NO. 18-42

In the
Supreme Court of the United States

GLAXOSMITHKLINE LLC,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary nonprofit association representing the country's leading research-based pharmaceutical companies. PhRMA members produce innovative medicines, treatments, and vaccines that save and improve the lives of countless individuals every day. PhRMA members have invested more than a half-trillion dollars in research and development since 2000. PhRMA advocates in support of public policies that encourage the discovery of life-saving and life-enhancing new medicines.

PhRMA and its members have a strong interest in this case, as the decision below unsettles long-standing rules regarding class action settlements under Fed. R. Civ. P. 23(b)(3) on both a retrospective and prospective basis. The Third Circuit's unprecedented rule exempting states from the usual opt-out procedure will upend previous settlements that PhRMA members have reached in class action litigation and will impede the ability of PhRMA members to settle future class actions, all to the detriment of PhRMA members, patients, and

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus* certifies that counsel of record for all parties received timely notice of *amicus*'s intent to file this brief and have consented to this filing in letters on file with the Clerk's office.

consumers. Accordingly, PhRMA files this brief in support of the petition for certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Third Circuit's unprecedented decision exempting states from the long-settled rule that *all* class members that do not opt out after receiving constitutionally sufficient notice are bound by a class settlement will have an especially pronounced impact on the pharmaceutical industry. States purchase enormous volumes of pharmaceuticals as market participants and spend significant amounts of additional money on pharmaeuticals as administrators of federal-state programs. As such, they are often absent class members in class actions predicated on pharmaceutical purchases. Permitting states to invoke sovereign immunity to escape class action settlements will upend past settlements and impede future settlements reached by pharmaceutical companies. That rule, moreover, has no basis in this Court's sovereign immunity jurisprudence. Sovereign immunity protects states from being sued—not from being precluded from suing based on prior litigation brought on their behalf. And even if some sort of novel, limited, plaintiff-side sovereign immunity were to exist, a state's failure to opt out despite receiving constitutionally sufficient notice of a class action and proposed settlement encompassing the state constitutes litigation conduct sufficient to waive any such immunity.

I. States are large-scale purchasers of pharmaceutical products. As ordinary market participants, states purchase enormous quantities of

pharmaceuticals for their employees, retirees, and inmate populations. States also engage in additional large-volume pharmaceutical spending as administrators of federal-state programs such as Medicaid. All told, states spend billions of dollars in both state and federal money each year on pharmaceutical products.

As a result, states are almost always included as class members whenever a class action lawsuit is filed against a PhRMA member, whether the suit alleges an antitrust violation, products liability, or some other theory. The Third Circuit's rule exempting states from the ordinary opt-out requirements applicable to all other purchasers in class actions will undermine countless settlements already on the books, exposing PhRMA members to unanticipated liability when they thought they had bought litigation peace. And given the large quantities of pharmaceuticals purchased by states, and the correspondingly large share of any settlement to which states would be entitled, such a rule makes it exceedingly difficult for PhRMA members to settle future class actions. The resulting increase in uncertainty and expense from the retrospective and prospective consequences of the Third Circuit's unprecedented rule will harm PhRMA members, the patients they serve, and consumers alike.

II. The Third Circuit's decision is deeply flawed and has no support in this Court's precedents.

A. Sovereign immunity shields states from the indignity of being sued and haled into court by private citizens against their will. Thus, sovereign immunity has always been understood to protect states only in

their capacity as defendants, and not as plaintiffs. The Eleventh Amendment prohibits the federal courts from entertaining a lawsuit "prosecuted against" a state. U.S. Const. amend. XI. In turn, this Court has consistently held that sovereign immunity applies only when a state is a defendant. Nothing in the text of the Eleventh Amendment or the broader principles it reflects purports to exempt states from rules of res judicata or to embody some broad set of unique litigation rules for states when states seek to hale private citizens into court. Here, however, the state is in the position of a plaintiff in two respects: it was an absent class plaintiff in the original class action, and it is a plaintiff in the subsequent action seeking to avoid the normal consequences of the earlier litigation. The state did not somehow become a defendant at any point, including as a result of the judgment approving the class action settlement. Invoking sovereign immunity in those circumstances is a *non sequitur*.

B. To the extent states enjoy any sovereign immunity when they occupy a plaintiff-side position, that novel and limited form of immunity is waived when, as here, they receive constitutionally sufficient notice of a class action and proposed settlement and yet fail to opt out of the settlement. Under this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), when absent class plaintiffs receive constitutionally sufficient notice of a class action and proposed settlement, their failure to opt out precludes their future ability to raise due process objections to being bound by the settlement. There is no principled basis for a different rule when absent state plaintiffs fail to opt out after receiving the same constitutionally

sufficient notice, particularly since notice and opt-out rights preserve the only sovereign-immunity interest that plaintiff-side "sovereign immunity" even arguably implicates—a state's interest in maintaining a potentially valuable chose in action. Even well-established, traditional forms of sovereign immunity, which protect a broader range of state interests, can be waived through litigation conduct. Thus, any limited, plaintiff-side variant of sovereign immunity should be waivable *a fortiori*, including by litigation-related conduct that is sufficient to eliminate private parties' litigation opportunities consistent with due process. Allowing absent class member states to invoke an unprecedented form of plaintiff-side sovereign immunity and exempting them from the rule that applies to all other absent class plaintiffs gives states a windfall that is not justified by anything in the Eleventh Amendment or the sovereign immunity principles it reflects.

ARGUMENT

I. The Question Whether States May Be Bound By Class Action Settlements Is Of Enormous And Recurring Significance To Pharmaceutical Manufacturers, Patients, and Consumers.

The Third Circuit carved out an exception for states to the ordinary opt-out procedure of class action settlements under Fed. R. Civ. P. 23(b)(3). As Petitioner has explained, this decision will upend past class action settlements and jeopardize future settlements. *See* Pet.12-16. In light of states' outsized role as purchasers of pharmaceutical products, the destabilizing consequences of the decision below will

have an especially negative impact on the pharmaceutical industry, patients, and consumers.

States finance 17% of health care nationwide. *See* Ctr. for Medicare & Medicaid Servs., *National Health Expenditures 2016 Highlights* 2, https://go.cms.gov/2hn3vyt (last visited Aug. 6, 2018). Ten cents out of every health care dollar, moreover, is spent on prescription drugs. *See* Ctr. for Medicare & Medicaid Servs.: Office of the Actuary, *National Health Care Spending in 2016* 8, https://go.cms.gov/2LDPdMG (last visited Aug. 6, 2018).

Given their outsized role in paying for health care, it should come as no surprise that states are large-volume purchasers of pharmaceutical products. As ordinary market participants, states purchase vast quantities of prescription drugs through a number of state and local programs. States provide prescription drug coverage for their inmate populations and pay for prescription drugs through health coverage to state workers and retirees. States also often pay for and provide prescription drugs for nursing home and community health programs.

The numbers are substantial. For example, during a two-year period covering 2014-2015, California's pharmaceutical expenditures for its employee retirement program alone totaled $1.73 billion. *See* Legislative Analysts Office, *State Prescription Drug Purchases* 2 (May 10, 2016), https://bit.ly/2NXSO4U. The state spent an additional $338 million on pharmaceutical benefits for university students, faculty, and staff. *Id.* Prescription drug purchases for the California Department of

Corrections totaled $211 million, and for nursing home support and community health programs another $100 million. *Id.*

Even states with smaller populations and correspondingly smaller budgets are significant purchasers of pharmaceutical products. For example, in 2016, Washington State's pharmaceutical purchases totaled $379 million for public employees, $20 million for state inmates, and $10 million for hospitals and a developmental disabilities program. *See* Wash. State Health Care Auth., *Review of Prescription Drug Costs and Summary of Potential Purchasing Strategies* (May 10, 2016), https://bit.ly/2mZcBFw. Similarly, in 2016, New Mexico spent $243.1 million on pharmaceuticals for its employees and retirees and $9.5 million for state inmates' pharmaceuticals. *See* Health Notes, *Prescription Drug Costs: Maximizing State Agency Purchasing Power* 10 (Sept. 28, 2016), https://bit.ly/2vp5GcH.

In addition to this ordinary—and extensive—participation in the market, the states spend significant amounts of money on pharmaceuticals as administrators of federal programs that provide prescription drug benefits to certain private populations. The largest of these federal-state programs is Medicaid, but a number of other federal programs, such as the Children's Health Insurance Program (CHIP), also provide both the funding and the framework for state expenditures on prescription drugs.

One of the largest drivers of state spending on prescription drugs is Medicaid, which provides health

care for low-income residents. Approximately one out of every six health care dollars is spent via Medicaid. *See* Robin Rudowitz and Laura Snyder, *Medicaid Financing: How Does It Work and What are the Implications?*, Henry J. Kaiser Family Found. (May 20, 2015), https://kaiserf.am/2OAv9Zw. Medicaid is jointly funded by both the federal government and the states, and it is the third largest federal domestic program, after Social Security and Medicare. *Id.* Under Medicaid, state expenditures are matched by the federal government based on state income level. *See* Dep't of Health & Human Servs., *FY2017 Federal Medical Assistance Percentages*, https://bit.ly/2LGiVkg (last visited Aug. 6, 2018). The states are guaranteed at least $1 in federal funds for every $1 in state spending on the program. *Id.* Higher matching rates are available in lower-income states and for certain services or populations. *Id.*

As administrators of Medicaid, the states spend billions in both state and federal dollars on pharmaceuticals. According to the federal Centers for Medicare and Medicaid Services, in 2016, the states spent $11.3 billion on pharmaceuticals under Medicaid. *See* Ctr. for Medicare & Medicaid Servs., *National Health Expenditure Accounts: Methodology Paper, 2016* 4, https://go.cms.gov/2v6jXLV (last visited Aug. 6, 2018). States spent another $77 million on prescription drugs under CHIP, and an additional $87 million in connection with various maternal and child health programs. *Id.*

In many states, Medicaid spending can double the total amount spent by states on prescription drugs. During the same two-year time period referenced

above, for example, California spent $1.8 billion on pharmaceuticals through Medicaid. *See* https://bit.ly/2NXSO4U. Similarly, New Mexico spent $424 million on pharmaceuticals through Medicaid—nearly two-thirds of its total pharmaceutical expense. *See* https://bit.ly/2vp5GcH.

As purchasers of pharmaceutical products, states are routinely included in class definitions when class actions are brought by other purchasers against pharmaceutical manufacturers, including PhRMA members. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 449 (2003). For example, states have been included in suits alleging that purchasers bought improperly marketed prescription drugs. *See, e.g.*, *In re Neurontin Mktg. Sales Practices & Prods. Liab. Litig.*, No. 04-cv-10981, ECF No. 4302, at 2-3 (D. Mass. Nov. 7, 2014) (certifying nationwide class of third-party payors, including government entities). They have been included in antitrust class actions alleging that a pharmaceutical manufacturer wrongly sought to keep a generic drug off the market, inflating the price of a branded drug. *See* Jonathan Stempel, *Pfizer to Pay $325 Million in Neurontin Settlement,* Reuters (June 2, 2014), https://reut.rs/2LPY8K1; *see also* Pet.8-11 & nn.2-7.

In these and many other class actions suits, PhRMA members spend significant sums of money to settle the dispute and put an end to uncertainty and continuing expenses. Those settlements bring benefits not only to the parties to the suit, but also to patients and consumers, who are best served when PhRMA members are able to focus their efforts on the

research and development of life-saving products, not litigation. As Petitioner has well explained, however, these settlements are retrospectively and prospectively threatened by the Third Circuit's unprecedented rule, which gives states previously offered an opportunity to opt out a second bite at the apple and makes it impossible to attain the global and lasting peace that settlements are meant to achieve without ensuring that every state opts in to the settlement. *See* Pet.12-16.

The Third Circuit's decision affects every entity that sells products purchased by states. But given the enormous sums of money that states spend in purchasing pharmaceutical products, the consequences of the Third Circuit's decision on PhRMA members are especially pronounced. PhRMA members have paid specific (and often significant) amounts of money to settle purchaser class actions based on the understanding that states—some of the largest purchasers of their products—were included in the settlement classes. The Third Circuit's decision deprives PhRMA members of the benefit of those bargains and exposes them to successive suits by the very purchasers who may have some of the largest claims against them. And in light of the outsized spending by states on pharmaceuticals, the Third Circuit's rule—while detrimental to future settlements in general—will dramatically decrease the likelihood of settlements in pharmaceutical class actions in particular.

II. The Third Circuit's Decision Is Deeply Flawed.

A. States Do Not Enjoy Plaintiff-Side Sovereign Immunity.

The Eleventh Amendment protects states from being haled into court by private parties without the state's consent. Its text clearly limits its protection to states as *defendants*: "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." U.S. Const. amend. XI (emphasis added). And while this Court has recognized that the Eleventh Amendment confirms the "structural understanding that States entered the Union with their sovereign immunity intact" and that its text does not demarcate the full scope of sovereign immunity, *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011), nothing in the broader principles that the Eleventh Amendment reflects or this Court's cases suggests that sovereign immunity protects states in their capacity as *plaintiffs*. Rather, time and again, the Court has confirmed that sovereign immunity is an immunity from lawsuits "prosecuted against" states. *United States v. Peters*, 9 U.S. (5 Cranch.) 115, 139 (1809). Nothing in history or logic suggests that sovereign immunity gives rise to a host of rules that provide special protections to states as plaintiffs. And in the absence of any textual or historical basis for such special protections, there is simply no warrant for this Court or the Third Circuit to simply make such rules up.

1. This Court looks to "the laws and practices of our English ancestors" to determine the contours of

sovereign immunity. *United States v. Lee*, 106 U.S. 196, 205 (1882). The fundamental limitation of sovereign immunity—that it is an immunity from suit, not a special license for suits, *see* Pet.16-22—comports with English law at the time of the Constitution's ratification. Because of the legal fiction that "the King can do no wrong," he could not *a priori* be sued. *Lee*, 106 U.S. at 205. The crown could, however, assert its own claims both civilly and criminally, and in so doing could not assert sovereign immunity and could engage in litigation conduct with consequences for subsequent litigation. *See* 3 William Blackstone, Commentaries *257.

At the Virginia Ratifying Convention, John Marshall explained that Article III's grant of federal jurisdiction over cases "in which a State shall be a party," applied only where the state was a plaintiff. 3 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 555-56 (2d ed., 1836). This construction was "necessary," Marshall argued, because a state could not be made a defendant under the traditional understanding of sovereign immunity. *See id.* at 554.

The traditional understanding of sovereign immunity, therefore, was as a defensive doctrine, *i.e.,* as an immunity from suit. The Framers did not intend to prevent states from bringing suit on their own behalf to redress civil and criminal offenses, *Peters*, 9 U.S. at 139, nor did they intend to provide states an unfair litigation advantage whereby states could file suit or allow others to sue on their behalf but invoke sovereign immunity if an adverse judgment appeared

likely. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002).

2. The traditional understanding that sovereign immunity applies only to states as defendants is reinforced by the Eleventh Amendment, which was ratified shortly after this Court's holding in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that a nonconsenting state could be sued by a citizen of another state. The Eleventh Amendment provides that a noncitizen cannot maintain a "prosecut[ion] against" a state and says not one word about providing special rules for states as plaintiffs.

In subsequent years, an unbroken line of precedent from this Court has held that the Eleventh Amendment and the broader sovereign immunity principles that it reflects apply only when a state is a defendant. *See* Pet.19-21. In *Peters*, for example, Chief Justice Marshall explained that sovereign immunity protected by the Eleventh Amendment does not operate offensively. 9 U.S. at 139. The Eleventh Amendment did not deprive the state of its right "to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals" nor could it "be so construed as to oust the court of its jurisdiction" in such a case. *Id.* Rather, that amendment "simply provides, that no suit shall be commenced or prosecuted *against a state*." *Id.* (emphasis added). Sovereign immunity, the Court held, applies only to states as defendants: In other cases, "where a state is not necessarily a defendant," it "remains the duty of the courts of the United States to decide all cases brought before them." *Id.* at 139. Likewise, in *Cohens v. Virginia*, 19 U.S.

264 (1821), the Court held that sovereign immunity "extend[s] to suits commenced or prosecuted by individuals, but not to those brought *by States*." *Id.* at 407 (emphasis added). Indeed, as recently as 2011, this Court defined sovereign immunity as "the privilege of the sovereign not *to be sued* without its consent." *Stewart*, 563 U.S. at 253 (emphasis added).

3. These principles confirm that sovereign immunity principles do not apply when, as here, a state seeks to avoid the consequences of a class action brought on its behalf, from which the state did not opt out after receiving court-approved notice under Rule 23. In those circumstances, the state is doubly in the position of a *plaintiff*: it was an absent class plaintiff in the original class action, and it is the plaintiff in a subsequent action that seeks to proceed without regard to the res judicata consequences of the earlier plaintiff-side litigation. In no manner is the state a defendant, such that it could invoke sovereign immunity. It was never a defendant in the class action or in the subsequent action.

To be sure, the state is bound by the judgment in the first case approving the settlement. But simply being bound by a judgment does not somehow transmogrify a plaintiff into a defendant. Res judicata, settlement releases, and similar principles routinely apply to plaintiffs and defendants alike. Indeed, in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), this Court made clear that sovereign immunity is no bar to a binding judgment, even when state interests are discharged in a bankruptcy judgment. *See id.* at 445, 448. If a state cannot invoke sovereign immunity to avoid the

consequences of a judgment in federal bankruptcy proceedings in which it could have, but did not, participate, *a fortiori*, it cannot invoke sovereign immunity to avoid the consequences of a class action proceeding in which it is an absent class plaintiff.

B. Any Novel, Limited Plaintiff-Side Sovereign Immunity That Exists Is Waived by Failing to Opt Out of a Class Action Following Constitutionally Sufficient Notice.

To the extent states enjoy any sovereign immunity when they are positioned as plaintiffs, that novel and limited form of immunity remains subject to the well-established doctrine that states may waive their immunity. It is well established that states can waive even their traditional, long-established, defendant-side immunity through litigation conduct. *See Lapides*, 535 U.S. at 618. If any plaintiff-side variant of sovereign immunity exists, it is surely subject to the same possibility of waiver. And where a state receives the same notice and opportunity to opt out that satisfies due process with respect to every other litigant, the failure to opt out should be understood to waive whatever limited sovereign immunity might attach to the state as plaintiff. A contrary rule has no grounding in this Court's precedents and would give states an unjustified advantage over other absent class plaintiffs that would work tremendous unfairness on class action defendants. By holding that "Louisiana did not waive its sovereign immunity" despite indisputably receiving constitutionally sufficient notice, Pet.App.14a, the Third Circuit doubled down on its

erroneous and unprecedented sovereign immunity holding, reinforcing the need for this Court's review.

It is axiomatic that "[a] State remains free to waive its Eleventh Amendment immunity from suit in a federal court," *Lapides*, 535 U.S. at 618—even when the state is a defendant and the principles animating sovereign immunity are at their zenith. Indeed, the right to waive sovereign immunity is just as much a part of the sovereign's prerogative as is immunity itself. *See Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906). As this Court put it in *Clark v. Barnard*, 108 U.S. 436 (1883), sovereign immunity is the state's "personal privilege which it may waive at [its] pleasure." *Id.* at 447.

Even where a state's "traditional immunity from suit"—*i.e.*, immunity raised as a defendant—is involved, *Stewart*, 563 U.S. at 253, a state may waive its sovereign immunity in one of two ways. A state waives its immunity either by engaging in litigation conduct that "voluntarily invoke[s] [federal] jurisdiction," *Lapides*, 535 U.S. at 620, or by "mak[ing] a clear declaration that it intends to submit itself to [federal] jurisdiction," *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (internal citations omitted). For waiver through litigation conduct, a state expresses its consent to federal jurisdiction by voluntarily engaging in conduct inconsistent with a later claim of immunity. *See Lapides*, 535 U.S. at 620; *Gunter*, 200 U.S. at 284. A state need not give "a 'clear' indication of [its] intent to waive … immunity"; the question is whether "the litigation act the State takes that creates the waiver" is sufficiently "clear." *Lapides*, 535 U.S. at 620.

There is no dispute in this case that all class members, including absent states, received constitutionally sufficient notice of the class action and the pending settlement. *See* C.A. J.A.26 ("The Court finds 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."). Likewise, there is no dispute that under this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), when an absent class member receives constitutionally sufficient notice, its decision not to opt out of the settlement comprises litigation conduct that precludes a due-process objection to being enjoined from future litigation barred by a settlement or release. *See id.* at 811-14. It would be passing strange to treat the same litigation conduct—the failure to opt out after receiving constitutionally sufficient notice—as obviating all other absent class members' constitutional objections to the settlement (on due process grounds) but as *not* waiving absent states' constitutional objections to the settlement (on sovereign immunity grounds). Neither the Constitution nor this Court's precedents rank sovereign immunity concerns any higher (or lower) than due process concerns—particularly the novel plaintiff-side sovereign immunity invoked by states as absent class plaintiffs.

Indeed, if there is any limited plaintiff-side sovereign immunity, it certainly does not protect the states against the primary evil sovereign immunity seeks to eliminate—namely, the indignity of a state

getting sued and being haled into court against its will. *See Stewart*, 563 U.S. at 258. There is no comparable threat to the state's dignity interests when all that is at stake is the state's ability to bring a potentially duplicative lawsuit as a plaintiff. If states have any constitutionally protected interest in preserving plaintiff-side lawsuits, that interest stems not from dignity concerns, but from the financial interest in preserving a potentially valuable chose in action. *Cf. Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47-49 (1994). But that latter interest is the precise interest that notice and opt-out rights preserve for private litigants under the Due Process Clause. Thus, a state that receives constitutionally sufficient notice of a class action and does not opt out should be understood to waive whatever "sovereign immunity" exists to ensure that it does not unwittingly lose valuable litigation opportunities.

There is nothing anomalous in treating a state's inaction in responding to constitutionally sufficient notice as a valid basis to waive a constitutional right. Litigants relinquish many other constitutional rights in litigation through omission. Criminal defendants, for example, may waive their Fifth Amendment right to testify on their own behalf by failing to take the stand or failing to notify the court of their desire to do so. *See United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993). They may also waive their Sixth Amendment right to be tried where a crime was committed by failing to object to venue. *See United States v. Dabbs*, 134 F.3d 1071, 1078 (11th Cir. 1998). And a civil party waives its Seventh Amendment right to a jury trial by failing to serve the other party with a timely demand for a jury trial. *See* Fed. R. Civ. P.

38(d). This Court has suggested that sovereign immunity waiver rules should track waiver rules applicable to individuals' constitutional rights, *see Coll. Sav. Bank*, 527 U.S. at 681-82, and has never held to the contrary. To the extent the Court has suggested that waivers of sovereign immunity must be clear, it has underscored that certain forms of litigation conduct amount to clear waivers. And it has made those pronouncements in the context of the textually and traditionally based immunity from suit. If a plaintiff-side immunity for suit exists at all, it surely can be waived in the same circumstances that foreclose litigation opportunities for all other litigants consistent with due process.

If anything, what would be anomalous is to allow absent class member states to invoke an unprecedented form of plaintiff-side sovereign immunity *and* to exempt them from the rule that applies to all other absent class plaintiffs who waive their constitutional rights by failing to opt out. A "Constitution that permitted States" to engage in this sort of double-dealing not only "could generate seriously unfair results," *Lapides*, 535 U.S. at 619—it *has* produced those unfair results in this case, exposing Petitioner and other PhRMA members to extraordinary, unanticipated liability in heretofore-settled cases and severely impeding their ability to resolve future litigation.

Fortunately, that is not the Constitution this Court has recognized. Under this Court's precedents, the Constitution does not afford states any sovereign immunity in the plaintiff-side posture here; and to the extent states possess some novel, quasi-immunity as

absent class plaintiffs, the failure to opt out following constitutionally sufficient notice constitutes litigation conduct that waives that immunity, just as it waives all other absent class plaintiffs' constitutional rights. The Third Circuit's decision to the contrary has no support in this Court's decisions and will have far-reaching consequences on pharmaceutical manufacturers, patients, and consumers. Certiorari is imperative.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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