SUPREME COURT OF LOUISIANA

NO. 2020-C-00973

STATE OF LOUISIANA, by and through its
ATTORNEY GENERAL JEFF LANDRY,

Respondent,

vs.

ASTRAZENECA AB, ASTRAZENECA LP, ASTRAZENECA PHARMACEUTICALS LP,
AND AKTIBOLAGET HÄSSLE,

Applicants.

A Civil Proceeding

19th Judicial District Parish of East Baton Rouge, No. 637960,
The Honorable Judge Timothy Kelley Presiding

and

No. 2019 CA 0986

From The Louisiana Court of Appeal, First Circuit,
On Application for a Writ of Certiorari And Review

MOTION OF THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE APPLICANT

Arnd von Waldow (#2159)
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222-2716
Tel: 412 288 3131; Fax: 412 288 3063

Attorneys for Amici Curiae
Pharmaceutical Research and Manufacturers of America and
Chamber of Commerce of the United States of America

NOW INTO COURT, through undersigned counsel, comes the Pharmaceutical Research and Manufacturers of America ("PhRMA") and the Chamber of Commerce of the United States of America ("Chamber"), who move this Court for leave to file a brief as *amici curiae*, pursuant to Rule VII, Section 12 of the Rules of the Supreme Court of Louisiana, in support of the Applicant. PhRMA previously submitted and filed an amicus brief supporting the Writ Application in this proceeding. Amici now file this motion for leave to file a brief in support of Applicant on the merits. The proposed amicus brief is attached to this motion. In support of their motion, Amici state as follows:

A. Interest of Amici Curiae

PhRMA is a non-profit association representing the country's leading research-based pharmaceutical and biotechnology companies. Its mission is to advocate for public policies encouraging discovery and development of life-saving and life-enhancing medicines. PhRMA's members are devoted to discovering and developing medicines that enable patients to live longer, healthier, and more productive lives. More than half of PhRMA members have research and development efforts under way or are providing donations of medicines and critical medical supplies as well as providing financial donations to support patients and first responders in addressing the evolving COVID-19 crisis. Since 2000, PhRMA members have invested more than $900 billion in the search for new treatments and cures, including an estimated $79.6 billion in 2018 alone. The pharmaceutical industry supports over $1.1 trillion in goods and services.

As part of its organizational mission, PhRMA plays an important role representing the interests of its members in litigation. This includes cases where the issues implicate its members' conduct of their businesses, involve legal principles that govern resolution of their disputes, or evoke systemic interests concerning the relationship between its membership and the courts, state or federal. The issues raised on the merits in this case impact each of these areas.

Accordingly, PhRMA requests permission to appear as an amicus to provide its members' perspectives and explain why its members believe that the Applicant's position on the merits should be adopted.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interest of more than three million companies of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests before Congress, the Executive Branch, and the courts on issues that concern the nation's business community and those that impact the conduct of their business affairs.

The Chamber's members have a strong interest in conclusively resolving suits by individuals or public entities without the ongoing threat of duplicative litigation over similar conduct, seeking additional recoveries for the same injury. The issues raised on the merits in this case directly impact these concerns and the Chamber requests permission to appear as an amicus to provide its perspective on the legal principles that should be applied in addressing them.

Together, PhRMA and the Chamber have a substantial interest in the court systems' treatment of settlements involving their members and the interests they represent. This is so whether a public entity or private parties are bringing suit. When the settlement involves a case posing substantial risks and with nationwide impact, as it does here, Amici's members' interests in finality reach their peak. This kind of litigation drains resources, generates public comment, and disrupts business operations. When a business decides to resolve a high-profile lawsuit with significant cost and potential exposure, it needs certainty that the litigation will be over. That certainty conserves resources and puts business operations back on track. A threat of further

litigation after settlement of a high profile lawsuit has the opposite effects. Continued litigation drains resources better devoted to research and development of new life-saving or healing medicines, to beneficial and market-leading products, to salaries and perks for employees, to strategic initiatives, and payments to shareholders. High-profile litigation in particular diverts management attention from productive business operations with no corresponding corporate benefit. Accordingly, both PhRMA and the Chamber support robust legal principles that further settlement finality and the desirable public and private goals that such principles further.

B. Motion for Leave

For the foregoing reasons, Amici's brief focuses on the need for finality in settlements and the material advantages that follow from that for private and public interests alike. Permitting PhRMA and the Chamber to participate as *amici curiae* will assist this Court by identifying the deleterious effects that can follow where, as the First Circuit's decision provides, a settlement does not finally resolve the claims released or preclude a later lawsuit over the same conduct. Permitting PhRMA and the Chamber to participate as *amici curiae* also will assist this Court by helping to explain the far-reaching impact that adopting the First Circuit's reasoning would have on the availability, predictability, and finality of settlement agreements in Louisiana.

PhRMA and the Chamber hereby file their *amici curiae* brief with this motion, conditioned upon this Court's grant of leave. By service of this motion and brief, they have served notice on all counsel of record.

WHEREFORE, Amici respectfully requests leave of Court to file the attached brief as *amici curiae*.

Dated: January 19, 2021.

Respectfully submitted,

REED SMITH LLP

By */s/ Arnd von Waldow*
Arnd von Waldow (#2159)
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222-2716
Tel: 412 288 3131; Fax: 412 288 3063
Attorneys for Amicus Curiae the Pharmaceutical Research and Manufacturers of America and the Chamber of Commerce of the United States of America

Of Counsel:

James C. Martin
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222-2716
Telephone: 412 288 3131
Fax: 412 288 3063

Raymond A. Cardozo
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659
Telephone: 415 543 8700
Fax: 415 391 8269

Stephen J. McConnell
REED SMITH LLP
Three Logan Square, Suite 3100
1717 Arch Street
Philadelphia, PA 19103-7301
Telephone: 215 851 8100
Fax: 215 851 1420

SUPREME COURT OF LOUISIANA

No. 2020-C-00973

STATE OF LOUISIANA, by and through its
ATTORNEY GENERAL JEFF LANDRY,

Respondent,

vs.

ASTRAZENECA AB, ASTRAZENECA LP, ASTRAZENECA PHARMACEUTICALS LP,
AND AKTIBOLAGET HÄSSLE,

Applicants.

A Civil Proceeding

19th Judicial District Parish of East Baton Rouge, No. 637960,
The Honorable Judge Timothy Kelley Presiding

And

No. 2019 CA 0986

From The Louisiana Court of Appeal, First Circuit,
On Application for a Writ of Certiorari And Review

ORDER

Having considered the foregoing Motion of the Pharmaceutical Research and Manufacturers of America ("PhRMA") and the Chamber of Commerce of the United States of America ("Chamber") For Leave to File Brief as *Amici Curiae* In Support of the Applicant,

IT IS ORDERED that PhRMA and the Chamber be and are hereby GRANTED leave to file the attached Brief as Amici Curiae.

THUS DONE AND SIGNED, this _____ day of _____, 2021, in New Orleans, Louisiana.

_____
JUSTICE, LOUISIANA SUPREME COURT

Certificate of Service

A copy of this Motion of the Pharmaceutical Research and Manufacturers of America and the Chamber of Commerce of the United States of America for Leave to File Brief as Amici Curiae in Support of the Writ Application has been served by e-mail on the following persons:

Bradley C. Meyers
Linda R. Rodrigue
Amanda M. Collura-Day
KEAN MILLER LLP
Post Office Box 3513
II City Plaza
400 Convention Street, Suite 700
Baton Rouge, Louisiana 70821
brad.myers@keanmiller.com

Alejandro Perkins
Hammonds, Sills, Adkins & Guice LLP
2431 South Acadian Thruway, Ste. 600
Baton Rouge, LA 70808
aperkins@hamsil.com

Martin A. Stern
martin.stern@arlaw.com
ADAMS AND REESE LLP
701 Poydras Street, Suite 4500
New Orleans, LA 70139

Patrick C. Morrow
James P. Ryan
Morrow Morrow Ryan & Bassett
P.O. Drawer 1787
Opelousas, LA 70571
jamesr@mmrblaw.com

Michael P. Kelly
Daniel M. Silver
Daniel J. Brown
McCARTER & ENGLISH, LLP
Renaissance Centre
405 N. King Street, 8th Floor
Wilmington, Delaware 19801
DSilver@McCarter.com

Jerald P Block
Block Law Firm, APLC
PO Box 108
Thibodaux, LA 70301-0108
jpb@blocklawfirm.com

Jeff Landry
Elizabeth B. Murrill
Nicholas J. Diez
Office of the Attorney General
State of Louisiana
1885 N. Third Street
Baton Rouge, LA 70802
gunnelsk@ag.state.la.us
diezn@ag.state.law.us
deblieuxs@ag.state.la.us

January 19, 2021.

/s/ Arnd von Waldow

SUPREME COURT OF LOUISIANA

No. 2020-C-00973

STATE OF LOUISIANA, by and through its
ATTORNEY GENERAL JEFF LANDRY,

Respondent,

vs.

ASTRAZENECA AB, ASTRAZENECA LP, ASTRAZENECA PHARMACEUTICALS LP,
AND AKTIBOLAGET HÄSSLE,

Applicants.

A Civil Proceeding

19th Judicial District Parish of East Baton Rouge, No. 637960,
The Honorable Judge Timothy Kelley Presiding
and
No. 2019 CA 0986
From The Louisiana Court of Appeal, First Circuit,
On Application for a Writ of Certiorari And Review

BRIEF OF AMICI CURIAE THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Arnd von Waldow (#2159)
REED SMITH LLP
Reed Smith Centre
Pittsburgh, PA 15222-2716
Telephone: 412 288 3131
Facsimile: 412 288 3063

Attorneys for Amici Curiae
Pharmaceutical Research and Manufacturers of America and
Chamber of Commerce of the United States of America

TABLE OF CONTENTS

MOTION

PROPOSED ORDER

BRIEF

TABLE OF AUTHORITIES

Cases **Page(s)**

Other

I. INTRODUCTION

Achieving complete relief from further litigation is among the most important objectives for any party considering settlement. That closure is at the heart of what makes a settlement a viable option for ending a lawsuit. For all litigants, a final resolution decreases risk and reduces uncertainty by capping liability and cost exposure. For a corporate defendant, it also stabilizes the company's affairs and allows it to devote its resources to more productive endeavors.

When the Attorney General brings an action on behalf of the State against a business, the need for finality upon settlement is heightened because of the stakes involved. The Attorney General and State have extraordinary powers that are not available to other litigants. Prescription or other rules that establish time limitations do not bind the State in many circumstances. The theories and remedies at the State's disposal also can go beyond what private parties might employ and often involve relaxed burdens of proof. Moreover, as has occurred in this case, the State may pursue a public prosecution through agreements with private lawyers it deputizes. Given the State's ability to bring lawsuits that are unbounded in time and supported by private prosecutors, any business who is sued by the State would not agree to settle unless it could be certain there would be an end to all claims arising from the same conduct, events, or issues, regardless of the legal theory or damages sought in the pending lawsuit.

Of course, the benefits for finality in settlement agreements flow both ways. Settlement provides a more flexible and creative resolution option, where

the State can shape the outcome to best suit its purposes and further the public's interest. A settlement also enables the State to recover substantial funds on the public's behalf. And, in many instances, a resolution by settlement enables the State to recover in matters that raise unsettled and difficult issues—without the need to litigate to the bitter end and risk an unfavorable judicial determination. Finally, a settlement eases burdens on the public fisc by helping to relieve crowded dockets and conserving scarce public resources that otherwise would be devoted to protracted complex proceedings.

Here, however, the State's lawsuit, enabled by the First Circuit's decision, jeopardizes the public and private benefits that finality in settlements produces. When litigation purports to conclude, it should in fact conclude, so the parties can reorder their affairs and make future decisions unburdened by the threat that the litigation will revive, risks will re-emerge, and additional costs and expense will be incurred. It is impossible to make reasonable business decisions where a settlement's finality may be eroded because one adversary can fashion a new legal theory and start again. Such a rule ensures that a settling party cannot buy its peace. Yet the First Circuit's decision provides for that very outcome and adoption of its reasoning and holding plainly would impact any company's willingness to enter into a settlement in this State.

This threat to the certainty and predictability in the finality of settlements is a central concern for PhRMA and the Chamber. Their members can face lawsuits in all 50 states based on myriad theories founded on common law and statute. Those lawsuits can involve tort claims, consumer claims, antitrust

claims, securities claims or claims founded on an infinite number of regulatory requirements, brought by individuals, groups of individuals, as well as the state or federal governments. The costs of defending and resolving these lawsuits from just one of these enforcers can reach millions of dollars. If serial lawsuits by individuals and governments are permitted notwithstanding a settlement, the potential for excessive punishments, disproportionate to the conduct at issue, is created. By comparison, allowing final settlement to cut off that piggy-backing effect can keep litigation costs and liability exposure within reasonable bounds. There is no incentive to settle in an environment where piggy-back lawsuits are the norm as opposed to the exception; there are strong incentives to settle where certainty and finality are obtained. For the members of PhRMA and the Chamber, the First Circuit's decision enfranchising piggy-back litigation despite a prior final settlement is bad law and bad public policy.

Beyond that, the First Circuit's decision injects palpable uncertainty into an area of the law where clarity is essential. To even begin to contemplate a negotiated resolution, businesses must be able to evaluate if and when a settlement agreement will bar further litigation. Above all, businesses need to know what the controlling rule is, so they can decide whether to enter settlements in the first place, and if so, on what terms. Otherwise, there are no ground rules to help frame the negotiations in the first instance or to solidify the terms of the bargain in the second. For these reasons, the uncertainty created by the First Circuit's decision creates disincentives to settle and incentives to litigate. This harms everyone, including the State.

II. THIS COURT SHOULD ISSUE A DECISION STRONGLY SUPPORTING THE FINALITY OF SETTLEMENTS

The finality issues raised in this proceeding transcend this litigation and directly impact a core public policy that this Court and others have articulated. The public policy favoring settlement, and the systemic benefits it confers, are universally recognized for all types of litigation. Conversely, the deleterious effects of allowing duplicative litigation after a settlement agreement has been reached are documented by courts and commentators alike, principally because of the difficulties it creates for businesses and other parties who are trying to order their affairs. Amici, on behalf of their member businesses and the interests they represent, accordingly urge this Court to come down firmly in favor of the principle of finality as urged by the Applicant in this case.

A. Louisiana Has A Strong Public Favoring Settlement And That Policy Is Best Implemented Through Legal Principles That Assure Finality

The value of settlement agreements to Louisiana's jurisprudence cannot be overstated. As the Court indicated in *Joseph*:

> The jurisprudence of Louisiana has a long-stated, strong public policy favoring compromises: "The law in its wisdom, and out of solicitude to end or avert threatened litigation, encourages settlement of disputes by compromise, ..."

Joseph v. Huntington Ingalls Inc., 2018-02061 (La. 1/29/20) 2020 WL 499939, at *28. (quoting *Beck v. Continental Cas. Co.*, 145 So. 810, 811 (La. App. 2nd Cir. 1933)). "In other words, it has long been the public policy of this state that the compromise of disputes is highly favored and promotes judicial efficiency."

Teague v. St. Paul Fire & Marine Ins. Co., 2006-1266 (La. App. 1 Cir. 4/7/09) 10 So. 3d 806, 819.

Louisiana, of course, is not alone in holding this view. The United States Supreme Court echoes the systemic value of compromise in litigation. *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts. . ."); *St. Louis Mining & Milling Co. v. Mont. Mining Co.*, 171 U.S. 650, 656 (1898) ("Settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored. . .").

So, too, does the Fifth Circuit. *See Joseph Weeks v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 412 Fed. Appx. 653, 654 (5th Cir. 2010) ("Public policy favors compromise agreements and the finality of settlements.") (quoting *Red River Waterway Comm'n v. Fry*, 36 So. 3d 401, 407 (La. Ct. App. 2010)); *Courtney v. Andersen*, 264 Fed. Appx. 426, 429 (5th Cir. 2008) ("Public policy favors and encourages the settlement of claims between parties and permits them to release future damages as part of a settlement agreement.") (quotations omitted); *Insurance Concepts, Inc. v. Western Life Ins. Co.*, 639 F.2d 1108, 1111 (5th Cir. 1981) ("Without a doubt, public policy favors the settlement of claims brought before the courts. 'Settlement agreements have always been a favored means of resolving disputes. When fairly arrived at and properly entered into, they are generally viewed as binding, final, and as conclusive of rights as a judgment.'") (quoting *Thomas v. Louisiana*, 534 F.2d 613, 615 (5th Cir. 1976)); *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1164 (5th Cir. 1985) ("public policy favors voluntary settlements which obviate the need for expensive and

time-consuming litigation."); *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977) (there is a "strong public policy" which favors the fair settlement of judicial controversies. 'Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits.'") (quoting *D. H. Overmyer Co. v. Loflin*, 440 F.2d 1213, 1215 (5th Cir. 1971)).

Other federal appellate courts likewise view settlement, and the benefits it confers, as a highly favored public policy. *See Doe v. Déjà Vu Consulting, Inc.,* 925 F.3d 886, 899 (6th Cir. 2019) ("[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources.") (quoting *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 530 (E.D. Mich. 2003)); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings. This policy also ties into the strong policy favoring the finality of judgments and the termination of litigation. Settlement agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts."); *In re Smith*, 926 F.2d 1027, 1029 (11th Cir. 1991) ("Settlement is generally favored because it conserves scarce judicial resources."); *ARO Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976) ("Public policy strongly favors settlement of disputes without litigation"; settlement relieves the parties of the burdens of trial,

facilitates resolution for other parties in over-burdened courts, and reduces costs to taxpayer who support the courts); *Autera v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969) ("Voluntary settlement of civil controversies is in high judicial favor [because] the parties avoid the expense and delay incidental to litigation of the issues [and] the court is spared the burdens of a trial, and the preparation and proceedings that must forerun it.").

Louisiana cases concomitantly recognize that this State's strong public policy in favor of settlement would be undermined if its governing legal principles failed to assure settling parties finality and litigation peace. Thus, as this Court noted in *Joseph*, the law "does not sanction the solemn acts of contending parties settling their disagreements being lightly brushed aside, unless there be present evidence of bad faith, error, fraud, etc. If such were not the law, there would be little incentive to anyone to part with anything of value in the desire to escape the harassments of litigation. A compromise agreement, when freely entered into, is intended to have the binding effect of the thing adjudged. The law has ordained that such transactions have the dignity and force of a definitive judgment, in so far as definitely and irrevocably fixing the rights and liabilities of the parties thereto, as relates to the subject-matter dealt with." *Joseph*, 2020 WL 499939, at *28

Further underscoring the systemic importance of ensuring finality, many jurisdictions protect settling parties from cross-claims for indemnity and contribution. These cases explain that such protection is essential because corporate defendants who are willing to settle "buy little peace through settlement

unless they are assured that they will be protected against co-defendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation." *In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 494 (11th Cir. 1992); *see In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 (4th Cir. 1991).

For the members of PhRMA and the Chamber, the ability to settle litigation is an invaluable option for decreasing risk, reducing uncertainty, capping liability exposure, stabilizing business affairs, and enabling the company to focus on more productive business activities. Simply put, "one reason that most corporate defendants are willing to settle a class action case is a desire for litigation peace; in return for the settlement funds, the plaintiff class provides such peace by releasing its claims, which generally includes both present and future claims for the course of conduct that was the subject of the litigation." *In re Gen. Elec. Co. Secs. Litig.*, 998 F. Supp. 2d 145, 155 (S.D.N.Y. 2014).

Amici's members therefore need and desire controlling legal principles that ensure the predictability, certainty and finality of litigation settlements. Robust finality principles are, in fact, the most critical considerations that a corporate defendant will weigh in deciding whether to settle. This is so because corporate defendants, particularly those who can be sued nationwide on common law and statutory claims by individuals, groups of individuals, or public enforcers, have understandable and reasonable concerns about entering into any resolution that leaves the door open for further litigation over the same conduct. *See* Lemos, *Privatizing Public Litigation*, 104 Geo. L.J. 515, 532-33 (2016);

Minzner, *Should Agencies Enforce?*, 99 Minn. L.Rev. 2113, 2144, 2173 (2015); Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. Rev. 2173, 2174-75 (2010); Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 Geo. J. L. & Pub. Pol'y 5, 9-10 (2004).

Among the adverse effects of that can follow from endorsing piggy-back litigation that piles on to a prior resolution are over-deterrence, excessive costs, over-reserving on claims, and refusing to settle for fear of later litigation. To be sure, circumstances can be hypothesized where follow-on litigation, whether public or private, might be warranted. But there is nothing abstract about these consequences if it is permitted routinely. They limit company investments, and ultimately, employee benefits and shareholder returns. *See* Dishman, *Enforcement Piggybacking and Multistate Actions*, 2019 Brigham Young L. Rev. 421, 424-28, 440-46, 458-59 (2020); Clopton, *Redundant Public- Private Enforcement*, 69 Vand. L. Rev. 285, 287-88, 292, 296-97 (2016); Pincus, *Unprincipled Prosecution: Abuse of Power and Profiteering in the New "Litigation Swarm,"* U.S. Chamber Inst. For Legal Reform 3-6 (2014); Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 499-500 (2012); Pryor, *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 Tul. L. Rev. 1885, 1889 (2000); *see also* Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1 (2000).

Those adverse impacts on business investments, employment and shareholder returns, in turn, specifically impact commerce in this State. Louisiana companies who try to settle lawsuits only to be sued again over the same conduct are impacted directly. But there are further collateral consequences as well. Nationwide companies distribute and sell products and services in Louisiana generating jobs for local residents. In ordinary circumstances, those Louisiana companies, in turn, have more money to invest, they generate tax revenues and their employees have disposable income to spend on tourism, hospitality, and consumer goods, all to the benefit of this State's businesses. Higher tax revenue follows from this investment and spending as well. So when nationwide companies sustain extraordinary litigation costs —costs like those wrought by the serial litigation the First Circuit has authorized — the adverse ripple effects on local businesses, commerce, and revenues reverberate, too.

In the end, no incentives to settle are present for any targeted corporate defendant if an attempted global resolution of a high-profile lawsuit simply becomes an invitation to the next public or private litigant seeking to recover for the same alleged harm. Given that, Louisiana should embrace legal principles that ensure certainty, predictability, and finality of settlements to further Louisiana's strong public policy promoting and facilitating settlement.

B. The First Circuit's Decision Threatens Established Principles Of Finality And This Court Should Reject It

Prior to the First Circuit's decision, the certainty, predictability and finality that litigants obtained when entering settlement agreements in Louisiana served the State well. Although Amici have not located a publication that

comprehensively totals all funds that Louisiana has recovered through settlements of public prosecutions, publicly available information indicates that the total is vast. In the Average Wholesale Pricing lawsuit alone—whose settlement bars the current action—the State of Louisiana sued 109 defendants and collected $238 million in settlements. https://archive.eunicetoday.com/state/drug-fraud-cases-close-state-gets-238-million-payback (as one state official noted: "I hope that this settlement, as with previous ones successfully reached by the Attorney General's office, sends a message to companies ***that they cannot charge the state more for necessary prescription*** medications than is appropriate.")

Moreover, the chart below identifies other settlements that the Louisiana Attorney General has been able to recover in actions prosecuted on behalf of the State, as reported in the articles or other publications referenced:

Date of Article	Article	Case Name (if referenced)	Paid by Pharmaceutical Companies
April 1, 2010	Law360: Lilly Settles La. AG Zyprexa Claims for $20M	Louisiana v. Eli Lilly & Co.	$20 million paid by Eli Lilly & Co.
2012	Beasley Allen website - Louisiana v. Actavis etc.		$32,685,000
2012	Beasley Allen website - Louisiana v. Teva Pharm et al		$20 million
February 16, 2012	Mealey's Emerg.Drugs & Devices: 5 Drug Makers Pay $25.2M to Settle Louisiana Drug Price Suit	Louisiana v. Abbott Labs, Inc., et. al., No. 596164, La. Dist., E. Baton Rouge Parish	$25.2 million paid by five pharmaceutical companies
July 26, 2012	Law360: 8 Pharma Cos To Pay $38M For Boosting La. Drug Prices		$38 million between eight pharmaceutical companies

July 26, 2012	16-6 Mealey's Emerg. Drugs & Devices 2 (2011): AstraZeneca Pays States $68.5M for Off-Label Marketing of Seroquel Antipsychotic	Dow, et al. v. AstraZeneca, No. MER-C-24-11, N.J. Super., Mercer Co. Final consent judgment available 28-110317-005P	
August 14, 2013	Legal News Line: Louisiana AG announces recovery of $8.5 million from Watson Pharmaceuticals		$8.5 million from Watson Pharmaceuticals
November 20, 2013	Law360: 25 Drug Cos. Put Up $88M to Escape Price-Rigging Suits	Louisiana v. Abbott Labs et al., no 596,164, & Louisiana v. McKesson et al., no.567,634, both in 19th Jud. Dist. Court	$88 million paid by 25 pharmaceutical firms
November 21, 2013	The Advocate (Baton Rouge, Louisiana): La. Gets $238 million from pharmaceutical lawsuit settlements	Louisiana v. Abbot Labs	$238 million paid by 53 companies
May 17, 2017	Law360: Pfizer, La. End Neurontin Antitrust Suit with $1M in Naloxone	Louisiana v. Pfizer Inc. et al., no. 638506, 19th Judicial District Court	$1 million paid by Pfizer Inc.

These are only select examples of what Amici found on-line, and only examples concerning a single industry sector (pharmaceuticals), but they indicate that the State has recovered enormous funds through litigation settlements. As this Court is undoubtedly aware, the State also is involved in pending negotiations in opioid litigation, with even greater stakes than any of the above-listed settlements.

Because the rule of prescription does not bind the State, the breadth and importance of the finality issues raised here are manifest and greatly transcend

the interests of the parties. If the State's settlements do not finally resolve all claims arising from the same transactions or occurrences or seeking the similar damages or relief, every business contemplating a settlement with the State would have to think once, twice, and a third time about whether a settlement, as opposed to litigating, makes any sense. The State's ability to creatively resolve its lawsuits also would be impaired where no principles of finality accompany such a resolution. As noted above, when a business's incentives to settle are replaced by incentives to litigate, the State must incur costs in defending and in expending public resources. And there is no corresponding benefit — particularly if the continued litigation results in a rejection of the State's position.

Before the First Circuit's decision, a business contemplating whether to settle an action might reasonably have expected that a settlement would bar a second lawsuit that sought to recover from the same underlying transaction or seeking the same damages. After all, in *Joseph*, this Court held that a plaintiff who has settled a suit that had claimed that wrongful conduct caused one injury cannot file a second suit claiming that the same conduct caused another injury. This Court reached that conclusion by tracing the State's long-standing policy in favor or settlements, relying on principles that predated the modern, broader version of *res judicata*, including precedents dating back to the 1930s. *See Joseph*, 2020 WL 499939, at * 27-29.

Under the principles this Court articulated in *Joseph*, businesses correspondingly would infer that under the even broader modern version of *res judicata* that is now the controlling law in Louisiana, the converse rule also would

apply. That is, businesses reasonably could expect that if a plaintiff had claimed the same damages in a prior lawsuit, a settlement containing a broadly worded general release would bar a second lawsuit that makes claims for similar damages, but purportedly under a different legal theory.

There is ample logic behind that view. For example, principles of full faith and credit and issue preclusion typically apply to settlements in class action lawsuits. Private litigants, including businesses, are presumptively entitled to these protections as a matter of fundamental due process. *See Matsushita Electric Co. v. Epstein,* 516 U.S. 367, 374-77 (1996) (full faith and credit); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12 (1985) (preclusion). Louisiana courts' resolutions of disputes are, consistent with these principles, given finality by sister state and federal courts—just as due process would command. *E.g.*, *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Litig.*, 134 F.3d 133, 142-43 (3d Cir. 1998); *Mayhew v. Caprito*, 794 S.W.2d 1 (Tex. 1990) (per curiam) (applying full faith and credit doctrine to judgment of Louisiana Supreme Court); *Marsh v. Luther*, 373 So. 2d 1039, 1042 (Miss. 1979) ("The judgment of the Louisiana court was a valid final one, entitled to, and by the court correctly accorded, full faith and credit."). A settling party's ability to rely on these finality principles is what makes nationwide resolution of aggregate litigation possible for targeted corporations. *See* Smallwood, *Nationwide Class Actions and the Beauty of Federalism,* 53 Duke. L.J. 1137 (2003) (explaining systemic benefits of facilitating settlement in nationwide class action lawsuits).

By the same token, as this Court also observed in *Joseph*, businesses have

"little incentive" to settle if the settlement does not bar a second suit. That observation applies equally when the second suit makes claims for similar damages, but purportedly asserts a different legal theory. In fact, since the ability to fashion a new legal theory is limited only by an active imagination, the need for finality is even greater. That is particularly so when, as here, opposing counsel not only has the creativity to devise new theories, but a substantial pecuniary interest in doing so.

In short, PhRMA's and the Chamber's members have a compelling need to know what rules of finality govern a settlement they might enter. And Amici urge this Court to come down firmly on the side of finality upon declaring the law. Without a certain and predictable assurance of finality, a settlement cannot deliver the benefits that motivate defendants to settle—reduction in risk and uncertainty, a cap on liability exposure, stability in business affairs, and the ability to devote resources to more productive endeavors. And, predictability and certainty as to the finality of settlement agreements is equally important when a business attempts to negotiate a settlement with the State or any other adversary. Principles of finality are needed to frame the negotiations and define the final bargain. Those principles incentivize negotiations at the expense of further litigation. But if the State can evade an earlier settlement simply by crafting a new legal theory supporting similar claimed damages, the foundations necessary for negotiations are absent and the incentive to litigate is even greater. No one benefits in this circumstance, including the State. Louisiana's public policy favoring settlement is undermined where it is needed most. As a result, this Court

should reject the First Circuit's reasoning and restore litigation finality as a cornerstone of Louisiana's public policy.

III. CONCLUSION

The issues raised here have enormous implications for Louisiana—and for all business locally and nationwide who may be involved in disputes in this State. For all the above reasons, Amici believe that the First Circuit's reasoning and holding should be rejected and the public policies favoring the finality of settlements should be restored.

DATED: January 19, 2021

REED SMITH LLP

By *Arnd von Waldow*

Arnd von Waldow (#2159)
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222-2716
Telephone: 412 288 3131
Facsimile: 412 288 3063
Attorneys for Amici Curiae The Pharmaceutical Research and Manufacturers of America and the Chamber of Commerce of the United States of America

Of Counsel:

James C. Martin
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222-2716
Telephone: 412 288 3131
Fax: 412 288 3063

Raymond A. Cardozo
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659
Telephone: 415 543 8700
Fax: 415 391 8269

Stephen J. McConnell
REED SMITH LLP
Three Logan Square, Suite 3100
1717 Arch Street
Philadelphia, PA 19103-7301
Telephone: 215 851 8100
Fax: 215 851 1420

Certificate of Service

A copy of this Brief of Amici Curiae by the Pharmaceutical Research and Manufacturers of America and the Chamber of Commerce of the United States of America has been served by e-mail on the following persons:

Bradley C. Meyers
Linda R. Rodrigue
Amanda M. Collura-Day
KEAN MILLER LLP
Post Office Box 3513
II City Plaza
400 Convention Street, Suite 700
Baton Rouge, Louisiana 70821
brad.myers@keanmiller.com

Alejandro Perkins
Hammonds, Sills, Adkins
& Guice LLP
2431 South Acadian Thruway,
Ste. 600
Baton Rouge, LA 70808
aperkins@hamsil.com

Martin A. Stern
martin.stern@arlaw.com
ADAMS AND REESE LLP
701 Poydras Street, Suite 4500
New Orleans, LA 70139

Patrick C. Morrow
James P. Ryan
Morrow Morrow Ryan & Bassett
P.O. Drawer 1787
Opelousas, LA 70571
jamesr@mmrblaw.com

Michael P. Kelly
Daniel M. Silver
Daniel J. Brown
McCARTER & ENGLISH, LLP
Renaissance Centre
405 N. King Street, 8th Floor
Wilmington, Delaware 19801
DSilver@McCarter.com

Jerald P Block
Block Law Firm, APLC
PO Box 108
Thibodaux, LA 70301-0108
jpb@blocklawfirm.com

Jeff Landry
Elizabeth B. Murrill
Nicholas J. Diez
Office of the Attorney General
State of Louisiana
1885 N. Third Street
Baton Rouge, LA 70802
gunnelsk@ag.state.la.us
diezn@ag.state.law.us
deblieuxs@ag.state.la.us

January 19, 2021. */s/ Arnd von Waldow*