No. 16-1513

IN THE
Supreme Court of the United States

PLIVA, INC.,
Petitioner,
v.
SUPERIOR COURT OF CALIFORNIA,
SAN FRANCISCO COUNTY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal First Appellate District

REPLY BRIEF FOR PETITIONER

JEFFREY F. PECK
Counsel of Record
LINDA E. MAICHL
ULMER & BERNE LLP
600 VINE ST. SUITE 2800
CINCINNATI, OH 45202
(513) 698-5000
jpeck@ulmer.com
lmaichl@ulmer.com
Counsel for PLIVA, Inc.

September 1, 2017

RULE 29.6 STATEMENT

The corporate disclosure statement set forth in the petition remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Respondent argues the petition should be denied because it presents only a dispute as to the "trial court's determination of the facts." (Opp., p. i.) To the contrary, the petition presents a significant due process issue, one that is increasingly important in today's environment of mass torts and state court procedures used to handle them. At its most fundamental level, the question asks whether state-court procedures, like California's Judicial Council Coordination Proceedings ("JCCP"), that mandate participation in state-created proceedings designed to manage hundreds or thousands of lawsuits filed in a state's courts may constitutionally deprive defendants of due process rights in individual lawsuits. The answer, of course, must be no. And, it must be no because it is incomprehensible that defendants constitutionally can become subject to a state court's coercive power in individual lawsuits merely because a state decided to combine similar lawsuits, some brought by California residents but many of which were not, into a single proceeding before a single judge in a single courtroom. The "facts" merely demonstrate how those procedures are used to erase the lines defining individual lawsuits, to amass them into a pile devoid of individual characteristics, and to pretend they are no longer separate but only a part of a larger whole.

State coordination proceedings established for the benefit of the courts and plaintiffs are subject to Due Process limitations. That means a defendant's conduct *vis-a-vis* the coordinated proceeding cannot be attributed to individual lawsuits; lawsuits in which

the defendant never appeared, never answered, never demurred, never acted at all. An "appearance" in a coordinated proceeding is not, and cannot be, an "appearance" in every individual lawsuit, whether filed before or after the coordinated proceeding is established. If it were, all that would be required to acquire personal jurisdiction over any defendant in any lawsuit by an out-of-state plaintiff would be to have an in-state plaintiff file a lawsuit (as was done here by the Elkins), have that in-state plaintiff petition for a coordination proceeding to include all then-pending and later-filed lawsuits whether by in-state or out-of-state plaintiffs (which was done here), and abracadabra the court has personal jurisdiction over the defendants. Sleights of hand and magic incantations do not satisfy due process.

ARGUMENT

A. The Issue Presents a Substantial Question of Federal Constitutional Law

In arguing that the petition should be denied because "there is no conflict among the courts on the jurisdiction wavier and consent issue that warrants review under Rule 10" (Opp., p. 19), Respondent ignores the Rule's other provisions. The issue presented falls squarely within Rule 10(c) as the trial court's ruling conflicts with this Court's decisions setting the legal requirements for determining waiver and consent as they pertain to personal jurisdiction.

Citing *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694 (1982), Respondent melds "consent" and "waiver" contending

the trial court's decision is "completely congruent with this [C]ourt's seminal decision on consent and waiver." (Opp., p. 22.) Yet, *Insurance Corp.* did not involve waiver, it addressed a defendant's consent to jurisdiction. Increasingly, as has Respondent, courts blend the concepts of "consent" and "waiver," rather than apply this Court's separate tests for determining when and whether a defendant has consented to the court's jurisdiction or waived its personal jurisdiction defense. Returning the analysis to it proper perspective alone warrants this Court's review.

Moreover, to reach her conclusion, Respondent points to California's process for challenging personal jurisdiction in *individual* lawsuits and treats the JCCP as one lawsuit. Under Respondent's reasoning, an "appearance" in the JCCP is the same as an appearance in an individual lawsuit; indeed, in every individual lawsuit combined into the JCCP. What Respondent advocates, and the trial court accomplished, was to deprive Petitioner of its right to challenge personal jurisdiction in individual lawsuits based on its involuntary participation in the JCCP, a proceeding that included numerous lawsuits that did not implicate personal jurisdiction concerns. Accepting what occurred here means that a defendant's right to challenge personal jurisdiction in individual lawsuits is extinguished whenever citizens of a state (like the Elkins) successfully petition for coordination of lawsuits involving similar questions of law or fact and then invite citizens of other states to file their suits in that state's courts. Having once participated in the coordinated proceedings in continued defense of the in-state resident's lawsuit (over which the defendant has no choice), the defendant is forevermore

estopped from contesting personal jurisdiction in the tens, hundreds, or thousands of lawsuits that follow. Surely, that does not even approach "waiver" or "consent" in an individual case under the Due Process Clause or this Court's precedent.

B. The "Facts" Demonstrate Petitioner Never Consented to Personal Jurisdiction or Waived Its Personal Jurisdiction Defense

Respondent's contention that Petitioner never told the trial court "of any intent to challenge personal jurisdiction before [a] February 11, 2014 conference" (Opp., pp. 22-23) is contrary to the record, which amply demonstrates that personal jurisdiction was raised early and often but tabled until the trial court decided preemption. Not only did Petitioner initially address preemption only in a California-resident case that was set aside by the court when it ordered Generic Defendants to direct the challenge at plaintiffs' master complaint, but also repeatedly raised personal jurisdiction in status conferences and every filing. The defense was reserved with the court's and plaintiffs' counsel's concrete assurances that there had been and would be no waiver of the defense.

Now, Respondent tries to repaint the canvas. While facts are relevant in a personal jurisdiction inquiry, Respondent recitation of the "facts" demonstrates—in shining colors—not only the fallacy of her arguments, but also the lack of due process afforded Petitioner. As did the trial court, Respondent treats the JCCP as a single, individual lawsuit. It is not. She attributes actions taken in the JCCP as actions

taken in her (and every other) individual lawsuit. They were not. She treats the separate defendants as a single entity. They are not. And, she conflates the chronology to make it appear all the lawsuits transferred to the JCCP were filed and active from the outset. They were not.

- The JCCP is an amalgamation of individual lawsuits involving common questions before a single judge in a single courtroom.

- Actions, discussions, and hearings in the JCCP might impact individual lawsuits, but they are not taken in those individual lawsuits.

- There were more than a dozen defendants in the JCCP. Some, the manufacturers of the brand-name drug ("Brand Defendants"). Others, the manufacturers of the generic version of the drug ("Generic Defendants"). And, still others, distributors of the drugs. The claims and course of the proceedings differed as to those groups of defendants.

- When the JCCP was formed, there were but 21 lawsuits pending that became part of it. Respondent's was not one of those 21.

It's easy to say Petitioner "was provided ample opportunity" and "instructed by Respondent Court at the outset of the coordination in 2010 and 2011 to address personal jurisdiction issues," (Opp., p. 2), if one ignores salient facts: The September 8, 2010, hearing Respondent cites (*id.*, pp. 5, 24-25) occurred weeks before the motion to coordinate the cases was

granted forming the JCCP and months before Respondent's lawsuit was filed on January 20, 2011. Even the "two-day motion-o-rama," (January 5 and 6, 2011) that Respondent tells this Court was set to hear whatever responses were filed to the complaints that were pending *at that time*, was scheduled *before* Respondent's lawsuit was filed. Clearly, Petitioner could not have moved to quash Respondent's lawsuit for lack of personal jurisdiction *before* it was filed.

By January 5, 2011, when the first hearing in the JCCP was held, this Court had granted the petition for writ of certiorari in *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011). As a result, the trial court continued the stay in all lawsuits involving Generic Defendants. That too occurred *before* Respondent's lawsuit was filed. So, to say Petitioner had "ample opportunity" to "address personal jurisdiction issues," is, putting it mildly, a sleight of hand. Petitioner's window to address personal jurisdiction closed in Respondent's lawsuit (and the vast majority of other lawsuits in the JCCP) before it opened—as lawsuits like Respondent's were filed and transferred to the JCCP, they automatically became subject to the court's stay as to Generic Defendants.

Meanwhile, the lawsuits against Brand Defendants proceeded, which leads to another of Respondent's sleights of hand—pretending that case management orders and discovery involved Generic Defendants. They did not. While the litigation was stayed as to Generic Defendants awaiting the decision in *Mensing*, activity continued as to Brand Defendants. Case management orders were entered that applied *only* to Brand Defendants and discovery

proceeded between *only* Brand Defendants and plaintiffs. Throughout, Generic Defendants were inactive, first waiting for *Mensing* and thereafter following the trial court's direction to address *Mensing*'s impact on its subject matter jurisdiction. And although Brand Defendants actively pursued the litigation, when the court's third case management order ("CMO3") was issued, it included a very telling provision: It specifically provided that the filing of a master answer to plaintiffs' master complaint "does not constitute an appearance by any Brand Defendant in any action." (App. 54.) In other words, an act deemed a "general appearance" (i.e., filing an answer to a complaint, here plaintiffs' master complaint in the JCCP), which Respondent claims constitutes consent to the court's exercise of personal jurisdiction (and waiver of the defense) was specifically carved out as a general appearance in any individual action. So, while Respondent now claims the "Jurisdiction" provision in the first case management order constituted Petitioner's "consent" to personal jurisdiction, that same provision clearly did not constitute consent when CMO3 was entered. Nor did any of the activity—negotiating case management orders, participating in discovery, filing motions—Respondent now points to as constituting Petitioner's "general appearance" constitute a "general appearance" by Brand Defendants. Respondent does not, and cannot, explain that discrepancy.

CMO3 also provided that "any action that is the subject of a [short-form complaint] shall be stayed as to all non-Brand defendants" (App. 55), and provided that those complaints would be served on Brand Defendants only. Similarly, CMO3's discovery provi-

sions applied solely to plaintiffs and Brand Defendants. The "burden on the plaintiffs" that Respondent claims was imposed (Opp. p. 11) was a direct result of the continuing litigation with Brand Defendants. It would have occurred with or without Petitioner's or any Generic Defendant's presence in any lawsuit. Respondent's contention that plaintiffs were "burdened" by Generic Defendants has no factual support.

Respondent's next sleight of hand also is belied by the record. Petitioner raised the personal jurisdiction issue long before May 2014. While Respondent contends Petitioner's assertion that personal jurisdiction was raised at the same time *Mensing* was discussed in July 2011 is "astonishing" because the assertion is uncorroborated, it is notable that plaintiffs never submitted any declaration disputing Petitioner's counsel's declaration establishing that personal jurisdiction was raised during the court's "cookie lunch" the day before the formal status conference on July 25, 2011. The most plaintiffs did then, and do now, is complain that the issue does not appear on the formal record. Yet, in keeping with the fact, and further corroborating that the issue indeed was raised and understood by the court, are the repeated reservations of Generic Defendants' personal jurisdiction defenses and the repeated references—on the record—by both plaintiffs' counsel and the court that personal jurisdiction was reserved for a later time. (App. 32, 33, 50, 59, 67, 69, 71-72, 82.) What is truly "astonishing" is Respondent's attempt to rewrite the factual record.

Notable in that regard is Respondent's claim that plaintiffs' counsel's statements that personal jurisdiction arguments were preserved and would be addressed later (all clearly documented in the record), were made "in the context of preserving subject matter and not personal jurisdiction." (Opp., p. 31.) Now, it is somewhat curious why the court and plaintiffs' counsel would agree to "preserve subject matter jurisdiction" for later when (1) subject matter jurisdiction is not waivable; (2) courts are required to assess their subject matter jurisdiction, sua sponte if necessary; and (3) the court specifically and consciously chose to address *Mensing* first precisely because the court concluded it bore on the its subject matter jurisdiction. Respondent's nonsensical recreation highlights the lack of candor and lack of weight due Respondent's "factual recitation" and arguments.

C. The Issues Relate to the JCCP Court's Utter Failure to Perform a Constitutional Due Process Analysis

According to Respondent, Petitioner's due process rights were not violated. Notably, Respondent does not dispute that the trial court never applied this Court's requirements for consent or waiver when it blithely pulled Petitioner's constitutional rights out from beneath it. Nonetheless, Respondent contends that the trial court's decision to imply consent and waiver in every individual lawsuit based on Petitioner's forced participation in the JCCP "do[es] not offend the notion of fair play and substantial justice." (Opp., p. 33.) It most surely does.

Respondent ignores this Court's test for waiver of constitutional rights and instead improperly relies on California rules and law relating to individual lawsuits to argue Petitioner waived its right to challenge personal jurisdiction. Respondent argues the wrong test because she cannot satisfy the right one. The circumstances surrounding Generic Defendants' filing of the *Mensing* challenges do not satisfy this Court's test for waiver, which requires an "intentional relinquishment or abandonment of a known right or privilege." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Nor do they satisfy the test for consent, which requires explicit consent. *J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (plurality opinion). Implied consent is merely a fiction, *see id.* at 900-901 (Ginsburg, J., dissenting) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *Burnham v. Superior Court,* 495 U.S. 604, 618 (1990) (plurality opinion)), and constructive consent is not "commonly associated with the surrender of constitutional rights." *College Sav. Bank*, 527 U.S. at 681 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). It cannot be said that Petitioner intentionally and knowingly abandoned rights or explicitly consented to the court's jurisdiction when it repeatedly invoked those rights and was assured repeatedly they were preserved.

To evade the due process issue, Respondent distorts state law. She claims the *Mensing* challenges constituted a "general appearance" in individual lawsuits. But, the rules governing JCCPs vest the court

with power to "[o]rder any issue or defense be tried separately and before the trial of the remaining issues when it appears the disposition of any of the coordinated actions might be expedited thereby." Cal. R. Ct. 3.541(b)(3). The Judicial Council's rules prevail over conflicting provisions applicable to civil actions generally. Cal. Civ. P. Code §404.7; Cal. R. Ct. 3.504(b). In short, the JCCP Court was authorized to defer personal jurisdiction while it entertained preemption and resolved its concerns about subject matter jurisdiction. *See McGhan Med. Corp. v. Superior Court*, 11 Cal. App. 4th 804, 812, 814 (1992) (noting coordination judge has authority to address issues in order most likely to ease logjam of cases through judicial system and permit uniform and centralized resolution on appeal). Moreover, Respondent's assumption that the term "general appearance" is somehow synonymous with waiver of a constitutional right lacks any basis. The Court has enunciated the test for the latter. And, the former is a state court procedural determination that must satisfy Due Process constraints.

The same is true of Respondent's suggestion that Petitioner waived personal jurisdiction in pursuing appellate review in the California courts. Following denial of the demurrer, the trial court's reservations about subject matter jurisdiction persisted and it encouraged immediate appellate review of its decision. Respondent attempts to conjure waiver and consent out of the listing of all plaintiffs in the appeal. (Opp., pp. 13-14.) California writ procedures, however, require that the real parties in interest be identified on a petition for writ of mandate. That meant every

plaintiff whose lawsuit was coordinated into the JCCP had to be listed.

It similarly is incorrect that Petitioner invoked the forum court's jurisdiction. (Opp., p. 23.) Again, after expressing concern about its subject matter jurisdiction over claims against Generic Defendants, the JCCP Court directed Generic Defendants to file a demurrer to the master complaint. They did so under California Code of Civil Procedure §430.10(a), which is a direct challenge to the court's subject matter jurisdiction. Respondent's attempt to contort the court's decision to address subject matter jurisdiction before the case-specific issues of personal jurisdiction into a waiver and consent to personal jurisdiction is contrary to fact and light years away from conduct this Court says constitutes a waiver of constitutional rights. Generic Defendants followed the court's direction and relied on repeated assurances that personal jurisdiction would be addressed later. Petitioner cannot be punished for complying with the court's directives and relying on the court's assurances.

This Court should grant this petition to make clear that it violates due process to strip a party of its constitutionally protected rights in individual lawsuits and subject it to a court's jurisdiction for following a judge's direction in mandatory coordination proceedings.

D. The Petition Presents a Live Controversy

The conditional global settlement of the lawsuits in this JCCP, as well as those pending in other

states' mass tort programs and stand-alone lawsuits has not been finalized. The fact Respondent has "accepted" the settlement terms is of no legal consequence. Until all settlement conditions are satisfied, this case remains a live controversy. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 670 (2016) ("An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect." (citation and internal quotation marks omitted)). As it is unknown whether those conditions will be met, Respondent's "acceptance" of the settlement terms does not render this case moot and is not grounds for denying the petition.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Jeffrey F. Peck
Counsel of Record
Linda E. Maichl
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, Ohio 45202
jpeck@ulmer.com
lmaichl@ulmer.com
Tel: 513-698-5000
Counsel for Petitioner PLIVA, Inc.