No. 17-633

IN THE

Supreme Court of the United States

ENDO PHARMACEUTICALS INC.,
Petitioner,

v.

NEW HAMPSHIRE
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of New Hampshire

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. An important function of the Chamber is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of national concern to American business, such as this one. The Chamber's members operate in nearly every industry and business sector in the United States. These members have an interest in vindicating bedrock principles of due process and ensuring that defendants are afforded a neutral tribunal in cases brought against the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties in this case received notice of the intention to file this brief at least 10 days before its due date and provided written consent to the filing of this brief.

Chamber's members by or on behalf of governmental entities.

The Chamber has a strong interest in this case because its members are increasingly the targets of investigations and litigation involving contingency-fee arrangements between Attorneys General and private counsel. The Chamber has been actively involved as *amicus* in numerous court proceedings addressing this important issue.[2] The Chamber has also published reports regarding the outsourcing of state enforcement powers,[3] the use of contingency-fee counsel by local

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[2] *See, e.g.,* Brief of Chamber as *Amicus Curiae*, *County of Santa Clara v. Atlantic Richfield Co.*, No. 10-546 (U.S. Nov. 26, 2010); Brief of Chamber as *Amicus Curiae*, *Ortho-McNeil-Janssen Pharmaceuticals, Inc. v. South Carolina ex rel. Alan Wilson*, No. 15-600 (U.S. Dec. 9, 2015); Brief of Chamber as *Amicus Curiae, EEOC v. Peoplemark, Inc.*, No. 11-2582 (6th Cir. June 7, 2012); Brief of Chamber as *Amicus Curiae*, *Merck v. Conway*, No. 13-5792/13-5881 (6th Cir. July 12, 2013); Brief of Chamber as *Amicus Curiae*, *American Bankers Mgmt. Co., Inc. v. Heryford*, No. 16-16103 (9th Cir. Oct. 3, 2016); Brief of Chamber as *Amicus Curiae*, *Pennsylvania v. Janssen Pharmaceuticals, Inc.*, No. 24 EAP 2009 (Pa. Aug. 10, 2009); Brief of Chamber as *Amicus Curiae*, *Wyeth v. Nevada*, No. 66155 (Nev. Aug. 4, 2013); Brief of Chamber as *Amicus Curiae*, *Cephalon v. Wilson*, No. 2014-001465 (S.C. Nov. 24, 2014); Brief of Chamber as *Amicus Curiae*, *Bristol-Myers Squibb Co. v. Jim Hood*, No. 2015-M-1543-SCT (Miss. Oct. 20, 2015); Brief of Chamber as *Amicus Curiae*, *Grady v. Hunt County, Texas*, No. 3:16-cv-01404-C (N.D.Tex. July 6, 2016); Brief of Chamber as *Amicus Curiae*, *County of Butler v. Centurylink Comms.*, No. 1506 CD 2016 (Pa. Commw. Ct. Feb. 28, 2017).

[3] U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, PRIVATIZING PUBLIC ENFORCEMENT: THE LEGAL, ETHICAL, AND DUE-PROCESS IMPLICATIONS OF CONTINGENCY-FEE ARRANGEMENTS IN THE PUBLIC SECTOR (September 2013),

governments,[4] and other issues related to litigation involving the business community.[5]

SUMMARY OF ARGUMENT

This is not a case challenging the propriety of States hiring outside counsel. This is a case about the limits the Constitution places on States' ability to use contingency-fee arrangements that vest core executive functions in private attorneys who have a direct monetary interest in the outcome of a government enforcement action. The increasing frequency of these types of arrangements across no less than 36 States, as well as various local government entities, has fostered a lucrative cottage industry of bounty-hunter prosecutors, who offer States the promise of large paydays with no risk in exchange for the ability to personally profit from public civil enforcement.

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http://www.instituteforlegalreform.com/uploads/sites/1/PublicInterestPrivateProfit_FINAL.pdf.

[4] U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, BIG BUCKS AND LOCAL LAWYERS: THE INCREASED USE OF CONTINGENCY FEE LAWYERS BY LOCAL GOVERNMENTS (October 2016), http://www.instituteforlegalreform.com/uploads/sites/1/LocalProsecutorsPaper_WebPaper.pdf (hereinafter "Big Bucks and Local Lawyers").

[5] U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, THE NEW LAWSUIT ECOSYSTEM (October 2013), http://www.instituteforlegalreform.com/uploads/sites/1/The_New_Lawsuit_Ecosystem_pages_web.pdf (hereinafter "Lawsuit Ecosystem"); U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, LAWSUIT ECOSYSTEM II: NEW TRENDS, TARGETS, AND PLAYERS (December 2014), http://www.instituteforlegalreform.com/uploads/sites/1/evolving.pdf (hereinafter "Lawsuit Ecosystem II").

The increasing privatization of public enforcement is more than a policy concern regarding how the States go about carrying out their most essential function of enforcing the law. States have encroached on the Due Process protections afforded by the Fourteenth Amendment by turning their enforcement power into a for-profit venture, creating a schism between the public interest and the financial interest of private lawyers with huge stake in the outcome, and depriving the targets of enforcement actions of their Constitutional right to a neutral public enforcer. This blurring of the line between public and private enforcement puts both the State's cloak of credibility and the hammer of the State's enforcement power into the hands of private counsel to wield for their own profit.

The Court should grant review to establish the fundamental Constitutional limitations that apply when a State puts its enforcement authority into the hands of a for-profit private actor.

ARGUMENT

I. The Question Presented is Recurring and Important, as States Increasingly Rely on Private Contingency-Fee Counsel to Carry Out Public Investigative and Prosecutorial Duties

Since the first well-publicized use in the 1990s, the practice of State Attorneys General employing contingency-fee private counsel has expanded rapidly. This rise may be traced to the States' use of

contingency fee counsel in the tobacco litigation of the 1990's. While the stakes in these cases were certainly significant enough to warrant the direct involvement of State Attorneys General, the use of contingency-fee counsel resulted in an astonishing $14 billion in payouts[6] to the private counsel that litigated on behalf of 36 states.[7] Since then, private contingency-fee counsel have been in search of their next big paydays, selling cash- and resource-strapped State Attorneys General on the idea of large paydays in exchange for allowing the private counsel to profit from government enforcement efforts. And these efforts have paid off.

In 2011, Freedom of Information Act requests served on all 50 States and the District of Columbia found that 36 States have used contingency-fee litigation counsel in non-tobacco cases, with reported contingency fees ranging as high as 50%.[8] The enforcement actions brought under such arrangements pursue a wide variety of legal claims against the full spectrum of industries.

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[6] Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 COLUM. J.L. & SOC. PROBS. 587, 588–89 (2009).

[7] Lise T. Spacapan Et al., *A Threat to Impartiality: Contingency Fee Plaintiffs' Counsel and the Public Good*, IN-HOUSE DEFENSE QUARTERLY, Winter 2011, at 13. On just a single day, an astonishing $8.2 billion in attorneys' fees were awarded in the tobacco litigation. Barry Meier, *Lawyers in Early Tobacco Suit to Get $8 Billion*, N.Y. TIMES, Dec. 12, 1998, http://www.nytimes.com/1998/12/12/us/lawyers-in-early-tobacco-suits-to-get-8-billion.html.

[8] *See* Spacapan, *supra* n. 7, at Appendix B.

Though information on the nature and scope of these arrangements typically is not publicly available in most States, documents obtained from one State (Mississippi) shed some light on the immense scope of these arrangements. Mississippi has 105 *currently-active* contingency-fee contracts.[9] These cases target companies that provide healthcare,[10] consumer products,[11] financial services,[12] and technology

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[9] *Outside Legal Counsel*, OFFICE OF THE ATTORNEY GENERAL STATE OF MISSISSIPPI, http://www.ago.state.ms.us/outside-legal/ (last visited Nov. 27, 2017).

[10] Retention Agreement between the State of Mississippi and Zimmerman Reed, PLLP dated January 3, 2007, *available at* http://www.ago.state.ms.us/wp-content/uploads/2013/07/Boston-Scientific-Outside-Legal.pdf (for the investigation, research, and filing of claims against Boston Scientific Corporation). This retention agreement does not specify the nature of the suspected misconduct by Boston Scientific, but indicates that "the Attorney General has determined that the damages to the State, from unspecified conduct, total in excess of $4 million," and notes that the outside law firm has expertise in a broad list of matters, namely "securities fraud litigation, general tort law litigation, professional malpractice litigation, and general litigation."

[11] Retention Agreement between the State of Mississippi and Abraham & Associates, PA dated March 24, 2011, *available at* http://www.ago.state.ms.us/wp-content/uploads/2013/07/LCD-Outside-Legal.pdf (for the investigation, research and filing of claims against unnamed entities related to the fixing of prices of liquid crystal display ("LCD") panels). According to its website, Abraham & Associates, PA employs just two attorneys, specializes in personal injury law, and does not practice antitrust. *See* WEBSITE OF LEE ABRAHAM & ASSOCIATES, PA, http://leeabrahamlaw.com/ (last visited Nov. 28, 2017).

[12] Retention Agreement between the State of Mississippi and Gadow Tyler, PLLC dated January 13, 2017, *available at* http://www.ago.state.ms.us/wp-content/uploads/2017/01/SANTANDER.pdf (for the investigation,

products,[13] and also bring shareholder actions[14] and claims against the federal government.[15]

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research, and preparation of clams or complaint(s) against Santander Consumer USA, Inc. "and potentially other entities" for conduct relating to loans made to citizens of the State of Mississippi). John Gadow, who signed the Retention Agreement on behalf of Gadow Tyler, was a contributor to Attorney General Jim Hood's 2015 reelection campaign. *See* VoteSmart, *Jim Hood's Campaign Finances*, https://votesmart.org/candidate/campaign-finance/40176/jim-hood#.Whv5f1WnFhE (hereinafter "VoteSmart").

[13] Retention Agreement between the State of Mississippi and Kitchens Law Firm, P.A. dated January 13, 2017, *available at* http://www.ago.state.ms.us/wp-content/uploads/2017/01/Google-Retention-Agreement.pdf (for the investigation, research, and preparation of claims against Google Inc. for damages related to, *inter alia*, privacy violations stemming from the Google Apps for Education program in the K-12 school system). The Kitchens Law Firm, PA was a contributor to Attorney General Jim Hood's 2015 reelection campaign. *See* VoteSmart, *supra* n. 12.

[14] Retention Agreement between the State of Mississippi and Bernstein Litowitz Berger & Grossman LLP dated May 17, 2006, *available at* http://www.ago.state.ms.us/wp-content/uploads/2013/07/United-Health-Outside-Legal.pdf. (for the investigation, research, and prosecution of claims against UnitedHealth Group Inc. related to "the granting of backdated stock options to UnitedHealth's executives," resulting in damage to the company and its shareholders, including the State of Mississippi). The law firm receiving this contract was a contributor to Attorney General Jim Hood's 2015 reelection campaign. *See* VoteSmart, *supra* n. 12.

[15] Retention Agreement between the State of Mississippi and Walters Bender Strohnbehn & Vaught, P.C. dated November 18, 2015, *available at* http://www.ago.state.ms.us/wp-content/uploads/2015/11/US-Treasury-outside-legal-council.pdf (for the investigation, research, and filing of claims against the United States Treasury related to collections from savings bonds).

This surge in contingency-fee "Special Assistant Attorney General" retentions has resulted in monumental paydays for private attorneys. According to the most recent report of legal fees and expenses related to contingency fund payments, the Office of the Attorney General of the State of Mississippi has paid seventeen law firms over $98.5 million since August 31, 2012.[16] A single law firm, Copeland Cook Taylor & Bush PA, had been retained and paid by the State of Mississippi 27 times, collecting over $39.6 million in contingency fees to date.[17]

New Hampshire, for its part, does not publish such extensive data on its use of contingency-fee counsel. However, public litigation suggests that the State is also active in this space. For example, in April 2013, contingency-fee counsel from California-based firm Sher Leff LLP and Pawa Law Group, P.C., (a firm with offices in Boston and Washington, D.C.) represented New Hampshire in a lawsuit stemming from energy companies' EPA-approved practice of adding methyl tertiary-butyl ether ("MTBE") to its gasoline to fulfill Congressionally-established requirements designed to reduce air pollution.[18] The lawsuit resulted in $272 million in verdicts and

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[16] Attorney General Contingent Fund Attorney Fees & Expenses Through August 17, 2017, *available at* http://www.ago.state.ms.us/wp-content/uploads/2017/09/Contingent-Fund-Attorney-Payments.pdf

[17] *Id.*

[18] Lawsuit Ecosystem II, *supra* n. 5, at 97.

settlements, yet over $35 million of that sum was designated to the contingency fee lawyers.[19]

Following the New Hampshire lawsuit, Vermont Attorney General William Sorrell retained the same Pawa Law Group to bring nearly identical suits in Vermont, against a litany of gasoline refiners doing business in the State.[20] The Vermont Attorney General also retained two additional firms as co-counsel to that litigation, Baron & Budd PC and Weitz & Luxenberg PC.[21] Six months prior to being hired, Baron & Budd, Russell Budd (its principal), Dorothy Budd (his wife), and Scott Summy (who leads the firm's MTBE litigation practice) each contributed to the Vermont Attorney General's re-election campaign.[22]

The outsourcing of the government's investigative and prosecutorial functions occurs not only at the State level, but also at county and municipal level. For example, the City of Chicago has retained Cohen Milstein Sellers & Toll PLLC on a contingency-fee basis to bring suit against Endo Pharmaceuticals and other pharmaceutical companies

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[19] *Id.*

[20] *Id.*

[21] *Vermont v. Atlantic Richfield Co.*, No. 340-6-14 (Vt. Super. Ct., filed June 5, 2014).

[22] *See* William H. Sorrell, Campaign Finance Disclosure Form, filed Mar. 14, 2014*, available at* https://www.sec.state.vt.us/media/473271/Sorrell-Bill-3172014-AG.pdf.

based on the marketing of their FDA-approved opioid pain medication[23]—the same law firm, pursuing the same companies, for the same conduct as the subject of the investigative demand in New Hampshire in the case presently before this Court. Similarly, various Louisiana parish governments, counties, municipalities, school boards, and other government agencies along the Gulf coast hired contingency-fee counsel to bring claims on their behalves for lost tax revenue and other effects stemming from the BP deep water horizon oil spill.[24] In Jefferson Parish alone, the contingency-fee counsel was slated to receive almost $12 million for its work in securing the parish's $53.1 million settlement.[25]

Because local governments can readily participate in this outsourcing practice, private law firms are able to shop identical or nearly-identical lawsuits not just to all 50 States, but to hundreds and even thousands of local governmental enforcement

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[23] *City of Chicago v. Purdue Pharma LP*, No. 1:14-cv-04361 (N.D.Ill., filed June 11, 2014).

[24] Richard Thompson, *Attorney General's office has paid more than $38 million to law firms working on BP settlement*, THE NEW ORLEANS ADVOCATE, Aug. 14, 2015, http://www.theadvocate.com/new_orleans/news/politics/article_4eaae774-7762-56c8-b6a1-918806ec3e7b.html (last visited November 27, 2017).

[25] Advocate Staff Report, *Jefferson Parish to get $53M-Plus in BP Settlement Cash; Here's How the Money Will be Allotted,* THE NEW ORLEANS ADVOCATE, July 10, 2015, http://www.theadvocate.com/new_orleans/news/politics/article_f0729562-2465-51f5-af6e-e19a80a637b4.html.

bodies, each of which can sign on to the no-risk payday that the firms purport to offer. Representing a city or county can present lucrative opportunities for contingency-fee counsel, yet often comes with fewer restrictions and laxer oversight than representing State governments.

In light of the strong incentives to bring such contingency cases, States have already begun to fall victim to private counsel's overreach. For example, in 2014, both Arkansas's and Louisiana's large monetary verdicts for false claims against a Johnson & Johnson subsidiary were overturned, reversing a $1.2 billion verdict for Arkansas and $330 million verdict for Louisiana.[26] Both States had pursued their own suits after opting out of a $2.2 billion federal multi-State settlement that would have allowed them to recover damages resulting from Medicaid overpayment.[27] Instead, the contingency-fee attorneys pursued more aggressive claims, including statutory penalties and attorneys' fees, in lawsuits that ultimately resulted in the States recovering nothing.

Both legislatures and courts throughout the country have been grappling with the propriety of these arrangements.[28] But the inherent structural flaws in these practices are not just policy questions—

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[26] Lawsuit Ecosystem II, *supra* n. 5, at 106–07.

[27] *Id.*

[28] *See, e.g., supra* n. 2 (listing cases); Spacapan, *supra* n. 7, at Appendix B (listing state legislation).

they implicate the Constitutional question of whether the Fourteenth Amendment's Due Process clause guarantees the targets of State action a neutral prosecutor without a personal financial stake in the outcome of the proceeding.

II. The Use of Contingency Fee Arrangements to Carry Out Investigative and Prosecutorial Duties Departs from Historical Legal Norms and Creates an Incurable Conflict of Interest

Reliance on contingency-fee arrangements to identify, investigate, and litigate cases on behalf of State and local governments creates an insurmountable moral hazard that Courts have long recognized as an ethical concern and, ultimately, an incurable conflict of interest that does not exist when outside counsel is retained at an hourly or other established rate.

A. Historical Precedent Demonstrates That This is an Anomalous Application of Contingency-Fee Arrangements

Historically, contingency fee arrangements have been viewed with suspicion, even outside the context of government enforcement, seen as a necessary evil to facilitate access to the courts for those who could not

otherwise afford to retain counsel.[29] Indeed, special ethical rules have been created to facilitate appropriate conduct in such relationships.[30]

While modern practice accepts the use of contingency-fee arrangements in the private civil context, the justifications offered for that practice are inapplicable to State Attorneys General. As summarized by one law journal article, "[t]here are four principal policy justifications for contingent fee arrangements."[31] First, "such arrangements enable the impecunious to obtain representation."[32] Second, "contingent fee arrangements can help align the interests of lawyer and client."[33] Third, "by predicating

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[29] *See, e.g., Calhoun v. Massie*, 253 U.S. 170 (1920) (Brandeis, J.) (upholding statute limiting contingent fees in suits against government, since such fees might stimulate lawyers to stir up unjust claims or use improper methods); Adam Shajnfeld, *A Critical Survey of the Law, Ethics, and Economics of Attorney Contingency Fee Arrangements*, 54 N.Y.L.S. REV. 773, 775 (2010) ("In the Middle Ages, a contingent fee arrangement 'was not only void, but constituted the criminal offense of champerty.' … In the United States, over time, the contingent fee 'won a grudging acceptance as a 'necessary evil.'").

[30] *See, e.g.,* MODEL RULES OF PROF'L CONDUCT r. 1.5(a), (c), (d) (AM. BAR ASS'N 1983); Gregory R. Hanthorn et al., *Ethical Principles Applicable to Alternative Fee Arrangments and Related Areas*, ABA Section of Litigation 2012 Section Annual Conference April 18-20, 2012, *available at* https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/17-1_ethics_surrounding_attorneys_fees.authcheckdam.pdf.

[31] Shajnfeld, *supra* n. 29, at 776.

[32] *Id.*

[33] *Id.*

an attorney's compensation on the success of a suit, the attorney is given incentive to function as gatekeeper, screening cases for both merit and sufficiency of proof, and lodging only those likely to succeed."[34] Fourth, it is consistent with the inherent freedom to contract.[35]

None of these justifications hold water when government entities engage contingency-fee counsel to carry out their investigative and prosecutorial duties. As to the first justification, while States and local governments across the country have increasingly faced budget constraints and fiscal difficulties, Attorneys General have typically been a source of significant monetary recoupment for States and local governments, even without the use of contingency-fee arrangements.[36] Moreover, even when large cases demand significant up-front outlay of resources, Attorneys General are often able to recoup far more than their outlay through vehicles such as awards of attorneys' fees and cost-shifting, treble and enhanced damages, and punitive awards. When a case requires particular expertise, Attorneys General can also retain

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[34] *Id.*

[35] *Id.*

[36] *See, e.g.*, WEBSITE OF ILLINOIS ATTORNEY GENERAL LISA MADIGAN, http://lisamadigan.org/Meet-Lisa/biography (last visited Nov. 28, 2017) (last visited November 27, 2017) ("Madigan consistently brings back hundreds of millions of dollars to Illinois taxpayers each year. Since 2003, she has recouped more than $10 billion in funds defrauded from or owed to the state.").

co-counsel at an appropriate hourly rate, and should expect to recoup this expense if they believe they are pursuing a meritorious case that will ultimately prove profitable to the State.

As to the second justification, the use of contingency counsel in the context of public prosecution does not serve to align incentives between attorney and client. Unlike private litigants whose interests are served by the vigorous advocacy of their position, the public prosecutor has broader obligations to the public good, including to the very targets of the investigation, and an obligation not just to win, but to achieve a just result in a fair manner. Contingency-fee counsel reimbursed based solely on monetary recovery will have no incentive to serve the broadly-understood public good by seeking non-monetary relief at the expense of pecuniary relief, or by foregoing legal action entirely when public interest warrants doing so notwithstanding the investigative costs that have already been borne. In prioritizing monetary gain over all other considerations, contingency-fee arrangements also create a schism between the interests of the prosecutor and the interest of the people, who often are not best served simply by the infusion of money into the State coffers. Public prosecution by contingency-fee private counsel creates a fundamental structural conflict because it cannot, realistically, prioritize non-pecuniary considerations over the pure monetary calculation.

As to the third justification, the gatekeeper function, contingency-fee counsel in public prosecution stands this justification on its head. Unlike in the private context, contingency-fee arrangements for government enforcement are accompanied by the scepter of state authority and investigative powers, the prospect of extraordinary high judgments resulting from civil penalties levied on a State-wide basis, and the reputational harm of being prosecuted in the name of the State.[37] All of these features distort the incentives of profit-driven counsel and can coerce settlement even out of a truly innocent target seeking to avoid the stigma of public prosecution. Therefore, rather than fostering the gatekeeping function, this application of contingency fee arrangements risks opening the floodgates to investigations and litigation that would not be brought by government attorneys without a profit motive.

Finally, as to the fourth justification, the freedom of parties to contract, State agents, by definition, do not enjoy the same unencumbered freedom as do private actors. Indeed, extensive

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[37] Indeed, publicly-traded companies are required to report adverse legal proceedings in their mandatory public filings with the Securities and Exchange Commission ("SEC."). The targets of outsourced Attorney General investigative and enforcement actions typically report these proceedings as Attorneys General enforcement actions, and therefore incur financial and reputational consequences among investors and potential investors.

government procurement rules exist precisely to limit this freedom to contract. In this very case, in fact, New Hampshire's state appropriations statute appears to have been violated, but the lower court held that Petitioner did not have standing to bring allegations based on those violations.[38] Thus, none of the four traditional justifications for tolerating contingency fee arrangements is applicable when the client is the State.

Most fundamentally, whether or not it is good policy for State Attorneys General to use contingency-fee counsel, such arrangements are subject to constitutional requirements that do not apply in private civil disputes. Specifically, government enforcement actions must comply with the impartiality requirements imposed by the Due Process Clause of the United States Constitution. As explained above and in the petition, importing contingency-fee arrangements into government enforcement actions creates an inherent conflict of interest that violates Due Process.

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[38] *See* Petition for Writ of Certiorari, *Endo Pharmaceuticals Inc. v. New Hampshire,* No. 17-633 (U.S. Oct. 27, 2017), at 6–7.

B. The Federal Government Has Recognized the Impropriety of Contingency-Fee Arrangements for Public Prosecutions

While a number of states have ramped up their use of contingency-fee counsel in Attorney General investigations and prosecutions, the federal government has restricted the practice. Tellingly, for the last decade the United States federal government has prohibited the practice of outsourcing of the government's investigative and prosecutorial function to contingency-fee counsel, *while not restricting the retention of private counsel who are paid reasonable compensation through other financial arrangements*.[39] Specially, it is the policy of the United States, by Executive Order, that:

> To help ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States, it is the policy of the United States that organizations or individuals that provide such services to or on behalf of the United States shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation or other proceedings, and established according to criteria set in advance of

[39] *Protecting American Taxpayers from Payment of Contingency Fees,* Exec. Order No. 13433, 72 Fed. Reg. 28441 (May 16, 2007).

> performance of the services, except when otherwise required by law.[40]

This Executive Order reflects the United States' conclusion that the retention of private contingency-fee counsel would bear negatively on the "integrity and effective supervision" that are likely to result from such an arrangement.

Federal law also prohibits any federal officer or employee from "participat[ing] personally and substantially" in proceedings in which the individual "has a financial interest," unless that interest is deemed to not be sufficiently substantial.[41] The federal government thus prohibits the wielding of governmental powers by those with a direct pecuniary interest in the outcome of the action *and holds its retained private counsel to the same standard*, in stark contrast to a growing number of States that have increasingly turned to a contingency-fee based approach.

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[40] *Id.*
[41] *See* 18 U.S.C. § 208(a).

III. The Outsourcing Of State Attorney General Investigative and Prosecutorial Functions to Private Contingency-Fee Counsel Cannot Be Subject to Any Meaningful Control

The Petition for Writ of Certiorari convincingly explains why Attorneys' General purported "control" of contingency-fee counsel cannot salvage this practice.[42] *Amicus* writes here only to add a few points about the inherent unworkability of the control mechanisms.

Some State Attorneys General have claimed in litigation that the redeeming quality of their outsourcing practices are the control powers provided for under their retention agreements, which purport to ensure that the Office of the Attorney General will maintain control throughout all phases of the investigation and litigation. Notably, the position of the federal government is clear that effective supervisions is not possible under such circumstances.[43] Furthermore, as the majority of these challenges have arisen only after litigation had commenced, other courts have not taken the opportunity to address whether control is realistically

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[42] *See* Petition for Writ of Certiorari, *Endo Pharmaceuticals Inc. v. New Hampshire,* No. 17-633 (U.S. Oct. 27, 2017), at 22–27.

[43] *See* Exec. Order No. 13433, *supra* n. 39 (justifying the prohibition of such practices on the need to "ensure the integrity and *effective supervision* of the legal and exper t witness services provided to or on behalf of the United States") (emphasis added).

possible specifically at the *investigative* stage. Simply put, it is not. And it is particularly in the investigative stage of the proceedings that deputized private attorneys most clearly wield powers far beyond those possessed by a private litigant.

In this case, Petitioner had not been sued in court, nor had it been informed of the nature of the investigation against it. Instead, it received an investigative demand purporting to have been issued under the powers of the State Attorney General and demanding the production of their confidential business documents to the offices of Cohen Milstein, a well-known plaintiffs' law firm that operates throughout the country—and that had, in fact, already signed up other jurisdictions to pursue outsourced public litigation against the Petitioner.

Had Cohen Milstein been working on behalf of private litigants, it would not have been authorized to obtain pre-litigation discovery or demand the production of Petitioner's confidential records. Yet the contract between the State of New Hampshire and Cohen Milstein permitted it to operate with all of the powers of the State, while still wielding the pecuniary self-interested motivations of a private firm. Meanwhile, the Attorney General personnel overseeing this investigation have little incentive to reign in the actions of outside counsel, as an

aggressive investigation may be more likely to result in a payout.

If litigation subsequently commences, it is incurably tainted by the private contingency-fee attorneys' need to recoup their investigative costs. In this case, Cohen Milstein retained a contractual right of first refusal to take on the subsequent litigation, barring any performance issues during the investigative stage.[44] As a result, Cohen Milstein would begin litigation with accumulated costs that it needed to recover, further enhancing its incentive to obtain the largest monetary reward possible, obstructing the prioritization of non-monetary relief or the dropping of a non-meritorious suit. This creates a situation in which private prosecutors wield the power of the State while operating with the financial self-interest of a private attorney that has already made a substantial financial outlay in the case.

The prospect of control is further thwarted by the "pile on" effect from the shopping of these lawsuits to various jurisdictions.[45] Plaintiffs' attorneys often arrive at the Attorney General's doorstep with a ready-

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[44] *See* Petition for Writ of Certiorari, *Endo Pharmaceuticals Inc. v. New Hampshire,* No. 17-633 (U.S. Oct. 27, 2017), at Appendix D, 69a, ¶ 2 ("If OAG decides to proceed, and Cohen Milstein has performed to the satisfaction of OAG in the investigatory phase, OAG will not hire a law firm other than Cohen Milstein to represent it in any litigation or other resolution of the Matter (unless Cohen Milstein declines to continue to represent OAG, pursuant to Paragraph 18).").

[45] *See* Big Bucks and Local Lawyers, *supra* n. 4, at 8–10.

made lawsuit, or investigate and pursue cases in parallel for various jurisdictions. When one firm or a handful of firms is pursuing an action on behalf of several States, query whether any State can be said to be in control of its own case. This is particularly acute when, as was the case in the tobacco cases, 36 states are involved in the proceedings through various contingency-fee counsel.[46] But even in less crowded proceedings, it is the private attorneys who hold the reins in coordinating between interested parties and advancing the case because they are, inevitably, the attorneys most knowledgeable about the case. It is the challenge inherent in this coordination of large cases that makes contingency-fee private counsel both an understandable temptation and an uncontrollable force.

All of the foregoing misalignment of incentives, both for the contingency fee counsel and for the State Attorneys General, lead to the conclusion that real control will inherently lie with the private attorney. Due Process cannot tolerate a public prosecutor with such an agenda any more than it can tolerate a financially self-interested criminal prosecutor simply because the prosecutor operates under the control of an objective judge. Due Process demands that outside counsel not be compensated in a way that gives them every incentive to put their own financial interests

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[46] Spacapan, *supra* n. 7, at 13.

over the interests of the State, the public good, or fundamental fairness to the target of the investigation.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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