No. 20-2864

In the United States Court of Appeals
FOR THE THIRD CIRCUIT

IN RE: 3M COMPANY; INGE G. THULIN;
NICHOLAS C. GANGESTAD; MICHAEL F. ROMAN,

Petitioners

On Petition for a Writ of Mandamus
to the United States District Court for the District of New Jersey

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

STEVEN P. LEHOTSKY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-3000
michael.kenneally@morganlewis.com

Counsel for the Chamber of Commerce of the United States of America

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community, including cases involving federal securities laws and venue.

Many of the Chamber's members are companies subject to federal securities laws. As a result, the issues presented in this case significantly affect the interests of the Chamber and its members. By permitting this litigation to proceed in a forum that is highly inconvenient for Defendants based on improper considerations, the district court's decision gives the

[1] No counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* FED. R. APP. P. 29(c)(5). All parties have consented to the filing of this brief.

class-action bar another tool to forum shop and add to the costs of defending securities litigation. In doing so, that decision creates the very potential for abuse that the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, was enacted to avoid. Because forum-transfer disputes are common in trial courts but virtually nonexistent in courts of appeals, it is vital that the Court seize this opportunity to correct the clear legal errors that produced the decision below before those errors resurface in other decisions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court denied Defendants' motion to transfer on the flimsiest of grounds. First, the court dismissed the interests of the company and individuals accused of violating the securities laws, who have strong and legitimate reasons to prefer to litigate in Minnesota, the state in which the alleged acts at the heart of this lawsuit occurred. Instead, the court deferred to plaintiff preferences even though the Lead Plaintiffs who are actually conducting this case did not pick the New Jersey forum, have no relevant New Jersey ties, and lack any legitimate reason to insist that this Minnesota-centered securities litigation remain there.

The district court compounded this first error by conflating the purported securities violations—Defendants' alleged misstatements to investors about 3M's potential liability in connection with its prior production and disposal (all outside New Jersey, according to the operative complaint) of certain chemical products—with the environmental harm allegedly traceable to such products. So even though this case revolves around statements made almost exclusively from Minnesota to investors everywhere, the district court considered it to be more of a "local controvers[y]" for New Jersey. But it is concerning, to say the least, that the district court regards this *securities* litigation as implicating New Jersey's interest in redressing "*environmental* wrongdoing." App6 (emphasis added). Certainly that belief provides no sound basis for denying Defendants' request to transfer this action.

On the contrary, as Defendants' petition explains, the overwhelming weight of case law holds that securities actions normally belong in the forum where the defendants are based and where they made the alleged misstatements to investors. And courts of appeals have issued writs of mandamus for refusals to transfer that were far more defensible than the refusal below. The same result should follow here: The Court

should grant the petition and order that the case be transferred to the District of Minnesota.

ARGUMENT

I. Erroneous transfer denials inflict irreparable harm that supports mandamus relief

At the outset, it is worth stressing the irreparable harm that erroneous transfer rulings inflict, which this Court and others have long recognized as grounds for mandamus relief. Unlike the mine run of trial court errors, forcing parties to litigate in an inconvenient forum cannot feasibly be cured on appeal from final judgment. "[T]he harm—inconvenience to witnesses, parties and other—will already have been done by the time the case is tried and appealed, and the prejudice suffered cannot be put back in the bottle." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) (en banc). Courts therefore recognize that "[t]he usual post-judgment appeal process is not an adequate remedy for an improper failure to transfer" and that the writ of mandamus is therefore available. *In re Apple, Inc.*, 602 F.3d 909, 912 (8th Cir. 2010) (per curiam).

Importantly, mandamus review of transfer rulings also serves a broader function. Since ordinary appeals essentially never present

forum-transfer issues, mandamus is the only avenue for the Court to articulate the governing legal standards and ensure consistent results. *In re Volkswagen*, 545 F.3d at 319 ("Because venue transfer decisions are rarely reviewed, the district courts have developed their own tests, and they have applied these tests with too little regard for consistency of outcomes.").

Based on considerations like these, this Court has held that in the context of 28 U.S.C. § 1404(a) transfer orders, the traditional three-prong test for mandamus relief collapses into a single question: "Was the District Court's transfer order a clear and indisputable 'abuse of discretion or . . . error of law' for which mandamus relief is appropriate?" *In re Howmedica Osteonics Corp.*, 867 F.3d 390, 401 (3d Cir. 2017). The answer here is yes, for the reasons discussed below and in Defendants' petition.

II. The district court improperly elevated plaintiff preferences over Defendants' demonstrated interests

The district court's conclusion that "the private factors weigh against transfer" rests entirely on the court's deference to plaintiff preferences. App6. The private-interest factors that the court found to count against transfer were plaintiff preference (factor one), the convenience of witnesses (factor four), and the convenience of the parties (factor five).

App4-5. But since it is more convenient for Defendants and their likely witnesses to litigate in Minnesota and the court identified no relevant witnesses who would be unavailable in New Jersey,[2] all three conclusions simply reduce to giving plaintiff preferences controlling weight. The court otherwise acknowledged that Defendants' preference (factor two) supported transfer. App5. And it did not deny that nearly every one of the alleged misstatements (30 out of 31) occurred in Minnesota, although it refused to recognize that this strongly supported the conclusion that the case arose in Minnesota (factor three) because the thirty-first statement occurred in New York—which still is obviously not New Jersey. *Id.* The court also found it "neutral" that there are relevant books and records in Minnesota but no relevant books and records in New Jersey. App5-6.

This analysis exhibits the sort of one-sidedness that has led other courts of appeals to issue writs of mandamus to correct plainly erroneous transfer denials. In *In re Apple*, for instance, the Eighth Circuit directed

[2] The district court did note potential New Jersey witnesses to PFAS levels, App6, but as explained in Section III below, it was wrong for the court to conflate alleged environmental harm with alleged securities fraud.

transfer from Arkansas to California of a business dispute between manufacturers of digital music players. 602 F.3d at 911. The court of appeals concluded that the district court had deferred excessively to the preference of the plaintiff, which did not even reside in the forum. *Id.* at 912-13. Indeed, there was "*no relevant connection* . . . between [plaintiff] Luxpro, [defendant] Apple, potential witnesses, or the dispute and Western Arkansas." *Id.* at 913 (emphasis added). "The only connection between [the] dispute and Western Arkansas [was] that Luxpro chose to file there and retained local counsel." *Id.* And that connection was insufficient. *Id.*

But not even that insufficient connection is present here. The three court-appointed Lead Plaintiffs who are actually litigating this case (the State of Rhode Island, Office of the Rhode Island Treasurer on behalf of the Employees' Retirement System of the State of Rhode Island, the Iron Workers Local 580 Joint Funds, and Flossbach von Storch Invest S.A.) did not choose where this suit would begin. The original named plaintiff (Heavy & General Laborers' Locals 472 & 172 Welfare Fund) made that choice. *See* App17. And where, as here, a named plaintiff has been supplanted by lead plaintiffs in accordance with the PSLRA's lead-plaintiff

appointment process, the named plaintiff's interests and forum preferences no longer have any relevance.

As this Court has repeatedly explained, "[t]he PSLRA sets forth a detailed procedure for class members to apply to become lead plaintiffs." *In re Cendant Corp. Litig.* (*Cendant I*), 260 F.3d 183, 196 (3d Cir. 2001). After a putative securities class action is filed, the first named plaintiff publishes notice advising putative class members that "any member of the purported class may move the court to serve as lead plaintiff of the purported class." 15 U.S.C. § 78u–4(a)(3)(A)(i)(II). The district court then considers all prospective lead plaintiffs' motions, and "appoint[s] as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members." *Id.* § 78u–4(a)(3)(B)(i). Congress's goal in creating these detailed procedures was "to transfer control of securities class actions from the attorneys to the class members (through a properly selected lead plaintiff)." *Cendant I*, 260 F.3d at 197. The procedures accordingly confirm "that Congress meant to give the lead plaintiff significant responsibility in controlling the litigation." *In re Cendant Corp. Sec. Litig.* (*Cendant III*), 404 F.3d 173, 192 (3d Cir. 2005).

For this reason, the only plaintiffs whose interests could matter here are the three Lead Plaintiffs. Placing any weight on the forum preferences of the named plaintiff, which not only *isn't* a lead plaintiff but also *didn't move to become* a lead plaintiff conflicts with the PSLRA's framework. By its design, "only one 'entity' is entitled to speak for the class: the lead plaintiff." *In re Cendant Corp. Litig.* (*Cendant II*), 264 F.3d 201, 223 n.3 (3d Cir. 2001) (emphasis omitted).

And the three Lead Plaintiffs have no ostensible connection to New Jersey. They did not even file suit there. So their preferences merit even *less* weight than those of the plaintiff in *In re Apple*. For while that plaintiff was likewise trying to litigate in a forum in which it did not reside, it at least had chosen the forum originally. *See In re Apple*, 602 F.3d at 913. The three lead plaintiffs' lone connection to the choice over where this lawsuit would begin is that its New Jersey–based attorney also represented the original named plaintiff when it commenced suit in that forum. *See* App17, App137. But counsel's preferences, of course, are irrelevant—in the PSLRA context especially. *See In re Apple*, 602 F.3d at 913 (attaching no significance to the fact that the plaintiff hired "local counsel"); *cf. Cendant I*, 260 F.3d at 197 (recounting how the PSLRA's lead-

plaintiff procedures were "intended to permit the plaintiff to choose counsel rather than have counsel choose the plaintiff" (citation omitted)).

But even assuming that Lead Plaintiffs had originally chosen the forum, their choice still would be entitled to no real weight. Again, much as in *In re Apple*, none of the three Lead Plaintiffs is "a resident of the forum," making the initial forum choice "entitled to relatively little deference." 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3848 (4th ed. 2020). And on top of that, Lead Plaintiffs are seeking to conduct a "representative" action on behalf of a nationwide class, and for this reason as well its "venue preference is weakened." *Id.* As Defendants detail (at 20-21), courts widely recognize the impropriety of attaching significant weight to a plaintiff's choice in circumstances like these, and the district court's contrary approach was clear error.

The district court also clearly erred in suggesting that the broad venue provision in the Securities Exchange Act of 1934 supports granting deference to plaintiff preferences. *See* App4-5. The en banc Fifth Circuit rejected a similar argument when it issued a writ of mandamus requiring transfer in *In re Volkswagen*: A broad venue statute does not justify departing from the usual transfer analysis. After all, Congress "tempered

the effects of [its] general venue statute[s] by enacting the venue transfer statute, 28 U.S.C. § 1404," whose "underlying premise . . . is that courts should prevent plaintiffs from abusing their privilege . . . by subjecting defendants to venues that are inconvenient." *In re Volkswagen*, 545 F.3d at 313. By its own terms, Section 1404 applies in "*any* civil action," 28 U.S.C. § 1404(a) (emphasis added), and there is no justification for applying it with diminished force in this setting.

On the contrary, courts sensibly recognize that defendants' convenience should generally receive the most weight in securities litigation because of how such litigation proceeds in practice. In securities litigation, it is typical for "plaintiffs' allegations [to] focus on defendants' conduct" rather than "plaintiffs' behavior." *In re Yahoo! Inc.*, No. 07-cv-3125, 2008 WL 707405, at *3 (C.D. Cal. Mar. 10, 2008). That is why—other than the decision below—"courts in this Circuit have held that deference to a plaintiff's choice of forum is lessened considerably in securities fraud class actions." *Gallagher v. Ocular Therapeutix, Inc.*, No. 17-cv-5011, 2017 WL 4882488, at *4 (D.N.J. Oct. 27, 2017); *see also, e.g.*, *In re Amkor Tech., Inc. Sec. Litig.*, No. 06-cv-298, 2006 WL 3857488, at *4 (E.D. Pa. Dec. 28, 2006); *Job Haines Home for the Aged v. Young*, 936 F. Supp. 223,

231 (D.N.J. 1996). The district court inverted that analysis by insisting that "3M's size, resources and ongoing [environmental] litigation" in New Jersey made it "not overly burdensome" for 3M to litigate this securities case there, App5—all while ignoring the interests of the individual Defendants as well as the demonstrated ability of institutional-investor Lead Plaintiffs to litigate securities actions around the country. *See* Pet. 9-10.

In inverting the usual analysis in securities cases, the district court opened the door wide to forum shopping. Its decision allows lead plaintiffs to simply piggyback on a forum preference expressed by a named plaintiff no longer at the helm. Such a strategy enables plaintiffs to avoid a forum that is plainly more convenient for the other side for no legitimate reason at all. *See In re Apple*, 602 F.3d at 913 (observing that when the plaintiff has no substantial ties to the forum, "the risk that the plaintiff chose the forum to take advantage of favorable law or to harass the defendant increases").[3]

[3] Here, these concerns are underscored by the curious procedural history of this case. Lead Plaintiffs' counsel, while representing the named plaintiff, originally marked this putative securities class action as "related" to an individual, environmental tort lawsuit already pending before Judge Cecchi. App17. As Defendants note (at 9), there were

That result is inimical to the federal policies embodied in the PSLRA and other securities reform statutes. As the Supreme Court has explained, Congress enacted those reforms out of recognition that "[p]rivate securities fraud actions . . . can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Among other things, Congress was concerned about "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers," all of which can be leveraged into "extortionate settlements." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

This Court should issue the writ to prevent inconvenient forums from joining that list. A fair balancing of the relevant private interests unmistakably shows that this case, like most every securities lawsuit, belongs in the district where the corporate and individual defendants were located and where the alleged misstatements occurred. The district

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two other environmental cases pending in the district court before other judges. But the named plaintiff or its counsel apparently preferred to mark the case as "related" only to the case pending before Judge Cecchi.

court's contrary conclusion contravenes the overwhelming weight of authority and was a clear abuse of discretion.

III. The district court improperly conflated the alleged investor injury here with alleged environmental injury

The district court's assessment of the public interests in this litigation may be even more troubling. The district court found most of the public-interest factors to be neutral, App6-7—despite the fact that caseloads in the District of Minnesota are substantially lighter than caseloads in the District of New Jersey, which currently has six vacancies, all of which are "judicial emergencies."[4]

The district court rested its public-interest analysis on "[t]he factor that relates to deciding local controversies at home." App6. The court thought that this factor "points strongly towards keeping the case

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[4] *See Judicial Emergencies*, U.S. COURTS (Sept. 22, 2020), https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies (showing that the District of New Jersey has 6, or roughly 15%, of the country's 39 judicial emergencies); Joe Atmonavage, *One Federal Court Judge in N.J. Says She Is Handling Thousands of Cases as 'Judicial Crisis' Worsens*, NJ.COM (June 26, 2019), https://www.nj.com/news/2019/06/one-federal-court-judge-in-nj-says-she-is-handling-thousands-of-cases-as-judicial-crisis-worsens.html ("Whenever U.S. Chief Judge Freda L. Wolfson speaks with one of the other federal judges in New Jersey, she says the same issue keeps coming up. What can be done about the ever growing caseload, and will the judges ever get relief."); Pet. 30-31.

because New Jersey is alleged to be greatly affected by 3M's PFAS and the putative class is likely to contain New Jersey residents." *Id.* Of course, the second of these points—*i.e.*, the fact that the putative nationwide class presumably includes some New Jersey residents—hardly shows this controversy to be a "local" one or that this is "home" for the dispute. Plaintiffs' operative complaint alleges that there are over 75,000 3M shareholders who (unsurprisingly) are "geographically dispersed." App125 (¶ 237). Instead, the critical consideration for the district court was the environmental harm allegedly caused in New Jersey.

This action is part of a growing trend of securities fraud cases known as "event-driven litigation." These cases essentially seek to capitalize on some other type of high-profile problem that causes a large drop in the company's stock. Columbia Law School Professor John Coffee explains:

> Once, securities class actions were largely about financial disclosures (*e.g.*, earnings, revenues, liabilities, etc.). In this world, the biggest disaster was an accounting restatement. Now, the biggest disaster may be a literal disaster: an airplane crash, a major fire, or a medical calamity that is attributed to your product. . . . The expectation of major losses from the disaster sends the issuer's stock price down, which in turn triggers securities litigation that essentially alleges that the issuer

> failed to disclose its potential vulnerability to such a disaster.

John C. Coffee, Jr., *The Changing Character of Securities Litigation in 2019: Why It's Time to Draw Some Distinctions*, THE CLS BLUE SKY BLOG (Jan. 22, 2019), https://clsbluesky.law.columbia.edu/2019/01/22/the-changing-character-of-securities-litigation-in-2019-why-its-time-to-draw-some-distinctions/.

The Chamber's own Institute for Legal Reform has argued that these lawsuits illicitly try to transform virtually any high-dollar corporate problem into an instance of securities fraud. *See, e.g.*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, CONTAINING THE CONTAGION: PROPOSALS TO REFORM THE BROKEN SECURITIES CLASS ACTION SYSTEM 9-10 (February 2019), https://www.instituteforlegalreform.com/uploads/sites/1/Securites-Class-Action-System-Reform-Proposals.pdf (discussing commentators' views). But "just because something bad happened does not mean that the company or its directors and officers committed fraud." *Id.* (citation omitted). The Institute predicts that "[t]he COVID-19 pandemic is likely to spawn" a new spate of event-driven securities cases. *See* U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, ILR BRIEFLY, COVID-19: FEDERAL LIABILITY PROBLEMS AND SOLUTIONS 9 (May 2020),

https://www.instituteforlegalreform.com/uploads/sites/1/ILR_Briefly_COVID19_Series_Federal_ProblemsSolutions_May2020.pdf.

The district court's ruling here takes event-driven litigation to a new level. By using alleged environmental harm in New Jersey as the underlying "event" and basis for retaining the securities lawsuit, the district court amplified plaintiffs' ability to forum shop in such cases. After all, the events underlying event-driven securities litigation usually have a wide geographic scope. Lead Plaintiffs themselves allege environmental harm throughout the country. And more generally, whenever the underlying event concerns a widely sold product, plaintiffs will always be able to assert that the forum has a general interest in redressing alleged harm related to that product. As the Fifth Circuit has explained, such an approach must be rejected. *In re Volkswagen*, 545 F.3d at 318 ("[T]he district court's provided rationale—that the citizens of Marshall have an interest in this product liability case because the product is available in Marshall[—]could apply virtually to any judicial district or division in the United States[.]").

Here, moreover, the connection between Lead Plaintiffs' claims and the relevant "product" is particularly attenuated. The district court

concluded that "New Jersey has an interest in the alleged financial and *environmental wrongdoing* at issue in this matter." App6 (emphasis added). But it should be obvious that Exchange Act claims provide no legitimate avenue for redressing supposed environmental wrongdoing. And the mere suggestion to the contrary—that 3M's alleged responsibility for environmental harms somehow bears on Defendants' asserted liability for misstatements to investors—is highly prejudicial to Defendants. Indeed, the prejudice is apparent on the face of the district court's ruling, which repeated Lead Plaintiffs' inflammatory assertion that "3M's poisoning of communities, including many in New Jersey, is at the heart of this case." App6 (citation omitted).

Defendants are therefore right to contend (at 16) that it was "clear legal error" for the district court to connect these securities claims to alleged environmental wrongdoing. Such a mistake provides no justification for denying transfer. And when the court making that mistake has also given decisive weight to the most tenuous of plaintiff interests, the court has "clearly abused its discretion and reached a patently erroneous result" that justifies correction through this Court's supervisory powers.

In re Volkswagen, 545 F.3d at 319 (citing *United States v. Bertoli*, 994 F.2d 1002, 1014 (3d Cir. 1993)).

CONCLUSION

The Court should grant the petition for a writ of mandamus.

Dated: September 23, 2020

Respectfully submitted,

/s/ Michael E. Kenneally

MICHAEL E. KENNEALLY
DC Bar No. 1025767
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-3000
michael.kenneally@morganlewis.com

STEVEN P. LEHOTSKY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

COMBINED CERTIFICATES OF COMPLIANCE

In accordance with Local Appellate Rules 28.3(d) and 46.1(e), I certify that I am a member in good standing of the bar of this Court.

In accordance with Local Appellate Rule 31.1(c), I certify that the texts of the electronic brief and paper copies are identical and that McAfee Endpoint Security 10.7 was run on the file and did not detect a virus.

In accordance with Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g)(1), I certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 21(d)(1) and 29(a)(5) because it contains 3,669 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the word count of Microsoft Word 2016. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in Century Schoolbook 14-point font, a proportionally spaced typeface.

Dated: September 23, 2020

/s/ Michael E. Kenneally
MICHAEL E. KENNEALLY

CERTIFICATE OF SERVICE

I hereby certify that counsel for all real parties in interest are registered as Filing Users of the Court's CM/ECF system and that a copy of this brief will be served electronically on this date by operation of the Court's CM/ECF system. In addition, service will be made by third-party commercial carrier for delivery within 3 days on the nominal party:

The Honorable Claire C. Cecchi
United States District Judge
U.S. District Court for the District of New Jersey
Martin Luther King Building & U.S. Courthouse
50 Walnut Street Room 4015
Newark, NJ 07101
973-645-3730

Dated: September 23, 2020

/s/ Michael E. Kenneally
MICHAEL E. KENNEALLY