17-633

17-633

IN THE

Supreme Court of the United States

ENDO PHARMACEUTICALS INC.,

Petitioner,

v.

NEW HAMPSHIRE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

PETITION FOR A WRIT OF CERTIORARI

WILBUR A. GLAHN, III
MICHAEL A. DELANEY
MCLANE MIDDLETON, P.A.
900 Elm Street
Manchester, NH 03101
(603) 625-6464

LISA S. BLATT
Counsel of Record
R. STANTON JONES
ANTHONY J. FRANZE
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave, NW
Washington, DC 20001
(202) 942-5000
Lisa.Blatt@apks.com

Counsel for Petitioner

October 27, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment bars states from outsourcing the investigation and prosecution of public claims to private contingency-fee lawyers who have a substantial personal financial stake in the outcome.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the parties to the proceeding in the Supreme Court of New Hampshire were:

Plaintiff the State of New Hampshire.

Defendants Endo Pharmaceuticals Inc.; Purdue Pharma L.P.; Janssen Pharmaceuticals, Inc.; Actavis Pharma, Inc.; and Teva Pharmaceuticals USA, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states as follows:

Endo Pharmaceuticals Inc. is an indirect wholly owned subsidiary of Endo International plc, a publicly held company that is not a party to this case. As of this date, there are no entities that own 10% or more of Endo International plc's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

STATUTES, REGULATIONS, AND EXECUTIVE ORDERS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire (App. 1a-14a) is available at 167 A.3d 1277. The opinion of the Superior Court of New Hampshire (App. 15a-61a) is available at 2016 WL 1463904.

JURISDICTION

The Supreme Court of New Hampshire entered judgment on June 30, 2017. App. 1a. This Court extended the time in which to file a petition for a writ of certiorari until October 27, 2017. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

INTRODUCTION

This case is about the "flourishing industry that pairs plaintiffs' lawyers with state attorneys general to sue companies." Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. Times, Dec. 18, 2014. These controversial suits follow a familiar pattern: "Private lawyers, who scour the news media and public records looking for potential cases . . . approach attorneys general. The attorneys general hire the private firms to do the necessary work, with the understanding that the firms will front most of the cost of the investigation and the litigation. The firms take a fee, typically 20 percent, and the state

takes the rest of any money won from the defendants." *Id.*

Relevant here, in 2013, *People* magazine ran a story about a national painkiller epidemic, and soon thereafter private contingency-fee lawyers began pitching state attorneys general around the country to bring lawsuits against manufacturers of FDA-approved opioid medications. "You know it's important when it makes *People*," one private lawyer wrote in a pitch email. *New York and Linda Singer*, N.Y. Times, Dec. 18, 2014. Soon enough, several government entities—including the State of New Hampshire—hired that lawyer to investigate and prosecute claims against petitioner and other manufacturers of opioid medications. So began this case.

Here, and in hundreds of other cases, plaintiffs' lawyers offered the same deal: a pre-packaged, lawyer-concocted lawsuit that they would fund at "no cost" to state and local governments in exchange for a direct and substantial financial stake in the ensuing enforcement actions or settlements. Just this month, one contingency-fee lawyer pursuing opioid-related lawsuits like this one on behalf of local governments reportedly said: "My plan [] is to file as many county cases as I can gather over the course of the next year or so . . . . I have 50 or so [now], and I expect that to grow to as many as 500 or 600." Emily Field, *MDL May Be On The Horizon In Opioid Litigation*, Law360, Oct. 6, 2017. The same lawyer added: "Do we hope at the end of the day to get a $100 million fee or something like that? Sure." Andrew Joseph, *A Veteran New York Litigator is Taking On Opioid Makers. They Have a History*, StatNews, Oct. 10, 2017.

Although these contingency-fee lawsuits are pitched as no-cost, they impose substantial costs on the justice

system. They hand the reins of government to private lawyers motivated by a potential bounty, depriving defendants of a neutral civil prosecutor devoted to seeking public justice—a due process violation of the most basic sort. What's more, the arrangements create a gross appearance of impropriety that diminishes the public's faith in the civil justice system. In a Pulitzer Prize-winning exposé, the *New York Times* found: "While prospecting for contracts, the private lawyers have also donated tens of thousands of dollars to campaigns of individual attorneys general, as well as party-backed organizations that they run. The donations often come in large chunks just before or after the firms sign contracts to represent the state." *Lawyers Create Big Paydays*, *supra*. These contracts have delivered billions in taxpayer funds to private plaintiffs' lawyers as contingency fees.

The New Hampshire Supreme Court's decision below holds that these contingency-fee arrangements comport with due process so long as a government lawyer retains "control" over the private lawyers. This "control" exception is nothing but a fiction—the erroneous supposition that government lawyers who have publicly asserted that they lack the expertise or resources to pursue a case will "control" financially self-interested lawyers brought on to do so. In any event, no amount of "control" can cure the appearance that these cases are born not of the merits of the claims, but rather of political patronage and an effort to extract settlements by plaintiffs' lawyers who have co-opted the mantle of sovereign authority. Further, the control exception swallows the rule, allowing contingency-fee lawyers, as here, to circumvent the due process prohibition through the simple expedient of inserting boilerplate "control" provisions in their retainer agreements.

The decision below conflicts with this Court's long-standing due process jurisprudence. The Court long has held that due process *categorically* forbids any extraneous influence that could compromise a government actor's ability to faithfully discharge his or her duties in the judicial system. Time and again, the Court has rejected the notion that proposed "procedural safeguards" can effectively cabin improper influence. A *per se* bar is needed, the Court has reasoned, to ensure not only the reality of fairness, but also its appearance.

This Court should grant review to resolve a frequently recurring constitutional question that is both central to the integrity of the judicial process and exceptionally important as government entities increasingly outsource their public enforcement powers to profit-motivated private lawyers.

STATEMENT

A. New Hampshire's Retention of Contingency-Fee Counsel to Investigate and Prosecute Claims Against Petitioner

In June 2015, the New Hampshire Attorney General retained Linda Singer and her private law firm to "represent [the State] in an investigation and litigation of potential claims regarding fraudulent marketing of opioid drugs." App. 62a. Under the retainer agreement, the private lawyers would receive 27 percent of any "net recovery" from a settlement or enforcement action against petitioner. App. 64a. The private lawyers would front all expenses for the investigation and any prosecution, and would recoup those expenses only in the event of a financial recovery. If the State chooses not to prosecute, or fails to

recover, the private lawyers would receive nothing. App. 63a-64a.

At the time the private lawyers agreed to "investigate" petitioner, they were already suing petitioner and other manufacturers of opioid medications on behalf of other government entities for the same alleged unlawful conduct.[1]

In August 2015, the New Hampshire AG's office issued investigative subpoenas to petitioner and other manufacturers seeking documents related to the marketing of prescription opioid medications. App. 3a. The AG's office thereafter disclosed the existence of its contingency-fee agreement with the private law firm, and petitioner notified the AG's office that both state and federal law prohibit such agreements. App. 3a-4a.

Soon after petitioner raised these concerns, the AG's office and the private firm executed a new contingency-fee agreement in an apparent effort to address legal deficiencies with the arrangement. *See* App. 17a. Relevant here, the terms of the second agreement are materially identical to the original, except that the second agreement was modified to now state that the law firm will "assist" rather than "represent" the AG's office in its investigation and any prosecution. App. 17a.

The agreement provides that the AG's office "will maintain control of the investigation and will make all key decisions, including whether and how to proceed with litigation, which claims to advance and what relief to seek." App. 72a. Despite that boilerplate

---

[1] *See City of Chicago v. Purdue Pharma L.P.*, No. 14-C-4361, 2015 WL 920719, at *1 (N.D. Ill. Mar. 2, 2015); First Am. Compl., *California v. Purdue Pharma L.P.*, No. 30-2014-00725287 (Cal. Super. Ct., filed June 9, 2014).

language, the agreement makes the private lawyers "responsible for providing all legal services, including all associated support services, required in investigating and/or litigating this matter to a final judgment." App. 71a.

The agreement further authorizes the private lawyers "to retain or associate experts, investigators, and technical and legal assistants, and such additional counsel" as needed to investigate the matter. App. 71a. At the investigation stage, the private lawyers' duties "include[], but [are] not limited to, (1) drafting and negotiating compliance with civil investigative demands; (2) reviewing relevant documents and other information; and (3) interviewing witnesses." App. 68a-69a.

Petitioner offered to produce documents responsive to the subpoena on the condition that those documents not be shared with the contingency-fee lawyers. *See* App. 3a. The State refused.

Instead, the State commenced an action to enforce the subpoenas in New Hampshire Superior Court. App. 3a. Petitioner opposed enforcement and sought a protective order on the ground that the investigation was tainted by the private lawyers' financial self-interest in its outcome. App. 20a. Petitioner asserted that the contingency-fee arrangement exceeded the AG's authority under state law and violated due process. App. 21a.

B. Decisions Below

1. On March 8, 2016, the New Hampshire Superior Court denied the State's petition to enforce the subpoenas and granted petitioner's request for a protective order. App. 16a. The court held that the contingency-fee arrangement exceeded the AG's

authority under state statutes restricting the hiring and payment of outside counsel, and also restricting the AG's diversion of any litigation recoveries by the State away from the state treasury. App. 38a, 41a.

The court, however, rejected petitioner's due process challenge. App. 60a. The court recognized that "where a government attorney has a personal interest, there is the potential that the interest will influence the attorney's public duty to serve the public interest and risk violating a defendant's due process rights." App. 54a. The court further recognized that these due process principles "implicate heightened neutrality requirements for private counsel who supplant government attorneys in civil cases" like this one. App. 57a. But the court concluded that due process "do[es] not categorically prohibit private contingency-fee counsel from assisting government attorneys who retain all of the discretion to make critical decisions." App. 57a.

The court found "no violation of due process" here because the contingency-fee agreement provides for government lawyers to "supervise[] outside counsel and retain[] control over all critical decisions such that the outside counsel's personal interest is neutralized." App. 58a. Thus, the court concluded, the contingency-fee lawyers' "involvement in the opioid investigation with possible civil prosecution on a contingency fee basis does not inherently violate [petitioner's] due process rights." App. 60a.

2. On June 30, 2017, the New Hampshire Supreme Court reversed and remanded for enforcement of the subpoenas. The court held that petitioner lacks standing to challenge the contingency-fee arrangement under the state statutes at issue. App. 9a. Relevant here, the State did not challenge, and the New

Hampshire Supreme Court did not question, the trial court's holding (App. 25a) that petitioner had standing to challenge the contingency-fee arrangement on due process grounds. Nevertheless, the state high court found no "reversible error" as to "the trial court's finding that because the contingency fee agreement provides for the OAG to retain ultimate control over the investigation, the agreement does not violate due process." App. 13a, 14a. The court rejected the argument that this Court's precedents "categorically bar[]" such arrangements, stating that those decisions "are not pertinent to the issues" here. App. 13a.[2]

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to confirm that the Due Process Clause categorically bars states from outsourcing the investigation and prosecution of public claims to private contingency-fee lawyers who have a substantial personal financial stake in the outcome.

The Court consistently has condemned any financial or other arrangement that might undermine a judge's impartiality, *see Tumey v. Ohio*, 273 U.S. 510, 523-24 (1927), or distort a criminal or civil prosecutor's duty to pursue justice rather than personal interests, *see Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (plurality op.); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980). The bar on such improper arrangements is "categorical," *Young*, 481 U.S. at 814—a "per se rule," *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 62 (1972) (White, J., dissenting).

[2] Since the New Hampshire Supreme Court's decision, the State has continued its investigation of petitioner using Linda Singer (who switched firms from Cohen Milstein to Motley Rice LLP) as its lead private counsel.

The decision below runs afoul of this bright-line rule. The New Hampshire Supreme Court adopted an exception that allows profit-motivated private lawyers to investigate and prosecute public claims on behalf of the State in exchange for a contingency fee, so long as the retainer agreement provides for a government lawyer to "control" the private lawyers. App. 12a-14a. But the patina of government "control" is no safeguard at all. The "control" exception ignores the reality that development of the evidence and legal theories is filtered through private lawyers who have a massive financial stake in the proceedings. The exception further ignores that courts lack the ability to ensure that the government truly is in control because the government and private lawyers interact behind the scenes within the cone of attorney-client privilege. And even if meaningful control were possible, it could not overcome the appearance of impropriety. The decision below thus turns a blind eye to the denial of due process and fundamental fairness.

This Court, moreover, has never recognized a "control" exception, and indeed has repeatedly rejected arguments that other "procedural safeguards" might minimize the risk that a government actor's personal interest could improperly influence proceedings. A categorical bar is needed, the Court has reasoned, because no safeguard can eliminate either the risk of improper influence or the appearance of impropriety.

This case highlights the due process violation. New Hampshire hired private lawyers to "investigate" possible claims against petitioner related to marketing of opioid medications, but the outcome of this "investigation" is preordained. The same private lawyers are *already* suing petitioner for the same alleged conduct, on behalf of other state and local governments, in

other jurisdictions. The private lawyers will not get paid for their work in New Hampshire unless their "investigation" leads to a settlement or enforcement action.

Worse, the arrangement upsets a public prosecutor's duty to consider whether a non-monetary remedy—like an injunction that could immediately redress public harm—is more fitting than money. The arrangement here incentivizes seeking the most damages possible because the more liability the private lawyers seek to impose, the more they stand to receive as a bounty. Particularly given the recent explosion of these arrangements—targeting not just pharmaceutical, but multiple other industries—this Court's review is urgently needed to preserve both the reality and appearance of fairness in the civil justice system.

I. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

This Court's recent decisions reflect that, even absent a circuit conflict, cases involving the fundamental fairness and integrity of judicial proceedings merit plenary review. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). The same is true here: State and local governments' use of private contingency-fee lawyers to investigate and prosecute public claims creates an appearance of impropriety that undermines public confidence in the civil justice system. The issue has never been more pressing, given the vast number of public investigations and enforcement actions now being led by profit-motivated plaintiffs' lawyers against a multitude of industries. Only this Court can conclusively resolve whether these arrangements comport with due process despite being widely perceived as unfair and illegitimate.

A. Government Use of Contingency-Fee Lawyers Undermines Public Confidence in the Integrity of the Civil Justice System

1. State and local governments' use of profit-motivated lawyers to pursue public claims has been a source of widespread controversy because it creates the impression that these enforcement actions are not generated by a fair-minded analysis of their legal and factual merit, but instead are conceived by private lawyers who pitch cases to elected officials, often after making sizable campaign donations.

"Trial lawyers love these deals. Even aside from the chance to rack up stupendous fees, they confer a mantle of legitimacy and state endorsement on lawsuit crusades whose merits might otherwise appear chancy." Walter Olson, *Tort Travesty*, Wall Street J., May 18, 2007. "Many of these cases are not brought on an independent judgment by analysis of the state attorney general as a law enforcement official. Instead, outside trial lawyers generate cases and then pitch the case to the state. . . . In this way, the lawyers' interest in profit supplants prosecutorial discretion in deciding when to enforce the law." *Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law: Hearing Before the Subcommittee on the Constitution of the House Comm. on the Judiciary* ("*Contingent Fees* Hearing"), 112th Cong. 2 (2012).

The arrangements fundamentally upset the usual balance of government enforcement discretion. "On occasion, the public interest may be furthered not by continued litigation, not by gaining damage awards, but either by cessation of litigation or accepting of a form of non-monetary relief." Martin H. Redish, *Private Contingent Fee Lawyers and Public Power:*

Constitutional and Political Implications, 18 Sup. Ct. Econ. Rev. 77, 103 (2010). Government enforcement actions, unlike private lawsuits, thus involve a balancing of interests that can only be conducted by a neutral government lawyer, not by a private lawyer with a substantial personal financial interest in both pursuing litigation and maximizing monetary recovery.

Moreover, "the plaintiffs firms know that by bringing suits in multiple states, they increase the likelihood that companies will settle rather than endure the expense of multiple trials. Both the lawyers and the state politicians get a windfall, albeit at the expense of a private business that may have done nothing wrong." Editorial, *The Pay-to-Sue Business: Write a Check, Get a No-bid Contract to Litigate for the State*, Wall Street J., Apr. 16, 2009. Just this month, private plaintiffs' lawyers held a national conference on opioid-related litigation with the aim of bringing as many cases as possible, in an effort to raise the stakes so high that companies will have no choice but to settle. Presenters suggested how to approach government officials to secure more cases: use "local connections," "lobbyists and consultants," and "cold call[ing]."[3]

2. These contingency-fee arrangements come at the expense of the public trust. They often result in allegations that government officials are doling out valuable contracts to private lawyers for improper reasons. The arrangements allow government officials "to institute a system of political patronage in which friends, former colleagues, and big ticket donors are awarded

[3] Harris Martin, National Opioid Litig. Conf., Presentation, Opioid Case Selection Criteria at 10, Oct. 3, 2017, https://harrismartin.com/media/uploads/conf_materials/CaseSelectionPresentation.pdf.

lucrative contracts in exchange for campaign contributions and other benefits." Lester Brickman, *Lawyer Barons: What Their Contingency Fees Really Cost America* 431 (Cambridge Univ. Press 2011).

The *New York Times* analyzed contingency-fee lawyers' emails and pitches to government officials and found a too-cozy relationship. "The boom in the contingency law business has been driven in part by former attorneys general like Ms. Singer who have capitalized on personal relationships with former colleagues that they have nurtured since leaving office, often at resort destination conferences where they pay to gain access." *Lawyers Create Big Paydays*, *supra*.

With these relationships have come numerous "pay to play" scandals. As the *Times* found, contingency-fee contracts often are awarded to private lawyers or firms who made substantial contributions to the campaigns of the elected officials awarding those contracts. "The donations often come in large chunks just before or after the firms sign contracts to represent the state." *Id.*; *accord* Margaret Little, *Pirates at the Parchment Gates: How State Attorneys General Violate the Constitution and Shower Billions on Trial Lawyers* 13-14, Competitive Enterprise Institute (Feb. 2017) (identifying numerous pay-to-play scandals).

Though the New Hampshire Attorney General is appointed, in the 43 states where attorneys general are elected, "[c]ontingency fee contracts have routinely been awarded to law firms that are among the largest contributors to the attorney general's election campaign." Richard A. Samp, *Growing Concern Over Contingency Fee Agreements Between Attorneys General and Private Attorneys*, Bloomberg BNA Insights, 2012 WL 4811135, at *3 (B.N.A. 2012). "The private sector attorneys who may take in hundreds of millions

as part of state lawsuit awards are often the same attorneys who are political supporters and campaign contributors of the attorneys general who hired them to file suit." Am. Tort Reform Ass'n et al., *Beyond Reproach? Fostering Integrity and Public Trust in the Offices of State Attorneys General* 3 (2010) (detailing "pay for play" scandals in at least five states).[4]

According to publicly available campaign finance data, contingency-fee lawyers pursuing opioid-related cases like this one have made substantial campaign donations to state attorneys general in multiple states that have brought such suits.

3. These contingency-fee arrangements create the unseemly appearance of giving private lawyers an undue windfall at taxpayers' expense. Lawyers have recovered *billions* in contingency fees through their partnerships with government officials, and those fees often reflected exorbitant hourly rates—as high as tens of thousands of dollars per hour. *See Pirates at the Parchment Gates*, *supra*, at 17.

As Judge William H. Pryor Jr. of the Eleventh Circuit, then Alabama Attorney General, explained:

> The use of contingent-fee contracts allows government lawyers to avoid the appropriation process; it creates the illusion that the lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.

William H. Pryor Jr., *Government "Regulation by Litigation" Must Be Terminated*, Legal Backgrounder, May 18, 2001, at 4.

4. For these and other reasons, arrangements like the one here have been condemned as antithetical to fundamental fairness. The Executive Branch in 2007 banned the federal government from paying lawyers a contingency fee to "protect[] American taxpayers." *See Protecting American Taxpayers from Payment of Contingency Fees*, Executive Order No. 13,433, 72 Fed. Reg. 28441 (May 16, 2007). This prohibition, which has remained in effect through Republican and Democratic administrations, reflects the "policy of the United States" that the fees of lawyers representing the government should never be "contingent upon the outcome of litigation." *Id.* § 1.

Former state attorneys general on both sides of the aisle have criticized government use of private contingency-fee lawyers. One warned that these contingency-fee arrangements "seriously threaten[] the perception of integrity and professionalism of the office," and "raise[] the question of whether attorneys are taking up these cases because they are important public matters, or they are being driven more by potential for private financial gain." *Lawyers Create Big Paydays*, *supra* (quoting Scott Harshbarger, former Massachusetts AG (Dem.)). Another said simply: "Farming out the police powers of the state to a private firm with a profit incentive is a very, very bad thing."

---

[4] Editorial, *The State Lawsuit Racket: A Case Study in the Politician-Trial Lawyer Partnership*, Wall Street J., Apr. 8, 2009 (reporting large campaign contributions by named partner of law firm pursuing a contingency-fee contract with Pennsylvania); *The Pay-to-Sue Business*, *supra* (similar in Mississippi, New Mexico, Louisiana, and Arkansas); Manhattan Institute, Center for Legal Policy, *Trial Lawyers Inc.: A Report on the Alliance Between State AGs and the Plaintiffs' Bar* 1-22 (2011) (similar).

Id. (quoting John Suthers, former Colorado AG (Rep.)).[5]

B. Government Use of Contingency-Fee Lawyers Has Exploded in Recent Years

Review is particularly warranted in light of the recent explosion of contingency-fee agreements with government entities. While the issue has been percolating since the tobacco litigation of the late 1990s, it has now reached a pinnacle. Plaintiffs' lawyers and government officials in numerous states are now applying the model to virtually every area of litigation against numerous industries. This is largely "thanks to the pioneering efforts of a Washington, D.C.-based law firm, Cohen Milstein, and firms like it, which have been aggressively courting a pool of potential new clients among the nation's attorneys general." Peter Roff, *Attorneys General Shouldn't Outsource Legal Work to Private Firms*, Washington Examiner (Aug. 24, 2016).

These contingency-fee arrangements also tend to spur unwarranted copycat litigation. "The use of

[5] *Accord Contingent Fees* Hearing 20 (former Florida AG (Rep.), stating: "[W]hen state attorneys general elect to retain contingency fee counsel to pursue litigation on behalf of the state, there is a substantial risk of, and opportunity for, 'pay-to-play' schemes and other types of abuse in which political contributions from plaintiff firms are traded for contingency fee contracts."); Bonnie Campbell, *Penny-wise, Pound Foolish: Hiring Contingency-fee Lawyers To Bring Public Lawsuits Only Looks Like Justice on the Cheap*, LegalTimes.com, at 4, Aug. 18, 2003 (former Iowa AG (Dem.), stating: "In Iowa, where I was attorney general, we resolved the issue quite simply. When it was necessary to retain private counsel, we paid an hourly fee. . . . When a state decides to litigate, there must be no doubt that prosecutorial neutrality prevails.").

contingency fee attorneys facilitates piling on because it permits public entities to join in suits brought and led by other public entities without having to make a substantial expenditure of public resources." U.S. Chamber of Commerce, Institute for Legal Reform, *Big Bucks and Local Lawyers: The Increasing Use of Contingency Fee Lawyers by Local Governments* 8 (Oct. 2016).

The multitude of recent suits against manufacturers of FDA-approved opioid medications are a prime example. After a few such public enforcement actions were filed by the contingency-fee lawyers here, dozens of materially identical suits were filed by the same and other contingency-fee lawyers on behalf of additional state and local governments. Since May 2017 alone, at least 93 state and local governments in 20 states have filed opioid-related actions against manufacturers such as petitioner, distributors, and others.

This is just the tip of the iceberg. Without exaggeration, the question presented here affects countless lawsuits targeting multiple industries and a practice employed by state and local governments throughout the country. It is unquestionably important and recurring.

II. INVESTIGATION AND PROSECUTION OF PUBLIC CLAIMS BY CONTINGENCY-FEE LAWYERS VIOLATES DUE PROCESS

A. This Court Has Categorically Barred Government Actors From Having a Personal Interest in a Public Proceeding

This Court, in a variety of contexts, has adopted and repeatedly applied a categorical bar on any arrangement that could taint the neutrality of a government actor in the justice system.

In the context of judges, the Court reversed convictions rendered by a mayor's court where the mayor's neutrality as a judge was jeopardized because he was paid a portion of the criminal fines he imposed, whereas he received no payment for acquittals. *Tumey*, 273 U.S. at 520-21. The Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523.

The Court applied a *per se* rule based on the mere risk that the mayor could be improperly influenced by his financial self-interest in convictions, and found it unnecessary to engage in a factual inquiry into whether that risk had materialized. *Id.* Thus, it was irrelevant that the mayor received only a modest sum from the fines he imposed—$12 in one case and roughly $100 per month—or that many mayors would not be influenced by such amounts. *Id.* at 532. Nor did it matter that the mayor's self-interest allegedly had no impact on the outcome of the case because "the evidence show[ed] clearly that the defendant was guilty." *Id.* at 535. As this Court explained, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Id.* at 532; *see also Caperton*, 556 U.S. at 878 (quoting same).

Similarly, the Court invalidated an arrangement where fines imposed by a mayor's court accounted for a substantial portion of municipal revenues, even

though the mayor-judge did not personally receive any payment. Again, the Court applied a "per se rule," *Ward*, 409 U.S. at 62 (White, J., dissenting), based on the "possible temptation" that "the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 60 (majority op.). The Court rejected any factual inquiry into whether the mayor had been improperly influenced. *Id.* at 60-61. Nor was the Court persuaded by a supposed safeguard against improper influence. The Court rejected the government's argument that "any unfairness at the trial level can be corrected on appeal and trial de novo . . . ." *Id.* at 61. As the Court explained, "[t]his 'procedural safeguard' does not guarantee a fair trial in the mayor's court" in the first instance, as due process requires. *Id.*

In the context of prosecutors, the Court likewise has held that any arrangement that could undermine a prosecutor's duty to pursue justice over personal interest is categorically barred. While prosecutors need not have the same degree of impartiality as judges, *see Marshall*, 446 U.S. at 248, they serve a unique function in the judicial process as "both an administrator of justice and an advocate," *United States v. Young*, 470 U.S. 1, 9 n.6 (1985) (citation and internal quotation marks omitted). A prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). A prosecutor's

interest is not that the government "shall win a case, but that justice shall be done." *Id.*[6]

The Court has thus "establish[ed] a categorical rule against the appointment of an interested prosecutor" to pursue a criminal contempt action on behalf of the government. *Young*, 481 U.S. at 814 (plurality op.). There, the defendant in a civil case was charged with criminal contempt, and the judge appointed the plaintiff's private lawyer as a special prosecutor to pursue the charge. *Id.* at 790-92. Finding the appointment improper, the Court stated that "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States" and are "appointed solely to pursue the public interest in vindication of the court's authority." *Id.* at 804. Thus, they "should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* Because the plaintiff's lawyer "may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client," the arrangement was improper. *Id.* at 805.

The Court rejected an argument that oversight by the judge in a contempt proceeding could safeguard against self-interested conduct by a private prosecutor. *Id.* at 807. Inevitably, the Court explained, many critical decisions in a prosecution will be "made outside the supervision of the court." *Id.* The error in

[6] *See also, e.g.*, *Connick v. Thompson*, 563 U.S. 51, 71 (2011) ("The role of a prosecutor is to see that justice is done."); *Gannett Co. v. DePasquale*, 443 U.S. 368, 384 n.12 (1979) ("The responsibility of the prosecutor as a representative of the public . . . requires him to be sensitive to the due process rights of a defendant to a fair trial."); *Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963) ("[T]he [g]overnment wins its point when justice is done in its courts." (internal quotation marks omitted)).

appointing a self-interested prosecutor is "so fundamental and pervasive that [it] require[s] reversal without regard to the facts or circumstances of the particular case." *Id.* at 809-10 (citation and internal quotation marks omitted).

These principles apply to civil prosecutors as well. In *Marshall v. Jerrico, Inc.*, the Court confirmed that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." 446 U.S. at 242. The Court observed that "[a] scheme injecting a personal interest, financial or otherwise, into the [civil] enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50. The Court did not find a constitutional violation in *Marshall*, however, because "[n]o governmental official stands to profit economically from vigorous enforcement" of the statute at issue there. *Id.* at 250.

While *Marshall* recognized that "the standards of neutrality for prosecutors are not necessarily as stringent as those applicable to" judges, the Court later clarified that this "difference in treatment is relevant to *whether* a conflict is found, . . . not to its gravity once identified." *Young*, 481 U.S. at 810-11. In other words, once a conflict is established, the standard is the same and a categorical bar applies.

Here, the private contingency-fee lawyers representing the State of New Hampshire indisputably have a financial self-interest that conflicts with every prosecutor's duty to seek justice on behalf of the public. The New Hampshire Supreme Court's decision allowing the contingency-fee arrangement thus runs afoul of the *per se* rule established by this Court's jurisprudence. The court below adopted a case-by-case

approach examining whether a particular safeguard—"control" by a government lawyer—adequately protects against improper influence. But this Court has repeatedly rejected arguments that various "procedural safeguards" might cure the taint or appearance of impropriety from a self-interested government actor's participation in judicial proceedings. The court below thus erred in finding this Court's decisions "not pertinent to the issues." App. 13a.

B. The Court Below's "Control" Exception Does Not Preserve the Reality or Appearance of Fairness

The categorical bar on any arrangement that gives a government actor a personal interest in a case is necessary to "preserve[] both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall*, 446 U.S. at 242 (citation and internal quotation marks omitted). The contingency-fee arrangement here eviscerates both the "appearance and reality of fairness," *id.*, and a state lawyer's "control" cannot restore either.

1. "Control" Does Not Restore the Reality of Fairness

The "control" exception indulges in a fiction that a state's use of self-interested private prosecutors is fair so long as they are supervised by other lawyers who are not tainted by improper financial incentives. No one could reasonably dispute, however, that an assistant attorney general would be prohibited from having a financial stake in a case even if he or she was under the control of a neutral supervisor from the same office. This common sense principle applies equally to private lawyers with a financial stake in a

case. Provisions in a retainer agreement asserting "control" cannot cure the structural problems inherent in these arrangements.

First, the "control" theory does nothing to counter the overwhelming financial incentive that contingency fees give private lawyers to find ways, directly or indirectly, to steer the litigation. Contingency-fee prosecutors have incentives that, under any "realistic appraisal of psychological tendencies and human weakness," *Marshall*, 446 U.S. at 252 (citation and internal quotation marks omitted), create a structural conflict between the pursuit of justice and their personal interest in getting paid. Under the contingency-fee agreement here, the private lawyers are entitled to 27 percent of the net recovery if they obtain monetary relief through a judgment or settlement, but nothing otherwise. App. 70a. The private lawyers also agreed to front all expenses for the investigation and prosecution, an investment they would lose in full if the state declines to bring a case or seeks only non-monetary remedies. App. 69a-70a.

In the past, law firms representing states have been awarded contingency fees at "an effective rate of over $10,000 per hour—up to $92,000 in Texas—with over $30 billion going to private attorneys overall." Manhattan Institute, Center for Legal Policy, *Trial Lawyers Inc.: A Report on the Alliance Between State AGs and the Plaintiffs' Bar* 4 (2011).

The potential for such windfalls inherently skews decision-making and thus denies fundamental fairness at every stage of a case. For example, private lawyers "may be tempted to bring a tenuously supported prosecution if such a course promises [personal] financial . . . rewards." *Young*, 481 U.S. at 805. Beyond the initial decision to sue, "private attorneys

who operate on contingent-fee agreements have a financial incentive to maximize money recoveries, an incentive that would be congruent with a client's interests in private actions but is frequently in tension with a State's public interest role." *Contingent Fees* Hearing 48 (testimony of James R. Copland, Director, Center for Legal Policy, Manhattan Inst. for Policy Research).

Unlike a contingency-fee lawyer, "the government's interest and the public good are not necessarily advanced by inflicting the maximum penalty on defendants." Howard M. Erichson, *Coattail Class Actions: Reflections on* Microsoft, *Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 36 (2000); *see also* Andrew Staub, *Pennsylvania AG's Use of Outside Law Firm Draws Scrutiny*, Watchdog.org (Sept. 2, 2015) ("While other states reached settlements with the company, Nevada could not, as the private law firm was holding out for more money, according to the report"; Nevada then was sanctioned for "fail[ing] to provide evidence").

Second, the decision below ignores the inherent limitations on a government lawyer's ability to "control" self-interested private prosecutors. "One must question . . . how a government that justifies the agreement on the grounds that it lacks sufficient resources to provide enforcement as a basic matter can effectively monitor the special counsel agreement at a level sufficient to curb agent opportunism." Julie Steiner, *Should "Substitute" Private Attorneys General Enforce Public Environmental Actions?*, 51 Santa Clara L. Rev. 853, 870 (2011).

"[A]s long as contingency fee lawyers lead the litigation, these lawyers will invariably control the development and presentation of the 'facts' to the [government lawyers] and their staff." David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of* Parens Patriae *Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 329 (2001). "Thus, even when the [government lawyers] are interested in securing the public interest, rather than focusing on an exclusive goal of obtaining the most amount of money, and when they devote resources to active supervision of the litigation, the [government lawyers] and their staff may lack the necessary information to shape litigation outcomes." *Id.* "It strains credulity to believe that contingency fee counsel, having invested sizable funds, time, and resources, would not exert pressure to extract maximum financial recovery." Little, *supra*, at 14. And it is unrealistic to think that an elected official could exercise effective "control" over a substantial campaign donor awarded a contingency-fee contract.

Third, the "control" theory ignores courts' inability to determine whether the government is actually in control. "[A]s a practical matter, it is impossible to see how a reviewing court could assure itself, in the individual case, that such control is in fact being exercised." Redish, *supra*, at 106. This is especially true because "the communications between the state attorneys general and the contingency fee lawyers typically are protected by attorney-client privilege and the work product doctrine." Douglas F. McMeyer et al., *Contingency Fee Plaintiffs' Counsel and the Public Good?*, In-House Defense Quarterly, at 4 (Winter 2011). Courts are thus left to rely on boilerplate language in retainer agreements purporting to assign "control." Here, for instance, nothing in the relationship really changed when the private lawyers modified their

contingency-fee agreement from stating that they "represent" the State to stating that they will merely "assist." *See* App. 68a. That is scant better than no "safeguard" at all.

In sum, the control theory is a convenient fiction that defies any real-world understanding of the incentives and opportunities for private contingency-fee prosecutors to pursue their financial self-interest rather than justice on behalf of the public. As the Court recognized in *Young*, "[a]ppointment of an interested prosecutor is . . . an error whose effects are pervasive." 481 U.S. at 812. Once a court determines that an improper influence exists, the court should not engage in a fruitless enterprise of trying to discern whether it actually polluted a case:

> Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record.

Id. at 812-13. A prosecutor's "considerable discretion" involves many "decisions, critical to the conduct of a prosecution, [that] are all made outside the supervision of the court." *Id.* at 807.

2. "Control" Does Not Eliminate the Appearance of Impropriety

Even indulging in the fiction that government counsel's "control" could neutralize the contingency-fee prosecutors' structural conflict of interest, the

"appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system." *Young*, 481 U.S. at 811. Thus, in *Young*, the Court adopted a prophylactic rule, finding it irrelevant whether such an appointment caused actual harm, for "what is at stake is the public perception of the integrity of our criminal justice system." *Id.*; *see also United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961) (adopting a "broad proscription" against conflicts of interest by government actors based on "a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government"). Contingency-fee prosecutors likewise diminish the public's faith in the fairness of civil prosecutions.

As noted above, arrangements like the one here create the appearance that cases are being pursued—and contingency-fee contracts assigned—not based on the merits of a given case, but as a matter of political patronage that can result in massive windfalls to campaign donors at taxpayer expense. No amount of "control," even if it were possible, could offset the appearance of impropriety.

C. The Court Below Wrongly Cast Aside This Court's Due Process Precedents

The specific question of whether a civil prosecutor's pecuniary interest in a case violates due process has been a recurring issue in this Court. *See Marshall*, 446 U.S. at 239; *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 620 n.12 (1993). In *Marshall*, however, the Court had no occasion to calibrate "with precision what

limits there may be on a financial or personal interest of one who performs a prosecutorial function," because the potential interest of the civil prosecutor in that case was "exceptionally remote." 446 U.S. at 250. In *Concrete Pipe*, the Court again declined to precisely define those limits because the issue was not properly presented. 508 U.S. at 620 n.12.

Lacking guidance from this Court, lower courts have correctly recognized that government contingency-fee arrangements implicate due process, *see* App. 12a, 13a, but have erroneously brushed aside the Court's decisions in adopting a "control" exception.[7] No lower court has confronted the "control" theory's fatal flaws set forth above. Instead, decisions adopting the theory all derive from *City & County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1135-36 (N.D. Cal. 1997), which held, without citation, that a government lawyer's control is an exception to the due process prohibition. Subsequent decisions simply relied on *Philip Morris* and then each other.[8]

[7] *See Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp. 2d 733, 739 (E.D. Ky. 2013) (defendant in public enforcement action "has a due process right to a neutral prosecution, free from any financial arrangement that would tempt the government attorney or his outside counsel to tip the scale" (citation and internal quotation marks omitted)).

[8] *See Cty. of Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842, 852-53 (Cal. Ct. App. 2008) (citing *Philip Morris*); *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 475-76 (R.I. 2008) (citing the California Court of Appeal's decision in *Santa Clara*); *Cty. of Santa Clara v. Superior Court*, 235 P.3d 21, 31 n.7 (Cal. 2010) (citing the Rhode Island Supreme Court's decision in *Lead Indus.*); *Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp. 2d 733, 739-40 (E.D. Ky. 2013) (citing *Philip Morris*, *Santa Clara*, *Lead Indus.*); *West Virginia ex rel. Discovery Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 639 (W. Va. 2013) (quoting verbatim several pages from *Santa Clara*); *Int'l Paper Co. v. Harris Cty.*, 445 S.W.3d 379, 390-94 (Tex. App. 2013) (citing *Santa Clara*, *Lead Indus.*, *Merck*, *Nibert*); *City of Chicago v. Purdue Pharma L.P.*, No. 14-C-4361, 2015 WL 920719, at *4-*5 (N.D. Ill. Mar. 2, 2015) (citing *Santa Clara*, *Lead Indus.*, *Merck*); *Am. Bankers Mgmt. Co. v. Heryford*, 190 F. Supp. 3d 947, 956-58 (E.D. Cal. 2016), *appeal pending* No. 16-16103 (9th Cir.) (following *Santa Clara*).

The trial court below relied on this same line of cases, App. 53a-60a, and the state high court upheld this approach, finding this Court's decisions "not pertinent to the issues" in this case, App. 13a. Due process demands a more searching examination. This Court should intervene now.

* * *

Abuse of FDA-approved prescription opioid medications is unquestionably a serious issue that merits public response. But turning over the matter to profit-motivated plaintiffs' lawyers is not the answer. "The function of the prosecutor . . . is not to tack as many skins of victims as possible to the wall," but to "vindicate the right of people as expressed in the laws." *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting). This Court should grant review to restore the reality and appearance of fairness that this Court's jurisprudence demands, and that is necessary to ensure the public's confidence in the civil justice system. Only this Court can resolve this important question affecting countless government investigations and lawsuits across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILBUR A. GLAHN, III
MICHAEL A. DELANEY
MCLANE MIDDLETON, P.A.
900 Elm Street
Manchester, NH 03101
(603) 625-6464

LISA S. BLATT
Counsel of Record
R. STANTON JONES
ANTHONY J. FRANZE
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave, NW
Washington, DC 20001
(202) 942-5000
Lisa.Blatt@apks.com

Counsel for Petitioner

October 27, 2017

APPENDIX