Nos. 16-1124, 16-3019

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: FLONASE ANTITRUST LITIGATION

SMITHKLINE BEECHAM CORPORATION
d/b/a GLAXOSMITHKLINE n/k/a GLAXOSMITHKLINE LLC,
Defendant-Appellant,

v.

STATE OF LOUISIANA,
Respondent-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case Nos. 2:08-cv-03301, 2:12-cv-4212
Hon. Anita B. Brody, Presiding

BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, Washington Legal Foundation (WLF) states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

The National Association of Manufacturers (NAM) states that it is a corporation organized under § 501(c)(6) of the Internal Revenue Code. The NAM has no parent corporation, nor has it issued any stock owned by a publicly held company.

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INTERESTS OF *AMICI CURIAE*

Washington Legal Foundation (WLF) is a public-interest law firm and policy center headquartered in Washington, DC, with supporters in all 50 States, including many in Pennsylvania and Louisiana.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has regularly appeared in this and other federal courts to ensure that class-action litigation is conducted in a manner that is fair to all parties, including defendants, named plaintiffs, and absent class members. *See, e.g.*, *Microsoft Corp. v. Baker*, No. 15-457, *cert. granted*, 136 S. Ct. 890 (2016); *In re K-Dur Antitrust Litig.*, 686 F.3d 197 (3d Cir. 2012), *vacated*, 133 S. Ct. 2849 (2013).

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs over 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private sector research and development. The NAM

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[1] Pursuant to Fed.R.App.P. 29(c)(5), *amici* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and its counsel, contributed monetarily to the preparation and submission of this brief.

is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

After approving a class-wide settlement in this case as fair to all absent class members, the district court declined to enforce its own anti-suit injunction and instead permitted a class member, the State of Louisiana, to proceed with copycat litigation raising claims against Defendant-Appellant GlaxoSmithKline (GSK) that are virtually identical to the settled claims. *Amici* are concerned that the court's decision inappropriately undermines the efficacy of class-wide settlements and, if affirmed on appeal, will substantially reduce defendants' willingness to enter into such settlements. To a large degree, class-action defendants are motivated to settle by an understanding that a settlement, although often expensive, will buy them litigation peace and ensure that they will never again face claims based on the same factual allegations. The district court's order seriously undermines that motivation.

STATEMENT OF THE CASE

On December 6, 2012, GSK entered into an agreement with the named Plaintiffs to settle class claims, pending in the U.S. District Court for the Eastern District of Pennsylvania, that it had improperly sought to delay the marketing of a generic equivalent of Flonase, an allergy-relief medication manufactured by GSK.

Plaintiffs alleged that GSK's conduct violated a variety of antitrust and state consumer protection laws.

On June 19, 2013, the district court certified a "Settlement Class" and issued a Final Order and Judgment approving the settlement. Dkt. 606. Included within the "Settlement Class" were persons who purchased or paid for Flonase, including "State governments and their agencies and departments ... to the extent they purchased [Flonase] for their employees or others covered by a government employee health plan." *Id.* at 4.

The court explicitly found that "due process and adequate notice have been provided pursuant to Rule 23 of the Federal Rules of Civil Procedure to all members of the Settlement Class, notifying the Settlement Class of, among other things, the pendency of these actions and the proposed Settlement with GSK." *Id.* at 3. The Final Order enjoined all members of the Settlement Class from initiating any legal proceedings against GSK and related entities based on the claims released by the Settlement. *Id.* at 11. The court retained exclusive jurisdiction over the proceeding for the purpose of resolving any disputes that might arise in connection with the Settlement, and it directed the parties to bring any such disputes "exclusively to this Court." *Id.* at 8.

The settlement notice afforded all absent class members an opportunity to

opt out. Louisiana was not among the class members who opted out of the Settlement.

On December 29, 2014, the Louisiana Attorney General—represented by private counsel hired on a contingency-fee basis—filed a complaint in Louisiana state court against GSK that is identical in all material respects to the complaints filed in this case. The substantive paragraphs of the Louisiana complaint are copied word-for-word from the July 14, 2008 complaint filed by the Indirect Purchaser Plaintiffs. On April 2, 2015, GSK filed a motion in the district court, seeking to enforce the class settlement against the Louisiana Attorney General.

On December 21, 2015, the district court issued a Memorandum denying the motion. The court held that Louisiana is entitled to Eleventh Amendment sovereign immunity that precludes it from being made a party to federal court proceedings without its "unequivocal consent." Memorandum at 6-8. It further held that Louisiana should not be deemed to have provided such consent based on its failure to opt out of the settlement. *Id.* at 8-12.

On March 9, 2016, GSK filed a Rule 60(b) motion for relief on the basis of newly discovered evidence. The motion presented evidence strongly suggesting that Louisiana (acting through an agent) sought and received a $183,000 payment from the settlement fund. GSK asserted that the new evidence strengthened its

contention that Louisiana waived any Eleventh Amendment rights. The evidence appeared to contradict assurances provided to the district court by counsel for Louisiana that the State had not received any payments from the settlement fund.

The district court denied the Rule 60(b) motion on May 31, 2016, concluding that GSK "failed to exercise reasonable diligence," prior to denial of its motion to enforce, in pursuing its newly discovered evidence. Explanation and Order at 5. In support of that conclusion, the court stated that GSK knew of the possibility that Louisiana had sought and received payment from the settlement fund but "did not inform the Court of its ongoing discussions" designed to elicit such information. *Id.* at 4. GSK has appealed from both the December 21 order and the May 31 order.

SUMMARY OF ARGUMENT

The Eleventh Amendment to the U.S. Constitution states, "The 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." The Supreme Court has always construed the Eleventh Amendment to protect States only when they are sued in federal court as defendants. GSK has not sought to bring Louisiana into federal court as a defendant. Rather, it has sought to make the U.S. District

Court for the Eastern District of Pennsylvania the principal forum for those wishing to assert claims *against GSK* for its alleged efforts to impede the marketing of a generic equivalent of Flonase. Louisiana's Attorney General could have avoided the need to appear in federal court by simply choosing to opt out of these proceedings; or (having failed to opt out) by not asserting separate damage claims against GSK based on the same course of conduct.

Louisiana's novel assertion that Eleventh Amendment immunity extends beyond claims filed against a State has been uniformly rejected by the courts. Most famously, in *Cohens v. Virginia*, the Supreme Court rejected Virginia's contention that the Eleventh Amendment barred the Court from asserting jurisdiction over a defendant's efforts to obtain appellate review of his conviction in a Virginia state court. *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 405-12 (1821). The Court held that the amendment "was intended for those cases, and for those only, in which some demand against a State is made by an individual in the Courts of the Union." *Id.* at 407.

Thus, when an individual has filed a federal bankruptcy petition, case law uniformly holds that federal courts may, consistently with the Eleventh Amendment, prevent state officials from filing separate debt-collection claims against the debtor in state court. Bankruptcy courts have not hesitated to issue

injunctions against state government officials who have sought to bypass this federal-forum requirement.

The chief goal of the Eleventh Amendment—and, more generally, the principle of sovereign immunity—is to prevent States from facing *monetary liability* as a result of federal court proceedings. Thus, for example, courts have long held that the Eleventh Amendment does *not* bar federal courts from issuing injunctions against state officials in their official capacities, to prevent them from violating federal law. *See, e.g.*, *Ex Parte Young*, 209 U.S. 123 (1908). Injunctions of that nature are permissible so long as they do not directly require monetary payments, even though an official-capacity injunction against a state official is functionally indistinguishable from an injunction against the State itself. Because requiring Louisiana to adjudicate its Flonase-related claims against GSK in a federal forum does not expose the State to any potential monetary liability, the Eleventh Amendment is not implicated by this case.

The proper yardstick for measuring limitations on the federal courts' authority over absent class plaintiffs is Rule 23 of the Federal Rules of Civil Procedure, not the Eleventh Amendment. Rule 23, which protects States to the same extent that it protect other class plaintiffs, incorporates each of the due process rights to which the Supreme Court has determined class plaintiffs are

entitled.

In *Phillips Petroleum Corp. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court held that the Due Process Clause protects the rights of absent class plaintiffs who have not voluntarily submitted to the court's jurisdiction (by joining as named parties to the class action). It held that due process permits the forum court to exercise personal jurisdiction over an absent class plaintiff (and thus prevent that plaintiff from asserting a subsequent claim for money damages) only if the court: (1) provides adequate notice to the absent class plaintiff regarding the pending litigation; (2) provides him an opportunity to participate in the litigation as well as to opt out altogether; and (3) ensures that the named plaintiffs at all times adequately represent the interests of absent class members. The district court determined that each of those requirements was satisfied in this case and thus that absent class members who did not opt out would be bound by the settlement agreement under Rule 23. Louisiana has not articulated any reason why it should be afforded a greater degree of Rule 23 protection than other absent class members.

The district court's decision affording heightened protection to some, but not all, absent class members places a federal-court class-action defendant in an untenable position. If the defendant contests class claims through trial, States that are absent class plaintiffs can delay deciding whether to be bound by the judgment

until after it has been handed down. By waiting and staying silent, a State can collect its share of the judgment; or, if it is dissatisfied with the judgment, it can get a second bite at the apple by opting to file a separate lawsuit (as Louisiana's Attorney General did here) and asserting that the Eleventh Amendment immunizes the State from being bound by the judgment—even though it failed to opt out. Yet, the defendant cannot assure itself litigation peace by settling the claim on a class-wide basis, because even non-opt-out States might later decide to repudiate the settlement.

Rule 23 took just such considerations into account when specifying procedures that protect the rights of absent class members while simultaneously ensuring fairness (and the ability to secure litigation peace) to class-action defendants. The Court should apply those rules, rather than the novel Eleventh Amendment rules invented by the district court, when determining whether to bind a State to a judgment issued in a case in which the State is an absent class member.

Even if the Eleventh Amendment were applicable to this case, the Court should rule alternatively that Louisiana has waived its Eleventh Amendment rights (which are waivable) on the basis of its litigation-related conduct. The district court certified Louisiana as a member of the plaintiff class, and it found that class members were: (1) adequately served notice of the lawsuit; (2) provided an

adequate opportunity to opt out of the litigation; and (3) adequately represented throughout the proceedings by the named plaintiffs and their counsel. Despite the uncontroverted evidence that Louisiana received actual notice of the suit and its status as a class member, Louisiana chose not to exercise its right to opt out. As both this Court and the Supreme Court have held, an absent class member that does not opt out is bound by the judgment and becomes subject to the forum court's jurisdiction for purposes of enjoining subsequent copycat litigation.

The case for binding Louisiana to the settlement agreement is particularly strong in light of GSK's evidence that Louisiana (acting through an agent) likely requested and obtained a substantial payment from the settlement proceeds. The district court abused its discretion in refusing to consider that evidence. The district court faulted GSK for insufficient diligence in seeking to uncover evidence that Louisiana profited from the settlement and for failing to keep the court apprised of those efforts. That finding is nonsensical given that primary responsibility for delay in uncovering the evidence lies with Louisiana, which has never denied the accuracy of GSK's new evidence. Louisiana not only failed to bring evidence regarding its receipt of settlement funds to the court's attention, but it also appears to have misled GSK and the court when its counsel assured them both that no funds had been received.

ARGUMENT

I. ELEVENTH AMENDMENT PROTECTION IS LIMITED TO IMMUNITY FROM CLAIMS FILED *AGAINST* A STATE

Included within the plaintiff class in this case are persons who purchased or paid for Flonase during the class period, including "State governments and their agencies and departments ... to the extent they purchased [Flonase] for their employees or others covered by a government employee health plan." Final Order, Dkt. 606, at 4. The district court's Final Order, which approved a class-wide settlement of Flonase-related claims, enjoined all members of the Settlement Class from initiating any legal proceedings against GSK or related entities based on the claims released by the settlement. *Id.* at 11. Despite its admitted membership in the Settlement Class and its failure to opt out, Louisiana contends that the federal courts lack jurisdiction to enjoin its copycat lawsuit, which raises Flonase-related claims identical to those whose settlement the district court approved. The sole basis for that contention is the Eleventh Amendment, which Louisiana portrays as applying when States are federal-court plaintiffs, not just defendants.

Louisiana's contention is supported by neither the language of the Eleventh Amendment (which states that the amendment applies only to a "suit in law or equity commenced or prosecuted against" a State) nor case law construing the

history surrounding its adoption. Although courts have not understood the text of the Eleventh Amendment as establishing outer bounds on the scope of sovereign immunity available to state governments,[2] the amendment has always been construed as limited to instances where States are in the position of defendants. GSK's April 2015 motion to enforce the class Settlement does not place Louisiana in that position. It seeks merely to prevent the Louisiana Attorney General from filing a lawsuit against GSK that duplicates the claims previously adjudicated in federal court.

A. Courts Uniformly Reject Assertions that the Eleventh Amendment Prevents Federal Courts from Exercising Jurisdiction over Nonconsenting States in Other Contexts

Courts have never applied the Eleventh Amendment to bar federal court jurisdiction, outside the context of suits in law or equity commenced or prosecuted against a State. They have uniformly recognized that eighteenth-century respect for state sovereign immunity (which gave rise to adoption of the Eleventh Amendment in 1795) was animated to a large degree by a desire to permit States to set the terms and conditions under which they would repay loans, a goal that could have been thwarted had creditors been permitted to sue States in federal court.

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[2] *See, e.g.*, *Lombardo v. Pennsylvania Dep't of Public Works*, 540 F.3d 190, 195 (3d Cir. 2008) (citing *Alden v. Maine*, 527 U.S. 706, 766 (1999)).

Cohens, 6 Wheat. (19 U.S.) at 406. Sovereign immunity and the Eleventh Amendment were *not* grounded on a belief that compelling a State to "appear[ ] before the tribunal of the nation" was in some way impermissibly "degrad[ing]" and an insult to their "dignity." *Ibid.* Indeed, Article III of the Constitution expressly sanctions several circumstances under which a State can be involuntarily made a party to federal court proceedings. *See* Art. III § 2 (granting federal-court jurisdiction over controversies between the United States and a State, or between "two or more States").

In *Cohens v. Virginia*, the Supreme Court expressly limited the Eleventh Amendment's application to instances in which federal court jurisdiction was invoked by a party asserting a claim against a State, and it held that the Amendment did not apply when the party sought federal-court protection from a claim being asserted by a State. The Court held that the amendment "was intended for those cases, and for those only, in which some demand against a State is made by an individual in the Courts of the Union." *Cohens*, 6 Wheat (19 U.S.) at 407.

Cohens involved Virginia's prosecution of a man for selling District of Columbia lottery tickets in Virginia. Although Virginia law prohibited the sale of lottery tickets, the defendant argued that a federal law expressly permitted the sale of D.C. lottery tickets throughout the nation. When the defendant sought Supreme

Court review of his Virginia state-court conviction, Virginia asserted that the Eleventh Amendment prohibited the Supreme Court from forcing it to come into federal court to defend its prosecution.

The Supreme Court unanimously rejected that assertion. It conceded that because Cohens was seeking a writ of error from a state-court judgment, Virginia was technically the "defendant in error" in the proceeding. *Id.* at 376. The Court nonetheless concluded that the action could not be deemed a "suit" commenced and/or prosecuted against a State and thus that the Eleventh Amendment was inapplicable, explaining:

> To commence a suit, is to demand something by the institution of process in a Court of justice, and to prosecute the suit, is, according to the common acceptance of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court. ... A writ of error, then, is in the nature of a suit or action when it is to restore the party who obtains it to the possession of any thing that is withheld from him, not when its operation is entirely defensive.

Id. at 408-10. Because Cohens did not seek the assistance of a federal court for the purpose of gaining possession of some thing allegedly withheld by Virginia but rather sought relief that was "entirely defensive" in nature, the Supreme Court concluded that the Eleventh Amendment did not prevent it from considering

Cohens's claim. *Id.* at 410-12.[3]

Similarly, because GSK's motion is "entirely defensive" in nature, the Eleventh Amendment does not prevent the district court from addressing the merits of GSK's claim. GSK's motion merely seeks to prevent Louisiana's Attorney General from proceeding with a lawsuit in state court against GSK in light of the federal district court's prior adjudication of the very same claim between the very same parties. It does not seek money or property from the State.

Cohens's understanding of what constitutes a suit "against" a State for Eleventh Amendment purposes has informed the Court's bankruptcy jurisprudence. The Court held in *State of New York v. Irving Trust Co.*, 288 U.S. 329 (1933), that federal courts possess jurisdiction to prevent state officials from proceeding on their own against the assets of one who has declared bankruptcy. It explained:

> If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise,

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[3] The Court re-affirmed its construction of the Eleventh Amendment in *Hans v. Louisiana*, 134 U.S. 1 (1890). The court stated that the amendment is inapplicable in a federal-court proceeding in which "[n]othing is demanded of the state. No claim against it of any description is asserted or prosecuted. [The party seeking federal court relief] asserts only the constitutional right to have his defense examined by that tribunal whose province it is to construe the constitution and laws of the Union." 134 U.S. at 508-09 (quoting *Cohens*, 6 Wheat. (19 U.S.) at 410-11).

> orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated.

288 U.S. at 333.

In *Gardner v. New Jersey*, 329 U.S. 565 (1947), the Court explicitly rejected New Jersey's claim that the Eleventh Amendment barred federal bankruptcy courts from adjudicating the legitimacy and priority of state tax liens asserted against a bankrupt railroad's property located in New Jersey. The Court said:

> If the claimant [before a bankruptcy court] is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is none the less such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than cash.

329 U.S. at 573-74. In other words, the Eleventh Amendment does not bar federal courts, when called upon to decide federal issues implicated by a State's assertion of a claim against a third party, from asserting jurisdiction over the issue and enjoining state officials from proceeding on that claim in their own courts.

Indeed, federal courts have repeatedly made clear that the principal focus of the Eleventh Amendment is protecting States against suits for money damages. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651 (1974). *Edelman* approved the line of cases (starting with *Ex Parte Young*) that has upheld the authority of federal courts

to issue prospective injunctions requiring state officials to conform their future conduct to federal law, even though such injunctions operate (for all practical purposes) against state governments and even though one ancillary effect of the injunction may be that States end up spending more money "from the state treasury than if they had been left free to pursue their previous course of conduct." 415 U.S. at 668.[4] But *Edelman* drew a strict Eleventh Amendment line which federal courts may not cross: they may not make a "retroactive award of monetary relief" against state officials sued in their official capacity, because such awards "will to a virtual certainty be paid from state funds." *Ibid.* The Court explained that federal court orders whose practical effect is to require the expenditure of state funds must be deemed to "fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived as having any present force." *Id.* at 665 (citations omitted). GSK does not, of course, seek to recover money or anything else from Louisiana.

In recognition of the Eleventh Amendment's focus on protecting States against federal-court monetary awards, this Court has been careful to distinguish between immunity from suit and immunity from liability. Thus, the Court held in

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[4] *Ex Parte Young* does not authorize federal courts to issue injunctions against the State itself. But GSK's motion seeks injunctive relief against the Louisiana Attorney General acting in his official capacity, not against Louisiana.

Lombardo that Pennsylvania waived its immunity from being sued in a federal court when it removed from state court to federal court an employment discrimination claim in which the plaintiff sought an award of monetary damages. 540 F.3d at 197. But the Court held that Pennsylvania was still entitled to assert its Eleventh Amendment immunity from damages because sovereign immunity would have protected the State from damages had the case remained in state court. *Id.* at 198-99.

In sum, there is no merit to Louisiana's contention that the Eleventh Amendment broadly applies to efforts to bring a State into a federal court proceeding in the role of a plaintiff. The amendment affords States with important protections from lawsuits filed "against" them, particularly where the suit seeks recovery of damages payable from the state treasury. But where, as here, a party invokes federal court jurisdiction for "entirely defensive" purposes, the Eleventh Amendment is inapplicable.

B. Class-Wide Litigation Can Operate Efficiently and Fairly If the Rights of All Absent Class Members, Including States, Are Measured under the Due-Process Standards Codified in Rule 23 of the Federal Rules of Civil Procedure

States already enjoy significant protection against being drawn involuntarily into federal-court class actions as absent class plaintiffs. The Due Process Clause

provides that no person may be bound by a judgment issued in a class action in which he did not directly participate as a party, unless the court adheres to procedural rules designed to protect absent class members. *Shutts*, 472 U.S. at 811-12. Those due process standards apply to all federal-court litigants, including Louisiana, via application of Fed.R.Civ.P. 23. Louisiana has failed to articulate why it should be entitled to more expansive procedural protections than those afforded to average citizens, many of whom lack the legal resources readily available to state governments. Moreover, granting Louisiana the additional protections it seeks would undermine one of the basic purposes of class actions, which is to facilitate the efficient resolution of large numbers of similar legal claims. Efficiently resolving claims on a class-wide basis will become much more difficult if Louisiana and other States are afforded special protections unavailable to other class-action litigants.

A class action is "an exception to the rule that one could not be bound by a judgment *in personam* unless one was made fully a party in the traditional sense." *Id.* at 808 (citing *Hansberry v. Lee*, 311 U.S. 31, 40-41 (1940)). Courts permit this exception, provided that absent class members are afforded adequate procedural protections, in order to achieve certain desirable goals:

> [Class actions permit] litigation of a suit involving common questions

> when there are too many plaintiffs for proper joinder. Class actions also may permit the plaintiffs to pool claims that would be uneconomical to litigate individually.

Ibid. Applying the Due Process Clause, *Shutts* held that the minimum procedural protections that a court must afford absent plaintiffs, if it wants to bind them to a judgment in a case seeking money damages, include the following:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Id. at 812 (citations omitted).[5]

Importantly, the district court determined, after conducting a fairness hearing, that each of the procedural requirements set forth in *Shutts* and Rule 23 was satisfied in this case. Final Order at 3. In particular, the district court held that notification of absent class plaintiffs—which included mailed notice to numerous individuals and "publication in multiple publications"—"was the best notice

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[5] Rule 23 incorporates each of those due process standards. *See* Fed.R.Civ.P. 23(a)(4), 23(c)(2)(B), 23(d)(1)(B); 23(e).

practicable under the circumstances." *Ibid*. Louisiana has not challenged that determination. Under those circumstances, the district court's ruling that absent class plaintiffs are bound by the settlement agreement, *id*. at 7, fully complies with Rule 23 requirements.

Yet, despite these Rule 23 findings and the district court's acknowledgment that Louisiana is a member of the plaintiff class, the court held that the Eleventh Amendment bars enforcement of the judgment against Louisiana officials. It held that the Eleventh Amendment imposes a particularly "stringent" notification requirement, Memorandum at 10, and that the notification provided in this case to the state members of the plaintiff class was insufficient to satisfy Eleventh Amendment requirements—even though that notification admittedly satisfied the Rule 23 and due-process rights of the thousands of other absent class plaintiffs. *Ibid*.

That holding lacks any support in the language or history of the Eleventh Amendment. Even assuming that the Eleventh Amendment has some application in the context of notice to absent class plaintiffs (and it does not), there is no case-law support for the district court's conclusion that the Constitution imposes more stringent requirements for notifying States than for notifying other absent class plaintiffs. The notification in this case provided Louisiana with the same

opportunity to opt out of the settlement that every other class plaintiff was afforded.[6] Accordingly, nothing in Rule 23 or *Shutts* suggests Louisiana should be any less bound by the judgment than other class plaintiffs who did not opt out.

Moreover, the district court's decision affording heightened constitutional protection to some, but not all, absent class members places a federal-court class-action defendant in an untenable position. That is particularly true if the case goes to trial after certification of a plaintiff class. The decision below allows a State that is an absent class plaintiff to lie in wait while the trial progresses. If the plaintiff class obtains a favorable verdict, it can submit a claim for its share of the judgment. But if the defendant prevails, it can get a second bite at the apple by asserting its supposed Eleventh Amendment rights not to be bound by the judgment and filing its own lawsuit. In effect, it can say to the defendant, "Heads I win, tails you lose."

Shutts recognized that defendants in class actions have a cognizable interest in avoiding precisely that predicament by obtaining advance assurances that, win or lose, the judgment will bind every class plaintiff:

> As a class-action defendant petitioner is in a unique predicament. If [the Kansas state court] does not possess jurisdiction over the plaintiff class, petitioner will be bound to 28,100 judgment holders scattered across the

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[6] Indeed Louisiana's opportunity to opt out *exceeded* the opportunity afforded to the many absent class plaintiffs who, unlike Louisiana, did not receive notice by mail.

> globe, but none of these will be bound by the Kansas decree. Petitioner could be subject to numerous later individual suits by these class members because a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party. Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound.

Id. at 805. By concluding that compliance with Rule 23 procedural requirements is insufficient to bind a State to a class-action judgment, the district court's decision deprives defendants of the ability to satisfy their "distinct and personal interest" in ensuring that all class plaintiffs are bound by the judgment.

The Supreme Court has repeatedly endorsed the class action as an efficient method of settling large numbers of relatively small claims.[7] But the efficiency of class actions will be undermined if parties lose faith in the fairness of the process and become less willing to enter into class-wide settlements. To a large degree,

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[7] Class actions filed within the Third Circuit often include States as members of the plaintiff class. *See, e.g., In re Real Estate Title and Settlement Services Antitrust Litig.*, 815 F.2d 695 (3d Cir. 1987) (mem. op.) ["*Real Estate I*"], *cert. denied*, 485 U.S. 909 (1988). In a subsequent decision arising in closely related antitrust proceedings, the Court noted that the plaintiff class in *Real Estate I* included numerous States. *In re Real Estate Title & Settlement Services Antitrust Litig.*, 869 F.2d 760, 764 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). The Court explained that *Real Estate I* had affirmed the district court's rejection of Arizona's contention that it should be permitted to opt out of the non-opt-out class settlement. *Ibid.* At no point did the Court suggest that the Eleventh Amendment prevented the federal courts from exercising jurisdiction over nonconsenting States within the context of a class action.

class-action defendants are motivated to settle by an understanding that a settlement, although often expensive, will buy them litigation peace and ensure that they will never again face claims based on the same factual allegations. The district court's order seriously undermines that motivation.

II. EVEN IF LOUISIANA ONCE POSSESSED ELEVENTH AMENDMENT RIGHTS TO OBJECT TO FEDERAL COURT JURISDICTION, IT HAS WAIVED THEM

Even when States are otherwise entitled to Eleventh Amendment immunity from suit in federal court, they are frequently deemed to have waived their immunity by virtue of their litigation conduct. *See, e.g., Lapides v. Board of Regents*, 535 U.S. 613 (2002) (holding that removal of case from state to federal court constitutes a waiver of Eleventh Amendment immunity).[8] Louisiana's conduct in this case demonstrates that it has waived whatever Eleventh Amendment immunity it might otherwise have enjoyed.

A. Louisiana Did Not Opt out of the Settlement Despite Being Provided Ample Notice of Its Right to Do so

As noted above, the district court, in approving settlement, explicitly held that the notice provided to class plaintiffs (including Louisiana) was "the best

[8] In *Lapides*, Georgia law did not provide the state defendant with sovereign immunity from the plaintiffs' claims in state court. *Lapides* did not address whether removal would constitute a waiver of any sovereign immunity from damages that a State would have enjoyed had the suit remained in state court.

notice practical under the circumstances" and "fully complied in all respects with the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process of law." Final Order at 3. But this Court need not rely solely on this generalized finding of adequate notice, because the evidence is uncontested that *GSK itself* provided detailed notice of the Settlement to Louisiana's Attorney General by certified mail.[9] Under those circumstances there can be no legitimate dispute over the adequacy of the notice provided to Louisiana regarding the terms of the settlement.

The district court's assertion that the CAFA Notice did not adequately inform Louisiana of its rights and options under the settlement agreement, Memorandum at 11, is nonsensical. The notice explicitly stated that Louisiana was a member of the plaintiff class, that it had a right to opt out of the Settlement, and that it would be bound by the Settlement if it did not opt out. Indeed, the notice provided far more detailed information to Louisiana than was conveyed to the

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[9] The Claims Administrator mailed notice directly to numerous individual class members. In addition, GSK sent notice directly to the Louisiana Attorney General pursuant to the Class Action Fairness Act (CAFA), which requires a settling defendant to send detailed notice of a proposed settlement to the "appropriate official of each State in which a class member resides." 28 U.S.C. § 1715(b). As the district court noted, the CAFA notice requirement "is meant to allow States 'to review the proposed settlement and decide what (if any) action to take to protect the interests of the plaintiff class.'" Memorandum at 10 (quoting S. Rep. No. 109-14, at 35, 2005 WL 627977, at *34 (2005)).

individual class members to whom the Claims Administrator mailed post cards. The district court suggested that perhaps the Louisiana Attorney General did not fully appreciate the fact that the CAFA Notice informed him that Louisiana itself was a member of the plaintiff class, because Louisiana might have viewed CAFA Notices as providing information about settlements involving "some of its citizens" rather than the State itself. *Ibid*. But that suggestion is belied by the language of CAFA and its legislative history, which make clear that notice is designed "to protect the interests of the plaintiff class" by notifying the appropriate official "of each State in which a class member resides." S. Rep. No. 109-14, at 35; 28 U.S.C. § 1715(b). In other words, a CAFA Notice is required for the protection of *all* class members, including class members that happen to be States. Thus, the Louisiana Attorney General would have had no reason to assume, contrary to the express language of the notice sent to him by certified mail, that the CAFA Notice did not concern Louisiana's own status as a member of the plaintiff class.

Despite receiving clear notice that it would be bound by the judgment if it did not opt out, Louisiana chose not to opt out. By virtue of that voluntary litigation activity, Louisiana thereby waived any Eleventh Amendment rights it might otherwise have possessed not to be subject to federal court proceedings conducted for the purpose of enforcing the settlement agreement. Under similar

circumstances, this Court has not hesitated to enjoin efforts by absent class members to separately pursue claims against the defendant, when they received adequate notice yet failed to exercise their opt-out rights. *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Action*, 148 F.3d 283, 306 (3d Cir. 1998) (stating that "silence on the part of those receiving notice is construed as tacit consent to the court's jurisdiction").

The district court stated that a State's consent to the exercise of federal court jurisdiction is not to be lightly inferred, and must be based on evidence that the State "unequivocally expressed" its consent to suit. Memorandum at 7 (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984)). But the issue here is not whether Louisiana expressly consented to the district court's jurisdiction. Rather, the issue here is whether Louisiana's litigation conduct constitutes a waiver of its rights. *See* Jonathan Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 Duke L.J. 1167 (2003) (noting the Supreme Court's longstanding distinction between a State's express consent to federal court jurisdiction and the constructive waiver of Eleventh Amendment immunity based on its litigation conduct).

Thus, for example, the Supreme Court held that Georgia waived its Eleventh Amendment immunity when it removed a lawsuit (filed against it in a Georgia state

court) to federal court. *Lapides*, 535 U.S. at 620 (recognizing that "waiver [may be] effected by litigation conduct"). The Court explained that whether a State's litigation conduct effects a waiver of Eleventh Amendment rights should be based on an evaluation of fairness to the parties:

> [A]n interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of "immunity" to achieve litigation advantages.

Ibid. The only means of ensuring consistency and fairness in the class-action context is to apply to States the same rules that are applied to all absent class plaintiffs: when a State or any other absent class plaintiff has been adequately notified of a class-wide settlement and its opportunity to opt out of the settlement, yet it fails to opt out, it should be deemed to have waived any constitutional or Rule 23 right to object to being bound by the settlement.

B. Louisiana Has Failed to Rebut GSK's Evidence that the State Waived Its Immunity by Seeking Compensation from the Settlement Fund

Prior to the district court's denial of GSK's motion to enforce the Class Settlement, counsel for Louisiana assured the Court that the State had neither sought nor received any payments from the settlement fund. In its Rule 60(b) motion, GSK submitted substantial evidence that called into question the accuracy

of that assurance and suggested that Louisiana (acting through an agent) had sought and received a $183,000 payment from the fund. Louisiana has not sought to rebut that evidence. The district court nonetheless denied the Rule 60(b) motion on the ground that GSK "failed to exercise reasonable diligence," prior to denial of its motion to enforce, in pursuing its newly discovered evidence and in keeping the court apprised of those efforts. Explanation and Order at 5.

The district court's denial of the Rule 60(b) motion constituted an abuse of discretion. Any delay in uncovering evidence of Louisiana's receipt of the $183,000 is most properly attributable to Louisiana itself. The State expressly denied that it had received any payment. GSK cannot be faulted if, as a result of that denial, it took Louisiana at its word and pursued evidence of a payment less diligently than it otherwise might have done. The district court's rejection of the Rule 60(b) motion might have been defensible if Louisiana had responded by denying that it authorized Humana to act as its agent in seeking payment, or that Humana ever transferred funds to Louisiana. But Louisiana has issued no such denials. Instead, it has responded by arguing that GSK has not done enough to verify the authenticity of the documents attached to its Rule 60(b) motion. Given that those documents indicate that primary responsibility for delay should be assigned to counsel for Louisiana (whose now-questionable assurances to the court

indicated that further inquiry was unwarranted), the court abused its discretion in faulting GSK for an alleged lack of diligence in pursuing new evidence and denying the Rule 60(b) motion on that basis.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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Dated: November 1, 2016

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation and the National Association of Manufacturers. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of *amici* is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X5), the word count of the brief is 6,993, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, certificate of bar membership, and this certificate of compliance. The hard copy and the electronic copy of this brief are identical. The electronic copy has been virus-scanned using antivirus software, VIPRE Business, Version 5.0.4464, and no virus was detected.

/s/ Richard A. Samp
Richard A. Samp

Dated: November 1, 2016

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2016, 10 copies of the brief of *amici curiae* in support of Appellant were deposited in the U.S. Mail, addressed to the Court. I further certify that on November 1, 2016, I electronically filed the brief of *amici curiae* with the Clerk of the Court of the U.S. Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp