I. WHETHER JUDGES CAN TAKE INTO ACCOUNT GENDER OR RACIAL STATUS WHEN APPOINTING A LEAD COUNSEL IN A CLASS ACTION?

A. YES. THE PRACTICE PROMOTES DIVERSITY IN THE LEGAL PROFESSION.

Federal judges may take gender and race into account when appointing a single lead in a class action through interpreting Rule 23(g) criteria and because the policy comports with the current practice of judges in multidistrict litigation. Additionally, this practice is constitutional because there is a compelling and important government interest in allowing the consideration of race and gender when selecting lead counsel—it remedies the present and historical discrimination suffered by both women and minorities in the legal field.1

Federal Rule of Civil Procedure 23(g)(1)(B) allows judges to consider any factor relevant to counsel’s ability to represent the class, including gender and race; there is no limiting language.2 Although Justice Alito discussed how this may not pass constitutional muster, it is not a binding opinion of the U.S. Supreme Court, which could find that remedying past discrimination and fostering diversity in the legal profession are government interests justifying race or gender classification.3 Further, the Advisory Committee instructs that, in multiple applicant situations, “... the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants.”4 Congress gave the judiciary the power to enact Rules of Civil Procedure through the Rules Enabling Act to self-govern and it is the federal judiciary’s responsibility to construe and apply these rules as necessary.5

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4 Fed. R. Civ. P. 23(g)(1)(B), Advisory Committee’s note.
Presently, judges are taking gender into consideration when appointing lead counsel positions in mass tort multidistrict litigations, opening the door for the same practice in class actions when choosing a single lead counsel. For example, Judge Vratil of the District of Kansas received praise from the legal community when she appointed the first Plaintiff Steering Committee that comprised of a majority of women in the Morcellator MDL.6 Additionally, in the Digoxin antitrust litigation, Judge Rufe, of the Eastern District of Pennsylvania, recently appointed a PSC comprised of 50% women.7 There is a growing recognition within the federal judiciary of the overwhelming underrepresentation of women attorneys and minorities in leadership positions.8

Current and past discrimination of women and minorities in the legal field in general necessitates promotion of participation of women and minorities as leaders in their field through class counsel appointments and is therefore constitutional. Although the number of female and minorities law school students has increased, underrepresentation of females and minorities in legal practice is still extensive.9 For example, according to the National Association for Law Placement (NALP), in 2016 in private practice, 45% of associate attorneys were women and 22.72% identified as a minority group.10 However, when looking at the number of women and minorities to make partner, the amount of women and minorities decreased significantly, with

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7 See *In re Generic Digoxin and Doxycycline Antitrust Litig.*, No. 2:16-md-02724-CMR, Doc. No. 84 (Nov. 28, 2016).

8 Id.


only 22.13% women partners and 8.05% minority partners. The shockingly low number of women and minorities partners can be changed through expanding the number of class action lead counsel appointments, which are coveted and lucrative positions. The more women and minorities who are able to obtain such positions, the more law firms will have an incentive to promote female and minority attorneys to partner.

The federal judiciary’s promotion of women and minorities in class action lead appointments is also consistent with national and state bar associations’ commitment to diversity. The American Bar Association instituted Goal IX in 1986 to promote the full and equal participation in the legal profession” by minorities and women, which prompted several state bar associations to adopt commitments to fostering full and equal participation by women and minorities in the legal profession. Fostering equality must be more than mere lip service in bar conferences held on diversity. Action is required. As the statistics show, the profession is far from meaningful equality. Fostering diversity from the bench will positively affect law firms and their hiring and promotion practices, which will foster diversity nationally.

**B. NO. THE PRACTICE IS IMPERMISSIBLE AND UNCONSTITUTIONAL.**

To take gender and race into account when appointing a single lead counsel in a class action is impermissible under the Federal Rules of Civil Procedure, unconstitutional, and detrimental to the evolution of the rights of women and minorities. Justice Alito voiced disdain for this practice, stating, “[t]his Court has often stressed that ‘racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.’ Court-approved discrimination

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11 Id.

based on gender is similarly objectionable, and therefore it is doubtful that the practice in question could survive a constitutional challenge.”

First, to read that Rule 23(g)(1)(B) allows courts to consider gender and race in making class action appointments is mistaken. Although a court may “consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class,” this should not be so broadly interpreted to allow consideration of race or gender because it would lead to absurd results that would impede the appointment process. Further, the Advisory Committee instructs that “no single factor should be dispositive in selecting class counsel in cases which there are multiple applicants.” The lead represents a class, not a specific gender or race. To single out the lead of the class based on gender or race is per se discrimination. Although there has been some consideration of gender, not race, in multi-district litigation appointments, that consideration is different because the district court is choosing a slate of people, not one class representative.

Considering gender and race in making lead counsel appointments is also unconstitutional. The Equal Protection Clause provides that no state shall deny any person

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15 Martin v. Blessing, et al., 571 U.S. at ____ (“It may be no easy matter to ascertain the class composition in terms of relevant race and gender metrics. In some cases, only the defendant will possess such information, and where that is so, must the parties engage in discovery on this preliminary point? In other cases, it may be impossible to obtain the relevant information without request it from all members of the class.”).
16 Fed. R. Civ. P. 23(g)(1)(B) advisory committee’s note.
17 Arguably one reason for multidistrict judges taking gender into consideration in PSC appointments and not race is that race classifications require a compelling government interest and is a much more difficult standard of review while gender classifications only require an important government interest because of the recognized biological differences between men and women.
18 Title VII of the Civil Rights Act of 1964 also prohibits considering race and sex in employment decisions. See 42 U.S.C. §§ 2000e to 2000e-17 (2012). This argument does not address the Title VII
equal protection of the laws, which applies to federal courts through the Due Process Clause of the Fifth Amendment.\textsuperscript{19} Strict scrutiny is used in race discrimination, meaning the challenged practice must be narrowly tailored to serve a compelling government interest and must not have a less restrictive alternative.\textsuperscript{20} Intermediate scrutiny is used in gender discrimination and requires the justification of an important governmental interest.\textsuperscript{21} Under both of those review levels, a policy allowing the federal judiciary to consider race or gender as a factor would fail because there is no compelling or important government interest. The only benefit of a judge considering race or gender inures to that private counsel and their law firm; there is no overarching government interest. Indeed, even any arguable ripple effect on private law firms hiring more women and minorities is clearly not a government interest justifying classification.

A common justification for allowing the consideration of race or gender is that it remedies past discrimination, which is inappropriate.\textsuperscript{22} Although discrimination still exists in the legal field, women and minorities have a more level playing field than ever before and any need for special treatment is outdated. For example, more than half of the law school graduates today are women and minority graduation rates are increasing.\textsuperscript{23} Additionally, NALP reports

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\item body of case law as the federal judiciary is not the employer of the individuals it selects as lead counsel in class action suits.
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that representation of women and minorities among partners in law firms increased from 2015 to 2016 and that the progress has been steady.24 Because of the growing diversity of the legal profession, remedying past discrimination is no longer necessary.

The policy of federal courts considering race or gender classifications is detrimental to the evolution of women and minority rights. To use gender or race as a reason to be selected for a court appointment perpetuates society’s acceptance of discrimination on the basis of gender and race by sanctifying the perception that women or minorities are unable to achieve merit-based appointments on their own. In conclusion, gender and race classification is impermissible under the Rules, different from MDL appointments, unconstitutional, and harmful to achieving equality.

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