Case No. 21-1121

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

ON PETITION FOR WRIT OF MANDAMUS

PETITION FOR REHEARING EN BANC OR REHEARING

HECTOR BALDERAS
Attorney General

P. Cholla Khoury
William G. Grantham
Assistant Attorneys General
ckhoury@nmag.gov
wgrantham@nmag.gov
Post Office Drawer 1508
Santa Fe, NM 87504
(505) 717-3500

Christopher Atencio
Assistant General Counsel
Special Assistant Attorney General
christopher.atencio@state.nm.us
New Mexico Environment Department
121 Tijeras Ave. NE
Albuquerque, NM 87102
Phone: (505) 222-9554
Fax: (505) 383-2064

KANNER & WHITELEY, LLC
Allan Kanner
Elizabeth B. Petersen
Allison S. Brouk
701 Camp Street
New Orleans, LA 70130
Telephone: (504) 524-5777
Special Counsel for
Plaintiffs–Petitioners
Attorney General,
State of New Mexico

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Plaintiffs-Petitioners the State of New Mexico and the New Mexico Environment Department ("NMED") (collectively "Petitioners" or "the State") petition this Court to rehear their Petition for Writ of Mandamus ("Petition") en banc pursuant to Fed. R. App. P. 35 and Fourth Circuit Rule 35. In the alternative, Petitioners request that the panel grant rehearing pursuant to Fed. R. App. P. 40 and Local Rule 40.

The Court's denial of the State's request provides no reasoning for its decision whatsoever, despite the questions of exceptional importance that were raised by the State's Petition. The primary issue for review in this case is whether a sovereign state, acting under its *parens patriae* authority and exercising its rights under a federal statute to obtain emergency injunctive relief, can be stripped of its ability to protect its citizens from harm from toxic contaminants through transfer by the Judicial Panel on Multidistrict Litigation ("JPML"), acting pursuant to 28 U.S.C. § 1407, to an MDL that provides no mechanism that allows the State to prosecute its own case. This Petition raises this issue in the context of Plaintiffs-Petitioners' argument that the JPML improperly transferred the State's case to the Aqueous Film-Forming Foam Multidistrict Litigation ("AFFF MDL") pending in the District of South Carolina. The JPML order transferring this case to the AFFF MDL exceeds the limited authority granted to the federal judiciary by Congress in 28 U.S.C. § 1407

and violates the well-established Constitutional principles of federalism, which grant authority to the State to bring an action pursuant to its police powers to abate an imminent and substantial endangerment to human health and the environment caused by a defendant's repeated and uncontrolled discharge of toxic chemicals.

This Court, contrary to the principles of federalism and state sovereignty, denied the State's request for a writ of mandamus to order the JPML to vacate its transfer order, thereby subjecting the State to continued obstruction of its ability to protect the public and the environment. In doing so, the Court erred by suggesting that the State did not in fact retain its sovereign duties and powers recognized by the Tenth Amendment to the United States' Constitution.

This issue is of exceptional importance because it implicates constitutionally-mandated state sovereignty and the Supreme Court's decisions regarding the same. Thus, en banc reconsideration is necessary to secure and maintain uniformity consistent with the Supreme Court's decisions. In the alternative, rehearing is appropriate because material legal matters regarding state sovereignty and federalism, as well as matters involving Congressional interference with the same, were overlooked.

II. PROCEDURAL HISTORY

This case arises from Defendants the United States' and the U.S. Department of the Air Force's ("Defendants") uncontrolled discharges of aqueous film-forming

foam ("AFFF") at the Cannon Air Force Base and the Holloman Air Force Base (collectively "the Bases"). The AFFF used by Defendants contained per- and polyfluoroalkyl substances ("PFAS"), including perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonate ("PFOS"), which are known to be toxic and cause numerous health effects. PFOA and PFOS are also biologically and chemically resistant to degradation, meaning that they remain stable in the environment once released. PFAS have been detected at Cannon and Holloman at dangerously high levels and have migrated offsite into public and private drinking wells that provide drinking water and livestock and irrigation water to the surrounding communities.

The State filed its initial complaint in the United States' District Court for the District of New Mexico on March 5, 2019, asserting a claim under the New Mexico Hazardous Waste Act ("HWA"), NMSA 1978, § 74-4-1 to -14, against Defendants for violations of the HWA by causing an imminent and substantial endangerment to human health and the environment through its repeated discharges of PFAS. On July 24, 2019, the State filed an Amended Complaint, adding a cause of action under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq*.[1] Also on that date, the State filed a Motion for Preliminary Injunction seeking immediate, limited injunctive relief necessary to stop the imminent and continued

[1] State of New Mexico's First Amended Complaint (July 24, 2019), D.N.M Rec. Doc. 9 [A008]. References to "A___" throughout are to the State's Appendix, filed in connection with its Petition for Writ of Mandamus, filed on February 1, 2021 (Doc. No. 2-1).

threat of injury to communities and the environment surrounding the Bases that had been exposed to Defendants' contaminants. *See* State of New Mexico's Motion for Preliminary Injunction.[2] Defendants, together with their opposition to the State's motion for preliminary injunction, moved to dismiss the case.[3] The State's motion for preliminary injunction, as well as Defendants' motion to dismiss, were fully briefed and had been awaiting a decision from the New Mexico federal district court for eight months at the time the case was transferred to the AFFF MDL.[4]

The Clerk of the JPML issued a Conditional Transfer Order No. 26 ("CTO") on February 20, 2020.[5] The State filed a notice of opposition to the CTO with the JPML.[6] New Mexico then filed a motion to vacate and a supporting brief requesting that the JMPL vacate the CTO, pursuant to Rule 7.1(f), arguing that the criteria for transfer of its case to the MDL were not satisfied here.[7] Only a small group of

[2] D.N.M Rec. Doc. 10 [A042]. The Plaintiffs' Preliminary Injunction filing encompasses D.N.M. Rec. Doc. Nos. 10-14, as listed here: D.N.M. Rec. Doc. 10 – Plaintiffs' Motion for Preliminary Injunction, D.N.M. Rec. Doc. 11 – Plaintiffs' Brief in Support of Motion for Preliminary Injunction, D.N.M. Rec. Doc. 12 – Certification of Dave Cobrain In Support of Plaintiffs' Motion for Preliminary Injunction, D.N.M. Rec. Doc. 13 – Certification of Mark Laska, Ph.D., In Support of Plaintiffs' Motion for Preliminary Injunction and D.N.M. Rec. Doc. 14 – Certification of Cholla Khoury in Support of Plaintiffs' Motion for Preliminary Injunction.

[3] United States' Motion to Dismiss and Opposition to State's Motion for Preliminary Injunction, D.N.M. Rec. Doc. 31 [A415].

[4] *See* State's Response in Opposition/Reply in Support, D.N.M. Rec. Doc. 35 [A536]; United States Reply in Support, D.N.M. Rec. Doc. 40 [A579]; Notice of Completion of Briefing US Mot. to Dismiss, D.N.M. Rec. Doc. 41 [A594]; Notice of Completion of Briefing State Motion for Preliminary Injunction, D.N.M. Rec. Doc. 42 [A597].

[5] AFFF MDL Rec. Doc. 603 [A006].

[6] *State of New Mexico v. United States, et al.*, Dkt No. NM/1:19-cv-00178, Rec. Doc. 3 (Feb. 27, 2020) (JPML Rec. Doc. 606, MDL No. 2873) [A671].

[7] New Mexico's Motion to Vacate CTO 26 (Mar. 13, 2020), JPML Rec. Doc. 618 [A673].

defendants, not party to the litigation between the State and the United States, submitted a response in opposition.[8] Thereafter, on June 3, 2020, the JPML denied the State's motion to vacate and ordered transfer of this case to the AFFF MDL.[9]

Upon transfer of the State's case to the AFFF MDL, its pending motion for preliminary injunction was dismissed without prejudice pursuant to the AFFF MDL Case Management Order No. 2A, which pre-existed the JPML ruling at issue here.[10] Because the need for immediate relief remained, as it does to this day, the State sought to have its motion for injunctive relief heard before the MDL court.

As required by the MDL court's Case Management Order No. 2A, the State requested that the Plaintiffs' Executive Committee ("PEC") sign its proposed motion for preliminary injunction. The PEC declined to sign the State's proposed motion, and thus, the State sought leave to file its motion on August 4, 2020. The PEC, Defendants' Coordinating Counsel ("DCC"), and the United States filed oppositions to the State's motion, but none provide any proper justification for denying the State its requested relief.[11] The MDL Court, essentially deferring to its Court-appointed

[8] Response of Tyco Fire Products, LP, Chemguard, Inc., and 3M Company in Opp'n to State of New Mexico's Motion to Vacate CTO 26 (Apr. 3, 2020), JPML Rec. Doc. 625 [A689].
[9] JPML Transfer Order (June 3, 2020), JPML Rec. Doc. 650 [A001].
[10] AFFF MDL Rec. Doc. 130 [A413].
[11] Defense Coordination Committee's Response to the State of New Mexico's Motion for Leave to File Motion for Preliminary Injunction, at 6 (Aug. 17, 2020), AFFF MDL Rec. Doc. 762 [A789]; PEC's Response to State of New Mexico's Motion for Leave to File Motion for Preliminary Injunction, at 5 (Aug. 17, 2020), AFFF MDL Rec. Doc. 760 [A728]; United States Response in Opp'n to Mot. for Leave (Aug. 17, 2020), AFFF MDL Rec. Doc. 761 [A735].

leadership, denied the State's motion for leave to file its motion for preliminary injunction, finding 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 . . . and impede each plaintiff's opportunity to participate in an organized proceeding and efficient resolution." AFFF MDL Order (Sept. 3, 2020), AFFF MDL Rec. Doc. 801 [A860]. In denying the State the opportunity to seek emergency relief, the Court ignored the special status of a sovereign plaintiff in this litigation and negated the power of the duly elected Attorney General and the appointed Secretary of NMED to act as they determined necessary to protect the people and resources of the State. Instead, the Court made its own determination that it was in the best interest of the State to wait to be heard on its requested relief.

Thereafter, the State filed a Petition for Writ of Mandamus in this Court. Because 28 U.S.C. §1407 does not expressly trump state sovereignty concerns, a writ of mandamus reversing the transfer order of the JPML is appropriate here. Such relief will allow the State, consistent with its authority, to protect its citizens and environment from ongoing harm from toxic contaminants infiltrating the environment.

On June 16, 2021, this Court denied the State's Petition. The order provided no discussion of or reasoning behind its decision and failed to address any of the

constitutional and state sovereignty issues raised by the State, including the Supreme Court cases interpreting the same. With only one vague statement that the decision was made "[u]pon consideration of submissions relative to the petitioners' motion[] for writ of mandamus," there is no evidence that the Court properly reviewed the important legal matters at issue in this case. The results of the Court's decision diverge from the purpose and intent of both the MDL process[12] as well as the Constitutional balance of federal and state powers and the State's inherent right to control its own litigation.

III. ARGUMENT

A. Standard for Rehearing En Banc and Rehearing

Rehearing en banc is appropriate where the proceeding involves one or more questions of exceptional importance. Fed. R. App. P. 35(b)(1). Rehearing, as opposed to rehearing en banc, is also appropriate where the proceeding involves one or more questions of exceptional importance and where a material legal matter was overlooked. *See* Fourth Circuit Loc. R. 40(b). Petitions for rehearing are designed to ensure that the appellate court properly considered all relevant information in rendering its decision. *See In re Hessco Indus., Inc.*, 295 B.R. 372, 374 (B.A.P. 9th Cir. 2003).

[12] While the MDL process provides for efficiencies and may be well-suited for certain matters, such is not the case here where a state has brought an action seeking to redress an imminent and substantial harm and proceeding within an MDL impedes its ability to act as necessary to protect its people and environment.

Here, the issues presented in the State's Petition are of exceptional importance because they concern matters of federalism and state sovereignty that serve as the foundation of our government. Thus, en banc reconsideration is appropriate. In the alternative, rehearing is appropriate because material legal matters regarding when a state's sovereign powers may be superseded by a federal statute were overlooked.

B. Rehearing En Banc is Appropriate Here because the Issues of Federalism and State Sovereignty Presented in the State's Petition for Writ of Mandamus are of Exceptional Importance

The issues presented in the State's Petition stem from the Tenth Amendment to the U.S. Constitution. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. Through this language, the Constitution established a system of dual sovereignty between the States and Federal Government that grants the Federal Government limited powers and reserves for the states those that are "numerous and infinite." *See Gregory v. Ashcroft*, 501 U.S. 452, 457-458 (1991) (quoting The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961)). Specifically, "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary case of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Id.* at 458.

In *Gregory v. Ashcroft*, the Supreme Court explains that this Constitutional framework must not be disrupted:

> Not only, therefore, can there be no loss of separate and independent autonomy of the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Id. at 457 (quoting *Texas v. White,* 74 U.S. 700 (1869)). Thus, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" the important balance between state and federal governments. *Id.* at 460 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985)).

Contrary to the intent of the Framers in establishing this federalist structure, and contrary to the intent of Congress in passing 28 U.S.C. § 1407, this Court denied the State's request to vacate the JPML's transfer order and remand the State's claims to the District of New Mexico to allow the State to move forward pursuant to its sovereign powers. In effect, and while the State's case remains pending in the AFFF MDL, the State is stripped of its ability to advocate for and protect its citizens from ongoing harm and further risk of harm from toxic PFAS chemicals that are emanating from the Bases into the neighboring communities.

The importance of a state's ability to exercise its police powers to protect the well-being of its residents cannot be overstated. Here, where the State has improperly been subjected to an MDL case management structure that has stripped the State of these powers, proper consideration of the impacts to the State's sovereign rights is warranted. Thus, the State's request for rehearing en banc should be granted.

C. Rehearing of the State's Petition for Writ of Mandamus is also Appropriate because the Court Overlooked a Material Legal Matter.

In the alternative to a rehearing en banc, a rehearing is appropriate pursuant to Fourth Circuit Local Rule 40(b). As explained above, Congress must make its intentions clear if it wishes to override the state and federal balance of power. *See Gregory v. Ashcroft*, 501 U.S. at 460. "[I]f the Federal Government would 'radically readjust[] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit about it." *Bond v. United States*, 572 U.S. 844, 858 (2014) (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)) (internal quotations omitted). This Court overlooked this legal matter in denying the State's Petition for Mandamus, and thus, the State's request for rehearing should be granted.

In its Petition, the State correctly argued that "the JPML lacks the authority under 28 U.S.C. §1407 to strip the State of its police powers and ability to control

its case as needed to address the public health, environmental, and economic crises that New Mexicans living near the Bases are facing." Petition for Writ of Mandamus, at 4. Section 1407 says nothing about the application of the statute where a state, exercising its police powers by bringing a suit for injunctive relief to protect its people and environment, would be stripped of the authority granted to it by the Tenth Amendment by subjecting it to the MDL process. Yet, despite Section 1407's silence on the matter, this Court said nothing as to why it found that this federal law overrides the balance of federal and state power, contrary to the legal principle set forth in *Gregory v. Ashcroft* and *Bond v. United States*.

Even if this Court had found that Section 1407 could properly usurp state powers as has been done here, such a finding would be contrary to the prohibition against Congress "commandeering" states in the exercise of its federal powers. *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). In *Printz v. United States*, the Court specifically emphasized that "the power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States." 521 U.S. at 922; *see also New York v. United States*, 505 U.S. 144, 181 (1992) (finding that a federal statute was contrary to the Constitution's intention of preventing the dangerous concentration of power in any one government to "reduce the risk of tyranny and abuse"). These rulings preventing federal commandeering

are consistent with the Constitutional division of power within our system of federalism. As such, Congress could not, in drafting a statute geared towards efficient resolution of lawsuits, effectively "commandeer" a state to relinquish control its own lawsuit brought pursuant to its police powers. Section 1407 does not provide for this encroachment of state authority, and neither this Court nor the JPML have provided reasoning to explain their rulings that have had that effect on the State's case here.

As evidenced by the lack of reasoning provided in its decision, this Court has overlooked the material legal matter regarding the reach of Section 1407, and thus, rehearing is warranted under the circumstances of this case.

IV. CONCLUSION

For the foregoing reasons, this Petition for rehearing en banc, or in the alternative rehearing by the panel, should be granted.

Date: July 30, 2021

Respectfully submitted,

/s/ Allan Kanner
Allan Kanner
KANNER & WHITELEY, LLC
701 Camp Street
New Orleans, LA 70130
Telephone: (504) 524-5777

Counsel for Plaintiffs –Petitioners

CERTIFICATE OF COMPLIANCE

I. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2) because it contains 3,063 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fourth Circuit Rule 32(f).

II. This brief also complies with the type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it uses a proportionally-spaced typeface using Microsoft Word in size 14 Times New Roman font.

Signed,

/s/ Allan Kanner
Allan Kanner
KANNER & WHITELEY, LLC
701 Camp Street
New Orleans, LA 70130
Telephone: (504) 524-5777

Special Counsel for
Plaintiffs –Petitioners
Attorney General,
State of New Mexico

Dated: July 30, 2021

CERTIFICATE OF SERVICE

I certify that on this 30th day of July, 2021, I electronically filed the foregoing using the Court's ECF system, which will send notification of such filing to all counsel of record.

Signed,

/s/ Allan Kanner
Allan Kanner
KANNER & WHITELEY, LLC
701 Camp Street
New Orleans, LA 70130
Telephone: (504) 524-5777

Special Counsel for
Plaintiffs –Petitioners
Attorney General,
State of New Mexico

Dated: July 30, 2021