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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PANEL HEARING AND/OR REHEARING EN BANC

Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

William S. Consovoy (VA Bar #47704)
Thomas R. McCarthy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423

Counsel for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(c) and 26.1, *amicus curiae* states as follows:

The Chamber of Commerce of the United States of America has no parent company. No publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") has a direct interest in this important case. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. It regularly represents the interests of its members by filing *amicus* briefs in cases involving issues of concern to the nation's business community. The panel decision threatens serious injury to the business community by disrupting the longstanding federal policy favoring settlements of class actions. As frequent class-action defendants, the Chamber's members are deeply interested in the continuing viability of class settlements.

SUMMARY OF THE ARGUMENT

The panel's refusal to enforce the class settlement filed by Defendant-Appellant GlaxoSmithKline ("GSK") warrants rehearing *en banc*. The panels' decision to exempt States from the normal rules that apply to all other class-action plaintiffs undermines this Circuit's interest in encouraging class-action settlements. Pet. 6-10. If the panel opinion stands, this Circuit will end up adjudicating disputes that would have settled

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

but for the fact the class-action defendant could not secure global resolution. This is bad for the business community, it is bad for class-action plaintiffs, and it is bad for the judiciary.

Moreover, the panel's decision is wrong. The panel incorrectly held that, even though Louisiana received the notice the Class Action Fairness Act required and became a member of the plaintiff class by not opting out, Louisiana was not bound by the settlement because it did not waive its sovereign immunity. Panel Opinion ("Op.") 8-15. Sovereign immunity does not bar a court from binding a State as an absent member of a plaintiff class in a class settlement. That conclusion follows from both controlling and persuasive precedent. GSK Rehearing Petition ("Pet.") 11-18. But it also follows from the history of sovereign immunity.

For these reasons, the Court should grant *en banc* review of this exceptionally important question.

ARGUMENT

I. Allowing Louisiana to Invoke Sovereign Immunity Here Undermines Class-Action Settlements.

The panel's decision would deal a major blow to class-action settlements. Consider what the panel allowed here. Louisiana was a member of a class action, it received the statutory notice, it did not opt out, and it let the parties settle. It then brought its own lawsuit alleging nearly identical claims, and it raised sovereign immunity only after GSK tried to enforce the original settlement. States could do this

in many, if not most, class actions because the States are major purchasers of goods and services. Pet. 7, 10; Trevor L. Brown et al., Pew Center on the States, *States Buying Smarter* 4 (May 2010), goo.gl/s6Q1L3 ("States spend more than $200 billion annually purchasing goods and services ….").

Allowing States to abuse sovereign immunity would obviously hinder class-action settlements. Class-action defendants "seek and pay for global peace—i.e., the resolution of as many claims as possible," and "global peace is a valid, and valuable, incentive to class action settlements." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (quotation omitted). "No defendants would consider settling" if some class members could "go right back into court to continue to assert their claims." *Id.* Defendants "could never be assured that they have extinguished every claim from every potential plaintiff." *Id.*

The resulting discouragement of class-action settlements would be unfortunate. This Court has "explicitly recognized with approval" the "strong presumption in favor of voluntary settlement agreements." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010). "This presumption is especially strong in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Id.* at 595 (quotation omitted). Settlements both "promote the amicable resolution of disputes" and "lighten the increasing load of litigation faced by courts." *D.R. ex rel. M.R. v. E. Brunswick Bd. of Educ.*, 109 F.3d 896, 901 (3d Cir. 1997). But class-action defendants are unlikely to settle (or will settle for far lesser amounts)

if States are given special dispensation from the normal rules that apply to all other class-action plaintiffs. Pet. 8-9.

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

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

This case should have been straightforward. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, *commenced or prosecuted* against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI (emphasis added). Under controlling precedent, sovereign immunity does not apply when the State is a plaintiff, and enforcing a settlement against a State does not alter that understanding. Pet. 11-13. Louisiana became a member of the plaintiff class when it received adequate notice

but failed to opt out. *Id.* at 4-5. If notice and an opportunity to opt out are sufficient to make individual litigants parties to a class action, they are sufficient for States. This procedure "is by no means *pro forma*," and "the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985).

More fundamentally, the Supreme Court cases the panel overrode implement "the laws and practices of our English ancestors." *United States v. Lee*, 106 U.S. 196, 205 (1882). Sovereign immunity ultimately depends on "'history and experience, and the established order of things.'" *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quoting *Hans v. Louisiana*, 134 U.S. 1, 14 (1890)). Here, those considerations confirm sovereign immunity has never applied to the States *as plaintiffs*.

During the Middle Ages, the King's immunity derived from a system under which feudal lords established courts for their inferiors. Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 Nw. U. L. Rev. 739, 745 n.27 (1999). "[N]o feudal lord could be sued in his own court." 3 William S. Holdsworth, *A History of English Law* 465 (3d ed., rewritten 1923). And no one was superior to the King; he was the ultimate lord who sat "at the apex of the feudal pyramid" and was "subject to the jurisdiction of no other court." Harry Street, *Governmental Liability: A Comparative Study* 1 (1953). This made the King practically immune from suit. 1 Frederick Pollock &

Frederick William Maitland, *The History of English Law Before the Time of Edward I*, at 502 (1895). Yet the King still *used* the courts to redress civil and criminal offenses against him. William Sharp McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 80 (2d ed. 1914). And when he did, the King was subject to the same rules as other plaintiffs. Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 St. Louis U. L.J. 393, 432-34 (2005).

Sovereign immunity remained defense-oriented even after feudalism's decline. At common law, it was based on the fiction that "the king can do no wrong." 3 William Blackstone, *Commentaries on the Laws of England* *254 (1765-69). This fiction followed from the King's "sovereignty": "[N]o suit or action can be brought against the king … because no court can have jurisdiction over him. For all jurisdiction implies superiority of power … but who … shall command the king?" 1 *id.* *235. Yet, when his subjects wronged *him*, the King could "redress[] such injuries as the crown may receive from a subject" like other plaintiffs—by commencing and prosecuting claims through the "usual common law actions." 3 *id.* at *257.

This understanding was not lost on the Framers. Section 2 of Article III, as drafted by the Philadelphia Convention, extends the federal judicial power to "Controversies … between a State and Citizens of another State." U.S. Const. art. III, § 2, cl. 1. The Antifederalists argued that this broad grant of jurisdiction would eliminate sovereign immunity because it appeared to contemplate individual suits

against States *as defendants*. *See, e.g.*, Letters from the Federal Farmer III (Oct. 10, 1787), *reprinted in* 2 *The Complete Anti-Federalist* 245 (Herbert J. Storing ed. 1981); Essays of Brutus XIII (Feb. 21, 1788), *reprinted in* 2 *The Complete Anti-Federalist* 429; 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 527 (Jonathan Elliot ed. 1836) ["*Elliot's Debates*"].

The Federalists denied that Article III would eliminate sovereign immunity. *See, e.g.*, *The Federalist No. 81*, at 548 (Jacob E. Cooke ed. 1961) (Alexander Hamilton). Tellingly, their argument was that Article III contemplated only those lawsuits involving States *as plaintiffs*. At the Virginia ratifying convention, John Marshall explained that "[t]he intent [of Article III] is, to enable states to recover claims of individuals residing in other states." 3 *Elliot's Debates* 555-56. Sovereign immunity means that "a state cannot be defendant," but that doctrine "does not prevent its being plaintiff." *Id.* James Madison agreed. He explained that the jurisdictional grant in Article III means "only" that, "if a state should wish to bring a suit against a citizen, it must be brought before the federal court." *Id.* at 533. Although sovereign immunity denies "the power of individuals to call any state into court," it does not apply when the state is the plaintiff: "if a state should condescend to be a party, [a federal] court may take cognizance of it." *Id.* George Nicholas put it most succinctly: sovereigns "may be plaintiffs, but not defendants." *Id.* at 476-77.

The Federalists' statements accurately "reflect the original understanding of the Constitution." *Alden*, 527 U.S. at 727. Indeed, no Antifederalist argued that sovereign

immunity would be implicated if States could be plaintiffs in federal court. William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1063 (1983). The debate was over "whether the jurisdiction given by the constitution in cases, in which a state is a party, extended to suits brought against a state, as well as by it, or was exclusively confined to the latter." 3 Joseph L. Story, *Commentaries on the Constitution of the United States* § 1677 (1833).[2]

Shortly after ratification, the Supreme Court decided *Chisholm v. Georgia*, 2 U.S. 419 (1793), which held that Article III *did* allow suits against the States as defendants. *Chisholm* was a "profound shock" to a country that had just relied on the Federalists' assurances to the contrary. *Alden*, 527 U.S. at 719-20 (quotation omitted). *Chisholm* was wrong, and the Eleventh Amendment quickly overruled it. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002).

The fallout from *Chisholm* confirms that the Founders understood sovereign immunity as not implicating States as plaintiffs. In the wake of *Chisholm*, the States mobilized to express their disapproval. Henry Lee wrote a letter to the Virginia House of Delegates explaining why sovereign immunity applied to the States as defendants,

[2] The Founding generation held the same view with respect to the sovereign immunity of the United States Federal Government, *In re Monongahela Rye Liquors*, 141 F.2d 864, 869 (3d Cir. 1944), which is relevant because "a state … is as exempt as the United States are from private suit." *Belknap v. Schild*, 161 U.S. 10, 18 (1896). Indeed, the First Judiciary Act gave jurisdiction to the federal courts only when the United States was a *plaintiff*. Judiciary Act of 1789 §§ 9, 11, 1 Stat. 73, 76-78.

but not plaintiffs: "To be plaintiff party … is consistent with the two sovereignties, [and] conforms to the object of the constitution, confederation and not consolidation of the states …. To be defendant … is a prostitution of State Sovereignty, [and] is hostile to confederation[,] the acknowledged object of our political union …." Henry Lee to the Speaker of the Virginia House of Delegates (Nov. 13, 1793), *reprinted in* 5 *The Documentary History of the Supreme Court of the United States, 1789-1800*, at 336 (Maeva Marcus ed., 1994) [hereinafter *DHSC*]. Charles Jarvis reiterated this long-held view in a speech on the floor of the Massachusetts House of Representatives: "Before the present Constitution was conceived; and even before the happy emancipation of the country, the respective Provinces and States had often been plaintiffs, but they never had been defendants." Charles Jarvis, Speech in the Massachusetts House of Representatives (Sept. 23, 1793), *reprinted in* 5 *DHSC* 436. Similarly, the Georgia House of Representatives passed a resolution stating that Article III should be interpreted to allow only controversies "commenced by a state as plaintiff against a citizen as defendant." Proceedings of the Georgia House of Representatives, Augusta Chron. (Dec. 14, 1792), *reprinted in* 5 *DHSC* 162.

Cohens v. Virginia, 19 U.S. 264 (1821), illustrates the point. Virginia had filed an information in state court against Cohens for selling lottery tickets. *Id.* at 375. Cohens filed a petition in the U.S. Supreme Court, and Virginia invoked sovereign immunity. *Id.* at 376. Virginia argued that, because it was the "defendant in error," it was immune from a writ filed by an individual in federal court. *Id.* The Supreme Court rejected this

argument because Virginia was the *plaintiff* in the litigation. *Id.* at 407-09. As Chief Justice Marshall explained, sovereign immunity "extend[s] to suits commenced or prosecuted by individuals, but not to those brought by States." *Id.* at 407. "[I]t [i]s intended for those cases, and for those only, in which some demand against a State is made by an individual in the Courts of the Union." *Id.*

In sum, sovereign immunity has always been a defense from suit, with no application when the State is a plaintiff. This explains why "[a] legion of case law could be cited reflecting the general understanding that the ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not *be sued* by private individuals in federal court." *Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1239 (10th Cir. 2004); *see also Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 432 n.12 (5th Cir. 2008). The panel's contrary holding is untenable.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing *en banc*.

Dated: January 16, 2018

Respectfully submitted,

/s/ William S. Consovoy

Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

William S. Consovoy (VA Bar #47704)
Thomas R. McCarthy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, Local Rule 28.3(d), and Local Rule 31.1(c), I certify the following:

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(b)(4) because it contains 2,592 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2015 in Garamond 14-point font.

I am a member of the bar of this Court.

The text of the electronic brief is identical to the text in the paper copies.

This brief has been scanned for viruses with version 11.2.2262 of Avast! Antivirus and is virus-free.

By: */s/ William S. Consovoy*

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2018, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Third Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

By: */s/ William S. Consovoy*