 221. Thus, as bad as it is for there to be ***32** different rules in different parts of the country, here, two California state court litigants could end up being treated differently based on the happenstance of where related federal court litigation gets assigned for pretrial coordination. To make matters worse, the same case will be potentially subject to different rules depending on whether it settles during pretrial proceedings before the transferee court or after the case is transferred back to the originating federal district court.

None of this makes any sense. Every case filed in state court should be treated the same based on the rules adopted by the state courts, not differently based on the happenstance of whether there is related federal court litigation filed by the same lawyers, whether that federal court litigation is transferred to a court in the Third Circuit versus the Fourth, Eighth, and Ninth Circuits, whether those same lawyers enter an agreement, or whether that agreement is incorporated into an order by a district court in which the state court plaintiff has never appeared. In short, the settlement terms of a state court action should be dictated by state courts and should not depend on the vagaries of federal court litigation. This Court should grant certiorari to eliminate the Third Circuit's dramatic jurisdictional overreach and restore much-needed uniformity to the world of federal MDL proceedings.

***33 CONCLUSION**

For the foregoing reasons, this Court should grant the petition for certiorari.

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