Nos. 16-1124 & 16-3019

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: FLONASE ANTITRUST LITIGATION

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

Defendant-Appellant,

v.

STATE OF LOUISIANA,

Respondent-Appellee.

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

PETITION OF SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE FOR PANEL REHEARING AND/OR REHEARING EN BANC

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STATEMENT UNDER LOCAL RULE 35.1

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance: whether in class-action litigation, States that are absent class members must give affirmative, unambiguous consent to be bound to a class-action settlement when those States are aligned solely with plaintiffs and subject to no counterclaims.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the Supreme Court of the United States, including *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court.

/s/ Lisa S. Blatt
Attorney for GlaxoSmithKline

INTRODUCTION

The panel's unprecedented decision holds that sovereign immunity renders federal courts powerless to enforce class-action settlements against States that are absent class members. That holding warrants en banc review. While private class members must opt *out* of class actions to avoid being bound, the panel held that sovereign immunity requires States to affirmatively opt *in* for any class settlement to be enforceable against them. By changing this basic rule for States alone, the panel's novel decision creates a two-tiered class-action system that forestalls defendants' attempts to settle and privileges States over other class members. Moreover, the decision below renders class-action defendants—even in long-settled cases—suddenly susceptible to suits from 50 States in 50 different forums. That result is contrary to the Constitution, controlling Supreme Court precedent, and decisions of multiple other circuits. The en banc Court should reverse the panel's decision and hold that States are bound by the same class-action rules as other absent class members.

The Supreme Court has framed every decision involving State sovereign immunity as protecting States only when they are *defendants* in a suit. The Eleventh Amendment confirms this: federal jurisdiction does not extend to "any suit in law or equity, commenced or prosecuted against" a State. U.S. Const. amend. XI. Yet the panel held that sovereign immunity bars federal courts from

enforcing class-action settlements against States in their capacity as absent *plaintiff* class members. In the panel's view, a suit in which States are absent plaintiff class members is a "suit" *against* the States. That holding ignores the constitutional text, centuries of history, and precedent.

The panel's decision also upends class settlements. States are often absent plaintiff class members. Yet the panel's decision unbinds States from all previous class-action settlements, save the rare-to-nonexistent instance where a State affirmatively opted in. The decision invites States to re-litigate settled claims, upsetting massive reliance interests of defendants who thought they bought lasting peace. And as the *amici* explained, excluding States from class-action settlements absent their express consent will make it extraordinarily difficult for future class-action defendants to buy global peace. Chamber of Commerce of the United States of America ("Chamber") Br. 15; Am. Tort Reform Ass'n ("ATRA") Br. 12-15; Washington Legal Found. and Nat'l Ass'n of Mfrs. Br. 19.

The panel's decision also conflicts with the Supreme Court's landmark decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which upheld the constitutionality of binding absent plaintiff class members to class-action settlements based on the Copernican distinction between plaintiffs and defendants. A "defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it," whereas "[a]bsent plaintiff class members are

not subject to coercive or punitive remedies." *Id.* at 808, 810. The panel's decision did not mention *Phillips Petroleum*, much less distinguish it.

Rehearing is warranted to preserve the ability of litigants to settle class actions and to reverse the panel's departure from Supreme Court precedent.

STATEMENT OF RELEVANT FACTS

This case originated when indirect purchasers of the prescription drug Flonase filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania alleging that GSK—Flonase's manufacturer—violated antitrust laws by seeking to delay FDA approval of a competitor's generic equivalent. JA355. The indirect purchasers sought class certification, under Federal Rule of Civil Procedure 23(b)(3), of an "opt out" class consisting of entities that purchased and/or paid for Flonase. JA378.

The district court certified the class and approved the Settlement Agreement on June 19, 2013. JA24-37. The class comprised all indirect purchasers of Flonase or its generic equivalents, including "State governments and their agencies and departments … to the extent they purchased … [Flonase or its generic equivalents] for their employees or others covered by a government employee health plan." JA27. Louisiana was a class member because it purchased Flonase for individuals covered by its government employee health plan.

The Settlement Agreement had standard terms. GSK agreed to pay tens of millions of dollars. In exchange, class members relinquished their claims and authorized the district court to enjoin future suits asserting released claims. JA35 (providing that "each Settlement Class member shall be permanently barred and enjoined from asserting any Released Claims"). The court retained exclusive jurisdiction over disputes related to the settlement. JA35.

Almost eighteen months later, Louisiana's Attorney General filed a state-law antitrust suit against GSK in Louisiana state court. JA331-54. The Attorney General's complaint largely copied verbatim the indirect purchasers' earlier class complaint. *Compare, e.g.*, JA357-78 *with* JA333-49.

Relying on *Ex parte Young*, 209 U.S. 123 (1908), GSK moved the district court to enjoin the Louisiana Attorney General from pursuing claims in state court that were released in the class settlement. JA10. The district court denied the request. While recognizing that States fell within the settlement class, JA13-14, the court held that sovereign immunity shields States from being made absent plaintiff class members without their unequivocal consent, JA17.

The panel affirmed. It concluded that, because the Settlement Agreement authorized an injunction to prevent class members from seeking double recovery, the motion to approve the settlement had constituted a suit by "private parties" against States seeking an "equitable remedy." Op. 10. As a result, the panel held

that sovereign immunity barred the district court from exercising jurisdiction over States in the class without their express consent. Op. 10-12. The panel further found that Louisiana had not given express consent to the settlement and that consent could not be inferred from Louisiana's decision not to opt out despite its Rule 23 duty to do so. Op. 15-18.[1]

ARGUMENT

I. THE PANEL'S DECISION UPENDS BOTH FUTURE AND PREVIOUS CLASS-ACTION SETTLEMENTS

The panel's decision has grave implications for class-action settlements. The Settlement Agreement's injunction against re-litigation of released claims is standard in large class-action settlements. Otherwise, defendants would be susceptible to duplicative suits, and settlements would hardly be worth the paper they are written on. By holding that this provision constitutes an equitable suit by private parties against States, the panel's decision exempts States from every class-action settlement to which they have not expressly consented and renders federal courts powerless to exercise their continuing jurisdiction over court-approved settlements. The decision subjects class-action defendants to claims they long

[1] The panel also affirmed the denial of GSK's motion to reopen judgment under Federal Rule of Civil Procedure 60(b), after GSK discovered evidence that Humana (which administers Louisiana's health insurance plans) received settlement funds on Louisiana's behalf. Op. 18-19.

believed settled, inhibits future class-action settlements, and gives States unfair advantages over private class members.

These results place intolerable burdens on attempts to settle class-action litigation. Class-action defendants "seek and pay for global peace—i.e., the resolution of as many claims as possible." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (en banc) (citation omitted). Class settlements thus routinely prohibit class members from re-litigating the settled claims and authorize the court that approved the settlement to enforce this prohibition.[2] The panel, however, held that these standard provisions are tantamount to private parties filing "suit" against States and thus oust federal courts of jurisdiction over States that have not manifested an express intent to join the class. Op. 9-10.

As explained by the prominent *amici* in this case, States frequently become absent plaintiff class members because of their ordinary participation in the market. *See* Chamber Br. 14-15 (explaining that "States are major purchasers of goods and services," spending over $200 billion per year); ATRA Br. 4 (similar). States buy prescription medications for their employees, body armor for their police, securities for their pension funds, construction materials for their buildings, and much more. ATRA Br. 4-6. Like private parties, States become absent class

[2] *See, e.g.*, *Schwartz v. Avis Rent a Car Sys., LLC*, C.A. Nos. 11-4051, 12-7300, 2016 WL 3457160, at *2 (E.D. Pa. June 21, 2016) ; *In re Am. Inv. Life Ins. Co. Annuity Marketing and Sales Prac. Litig.*, 263 F.R.D. 226, 250-51 (E.D. Pa. 2009).

members in product liability and antitrust suits because of these purchases. *Id.* (collecting cases). Louisiana became an absent class member in this case because it was a third-party payor for Flonase.

This decision, if permitted to stand, will devastate class-action settlements. As this Court's en banc decision in *Sullivan* recognized, "[n]o defendants would consider settling" if they nonetheless would face successive lawsuits by class members. 667 F.3d at 311. "Class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability." *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 254 (2d Cir. 2001) (citation omitted), *aff'd by an equally divided court*, 539 U.S. 111 (2003) (per curiam); *see also* Joseph M. McLaughlin, 2 McLaughlin on Class Actions: Law and Practice § 6:29 (14th ed. 2017) ("[A] settlement is ordinarily impractical unless it covers all claims, actual and potential, state and federal, arising out of the transaction or conduct at issue.").

As the Second Circuit has recognized, exempting States from class-action settlements would be particularly detrimental. "The existence of multiple and harassing actions by the states could only serve to frustrate the district court's efforts to craft a settlement in the multidistrict litigation before it." *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 337 (2d Cir. 1985). "The success of any federal settlement [i]s dependent on the

parties' ability to agree to the release of any and all related civil claims the plaintiffs had against the settling defendants based on the same facts." *Id.*

Requiring class-action defendants to obtain affirmative approval of every State will make it difficult, if not impossible, to settle class actions. States will have the option to stand silent during the opt-out period and decide later whether to accept the settlement's terms or pursue their own litigation. When trying to settle, defendants will have to weigh the risk that they will face future lawsuits by States that neither opt out nor affirmatively consent. Invariably, private class plaintiffs will receive lower settlements as defendants offset that risk of successive litigation. And even if defendants could get consent from all 50 States, the panel's decision would still shift compensation from private class members to States, which could use their special "opt in" rule to hold out for more money before consenting.

The decision also upends long-settled class actions. The panel concluded that the district court never "exercised jurisdiction over Louisiana in the primary suit." Op. 8; *see also* Op. 11 ("In approving the settlement agreement, the District Court lacked jurisdiction over the State because the Eleventh Amendment applies to the primary case and because Louisiana did not waive its sovereign immunity in that case."). But if that is true here, it is equally true in an untold number of class-action lawsuits settled long ago, because it has not been standard or practicable to obtain affirmative consent when States are absent plaintiff class members.

The panel never addressed whether defendants may raise a settlement as a defense against released claims re-asserted in state court. Presumably Louisiana does not believe the Settlement Agreement is a defense because the State asserted released claims in state court. The panel's decision leaves previous class-action defendants exposed to successive liability in 50 state forums and powerless to obtain relief from the federal court that approved their settlements. And it is uncertain whether previous settlements will be upheld in state courts throughout the country. In short, States could re-litigate claims covered by federal class-action settlements, with each State's courts deciding for themselves the quintessentially federal question whether States are bound by those settlements.

The prospective and retrospective consequences of this decision are difficult to overstate. As large consumers in their own right, States are frequently absent plaintiff class members in federal class-action litigation. And the panel's decision transforms the States' shield of sovereign immunity into a class-action plaintiff's sword. Class-action defendants will have a much harder time buying peace. And when they do, the compensation realized by injured private class members will be lower as States leverage their ability to sue later in their own courts to extract higher settlements or defendants prepare for successive litigation by States. The en banc Court should reverse the panel's decision.

II. THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT AND DEEPENS THE CIRCUIT CONFLICT ON THE SCOPE OF SOVEREIGN IMMUNITY

Rehearing is independently warranted because the panel's decision conflicts with *Phillips Petroleum Co.*, 472 U.S. 797, and is based on an erroneous reading of *Missouri v. Fiske*, 290 U.S. 18 (1933). Moreover, the decision deepens the circuit conflict on whether sovereign immunity applies to plaintiff States.

A. The Panel's Decision Conflicts with *Phillips Petroleum v. Shutts*

The panel held that the motion to approve the Settlement Agreement constituted a "suit" brought by private parties *against* States because the Agreement included an injunction against successive litigation. Op. 9-10. That decision conflicts with the Supreme Court's due process precedent, which sharply distinguishes between absent plaintiff class members and defendants. At the same time, the panel's reasoning throws class-action litigation into chaos by holding that class members file suit against their fellow class members when they agree to settlement terms that bar future litigation of released claims.

First, the panel's decision conflicts with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which held that absent plaintiff class members receive less due process protection than defendants because they are not subject to adverse judgments. In *Phillips Petroleum*, a class-action defendant argued that courts could exercise jurisdiction over absent plaintiff class members only under the same

conditions that courts could exercise jurisdiction over defendants—namely, when the absent class members have meaningful contacts with the forum state or consent to jurisdiction. *Id.* at 806. The Supreme Court rejected this argument, explaining that absent plaintiff class members face fundamentally different, and fewer, burdens than defendants. *Id.* at 808. Absent plaintiff class members are not "haled anywhere to defend themselves upon pain of a default judgment." *Id.* at 809. Nor do they face the prospect of "damages or to comply with some other form of remedy imposed by the court should [they] lose the suit." *Id.* at 808.

The panel's opinion cannot be reconciled with *Phillips Petroleum*. The panel concluded that, by seeking court approval of a settlement provision barring re-litigation of settled claims, "the private parties here" filed "suit" against Louisiana seeking "an equitable remedy against a State." Op. 9, 10. If that is so, the named class plaintiffs sued all the unnamed class plaintiffs, who are similarly bound by the settlement. Consequently, while absent class plaintiffs are plaintiffs under *Phillips Petroleum* because there is no risk that a court will enter an adverse judgment against them, 472 U.S. at 808, those same absent class members are paradoxically defendants being sued for injunctions. Op. 9-10. This defies both precedent and logic.

If settlement provisions barring subsequent suits transform absent plaintiff class members into defendants, the consequences for class-action law are

extraordinary. Class actions are preclusive against absent class members only because they were "adequately represented by someone with the same interests who was a party to the suit." *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (internal quotation marks omitted). But named class plaintiffs cannot adequately represent absent class members to whom they are adverse—let alone absent class members against whom they have filed suit, as the panel held. "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997). Thus, "[i]t is axiomatic that a putative representative cannot adequately protect the class if the representative's interests are antagonistic to or in conflict with the objectives of those being represented." Charles Alan Wright et al., 7A Federal Practice & Procedure § 1768, at 389 (3d ed. 2005).

It could even be unethical for a named class plaintiff's attorney to represent absent class members. If a motion to approve a settlement constitutes a "suit" against absent class members (because the settlement enjoins them from re-litigating), then plaintiffs' attorneys have ethical obligations to cease advocating for absent class members, who presumably must have independent counsel. "An attorney also should not continue to represent different groups of class members if the interests of members of one group become adverse to the interests of members of another." ABA Section of Litigation, Ethical Guidelines for Settlement

Negotiations 30 (2002). Plaintiffs' counsel cannot simultaneously represent the entire class while also representing the named plaintiffs in a "suit" against the unnamed plaintiffs. The panel's theory that the parties' motion to approve the settlement was a suit by the indirect purchasers against Louisiana and other States creates too many Gordian knots to sustain the panel's holding.

Finally, these knots cannot be cut by the notion that all private parties—all other named and unnamed plaintiffs—filed suit against the States. Absent class members did not negotiate the settlement or seek the court's approval of it. Private class members no more sought an injunction against Louisiana than Louisiana sought an injunction against private class members. All absent plaintiff class members are bound by the named plaintiffs' litigation because the named plaintiffs adequately represented the absent class members' interests. *Taylor*, 553 U.S. at 894. So if any subset of the plaintiffs has filed "suit" against any other subset (as the panel held), it can only be that the named plaintiffs have filed suit against the unnamed plaintiffs. That undermines the fundamental justification for class actions: that named plaintiffs represent the interests of absent class members.

B. This Case Is Not Controlled by *Fiske*

Missouri v. Fiske, 290 U.S. 18 (1933), does not control the outcome, and the panel erred in holding otherwise. Op. 10-12. Indeed, Louisiana's brief did not even cite *Fiske*. Not once.

Fiske held that sovereign immunity protects States from equitable injunctions, in addition to suits for money damages. 290 U.S. at 27. The case arose out of complex proceedings over who inherited a decedent's property and the state tax consequences flowing from that inheritance. *Id.* at 22. To prevent interference in the property proceedings, private parties sought a federal court injunction barring Missouri from filing a separate suit in state court.

Any analogy between *Fiske* and this case ends there. As the panel acknowledged, *Fiske* involved private parties filing suit *against* Missouri to obtain an injunction, rather than States acting as absent *plaintiff* class members. Op. 10-11. The panel shrugged off this distinction by asserting that "[t]he Supreme Court has instructed us to focus on the nature of the claim's requested relief, as opposed to the 'mere names of the titular parties.'" *Id.* (quoting *In re New York*, 256 U.S. 490, 500 (1921)). But that principle obfuscates an unbridgeable gulf between *Fiske* and this case. The "injunction" upon which the panel relied is simply part of a standard release in which all plaintiff class members (including plaintiff States) received compensation in exchange for releasing settled claims. To label that release an adverse judgment in a "suit" against the States does violence to the basic distinction between plaintiffs and defendants. Here, States stood only to recover money as absent plaintiff class members. Sovereign immunity does not block States from *receiving* money for their legal claims. Unlike an injunction, as in

Fiske, a class-action settlement's prohibition against seeking double recovery is not an adverse judgment against States, but part of a bargained-for exchange in which States benefitted as *plaintiffs*.

In its effort to treat the States as defendants, the panel manufactured a fictional lawsuit in which it is unclear who was supposedly suing the States when the court approved the Settlement Agreement. But class settlements do not have an Alice-in-Wonderland quality in which named class plaintiffs are unethically suing absent class members. The district court had jurisdiction over States because they are plaintiffs not subject to an adverse judgment.

C. The Panel's Decision Deepens the Circuit Conflict Over Whether Sovereign Immunity Protects States As Plaintiffs

Finally, the panel's decision deepens the conflict among circuits whether States have sovereign immunity as plaintiffs. Most courts hold that sovereign immunity protects States *only* when they are defendants—*i.e.*, when claims have been asserted against them. *E.g.*, *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 847 (9th Cir. 2004) (finding "little indication that sovereign immunity was ever intended to protect *plaintiff* states. Rather, it plainly understands sovereign immunity as protection from *being sued*."); *Oklahoma ex rel. Edmondson v. Magnolia Marine Transport Co.*, 359 F.3d 1237, 1239 (10th Cir. 2004) ([T]he Eleventh Amendment's abrogation of federal judicial power … does not apply to suits commenced or prosecuted *by* a State."); *Regents of Univ. of Cal.*

v. Eli Lilly & Co., 119 F.3d 1559, 1564 (Fed. Cir. 1997) ("[T]he Eleventh Amendment applies to suits 'against' a state, not suits by a state."). The Eighth Circuit, in contrast, has suggested that sovereign immunity protects plaintiff States, too. *See Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 505 (8th Cir. 1995) ("Involuntary joinder will compel [a state plaintiff] to act by forcing it to prosecute [the defendant] at a time and place dictated by the federal courts."). And the Fifth Circuit was uncertain whether a plaintiff State could use sovereign immunity to block removal under diversity jurisdiction but decided that the plaintiff State waived any immunity it might have had. *In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 711 (5th Cir. 2008).

In the panel's view, a State can be both a plaintiff and a defendant at the same time with respect to the same claim. But just like a football team cannot simultaneously be on offense and defense, a litigant cannot be a plaintiff and a defendant with respect to the same claim. Plaintiffs are *always* subject to adverse possibilities in litigation, including discovery orders requiring affirmative action, unfavorable judgments on the merits, preclusion against re-litigating identical claims, and sanctions related to their litigation conduct. If any adverse possibility resulting in an order were sufficient to make a State a "defendant"—even when the State is otherwise aligned solely as a plaintiff—then plaintiff States would always have sovereign immunity. Thus, the panel's decision is fundamentally

incompatible with those in other circuits holding that sovereign immunity protects States only as defendants.

This Court should grant en banc review. Consistent with most circuits to have examined the issue, this Court should hold that States lack sovereign immunity as absent plaintiff class members.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Dated: January 5, 2018

Respectfully submitted,

/s/ Lisa S. Blatt

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CERTIFICATE OF COMPLIANCE

The foregoing Petition complies with the type-volume limitations of Fed. R. App. P. 35(b)(2)(A) and Fed. R. App. P. 40(b) because the Petition contains 3,862 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Dated: January 5, 2018

/s/ Lisa S. Blatt

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2018, I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 5, 2018

/s/ Lisa S. Blatt

EXHIBITS

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EXHIBIT 1

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 16-1124 & 16-3019

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IN RE: FLONASE ANTITRUST LITIGATION

Smithkline Beecham Corporation, d/b/a GlaxoSmithKline;
n/k/a GlaxoSmithKline LLC, including GlaxoSmithKline,
PLC,

Appellant

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 2-08-cv-03301)
District Judge: Honorable Anita B. Brody

_____

Argued June 7, 2017
Before: CHAGARES, GREENAWAY, JR., and
VANASKIE, *Circuit Judges*.

(Opinion Filed: December 22, 2017)

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OPINION

GREENAWAY, JR., *Circuit Judge*.

In this case, SmithKline Beecham Corporation, doing business as GlaxoSmithKline ("GSK"), seeks to enforce a court-approved settlement agreement and enjoin the State of Louisiana, through its Attorney General, from bringing allegedly released claims against GSK in the Louisiana state courts. Louisiana protests this enforcement action on the theory that the Eleventh Amendment to the Constitution of the United States bars its involuntary inclusion in the settlement agreement.

To resolve this dispute, we must answer two questions: First, does a motion for approval of a class action settlement qualify as a suit against a state for Eleventh Amendment purposes if the requested settlement agreement enjoins a state

from suing in a state court? Second, if the Eleventh Amendment does cover this motion for settlement approval, may GSK avoid the Eleventh Amendment's prohibition by showing that Louisiana waived its sovereign immunity? We find that the Eleventh Amendment covers this motion and that GSK may not avoid its bar.

In addition to this claim, GSK asserts that the District Court abused its discretion in denying Rule 60(b) relief from a final judgment. We find this argument unavailing. On these two grounds, we will affirm.

I.

On July 14, 2008, private indirect purchasers of Flonase, a brand-name prescription drug, sued GSK in the United States District Court for the Eastern District of Pennsylvania. They alleged that: (a) GSK had filed sham citizen petitions with the Food and Drug Administration to delay the introduction of a generic version of Flonase, and (b) this delay forced the private indirect purchasers to pay more for Flonase than they would have if the generic version were available. The private indirect purchasers sued on behalf of themselves and a class of other indirect purchasers. For the purpose of the case at bar, two motions matter.

First, in the primary suit, the private indirect purchasers moved for final approval of settlement on April 1, 2013, after the District Court had certified the class, and had approved of the notice to settlement class members. The State of Louisiana, an indirect Flonase purchaser, qualified as a potential class member but did not receive the approved notice. Instead, it only received a Class Action Fairness Act ("CAFA") Notice. This notice, "serve[d] upon the appropriate State official of

each State in which a class member resides," included: (1) "a copy of the complaint," (2) "notice of any scheduled judicial hearing in the class action," (3) "any proposed or final notification to class members," (4) "any proposed . . . class action settlement," and (5) an estimate of the number of class members in each state. 28 U.S.C. § 1715(b) (2012). The notice includes this information because Congress "designed [this notice requirement] to ensure that a responsible state and/or federal official receives information about proposed class action settlements and is in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies." S. Rep. No. 109–14, at 31 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 32. It made clear, however, that state officials "will not be required" to "get involved." *Id.* at 33.

The requested court order "permanently enjoined" all members of the settlement class, including Louisiana, from bringing released claims against GSK, even in Louisiana's state court. Pls.' Mot. Final Approval Settlement and Plan Allocation, Award Att'ys' Fees, Reimbursement Expenses and Incentive Awards Named Pls. at 9-10, *In re Flonase Antitrust Litig.*, No. CV 08-3301, 2015 WL 9273274 (E.D. Pa. Dec. 21, 2015), ECF No. 574 [hereinafter Motion for Final Approval of Settlement Plan]. The proposed settlement agreement, among other things, provided compensation to the plaintiffs and class members, released the plaintiffs' and class members' claims, "reserv[ed] exclusive and continuing jurisdiction over the Settlement and this Settlement Agreement" for the District Court, and gave GSK the power to enforce the settlement. App. 98–107. On June 19, 2013, the District Court approved the final settlement.

Second, in the ancillary suit, GSK filed a motion to enforce the settlement agreement against the Louisiana Attorney General because, according to GSK, Louisiana violated the settlement agreement. In its motion, GSK argued that "Louisiana did not opt-out of the Settlement Class, and thus is bound by the release and covenant not to sue provisions in the Settlement Agreement and Final Order and Judgment." App. 314. As a result, GSK "respectfully submit[ted] that this Court should enjoin the Louisiana Attorney General from further pursuit of claims that were encompassed by the settlement in this litigation." App. 315.

On December 21, 2015, the District Court for the Eastern District of Pennsylvania denied this request and dismissed the case. It held that the Eleventh Amendment covered this enforcement action because, pursuant to the Eleventh Amendment, "a State retains the autonomy to choose 'not merely whether it may be sued, but where it may be sued.'" App. 12 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)). *See also* App. 14 ("Even though some of Louisiana's claims fall within the Settlement Agreement, I cannot enjoin Louisiana unless the State has waived its sovereign immunity and consented to this Court's jurisdiction."). It then held that "Louisiana's receipt of the CAFA Notice is insufficient to unequivocally demonstrate that the State was aware that it was a class member and voluntarily chose to have its claims resolved by the Settlement Agreement." App. 17.

Shortly before the District Court decided GSK's motion to enjoin Louisiana's state court action, GSK moved pursuant to Rule 60(b)(2) for Relief from a Judgment or Order because of newly discovered evidence that a third party had allegedly submitted a settlement claim on behalf of Louisiana. On May

31, 2016, the District Court denied this motion. GSK appealed the December 21 and May 31 orders.

II.

Because we review the District Court's final decisions, we exercise jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. "Dismissal of an action based upon sovereign immunity is subject to plenary review by this Court." *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 694 (3d Cir. 1996). "We review the denial of Rule 60(b) relief for an abuse of discretion." *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 269 (3d Cir. 2002).

III.

The District Court: (a) properly granted Louisiana's Motion to Dismiss, (b) appropriately denied GSK's Motion to Enforce Class Settlement, and (c) did not abuse its discretion in denying GSK's Rule 60(b) motion. As a result, we will affirm.

This case turns on whether the District Court exercised jurisdiction over Louisiana in the primary suit. A private party may bring a suit against a state official to enforce a settlement agreement despite the Eleventh Amendment. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004). To enforce a settlement agreement, a private party must draw upon a federal court's ancillary jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379–80 (1994). "Ancillary jurisdiction may extend to claims having a factual and logical dependence on the primary lawsuit, but that primary lawsuit must contain an independent basis for federal jurisdiction." *Peacock v. Thomas*, 516 U.S. 349, 355 (1996) (internal quotation marks

and citation omitted). As a result, GSK may not draw upon the District Court's powers of ancillary jurisdiction unless the District Court properly exercised jurisdiction over the State in approving the settlement agreement. In approving the settlement agreement, the District Court lacked jurisdiction over the State because the Eleventh Amendment applies to the primary case and because Louisiana did not waive its sovereign immunity in that case.

A.

The Eleventh Amendment applies to the primary suit. The Eleventh Amendment provides that "[t]he 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.

The Supreme Court has defined a "suit" as "the prosecution, or pursuit, of some claim, demand, or request" and regarded "commenced or prosecuted" as follows: "By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance." *Cohens v. Virginia*, 19 U.S. 264, 407–08 (1821). "[A] suit is *against* the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 102 n. 11 (1984) (internal quotation marks and citation omitted) (emphasis added).

In *Missouri v. Fiske*, the Supreme Court found that the Eleventh Amendment applied to a motion to enjoin a state from suing in its own court. 290 U.S. 18, 26 (1933). The Supreme Court came to this conclusion because the Eleventh Amendment covers claims that seek equitable remedies and because the private party's motion to enjoin the State from suing in its own court qualified as a suit that sought an equitable remedy. *Id.* at 27.

Like the private parties in *Fiske*, the private parties here sought an equitable remedy against a State. In their motion for final approval of settlement, the private indirect purchasers asked the District Court to order that "all members of the Settlement Class[, including Louisiana,] . . . are hereby permanently enjoined" from bringing any of the released claims against GSK "in any state or federal court . . . ." Motion for Final Approval of Settlement Plan at 9–10. Because *Fiske* held that the Eleventh Amendment covers a motion to enjoin a state from suing in its own court and because the motion for final settlement approval sought to enjoin Louisiana from suing in its own court, the Eleventh Amendment covers the motion for final approval of settlement at issue here.

Procedurally, *Fiske* differs from the case at bar in two respects. Neither distinction, however, undermines *Fiske*'s utility or applicability. First, the States played a different role in each claim. In *Fiske*, the private parties sought an injunction against a state that acted as an intervening defendant. 290 U.S. at 23–24. Here, private parties sought an injunction against a state that acted as an absent class member.

This distinction between the States' procedural titles does not make *Fiske* less useful. The Supreme Court has instructed us to focus on the nature of the claim's requested

relief, as opposed to the "mere names of the titular parties," *In re New York*, 256 U.S. 490, 500 (1921), and, "in the context of lawsuits against state and federal employees or entities," the Supreme Court has ruled that "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017). To make this decision, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* at 1290. If we must look beyond "the characterization of the parties in the complaint" and, instead, scrutinize the requested remedy's effects to ensure that it does not infringe upon an unnamed sovereign's immunity, we should surely adopt the same approach here when considering whether a claim implicates the rights of a state acting as an absent class member. *Id.*

Second, the private parties sought equitable relief in different types of motions. In *Fiske*, the private parties filed an "ancillary and supplemental bill of complaint," *Fiske*, 290 U.S. at 24, and requested "the equitable remedy of injunction against the state." *Id.* at 27. Here, the private parties asked for the approval of a settlement agreement in which the state was "hereby permanently enjoined . . . ." Motion for Final Approval of Settlement Plan at 9.

The specific name of the vessel requested to carry the injunction does not distinguish *Fiske* from the case at bar. The Supreme Court has acknowledged a consent decree's hybridity. On the one hand, "[a] consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992). On the other hand, "it is an

agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Id.* Because of this ambiguity, the Supreme Court has established a rule to determine whether a settlement agreement carries the force of federal law and has held that a settlement agreement becomes enforceable federal law when it: (a) receives a federal court's approval, (b) "springs from a federal dispute," and (c) "furthers the objectives of federal law." *Hawkins*, 540 U.S. at 438.

As GSK concedes, this settlement agreement "was functionally a consent decree" that "federal courts may enforce." Appellant's Br. at 35. As a result, *Fiske* applies even though the private parties in *Fiske* requested an injunction in the form of a court order—as opposed to in the form of a court approved settlement agreement.

Another court of appeals has come to a similar conclusion, albeit in a slightly different situation. In *Thomas v. FAG Bearings Corp.*, the Eighth Circuit found that "the Eleventh Amendment bars involuntary joinder of" a state because "[i]nvoluntary joinder will compel [the state] to act by forcing it to prosecute [a private party] at a time and place dictated by the federal courts." 50 F.3d 502, 505 (8th Cir. 1995). The Eighth Circuit supported its conclusion by noting that "[p]ermitting coercive joinder also undermines the two aims of the Eleventh Amendment: protection for a state's autonomy and protection for its pocketbook." *Id.* at 506. According to our sister circuit, a contrary ruling would undermine the Amendment's aims by: (a) allowing a private party to waive a state's sovereign immunity, and (b) compelling "[p]remature litigation [that] potentially limits the

costs [the state] can recover." *Id.* These same concerns motivate our decision today.

GSK preemptively questions our holding by citing three Supreme Court cases that held that the Eleventh Amendment did not cover a private party's suit involving a state. In the first case, *Cohens*, the Supreme Court held that the Eleventh Amendment did not cover a criminal defendant's appeal from a state court to the Supreme Court of the United States on a writ of error. 19 U.S. at 407–08. In the second case, *California v. Deep Sea Research, Inc.*, the Supreme Court found that the Eleventh Amendment did not apply to an *in rem* complaint over a sunken ship that the State of California claimed as its own after the private party filed the *in rem* suit. 523 U.S. 491, 496 (1998). In the third case, *Tennessee Student Assistance Corp. v. Hood*, the Supreme Court held that the Eleventh Amendment did not apply to discharge orders in *in rem* bankruptcy proceedings even though a state agency had guaranteed the allegedly dischargeable loan. 541 U.S. 440, 449 (2004).

In addition to these Supreme Court cases, GSK relies on three sister circuit cases that held that motions to remove or transfer did not implicate the Eleventh Amendment. *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 845, 848 (9th Cir. 2004) (observing that "*Cohens* counsels strongly that removal does not constitute the commencement or prosecution of a suit" and holding that "a state that voluntarily brings suit as a plaintiff in state court cannot invoke the Eleventh Amendment when the defendant seeks removal to a federal court of competent jurisdiction"); *Okla. ex rel. Edmondson v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1240 (10th Cir. 2004) ("We hold that the State may not assert its Eleventh Amendment immunity to preclude defendants' removal of the

tort action it brought against them in its own courts."); *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1565 (Fed. Cir. 1997) (finding "that the Eleventh Amendment does not deprive the Indiana district court of jurisdiction in this case" because "it does not involve any claim or counterclaim against [the state] that places [the state] in the position of a defendant").

We distinguish these Supreme Court and sister circuit cases from the case at bar because none of the private parties in the cases cited by GSK sought legal or equitable remedies *against* the State. Indeed they sought a writ of jurisdiction that "acts only on the record," *Cohens*, 19 U.S. at 410, a removal notice that was not "dissimilar" from a writ of jurisdiction, *Dynegy*, 375 F.3d at 845,[1] a transfer motion that "does not involve any claim or counterclaim *against*" the State, *Eli Lilly & Co.*, 119 F.3d at 1565,[2] an *in rem* admiralty action where the "the possession of the" sovereign was not "invaded under process of the court," *Deep Sea Research*, 523 U.S. at 507, and an *in rem* bankruptcy determination not "seeking to recover

[1] GSK unsuccessfully sought to remove Louisiana's state court case to the United States District Court for the Middle District of Louisiana. Ruling and Order, Louisiana *v. SmithKline Beecham Corp.*, No. 15-cv-00055 (M.D. La. Feb. 4, 2015), ECF No. 38. As GSK's counsel conceded at Oral Argument, this issue is not before us.

[2] While the removal notice was pending in the Middle District of Louisiana, GSK futilely tried to transfer the case from the Middle District of Louisiana to the Eastern District of Pennsylvania. *Louisiana v. SmithKline Beecham Corp.*, No. 15-cv-00055, (M.D. La. Feb. 4, 2015), ECF No. 36.

property in the State's hands," *Hood*, 541 U.S. at 441–42. As a result, we conclude that the Eleventh Amendment applies here.

B.

The Eleventh Amendment prevented the District Court from issuing an injunction against Louisiana because Louisiana did not waive its sovereign immunity. A suit may avoid the Eleventh Amendment's broad prohibition in three ways. "First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. Second, a State may waive its sovereign immunity by consenting to suit." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (internal citation omitted). Third, a private party may sue a state official to prevent the official from violating federal law. *Ex parte Young*, 209 U.S. 123, 159–60 (1908). GSK argues that Louisiana waived its sovereign immunity. We disagree.

The State of Louisiana did not waive its sovereign immunity by receiving a CAFA notice and by failing to oppose the settlement based on that notice. A state waives its immunity "if the State makes a 'clear declaration' that it intends to submit itself to our jurisdiction." *Coll. Sav. Bank*, 527 U.S. at 675–76 (citation omitted). The law "requir[es] a 'clear declaration' *by the State* of its waiver" to ensure "that the State in fact consents to suit" and because "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *Id.* at 680.

In *College Savings Bank*, a private party sued a state for infringing upon a patent. *Id*. at 671. The private party argued that the Eleventh Amendment did not bar the suit because the State "constructively waived its immunity from suit by engaging in the voluntary and nonessential activity . . . after being put on notice by the clear language of the [Act] that it would be subject to . . . liability for doing so." *Id.* at 680. The Supreme Court rejected this argument and found that the State did not voluntarily consent to federal jurisdiction by engaging in "voluntary and nonessential activity" because "[t]here is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *Id.* at 680–81.

In *Lapides v. Board of Regents of University System of Georgia*, the Supreme Court applied this test and came to a different conclusion. 535 U.S. 613, 620 (2002). In that case, a private party sued a state official and the State removed the case to federal court. *Id.* Once in federal court, the state claimed sovereign immunity. *Id.* The Court observed that *College Savings* did "require[] a 'clear' indication of the State's intent to waive its immunity" and held that "[t]he relevant 'clarity' here must focus on the litigation act the State takes that creates the waiver. And that act—removal—is clear." *Id.*

In light of *College Savings Bank* and *Lapides*, Louisiana did not clearly indicate its intent to waive its sovereign immunity in the primary suit. It received a CAFA notice. That notice may not "impose any obligations, duties, or responsibilities upon . . . State officials." 28 U.S.C. § 1715(f). After it received this notice, it did not act, in its capacity either

as a litigant, as was the case in *Lapides*, or as a market participant, as was the case in *College Savings Bank*. As a result, we reject GSK's argument and hold that Louisiana did not waive its sovereign immunity in the primary suit by merely receiving a CAFA notice and failing to act.

GSK attempts to refute this argument in three ways. We find none of them persuasive. First, it attempts to distinguish *College Savings Bank* by arguing that *College Savings Bank* announced "the test for whether States consented to federal jurisdiction by enacting statutes or otherwise engaging in non-litigation conduct that Congress specified would abrogate immunity" and that *Lapides* "governs whether a State's litigation conduct waives immunity." Appellant's Reply at 18. This argument lacks merit because the Court decided *Lapides* and *College Savings Bank* under the same rule. Indeed, in *Lapides*, the Court observed that *College Saving Bank* "required a 'clear' indication of the State's intent to waive its immunity" and concluded that, in *Lapides*, "that act—removal—is clear." *Id.* at 620.

Second, GSK argues that "Louisiana cites no authority suggesting that only affirmative litigation acts can waive immunity." Appellant's Reply at 19. This characterization misconstrues Louisiana's argument. Louisiana does not argue that only affirmative litigation acts can waive immunity. Instead, it argues that a state cannot waive its immunity merely by receiving notice and failing to act. Appellee's Br. at 23 ("Sovereign immunity . . . requires something more than silence or inaction before a state can be bound by a federal proceeding."). This distinction matters because, as explained above, *College Savings* supports the State's actual position.

Third, GSK asserts, without citation, that "it does not follow that sovereign immunity must afford States more protection against becoming absent class members than what ordinary litigants receive under Rule 23." Appellant's Reply at 19. It reasons that States should not receive more protection because "States are far more sophisticated than ordinary litigants, and understand the significance of litigation conduct far better." *Id.* at 19. This argument misses the point. The Constitution requires more protections for States than for ordinary litigants not because of their sophistication but because of their status as sovereigns. *P.R. Aqueduct & Sewer Auth., v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity."). Analogizing states to private parties and comparing their respective sophistication ignores this justification. As a result, we find that Louisiana did not waive its sovereign immunity when it received a CAFA notice and failed to act.

C.

The District Court did not abuse its discretion in denying GSK's Rule 60(b) motion. In its briefing before the District Court, GSK expressed its belief that another organization could have filed a claim on behalf of the State of Louisiana. Because of this suspicion, it asked the claims administrator to inform GSK of any claims submitted on Louisiana's behalf. The claims administrator refused and cited its commitment to confidentiality to justify its decision. After the District Court had denied GSK's motion to enforce the settlement agreement, GSK learned that an organization, Humana, had submitted a claim on behalf of Louisiana. Based on this information, GSK then moved pursuant to Rule 60(b)

on the theory that it had discovered new evidence. The District Court denied this motion.

The District Court did not abuse its discretion in denying this motion. A "court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60. "That standard requires that the new evidence (1) be material and not merely cumulative, (2) could not have been discovered before trial through the exercise of reasonable diligence and (3) would probably have changed the outcome of the trial." *Compass Tech., Inc. v. Tseng Labs., Inc.*, 71 F.3d 1125, 1130 (3d Cir. 1995).

The District Court found that GSK had not carried its burden under the second prong because it did not prove that it could not have discovered this information with reasonable diligence. It came to this conclusion because GSK did not draw on the Court's power to recover the discovered information and because GSK did not show that it could not have received this information with a court order. GSK has not cited a case to support its position that reasonable diligence requires less than a court order. As a result, the District Court did not abuse its discretion in denying this motion.

IV.

The Eleventh Amendment applies to the settlement agreement and the instant enforcement action. GSK may not avoid the Eleventh Amendment's prohibition. Additionally, the District Court did not abuse its discretion in denying GSK's

Rule 60(b) Motion. For the foregoing reasons, we will affirm the District Court's orders.

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

Nos. 16-1124 & 16-3019

_____

IN RE: FLONASE ANTITRUST LITIGATION

Smithkline Beecham Corporation, d/b/a GlaxoSmithKline;
n/k/a GlaxoSmithKline LLC, including GlaxoSmithKline, PLC,
Appellant

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 2-08-cv-03301)
District Judge: Honorable Anita B. Brody

_____

Argued June 7, 2017
Before: CHAGARES, GREENAWAY, JR., and VANASKIE, *Circuit Judges*.

_____

JUDGMENT

_____

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on June 7, 2017. On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the orders entered by the District Court on December 21, 2015, and May 31, 2016, are hereby AFFIRMED. Costs shall be taxed against Appellant. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Clerk

Date: December 22, 2017