THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CEPHALON, INC.,

Appellant,

v.

ALAN WILSON, in his capacity
as Attorney General for the State of South Carolina

Respondent,

Case No. 2014-001465

Appeal from Richland County
Court of Common Pleas, Fifth Judicial Circuit
G. Thomas Cooper, Jr., Circuit Court Judge

BRIEF BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLANT, CEPHALON, INC.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("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. One of the Chamber's key functions is to represent the interests of its members before the courts, Congress and the Executive Branch. The Chamber has filed many *amicus* briefs in cases of vital concern to the nation's business community, including cases addressing the constitutional, ethical, and policy issues surrounding the controversial practice of state and local governments hiring private attorneys on a contingency-fee basis.

PhRMA is a voluntary nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies are dedicated to discovering medicines that enable patients to lead longer, healthier, and more productive lives. During 2013 alone, PhRMA members invested an estimated $51.1 billion in efforts to research and develop new medicines. PhRMA has frequently filed *amicus* briefs in cases raising matters of significance to its members.

Both the Chamber and PhRMA have a strong interest in this case, as their members are being 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.

STATEMENT OF THE ISSUES ON APPEAL

Amici curiae adopt the Statement of Issues on Appeal set forth by Appellant Cephalon, Inc.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case set forth by Appellant Cephalon, Inc.

INTRODUCTION AND SUMMARY OF ARGUMENT

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 most of these cases, 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 the amount they recover depends on the amount awarded to the State. 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 or to settle for any reasonable amount. The result is guaranteed litigation and, when a state prevails, highly inflated penalties, placing additional burdens on court dockets and harming American businesses.

Here, the South Carolina Attorney General ("AG") hired a private law firm on a contingency-fee basis to seek statutory penalties from a pharmaceutical manufacturer

under the South Carolina Unfair Trade Practice Act ("SCUTPA"). The contingency-fee agreement would allow the private firm to recover fees on a sliding scale depending on the amount actually recovered in the action, with the AG retaining 10% of the private firm's recovery for itself. The circuit court found no fault with this arrangement, concluding that the AG may properly "withhold attorneys' fees from any recovery [in an SCUTPA action] both for his Office and for outside counsel." (Order Granting Defendant's Motion For Summary Judgment, June 2, 2014, at 3 ("Order").) That conclusion was in error, and – if left to stand – will have a serious and deleterious effect on the justice system.

As an initial matter, the AG's contingency-fee arrangement "is antithetical to the standard of neutrality that an attorney representing the government must meet" when prosecuting a quasi-criminal enforcement action, *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 353 (Cal. 1985), and therefore contravenes Cephalon's due process rights. Further, the contingency-fee arrangement's provision that the AG may retain 10% of outside counsel's fee award for itself, instead of remitting that money to the State of South Carolina's general fund, deprives the legislature of its authority over state spending, in violation of the separation of powers.

As set forth below, the practice of delegating the coercive powers of the state to outside counsel using constitutionally improper contingency-fee arrangements has and will continue to have profound negative consequences for both businesses and the justice system. The growing use of contingency-fee counsel by state attorneys general makes it critical that the Court overturn the circuit court's order and recognize a categorical bar on the use of contingency-fee counsel in quasi-criminal cases like this one.

ARGUMENT

I. THE USE OF CONTINGENCY-FEE COUNSEL IS CONSTITUTIONALLY IMPERMISSIBLE IN THIS CASE.

A. There Is A Categorical Bar Against The Use Of Contingency-Fee Counsel In Quasi-Criminal Actions Like This One.

Due process requires a categorical bar against the retention of private, contingency-fee counsel in suits like this one that resemble criminal prosecutions. This suit is brought in the name of the State; it seeks injunctive 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 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 here – even if such arrangements might be permissible in other circumstances.

The Supreme Court long ago recognized that a state violates due process when it deprives a defendant of an impartial tribunal or subjects a defendant to prosecution by a lawyer for the government whose judgment is clouded by a financial or other personal stake in the outcome. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980). The Supreme Court extended "the requirement of a disinterested prosecutor" to private attorneys representing the government in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) ("to pursue the public interest," private attorneys appointed to represent the government "certainly should be as disinterested as a public prosecutor who undertakes such a prosecution"). These Supreme Court decisions adopt 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. For example, in *Clancy*, the City of Corona, California, sought to enjoin a bookstore from selling sexually explicit materials. 705 P.2d 347. The City hired outside counsel to prosecute abatement actions under a public-nuisance theory, *id.* at 348, 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 as violating due process, 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. *Id.* at 350, 352. 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," *Cnty. of Santa Clara v. Super. Ct.*, 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.*; and

- Claimed a "remedy [that] is in the hands of the state" and "carried the threat of criminal liability," *id.* at 33 & n.10 (internal quotation marks and citation omitted).

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 (emphasis added). The court therefore disqualified the counsel.

Years later, when the same court concluded that attorneys general may retain private counsel on a contingency-fee basis in certain actions as long as the attorney general retains "control" of the litigation, it was careful to point out that *Clancy*'s categorical bar would continue to apply in quasi-criminal cases. In *County of Santa Clara v. Superior Court*, the California Supreme Court confronted another nuisance action, this time by various municipalities against former manufacturers of lead paint. The municipalities sought to have the manufacturers remove or pay for the removal of lead paint. The court concluded that *Clancy*'s rule of "automatic disqualification" was "unwarranted" because the cases differed in nature. 235 P.3d at 32. Specifically, in *Santa Clara*:

- "[W]hatever the outcome of the litigation, no ongoing business activity will be enjoined" since the manufacture of lead paint had already been illegal for decades, *id.* at 34;

- "[T]he ***remedy*** will 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 as long as 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, 343 (2011) ("The 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*.") (citation omitted, emphasis added).[1]

Here, even if the Court were to conclude that a control test might be appropriate in some circumstances, the *Clancy* rule governs. The AG in this case, like the government in *Clancy*, seeks injunctive relief. (*See* Compl., Prayer For Relief ¶ 7.) While the AG does not detail precisely what activities it seeks to permanently enjoin in

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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").

its complaint, it can be assumed that the AG intends to preclude Cephalon from engaging in the conduct that it claims violates the SCUTPA, i.e., Cephalon's "marketing and promotion" of the prescription drugs Provigil, Gabitril and Actiq. (*See id.* ¶¶ 7-64.) This will necessarily impinge upon Cephalon's future business activities by stifling its ability to communicate about its products. Moreover, the requested injunctive relief implicates the defendant's 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. 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, 2667 (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. *Santa Clara*, 235 P.3d at 33 n.10, 34 (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 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, 78 Def. Couns. J. 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). Indeed, the AG's office has effectively boasted that the claim for penalties will provide its private counsel the opportunity for substantial recovery. When the private attorneys asked the AG's office to estimate the anticipated damages in the case, the AG's office assured them that "***the civil penalties would be the big #.***" (*See* Cephalon's MSJ Ex. 5, email from Sonny Jones to Kenneth M. Suggs, July 8, 2011, 12:23 P.M., R. p. __.) Unsurprisingly, the private attorneys have already set the stage to maximize the penalties – and, by extension, their recovery – in this case by seeking up to $5,000, the statutory maximum, for each "method, act, or practice" deemed to violate the SCUTPA. (*See* Compl. ¶ 68; *id.* Prayer For Relief ¶ 5.)

For all of these reasons, the quasi-criminal nature of this proceeding compels application of a per se rule against retention of private counsel on a contingency-fee basis.[2]

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[2] Even if the Court were to determine that the SCUTPA action were civil in nature and therefore permit the use of contingency-fee counsel so long as a "neutral, conflict-free" AG retains "control" of the action, *see Santa Clara*, 235 P.3d at 32, that test is not met here. As the court explained in *Santa Clara*, "[s]trict control by neutral government attorneys is needed to "provide[] a safeguard against the possibility that private attorneys unilaterally will engage in inappropriate prosecutorial strategy and tactics geared to maximize their monetary reward." *Id.* at 38-39; *see also Clancy*, 705 P.2d 347 (prosecutorial neutrality is essential because a state agent "has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly"). The contingency-fee arrangement here violates this rule because it guarantees the AG 10% of outside's counsel's fee, which would be tied directly to the

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B. The AG's Retention Of A Portion Of Any Fee Award Would Violate The Separation Of Powers.

The fee agreement also violates the separation of powers by effectively arrogating to the AG the unambiguously legislative power to appropriate public funds. The court of common pleas approved the arrangement, believing that the General Assembly authorized such arrangements by enacting statutes that authorize the AG to "'obtain reimbursements for its costs'" and to retain any award of "'investigative costs or costs of litigation'" by court order or settlement. (Order at 8 (quoting S.C. Code § 1-7-85 (2013)); *see also id.* at 17 (quoting S.C. Code § 1-7-150(B) (2005)).) This holding was clearly erroneous. Appropriations are clearly a legislative function, and a straightforward reading of the structure and language of the statutes cited by the court below makes clear that the General Assembly did not delegate any authority to the AG to appropriate new public funds to pay private, contingency-fee counsel.

"In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 591 (2014). "One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It

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amount ultimately recovered in the action. Unlike other scenarios in which the AG may obtain attorneys' fees, the AG's cut in this case will not be based on the amount of time or resources expended by the State in pursuing the case. Instead, the AG will receive a set percentage of the monetary award, resulting in a windfall for the AG's office and giving the AG an improper incentive to maximize the statutory penalties assessed.

prevents the concentration of power in the hands of too few, and provides a system of checks and balances." *State v. Langford*, 400 S.C. 421, 434 (2012) (citation omitted).

"A usurpation of powers exists, for purposes of the separation of powers doctrine, when there is a significant interference by one branch of government with the operations of another branch." *Id.* at 435 (internal quotation marks, citation and alteration omitted). "The General Assembly 'has plenary power over all legislative matters unless limited by some constitutional provision.'" *Amisub*, 407 S.C. at 591 (quoting *Hampton v. Haley*, 403 S.C. 395, 403 (2013)). "Under the constitution and laws of this State, the General Assembly is the sole entity with the power to appropriate funds . . . ." *Edwards v. State*, 383 S.C. 82, 91 (2009).

There is no question that the General Assembly's exclusive authority over appropriations extends to the AG's budget. The General Assembly sets the AG's salary, S.C. Code Ann. § 1-7-10 (2005), and it establishes the AG's budget through the appropriations process, *see id.* § 1-7-80. It also expressly conditions its appropriation of funds to the AG's office on, among other things, the AG's conduct of "all litigation which may be necessary for any department of the state government or any of the boards connected therewith . . . ." *Id.* § 1-7-80(1) (2005).

The General Assembly has also clearly identified and limited the other sources of funding that the AG may seek in connection with the execution of its duties. For example, the AG

> may obtain reimbursement for its costs in representing the State in criminal proceedings and in representing the State and its officers and agencies in civil and administrative proceedings. These costs may include, but are not limited to, *attorneys' fees or investigative costs or costs of litigation* awarded by court order or settlement, travel expenditures, depositions, printing, transcripts, and personnel costs.

> *Reimbursement of these costs may be obtained* by the Office of the Attorney General *from the budget of an agency or officer that it is representing or from funds generally appropriated for legal expenses, with the approval of the State Budget and Control Board.*

Id. § 1-7-85 (emphases added). The AG is not free, by contrast, to treat recoveries from lawsuits pursued on behalf of the State as the AG's own funds. Instead, all such monies must generally be deposited in the general fund of the State, except, as relevant here, "investigative costs or costs of litigation." Specifically, the General Assembly has provided as follows:

> (A) The Attorney General shall account to the State Treasurer for all fees, *bills of costs*, and monies received by him by virtue of his office.
>
> (B) All monies, *except investigative costs or costs of litigation* awarded by court order or settlement, awarded the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State or one of its agencies or departments must be deposited in the general fund of the State, except for monies recovered for losses or damages to natural resources, which must be deposited in the Mitigation Trust Fund, or where some other disposition is required by law.

Id. § 1-7-150 (2005) (emphases added).

It is clear that none of these provisions authorizes the AG to pay contingency fees to private counsel based on recoveries in litigation or settlement. Rather, the plain language of S.C. Code Ann. § 1-7-150 makes clear that, with narrow exceptions, such recoveries belong to the State's general fund, over which the General Assembly has appropriations authority. The court of common pleas thought otherwise, believing that the exemption in section 1-7-150 of "investigative costs or costs of litigation" must include attorneys' fees. (*See* Order at 17-18.) That construction is fatally flawed. Although section 1-7-150 authorizes the AG to retain "investigative costs or costs of litigation" from recoveries in litigation or settlement, it does not mention "attorneys'

fees," an omission that is notable because "attorneys' fees" is distinctly identified as a separate item of cost in section 1-7-85 in a list of other costs that includes "investigative costs [and] costs of litigation." *Compare id.* § 1-7-150(B) (authorizing retention of "investigative costs or costs of litigation" from a recovery) *with id.* § 1-7-85 (authorizing the AG to seek reimbursement from state agencies or officers for "costs in representing [the] State," which are defined to include, among other things, "attorneys' fees or investigative costs or costs of litigation"). Plainly, if the terms "investigative costs or costs of litigation" were broad enough to include attorneys' fees, the express mention of "attorneys' fees" as a distinct basis for reimbursement in section 1-7-85 would be surplusage – a reading that must be avoided under elementary principles of statutory construction. *See, e.g.*, *In re Decker*, 322 S.C. 215, 219 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . .") (internal quotation marks and citation omitted).[3]

Faced with an analogous dearth of statutory authority for the diversion of portions of state recoveries to pay private attorneys, the Louisiana Supreme Court concluded that separation-of-powers principles barred that state's AG from paying private attorneys on a contingent-fee basis. As it explained in *Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997),

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[3] It follows that the trial court also placed undue significance on the AG's authority to hire attorneys for a fee. (*See* Order at 8-9 (citing S.C. Code § 1-7-170).) The referenced statute authorizes the AG to set a fee, but it does not authorize the AG to pay that fee as a percentage of a recovery. As explained above, recoveries other than costs of litigation and investigation belong to the State and are to be appropriated, if at all, by the General Assembly. Notably, the statutes also give the AG the power to appoint Assistant AGs, but no one would suggest that this power includes the authority to reimburse such attorneys on a contingency-fee basis. Rather, those attorneys, like attorneys engaged on a fee basis pursuant to section 1-7-170, must presumably be paid out of funds appropriated to the AG by the General Assembly.

the lack of such express authority was definitive. "The question is not, as the Attorney General and Intervenors argue, whether any law prohibits the Attorney General from entering into such contracts because, as we have seen, our constitution vests the power over state finances in the legislative branch as part of its plenary power, a power the Attorney General can obtain only by the constitution or other law." *Id.* at 481. The same principles obtain here. South Carolina's Constitution makes the same commitment of legislative power and power over spending to the General Assembly, and the absence of any statute granting the AG the power to appropriate attorneys' fees from monetary recoveries amounts to a bar of that exercise in this case. Indeed, if anything the case here is even stronger because the AG's fee agreement diverts the State's money not only to private counsel but to the AG itself – directly infringing on the General Assembly's sole discretion to determine and limit the funds to be appropriated to the AG.

As a number of commentators have noted, such infringements have real-world consequences for legislative power. Funding decisions often reflect delicate political judgments as to the proper extent of regulation. *See, e.g.*, Bill Pryor, *Government "Regulation by Litigation" Must Be Terminated*, 16 Legal Backgrounder 21, at 3 (2001). Thus, while AGs often defend contingency-fee contracts on the ground that such arrangements allow the AGs to undertake projects that they could never afford to litigate on their own, this proclaimed virtue is actually a vice in that it facilitates AGs' perceived "'need to bypass state legislatures.'" Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 S. Ct. Econ. Rev. 77, 82-83 (2010) (citation omitted). The effect is not only to divest legislatures of their proper authority to make regulatory decisions but also to diminish accountability by moving

such important decisions away from elected officials to private counsel. *See, e.g.*, Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913, 961-64 (2008); Redish, 18 S. Ct. Econ. Rev. at 83 (noting that the use of private counsel allows AGs "to cloud accountability for their actions") (internal quotation marks and citation omitted).

Accordingly, the court of common pleas erred here in concluding that the AG's fee agreement – which would divert recoveries from the State's general fund to private counsel and to the AG itself – did not pose any constitutional problems. The agreement constitutes an improper appropriation by the executive branch, in clear violation of the separation of powers. For this reason, too, the Court should reverse the judgment below.

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

This case is just one of a growing number in which state attorneys general have improperly delegated 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 (2007). 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* Redish, 18 Sup. Ct. Econ. Rev. at 80 ("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. Lise T. Spacapan, Douglas F. McMeyer & Robert W. George, *A Threat to Impartiality: Contingency Fee Plaintiffs' Counsel and the Public Good?*, In-House Defense Quarterly, Winter 2011, at 14.

The breadth of the practice cannot be overstated: in one study of the 50 states and the District of Columbia, 36 of the attorney general offices reported using contingency-fee counsel. *Id.*[4] Mississippi is among the most prolific of these jurisdictions. The

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

Mississippi Attorney General is a repeat hirer of contingency-fee counsel, causing that 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-andanalysis/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 to Office After New Laws Take Effect*, Charleston Daily Mail (Apr. 24, 2013), http://www.charlestondailymail.com/News/201304230240 (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.[5] 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.

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[5] For example, state AGs can 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)(2).

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 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." *Lawsuit Inc.*, Wall St. J., Feb. 25, 2008, *available at* http://online.wsj.com/articles/SB120389878913889385. Officials in other states have also been criticized for awarding contingency-fee contracts to private counsel with whom the officials have political and financial ties. *See, e.g.*, Glenn G. Lammi, *Pennsylvania High Court Joins Judicial Stampede That's Trampling State Attorneys-General/Plaintiffs' Bar Alliances*, Forbes (June 19, 2014), *available at* http://www.forbes.com/sites/wlf/2014/06/19/pennsylvania-high-court-joins-judicial-stampede-thats-trampling-state-attorneys-generalplaintiffs-bar-alliances/ ("Pennsylvania came under considerable fire for the state AG-trial lawyer alliance in its case, in part because the Texas-based law firm . . . had made over $90,000 in campaign contributions to then-Governor Ed Rendell's reelection bid prior to being chosen.").

Concern over the effects of such liaisons has grown 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 (internal quotation marks and 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, underscore the importance of developing meaningful judicial limitations on the use of contingency-fee counsel by state attorneys general. Accordingly, 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 Cephalon's brief, the Court should reverse the circuit court's order and find that the AG's contingency-fee arrangement is unconstitutional.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Please

G. Thomas Cooper, Jr., Circuit Court Judge Name

Appellate Case No. 2014-001465

Cephalon, Inc..... Appellant,

v.

Alan Wilson, in his capacity as
Attorney General for the State of South Carolina.....Respondent.

PROOF OF SERVICE

I certify that I have served the foregoing *Brief by the Chamber of Commerce of the United States of America and Pharmaceutical Research and Manufacturers of America as Amici Curiae In Support of Appellant, Cephalon, Inc.* on Appellant Cephalon, Inc.'s counsel of record and on Respondent, Alan Wilson, counsel of record, by depositing a copy of same in the United States mail, postage prepaid, on November 24, 2014, addressed to their attorneys of record:

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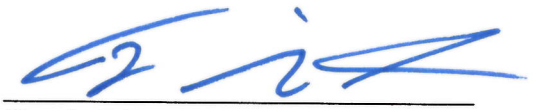

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