No. 18-42

IN THE
Supreme Court of the United States

GLAXOSMITHKLINE LLC,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, the American Tort Reform Association (ATRA) requests leave to file the accompanying *amicus curiae* brief in support of the above-referenced Petition for a Writ of Certiorari. Petitioner, GlaxoSmithKline LLC, consented to the filing of this brief. Respondent, State of Louisiana, responded that it does not affirmatively consent, but does not object, to the filing of this brief.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

ATRA seeks leave to file an *amicus* brief in this case because of the broad implications of the Third Circuit's ruling on the ability of defendants to fully, fairly, and finally settle class action litigation. ATRA is concerned that if this decision stands, businesses that believe they have settled antitrust, consumer, securities, and other class actions after years of expensive litigation will find themselves subject to copycat lawsuits brought by States.

The proposed brief explores the range of class action litigation in which States, as participants in the marketplace for goods and services, are potential members. The brief highlights the options States

have available to them when included as a member of a class. The Third Circuit's ruling, the brief argues, effectively converts the class action mechanism from opt-out to an opt-in system only for States and State entities. If not reversed, the ruling may embolden States to remain silent during years of class action litigation, then file their own suits seeking a premium over the class settlement. The brief urges the Court to consider the detrimental effect this path would have on the ability of parties to reach a comprehensive and final resolution of disputes.

Accordingly, ATRA respectfully requests that the Court grant its Motion.

Respectfully submitted,

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QUESTION PRESENTED

Whether a State can invoke sovereign immunity to avoid being bound by a class settlement and, instead, bring a new lawsuit making identical claims when the State was expressly included in the class, received notice of the action and settlement, and did not opt out or object.

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INTEREST OF *AMICUS CURIAE*[1]

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues. ATRA is concerned that if the Third Circuit's decision stands, ATRA members who believe they have settled antitrust, consumer, securities, and other class actions after years of expensive litigation will find themselves subject to copycat lawsuits brought by States.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Class actions brought by private attorneys often include state governments as members of the putative class. States are consumers of goods and services, just like ordinary members of the public. Governments act similarly to private insurers in purchasing or reimbursing the costs of prescription drugs. State entities manage pension funds for their employees, acting in a similar capacity to private shareholders. When a class action alleges that consumers were misled to purchase a product due to an

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[1] In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel have made a monetary contribution to the preparation or submission of the brief.

unfair trade practice, that investors suffered losses due to a securities violation, or, as here, overpaid in purchasing a product due to anti-competitive practices, states are in the same position as private actors. When States are included within the class definition, receive notice, and do not opt-out of the class or object to the settlement, they should be equally bound by the agreed result.

Here, States that indirectly purchased the nasal spray, Flonase, were expressly included in a conditionally-approved settlement class. The settlement resolved, after years of litigation, allegations that a pharmaceutical company improperly delayed the introduction of a generic version of the drug. Louisiana received notice of the proposed $35 million settlement and did not opt out or otherwise object. Instead, it took a wait-see-and-remain-silent approach. More than a year after final approval of the settlement, Louisiana, through retained outside law firms, filed its own lawsuit asserting the very same allegations settled in the federal lawsuit.

When GlaxoSmithKline requested that the district court overseeing the class settlement enjoin Louisiana from proceeding, the district court held, and the Third Circuit agreed, that sovereign immunity did not allow the district court to bind the State to the settlement—rendering the settlement unenforceable against the State. That result is not supported by the Eleventh Amendment. Sovereign immunity does not apply to a State when acting as a *plaintiff*, nor does it preclude a court's ability to enjoin a State from prospectively acting in a manner that is contrary to a court-approved settlement.

Scholars recognize that the Third Circuit's decision "means that states . . . can evade the binding effect of federal class actions" and raises the question of whether State entities can be included in class actions at all. William B. Rubenstein, 6 Newberg on Class Actions § 18:23 (5th ed. updated June 2018). This is a troubling conclusion, one that if not addressed by this Court will irreparably damage the ability of parties to enter comprehensive class settlements that fully resolve disputes. It also subjects businesses that believe litigation is behind them to the potential for multiple copycat lawsuits by State attorneys general and other entities. These lawsuits, which may be brought through retained contingency-fee counsel, will seek a premium over what the State could have received through the class settlement and require defendants to pay a second time to settle claims they believed were already resolved.

The Court should grant certiorari to address the inability to fully resolve class action litigation and the potential for duplicative lawsuits created by the Third Circuit's decision.

ARGUMENT

I. Whether States, as Consumers of Products and Services, Are Bound to Class Settlements Impacts a Wide Range of Litigation

The State of Louisiana contends, and the Third Circuit agreed, that sovereign immunity prevents states from being bound to class action settlements. Since States purchase goods and services just as any other class members, the decision jeopardizes the ability of parties to settle disputes in a comprehensive and final manner.

It is common for States or State entities to be included in the definition of a class. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 449 (2003). Here, the district court acknowledged that class settlements have included State governments and agencies, but nevertheless found the ability of class settlements and judgments to bind them "an open question of law." Pet. App. at 31a n.7. The Third Circuit found that absent an affirmative action that clearly waives sovereign immunity, a State may not be bound to a class settlement. *See id*. at 14a-16a. This ruling effectively converts the class action mechanism from opt-out to an opt-in system only for States and State entities.

States purchase goods and services, like anyone else. When a dispute arises with the quality, marketing, or pricing of a product, States may be included as members of a class action. For example, as purchasers of equipment or other products for state agencies, states may be included as class members in litigation following a product failure. *See, e.g., Southern States Police Benevolent Ass'n v. First Choice Armor & Equip*., 241 F.R.D. 85, 93 (D. Mass. 2007) (certifying class action including state and local law enforcement entities that purchased allegedly defective body armor).

States, as indirect purchasers of prescription drugs, are included in class actions alleging that products are overpriced as a result of racketeering or violations of consumer protection law. *See, e.g., In re Lupron Mktg. & Sales Practices Litig*., 228 F.R.D. 75, 77 n.3 (D. Mass. 2005) (defining settlement class to include "the United States government . . . and all

other government entities' claims"). States are also included in class actions alleging that they bought or reimbursed patients for prescription drugs that were improperly marketed for off-label uses. *See, e.g., In re Neurontin Mktg., Sales Practices & Prods. Liab. Litig.*, No. 04-cv-10981, ECF No. 4302, at 2-3 (D. Mass. Nov. 7, 2014) (certifying nationwide class of third-party payers, including government entities that purchased epilepsy drug or generic equivalents for their employees or others covered by a government employee health plan); *see also* David McAfee, *Pfizer to Pay $325M to End Neurontin Off-Label Suit*, May 30, 2014, https://www.law360.com/articles/543453/pfizer-to-pay-325m-to-end-neurontin-off-label-suit (discussing settlement of decade-long litigation).

As administrators of retirement and pension funds, States suffer losses when misrepresentations inflate the value of shares, and they obtain recovery through class actions alleging securities fraud. *See, e.g., In re: Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455 (2013) (affirming certification of class action brought by Connecticut Retirement Plans and Trust Funds on behalf of all persons and entities that purchased Amgen stock).

State entities, as here, are also included as class members in antitrust class actions that allege uncompetitive behavior resulted in overpriced products. *See, e.g.*, *Nichols v. SmithKline Beecham Corp.*, No. CIV.A.00-6222, 2005 WL 950616, at *7 (E.D. Pa. Apr. 22, 2005) (approving settlement class including "a governmental entity . . . to the extent it makes prescription drug purchases as part of a health benefit plan for its employees"); *Philadelphia Elec. Co. v.*

Anaconda Am. Brass Co., 43 F.R.D. 452, 456-57 (E.D. Pa. 1968) (certifying class including "[a]ll state and municipal governments, governmental authorities and sub-divisions in the United States" that purchased certain pipe and tubing from defendants).

States that participate in class actions stand to receive substantial recovery as a result of a settlement. For example, State pension funds received a share of a $95 million securities class action settlement with Amgen. *See In re Amgen Inc. Sec. Litig.*, No. 07-cv-2536, 2016 WL 10571773, at *3 (C.D. Cal. Oct. 25, 2016).

States can and do opt-out of class actions when they find that the state is likely to receive a more substantial recovery through separate litigation. For example, Alaska opted out of a $2.5 billion settlement with AOL Time Warner, in an action in which shareholders alleged that the company overstated its revenues. *See* Josh Gerstein, *Time Warner Cases Finds a Surprise*, N.Y. Sun, Dec. 7, 2006, at 1, https:// www.nysun.com/national/time-warner-case-finds-a-surprise/44761/. Alaska would have received about $1 million through the class settlement, but instead recovered $50 million through its own lawsuit. *See id.* Alaska also opted out of a $400 million class settlement with Qwest under which the state would have received $427,000. Instead, it recovered $19 million for its funds' losses. *See* Alaska Dep't of Law, Press Release, *Department Announces $19 Million Settlement in Securities Fraud Claims Against Qwest Communications*, Nov. 21, 2007, https:// perma.cc/JD9W-NJSM.

Similarly, Oregon was among major institutional investors that opted out of a $624 million class set-

tlement with mortgage lender Countrywide Financial. *See* E. Scott Reckard, *Judge OKs Countrywide Settlement but Big Investors Opt Out*, L.A. Times, Feb. 26, 2011, https://perma.cc/C9N6-UV2J. Under the class settlement, Oregon would have received $500,000 to cover $14 million in investment losses by the state's pension and workers' compensation funds. *See id.* Instead, the State Treasurer and Attorney General opted out and the state filed its own securities lawsuit because it believed it could do far better in separate settlement talks. *See id.*; *see also* Or. Dep't of Justice, Press Release, *Oregon Files Securities Lawsuit Against Countrywide for Misleading Filings that Caused $14 Million in Losses to State*, Jan. 26, 2011, https://perma.cc/P6CH-XSAJ. Michigan similarly opted out of the Countrywide settlement and brought its own claim. *See* Jonathan Stempel, *Lawsuits Mount for BofA's Countrywide*, Reuters, Jan. 27, 2011, https://perma.cc/7LRX-EN8T.

States that have concerns with a class action also have other options available to them, such as intervening in the litigation, objecting to a settlement, or filing an *amicus* brief.[2] Courts have divided, howev-

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[2] *See* Ashley L. Taylor, Jr. et al., *Post CAFA: Objections by State Attorneys General to Class Action Settlements*, ABA State & Local News, vol. 36, no. 4 (2013), https://perma.cc/39VF-384A (providing examples of groups of state attorneys general filing amicus briefs or otherwise raising objections to settlement of consumer class actions); Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. Penn. L. Rev. 1971, 1982-88 (2008) (same); *see also* Barbara J. Rothstein & Thomas E. Willging, Managing Class Action Litigation: A Pocket Guide for Judges 37 (Fed. Jud. Ctr. 3d ed. 2010), https://perma.cc/MX9V-SY7B (recognizing that government actors may participate as an intervenor or friend of the

er, on whether states may be bound to a class settlement so long as they are afforded an opportunity to opt out. *Compare Southern States Police Benev. Ass'n, Inc. v. First Choice Armor & Equip., Inc.*, 241 F.R.D. 85, 93 (D. Mass. 2007) ("[T]his Court has certified state agencies as part of a class action so long as they are afforded the opportunity to opt out of the class.") *with In re McKesson Governmental Entities Average Wholesale Price Litig.*, 767 F. Supp. 2d 263, 271 (D. Mass. 2011) ("[S]ignificant sovereignty issues may preclude defining a class to include State entities as absent class members under the Eleventh Amendment of the Constitution."); *Walker v. Liggett Group, Inc.*, 982 F. Supp. 1208, 1210 (S.D. W. Va. 1997) (excluding States from nationwide settlement class on Eleventh Amendment grounds).

The Court should grant certiorari to consider whether States may sit on their rights during class action litigation and, after a court approves a settlement, invoke the Eleventh Amendment as a means to bring a separate, identical lawsuit.

II. The Third Circuit's Reading of the Eleventh Amendment Extends State Sovereignty to Cases in Which the State Acts as a Plaintiff and Is Not Subject to Claims Against It

The Court should grant certiorari to consider whether sovereign immunity applies to situations in which a State serves in the capacity of private *plaintiff* (or class member) and where the state is entitled to monetary recovery stemming from its participation in the marketplace.

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court and suggesting that courts consider inviting them to participate as such, particularly in addressing attorney fee issues).

The Eleventh Amendment provides "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI. The Eleventh Amendment protects States, as sovereigns, from being sued by "an individual without its consent." *See Hans v. Louisiana*, 134 U.S. 1, 12-13 (1890) (applying sovereign immunity to preclude Louisiana citizen from suing his state for interest payments on bonds).

The Eleventh Amendment shields States from suit. It does not exempt a State from being bound to a court-approved settlement in which it was certified as a member of the plaintiff class after notice and an opportunity to opt-out or object. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808-12 (1985) (recognizing that absent class members are plaintiffs and not entitled to due process protections extended to defendants).

Ex Parte Young, 209 U.S. 123 (1908) preserves the ability of federal courts to prospectively require a State official to bring his or her conduct into conformity with federal law. While the Eleventh Amendment bars monetary relief against a State, the ability of a litigant to obtain prospective relief, enjoining a State attorney general from violating his or her rights, is well established. *See Rochester v. White*, 503 F.2d 263, 267-68 (3d Cir. 1974).

The Court should consider whether a class action defendant's request for an injunction to enforce a settlement alters a State's status from being a member

of the plaintiff class that is eligible to collect damages to a defendant that is exposed to liability.

III. A Wait-See-and-Remain-Silent Approach Undermines the Ability of Parties to Reach Global Settlements and Will Embolden States to File Copycat Lawsuits Seeking a Premium Over the Class Award

The Third Circuit's ruling allows States to wait, see, and remain silent during years of class action litigation, and then bring their own lawsuits. This approach is detrimental to the ability of parties to reach a comprehensive and final resolution of disputes.

Whether a State intends to opt-out of a class action may have significant implications for a settlement. Defendants may offer significantly less money to settle a class action if they expect a State, like any other major class member, to opt-out. *See* Amir Rozen *et al.*, *Opt-Out Cases in Securities Class Action Settlements*, Cornerstone Research, at 5 (2013), https://perma.cc/GP6K-MGKM. Defendants will also have less incentive to settle cases, and may decide to go to trial, since they may still face copycat class actions brought by States and State entities. *See id.*

If States are not bound by class action settlements, despite receiving notice and not opting out, then defendants will face duplicative lawsuits filed by State governments and entities around the country. That is precisely what occurred here. Instead of opting out or objecting to a settlement, States will sit on their rights, file their own lawsuits, and seek a premium over the amount they would have received through class settlements. This premium will not on-

ly seek an amount of compensation that exceeds the earlier class settlement, but an amount that covers the attorneys' fees of outside counsel that are often retained by some States to pursue such actions. *See, e.g.*, Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. Times, http://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue-.html (documenting how "[p]rivate lawyers . . . scour the news media and public records looking for potential cases in which a state or its consumers have been harmed, approach attorneys general" and the lawyers, who are often campaign contributors to the attorney general, typically take 20% of the state's recovery); Kyle Barnett, *La. AG Hires Nine Private Law Firms, 17 Attorneys for Federal Antitrust Pharmaceutical Lawsuit*, Legal Newsline, May 22, 2015, http://legalnewsline.com/stories/510550772-la-ag-hires-nine-private-law-firms-17-attorneys-for-federal-antitrust-pharmaceutical-lawsuit (examining Louisiana's history of hiring outside counsel who contribute to the campaigns of attorneys general).

As a result of the Third Circuit's decision, the only way for defendants to place a wide range of class action litigation behind them is to obtain affirmative opt-in consents from each of fifty States. The Court should grant certiorari to consider whether the Eleventh Amendment—long understood as protecting States from suits for damages—can create uncertain liability exposure, duplicative lawsuits, and unwarranted litigation costs for businesses in class action litigation.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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