No. 21-1121

In the

United States Court of Appeals

for the

Fourth Circuit

IN RE: STATE OF NEW MEXICO; NEW MEXICO ENVIRONMENT DEPARTMENT,

Petitioners.

On Petition for Writ of Mandamus Seeking Review of an Order of the United States Judicial Panel on Multidistrict Litigation, MDL No. 2873 related to a proceeding pending before the United States District Court of the District of South Carolina, No. 2:18-mn-02873-RMG

ANSWER OF TYCO FIRE PRODUCTS, LP, CHEMGUARD, INC., AND 3M COMPANY TO PETITION FOR MANDAMUS

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Case No. 21-1121

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re STATE OF NEW MEXICO AND THE NEW MEXICO ENVIRONMENTAL DEPARTMENT, Petitioners

From the United States Judicial Panel on Multidistrict Litigation

IN RE: STATE OF NEW MEXICO AND THE NEW MEXICO ENVIRONMENTAL DEPARTMENT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies, in an effort to comply with Fed. R. App. P. 26.1 and to allow the judges of this Court to evaluate possible disqualification or recusal, that this Answer is filed on behalf of the following parties:

1. 3M Company
2. Tyco Fire Products, LP
3. Chemguard, Inc.

Dated: April 9, 2021

Respectfully submitted,

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INTRODUCTION

This Court should deny the petition for mandamus filed by the State of New Mexico and the New Mexico Environment Department ("NMED") (together, "New Mexico" or "the State").[1] New Mexico filed an action in the District of New Mexico against the United States and the United States Department of the Air Force seeking remediation of areas around two Air Force Bases that defendants allegedly contaminated through the use and disposal of a military-specified firefighting foam called aqueous film-forming foam ("AFFF"). In June 2020, the Judicial Panel on Multidistrict Litigation ("the JPML" or "the Panel") transferred New Mexico's action to the *In re AFFF* MDL (the "MDL") pending in the District of South Carolina.

Eight months later, without any attempt to explain its delay, New Mexico asks this Court for an extraordinary writ vacating the Panel's transfer order. The State claims that the MDL statute (28 U.S.C. § 1407) cannot permit transfer of an action filed by a sovereign state without violating states' constitutional rights, such as their police power authority under the Tenth Amendment. New Mexico never raised this constitutional theory before the Panel; instead, it accepted that the statute applied to its action and argued that its action did not meet the statutory criteria for transfer. This Court should decline to address the State's new theory in its mandamus petition.

[1] This Answer is filed on behalf of Tyco Fire Products, LP, Chemguard, Inc., and 3M Company, all of whom are defendants in the *In re AFFF* MDL and their counsel are co-lead counsel for the defendants in the MDL.

That is not the only procedural problem with New Mexico's petition. Instead of seeking immediate review of the transfer order in June 2020, the State acquiesced in the transfer and then engaged in motion practice in the MDL court, requesting leave, pursuant to the MDL court's case management orders, to file a motion for preliminary injunction against the United States. By acquiescing in the transfer, the State waived its challenge to the Panel's June 2020 order and should be estopped from challenging it. Further, after its request for leave was denied without prejudice by the MDL court, and without seeking remand from the MDL court, the State waited another five months before filing this petition. A party must act diligently to obtain extraordinary mandamus relief, and New Mexico plainly did not.

Turning to the merits, New Mexico does not argue that the Panel misapplied the § 1407 criteria for transfer or that its action does not share common factual or legal questions with the other cases in the MDL. And New Mexico's belated argument that transfer of its action under § 1407 violates its sovereign rights has already been rejected by other circuit courts. Actions brought by state sovereigns are transferred to MDLs as a matter of course. As circuit courts have recognized, no sovereign rights are implicated when a state plaintiff voluntarily avails itself of a federal forum. In those circumstances, states are subject to federal procedural rules, including rules pertaining to multidistrict litigation, just like any other federal litigant.

New Mexico also takes issue with the practical effects of the MDL court's case management orders on the State's ability to control its own case. But such orders are inherent to the MDL process, which seeks, among other things, to benefit litigants and the legal system as a whole. Individual litigants thus may lose a measure of control in exchange for the efficiencies and other benefits of coordinated pretrial proceedings, but that fact does not justify vacatur of the Panel's transfer order properly applying the transfer criteria in the MDL statute.

STATEMENT OF FACTS

A. The Panel centralized actions alleging injury arising out of the use of AFFF in the *In re AFFF* MDL in the District of South Carolina.

On December 7, 2018, the Panel granted motions brought under 28 U.S.C. § 1407 to centralize proceedings in actions alleging injury arising from the use of AFFF containing per- or polyfluoroalkyl substances ("PFAS"), including perfluorooctane sulfonate ("PFOS") and/or perfluorooctanoic acid ("PFOA"). The Panel's initial transfer order encompassed actions in which "plaintiffs allege that AFFF products used at airports, military bases, or certain industrial locations caused the release of PFOA or PFOS into local groundwater and contaminated drinking water supplies." A359. The Panel noted that while most of the defendants in the pending AFFF actions were manufacturers and distributors of AFFF, some were governmental entities, including the United States and state governments. A358, A361, A363-65.

The Panel determined that the AFFF actions "involve common questions of fact, and that centralization will serve the convenience of the parties and witnesses and promote just and efficient conduct of this litigation." A359. The actions to be transferred "share factual questions concerning the toxicity of PFOA and PFOS and their effects on human health; [and] the chemical properties of these substances and their propensity to migrate in groundwater supplies." *Id*. The actions also shared questions about "the knowledge of the AFFF manufacturers regarding the dangers of PFOA and PFOS; their warnings, if any, regarding proper use and storage of AFFFs; and to what extent, if any, defendants conspired or cooperated to conceal the dangers of PFOA and PFOS in their products." *Id*.

In concluding that centralization was proper, the Panel rejected the argument that the actions were too different because some were personal injury cases and others were brought by governmental bodies seeking costs for remediation or upgrades to water treatment systems. A360. The Panel explained that "all the AFFF actions involve the same mode of groundwater contamination caused by the same product. Therefore, these actions will involve significant and overlapping discovery of the AFFF manufacturers and their products." *Id*. Among the issues in the AFFF cases that "remain[] to be litigated" is whether plaintiffs "can show there is scientifically reliable evidence of a causal connection between AFFF products allegedly discharged into the environment and harm to plaintiffs (*i.e.*, whether PFOS or PFOA can, as a general

matter, cause human illness).” A360 n.8. The centralized cases were transferred to Judge Richard M. Gergel of the District of South Carolina. A362.

Following the initial transfer of cases, the MDL court entered several detailed case management orders (“CMOs”) that, among other things, appointed Co-Lead Counsel and Liaison Counsel as well as creating the Plaintiffs’ Executive Committee (“PEC”) and Defense Coordination Committee (“DCC”) to enable coordination of discovery and filings. A367-407. In one CMO, the MDL court explained that all motions pending when a case is transferred to the MDL, except motions to remand, are denied without prejudice and that the parties may seek leave to refile them. A385. The CMOs further provided that the Co-Lead perform a gatekeeping role for motions by the parties, but a party may seek leave to file a motion even in the absence of consent by Co-Lead Counsel. A385, A413.

B. New Mexico filed its action against the United States for contamination resulting from use and disposal of AFFF.

On March 5, 2019, shortly after the MDL was created, New Mexico filed its action against the United States and the Department of the Air Force in the District of New Mexico. Pet. 9. On July 24, 2019, New Mexico filed an amended complaint alleging that the defendants improperly disposed of waste, including from use of PFAS-containing AFFF, at Cannon and Holloman Air Force Bases, both of which are in New Mexico. A8-9, A17-33. The State alleged that it first became aware of AFFF releases or potential releases at Cannon in July 2017 through a letter from defendants

to the NMED, and at Holloman in a 2015 report the federal government provided to NMED. A21, A29.

The State also alleged that public and private water sources on- and offsite were allegedly contaminated with PFAS, including PFOA and PFOS. A9. According to the State, the contamination has "created an imminent and substantial endangerment to human health and the environment." *Id*. New Mexico alleged that PFAS "are toxic, meaning that they pose significant threats to public health and the environment" and that exposure to PFOS and PFOA "presents health risks even when PFOS and PFOA are ingested at seemingly low levels." A13. According to the State, exposure to PFOS and PFOA is "associated" with a risk of certain illnesses. A13-14.

New Mexico raised two causes of action in the amended complaint: one under the New Mexico Hazardous Waste Act and another under the federal Resource Conservation and Recovery Act ("RCRA"). A37-40. In each count, the State asserted that the alleged contamination poses a danger to health and the environment. A38-39. The State sought interlocutory and permanent injunctive relief requiring the defendants to abate the allegedly dangerous conditions, civil penalties under the statutes, and a declaration that the State is entitled to reimbursement for its "oversight and efforts to obtain compliance" with the federal and state statutes. A40.

C. New Mexico filed a motion for preliminary injunction.

Also on July 24, 2019, New Mexico moved for a preliminary injunction. A42-45. The State sought an order compelling the United States to provide expedited discovery of documents relating to exposures at the Bases; to conduct sampling to delineate the extent of contamination in the area; to provide blood tests to local residents; and to provide alternative drinking water sources to individuals with contaminated wells. A42-43. The State supported its request for immediate relief by arguing that PFAS in AFFF cause harm to public health and the environment. A52, A65-69.

The United States responded to the preliminary injunction motion and moved to dismiss New Mexico's action. A417-57. The United States noted that any claim of an emergency was belied by the fact that New Mexico was on notice of potential contamination at the Bases in 2015 and 2017, respectively, but did not bring its action until March 2019. A451, A455. Even then, "New Mexico waited months to amend [its] Complaint and bring a motion for preliminary injunction. Such a delay undermines [its] claim of irreparable harm." A436. The United States also argued that New Mexico's action was a "prohibited challenge to ongoing response actions by the Air Force under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)" and that the state-law claim was barred by sovereign immunity. A420-22, A438-46.

In addition, the United States argued, New Mexico could not establish irreparable harm because the Air Force was undertaking environmental response work at the sites. A420, A436, A447-48. The United States explained that the "science on PFOS and PFOA and the potential to cause adverse health effects is relatively new and continues to evolve," and the government "has been working to better understand the extent and nature of risks from exposure to PFAS." A420. As part of that effort, the Air Force was due to undertake remedial investigations under the CERCLA process at Cannon in 2021 and Holloman in 2023. A421. At Cannon, the United States had already offered to sample private wells and provide alternative water solutions to nearby property owners. A449. At Holloman, "there are no human health exposure pathways because the water downgradient of the base is not used for drinking water" and "no PFOS or PFOA was detected in the closest downgradient drinking water wells." *Id*. The United States also argued that it would "be highly disruptive if courts allowed outside parties to substitute their own judgment for that of agencies exercising Presidentially-delegated CERCLA cleanup authority." A421.

In reply, New Mexico argued that the defendants' ongoing efforts were inadequate because evidence suggested there was a risk of harm to human health at levels lower than the EPA guidelines the defendants were using in remediation. A572-73.

D. New Mexico's action is transferred to the MDL.

The MDL parties' leadership counsel and the MDL court discussed the pendency of New Mexico's action during a status conference on February 7, 2020. A620-28. Counsel noted that the MDL already included an action brought by dairy farmers near Cannon Air Force Base against AFFF manufacturers and the United States. A623. The court expressed concern that issues could be decided in the New Mexico action that were pending in the MDL cases. *Id.* The court also opined that discovery in the MDL may be relevant to the United States' claim of immunity and that New Mexico would not have access to that discovery absent transfer of its case to the MDL. A625. The court explained that New Mexico's action raised complicated issues also in play in the MDL, and that the case should be identified to the JPML as a potential tagalong action. A626-27.

The United States subsequently filed the notice of the potential tagalong action with the Panel (A629), and the Panel issued a conditional transfer order ("CTO") on February 20, 2020. A6-7.

One week later, New Mexico filed its notice of opposition to the CTO. A671. On March 13, 2020, New Mexico filed a motion to vacate the CTO. A673. It argued that vacatur was proper "[b]ecause the criteria for transfer of this case to the MDL are not satisfied here." A677. The State asserted that its action was too dissimilar from the other actions in the MDL to satisfy the transfer standard. A675-76. In support, the

State claimed that "[t]hree key facts distinguish this action from those actions transferred and consolidated by this Panel in the AFFF Products Liability MDL," namely that (1) New Mexico does not bring claims against manufacturers or distributors; (2) the claims and defenses in its action are not "consistent with the cases consolidated in the MDL"; and (3) its action involved unique factual questions. A675. The State did not argue that it would be unconstitutional to transfer its action to the MDL, or that the MDL statute generally did not permit transfer of actions brought by states. A675-84.

New Mexico insisted that there were no common questions of fact because it did not sue product manufacturers or raise product liability claims. A677-78. The cases in the MDL naming the United States as a defendant were different, New Mexico argued, because manufacturers were also sued in those cases, and it was the presence of the manufacturer defendants that justified their transfer. A678. Additionally, the State claimed that the United States "has not disputed the toxicity of PFAS" in its action and there are no allegations of personal injury requiring discovery related to causation. A679.

With regard to defenses, New Mexico claimed that the U.S. government's invocation of sovereign immunity from the state law claim is unique to that case and the question of whether the RCRA claim is foreclosed by the Air Force's actions under CERCLA is fact-based. A680.

New Mexico also argued that transfer was inconvenient for the parties and witnesses because they were all located in New Mexico and that transfer did not promote the just and efficient conduct of its action because it would delay the case's resolution. A682-83. The State argued that "the unique nature of the State's role counsels in favor of allowing the claims [to] proceed where they were filed" because the federal government should not "limit[] a State's integrity or their authority to function effectively in a federal system on behalf of its citizens." A683-84. For these reasons, the State concluded, "[t]he goals supporting the MDL process are not achieved by transfer and consolidation of this action." A684.

Several of the AFFF manufacturer defendants in the MDL responded, pointing out that New Mexico's arguments for vacating the CTO were "just quarrels with the Panel's rationale for creating the MDL in the first place." A690. They observed that New Mexico's action shared common questions of fact regarding the toxicity of PFOA and PFOS and their alleged effects on human health and propensity to migrate in groundwater. A691. They noted further that there were already four other cases in the MDL involving claims of groundwater contamination allegedly arising out of the use or storage of AFFF at Cannon. A691-92.

The AFFF manufacturer defendants also pointed out that government entities, including other sovereign states, are defendants in many of the cases in the MDL and that, insofar as the United States had not disputed the toxicity of PFOA and PFOS in

the New Mexico action, that was simply because the case was at an early stage and the government had raised other, jurisdictional defenses. A693. Additionally, many cases in the MDL asserted claims other than personal injury claims. A693-94.

On June 2, 2020, the Panel denied New Mexico's motion to vacate the CTO and ordered the case transferred to the MDL. A1-5. The Panel determined that the action shares factual questions with actions pending in the MDL, including: (1) "[l]ike many of [the pending] actions, the State alleges that groundwater near military bases was contaminated through use of AFFFs to extinguish aviation fuel fires"; (2) several actions against the United States have been transferred to the MDL, and those "will involve the same or similar discovery relating to the military's use of AFFFs, as well as the United States' defenses to liability"; (3) several actions in the MDL "involve environmental claims" brought by governmental entities, including states; and (4) Cannon Air Force Base is directly at issue in at least four pending actions in the MDL. A1-2. Given these commonalities, the Panel concluded that "[c]entralization will allow coordinated discovery among all these actions to proceed in a streamlined and efficient manner." A2.

The Panel also rejected the State's claim that it would be prejudiced by the transfer, noting that discovery relevant to the two Bases can take place in New Mexico and that it is unlikely that any case-specific witness would have to travel to South Carolina. *Id*. "Further, transfer to the MDL will allow for coordination of this

discovery with the other actions in the MDL that assert claims relating to Cannon Air Force Base." *Id*. And New Mexico's counsel already represents Vermont in the MDL, so transfer is unlikely to impose significant costs on the State. *Id*.

The Panel found that New Mexico's pending preliminary injunction motion and the United States' pending motion to dismiss were not impediments to transfer because those motions "may well require resolution of factual and legal questions present in other actions pending in the MDL" so transfer "will reduce the risk of inconsistent pretrial rulings." A2.

Finally, the Panel explained that "the State filed its action in federal court, asserted a federal cause of action, and names exclusively federal government defendants" so "the State will not be heard to argue that only certain federal procedural rules and statutes are applicable to it." A3. The Panel continued that "the plain language of Section 1407 applies to all civil actions," and Congress could have carved out RCRA claims from § 1407 if it wished to exempt them from MDL proceedings. *Id*.

E. New Mexico acquiesced to transfer to the MDL by seeking leave to move for a preliminary injunction before the MDL court.

New Mexico did not seek review of the Panel's transfer order, but rather engaged in motion practice before the MDL court, seeking leave to file a preliminary injunction motion. Pet. 16. The PEC responded that the outcome of that motion would affect other cases in the MDL. A729. The PEC argued that "[a]llowing New Mexico

to circumvent the Court's carefully crafted procedures could set a burdensome and challenging precedent" and would undercut the MDL court's and the parties' ability to coordinate discovery and manage litigation priorities. A730-31. And the PEC noted that it would be unfair to give New Mexico's claim priority over those of other plaintiffs, and the State was not without a voice on the PEC because the Committee has a designated state/sovereign liaison counsel. A731.

The United States responded that the Air Force is currently undertaking actions under CERCLA at Cannon and Holloman and that New Mexico's motion raises "key legal and factual issues that implicate numerous other cases in the MDL" including the United States' jurisdictional defenses and the alleged toxicity of PFOA and PFOS and their effects on health. A735-36, A739-43, A746-47. The United States also noted that New Mexico "is only one of several sovereign plaintiffs currently in the MDL, with more states potentially joining in the future." A747.

The DCC also responded, arguing that New Mexico's request for preliminary relief under the RCRA raised contested issues regarding the alleged toxicity of PFAS common to all cases in the MDL. A789-92. In particular, deciding the State's motion would require the court "to resolve the issue of whether environmental concentrations of PFAS cause harm to human health." A791. Additionally, deciding the motion would require resolution of the United States' defense that the State's RCRA claim was barred by its CERCLA response actions, a defense that is not unique to New

Mexico's case. A792. And contamination near Cannon is at issue in four other cases, so a ruling on the State's motion could affect those cases. A792-93.

On September 3, 2020, the MDL court denied New Mexico's motion for leave. A860-62. The court explained that there are over 750 cases in the *In re AFFF* MDL, and adhering to the court's protocols, including the requirement that motions must be brought under the authority of court-appointed Lead Counsel, "is necessary to ensure that discovery in these proceedings is efficient and consistent." A861. The court concluded that "[a]llowing New Mexico, and each of the thousands of plaintiffs in this MDL, to conduct motion practice outside the auspices of Lead Counsel would derail a centralized proceeding—one of the primary responsibilities of the transferee Court—and impede each plaintiff's opportunity to participate in an organized proceeding and efficient resolution." *Id.*

New Mexico took no further action until it filed this mandamus petition five months later.

LEGAL STANDARD

New Mexico seeks review of the Panel's June 2, 2020 order transferring the State's action from the District of New Mexico to the *In re AFFF* MDL. Pet. 1. "No proceedings for review of any order of the [P]anel may be permitted except by extraordinary writ pursuant to the provisions of [28 U.S.C. § 1651]." 28 U.S.C. § 1407(e); *see also In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 780 (9th

Cir. 2014) ("Mandamus is the exclusive mechanism for reviewing JPML orders."). Mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes," and it is proper "only [in] exceptional circumstances amounting to a judicial usurpation of power … or a clear abuse of discretion." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (internal alterations and quotation marks omitted).

A petitioner seeking this extraordinary relief must establish that: (1) the petitioner has no other adequate means to attain the desired relief; (2) the petitioner has a "clear and indisputable" right to the relief; and (3) "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id*. at 380-81 (internal quotation marks omitted). New Mexico fails to meet its heavy burden of establishing that it is clearly and indisputably entitled to the extraordinary relief it seeks.

REASONS WHY THE PETITION SHOULD BE DENIED

I. New Mexico Did Not Preserve Its Argument That Congress Has Not Authorized Transfer Of Cases Brought By Sovereign States To An MDL.

The central theory of New Mexico's petition is that the Constitution precludes § 1407 from being applied to transfer cases brought by state sovereigns, but the State did not raise that argument before the Panel, and this Court should decline to address it. The State frames the question presented as whether an action brought by a sovereign state is subject to transfer to multidistrict litigation under § 1407, which, purportedly "does not expressly limit [the] state's rights to act pursuant to its

Constitutionally protected police powers." Pet. 5. Elsewhere, the State claims that application of § 1407 to actions brought by states conflicts with their Tenth Amendment police powers. *Id*. at 22. New Mexico argues that federal law may not intrude on states' sovereign powers without an explicit statement of congressional intent, and the Panel "ignored the law and fundamental structures established by our Constitution and transferred the State's case to the AFFF MDL," which has "disrupt[ed] the system of dual sovereignty." *Id*. at 24-26.

New Mexico did not raise these constitutional arguments about the general applicability of § 1407 to state actions before the Panel when it moved to vacate the CTO. A677-84. And "[i]t is well established that this court does not consider issues raised for the first time on appeal, absent exceptional circumstances," none of which are present here. *Hicks v. Ferreyra*, 965 F.3d 302, 310 (4th Cir. 2020) (internal quotation marks omitted); *see also Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999) ("Generally, issues that were not raised in the district court will not be addressed on appeal."). When a party challenges a Panel order on grounds not presented to the Panel, this Court should "consider the issue waived for purposes of this appeal." *Pinney v. Nokia, Inc.*, 402 F.3d 430, 452 (4th Cir. 2005); *see In re Mortg. Elec. Registration Sys.*, 754 F.3d at 780-81 (holding appellant waived arguments regarding MDL remand orders by failing to raise them below).

As New Mexico concedes, far from claiming that the Constitution bars § 1407 from applying to state suits, it argued in response to the CTO "that the *criteria for transfer* of its case to the MDL were not satisfied here." Pet. 14 (emphasis added); *see also* A677-84. Specifically, the State urged the Panel not to find that (1) there were common questions of fact; (2) transfer was convenient for the parties; and (3) transfer would promote the just and efficient conduct of such actions. A677; *see* 28 U.S.C. § 1407(a). Even when New Mexico argued to the Panel that the "unique nature" of its role "counsels in favor of allowing the claims [to] proceed where they were filed," A683, the State never argued, as it does now, that "nothing in Section 1407 expresses an intent to interfere with State powers through the MDL process." Pet. 27. Instead, the State simply made an argument under the just-and-efficient-conduct criterion of § 1407(a) that "[i]n this instance" transfer was improper as a factual matter. A682-84.

In short, New Mexico asked the Panel to weigh the traditional transfer criteria, applicable to all cases, and decline to transfer the case—a determination within the Panel's broad discretion. *See In re Wilson*, 451 F.3d 161, 173 (3d Cir. 2006) ("The JMPL retains unusually broad discretion to carry out its functions, including substantial authority to decide how the cases under its jurisdiction should be coordinated.") (internal quotation marks and alterations omitted). Now, in stark contrast, New Mexico asserts that the Panel had no discretion and that § 1407 *does not apply* to actions brought by state sovereigns for reasons of "constitutional and

statutory law." Pet. 21. The Panel had no opportunity to consider and address this argument—the Panel was urged to apply § 1407, not ignore it—and the argument is therefore waived. *See Pinney*, 402 F.3d at 452. Accordingly, New Mexico cannot show that its entitlement to mandamus relief is "clear and indisputable," and this Court's inquiry need go no further. *Cheney*, 542 U.S. at 381.

II. New Mexico's Petition Should Be Denied Because It Is Untimely.

As this Court has recognized, § 1407 "is a venue statute that allows the JPML to override a plaintiff's choice of forum" when the statutory criteria are satisfied. *Pinney*, 402 F.3d at 451. Rather than seek immediate review of the Panel's June 2020 transfer order, New Mexico acquiesced in the transfer to the MDL court, where it then sought leave to re-file its preliminary injunction motion and jump ahead of the other MDL cases. *See* Pet. 16. After the PEC, DCC, and United States objected, the MDL court denied the motion on September 3, 2020. A860-62. New Mexico chose not file an interlocutory appeal from that order. *See Rolo v. Gen. Dev. Corp.*, 949 F.2d 695, 702-03 (3d Cir. 1991); *Cedar Coal Co. v. United Mine Workers of Am.*, 560 F.2d 1153, 1161-62 (4th Cir. 1977). Instead, the State waited five months after the September order to seek review of the Panel's June transfer order through an extraordinary request for mandamus relief.

It is too late for the State to challenge the June 2020 transfer order and claim that transfer to the MDL was improper. *First*, when a party "by words or actions

misleads" the other parties into thinking it "is content with the venue of the suit," misleads "the court into becoming involved in the case so that there would be wasted judicial effort," or "stalls in pleading improper venue because he wants to find out which way the wind is blowing, then conventional principles of waiver or equitable estoppel come into play and … block the challenge to venue." *American Patriot Ins. Agency, Inc. v. Mutual Risk Mgmt., Ltd.*, 364 F.3d 884, 887-88 (7th Cir. 2004). Each of these acts would be independently fatal to New Mexico's mandamus petition, and the State did all three of them here. Rather than seek immediate (or even reasonably prompt) review of the Panel's transfer order, the State sought leave to move for a preliminary injunction in the MDL court pursuant to that court's CMOs, misleading the parties into thinking that it was "content with the venue" and misleading the court into becoming involved and expending effort on the motion. And once New Mexico learned "which way the wind [was] blowing"—when the MDL court denied its request for leave—the State decided (only after waiting five *more* months) to challenge the Panel's June 2020 transfer order. New Mexico thus waived its venue challenge many times over and is estopped from seeking review of the transfer order. *See id.*

Second, New Mexico was not diligent in seeking mandamus relief. "As with all remedies that are governed by equitable principles, mandamus must be sought with reasonable promptness," and "the question in each case is whether under all the

circumstances the remedy was pursued with reasonable dispatch." *U.S. v. Olds*, 426 F.2d 562, 565-66 (3d Cir. 1970). A petitioner who "slept upon his rights" may be barred from mandamus relief. *Cheney*, 542 U.S. at 379. For instance, the Fifth Circuit has held that an unexplained three-month delay in seeking review of an MDL transfer order establishes a lack of diligence and forecloses mandamus relief. *In re Red Barn Motors, Inc.*, 794 F.3d 481, 485 (5th Cir. 2015). Here, New Mexico not only slept on its rights but affirmatively acted as though venue were proper in the MDL court. Setting that aside, the State still waited eight months before seeking review of the transfer order. There was no reason it could not have filed its petition earlier, and during those intervening months, coordinated discovery has proceeded in the MDL, including discovery on issues relevant to New Mexico's case.

The State now insists that it has "no avenue for the needed immediate injunctive relief," and that this infringes on the State's sovereignty. Pet. 17. But New Mexico has never proceeded with urgency. It did not file its lawsuit until March 2019, although the United States informed NMED of potential releases associated with AFFF at the Bases in 2015 and 2017. A21, A29. Then, New Mexico waited several months before asking the District of New Mexico for a preliminary injunction. A42. And after the MDL court denied New Mexico's request for leave to refile that motion, the State did nothing to seek review of the MDL court's order and waited another five months

before seeking review of the Panel's June 2020 transfer order. Any claim now that New Mexico faces an urgent threat rings hollow.[2]

Accordingly, the State did not act with reasonable dispatch, and its lack of diligence in pursuing its current arguments and bringing this petition is an independent basis to deny mandamus relief. *See In re Red Barn Motors*, 794 F.3d at 485.

III. Transfer Of The Action That New Mexico Voluntarily Filed In Federal Court To The MDL Does Not Threaten New Mexico's Sovereignty.

New Mexico's constitutional argument that application of § 1407 violates its sovereignty rests on a flawed premise. The State claims that the Panel's transfer order interferes with its sovereign right to protect public health and the environment and "disarm[s]" it of "its Constitutional powers." Pet. 18, 25-26. But sovereign state interests are not implicated by application of federal venue statutes, such as 28 U.S.C. § 1407, to a state sovereign plaintiff that, like New Mexico, voluntarily avails itself of a federal forum. A state that seeks relief as a federal plaintiff is bound to comply with the procedural rules—including the venue and transfer rules—of the federal forum, just as all other federal court litigants must. It is therefore no surprise that cases

[2] The State also claims that the Panel's transfer order infringes on the State's ability to exercise its police powers, *see* Pet. 26, but New Mexico invoked federal jurisdiction in filing its claims and still may take measures to protect public health by following applicable laws, such as initiating remediation in state-owned or private areas of the state. The State's failure to do so to date undermines its claim that immediate relief is needed. And if it still wishes to do so, the State will have the opportunity to renew its motion for preliminary injunction later if circumstances require and as permitted by the procedures in the MDL.

brought by sovereign states are commonly transferred to MDLs, including more than a dozen other sovereign state/government cases in the *In re AFFF* MDL. *See* A1 (noting that "a number of actions" already in the MDL "involve environmental claims brought by states, water authorities, or other governmental entities").[3]

Section 1407 is a generally applicable "venue statute that allows the JPML to override a plaintiff's choice of forum" when transfer involves common questions of fact, transfer would service the convenience of parties and witnesses, and transfer would promote the just and efficient conduct of pending actions. *Pinney*, 402 F.3d at 451; *see also* 28 U.S.C. § 1407(a). The statute "was enacted as a means of conserving judicial resources in situations where multiple cases involving common questions of fact were filed in different districts." *In re Food Lion, Inc., Fair Labor Standards Act Effective Scheduling Litig.*, 73 F.3d 528, 531-32 (4th Cir. 1996). To serve the statutory purposes of conserving judicial resources and providing for coordinated resolution of multiple actions, "in considering transfer under 28 U.S.C. § 1407" and choosing a transferee court, the JPML "'is not encumbered by'" the ordinary venue limitations in 28 U.S.C. § 1391. *Treppel v. Reason*, 793 F. Supp. 2d 429, 434 (D.D.C. 2011) (quoting *In re Falstaff Brewing Corp. Antitrust Litig.*, 434 F. Supp. 1225, 1229

[3] The Panel has also rejected arguments by New York and Ohio that their cases should not be transferred to the *In re AFFF* MDL, explaining the JPML "often ha[s] transferred claims brought by a State so long as the action involves facts common to the MDL proceeding" and citing a different MDL to which an action by New Mexico had been transferred. MDL No. 2873 Dkt. 384, at 2 & n.2.

(J.P.M.L. 1977)). In multidistrict litigation, "the policies behind venue provisions designed to operate in the context of [a] single independent action[]" must give way because the Panel has a "statutory mandate to weigh the interests of all the plaintiffs and all the defendants and to consider multidistrict litigation as a whole in light of the purposes of the law." *In re Vernitron Sec. Litig.*, 462 F. Supp. 391, 394 (J.P.M.L. 1978); *see also In re Watson Fentanyl Patch Prod. Liab. Litig.*, 883 F. Supp. 2d 1350, 1351-52 (J.P.M.L. 2012) (mem.) ("[I]n deciding issues of transfer under Section 1407, we look to the overall convenience of the parties and witnesses, not just those of a single plaintiff or defendant in isolation.")

New Mexico is bound by the multidistrict litigation centralization process created by § 1407 just like any other federal litigant. To start, § 1407 by its terms applies to all civil actions, regardless of who filed the action, 28 U.S.C. § 1407(a), with the sole, express exception of certain antitrust actions filed by the United States, *id*. § 1407(g).

Further, there is no authority for New Mexico's claim that its constitutionally protected sovereign interests shield it from application of §1407. That is because "[w]hen a State voluntarily appears in federal court … it 'voluntarily invokes the federal court's jurisdiction,'" and "[i]t logically follows that the State must then abide by federal rules and procedures—including venue rules—like any other plaintiff." *Bd. of Regents of the Univ. of Texas Sys. v. Boston Sci. Corp.*, 936 F.3d 1365, 1379 (Fed.

Cir. 2019) (quoting *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002)), *cert denied*, 140 S. Ct. 2673 (2020); *see also In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1148 (4th Cir. 1997) ("When a state authorizes its officials voluntarily to invoke federal process in a federal forum, the state thereby consents to the federal forum's rules of procedure …."). Principles of "sovereign immunity do[] not apply to a State acting solely as a plaintiff." *Bd. of Regents of the Univ. of Texas*, 936 F.3d at 1382. Nor is there "a broader privilege of state sovereignty" that permits a state to avoid the federal venue and transfer statutes. *Id*. at 1381. Thus, "[w]hen a State proceeds as a plaintiff … there is no sovereign immunity or relevant state sovereign right to waive or abrogate," and the state is subject to the same federal venue rules as all other federal litigants. *Id*. In other words, a state proceeding as a plaintiff "must accept the federal statutory provisions that govern the allocation of cases among the courts." *Id*. at 1380.

The Federal Circuit's decision in *In re Regents of University of California*, 964 F.2d 1128 (Fed. Cir. 1992), is on point. There, the Regents sought review of a Panel order transferring cases to the Southern District of Indiana, including actions the Regents, as an arm of the State of California, filed in a California district court. *Id*. at 1133-34. The court rejected the Regents' argument that state sovereignty principles barred the Panel from consolidating their cases in a venue outside California, explaining that the transfer order "does not require the Regents to appear in actions to

which they are not party, or to defend against claims to which they are not otherwise subject." *Id*. at 1134. Indeed, centralization of the multidistrict litigation to avoid "inconsistent and duplicative demands on parties, witness, and judges" did not "enlarge[] the State's liability" or "invoke[] federal judicial power beyond that already sought by the State." *Id*. The court concluded: "Upon entering the litigation arena the Regents, like all litigants, become subject to the Federal Rules, including the procedural efficiencies administered by the Multidistrict Panel. Having invoked the jurisdiction of the federal court, the state accepted the authority of the court" and "became subject to coordinated pretrial proceedings under § 1407." *Id*. at 1135. *In re Regents of the University of California* thus squarely forecloses New Mexico's claim.

New Mexico claims that the Panel's transfer order exceeds its authority under § 1407 and "violates the well-established Constitutional principles of federalism." Pet. 1. But the foregoing discussion disproves both propositions. First, the Panel's transfer authority under § 1407 is not "limited" but instead applies broadly to all civil actions other than a narrow class explicitly exempted by Congress, and that broad authority is "not encumbered" by venue restrictions. *In re Falstaff Brewing Corp. Antitrust Litig.*, 434 F. Supp. at 1229. Second, federalism and state sovereignty principles do not come into play when a state voluntarily chooses to be a plaintiff in federal court, for then it is subject to the federal venue and transfer rules like all other litigants. *Bd. of Regents*

of the Univ. of Texas, 936 F.3d at 1379-82; *In re Regents of Univ. of California*, 964 F.2d at 1134-35.

New Mexico relies on *In re National Prescription Opiate Litigation*, 956 F.3d 838, 845 (6th Cir. 2020), for the proposition that a party's rights cannot "be impinged to create efficiencies in the MDL generally." Pet. 25. While that is true, the State ignores the well-established rule that a state's rights are not "impinged" when a state-filed federal court action is subject to federal venue rules, including § 1407. *See Bd. of Regents of the Univ. of Texas*, 936 F.3d at 1379-82; *In re Regents of Univ. of California*, 964 F.2d at 1134-35.

IV. New Mexico's Remaining Arguments Are Unpersuasive.

New Mexico also raises several general complaints about the MDL process and its necessary consequences. Congress recognized that the benefits of consolidating and coordinating pretrial proceedings outweigh the costs in terms of individual case control or a possible delay in the final resolution of particular individual cases. If New Mexico's general complaints, which are routinely raised by parties preferring to avoid transfer to MDLs, were sufficient to warrant mandamus relief, then virtually every party could obtain reversal of Panel transfer orders and thus render the MDL process largely useless.

As the Sixth Circuit explained, "an MDL court has broad discretion to create efficiencies and avoid duplication—of both effort and expenditure—across cases

within the MDL." *In re Nat'l Prescription Opiate Litig.*, 956 F.3d at 841. Even though New Mexico claims that it "is not challenging the MDL court's broad discretion in case management," Pet. 12 n. 11, it nonetheless complains about the natural consequences of the exercise of that discretion. For instance, the State complains that, under the MDL court's CMOs, Co-Lead Counsel must sign a motion or else the party must seek leave to file the motion. *Id*. at 16-17, 26. New Mexico also claims that state resources are being taken because it, like all other parties to the MDL, will be required to pay common benefit costs and expenses. *Id*. at 27.

These general complaints do not entitle the State to mandamus relief because the State is only entitled to the same treatment received by every other federal plaintiff when it comes to application of federal venue and transfer rules. *See In re Regents of Univ. of California*, 964 F.2d at 1134-35. Further, such MDL case management decisions are "an archetype for a discretionary judgment," so the State's quibbles will not support the extraordinary relief it seeks. *FedEx Ground Package Sys., Inc. v. U.S. Judicial Panel on Multidistrict Litig.*, 662 F.3d 887, 891 (7th Cir. 2011).

In any event, New Mexico is wrong to say that its Attorney General and NMED Secretary have been divested of the ability to represent state citizens. *See* Pet. 26. The MDL court's appointment of executive committees (as in this case) for coordination on both the plaintiff and defendant sides is standard practice and does not affect the State's representation by its own counsel. *See* Fed. Judicial Ctr., Manual for Complex

Litigation § 10.22 (4th ed. 2004). In fact, the sovereign states have their own representative on the PEC. A731. And under the MDL court's CMOs, New Mexico was able to file its own request for leave to file the preliminary injunction motion in the MDL court. That the MDL court exercised its discretion to deny that request—a ruling that the State does not challenge—does not mean the State has been deprived of its ability to represent its citizens or that the Panel's June 2020 transfer order was lawless. Further, the MDL statute provides for coordination of *pretrial* proceedings. 28 U.S.C. § 1407(a). The State will be entitled to remand for *trial* of the matter in its chosen forum, with the benefit of the coordinated discovery provided by participation in the MDL.

New Mexico also argues that transfer was improper because it has raised a claim under the RCRA, and that statute contemplates expeditious relief. Pet. 27-29. But many statutes provide for expeditious relief, and Congress only exempted certain antitrust suits from § 1407. *See* 28 U.S.C. § 1407(g). The fact that RCRA authorizes immediate relief under some circumstances thus cannot be reason enough to vacate a transfer order.

Finally, in its fact statement New Mexico asserts that the Panel did not adequately justify "expanding" the scope of the MDL to include a sovereign state action seeking to protect the public. Pet. 16. But the State does not argue that the Panel incorrectly determined that there were common factual and legal questions

between the transferred cases against manufacturers and the sovereign state cases, including this one. As the Panel explained, like other cases in the MDL, New Mexico's action alleges groundwater contamination near military bases due to the military's use of AFFF; contamination near Cannon Air Force Base is at issue in several of the other cases in the MDL; and several cases in the MDL involve environmental claims brought by government entities. A1-2. New Mexico's action also unquestionably rests on questions of PFAS toxicity and potential effects on human health. *See supra* at 5-6. Therefore, even if New Mexico were to argue that its case did not meet the § 1407 criteria, the Panel did not abuse its discretion in determining that transfer was warranted.

CONCLUSION

For these reasons, Tyco Fire Products, LP, Chemguard, Inc., and 3M Company request that this Court deny the petition for mandamus.

STATEMENT REGARDING ORAL ARGUMENT

Tyco Fire Products, LP, Chemguard, Inc., and 3M Company do not believe that oral argument is warranted for this mandamus petition. If the Court determines that oral argument would assist it in the resolution of this matter, counsel for these parties will be pleased to appear and present argument at a time convenient to the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that that on April 9, 2021, the forgoing document was filed via the Court's CM/ECF system, which accomplished electronic service upon all counsel of record.

Dated: April 9, 2021

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