No. 18-42

IN THE
Supreme Court of the United States

GLAXOSMITHKLINE LLC,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether state sovereign immunity bars a federal court from binding a State to a Rule 23 class settlement as an absent class member plaintiff based on the State's failure to opt out of the class.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

Miscellaneous:

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters nationwide.[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., China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018); *Microsoft Corp. v. Baker*, 137 S. Ct. 1602 (2017); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).

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 more than 12 million men and women, contributes roughly $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days before filing this brief, *amici* notified counsel for Respondent of their intent to file. All parties have consented to the filing.

advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

This is a troubling case for anyone interested in class-action fairness. After approving a class-wide settlement 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 file claims against Petitioner GlaxoSmithKline (GSK) that are virtually identical to the settled claims. The Third Circuit affirmed. *Amici* are concerned that the appeals court's decision undermines the efficacy of class-wide settlements and will greatly reduce defendants' willingness to settle. Class-action defendants are motivated to settle primarily 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 decisions below seriously undermine that motivation.

STATEMENT OF THE CASE

In December 2012, GSK agreed with a class of plaintiffs to settle claims in the Eastern District of Pennsylvania that it improperly delayed the marketing of a generic equivalent of Flonase, an allergy-relief medication manufactured by GSK. The plaintiffs alleged that GSK's conduct violated a variety of antitrust and state consumer protection laws.

In June 2013, the district court certified a "Settlement Class" and issued a Final Order and Judgment approving the settlement. Pet. App. 42a-

58a. The "Settlement Class" consisted of persons who bought 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.* 46a.

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.* 44a. The Final Order enjoined all members of the Settlement Class from initiating any legal proceedings "in any state or federal court" against GSK and related entities based on the claims released by the settlement. *Id.* 54a. The court retained exclusive jurisdiction over the proceeding for the purpose of resolving any disputes that might arise in connection with the settlement. *Id.* 50a. Although the settlement notice afforded all absent class members an opportunity to opt out, Louisiana did not do so.

Eighteen months later, the Louisiana Attorney General—represented by private counsel 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 the settled case. The substantive paragraphs of the Louisiana complaint are copied word-for-word from the July 2008 complaint filed by the indirect-purchaser plaintiffs. In response, GSK asked the district court to enforce the class settlement against the Louisiana Attorney General.

The district court denied GSK's motion in December 2015. Pet. App. 21a-35a. The court held that Louisiana is entitled to Eleventh Amendment sovereign immunity that protects it against being made a party to federal court proceedings without its "unequivocal consent." *Id.* 27a-31a. It also held that Louisiana's failure to opt out of the settlement did not constitute consent to the settlement. *Id.* 32a-35a.

The Third Circuit affirmed. Pet. App. 1a-19a. It held that the parties' motion for approval of the class-action settlement qualified as a suit *against* Louisiana for Eleventh Amendment purposes and that Louisiana's conduct did not constitute a waiver of its Eleventh Amendment immunity. *Id.* 8a. The appeals court distinguished the many Supreme Court and federal appeals court decisions cited by GSK that rejected Eleventh Amendment immunity under analogous circumstances "because none of the private parties in the cases cited by GSK sought legal or equitable remedies *against* the State." *Id.* 13a (emphasis in original). In particular, the court sought to distinguish *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264 (1821), on the basis that the criminal defendant who initiated federal-court proceedings against Virginia had merely "sought a writ of jurisdiction that 'acts only on the record.'" *Ibid* (quoting *Cohens*, 19 U.S. at 410).

The Third Circuit recognized that Louisiana received constitutionally adequate notice that: (1) GSK and the named plaintiffs were proposing to settle the claims on a class-wide basis; (2) Louisiana was a member of the plaintiff class but could opt out of the settlement by notifying the district court; and (3) it

would be enjoined from asserting those same claims in later court proceedings if it did not opt out. Pet. App. 4a-5a. But the court held that Louisiana's failure to opt out despite receiving notice was not the sort of litigation conduct that constitutes a waiver of Eleventh Amendment immunity. *Id.* 14a-17a. The court acknowledged that a failure to opt out following receipt of notice of the sort sent to Louisiana is sufficient to constitute waiver of the constitutional rights of "ordinary litigants." *Id.* 17a. It nonetheless concluded that "[t]he Constitution requires more protections for States than for ordinary litigants ... because of their status as sovereigns." *Ibid.*

SUMMARY OF ARGUMENT

The Petition raises an issue of exceptional importance. The Court has uniformly construed the Eleventh Amendment as providing sovereign immunity to a State only when an opposing litigant seeks to establish some claim *against* the State by court judgment. In sharp conflict with that uniform body of case law, the court below held that the Eleventh Amendment also applies to a State's determination to pursue claims against others.

Review is warranted because the Third Circuit's decision threatens to disrupt the orderly administration of class actions in the federal courts. As the Petition amply demonstrates, States very frequently participate in class actions as absent class plaintiffs. The decision below calls into question the finality of scores of class-action settlements approved by federal district courts. Defendants have agreed to pay millions of dollars to class members in reliance on

the enforceability of those settlement-approval orders. Yet the decision below grants States the unilateral option to violate the terms of those orders by initiating their own copy-cat litigation.

The decision also greatly reduces the incentives for defendants to enter into class-action settlements. A principal incentive for defendants to do so is a desire to buy litigation peace—paying a lump sum (often large) in return for assurances that the settlement will bar future lawsuits raising substantially identical claims. The decision below prevents defendants from obtaining such assurances because it bars enforcement of district court judgments if States included in the plaintiff class later decide to walk away from the settlement. And in the absence of such assurances, defendants will be less willing to enter into settlements.

The Court has expressly held that the Constitution imposes fewer restrictions on courts' exercise of jurisdiction over absent class plaintiffs than it imposes on the exercise of jurisdiction over defendants. It so held because it concluded that absent class plaintiffs are unlikely to be prejudiced by their participation in litigation so long as their interests are adequately represented by the named plaintiffs. *Phillips Petroleum Corp. v. Shutts*, 472 U.S. 797 (1985). Given the limited likelihood of prejudice, *Shutts* determined that "the obvious advantages in judicial efficiency resulting from the 'opt out' approach" to class actions counseled against creating more-than-minimal constitutional barriers to the exercise of jurisdiction over absent class plaintiffs. 472 U.S. at 813-14. Yet the decision below severely cripples the

opt-out approach lauded for its efficiency by *Shutts*.

Indeed, the Third Circuit's determination that granting Louisiana an opt-out right did not adequately protect its constitutional rights failed to include any citation to *Shutts*, despite that decision's obvious relevance to Louisiana's claims. Review is warranted to determine whether the major impediments to efficient class-action litigation created by the decision below are really required by the U.S. Constitution.

Review is also warranted because the Third Circuit decision conflicts with numerous decisions from this Court and other federal appeals courts. The appeals court's effort to distinguish those decisions is unavailing. Louisiana's novel assertion that Eleventh Amendment immunity extends beyond claims filed against a State has been uniformly rejected by this Court. Most famously, in *Cohens v. Virginia*, the 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. 19 U.S. at 405-12. 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 (emphasis added).

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. So, 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). Such injunctions 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. Review is warranted to resolve the conflict between this Court's decisions and the decision below on whether the Eleventh Amendment is implicated when, in accord with well-established Rule 23 procedures, a State that passes up an opt-out opportunity is required to adjudicate its claims against a private litigant in a federal forum.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW THREATENS TO DISRUPT THE ORDERLY ADMINISTRATION OF CLASS ACTIONS IN FEDERAL COURT

The Court has repeatedly endorsed the class action as an efficient method of settling large numbers of claims in a single proceeding. For example, in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court stated:

> A class action solves this problem [that individuals may lack sufficient financial incentives to assert claims on their own] by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor. ... [C]lass action practice has become ... a means of coping with claims too numerous to secure their "just, speedy and inexpensive determination" one by one. The development reflects concerns about the efficient use of court resources.

521 U.S. at 617-18 (quoting Fed.R.Civ.P. 1). Moreover, the Court has recognized that the class-action device has a pedigree dating back to medieval times. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) (stating that "representative suits have been recognized in various forms since the earliest days of English law").

Yet as the Petition demonstrates, the decision below threatens to disrupt modern class-action practice in the federal courts. By Petitioner's count, States were absent class members in at least 19 certified classes in the past five years within the Third Circuit alone. Pet. 8-11 & n.5. Given their involvement in many commercial activities, States are routinely included as absent class members in a wide variety of certified class actions. For example, in every major securities case heard by the Court in recent years that involved a certified class, States were among the absent class members. *See, e.g., CalPERS v. ANZ Securities*, 137 S. Ct. 2041 (2017); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *Amgen Inc. v. Connecticut Retirement Plans & Trust*

Funds, 568 U.S. 455 (2013).

The parties in those proceedings entered into court-approved settlements in reasonable reliance that the absent-plaintiff States were bound thereby and were not free to file copy-cat lawsuits against the defendants. The decision below upends those reliance interests by declaring that States are not bound by such court orders even if they declined the opportunity to opt out, unless they have affirmatively consented to the court's jurisdiction. Review is warranted in light of the significant impact that the decision below is likely to have on class-action litigation, both retroactively and going forward.

The Third Circuit focused much of its Eleventh Amendment concerns on what it viewed as the constitutional inadequacies of Rule 23's opt-out provision. The court conceded that Louisiana received constitutionally sufficient notice of the proposed settlement and failed to exercise its option to opt out of the settlement. It nonetheless concluded the Eleventh Amendment barred the district court from exercising jurisdiction in the absence of a "clear declaration" that Louisiana submitted to federal court jurisdiction—and that Louisiana's failure to opt out was an insufficient declaration. Pet. App. 14a. But it failed to acknowledge that the opt-out provision has been the linchpin of modern Rule 23(b)(3) class-action litigation, or that this Court (in *Shutts*) determined that the opt-out right adequately protected the constitutional rights of absent class plaintiffs who—but for the opt-out provision—would not have been subject to federal-court jurisdiction.

As *Shutts* explained, 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." 472 U.S. at 808 (citation omitted). This exception is a constitutionally permissible means of enhancing judicial efficiency, provided that absent class members are afforded adequate procedural protections:

> [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 a court, if it wants to bind absent plaintiffs to a judgment in a case seeking money damages, must afford them the following procedural protections:

> 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).[2]

The Court expressly held that, because absent class plaintiffs who do not opt out are unlikely to be prejudiced by class-action litigation in which their interests are adequately represented by the named plaintiffs, the Constitution imposes fewer restrictions on courts' exercise of jurisdiction over them than it imposes on the exercise of jurisdiction over defendants. *Id*. at 813-14. Given the limited likelihood of prejudice, *Shutts* determined that "the obvious advantages in judicial efficiency resulting from the 'opt out' approach" to class actions counsel against creating more-than-minimal constitutional barriers to the exercise of jurisdiction over absent class plaintiffs. *Id*.

Importantly, the district court determined here, after conducting a fairness hearing, that each of the procedural requirements set forth in *Shutts* and Rule 23 was satisfied. Pet. App. 44a. In particular, the district court held that notice provided to the absent class plaintiffs "was the best notice practicable under the circumstances." *Ibid*. Louisiana has not

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

challenged that determination; indeed, it concedes that it received a detailed description of the proposed settlement. Yet without discussing the disruptive effect that its decision would have on class actions and without even citing *Shutts*, the Third Circuit held that the opt-out procedures endorsed in *Shutts* were insufficient to overcome Louisiana's constitutional objections to federal-court jurisdiction.

The Third Circuit acknowledged that a failure to opt out following notice of the sort sent to Louisiana is sufficient to overcome any constitutional objections "ordinary litigants" might have to being bound by court proceedings as absent class plaintiffs. Pet. App. 17a. It nonetheless ruled summarily that "[t]he Constitution requires more protections for States than for ordinary litigants ... because of their status as sovereigns." *Ibid.* There is significant tension between *Shutts*'s conclusion that opt-out procedures are sufficient to protect the constitutional rights of "ordinary" litigants (because designation as an absent plaintiff imposes relatively minimal burdens) and the Third Circuit's conclusion that States have an absolute constitutional right to resist being subjected to those same minimal burdens.

The decision below also substantially reduces the incentives for defendants to settle class actions.[3] States are major players in many varieties of class-action litigation against the business community. All

[3] The Court has repeatedly recognized "a general legal policy favoring the settlement of disputes" and "the value of settlements." *FTC v. Actavis*, 570 U.S. 136, 153 (2013). *See Marek v. Chesny*, 473 U.S. 1, 5 (1985) (Fed.R.Civ.P. 68 was adopted to "encourage settlement" and "avoid litigation.").

50 States devote much of their annual budgets to healthcare expenditures, a fact that ensures their participation in the large volume of class-action litigation against (as here) pharmaceutical companies and other healthcare providers. A principal incentive for defendants to settle those class actions is a desire to buy litigation peace—paying a lump sum (often large) in return for assurances that the settlement will bar future lawsuits raising substantially identical claims. The Third Circuit's decision prevents defendants from obtaining such assurances because it bars enforcement of district court judgments if States included within the plaintiff class later decide to walk away from the settlement. And in the absence of such assurances, defendants will be less willing to settle.

Defendants routinely insist that any class-action settlement include a "blow-up" provision; that is, a clause providing that the settlement is inoperative if more than a specified number of absent class members opt out of the settlement. 4 *Newberg on Class Actions* § 13:6 (5th ed.). They insist on these provisions because the value of a class-wide settlement is considerably reduced if many plaintiffs opt out and the desired litigation peace is thereby undermined. *Id.* The utility of a blow-up provision is greatly reduced if the Third Circuit's ruling stands and States are free to back out of the agreement long after the opt-out period has closed and the settlement has taken effect. If the parties can avoid that uncertainty only by explicitly excluding the various agencies of all 50 States from the certified class, it would diminish the settlement's value by failing to foreclose future litigation—particularly in such fields as healthcare, in which States are likely to be among the larger claimants.

In sum, review is warranted because the decision below will seriously disrupt Rule 23(b)(3) class-action litigation, which is based on the opt-out model that the Third Circuit rejected as constitutionally deficient.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL APPEALS COURTS

Review is also warranted because the Third Circuit's decision conflicts with several decisions from this Court and other federal appeals courts. This Court has always construed the Eleventh Amendment to protect States only when they are sued as defendants in federal court. In sharp contrast, the Third Circuit held that the Eleventh Amendment precluded the parties' efforts to include Louisiana as an absent class *plaintiff*.

The Eleventh Amendment 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." In *Cohens v. Virginia*, the Court expressly limited the Eleventh Amendment's application to instances in which federal jurisdiction was invoked by a party asserting a claim *against* a State, holding that the Amendment did not apply when the party sought federal-court protection from a claim being asserted by a State. The Court found 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*, 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 Eleventh Amendment immunity from even having to come into federal court to defend its prosecution.

The 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. But the Court concluded that the action could not be deemed a "suit" commenced 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 something allegedly withheld by Virginia but rather sought relief that was "entirely defensive" in nature, this Court concluded that the Eleventh Amendment did not prevent it from considering Cohens's claim. *Id.* at 410-12.[4]

The decision below cannot be squared with *Cohens*. By approving a class-wide settlement that included States as absent class members, the district court did not "establish[ ] some claim" against Louisiana; it merely directed that any antitrust-related claim that Louisiana might wish to assert against GSK should (barring an opt out) be filed in federal district court. Similarly, GSK's motion was "entirely defensive" in nature; it sought merely 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 did not seek money or property from the State. Accordingly, *Cohens* mandates a finding that Louisiana is not

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[4] 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*, 19 U.S. at 410-11).

entitled to sovereign immunity from the district court's order enjoining it from asserting the settled claims in any other court.

The Third Circuit attempted to distinguish *Cohens* by stating (without further explanation) that the criminal defendant in that case "sought a writ of jurisdiction that 'acts only on the record.'" Pet. App. 13a (quoting *Cohens*, 19 U.S. at 410). But there is no significance, for Eleventh Amendment purposes, that the Court limited itself to an "on-the-record" review of the defendant's criminal conviction rather than permitting the parties to submit additional evidence. The Court unequivocally asserted the right to "submit the judgment of the inferior court [the Virginia Supreme Court] to re-examination," and to hale the State of Virginia into federal court for the purpose of defending its judgment against Cohens in response to the latter's assertion that "the judgment violates the constitution or laws of the United States." 19 U.S. at 410. The Court thereby asserted the right to enjoin Virginia from punishing Cohens in a manner inconsistent with federal law, yet it held that Cohens's efforts to obtain such an injunction cannot "be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined." *Id.*[5]

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[5] The Third Circuit held that a suit is one "against the sovereign ... if the effect of the judgment would be to restrain the Government from acting." Pet. App. 10a. But if that were the test for invoking the Eleventh Amendment, then *Cohens* was wrongly decided—because the effect of any judgment against Virginia would have been to restrain the State from imposing criminal penalties on Cohens. Indeed, under the Third Circuit's test, a federal court would virtually never be permitted to prevent a 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, 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

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from ignoring a judgment issued in a federal proceeding in which the State had not expressly consented to be a party.

> 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 *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), the Court rejected Tennessee's claim that the Eleventh Amendment prevented federal courts from requiring that the State adjudicate its claims against an individual in federal court following her filing of a Chapter 7 bankruptcy petition.[6] The Court held that a proceeding initiated by a debtor to discharge a debt owed to a State is not a claim "against" a State because "a debtor does not seek monetary damages or any relief from a State by seeking to discharge a debt." 541 U.S. at 450. The Court added, "[N]or does he subject an unwilling State to coercive judicial process," given that no monetary claims could be awarded against the State if it failed to

[6] The individual sought to discharge an otherwise-nondischargeable student loan debt on the ground that repaying the debt would create "undue hardship." She served a summons on Tennessee, directing Tennessee to appear in federal court if it wished to contest her discharge petition.

appear in federal court. *Id.*[7]

The Court's bankruptcy case law makes clear that the Eleventh Amendment does not bar federal courts, when called upon to decide issues arising from a State's claim against a third party, from asserting jurisdiction over the issues and enjoining state officials from seeking a separate determination of those issues in their own courts. The Third Circuit sought to distinguish *Hood* by noting the *in rem* nature of bankruptcy proceedings; that is, a bankruptcy court exercises jurisdiction over the estate of the debtor, and its determinations regarding the validity of claims against a debtor cannot give rise to personal liability for a nonparticipating creditor. Pet. App. 14a; *see Hood*, 541 U.S. at 447-48. But the *in rem* nature of bankruptcy proceedings fails to distinguish the Court's Eleventh Amendment case law from the decision below. The district court's Final Order approving the class-action settlement is similarly limited to adjudication of claims *against GSK*'s assets and does not purport to adjudicate any claims that GSK might assert against Louisiana or anyone else. Just as the Eleventh

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[7] Similar to its treatment of bankruptcy proceedings, Congress has determined that class-wide claims of the sort asserted against GSK are appropriately heard in federal court. Congress adopted the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2, 119 Stat. 4, to broaden federal court diversity jurisdiction so as to encompass "interstate cases of national importance," CAFA § 2(b)(2)—thereby ensuring that state-court defendants would almost always have the option of removing large, putative class-actions to federal court. In ensuing years, defendants have invoked CAFA on hundreds of occasions to remove lawsuits to federal court in which the putative plaintiff class included States among the absent class plaintiffs.

Amendment did not protect Tennessee from being required to assert its nondischargeability claim in federal court, so too the Eleventh Amendment does not preclude requiring Louisiana to come to federal court if it wishes to assert claims against GSK.

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. 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). The decision below—by invoking the Eleventh Amendment as a bar to an injunction that could not possibly require the expenditure of funds by

Louisiana—is inconsistent with *Edelman*.[8]

As the Petition explains in depth, the decision below also conflicts with the decisions of at least three other federal appeals courts. In particular, it conflicts with appeals court decisions holding that the Eleventh Amendment is wholly inapplicable (and thus there is no need to consider the issue of waiver of Eleventh Amendment rights) when defendants remove to federal court a case filed against them in a state court by a State—because a federal-court lawsuit is not a suit "against" a State if all the claims in the suit were initiated by the State. *See, California ex rel. Lockyer v. Dynergy, Inc.*, 375 F.3d 831, 846-48 (9th Cir. 2004); *Oklahoma ex rel. Edmondson v. Magnolia*, 359 F.3d 1237, 1240 (10th Cir. 2004). In sharp contrast, the Third Circuit held that the Eleventh Amendment applied to the district court's efforts to require that Louisiana's claims against GSK be heard in federal court (in the absence of an opt-out), notwithstanding that GSK asserted no claims against Louisiana.

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[8] In determining that the district court's Final Order violated the Eleventh Amendment, the Third Circuit relied heavily on *Missouri v. Fiske*, 290 U.S. 18 (1933). *Fiske* arose in decidedly different circumstances, was not cited by Louisiana in its Third Circuit briefing, and is largely irrelevant to this case. The Respondents in *Fiske* sought a federal-court injunction to prevent Missouri from litigating in state court its asserted right to collect estate tax from the estate of a Missouri resident. 290 U.S. at 27. Independently of the Eleventh Amendment, this Court has long recognized "the background presumption that federal law generally will not interfere with administration of state taxes." *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n* 515 U.S. 582, 588 (1995). *Fiske* can best be understood as an application of that presumption.

The Third Circuit sought to distinguish *Dynergy* by observing that the removal petition filed in that case "was not dissimilar from" the writ of error sought by the defendant in *Cohens v. Virginia*. Pet. App. 13a. While that observation may be accurate, it fails to distinguish *Dynergy* because (as explained above) the decision below also conflicts with *Cohens*. If, as the Ninth and Tenth Circuits held, the Eleventh Amendment does not protect a State from a federal court's assertion of jurisdiction over a lawsuit that does not include claims for affirmative relief against the State, then the Eleventh Amendment is similarly inapplicable to the district court's Final Order approving the settlement.

In sum, review is warranted to resolve the conflict between the decision below and numerous decisions from both this Court and other federal appeals courts.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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