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

REPLY BRIEF

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INTRODUCTION

The State does not dispute that the question presented—whether due process bars states from outsourcing the investigation and prosecution of public claims to private contingency-fee lawyers—is exceptionally important. And the State agrees that "government use of contingent-fee counsel is a recurring phenomenon." Opp. 23. Without exaggeration, resolution of the question here could change the face of modern enforcement proceedings by taking profit-motive out of the process.

Nor does the State dispute that this issue impacts literally hundreds of opioid-related lawsuits and investigations like this one and countless other actions against myriad industries nationwide. As *amicus* U.S. Chamber of Commerce explains, "[t]he 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." Chamber *Amicus* Br. 3.

On the merits, the State does not contest that due process would forbid a lawyer on the Attorney General's staff from having a personal financial stake in an investigation or civil prosecution. The State instead argues that this bar does not apply to private contingency-fee lawyers "so long as the attorney general's office maintains supervisory authority." Opp. 2. But the State cites not a single decision of this Court—not one—allowing a "control" exception to the due process prohibition on arrangements that compromise, in reality or appearance, the duty of prosecutors to seek public justice rather than personal gain.

Under the State's view, due process protection can be circumvented simply by adding boilerplate "control" language in a contract. Review is needed to confirm that the Constitution demands more, and to give guidance to lower courts that have adopted a "control" exception that is contrary to this Court's jurisprudence and wholly illusory in practice.

Review is also warranted to rectify the appearance of impropriety. The State touts that its lawyers did not donate to any campaign of the New Hampshire Attorney General, but that office is appointed, not elected. Opp. 6. The State ignores that the same contingency-fee lawyers (and many others) routinely contribute to the campaigns of attorneys general in states where they are elected, often resulting in "pay to play" controversies. As a Cohen Milstein lawyer put it: "There are certain places where, to be in the game, you have to donate."[1]

This case is a perfect vehicle. The question is squarely and cleanly presented, and this case is the poster child for the problems attendant to outsourcing public investigations and prosecutions. As we speak, entrepreneurial lawyers are traveling the country pitching "risk free" opioid lawsuits to government entities. Since the petition was filed, some 400 government entities have sued petitioner in 36 states. An MDL has been formed for hundreds of federal suits against multiple defendants. Notably, not one of the 22 lawyers on the MDL plaintiff steering committee controlling the litigation is a government lawyer. Instead, at the helm, leading the charge: the same contingency-fee firm handling this case. If these

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[1] Mark Maremont et al., *Trial Lawyers Contribute, Shareholder Suits Follow*, Wall St. J., Feb. 3, 2010.

arrangements are to continue to flourish, this Court should have the final say on their constitutionality.

I. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

The State concedes that "government use of contingent-fee counsel is a recurring phenomenon." Opp. 23. At least 36 states and many local governments use contingency-fee lawyers to "target companies that provide healthcare, consumer products, financial services, and technology products, and also bring shareholder actions and claims against the federal government." Chamber *Amicus* Br. 6-7.

The State does not dispute that these arrangements often lead to "pay to play" controversies where private lawyers are awarded lucrative contingency-fee contracts after donating to the officials who hired them. Pet. 10-16.

The State's only response is that "[n]either Linda Singer, Cohen Milstein nor Motley Rice made campaign contributions to the New Hampshire Attorney General." Opp. 6. Of course not, since New Hampshire's AG is *appointed*. But Cohen Milstein, Motley Rice (or its principal), and Ms. Singer donated to AG candidates in at least 24 states.[2]

Ms. Singer was the focal point of an exposé criticizing these arrangements. Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. Times, Dec. 18, 2014. And Cohen Milstein and Motley Rice have been at the center of many recent pay-to-play controversies:

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[2] Nat'l Inst. on Money in State Politics, https://www.FollowTheMoney.org.

- "Despite past scandals involving contingency-fee lawyers he hired, [Mississippi AG] Hood has continued to hire campaign contributors to sue on behalf of the State of Mississippi. A recent example is the law firm Cohen Milstein."[3]
- "State AGs have used outside lawyers for a wide variety of similar cases, some with more than a whiff of entrepreneurialism about them. Rhode Island tapped Motley Rice to sue paint manufacturers under the novel theory."[4]
- "After taking office in 2013—as well as $10,000 in campaign contributions from Cohen Milstein the year before—[Pennsylvania AG] Kane's office bumped up the financial incentive for the firm."[5]
- "[The New York AG] has received [donations] from lawyers with . . . Cohen Milstein [] who could have directly benefited from another state investigation into Exxon."[6]
- "[T]he U.S. Virgin Islands AG's contract with Cohen Milstein requires the firm to advance

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[3] Hans Bader, Competitive Enter. Inst., *The Nation's Worst State Attorneys General* 17 (2015).

[4] Daniel Fisher, *Mississippi Reins in Use of Contingency-Fee Lawyers*, Forbes, May 21, 2012.

[5] Andrew Staub, *Pennsylvania AG's Use of Outside Law Firms Draws Scrutiny*, Watchdog.org (Sept. 2, 2015), https://www.watchdog.org/news/pennsylvania-ag-s-use-of-outside-law-firms-draws-scrutiny/article_73573c3a-4366-58f7-9343-c692d6e09d6c.html.

[6] Michael Bastasch, *Exclusive: Anti-Exxon NY AG Raked in $264,000 from Some of the Company's Biggest Rivals*, Daily Caller (Sept. 12, 2016), http://dailycaller.com/2016/09/12/ny-attorney-general-raked-in-campaign-cash-from-donors-tied-to-enviros-targeting-exxon/.

all costs and expenses of litigating the climate change investigation, and awards Cohen Milstein 27 percent of the first $100 million in recovery from the investigation's targets. That is serious pay-to-play."[7]

- "About 18 lawyers from [Cohen Milstein] . . . donate[d] more than $11,000 to [the New Mexico AG's] campaign," and the firm "convinced [the AG] over a period of two years to file a suit against a nursing home company."[8]
- "[Y]ou don't need to be an attorney to wonder whether the money donated to [the Nevada AG's] 2010 reelection campaign by six partners of Cohen Milstein wasn't part of some kind of pay-to-play arrangement."[9]

These arrangements promote duplicative litigation based on tenuous legal theories. Pet. 23-24. As *amicus* explains, contingency-fee counsel pitch suits that might otherwise not warrant government resources, selling "the idea of large paydays in exchange for allowing the private counsel to profit from government enforcement efforts." Chamber *Amicus* Br. 5. Here, while New Hampshire is rightly concerned about opioid abuse, Opp. 1, it sought to blame *manufacturers* only when private lawyers already suing petitioner and others

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[7] Margaret A. Little, Competitive Enter. Inst., *Pirates at the Parchment Gates: How State Attorneys General Violate the Constitution and Shower Billions on Trial Lawyers* 12 (Feb. 2017).

[8] Andrew Oxford, *Firms with State Business Among AG's Key Donors*, Santa Fe New Mexican, Apr. 15, 2017.

[9] Lisa A. Rickard, U.S. Chamber Inst. for Legal Reform, *Legal Reforms Will Keep Nevada's Treasure from Out-of-State Trial Lawyers* (Mar. 24, 2015).

pitched a risk-free proposition: go after "Big Pharma." Never mind that FDA has approved all the medications with "black box" warnings on product labels—the most serious warnings—explaining the risk of abuse and death. Given the FDA approval and "black box" warnings, contingency-fee counsel had to create a novel legal theory—that manufacturers "downplayed" the risk of addiction in exercising their legally protected right to promote these products, in violation of state consumer protection statutes.

These arrangements needlessly multiply litigation. Private lawyers "shop identical or nearly-identical lawsuits not just to all 50 States, but to hundreds and even thousands of local government enforcement bodies, each of which can sign on to the no-risk payday that the firms purport to offer." Chamber *Amicus* Br. 10-11. Just last month, a contingency-fee lawyer leading the opioid litigation reportedly said, "There's a new case getting filed every day . . . . We could be in a situation a year from now when there are a thousand or two thousand cases." J. David Goodman et al., *New York City Sues Drug Companies Over Opioid Crisis*, N.Y. Times, Jan. 23, 2018.

The frequent recurrence of this issue, and its importance to thousands of cases and the integrity of the justice system, calls out for this Court's review.

II. THIS COURT HAS NEVER RECOGNIZED A "CONTROL" EXCEPTION TO DUE PROCESS

A. The Court's Precedents Establish a Categorical Bar

The State does not dispute that the investigation and prosecution of public claims by private contingency-fee lawyers implicates due process. Pet. 28. Yet the

State cites no decision of this Court recognizing a "control" (or any) exception to the bar on arrangements that could jeopardize "the appearance and reality of fairness" in public enforcement proceedings. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Instead, the State quibbles about immaterial "distinctions" between this case and the Court's precedents.

The State notes that *Tumey v. Ohio*, 273 U.S. 510 (1927), and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), involved judges, not lawyers. Opp. 12-14. True but irrelevant. The petition acknowledges that "'the standards of neutrality for prosecutors are not necessarily as stringent as those applicable to' judges." Pet. 21 (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987)). Critically, however, "[t]he requirement of a disinterested prosecutor is consistent with [the Court's] recognition that prosecutors may not necessarily be held to as stringent a standard of disinterest as judges." *Young*, 481 U.S. at 807.

Thus, *Marshall* rejected the notion "that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors." 446 U.S. at 248-49. The Court "may require a stronger showing for a prosecutor than a judge in order to conclude that a conflict of interest exists," but once that showing is made, there can be no "confidence that a prosecution can be conducted in disinterested fashion." *Young*, 481 U.S. at 811.

The State observes that *Young* rested on the Court's "supervisory authority over the federal courts," not due process. Opp. 15. But the Court's supervisory authority—like due process—requires that judicial proceedings be "conducted in a manner consistent with basic notions of fairness." *Young*, 481 U.S. at 808.

Young thus relied interchangeably on cases involving due process and supervisory authority. *Id.* at 807-08 & nn.18, 19. And *Marshall* recognized a due process limitation in a case involving, as here, a "purported financial interest in civil enforcement." Opp. 16.

The State notes that *Marshall* "rejected the due process challenge" to an administrative prosecutor's alleged improper interest. Opp. 16. But that was *only* because "the influence alleged to impose bias [was] exceptionally remote" and created no "realistic possibility" of "distort[ing]" the prosecutor's judgment. *Marshall*, 446 U.S. at 250. Here, by contrast, the State's lawyers "stand[] to profit economically"—and substantially—by virtue of the contingency-fee arrangement. *Id*.

The State offers no defense of the statement below that this Court's decisions are "not pertinent to the issues" here. App. 13a. This Court "ha[s] always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty." *Young*, 481 U.S. at 810. The same is true for the civil justice system. *Marshall*, 446 U.S. 248-50. These decisions are not only pertinent, but determinative.

At minimum, this Court often accepts review where "the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Stephen M. Shapiro et al., *Supreme Court Practice* 254 (10th ed. 2013). Only this Court can resolve whether government contingency-fee arrangements are barred under this Court's precedents.

B. Lower Court Decisions Highlight the Need for this Court's Guidance

The State's reliance on a few lower court decisions (Opp. 18) underscores the need for this Court to settle the issue.

As the petition explains, every decision cited by the State derives from *City & County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130 (N.D. Cal. 1997). Pet. 28. The State does not contest that *Philip Morris* cited zero support for a control exception, nor that subsequent decisions simply cited *Philip Morris* and then each other. Pet. 28-29.

The state high court decisions on which the State principally relies (Opp. 19-20) are not consistent with each other, much less an appropriate final word on the important federal due process question here. *State v. Lead Industries Association, Inc.*, 951 A.2d 428, 475 (R.I. 2008), recognized a categorical bar on contingency fees in criminal prosecutions, but held that that such arrangements can comport with due process in civil prosecutions if the retainer agreement gives government lawyers "absolute and total control." By contrast, *County of Santa Clara v. Superior Court*, 235 P.3d 21, 54 (Cal. 2010), recognized a categorical bar in criminal cases *and* civil cases that implicate "important constitutional concerns, threaten[] ongoing business activity, and carr[y] the threat of criminal liability." For other cases, the court "adopt[ed], in slightly modified form, the specific guidelines set forth by the Supreme Court of Rhode Island" for retainer agreements. *Id*. at 64.

These decisions create an unworkable framework. First courts must apply a multifactor test to determine whether a categorical bar governs, and if not they

must apply varying requirements for retainer agreements. Then courts must supervise discovery into whether government lawyers exercised actual control. The categorical bar avoids this costly, fruitless search for "control."[10]

C. Government "Control" Is Illusory

The State argues that the AG's office has "exercis[ed] effective oversight" here. Opp. 23-24. But the State never answers the structural defects with these arrangements. Pet. 22-26. New Hampshire paradoxically contends that states lack sufficient "resources" to pursue cases themselves (Opp. 2), but that states have sufficient resources to maintain "absolute and total control" over contingency-fee lawyers. "For the state to even attempt to exercise sufficient control to avoid the threat to neutrality caused by use of private contingent fee lawyers it would be forced to devote most or all of the very resources it had sought to avoid expending." Martin Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 106 (2010). Equally paradoxical, the State identifies opioid abuse as a public health crisis, yet chooses not to allocate its own resources, instead relying on the financial investment of private lawyers.

Nor is there any meaningful way to assure that government lawyers exercise actual control. It is

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[10] *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), does not support states' use of contingency-fee civil prosecutors. *Cf.* Opp. 22 n.12. The court noted that, unlike contingency-fee lawyers, *qui tam* plaintiffs do not "wield governmental powers and therefore owe the same type of duty to serve the public interest as government prosecutors." *Kelly*, 9 F.3d at 760.

fanciful to think that retainer agreements can offset the millions—or billions—in potential fees that motivate contingency-fee lawyers to invest their own money in the first place. The State points to a handful of public appearances by a government lawyer here, and the State's private lawyers conspicuously did not sign the opposition brief. But companies like petitioner have no right to discovery at the investigation stage, and when they do get discovery, attorney-client privilege imposes substantial barriers to testing purported control. For similar reasons, this Court's cases have eschewed a case-by-case inquiry in favor of a categorical bar. *Young*, 481 U.S. at 812-14.

"The prospect of control is further thwarted by the 'pile on' effect from the shopping of these lawsuits to 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." Chamber *Amicus* Br. 22-23. Again, the opioid litigation illustrates the point. In the MDL, plaintiffs held a meeting "attended by 150 lawyers from 97 law firms." *In re National Prescription Opiate Litig.*, No. 1:17-md-02804 (Jan. 3, 2018) (Doc. 34). They selected "co-leads, co-liaison, and plaintiff's executive committee"—22 lawyers charged with virtually every facet of the case. *Id.* at 2-4. Not one is a government lawyer. And among the three co-leads: a principal of Motley Rice, the firm handling this case.

III. THIS CASE IS A PERFECT VEHICLE

The State argues that this case is a "poor vehicle" because it involves an investigation. Opp. 23. But allowing contingency-fee lawyers to "investigate" brings into sharp focus the problems with these arrangements. When the State retained the lawyers here,

those lawyers were *already* suing petitioner and others for the same alleged conduct for other government entities. It is implausible that lawyers already suing petitioner could conduct a fair-minded "investigation" into whether to sue petitioner. That the State has held off suing petitioner pending this petition is no basis to deny review.

"[I]t 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." Chamber *Amicus* Br. 21. The State's contingency-fee lawyers issued an investigative subpoena seeking confidential business documents—pre-litigation discovery unavailable to private litigants.

Of course the State prefers this Court await an enforcement action because that is how this issue typically escapes review. Government actions impose immense pressure on defendants to settle even unmeritorious claims and deliver windfalls to contingency-fee lawyers at a significant cost to taxpayers. That is why the due process question here has largely evaded review even though "government use of contingent-fee counsel is a recurring phenomenon." Opp. 23.

The time has come for this Court to address the application of its due process precedents to states' use of private contingency-fee civil prosecutors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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