Nos. 16-1124 & 16-3019

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: FLONASE ANTITRUST LITIGATION

SMITHKLINE BEECHAM CORPORATION
N/K/A GLAXOSMITHKLINE LLC D/B/A GLAXOSMITHKLINE,

Defendant-Appellant,

v.

STATE OF LOUISIANA,

Respondent-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:08-cv-3301 (Hon. Anita B. Brody)

REPLY BRIEF (PUBLIC)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Louisiana offers no reason for this Court to break new constitutional ground. GSK settled a class action that unequivocally included States in the class definition as indirect purchasers. Louisiana undisputedly had actual notice of its membership in the settlement class and had a full and fair opportunity to opt out. After Louisiana declined to do so, Louisiana became entitled to substantial sums of money when the district court approved the class settlement—and also agreed not to relitigate these claims. Nothing about that result offends sovereign immunity, which has always been a privilege that States possess only as defendants. This Court should not allow Louisiana to wield sovereign immunity to upend a class settlement in which it participated as a *plaintiff*.

Louisiana portrays sovereign immunity as a State's absolute right to veto federal adjudication of any state claims, but ignores the many reasons this theory is untenable. Longstanding Supreme Court precedents have allowed federal courts to adjudicate many state claims against States' wishes. No historical evidence supports Louisiana, nor does Louisiana rebut the settled consensus that sovereign immunity protects States exclusively as defendants. The only cases purportedly embracing Louisiana's novel theory—one out-of-circuit decision and two district-court decisions—are inapposite for reasons Louisiana never addresses.

Nor does Louisiana dispute the serious adverse consequences of its position. States that are currently counted as absent class members in already settled class

actions would be free to relitigate settled claims against defendants who reasonably thought they bought peace long ago.

Even if sovereign immunity applied, Louisiana waived it by declining to opt out after receiving clear written notice of the class settlement. Louisiana claims that declining to opt out cannot constitute waiver, but ignores the many contexts where States and other parties waive other constitutional rights through inaction. And Louisiana's assertion that it lacked adequate notice—despite receiving a written notice that repeatedly identified States as class members—is legally and factually erroneous.

This Court can also reverse without wading into sovereign immunity doctrine. GSK is entitled to relief under Federal Rule of Civil Procedure 60(b)(2) based on newly discovered evidence that Louisiana may have collected settlement funds. All acknowledge that, if Louisiana actually received settlement funds, it unambiguously waived sovereign immunity. The only questions here are whether GSK was diligent and whether evidence that Louisiana's health plan administrator submitted and received settlement proceeds for Louisiana is material. Louisiana accuses GSK of dilatoriness in pursuing this evidence, but conveniently omits that GSK reasonably relied on Louisiana's representations that it never directly or indirectly received any settlement funds. GSK diligently began investigating once Louisiana abruptly changed tune. Louisiana now refuses to say whether it received

settlement funds. This Court could and should ask Louisiana to candidly commit one way or another, because if Louisiana received settlement funds, it has no case.

I. Sovereign Immunity Is Inapplicable

A. Sovereign Immunity Does Not Bar Louisiana from Being an Absent Class Member

Sovereign immunity shields States only as defendants. Louisiana cannot invoke state sovereign immunity to avoid being bound by a federal class settlement as an absent plaintiff class member, because defendants and absent class members stand on fundamentally different footing. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807–08 (1985). Defendants face the prospect of a federal-court judgment ordering them to pay money or compelling action; absent class members do not. Louisiana fails to acknowledge, much less refute, these settled principles.

1. Louisiana contends that States cannot be forced to litigate their claims in federal court irrespective of whether they are plaintiffs or defendants. LA Br. 17–18; *accord* JA12. That is wrong.

a. Louisiana's position defies Supreme Court and appellate precedents allowing federal courts to resolve States' claims over States' objections. States have sued private parties in state court, then opposed removal to federal court on the theory that the State never consented to federal jurisdiction. Yet federal courts

have consistently exercised jurisdiction, reasoning that sovereign immunity does not apply when the State is a plaintiff. GSK Br. 30–31.[1]

Louisiana is incorrect (at 21–22) that these cases "hold only that a state that *voluntarily* commences suit asserting an exclusively federal cause of action cannot assert its sovereign immunity as a bar to removal or appellate proceedings." The Supreme Court long ago explained that the Eleventh Amendment "was intended for those cases, *and for those only*, in which some demand against a State is made by an individual." *Cohens v. Virginia*, 19 U.S. 264, 407 (1821) (emphasis added). Likewise, the Tenth Circuit in *Edmondson* was pellucid in holding that "the Eleventh Amendment's abrogation of federal judicial power 'over any suit . . . commenced or prosecuted against one of the United States' does not apply to suits commenced or prosecuted *by* a State." 359 F.3d at 1239. The Ninth Circuit in *Dynegy* was equally clear in holding that Founding-era history "gives little indication that sovereign immunity was ever intended to protect *plaintiff* states." 375 F.3d at 847. And the Federal Circuit in *Eli Lilly* refused to even consider whether California waived its immunity in a case where California, as a plaintiff, objected to a change of venue from a California federal district court to an Indiana

[1] *See Ames v. Kansas*, 111 U.S. 449, 466, 470 (1884); *Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1239, 1240 (10th Cir. 2004); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 847, 848 (9th Cir. 2004); *cf. Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1564 (Fed. Cir. 1997).

federal district court. 119 F.3d at 1564–65. Because California was a plaintiff, no waiver question "even arises." *Id.* at 1565.

Moreover, federal courts have long exercised *in rem* jurisdiction over disputed property even when the State claims an interest to that property and opposes federal adjudication. *E.g.*, *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 449–51 (2004) (bankruptcy); *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 507–08 (1998) (admiralty); *United States v. Peters*, 9 U.S. (5 Cranch) 115, 139–41 (1809) (same). A federal bankruptcy discharge extinguishes all past or future judgments and past debts a State holds against a debtor, even if the State objects to federal resolution of these claims. *Hood*, 541 U.S. at 447. States that want to recover against an estate in bankruptcy proceedings thus "must submit to the appropriate requirements" and follow the same federal-court bankruptcy procedures as all other litigants. *Id.* at 448 (internal quotation marks omitted). Louisiana misses the point by noting that federal jurisdiction here is not premised on *in rem* jurisdiction. *Cf.* LA Br. 22 n.1. The *in rem* jurisdiction cases disprove Louisiana's conception of sovereign immunity by showing that federal courts have long adjudicated States' claims over States' objections.

b. Louisiana does not dispute that the scope of state sovereign immunity turns on how the Framers understood the doctrine. GSK Br. 26; Chamber Br. 3. Yet Louisiana marshals no evidence that anyone at the Founding understood the

doctrine to immunize States from federal jurisdiction without their consent. Nor does Louisiana dispute the overwhelming evidence going the other way. *See* GSK Br. 26–27; Chamber Br. 5–8

Louisiana asserts that the Supreme Court has concluded based on the historical record that "no court can have jurisdiction over the sovereign" as either a plaintiff or defendant. LA Br. 19 (citing *Alden v. Maine*, 527 U.S. 706, 716 (1999)). But as *Alden* explained, the Founding-era understanding of sovereign immunity was "that a sovereign *could not be sued* without its consent," because a "compulsory suit for the recovery of money against a State" was unheard of. 527 U.S. at 716 (citation omitted) (emphasis added). The Framers repeatedly rejected the notion that sovereign immunity applied when States were plaintiffs. Chamber Br. 5–8.

Moreover, if the Framers understood sovereign immunity to protect States against any exercise of federal jurisdiction without their consent, the Framers' failure to say so is inexplicable given how severely the Constitution would have curtailed that immunity. Article III of the Constitution gives the Supreme Court original jurisdiction over all cases within federal subject-matter jurisdiction in which a State is a plaintiff or a defendant. U.S. Const. art. III, § 2. The Constitution also empowers Congress to create inferior federal courts and to further regulate their jurisdiction. *Id.* § 1. The Constitution thus authorizes

Congress to force any State that wanted to sue another State or another State's citizens to do so in a federal forum. For the last two centuries, States have had to sue another State in federal court or not at all. Yet no one expressed concern that the Constitution was abrogating States' freedom *as plaintiffs* to decide which courts should hear their claims in a multitude of cases.[2]

c. Louisiana's own citations confirm that sovereign immunity protects States only as defendants. It is "[i]mmunity *from* private suits" that "has long been considered central to sovereign dignity." LA Br. 17 (quoting *Sossamon v. Texas*, 563 U.S. 277, 283 (2011) (emphasis added) (internal quotation marks omitted)). A State may "decide 'not merely *whether* it may be sued, but *where* it may be sued'"—but a State "may be sued" only as a defendant. LA Br. 13 (quoting *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)). And "[a]t its core, sovereign immunity protects against 'the indignity of subjecting a State to the coercive process of judicial tribunals.'" LA Br. 18–19 (quoting *Ex parte Ayers*, 123 U.S. 443, 505 (1887)). But *Ayers* equated "coercive process" with "summon[ing] [States] as defendants," holding that sovereign immunity covers

[2] Congress ultimately provided that suits between a State and citizens of another State can also be brought in state courts. *See* 28 U.S.C. § 1251(b)(3). The point, however, is that the Constitution authorized Congress to require States to bring these suits only in federal court. That States can still bring such suits in state court is purely a matter of legislative grace.

"suits brought against a state by name" or where the State is "the only real party" in interest. 123 U.S. at 505–06.

Louisiana (at 14–15, 19) cites *Thomas v. FAG Bearings Corp.*, 50 F.3d 502 (8th Cir. 1995), but does not address why *Thomas* is distinguishable. In *Thomas*, private plaintiffs sued FAG Bearings for the cost of remediating contaminants. To avoid multiple or inconsistent judgments, the company sought to join a Missouri agency that was also investigating it. 50 F.3d at 503–04. Because the agency did not "meet the stringent requirements for initial joinder as an involuntary plaintiff," the agency could only be initially joined *as a defendant*. *Id*. at 504 & n.5. This fact, the court noted, supported its Eleventh Amendment holding: "a 'plain words' interpretation could dictate that [the agency] should receive Eleventh Amendment protection despite its *later* realignment as a plaintiff." *Id.* at 504 n.8 (emphasis added); *see* GSK Br. 36–37.

To be sure, *Thomas* also opined that involuntary joinder would have violated Missouri's sovereign immunity "by forcing it to prosecute FAG at a time and place dictated by the federal courts." 50 F.3d at 505. But that misread Supreme Court precedent and does not justify a major expansion of sovereign immunity. *Thomas* surmised that the Court in *Pennhurst* prohibited federal suits that compel States to act in any way. *Id.* But *Pennhurst* just clarified that state sovereign immunity bars imposing judgments against States in the form of injunctions as well as money

damages. 465 U.S. at 101 n.11. *Thomas* read the Supreme Court's bar in *Ayers* on "coercive process" against States as encompassing "coercive joinder" as a plaintiff. 50 F.3d at 506. But *Ayers* held that "coercive process" is an issue only when the State is the named or de facto defendant. 123 U.S. at 505–06. And *Thomas* suggested that *Clark v. Barnard*, 108 U.S. 436 (1883), held that a State that voluntarily appears in federal court as a plaintiff waives immunity that would otherwise apply. 50 F.3d at 506. But *Clark* concerned whether sovereign immunity barred a suit against Rhode Island's treasurer, whom the plaintiffs sued alongside the City of Boston. 108 U.S. at 447. *Clark* held that Rhode Island waived any sovereign immunity it had *as a defendant* by intervening to interplead money that Boston paid to the federal court. *Id.*

Louisiana's other authorities are two district court opinions (at 20–21) that are unpersuasive for reasons Louisiana ignores. *See* GSK Br. 37–38. *In re McKesson Governmental Entities Average Wholesale Price Litigation*, 767 F. Supp. 2d 263 (D. Mass. 2011), reached no Eleventh Amendment holding, and its skepticism towards including States as absent class members conflicts with the many District of Massachusetts decisions certifying classes containing States. *Walker v. Liggett Group, Inc.*, 982 F. Supp. 1208 (S.D. W. Va. 1997), incorrectly asserted that absent class members are just like defendants without recognizing that the Supreme Court held the opposite in *Phillips Petroleum*.

Numerous Supreme Court and appellate decisions define sovereign immunity as a doctrine shielding States as defendants. *See* GSK Br. 26–31; Chamber Br. 8–12; WLF/NAM Br. 12–18. Louisiana accuses GSK of "selectively quot[ing] language from various cases" that describe sovereign immunity as a defendant-centric doctrine. LA Br. 22 n.1. But Louisiana identifies no case that GSK cites that contemplated extending the doctrine to States aligned as plaintiffs. Louisiana asserts that "[t]he fact that sovereign immunity is sometimes described as precluding suits against the states does not, of course, mean that it *only* applies if the state is named as a defendant." *Id.* But the Eleventh Amendment "was intended for those cases, *and for those only*, in which some demand against a State is made by an individual." *Cohens*, 19 U. S. at 407 (emphasis added); *accord City of Newark v. United States*, 254 F.2d 93, 98 (3d Cir. 1958) (similar).

d. Louisiana stresses (at 17 and 22–23) that the primary purpose of sovereign immunity is to protect States' dignity. But "not every offense to the dignity of a state constitutes a denial of sovereign immunity." *Va. Office of Prot. & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011). Rather, the doctrine guards against the "specific indignity" to States of "being haled into court" as a defendant. *Id.* Nor does GSK contend that the only purpose of sovereign immunity is to protect the State treasury against damages claims. *Cf.* LA Br. 23. Federal suits

seeking injunctive relief against States are equally barred, because they also force States to defend against claims for relief against them. GSK Br. 31–32.

2. Even assuming sovereign immunity protected States against all involuntary forays into federal court, that immunity does not apply here. Louisiana asserts that being bound to a settlement agreement as an absent class member because it failed to opt out is "just as coercive as any lawsuit brought directly against a state." LA Br. 19.

The Supreme Court, however, has long disagreed, holding in *Phillips Petroleum* that absent class members and defendants stand on fundamentally different footing. 472 U.S. at 807–08. Absent class members belong to a plaintiff class because they had a chance to opt out of the class and did not take it. *See id.* at 812. Absent class members' interests are thoroughly protected throughout the case, and they face no prospect of any court-imposed judgment against them. *Id.* at 808. Defendants receive no such protections and risk default judgments, money damages, and other court mandates. *Id.* at 808–09, 813–14. Yet Louisiana's brief does not mention *Phillips Petroleum*.

3. Louisiana sidesteps the consequences of its position. Adopting a rule that States cannot become absent class members without expressly conveying their consent would upend existing and future class-action settlements. Louisiana does not dispute that courts often approve class settlements that include States as absent

class members. GSK Br. 38–39; ATRA Br. 4–6. Indeed, States routinely opt out of class settlements. ATRA Br. 7–8. Nor does Louisiana deny that States have strong incentives for gamesmanship under its approach. States that declined to opt out of existing class-action settlements could follow Louisiana's example, claim they are not bound by the settlement, and sue on their own, demanding a premium over what they would have received under the settlement. GSK Br. 38–39; ATRA Br. 3–4, 14–15. And, going forward, defendants would have to negotiate separately with all 50 States to obtain their buy-in, significantly impeding future class settlements. GSK Br. 39; ATRA Br. 14–15; Chamber Br. 14–16; WLF/NAM Br. 8–9.

Louisiana argues (at 37) that negotiating with 50 separate States is straightforward, but that is patently incredible. Requiring defendants to obtain affirmative consent from all States before including them as absent class members would deter parties from including States within class definitions. Defendants presumably would need to negotiate with 50 States before the close of the class-action period, which could be as short as 30 days. *See* 1 McLaughlin on Class Actions § 5:78 (13th ed. 2016). As a condition of opting in, States might seek a favorable apportionment of damages as part of any class settlement. Defendants would have every incentive to reduce settlement offers to non-State class members to avoid these heavy costs, anticipating that they will face successive litigation

whether they settle or not. Louisiana (at 37) cites prior GSK settlements with Louisiana, but they do not show that negotiating side agreements with States would be quick or easy. Regardless, Louisiana has no answer for the many class-action defendants whose previous settlements included States as absent class members, all of which could be upended under Louisiana's position.

Louisiana also contends that "settling defendants will still be able to assert their defenses in state court," including "the defense that a state has already been compensated for a particular claim." LA Br. 38; *see id.* at 36. But the only way Louisiana could have received compensation for particular claims in the class action is if the settlement agreement actually bound Louisiana. *See* JA30. If so, Louisiana was also bound by the settlement's requirements that Louisiana litigate all future disputes over the settlement in federal court and face federal-court injunctions for violating it. *See* JA30–31.

Forcing GSK to invoke the settlement agreement as a state-court defense would let Louisiana flout the agreement with impunity. Even if the state court agreed that the settlement barred Louisiana's recovery, GSK would still have had to litigate settled claims anew—the very burden the settlement was designed to eliminate. It is likewise irrelevant that Louisiana's claims unrelated to its indirect purchases of Flonase might proceed in state court. *See* LA Br. 38. GSK should

not be exposed to double liability for claims that GSK already settled just because the settlement agreement might not cover all of Louisiana's claims.

B. Sovereign Immunity Does Not Bar Enjoining Louisiana's Attorney General from Violating the Settlement Agreement

For two reasons, GSK's enforcement motion against Louisiana's Attorney General also does not violate sovereign immunity. First, the motion is not against the State itself, so sovereign immunity is not implicated. Second, even were the motion against Louisiana directly, Louisiana bound itself to the settlement agreement as an absent class member that did not opt out. And that agreement—which is incorporated into the federal-court judgment—unequivocally provides for the district court's "exclusive and continuing jurisdiction" to enforce the settlement. JA31.

1. It is undisputed that sovereign immunity does not bar suits to enjoin state officials from violating federal law, including violating federal-court class action settlements that are the equivalent of consent decrees. *See* GSK Br. 35. Under *Ex parte Young*, sovereign immunity does not bar such injunctive relief because the demand is against the official in his individual capacity, not against the State itself. *See* 209 U.S. 123, 159–60 (1908). For instance, even if a federal bankruptcy court resolves a State's claims without the State's consent, federal courts can enjoin state officials under *Ex parte Young* if they violate the bankruptcy order. *E.g.*, *In re Ellett*, 254 F.3d 1135, 1141–45 (9th Cir. 2001).

Louisiana asserts without authority (at 30–31 & n.2) that GSK's motion to enforce the settlement against Louisiana's Attorney General is procedurally improper because GSK did not make him a party, did not serve him with process, and did not demonstrate personal jurisdiction over him. Louisiana is incorrect. First, GSK did not have to make the Attorney General a party through some formal joinder process. Federal courts may enforce their orders—here, the judgment incorporating the settlement—against nonparties who attempt to frustrate them. *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977).

Second, Louisiana errs in asserting that GSK failed to properly serve the Attorney General under Federal Rule of Civil Procedure 4(j) and Louisiana Code of Civil Procedure art. 1265. LA. Br. 30 n.2. Louisiana makes this argument in a footnote and never invoked these provisions below. JA 489–90. Regardless, neither provision applies. Rule 4 (which incorporates state-law procedure) applies only to summonses, and GSK did not need to serve a summons to enforce the settlement. Instead, GSK properly served the Attorney General under Federal Rule of Civil Procedure 5, the rule governing service of motions like GSK's enforcement motion. Rule 5 permits service by mail, *see* Fed. R. Civ. P. 5(b)(2)(C), and Louisiana concedes that the Attorney General received GSK's motion by mail. LA. Br. 30 n.2. Moreover, Federal Rule of Civil Procedure 71 provides that "[w]hen an order . . . may be enforced against a nonparty, the

procedure for enforcing the order is the same as for a party," confirming that Rule 5 governed service of GSK's motion to the Attorney General. Fed. R. Civ. P. 71. Finally, even if Rule 4 applied, Louisiana waived its service-of-process objection by failing to object below under Rule 12(b)(5). *See* Fed. R. Civ. P. 12(h)(1).

Third, GSK established personal jurisdiction. Nonparties located outside the district court's territorial jurisdiction become subject to its jurisdiction "if, with actual notice of the court's order, they actively aid and abet a party in violating that order." *S.E.C. v. Homa*, 514 F.3d 661, 675 (7th Cir. 2008) (internal quotation marks omitted); *see United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 266 F.3d 45, 49–50 (2d Cir. 2001) (courts can exercise personal jurisdiction to enjoin non-parties who interfere with federal consent decrees). Here, the Attorney General clearly knew of the federal-court order settling the indirect-purchaser litigation, and aided and abetted Louisiana in violating it by reasserting Louisiana's settled claims.

2. Even if the enforcement motion were construed as a motion against Louisiana itself, sovereign immunity would pose no obstacle. As described above, Louisiana became bound by the settlement agreement as an absent plaintiff class member. *Supra* Part I.A. And in the settlement, class members explicitly and "irrevocably submit[ted] to the exclusive and continuing jurisdiction" of the district court to enforce the settlement. JA118–19. In its final approval order, the

district court accordingly retained "exclusive and continuing jurisdiction" to enforce the order and settlement. JA31; *accord* JA35. As an absent class member bound by the settlement, Louisiana cannot now claim that GSK's enforcement motion violates its sovereign immunity.

II. Alternatively, Louisiana Waived Sovereign Immunity

Even if this Court were to break new ground and hold that States may assert sovereign immunity when positioned as plaintiffs, Louisiana waived any such immunity. Litigation conduct waives sovereign immunity when it clearly indicates consent to jurisdiction. And for absent class members, "silence on the part of those receiving notice is construed as tacit consent to the court's jurisdiction." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 306 (3d Cir. 1998). Louisiana, a sophisticated litigant, knew that its decision not to opt out of the class would constitute its consent to membership in the class. Yet Louisiana did nothing, even though States are often included in class definitions and successfully opt out. *See* GSK Br. 38–39; ATRA Br. 7–8. Louisiana thus waived any immunity it had. In becoming bound by the settlement, Louisiana also waived any objection to enforcing the settlement against it, since the settlement authorizes the federal court to enjoin violations.

1. Louisiana argues (at 23–25) that States can never waive their immunity by failing to opt out, and that only express consent to federal jurisdiction

suffices. That argument fails at every level. First, Louisiana is wrong that its litigation conduct waived its immunity only if Louisiana gave "express consent or . . . [a] clear declaration of intent to waive its immunity." LA Br. 26. That is the test for whether States consented to federal jurisdiction by enacting statutes or otherwise engaging in *non*-litigation conduct that Congress specified would abrogate immunity. *E.g.*, *Coll. Sav. Bank. v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 683–84 (1999) (Congress may not deem States to waive immunity by engaging in advertising that Congress intends to regulate); *Sossamon*, 563 U.S. at 285–86 (States do not consent to federal suit through state statutes that authorize "appropriate relief against a government").

A different test governs whether a State's litigation conduct waives immunity, i.e., whether "the litigation act the State takes that creates the waiver" is incompatible with the State's later claim of immunity. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002); *see* GSK Br. 41–42, 46–47; WLF/NAM Br. 26–27. It is immaterial whether the State accompanies that conduct with express waiver words or a clear declaration of intent. Indeed, the Supreme Court has held that States can waive their immunity inadvertently by, for instance, removing a case to federal court, *Lapides*, 535 U.S. at 620, or appearing as an intervenor, *Clark*, 108 U.S. at 447. Even if a State later claims that it had no intent to waive immunity, the State cannot withdraw that waiver by objecting that

it was too unclear or implicit. *See generally* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 Duke L.J. 1167, 1170–72, 1185–96, 1207–08, 1217 (2003) (explaining the distinctness of these doctrines).

Second, Louisiana cites no authority suggesting that only affirmative litigation acts can waive immunity, and ignores the many cases cutting the other way. Louisiana does not dispute that the Supreme Court has analogized Eleventh Amendment waiver rules to waiver rules for other constitutional rights. GSK Br. 44; *Coll. Sav. Bank*, 527 U.S. at 681–82. And Louisiana does not contest that litigants' failure to act can waive constitutional rights under the Fifth, Sixth, and Seventh Amendments. GSK Br. 44–45. Nor does Louisiana refute that courts apply the same rules to States and private litigants to ascertain whether particular conduct constitutes waiver. GSK Br. 47. The distinction between acts and omissions is often in the eye of the beholder, so a rule that only affirmative acts constitute waiver would be highly manipulable.

Third, it does not follow that sovereign immunity must afford States more protection against becoming absent class members than what ordinary litigants receive under Rule 23. LA Br. 25–26; *cf.* GSK Br. 40. States are far more sophisticated than ordinary litigants, and understand the significance of litigation conduct far better. There is no reason to create a States-only exception permitting

States alone to disregard opt-out notices. *See* WLF/NAM Br. 18–22. That is especially so given how easily and often States file opt-out notices to avoid becoming absent class members. *See* ATRA Br. 7–8.

2. Louisiana alternatively contends that it lacked sufficient notice of its membership in the class here because it did not receive a postcard directed to absent class members. LA Br. 23, 26–29. According to Louisiana, its receipt of an exhaustive notice pursuant to the Class Action Fairness Act (CAFA), 28 U.S.C. § 1715, is inadequate because the purpose of CAFA notices is to alert States to their citizens' possible claims, not to States' own claims. LA Br. 26–28.

Louisiana does not deny receiving or reviewing the detailed CAFA notice sent directly to its Attorney General, which included the settlement agreement. And actual notice of a settlement satisfies the notice requirement for absent class members even if they did not receive one of the prescribed forms of classwide notice. *In re Deepwater Horizon*, 819 F.3d 190, 199 (5th Cir. 2016) (a class member who claimed not to have received the class settlement notice could not collaterally attack a class-action settlement where his lawyer had actual notice of the agreement).

Moreover, Louisiana glosses over the CAFA notice's contents, but it is hard to see how it could have missed the notice's many statements explicitly identifying States as class members. GSK Br. 42–43. States have every incentive to read

CAFA notices carefully given that States are often included in class definitions as absent class members. *See* GSK Br. 38–39; ATRA Br. 4–6. Even a State that reads CAFA notices only with an eye to understanding its citizens' claims would be hard-pressed to miss repeated, all-caps sections entitled "WHO IS IN THE CLASS AND THE SETTLEMENT" that expressly identified State indirect purchasers of Flonase as class members. JA58, JA68. Nor does Louisiana explain how a State that blinds itself to such unambiguous information in a CAFA notice would appreciate its potential status as an absent class member if it simply received that same information in a separate postcard mailing containing far less information than the CAFA notice. GSK Br. 47–48.

Louisiana (at 29) is also incorrect that neither the CAFA notice nor the settlement agreement "clearly notified the State that it was at risk of . . . being haled into court for subsequent enforcement proceedings." The settlement provided that the district court "reserves exclusive and continuing jurisdiction" and that no settlement class members could pursue further litigation. JA31, JA34. And the enclosures to the CAFA notice informed class members that they are "bound by all terms of the Settlement Agreement, including, among other things, the Release and Discharge provision." JA61. It is irrelevant that neither the notice nor the settlement expressly told States that they would waive their sovereign immunity as to subsequent enforcement proceedings. *See* LA Br. 29. Louisiana

knew that by declining to opt out of the plaintiff settlement class, Louisiana would become part of that class. That conduct is manifestly inconsistent with later denying federal-court jurisdiction to enforce that settlement.

III. In Any Event, GSK Is Entitled to Rule 60(b)(2) Relief

This Court should reverse for a final, straightforward reason that does not require in-depth analysis of sovereign immunity doctrine. Louisiana does not dispute that, if it claimed or received proceeds from the settlement fund, Louisiana waived any sovereign immunity it had. *See* GSK Br. 48. Until December 2015, GSK had no reason to believe that Louisiana received settlement proceeds. But on the eve of the district court's denial of GSK's enforcement motion, GSK first learned that material evidence of Louisiana's receipt of settlement funds might exist. GSK immediately pursued that evidence and discovered that Humana, one of the Settling Health Plans that provided administrative services to members of the indirect purchaser class, [redacted] GSK Br. 49–51. That is quintessential newly discovered evidence warranting Rule 60(b) relief. And while Louisiana adamantly asserted earlier that it received no direct or indirect payments, Louisiana now dodges addressing this issue. *Compare* LA Br. 1, 12, 25 *with* GSK Br. 48, 50. Louisiana surely knows whether it received settlement funds, and can readily disclose whether it received them directly or indirectly.

A. GSK Acted Diligently

1. Louisiana argues (at 34–35) that GSK could have obtained the new evidence before the district court's December 21, 2015 denial of GSK's enforcement motion. Louisiana (at 33) asserts that GSK "slumbered on its rights for eight months" after learning by April 2015 that information about claims that Settling Health Plans submitted on behalf of indirect purchaser class members was confidential. Louisiana (at 34) further asserts that the claims administrator never identified Louisiana as a class member.

Critically, Louisiana omits that Louisiana represented to GSK and the district court four different times during those eight months that it never sought or received any settlement proceeds. JA407; JA482; JA487; JA585–86; JA603. Louisiana does not contest that litigants are entitled to rely on opposing parties' representations, including to a court, about facts within their possession. GSK Br. 50. Contrary to Louisiana's assertions (at 34), GSK's knowledge about the types of claims that class members or Settling Health Plans could make for settlement proceeds did not preclude GSK from relying on Louisiana's representations. And the claims administrator's failure to identify Louisiana as a class member based on its proprietary database does not matter. Louisiana was plainly included in the class definition as an indirect purchaser of Flonase.

Not until after the December 1, 2015 hearing was there any reason to suspect that Louisiana might have claimed or received settlement proceeds. GSK Br. 20–21, 50–51. Louisiana does not dispute that its newfound interest in learning from the claims administrator "whether Louisiana itself was involved/identified/what have you, in the settlement administration" was GSK's first inkling that Louisiana's prior representations were suspect. JA623. Far from declining to seek relevant information, LA Br. 35, GSK swiftly pursued evidence by all available means. GSK asked Louisiana to share any information Louisiana received from the claims administrator, including payments received. JA621–22. On December 5, GSK asked for Louisiana's consent for GSK to receive information from counsel or the claims administrator about any payments Louisiana received directly or through Humana. JA620–21. GSK also obtained Humana's permission for the claims administrator to disclose information about claims Humana submitted for Louisiana, [redacted] Because the district court had already denied GSK's motion to enforce the settlement on December 21, 2015, GSK could not seek discovery in this case. Thus, [redacted]

[redacted] GSK sought Rule 60(b) relief immediately.

2. Louisiana contends (at 35) that GSK should have sought formal discovery on December 5 to determine whether Louisiana obtained settlement funds. But as Louisiana pointed out in a December 5 email to GSK, there was "no time" for such discovery in light of the district court's briefing schedule. JA620; *see also* LA Br. 36. The parties filed supplemental briefs on December 9, and the district court denied GSK's motion on December 21. This timeline was too compressed to seek formal discovery. And GSK could not have sought state-court discovery because GSK removed the state-court case to federal court in February 2015, JA10, and the case was not remanded until February 2016, JA630. State-court discovery also would have imposed on GSK the burdens the settlement sought to forestall.

Nor did GSK represent that information about whether Louisiana received settlement payments was "not relevant." *Cf.* LA Br. 35. GSK's December 9 supplemental brief stated that Louisiana had "repeatedly refused to answer whether it had received any . . . payment" from the settlement, which was key to determining whether Louisiana was a class member bound by the settlement agreement. JA546 (emphasis omitted).

3. Neither case Louisiana cites (at 32-33) suggests that GSK should have done more. *Floorgraphics Inc. v. News America Marketing In-Store Services, Inc.* denied relief to a plaintiff who sought post-judgment relief after learning of evidence that should have been produced during discovery, reasoning that the plaintiff did nothing to compel discovery despite knowing of potentially material evidence. 434 F. App'x 109, 112 (3d Cir. 2011). Here, upon realizing that Louisiana's previous representations were suspect, GSK immediately investigated whether Louisiana received settlement payments. Likewise, *Boldrini v. Wilson* denied relief to a plaintiff who failed to explain why he had not requested the new evidence earlier. 609 F. App'x 721, 724 (3d Cir. 2015). But GSK explained that any delay in discovering the evidence was a result of [redacted]. It was Louisiana's eleventh-hour about-face—not any "tactical decision" by GSK (LA Br. 34)—that directed the timing of GSK's discovery of the evidence and its Rule 60(b) motion.

B. The Evidence Was Material

Louisiana (at 35–36) questions the authenticity of the new evidence that Humana obtained settlement funds for Louisiana. But GSK authenticated the itemized list of claims by submitting a sworn declaration from the claims administrator's program manager, [redacted]

[redacted];

Fed. R. Evid. 902.

Louisiana also objects (at 36) that GSK failed to detail "the relationship between Humana and the State; the scope of Humana's authority; whether Louisiana was aware these claims were being submitted; or what happened to the settlement funds after Humana received them." But GSK is not privy to that information, and all these questions would have been clarified had Louisiana not rebuffed GSK's inquiries. JA620. Louisiana is uniquely positioned to prove that Humana lacked authority to submit these claims and that Louisiana was unaware the claims were being submitted. But Louisiana has never done so, and now declines to say if these claims made their way to its coffers. Louisiana should obviate the need to reach novel Eleventh Amendment issues by answering whether it received settlement funds.

IV. GSK Is Entitled to Injunctive Relief

1. Louisiana argues (at 39–40) that GSK is not entitled to relief because Louisiana's state-law claims might not be covered by the settlement. But the district court held otherwise, determining that "some of Louisiana's claims fall within the Settlement Agreement." JA14. The court explained that "[o]n its face, Louisiana's complaint encompasses the types of claims covered by the Settlement

Agreement—namely, the State's purchases of [Flonase] for its employees and other beneficiaries of government employee health plans." JA13.

The district court was correct. Louisiana's complaint seeks "all damages sustained by the State," JA352, for GSK's alleged violation of various state statutes and for alleged unjust enrichment, JA349–51. Those allegations are identical to allegations in the class complaint, and encompass damages Louisiana sustained as an indirect purchaser of Flonase for State employees and others covered by government health plans. GSK Br. 16; *compare, e.g.*, JA357–78 *with* JA333–49. Louisiana has never denied making such indirect purchases. And the claims data that the claims administrator released suggests that Louisiana indeed had claims that fell within the scope of the class action and received compensation for them. *Supra* Part III.

Contrary to Louisiana's assertions (at 39 & n.4), GSK demonstrated its entitlement to enforce the settlement agreement against Louisiana. That agreement—incorporated in the district court's order—prohibited relitigation of claims released in the settlement. JA34. GSK detailed how "Louisiana's damages claims include claims covered by the release and covenant not to sue provisions" of the settlement and the court's final order. JA319. And GSK substantiated the court's authority to "grant relief against members of the Settlement Class who act in derogation of the release and covenant not to sue provisions." JA325.

2. Louisiana asserts (at 43) that this Court should abstain from federal jurisdiction and defer to the state-court proceedings under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). But whether that doctrine should apply is "necessarily left to the discretion of the district court in the first instance." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983). The district court did not abuse its discretion by not addressing abstention, which Louisiana mentioned in one cursory paragraph below. JA494.

Regardless, *Colorado River* abstention is inapplicable. Only where there are two "parallel" actions can a district court defer to state proceedings. *Ryan v. Johnson*, 115 F.3d 193, 196 (3d Cir. 1997). There are no parallel proceedings here. GSK is not asking Louisiana to litigate its claims in federal court. GSK is simply asking that the district court exercise its exclusive jurisdiction and enforce its own order. JA31.

Moreover, *Colorado River* abstention does not generally prohibit "dual track litigation." *Cf.* LA Br. 40–41. Deference to concurrent, parallel state-court proceedings is an "extremely limited" exception to the principle that "federal courts have a 'virtually unflagging obligation . . . to exercise the[ir] jurisdiction.'" *Ryan*, 115 F.3d at 195 (quoting *Colorado River*, 424 U.S. at 817). *Colorado River* abstention thus requires "a strongly articulated *congressional policy* against

piecemeal litigation in the specific context of the case under review." *Ryan*, 115 F.3d at 198. There is none here.

No other *Colorado River* factor supports abstention. *See Moses H. Cone*, 460 U.S. at 15–16, 23, 28 (listing factors). Louisiana's state-court suit is not *in rem*. There are no concurrent proceedings; the federal suit preceded Louisiana's complaint. Whether Louisiana is bound by the settlement is a question of federal law. And a state forum is inadequate: the point of GSK's motion was to prevent further litigation in light of a settlement agreement that gives the federal district court exclusive jurisdiction over disputes about the settlement.

CONCLUSION

This Court should reverse.

Dated: December 29, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users.

I certify that I served a copy of the foregoing brief on the State of Louisiana by placing a paper copy in the mail on December 29, 2016. *See* Fed. R. App. P. 25(c)(1)(A)–(C). I have also provided a copy of the brief to the State of Louisiana via electronic mail. *See* Fed. R. App. P. 25(c)(1)(D).

Dated: December 29, 2016

/s/ Lisa S. Blatt
Lisa S. Blatt

CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitations of Fed. R. App. P. 29(d) (2013) because the brief contains 6,890 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

3. Pursuant to Local Rule 31.1(c), I certify that the text of the electronic brief is identical to the text in the paper copies.

4. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection, Antimalware Client Version 4.6.305.0, last updated December 28, 2016, and according to that program, the submissions are free of viruses.

Dated: December 29, 2016

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