IN THE SUPREME COURT OF MISSISSIPPI
No. 2015-M-1543-SCT

BRISTOL-MYERS SQUIBB CO., SANOFI-AVENTIS U.S. LLC, SANOFI-AVENTIS U.S., INC., AND SANOFI-SYNTHELABO, INC.,

Petitioners/Defendants,

v.

JIM HOOD, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, EX REL. STATE OF MISSISSIPPI,

Respondents/Plaintiffs,

In re Petition to Appeal Interlocutory Order of the Chickasaw County Chancery Court, Honorable Dorothy Colom, in Jim Hood, Attorney General of The State of Mississippi ex rel. State of Mississippi v. Bristol-Myers Squibb Co. et al., Cause No. 2014-2124-C

MOTION BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF DEFENDANTS' PETITION FOR INTERLOCUTORY APPEAL

The Chamber of Commerce of the United States of America ("Chamber") and Pharmaceutical Research and Manufacturers of America ("PhRMA"), by and through counsel, respectfully move this Court to grant them leave to file a brief as *amici curiae* in support of the defendants' petition for interlocutory appeal with respect to the chancery court's order dismissing their counterclaims challenging the fee arrangement with private counsel in this case. (*See* Pet. for Interlocutory Appeal, *Bristol-Myers Squibb Co. v. Hood*, Dkt. No. 2015-M-1543-SCT (filed Oct. 13, 2015)). As set forth in the brief in support of this motion (Exhibit A), the Chamber and PhRMA meet the requirements for filing an amicus brief under Rule 29(a)(3) and (a)(4). A copy of the proposed amicus brief is submitted herewith as Exhibit B to this motion.

For the foregoing reasons, the Chamber and PhRMA respectfully request leave to file the proposed amicus brief submitted with this motion.

Dated this the 20th day of October, 2015.

Respectfully submitted,

The Chamber of Commerce of the United States of America and Pharmaceutical Research and Manufacturers of America

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This the 20th day of October, 2015.

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BRIEF IN SUPPORT OF MOTION BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' PETITION FOR INTERLOCUTORY APPEAL

The Chamber of Commerce of the United States of America ("Chamber") and Pharmaceutical Research and Manufacturers of America ("PhRMA") have submitted a motion requesting leave of this court to allow them to submit a joint brief of *amici curiae* in support of the petition for interlocutory appeal that was filed by the defendants in this matter.

Both the Chamber and PhRMA have a strong interest in this case because their members are increasingly the targets of suits involving contingency-fee arrangements between attorneys general and private counsel. In addition, their participation as *amici* is desirable because the law in this area remains unsettled, and the Court may find additional briefing helpful in grappling with the significant due-process issues raised by the parties' briefing.

"The practice of permitting *amicus curiae* participation to inform or advise the court is as old as the common law dating as far back as 1353." *Taylor v. Roberts*, 475 So. 2d 150, 151 (Miss. 1985) (citation omitted). Indeed, "[t]he trend under modern practice regarding *amicus curiae* participation has been to liberally allow participation to help the court's general understanding and insight central to the court's decision and possible implications of its rulings." *Id.*; *see also* Comment to Miss. R. App. Proc. 29 ("Briefs of an *amicus curiae* are allowed . . . consistent with the accepted view that such briefs, in appropriate cases, are of genuine assistance to the court and facilitate a more thorough understanding of the facts and law.").

This Court has articulated four bases for entertaining the views of *amicus curiae*:

> (1) *amicus* has an interest in some other case involving a similar question; or (2) counsel for a party is inadequate or the brief insufficient; or (3) there are matters of fact or law that may otherwise escape the court's attention; or (4) the *amicus* has substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case.

Miss. R. App. Proc. 29(a); *see also Taylor*, 475 So. 2d at 152 (listing these four grounds for granting a motion for leave to file an *amicus* brief). As set forth more fully below, leave should be granted under the first, third and fourth bases identified in *Taylor* and Rule 29(a).

First, leave should be granted under the first and fourth bases because the Chamber and PhRMA have a clear and substantial interest in how this Court adjudicates the legal issues raised in defendants' petition – namely, the propriety of delegating the coercive enforcement powers of the state to private contingency-fee counsel under state and federal law. The Chamber is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region of the country. PhRMA is a voluntary, nonprofit association representing the Nation's leading

biopharmaceutical researchers and biotechnology companies. In recent years, their members have been targeted with increasing frequency by private contingency-fee lawyers prosecuting civil-penalty and other enforcement actions on behalf of state and local governments across the country. More and more of these businesses are asserting challenges to these arrangements in cases throughout the country – including in Mississippi. *See Jim Hood ex rel. State of Mississippi v. Astrazeneca Pharms. LP*, No. 72395 (Chancery Ct. of Rankin Cnty.) (pending motion to dismiss counterclaim challenging Attorney General's retention of contingency-fee counsel).

As a result, not only do the Chamber and PhRMA have a legitimate interest in the outcome of this case, but they have also developed significant expertise in the constitutional, ethical and policy issues surrounding the controversial practice of state and local governments hiring private attorneys on a contingency-fee basis. It is precisely this interest and expertise that led them to seek leave to participate as *amici* on this very issue when this case was in a different posture before a federal district court.[1] The Chamber and PhRMA have also weighed in on this fundamental issue in a variety of other cases.[2] In sum, there can be no doubt that their members would be affected by this Court's resolution of the key legal issues raised in defendants' petition.

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[1] *See* Brief of the Chamber of Commerce of the United States of America and the Pharmaceutical Research and Manufacturers of America as *Amici Curiae* in Support of Defendants' Motion for Summary Judgment that Plaintiffs' Fee Arrangement is Unlawful, No. 3:13-cv-05910-FLW-TJB (D.N.J. Nov. 25, 2013).

[2] *See, e.g.*, Brief of the Chamber of Commerce of the United States of America and Pharmaceutical Research and Manufacturers of America as *Amici Curiae* in Support of Appellant and Reversal, *Cephalon, Inc. v. Wilson*, No. 2014-001465 (S.C. Sup. Ct. 2014); Brief of the Chamber of Commerce of the United States of America and the American Bankers Association as *Amici Curiae* in Support of Plaintiff-Appellant and Reversal, *Merck Sharp & Dohme Corp.*, Nos. 13-5792 & 13-5881 (6th Cir. July 12, 2013); Brief of Chamber of Commerce of the United States of America and the American Tort Reform Association as *Amici Curiae* in Support of Motion for Judgment as a Matter of Law in Light of Plaintiff's Constitutional Violations, *State v. Tyson Food, Inc.*, No. 4:05-cv-00329-GKF-SAJ (N.D. Okla. June 12, 2007).

Second, leave should also be granted under the third basis set forth in Rule 29(a) because there are matters of law presented by this case that may otherwise escape the Court's attention. After all, the state of the law in this area is unsettled. *See, e.g.*, *Merck Sharp & Dohme Corp.*, 861 F. Supp. 2d 802, 813 (E.D. Ky. 2012) (noting dearth of authority addressing the propriety of using contingency-fee counsel in attorney general-initiated consumer-protection suits). Drawing on their prior research and litigation experience in this field, the Chamber and PhRMA are well positioned to aid the Court in interpreting the disparate decisions in this area of the law.[3] And because they represent the interests of millions of American businesses both within and well beyond the prescription-drug industry, they can also help place the instant suit in a broader context.

CONCLUSION

For the reasons set forth above, the Court should grant the Chamber and PhRMA leave to file a brief as *amici* in support of defendants' petition for interlocutory appeal.

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[3] In addition to serving as *amicus* on these issues in other cases, the Chamber has also published on the topic of use of contingency-fee counsel in attorney-general suits. *See* U.S. Chamber Institute for Legal Reform, *Privatizing Public Enforcement: The Legal, Ethical, and Due Process Implications of Contingency-Fee Arrangements in the Public Sector*, Sept. 2013, available at http://www.instituteforlegalreform.com/uploads/sites/1/PublicInterestPrivateProfit_FINAL.pdf.

Dated this 20th day of October, 2015.

Respectfully submitted,

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PROPOSED BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTRODUCTION

This case is part of a growing trend around the country, in which state attorneys general delegate quasi-criminal enforcement powers to private attorneys who are already involved in multidistrict litigation against drug manufacturers or other corporate entities. In nearly every case, including this one, the private attorneys are to be paid on a contingency-fee basis – in other words, they are paid only if they win; and if they do win, they are paid more and more for each additional dollar they recover. The problem with these arrangements is simple: they entrust the duty of impartially administering justice to attorneys with an overwhelming incentive to "win" the case – even if it is entirely bereft of merit. As a result of these pressures, the neutral forum assured to defendants by basic principles of due process is incurably tainted. Given the personal interests of counsel, defendants have no hope of persuading them to abandon a meritless case because the quest for a high-dollar recovery becomes the paramount consideration, no matter how unreasonable the case. The result is guaranteed litigation and, when the state prevails, highly inflated penalties, placing additional burdens on court dockets and harming American businesses.

Defendants' petition for interlocutory appeal correctly argues for a categorical rule against all such arrangements. As the petition makes clear, the United States Supreme Court's due-process precedents are incompatible with the test adopted by some courts – and apparently followed by the Chancery Court here – which would allow the retention of private attorneys on a contingency-fee basis as long as a governmental office or attorney exercises "control" over the litigation. (*See* Pet. for Interlocutory Appeal ("Pet.") at 12-13.)

Amici Curiae The Chamber of Commerce of the United States of America and Pharmaceutical Research and Manufacturers of America seek leave to file this brief to supply the Court with two additional points to guide its consideration. First, even courts that have approved

a control test in some circumstances have acknowledged that a categorical bar on the use of contingency-fee counsel remains appropriate in cases, like this one, that are quasi-criminal in nature. Second, the growing use of contingency-fee counsel by state attorneys general in quasi-criminal enforcement actions around the country makes it all the more critical that the Court find the fee arrangement improper in this case.

For these reasons, this case presents a compelling case for immediate review. As the Chancery Court's divergence from the better-reasoned authorities demonstrates, "a substantial basis exists for a difference of opinion on" the question of whether state attorneys general are constitutionally barred from retaining contingency-fee counsel to prosecute civil statutory violations and collect penalties. *See* M.R.A.P 5(a). Moreover, if the Chancery Court's ruling is allowed to stand without this Court's early intervention, the parties could be forced to litigate this case only to retry it if the Court later sustains defendants' constitutional challenge. Thus, resolving the issue now would further every delineated purpose of interlocutory review – namely, materially advancing the termination of the litigation, avoiding exceptional expense to the parties, protecting defendants from substantial injury, and resolving an issue of importance in the administration of justice. *See id*.

ARGUMENT

I. A CATEGORICAL BAR AGAINST THE USE OF CONTINGENCY-FEE COUNSEL APPLIES IN QUASI-CRIMINAL CASES LIKE THIS ONE.

The Chancery Court rejected the defendants' challenge to the Attorney General's retention of private, contingency-fee counsel without significant analysis. In the Chancery Court's view, the retention agreement did not pose any due-process problems because the Legislature has enacted statutory restrictions on such arrangements and because other courts have approved them.

These justifications lack merit in a case, like this one, that is quasi-criminal in nature. This suit is brought in the name of the State; it seeks injunctive rather than compensatory relief, which would bar certain types of speech; and it seeks substantial penalties that, like criminal sanctions, are designed to punish and deter, and are not rooted in or limited by any damage ostensibly sustained by the State or its citizens. The need for neutrality is at its apex in such cases because any temptation to pursue self-enrichment rather than justice would subvert basic due-process protections. Accordingly, the use of contingency-fee counsel is inappropriate as a matter of due process – even if such arrangements might be permissible in other circumstances.

As the defendants' petition explains, due process includes "the right to an impartial tribunal and to prosecution by a lawyer for the government whose judgment is unclouded by any financial or other personal stake in the outcome." (Pet. at 9 (citing, inter alia, *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980)).) Pursuant to this principle, Supreme Court decisions have adopted a "categorical" rule against the use of prosecutors who have a financial incentive to obtain a conviction – be they government attorneys or private, retained counsel – a rule that other courts have extended to quasi-criminal enforcement actions. (*See id.* at 9-10.)

Despite the clarity of the Supreme Court's "categorical" approach, some courts have concluded that attorneys general may retain private counsel on a contingency-fee basis as long as the attorney general retains "control" of the litigation. (*See id.* at 12-13.) But even these courts have recognized that a categorical bar on such arrangements remains necessary in quasi-criminal enforcement proceedings like this one. In *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), the City of Corona, California, sought to enjoin a bookstore from selling sexually explicit materials. The City hired outside counsel to prosecute abatement actions under a public-nuisance theory, *see id.* at 348-49, agreeing to double the private firm's hourly rate if the City

prevailed (as long as the court ordered the losing party to pay the City's attorneys' fees). *Id.* at 350. The California Supreme Court rejected this arrangement, finding that the retention agreement "[o]bviously" gave outside counsel "an interest extraneous to his official function in the actions he prosecutes on behalf of the City." *Id.* at 351. The court held that such an interest was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 353.

As part of its rationale, the court explained that the abatement proceeding closely resembled a criminal prosecution, in which principles of neutrality and impartiality are of paramount importance. *See id.* at 352-53 & n.4. In particular, both in *Clancy* and in a subsequent case describing it, the California Supreme Court emphasized that the suit at issue:

- Was "brought in the name of the People," *id.* at 352-53, and "on behalf of the public," *County of Santa Clara v. Superior Court*, 235 P.3d 21, 34 (Cal. 2010);
- Sought not compensatory but injunctive relief, which would impinge upon "the continued operation of an established, lawful business," *Santa Clara*, 235 P.3d at 32;
- "[I]mplicated both the defendants' and the public's constitutional free-speech rights" because the materials at issue "involved speech that arguably was protected in part," *id.* at 32-33; and
- Claimed a "'remedy [that] is in the hands of the state,'" *id.* at 33 n.10 (quoting *Clancy*, 705 P.2d at 353), and "carried the threat of criminal liability." *Id.* at 33.

Based on these characteristics, the California Supreme Court determined that the close relationship between the nuisance action and a criminal proceeding "supports the need for a neutral prosecuting attorney," and "***[a]ny*** financial arrangement that would tempt the . . . attorney to tip the scale cannot be tolerated." *Clancy*, 705 P.2d at 352-53 (emphasis added). The court therefore disqualified the counsel.

Years later, when the same court embraced the control test in a different case, it was careful to point out that *Clancy*'s categorical bar would continue to apply in quasi-criminal cases.

In *County of Santa Clara*, 235 P.3d 21, the California Supreme Court confronted another nuisance action, this time by various municipalities against former manufacturers of lead paint. *Id.* The municipalities sought to have the manufacturers remove or pay for the removal of lead paint. *See id.* at 25, 34. The court concluded that *Clancy*'s rule of "automatic disqualification" was "unwarranted" because the cases differed in nature. *Id.* at 31-32. Specifically, in *Santa Clara*:

- "[W]hatever the outcome of the litigation, no ongoing business activity [would] be enjoined" since the manufacture of lead paint had already been illegal for decades, *id.* at 34;
- "[T]he *remedy* [would] not involve enjoining current or future speech" and thus could not "prevent defendants from exercising any First Amendment right or any other liberty interest," *id.*;
- The suits posed "neither a threat nor a possibility of criminal liability," *id.*; and
- The proposed remedy would "result, at most, in defendants' having to expend resources to abate the lead-paint nuisance they allegedly created" – "the type of remedy one might find in an ordinary civil case." *Id.*

Under these circumstances, the court held that the attorney general's office could hire private counsel on a contingency-fee basis, but only if it retained "'*absolute and total control over all critical decision-making*.'" *Id.* at 36 (quoting *Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 475 (R.I. 2008)). Importantly, however, the court's need to distinguish the case before it underscored the vitality of *Clancy*'s rule of "automatic disqualification" in quasi-criminal cases. *Accord, e.g.*, David M. Axelrad & Lisa Perrochet, *The Supreme Court of California Rules on Santa Clara Contingency Fee Issue – Backpedals on* Clancy, 78 Def. Couns. J. 331, 342 (2011) ("The [*Santa Clara*] court found the ***determinative*** factor in the case . . . to be

the difference between 'the types of remedies sought and the types of interests implicated' in *Clancy* and in *Santa Clara*.") (emphasis added; citation omitted).[1]

Here, even if the Court were to conclude that a control test might be appropriate in some circumstances, the *Clancy* rule should apply. This case, like *Clancy*, seeks injunctive relief that would stifle ongoing advertising and promotional conduct. (*See* Pet. at 3 (stating that current Complaint seeks "to enjoin Defendants from continuing to engage in misleading marketing of the drug").) Moreover, the requested injunctive relief implicates the defendants' liberty interests. In *Clancy*, it was sufficient that the proposed injunctive relief would have affected speech that was "arguably . . . protected in part." *Santa Clara*, 235 P.3d at 32-33. Here, the liberty interest at stake is at least as strong, as there is no question that pharmaceutical marketing speech is protected. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011) ("Speech in aid of pharmaceutical marketing . . . is a form of expression protected by the . . . First Amendment."); *United States v. Caronia*, 703 F.3d 149, 166-67 (2d Cir. 2012) (discussing the public's right to receive information about prescription drugs).

This case also involves a request for penalties – a remedy that (like the one in *Clancy*) rests exclusively in the State's hands. *See Santa Clara*, 235 P.3d at 33-35 (contrasting the state's exclusive remedies with ordinary compensatory relief, which is all that was sought in *Santa Clara*). The purpose of penalties is not to compensate but to punish and deter, giving them a

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[1] Other cases have acknowledged this same distinction. *See, e.g.*, *City & Cnty. of S.F. v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1135 (N.D. Cal. 1997) ("This lawsuit, which is basically a fraud action, does not raise concerns analogous to those in the public nuisance or eminent domain contexts discussed in *Clancy*. Plaintiffs' role in this suit is that of a tort victim, rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers."); *Lead Indus.*, 951 A.2d at 475 nn.48 & 50 (A categorical bar was inappropriate because "the case presently before us is completely civil in nature," but "we are unable to envision a criminal case where contingent fees would ever be appropriate[.]"); *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1242-43 (Md. 1998) (distinguishing *Clancy* in part because "there are no constitutional or criminal violations directly implicated here").

quasi-criminal character akin to punitive damages. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (noting that punitive damages "serve the same purposes as criminal penalties"). Indeed, the penalties remedy is particularly prone to abuse. Ordinary compensatory relief is, by its nature, limited by the extent of damage actually sustained by the state or its citizens, reducing the risk of "governmental overreaching or economic coercion." *Santa Clara*, 235 P.3d at 34. But penalties are not so limited, affording essentially unbridled discretion to a private lawyer to seek to maximize the number and amount of penalties, regardless of any damage allegedly sustained. *See, e.g.*, Axelrad & Perrochet, *supra*, at 342 (noting that "a penalty that is not tied to an amount needed to cure or abate harm caused by the defendant" is a consideration weighing against the application of *Santa Clara*'s control rule).[2] Unsurprisingly, the private attorneys in this case have already set the stage to maximize recovery along these lines. (*See* Pet. at 3 (explaining that the Complaint seeks "$10,000 in penalties for every claimed Mississippi Consumer Protection Act [ ] violation, apparently for every time Plavix was sold in the State") (citing APP. 2 at 22).)

The Chancery Court's decision below is entirely devoid of any of this authority or analysis. Instead, it merely held that it remained "unconvinced" that defendants' due process rights were violated by the contingent-fee arrangement at issue and cited, as its only support, *International Paper Co. v. Harris County*, 445 S.W.3d 379 (Tex. App. 2013). (*See* Pet. at 10-11; APP. 1 at 12.) But the Chancery Court's reliance on *International Paper* is wholly misplaced. There, the court held that *Santa Clara* – and not *Clancy* – controlled the case before it because the defendants had "not presented any argument or evidence" that the county's lawsuit

[2] As such, the arrangement in this case differs from prior actions in which the attorney general has retained private counsel to assist with claims for compensatory relief. *See, e.g.*, *In re Corr-Williams Tobacco Co.*, 691 So. 2d 424 (Miss. 1997).

implicated any "constitutionally protected interests that justif[ied] treating the lawsuit in the same manner as a criminal prosecution." *Int'l Paper*, 445 S.W.3d at 395; *see id.* at 391-95. As set forth above, however, this action ***does*** "implicate important First Amendment concerns and . . . threaten[s] ongoing business activity" – and therefore "'require[s] the same "balancing of interests" and "delicate weighing of values" on the part of the government's attorney prosecuting the case as would be required in a criminal prosecution.'" *Id*. at 392 (citation omitted). Accordingly, the action in *International Paper* failed to raise the same concerns at issue here, and the Chancery Court's total dependence on it was erroneous.

In sum, basic principles of due process compel application of a per se rule against retention of private counsel on a contingency-fee basis, and the Chancery Court erred in holding otherwise.

II. THE USE OF CONTINGENCY-FEE COUNSEL IN QUASI-CRIMINAL ENFORCEMENT SUITS IS A GROWING PROBLEM THAT NEEDS TO BE ADDRESSED.

Review is especially important because the practice of outsourcing quasi-criminal litigation to profit-seeking attorneys is a recurring problem that reflects poorly on the State's judicial system. This case is just one of a growing number in which state attorneys general have abdicated their duties by delegating quasi-criminal enforcement power to self-interested private attorneys. These arrangements promote unseemly quid pro quo relationships between government officials and private lawyers and undermine public confidence in the justice system, underscoring the need for strict judicial oversight.

Over the past few decades, contingency-fee arrangements have led to "the creation of a new model for state-sponsored litigation that combines the prosecutorial power of the government with private lawyers aggressively pursuing litigation that could generate hundreds of millions in contingent fees." Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The*

Transmutation of Public Nuisance Litigation, 2007 Mich. St. L. Rev. 941, 968. The genesis of this practice can be traced to litigation in the 1980s, when Massachusetts hired outside counsel on a contingency-fee basis to prosecute claims over asbestos removal. *Id*.

Since then, state attorneys general have used this model to mount aggressive enforcement actions against the entire spectrum of the business community. *See* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 80 (2010) ("In the last ten years, state governments have increasingly resorted to this practice in their efforts to pursue 'big money' claims against alleged tortfeasors."). For example, the state of Rhode Island employed outside counsel to sue former manufacturers of lead paint and pigment from 2003 to 2008. Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J.L. & Soc. Probs. 587, 589 (2009). Similarly, Oklahoma's Attorney General hired outside firms to sue poultry companies that allegedly polluted the state's waterways with chicken manure. *See id.* And in suits like this one, brought against the pharmaceutical industry, attorneys general have entered into contingency-fee contracts with outside counsel to prosecute a wide range of lawsuits, alleging failure to warn, fraudulent advertising or off-label promotion of prescription medications. *See* Lise T. Spacapan, Douglas F. McMeyer & Robert W. George, *A Threat to Impartiality: Contingency Fee Plaintiffs' Counsel and the Public Good?*, In-House Def. Q., Winter 2011, at 12, 14.

The breadth of the practice cannot be overstated: in one recent study of the 50 states and the District of Columbia, 36 attorney general offices reported using contingency-fee counsel. *Id.*[3] Mississippi is among the most prolific of these jurisdictions. The Mississippi Attorney

[3] This number does not include the use of contingency-fee counsel in the tobacco litigation during the 1990s. *See* Spacapan, McMeyer & George, *supra*, at 14.

General is a repeat hirer of contingency-fee counsel, causing the State to "lead[] the nation in contingency fee contracts." Jim Malewitz, *Mississippi Republicans Challenge Powers of Attorney General*, Stateline, Feb. 3, 2012, http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/02/03/mississippi-republicans-challenge-powers-of-attorney-general.

Such reliance on outside counsel can be expected to increase as state legislatures increasingly call on attorney general consumer-protection and Medicaid-fraud units to contribute to their own budgets or become self-funded. *See* Dave Boucher, *Attorney General Outlines Changes; Legislation Aims to Alter Way Official Handles Money from Settlements*, Charleston Daily Mail, Apr. 24, 2013, at P1A (referencing a bill passed by the West Virginia legislature that would take $7.46 million from the attorney general's Consumer Protection Fund and distribute it elsewhere in the state budget). This is all the more true because Congress has increasingly given state attorneys general authority to enforce federal laws.[4] And there will be no shortage of private lawyers eager to take on those representations. As one commentator noted in the Wall Street Journal:

> Trial lawyers love these deals. Even aside from the chance to rack up stupendous fees, they confer a mantle of legitimacy and state endorsement on lawsuit crusades whose merits might otherwise appear chancy. Public officials find it easy to say yes because the deals are sold as no-win, no-fee. They're not on the hook for any downside, so wouldn't it practically be negligent to let a chance to sue pass by?

Walter Olson, *Tort Travesty*, Wall St. J., May 18, 2007, at A17.

The growth of this practice has adversely affected the public's perception of the justice system. In particular, contingency-fee arrangements with private counsel create an opportunity

[4] For example, state attorneys general are authorized to enforce the Truth in Lending Act's mortgage mandates, 15 U.S.C. § 1640(e), and the Health Insurance Portability and Accountability Act's privacy provisions, 42 U.S.C. § 1320d-5(d).

for unseemly liaisons between public enforcement officials and private, profit-motivated lawyers. In Mississippi, for example, the Attorney General retained 27 law firms to represent Mississippi in 20 separate lawsuits over a five-year span, and "some of Mr. Hood's largest campaign donors are the very firms to which he's awarded the most lucrative state contracts." Editorial, *Lawsuit Inc.*, Wall St. J., Feb. 25, 2008, at A14. As the defendants' petition notes, this case continues and highlights that pattern. (*See* Pet. at 13 (private counsel contributed $125,000 to the Attorney General between May 2007 and November 2011).)

Concern over the effects of such liaisons has generated substantial criticism over the last few years. As one former attorney general who has been an outspoken critic of these liaisons observed, "'[t]hese contracts . . . create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.'" Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10 (quoting Hon. William H. Pryor, Jr.).

Further, contingency-fee counsel have incentives that, under any "'realistic appraisal of psychological tendencies and human weakness,'" *Marshall*, 446 U.S. at 252 (citation omitted), create a structural conflict between the pursuit of justice and their personal interest in obtaining a substantial financial recovery. In particular, contingency-fee counsel "have a financial incentive to maximize money recoveries, an incentive that would be congruent with a client's interests in private actions but is frequently in tension with a State's public interest role." *Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 48 (2012) (testimony of James R. Copland, Director and Senior Fellow, Center for Legal Policy, Manhattan Institute for Policy Research).

These concerns, coupled with the threat to important due-process rights as highlighted in the previous section and in the defendants' petition, underscore the importance of developing meaningful judicial limitations on the use of contingency-fee counsel by state attorneys general. At a minimum, the Court should hold that such arrangements are invalid in quasi-criminal enforcement suits like this one, in which the public's interest in seeing that justice is done and the defendant's interest in receiving the full protections of due process are at their apex. Absent such a standard, liaisons like the one here – between state attorneys general and private contingency-fee counsel – will continue unabated, fueling unreasonable verdicts, eroding public trust in judicial proceedings and undermining due process.

CONCLUSION

For the reasons set forth above and in defendants' petition, The Chamber of Commerce of the United States of America and Pharmaceutical Research and Manufacturers of America respectfully submit that the Court should grant the defendants' petition for interlocutory appeal and hold that plaintiff's fee arrangement is unconstitutional.

This is the _____ day of _____, 2015.

Respectfully submitted,

The Chamber of Commerce of the United States of America and Pharmaceutical Research and Manufacturers of America

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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I hereby further certify that on this day I served a copy of the foregoing by postage-paid U.S. Mail to the following non-MEC participant:

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This the _____ day of _____, 2015.

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