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 UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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

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August 8, 2018

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including in cases involving important issues of class action practice and procedure. *See, e.g.*, *Microsoft Corp. v. Baker*, No. 15-457 (2017); *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (2016); *Campbell-Ewald Co. v. Gomez*, No. 14-857 (2016); *Comcast Corp. v. Behrend*, No. 11-864 (2013); *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (2011).

Businesses are regularly named as defendants in class actions. The Chamber and its members therefore have a strong interest in ensuring that the courts correctly apply longstanding federal policy favoring comprehensive settlements to resolve class actions with finality. The

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and they have received appropriate notice.

decision below threatens serious injury to the business community by disrupting that policy. As frequent class-action defendants, the Chamber's members are deeply interested in the finality of class settlements.

INTRODUCTION & SUMMARY OF THE ARGUMENT

Amicus agrees with Petitioner that "[t]his case presents an exceptionally important question at the intersection of state sovereign immunity and class action litigation." Petition for a Writ of Certioriari ("Pet.") at 1. *Amicus* also agrees that the Third Circuit erred in this case, "turn[ing] sovereign immunity on its head." *Id.* at 2. If left unchecked, the decision below will "upend countless existing class settlement agreements" and "make future class settlements more costly, less valuable for plaintiffs and defendants alike, and ultimately less likely to occur in the first place." *Id.* at 3. *Amicus* writes seperately to underscore the point that the decision below will undermine the finality of class action settlements and to explain that the history of sovereign immunity demonstrates that the doctrine does not apply to States as plaintiffs.

The Third Circuit's decision to exempt States from the normal rules that apply to class-action plaintiffs undermines this Court's interest in encouraging final class-action settlements. As one of the leading class action treatises puts it, the Third Circuit's decision "means that states ... can evade the binding effect of federal class actions." William B. Rubenstein, 6 Newberg on Class Actions § 18:23 (5th ed. 2018). If that decision is left unchecked, courts in the Third Circuit (and perhaps elsewhere) will end up adjudicating disputes that

otherwise would have ended. This is bad for the business community, it is bad for class-action plaintiffs, and it is bad for the judiciary.

Moreover, the Third Circuit's decision is wrong. The panel incorrectly held that, even though Louisiana received the notice the Class Action Fairness Act required and became a member of the plaintiff class by not opting out, Louisiana was not bound by the settlement because it did not waive its sovereign immunity. Pet. App. 8a-17a. Sovereign immunity does not bar a court from binding a State as an absent member of a plaintiff class in a class settlement. That conclusion follows from both controlling and persuasive precedent. But it also follows from the history of sovereign immunity.

For these reasons, the Court should grant *certiorari* to resolve this exceptionally important question.

ARGUMENT

I. Allowing Louisiana to Invoke Sovereign Immunity Here Would Undermine the Finality of Class-Action Settlements.

If left unchecked, the decision below would deal a major blow to efforts to achieve global resolution of class-action litigation. Consider what the Third Circuit allowed here. Louisiana was a member of a class action, it received the statutory notice, it did not opt out, and it let the parties settle. It then brought its own lawsuit alleging nearly identical claims, and it raised sovereign immunity only after GSK tried to enforce the original settlement. States could do this in many, if not most, class actions because the States are major purchasers of goods and

services. Pet. 3, 7-8; Trevor L. Brown et al., Pew Center on the States, *States Buying Smarter* 4 (May 2010), goo.gl/s6Q1L3 ("States spend more than $200 billion annually purchasing goods and services ….").

Class-action "defendants seek and pay for global peace—i.e., the resolution of as many claims as possible," and "global peace is a valid, and valuable, incentive to class action settlements." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (en banc) (quotation omitted); *see also In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 337 (2d Cir. 1985). "No defendants would consider settling" if some class members could "go right back into court to continue to assert their claims." *Sullivan*, 667 F.3d at 311. *see also* Joseph M. McLaughlin, 2 McLaughlin on Class Actions: Law and Practice § 6:29 (14th ed. 2017) ("[A] settlement is ordinarily impractical unless it covers all claims, actual and potential, state and federal, arising out of the transaction or conduct at issue."). Defendants "could never be assured that they have extinguished every claim from every potential plaintiff." *Sullivan*, 667 F.3d at 311.

The resulting discouragement of class-action settlements would be unfortunate. This Court and others have recognized the general presumption in favor of settlement. *See, e.g., McDermott v. Amclyde & River Don Castings Ltd.,* 511 U.S. 202, 215 (1994) ("[P]ublic policy wisely encourages settlements."); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010) (recognizing the "strong presumption in favor of voluntary settlement agreements"); *Air Line Stewards & Stewardesses Ass'n, Local 550 v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1166 (7th Cir. 1980) ("Federal courts look with great

favor upon the voluntary resolution of litigation through settlement."). "This presumption is especially strong in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Ehrheart*, 609 F.3d at 595 (citation and quotation omitted); *see also Air Line Stewards*, 630 F.2d at 1167. Settlements both "promote the amicable resolution of disputes" and "lighten the increasing load of litigation faced by courts." *D.R. ex rel. M.R. v. E. Brunswick Bd. of Educ.*, 109 F.3d 896, 901 (3d Cir. 1997). But, as Petitioner explains, class-action defendants are unlikely to settle (or will settle for far lesser amounts) if States are given special dispensation from the normal rules that apply to class-action plaintiffs. Pet. at 14-15.

States—which are sophisticated, repeat players—should not be allowed to end-run global peace in class-action settlements through sovereign immunity. It would "undermine[] the integrity of the judicial system," "waste[] judicial resources," and "impose[] substantial costs upon the litigants." *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 756 (9th Cir. 1999). And in this context, it would undermine "the important policy interest of judicial economy" that is fostered by "permitting parties to enter into comprehensive settlements that prevent relitigation of settled questions at the core of a class action." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 326 n.82 (3d Cir. 1998) (quotation omitted). Put simply, if left to stand, the panel opinion ultimately will thwart this Court's stated desire to encourage class-action settlements.

II. The History of Sovereign Immunity Demonstrates that the Doctrine Does Not Apply When the States Are Plaintiffs.

The Eleventh Amendment provides: "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 …." U.S. Const. amend. XI (emphasis added). Based on the text alone, Louisiana is not entitled to sovereign immunity: it is a plaintiff in a class action "commenced or prosecuted against" GSK, not a defendant in a lawsuit "commenced or prosecuted against" Louisiana. *See California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 844-45 (9th Cir. 2004) (explaining that the word "against" means that the Eleventh Amendment "plainly protects states from being haled into federal courts *as defendants*.").

Of course, the text of the Eleventh Amendment "does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002). The scope of sovereign immunity ultimately depends on "'history and experience, and the established order of things.'" *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quoting *Hans v. Louisiana*, 134 U.S. 1, 14 (1890)). But here, those considerations confirm what the text indicates: the doctrine of sovereign immunity does not, and never has, applied to the States *as plaintiffs*.

Because sovereign immunity in the United States is "derived from the laws and practices of our English ancestors," *United States v. Lee*, 106 U.S. 196, 205 (1882), England is a natural place to start. During the Middle

Ages, the King's immunity stemmed from the feudal system that was prevalent in Europe at the time. Under that system, feudal lords established courts for their inferiors. Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 Nw. U. L. Rev. 739, 745 n.27 (1999). "[N]o feudal lord could be sued in his own court." 3 William S. Holdsworth, *A History of English Law* 465 (3d ed., rewritten 1923). And no one was superior to the King; he was the ultimate lord who sat "at the apex of the feudal pyramid" and was "subject to the jurisdiction of no other court." Harry Street, *Governmental Liability: A Comparative Study* 1 (1953). This structure meant that the King was practically immune from suit. *See* 1 Frederick Pollock & Frederick William Maitland, *The History of English Law Before the Time of Edward I*, at 502 (1895); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 2-3 (1972). Yet the King's immunity was entirely defense-oriented. The King still *used* the courts to redress civil and criminal offenses against him. *See* William Sharp McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 80 (2d ed. 1914); Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 St. Louis U. L.J. 393, 426-27 (2005); Engdahl, *supra*. And when he did, he was subject to similar rules as everyone else. *See* Seidman, *supra*, at 432-34.

With the decline of feudalism, the theoretical underpinnings for sovereign immunity shifted. *See* Homer Allen Walkup, *Immunity of the State from Suit by Its Citizens—Toward a More Enlightened Concept*, 36 Geo. L.J. 310, 315-19 (1948); Edwin M. Borchard, *Governmental Responsibility in Tort, VI*, 36 Yale L.J. 1, 30-32 (1926). Sovereign immunity nonetheless remained a

defense-oriented concept. As explained by Blackstone—the "preeminent authority on English law for the founding generation," *Alden*, 527 U.S. at 715—sovereign immunity under the common law was based on the fiction that "the king can do no wrong." 3 William Blackstone, *Commentaries on the Laws of England* *254 (1765-1769). This fiction stemmed from the King's "sovereignty": "[N]o suit or action can be brought against the king … because no court can have jurisdiction over him. For all jurisdiction implies superiority of power … but who … shall command the king?" 1 *id.* *235; *accord* 3 *id.* at *255. Yet, when his subjects wronged him, the King could "redress[] such injuries as the crown may receive from a subject" like other plaintiffs—by commencing and prosecuting claims through the "usual common law actions." 3 *id.* at *257; *see id.* at *257-65.

The historical understanding of sovereign immunity as a defense-oriented concept was not lost on the Framers. Indeed, the debates over the ratification of the U.S. Constitution provide the most telling evidence that sovereign immunity does not apply to the States as plaintiffs. Section 2 of Article III, as drafted by the Philadelphia Convention, extends the federal judicial power to "Controversies … between a State and Citizens of another State." U.S. Const. art. III, § 2, cl. 1. The Antifederalists argued that this broad grant of jurisdiction would eliminate sovereign immunity because it appeared to contemplate individual suits against States *as defendants*. The Federal Farmer, one of the leading Antifederalist writers, argued that "this new jurisdiction" would allow "the citizen of another state to bring actions against state governments." Letters from the Federal Farmer III (Oct. 10, 1787), *reprinted in* 2 *The Complete Anti-Federalist* 245 (Herbert J. Storing ed. 1981). Similarly, Brutus,

another prominent Antifederalist, wrote that Article III "is improper, because it subjects a state to answer in a court of law, to the suit of an individual," which "is humiliating and degrading to a government." Essays of Brutus XIII (Feb. 21, 1788), *reprinted in* 2 *The Complete Anti-Federalist* 429. George Mason echoed this concern at the Virginia ratifying convention, asking "[w]hat is to be done if a judgment be obtained against a state? … It would be ludicrous to say that you could put the state's body in jail." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 527 (Jonathan Elliot ed. 1836) [hereinafter *Elliot's Debates*].[2]

Prominent Federalists denied that Article III would eliminate sovereign immunity. *See, e.g.*, *The Federalist No. 81*, at 548 (Jacob E. Cooke ed. 1961) (Alexander Hamilton). Tellingly, their argument was that Article III contemplated only those lawsuits involving States *as plaintiffs*. At the Virginia ratifying convention, John Marshall explained that "[t]he intent [of Article III] is, to enable states to recover claims of individuals residing in other states." 3 *Elliot's Debates* 555-56. Sovereign immunity means that "a state cannot be defendant," but that doctrine "does not prevent its being plaintiff." *Id.* James Madison agreed. He explained that the jurisdictional grant in Article III means "only" that, "if a state should wish to bring a suit against a citizen, it must be brought before the federal court." *Id.* at 533. Although sovereign immunity denies "the power of individuals to call any state into court," it

2. The Antifederalists' primary concern was that the States would be held accountable for their Revolutionary War debts. *See Alden*, 527 U.S. at 716; *Cohens v. Virginia*, 19 U.S. 264, 406 (1821). Given the "immense quantity" of those debts, the prospect that "[a] state may be sued in the federal court" could have spelled economic disaster. 3 *Elliot's Debates* 318-19 (Patrick Henry).

does not apply when the state is the plaintiff: "if a state should condescend to be a party, [a federal] court may take cognizance of it." *Id.* George Nicholas put it most succinctly, stating that sovereigns "may be plaintiffs, but not defendants." *Id.* at 476-77. Similar statements were made at the ratifying conventions in Massachusetts and New York. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1593-94 (2002).

The Federalists' statements accurately "reflect the original understanding of the Constitution." *Alden*, 527 U.S. at 727; *see also* Wright & Miller, 13 Fed. Prac. & Proc. Juris. § 3524 (3d ed.) ("[M]any of the founders probably assumed that [Article III] would permit a state to sue, but not to be sued, in federal court."). Even the Antifederalists agreed: no Antifederalist argued that sovereign immunity would be implicated if the States could be plaintiffs in federal court. *See* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1063 (1983). The entire debate over Article III was "whether the jurisdiction given by the constitution in cases, in which a state is a party, extended to suits brought against a state, as well as by it, or was exclusively confined to the latter." 3 Joseph L. Story, *Commentaries on the Constitution of the United States* § 1677 (1833).

Shortly after ratification, the Supreme Court decided *Chisholm v. Georgia*, 2 U.S. 419 (1793), which held that section 2 of Article III *did* allow suits against the States as defendants. *Chisholm* was a "profound shock" to a country that had just relied on the Federalists' assurances to the contrary. *Alden*, 527 U.S. at 719-20 (quoting

1 Charles Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926)). *Chisholm* was wrong when it was decided, and it was quickly overruled by the Eleventh Amendment. *See S.C. State Ports Auth.*, 535 U.S. at 753.

The fallout from *Chisholm* confirms that the Founding generation understood that sovereign immunity was not implicated by States as plaintiffs. In the wake of *Chisholm*, the States mobilized to express their disapproval and to emphasize the correct understanding of sovereign immunity. Henry Lee wrote a letter to the Virginia House of Delegates explaining why sovereign immunity applied to the States as defendants, but not plaintiffs: "To be plaintiff party … is consistent with the two sovereignties, [and] conforms to the object of the constitution, confederation and not consolidation of the states …. To be defendant … is a prostitution of State Sovereignty, [and] is hostile to confederation[,] the acknowledged object of our political union …." Henry Lee to the Speaker of the Virginia House of Delegates (Nov. 13, 1793), *reprinted in* 5 *The Documentary History of the Supreme Court of the United States, 1789-1800*, at 336 (Maeva Marcus ed., 1994) [hereinafter *DHSC*]. Charles Jarvis reiterated this long-held view in a speech on the floor of the Massachusetts House of Representatives: "Before the present Constitution was conceived; and even before the happy emancipation of the country, the respective Provinces and States had often been plaintiffs, but they never had been defendants." Charles Jarvis, Speech in the Massachusetts House of Representatives (Sept. 23, 1793), *reprinted in* 5 *DHSC* 436. Similarly, the Georgia House of Representatives passed a resolution stating that Article III should be interpreted to allow only controversies "commenced by a state as plaintiff against a citizen as defendant." Proceedings of the Georgia

House of Representatives, Augusta Chron. (Dec. 14, 1792), *reprinted in* 5 *DHSC* 162.

Early decisions of the Supreme Court further confirm that sovereign immunity does not protect the States when they are plaintiffs. In *Cohens v. Virginia*, 19 U.S. 264 (1821), the State of Virginia filed an information in state court against Cohens for selling lottery tickets. *Id.* at 375. Cohens filed a petition for a writ of error in the U.S. Supreme Court, and Virginia invoked sovereign immunity. *Id.* at 376. Virginia argued that, because it was the "defendant in error," it was immune from a writ filed by an individual in federal court. *Id.* The Supreme Court rejected this argument because Virginia was the *plaintiff* in the litigation below. *See id.* at 407-09. Chief Justice Marshall explained that sovereign immunity, as recognized in the Eleventh Amendment, "extend[s] to suits commenced or prosecuted by individuals, but not to those brought by States." *Id.* at 407. "[I]t [i]s 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.*; *accord United States v. Peters*, 9 U.S. 115, 139 (1809) (explaining that sovereign immunity does not affect "[t]he right of a state to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States").

The Founding generation held the same view with respect to the sovereign immunity of the United States Federal Government, which is relevant because "a state … is as exempt as the United States are from private suit." *Belknap v. Schild*, 161 U.S. 10, 18 (1896); *accord Sossamon v. Texas*, 563 U.S. 277, 285 n.4 (2011). The First Congress quickly expressed its view that sovereign immunity was

a defendant-only doctrine: the First Judiciary Act gave jurisdiction to the federal courts only when the United States was a *plaintiff. See* Judiciary Act of 1789 §§ 9, 11, 1 Stat. 73, 76-78. The exclusion of suits when the United States was the defendant and inclusion of suits when the United States was the plaintiff reflects the Founders' general view of sovereign immunity. *See Williams v. United States*, 289 U.S. 553, 577 (1933). The First Judiciary Act "has always been regarded as practically contemporaneous with the Constitution, and, as such, of great value in expounding the meaning of the judicial article of that instrument." *Id.* at 573-74.

For example, in *The Siren*, 74 U.S. 152 (1868), the United States filed a "libel in prize" against a boat it had seized in order to condemn the boat and sell it. *Id.* at 152-53. Several individuals who had a claim against the boat intervened and asked for damages. *Id.* at 153. When the United States invoked sovereign immunity, the Supreme Court rejected that defense because it was the United States that had instituted the proceedings below. By filing the libel in prize, the United States had "submit[ted] to the application of the same principles by which justice is administered between private suitors." *Id.* at 159; *accord In re Monongahela Rye Liquors*, 141 F.2d 864, 869 (3d Cir. 1944) ("[W]hen the United States or a State institutes a suit, it thereby submits itself to the jurisdiction of the court ….").

In sum, sovereign immunity has always been a defense from suit, with no application when the State is merely a plaintiff. Or as Petitioner aptly puts it, longstanding historical understanding shows "that state sovereign immunity is not a sword, but only a shield." Pet. at 17. From the Middle Ages to today, the sovereign could sue but not

be sued, and when the sovereign commenced an action, it was treated like other litigants. This history explains why "[a] legion of case law could be cited reflecting the general understanding that '[t]he ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not *be sued* by private individuals in federal court.'" *Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1239 (10th Cir. 2004) (quoting *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001)).

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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August 8, 2018