No. 15-600

IN THE
Supreme Court of the United States

ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., F/K/A JANSSEN PHARMACEUTICAL, INC., AND/OR JANSSEN, L.P.,
Petitioner,

v.

SOUTH CAROLINA EX REL. ALAN WILSON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,
Respondent.

On Petition For Writ Of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KATE COMERFORD TODD
WARREN POSTMAN
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
Counsel of Record
GEOFFREY M. WYATT
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTE

OTHER AUTHORITIES

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* in support of petitioner.[1]

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing 300,000 direct members and an underlying membership of more than three million U.S. businesses and professional organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community.

The Chamber has a strong interest in this case because its members are being targeted with increasing frequency by private contingency-fee lawyers prosecuting civil-penalty and other enforcement actions on behalf of state and local governments across the country.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party in this case authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioner and respondent, upon timely receipt of notice of the Chamber's intent to file this brief, have consented to its filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the South Carolina Attorney General hired a private law firm on a contingency-fee basis to seek statutory penalties from a pharmaceutical manufacturer under the South Carolina Unfair Trade Practice Act ("SCUTPA"). Because they were litigating on behalf of the State, plaintiffs' counsel were not required to prove that Petitioner's statements were made with an intent to deceive, caused anyone any injury, or that anyone relied on these statements. Freed from such requirements inherent in analogous civil litigation, private plaintiffs' counsel initially secured a staggering $327,073,700 civil penalty against Petitioner, which the South Carolina Supreme Court later reduced to $124,324,700. As explained in the petition, this nine-figure judgment was rendered without any finding of knowing (or even reckless) falsity, injury, or reliance. As such, it constitutes a grossly disproportionate penalty, contravening the Eighth Amendment's Excessive Fines Clause and well-established principles of due process.

Amicus curiae writes separately to emphasize the need for this Court's intervention to ensure that the Excessive Fines Clause is properly enforced. This case is part of a growing trend around the country, in which state attorneys general delegate their enforcement powers to private attorneys who are already involved in multidistrict litigation against drug manufacturers or other corporate entities. In nearly every case, including this one, the private attorneys are paid on a contingency-fee basis. In other words, they are paid only if they win; and if they do win, they are paid more and more for each additional dollar they recover.

These arrangements fundamentally skew the incentives for all involved. They entrust the duty of impartially administering justice to attorneys with an overwhelming incentive to "win" a case by racking up huge penalty awards – even if the case is entirely bereft of merit. As a result, when a case is brought by private counsel working on contingency, there will typically be an exclusive focus on monetary penalties rather than nonmonetary remedies that would be just as effective (or more so) at protecting the public. And not surprisingly, these suits often end in a civil penalty that is grossly disproportionate to any conceivable state interest in enforcing the law.

The Excessive Fines Clause is perfectly suited to handling this specific problem as well as broader concerns about state enforcement actions. Yet, the lower state and federal courts, including the South Carolina Supreme Court in the decision below, have routinely failed to engage in the close constitutional scrutiny required by this Court's precedents. It is critical for this Court to grant certiorari to ensure that the Excessive Fines Clause provides a meaningful and enforceable check on the imposition of massive civil penalties on companies and individuals.

ARGUMENT

I. THE EXCESSIVE FINES IMPOSED IN THIS CASE WERE FUELED BY THE PRACTICE OF OUTSOURCING STATE ENFORCEMENT LITIGATION TO PROFIT-SEEKING ATTORNEYS.

As the petition ably demonstrates, the $124 million civil penalty imposed in this case with no proof of intent, injury, or reliance violated Petitioner's rights under the Eighth Amendment's Excessive Fines

Clause. (Pet. 28-35.) The size of the penalty alone warrants review by this Court. Cf., *e.g.*, *United States v. Mitchell*, 463 U.S. 206, 211 n.7 (1983) (noting the significance of $100 million of potential liability). So too do the circumstances of its award. As the petition points out, the enormous penalty in this case was awarded without any finding of actual harm to the State or its citizens. (See Pet. 36-37.)

This Court's review is also warranted to address a broader trend of deep significance to American business. The grossly disproportionate civil penalty in this case is part of a growing problem that has been created by the changing dynamics of civil enforcement at the state and local level. Specifically, over the past few decades, contingency-fee arrangements have led to the "creation of a new model for state-sponsored litigation that combines the prosecutorial power of the government with private lawyers aggressively pursuing litigation that could generate hundreds of millions in contingent fees." Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 968 (2007).[2] The result is that the attorneys assigned the task of enforcing state laws are increasingly seeking to maximize recovery (and, as a result, their own paychecks) rather than to serve the public interest. This development, coupled with the special advantages afforded attorneys litigating on behalf of a State, have led to eye-

[2] The genesis of this practice can be traced to litigation in the 1980s, when Massachusetts hired outside counsel on a contingency-fee basis to prosecute claims over asbestos removal. Faulk & Gray, 2007 Mich. St. L. Rev. at 968.

popping civil penalty awards like the one in this case. Because the growth of these arrangements poses a continuing and increasing threat of exorbitant penalty awards, there is a dire need for this Court to reaffirm the constitutional limitations on excessive fines.

This Court has long recognized the potential for abuse where, as here, a State deprives a defendant of an impartial tribunal or subjects a defendant to prosecution by a lawyer for the government whose judgment is clouded by a financial or other personal stake in the outcome. See, *e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980). In *Marshall*, for example, this Court warned that a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* (rejecting constitutional challenge but nonetheless recognizing requirement of neutrality and impartiality in enforcement proceeding). As the Court explained, "[p]rosecutors are also public officials; they too must serve the public interest." *Id.* at 249 (citation omitted). Thus, "[i]n appropriate circumstances," the "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." *Id.*

The Court again recognized the potential for abuse when private attorneys have a financial stake in a case they prosecute for the government in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987). In *Young*, private attorneys were appointed as special prosecutors to prosecute a crim-

inal contempt action against individuals who violated an injunction against trademark infringement. *Id.* 791-92. This Court determined that the prosecutors' appointment was improper because they were affiliated with the company whose trademark interests had been affected by the contemnors. *Id.* at 804-06. As the Court explained, because the private attorneys were appointed to represent the United States "to pursue the public interest," they "certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* at 804. The "appointment [of the interested attorneys] illustrate[d] the *potential* for private interest to influence the discharge of public duty." *Id.* at 805.

This case illustrates the same clash between public duty on the one hand and private interest on the other. Like the laws in *Marshall* and *Young*, enforcement actions under SCTUPA must be guided by the public interest. (See Pet. App 29 (explaining that "the legislature's manifest purpose in providing for an Attorney General directed claim" under SCUTPA was "to protect the citizens of South Carolina").) Needless to say, the vindication of the public interest is not to be guided by the attorney's own fiscal interests. Indeed, SCUTPA expressly provides that any civil penalty recovered is to be "recover[ed] on behalf of the State," S.C. Code Ann. § 39-5-110(a), not its counsel.

By definition, however, private fiscal interests are involved when private contingency-fee counsel are retained because such counsel *will not be paid at all* for their services unless there is a recovery – which for all practical purposes negates the possibility that the State would ever exercise its discretion not to seek penalties. And because any payment to counsel

will increase proportionately with each additional dollar recovered, counsel will have a strong incentive to pursue the maximum number of violations and maximum amount of penalties – with little or no regard for what the public interest requires. And, of course, private counsel will have little incentive to pursue nonmonetary remedies, such as requiring a company that made a misstatement to issue a correction. Thus, absent meaningful checks, statutes like SCUTPA are made to be exploited and to result in excessive fines when contingency-fee counsel are retained, as clearly happened in this case. (See, *e.g.*, Pet. 31-35 (explaining how two allegedly deceptive or unfair acts were spun into thousands of separate violations).)

This dynamic underscores the importance of the Excessive Fines issue presented by the petition. As the petition correctly argues, there is a growing need for "especially close constitutional scrutiny of a civil penalty" under statutes, like the one here, that "provide[] little notice to the defendant as to the types of triggering events that might lead to a massive penalty." (*Id.* at 34.) When the amorphous definition of "unfair" practices – and the lack of any guidance about the meaning of a "violation" – is combined with an enforcement regime that creates incentives to maximize monetary penalties over all else, the inevitable result will be massive and unjustified penalties, such as the one imposed here.

For all of these reasons, the Court should grant the petition, hold that the penalties levied here were improper under the Excessive Fines Clause, and provide much needed guidance on the limits of civil penalties under state consumer-protection statutes like SCUTPA.

II. ALLOWING PROFIT-SEEKING ATTORNEYS TO PURSUE EXCESSIVE FINES OUT OF SELF-INTEREST UNDERMINES THE INTEGRITY OF THE AMERICAN JUDICIAL SYSTEM.

Allowing self-interested attorneys to seek massive penalties on behalf of a State not only results in fines that increasingly violate the Excessive Fines Clause, but also produces incentives that undermine the perceived fairness of the American justice system. This case is just one of a growing number in which state attorneys general have abdicated their duties by delegating significant state enforcement power to self-interested private attorneys. Such arrangements promote unseemly quid pro quo relationships between government officials and private lawyers and undermine public confidence in the justice system, underscoring the need for strict judicial oversight, particularly in the case of large civil-penalty awards in civil-enforcement suits in which a State has employed private, contingency-fee counsel.

This mounting problem threatens the entire spectrum of the business community. See Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 80 (2010) ("In the last ten years, state governments have increasingly resorted to this practice in their efforts to pursue 'big money' claims against alleged tortfeasors."). For example, the state of Rhode Island employed outside counsel to sue former manufacturers of lead paint and pigment from 2003 to 2008. Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J.L. & Soc. Probs. 587, 589 (2009). Similarly, Oklahoma's

Attorney General hired outside firms to sue poultry companies that allegedly polluted the state's waterways with chicken manure. See *id.* And in suits like this one, brought against the pharmaceutical industry, attorneys general have entered into contingency-fee contracts with outside counsel to prosecute a wide range of lawsuits, alleging failure to warn, fraudulent advertising or off-label promotion of prescription medications. Lise T. Spacapan et al., *A Threat to Impartiality: Contingency Fee Plaintiffs' Counsel and the Public Good?*, In-House Defense Quarterly, Winter 2011, at 14. The breadth of the practice cannot be overstated: in one recent study of the 50 states and the District of Columbia, 36 attorney general offices reported using contingency-fee counsel. *Id.*

Such reliance on outside counsel can be expected to increase as state legislatures call on attorney general consumer-protection and Medicaid-fraud units to contribute to their own budgets or become self-funded. See Dave Boucher, *Attorney General Outlines Changes to Office After New Laws Take Effect*, Charleston Gazette-Mail, Apr. 24, 2013, http://www.wvgazettemail.com/News/201304230240 (referencing a bill passed by the West Virginia legislature that would take $7.46 million from the attorney general's Consumer Protection Fund and distribute it elsewhere in the state budget). And there will be no shortage of private lawyers eager to take on those representations. As one commentator noted in the *Wall Street Journal*:

> Trial lawyers love these deals. Even aside from the chance to rack up stupendous fees, they confer a mantle of legitimacy and state endorsement on lawsuit crusades whose merits might oth-

> erwise appear chancy. Public officials find it easy to say yes because the deals are sold as no-win, no-fee. They're not on the hook for any downside, so wouldn't it practically be negligent to let a chance to sue pass by?

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

As noted above, these arrangements have led to "eye-popping" verdicts in some of the cases that have gone to trial, see Peter Loftus, *States Take Drug Makers to Court Over Marketing*, Wall St. J., Apr. 22, 2013, underscoring the propensity for the retention of private, contingency-fee counsel to give rise to concerns about excessive fines. Earlier in the Risperdal litigation, for example, a trial court in Louisiana entered a $330 million award of civil penalties in a Medicaid false-claims suit, which separately penalized the company for each of thousands of identical "Dear Doctor" letters sent to Louisiana physicians, as well as alleged representations made in sales calls, all without proof of injury. See Linda Chiem, *J&J Beats $258M Risperdal Verdict in Split La. High Court*, Law360, Jan. 28, 2014, available at http://www.law360.com/articles/504849/j-j-beats-258m-risperdal-verdict-in-split-la-high-court. Similarly, in Arkansas, a trial court awarded a *$1.2 billion* verdict in another Risperdal case, again based on claims for individual penalty assessments for each representation made in marketing the drug – and again without proof that anyone was injured. Katie Thomas, *J&J Fined $1.2 Billion in Drug Case*, N.Y. Times, Apr. 11, 2012.

Both cases involved the use of private, contingency-fee counsel, prompting concern about the propriety of States' retention of "private counsel . . . on a contingency-fee basis to handle litigation against pharmaceutical and medical device companies." Ethan M. Posner, *A Blow to State Encroachment on Federal Turf*, Law360, Apr. 16, 2014.[3] These concerns are heightened by the incentives for private counsel to seek the maximum conceivable penalty in every case, no matter how excessive. As one federal judge has noted, penalty theories like the one pursued here could "result in a multibillion dollar cumulative penalty grossly disproportionate both to the injury [the State] had suffered and the seriousness of the [defendant's] conduct." *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 463 (E.D.N.Y. 2009). Such a "slash-and-burn-style of litigation" threatens to turn courts into "an engine of an industry's destruction." *Id.* at 463-64.

The growth in the practice of retaining contingency-fee attorneys to prosecute state enforcement actions has also raised questions about the propriety of liaisons between public enforcement officials and private, profit-motivated lawyers (who often include campaign donors). In Mississippi, for example, the Attorney General retained 27 law firms to represent Mississippi in 20 separate lawsuits over a five-year span, and "some of [the attorney general's] largest campaign donors are the very firms to which he's

---

[3] Although both judgments were ultimately reversed, those reversals were not rooted in conclusions that the fines were excessive or that the retention of private counsel was improper – leaving the door open to continued abuses going forward.

awarded the most lucrative state contracts." *Lawsuit Inc.*, Wall St. J., Feb. 25, 2008. As one former attorney general who has been an outspoken critic of these liaisons observed, "'[t]hese contracts . . . create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.'" Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10 (quoting Hon. William H. Pryor Jr.).

Concerns over the potential for improper "pay to play" arrangements between private lawyers and state officials, coupled with the constitutional implications highlighted in the previous section and in the defendants' petition, underscore the importance of meaningful constitutional limitations on the size of civil penalties. As this case starkly illustrates, the lower courts are routinely failing to apply the Excessive Fines Clause as a meaningful check on such awards – a trend that is problematic in all cases, but especially where a State has outsourced its enforcement authority to a private, self-interested law firm. The Court should grant review so that it may, at a minimum, clarify the limitations on fines in enforcement proceedings, like this one, that do not involve any proven harm to the public or any state citizen.

CONCLUSION

For the foregoing reasons, and for those stated by the Petitioner, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

KATE COMERFORD TODD
WARREN POSTMAN
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
Counsel of Record
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for Amicus Curiae

December 9, 2015