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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: MCKINSEY & CO., INC. NAT'L. PRESCRIPTION OPIATE CONSULTANT LTGN.	:	Judge Charles R. Breyer
	:	21-MD-2996-CRB

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ("AG Settlement Motion") BY *AMICI CURIAE* STATES OF OHIO, ARKANSAS, CONNECTICUT, IDAHO, INDIANA, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NORTH DAKOTA, AND TEXAS

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STATEMENT OF INTEREST OF AMICI CURIAE

States Attorneys General serve a critical role in American courts, and in our federated system of government. The claims advanced in this and similar MDLs interfere with, and attempt to usurp, that role. Resolution of Multi-State claims against McKinsey and other actors involved in the prescription opiate industry were significantly delayed, complicated, and/or devalued because of the complaints consolidated into this MDL and the companion MDL in the Northern District of Ohio.

In short, we are entering an era where phalanxes of political subdivisions file salvos of copy-cat complaints to Multi-State actions seeking duplicative remedies to gain a seat at the table when State AGs combine to confront industries and actors who have contributed to difficult societal problems. These political-subdivision complaints (here consolidated into an MDL), and the resulting mountains of fees claimed by private counsel, become a costly scourge on these classes of suits, the courts, and indeed, on our government structure—because the political subdivisions seek to leverage litigation to gain powers and authorities not afforded them under the respective State Constitutions or statutes that create them. As eloquently stated by Justice Kennedy, the atom of sovereignty was split in two. Equally definitively, but not as eloquently, the Supreme Court has said, two component parts, but not three. *United States v. Kagama*, 118 U.S. 375, 379 (1886) ("There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other

organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.")

If this Court countenances this interference, the role of States Attorneys General will be handicapped in all future litigation where brilliant and capable Plaintiffs' attorneys' rent-seeking[1] will align with the desire of local governments to obtain funds free-and-clear from the normal purse-strings-control of State legislatures. See NAAG Ltr. Brief of amici 37 State Attorneys General (Feb 24, 2020) (available at: https://ag.ks.gov/docs/default-source/documents/2-24-20-naag-letter-to-polster.pdf?sfvrsn=2890ad1a_2)

As a matter of constitutional structure, Federal courts may not serve as tools for political subdivisions to restructure the internal workings and distribution of powers of a State. As a matter of judicial economy, the addition of tens of thousands of additional plaintiffs, with different powers, damages, liability theories, and subject to different defenses—and most important for the attorneys, attorney-fee

[1] The rent-seeking takes two forms: 1) it allows attorneys not retained to represent a certain State, to obtain attorney-fees from relief afforded to that State; and 2) representing political subdivisions may afford higher rates of attorney fees in States that either have TPAC fees limits at the State level, but not at the subdivision level, or where the State AG negotiates lower rates than the subdivisions.

This highlights a different problem not before the court. Because there is a limited pool of attorneys in these claims, many firms, often many attorneys, are representing both political subdivisions and States, creating material, perhaps unwaivable, conflicts of interest for the lawyers.

structures—turns a feasible, if intricate, negotiation between corporate defendant(s) and up to 57 States and territories, into an interminable quagmire. As a matter of facts on the ground, available settlement dollars are often finite—and not adequate to fully remedy the harm. Delayed and devalued settlements cause damages to balloon before an increasingly inadequate remedy can be implemented. In other words, these cases harm our system of government, needlessly clog the courts, and result in a delayed and less-effective remedy. Allowing political subdivisions to usurp the role of States Attorneys General is universally bad. The problem will only grow worse if this Court does not act early to rule that a State can indeed provide the "universal peace" of extinguishing all claims, present or future, brought by the State and its component parts.

The AG Settlement Motion should be granted for multiple reasons. First, as articulated above, political subdivisions lack standing to assert claims that belong to the States and to Attorneys General. Second, the terms of the Settlement Agreement released the claims of political subdivisions for most, if not all, States.[2] Attorneys

[2] While some states may grant subdivisions standing to bring certain claims, those grants of authority do not generally transfer the authority to the political subdivision. As a basic proposition of agency law, granting an agent limited authority to act for the principal, does not prevent the principal from acting for itself. Amici do not seek to analyze the governmental structure of each State to ascertain whether there are outlier States that have forfeited the right to bring certain claims to their subdivisions.

General, have the authority to release claims of even nonconsenting subdivisions. Third, the subdivisions seek duplicative recovery for the same societal harms McKinsey already compensated the States. Basic principles of tort law prohibit multiple claims for the same harm.

Fourth, the dollars subdivisions seek to recover are significantly comprised of "pass-though" dollars that came through the States, meaning that not only is the injury generally the same, but the precise monetary expenditures claimed by political subdivisions have been remedied. To allow these claims to advance would be like permitting an insured to bring claims against a tortfeasor for damages for which the insured was previously compensated by an insurer; and where the insurer had already settled with, been compensated by, and released, the tortfeasor. Putting aside the structural-constitutional concerns presented by these case, even basic subrogation law bars these claims.

Amici States Attorneys General are interested in preserving the structural constitution provisions setting forth the dominion of States over their internal governance; maintaining their ability to successfully bring, litigate and resolve Multi-State matters; and protecting their ability to resolve complex matters without undue delay, cost, or diversion of funds.

STATEMENT OF THE CASE

There are no shortcuts around state sovereignty. A State must be able to speak with one voice for *all* its component parts when it so chooses. The *amici* States have already resolved claims against McKinsey for broad harms to "the prosperity and welfare of a State"—the kinds of harms that the Supreme Court has said the States may vindicate for their people. *Georgia v. Pa. R. Co.*, 324 U.S. 439, 450 (1945). Political Subdivisions may not. *Cmty. Commc'ns Co. v. Boulder*, 455 U.S. 40, 54 (1982).

To protect their States' sovereignty, amici request the motion to dismiss be granted. The claims advanced in the McKinsey MDL threatens amici's sovereignty in two ways: First by allowing political subdivisions to diminish the role that each State occupies, through its Attorney General, as the chief law enforcement officer of each State; and Second, by usurping each State's right to control its own, often identical, claims in its chosen forum. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607, 73 L. Ed. 2d 995, 102 S. Ct. 3260 (1982).

Unlike States, political subdivisions are not sovereigns. Our Republic's structure is *dual*, not triple, and that dual structure "has no place for sovereign cities" (or counties). *Cmty. Commc'ns Co. v. Boulder*, 455 U.S. 40, 54 (1982). "There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived

from, or exist in, subordination to one or the other of these." *United States v. Kagama*, 118 U.S. 375, 379 (1886). A political subdivision "may not sue to enforce its residents' rights—'courts have consistently held that municipalities are not vested with the power to protect their residents' interests under the theory of parens patriae.'" *Jackson v. Cleveland Clinic Found.*, No. 1:11 CV 1334, 2011 U.S. Dist. LEXIS 101768, at *17-18 (N.D. Ohio Sep. 9, 2011) (citation omitted).

As the recent settlements show, amici's concern for their sovereignty is not a theoretical exercise about the fallout from "splitting the atom of sovereignty." *Alden v. Maine*, 527 U.S. 706, 751 (1999) (internal punctuation and quotation marks omitted). The political subdivisions seek to assert duplicative claims that the States have already released through settlement, seeking damages and remedies already obtained by the States. Res judicata applies. Thus, allowing these suits to proceed would jeopardize each State's control of the response to the opioid epidemic, and violate state law. *See, e.g., Am. Fin. Servs. Ass'n v. City of Cleveland*, 2006-Ohio-6043, ¶ 55, 112 Ohio St. 3d 170, 181, 858 N.E.2d 776, 787 (Political subdivisions may not 'impinge upon matters which are of a state-wide nature or interest.' *State ex rel. Hackley v. Edmonds* (1948), 150 Ohio St. 203, 212, 37 O.O. 474, 80 N.E.2d 769.").

BACKGROUND

The amici States settled claims against McKinsey for the very injury alleged by the MDL plaintiffs. On February 4, 2021, amici States as part of a coalition of

47 states, the District of Columbia, and 5 territories entered a $573 million settlement with McKinsey regarding its liability for advising pharmaceutical companies on marketing and sales strategies for opiates.

In its settlement agreement and consent judgment, Ohio, and other settling states, provided the following release:

> Released Claims. By its execution of this Order, the State of Ohio releases and forever discharges McKinsey and its past and present officers, directors, partners, employees, representatives, agents, affiliates, parents, subsidiaries, operating companies, predecessors, assigns and successors (collectively, the "Releasees") from the following: ***all claims the Signatory Attorney General is authorized by law to bring arising from or related to the Covered Conduct***, including, without limitation, any and all acts, failures to act, conduct, statements, errors, omissions, breaches of duty, services, advice, work, engagements, events, transactions or other activity of any kind whatsoever occurring up to and including the effective date of the Order. Released claims will include, without limitation, claims that were or could have been brought by a Settling State under its State's consumer protection and unfair trade practices law, RICO laws, false claims laws and claims for public nuisance, together with any related common law and equitable claims for damages or other relief.

(See Agreed Entry and Final Judgment Order, at 15-16, attached to the Cheifetz Decl. at Ex. II) Covered Conduct was defined as:

> "Covered Conduct" means any and all acts, failures to act, conduct, statements, errors, omissions, events, breaches of duty, services, advice, work, deliverables, engagements, transactions, or other activity of any kind whatsoever, occurring up to and including the Effective Date arising from or related in any way to (i) the discovery, development, manufacture, marketing, promotion, advertising, recall, withdrawal, distribution, monitoring, supply, sale, prescribing, use, regulation, or abuse of any opioid, or (ii) treatment of opioid abuse or efforts to combat the opioid crisis, or (iii) the characteristics, properties, risks, or benefits of any opioid, or (iV) the spoliation of any materials in connection With or concerning any of the foregoing.

(Id. at 3-4). The release excepted claims by individuals, criminal liability, and certain other claims, but did not except claims by political subdivisions.

The very first paragraph of the Master Complaint (Subdivision) makes clear that the political subdivisions seek relief for the same harms:

> 1. For more than two decades, the opioid crisis has raged across this country. An opioid-related public health emergency was declared by the President in 2017. Last year was the worst on record, with drug overdoses soaring nearly 30%. Today, there are increasingly few Americans whose lives have not been affected by the consequences of opioid dependency, addiction, and overdoses.

[Doc Id. 296] The Master Complaint identifies the harm to the subdivisions at paragraph 541, as diversion of public funds, increased healthcare and medical care spending, increased costs of fielding first responders, naloxone expenses, increased mental health expenditures, increased jailer expenses, property damage, increased drug crimes, increased numbers of children needing services, and needle/syringe related expenses and public harms. Again, these are claims that States can bring.

Recognizing the thin reed upon which their claims are based, the very next paragraph disclaims bringing claims for harms to individuals (parens patriae style claims), or for "harm or damages incurred … by the Plaintiffs' States." Id. at ¶ 542. What this glosses over is that the subdivisions are subdivisions of the States. There is and can be no harm or damage incurred by a subdivision that is not incurred by the State—just as there is no harm suffered by an arm that is not suffered by the

whole body. And while a State may elect to treat and resolve harm to various subdivisions, agencies, state hospitals or universities separately, when it elects to treat them together, the subdivisions cannot protest.

To exemplify the rent-seeking, pile-on approach, a menagerie of 58 Ohio counties, cities, villages, townships and fire districts filed a single complaint against McKinsey on March 4, 2021, exactly one month after the AG Settlement was announced, albeit a 28-day month. *See, Montgomery Cty. Ohio v. McKinsey & Co., Inc.*, No. 1:21-op-45037-DAP. These claims were not even asserted until after Ohio released them.

The Ohio political subdivisions assert nearly identical claims, and pursue the same relief. Many of these claims may only be brought by the State.

The District Court judge overseeing the related prescription opioid MDL acknowledged that the real beef that the subdivisions have is with the States:

> ***The problem*** is that in a number of States money that is, that a State Attorney General obtains, either by victory in court, litigated judgment, or settlement, goes into the general funSAd. ***And the men and women who control what happens in the general fund are the elected state representatives and senators.*** That's what they do. And that's what happened in the tobacco litigation. Over $200 billion, far more than 90 percent of that was used for public purposes totally unrelated to tobacco smoking, lung cancer, whatever. And I believe that's why we have all these counties and cities that filed separate lawsuits, to make sure that doesn't happen again. … ***[Any settlement] has to address the problem of putting money into the state general funds or else it isn't going to fly***.

[Nat'l. Prescription Opiate Ltgn., MDL 2804, N.D.OH Aug. 6, 2019 Trans. at 54:12-55:6](emphasis added). In other words, the political subdivision cases are designed to shift the control of any recovered funds from State to local officials.

Not only is this a political question. It is a *State* level political question. The federal courts are not open territories for political subdivisions to do end-runs around State imposed fiscal restraints—even ones the federal courts find to be "the problem." More to the point, once a State settles these competing claims, the corresponding claims of political subdivisions are extinguished, unless expressly preserved.

ARGUMENT

A. The asserted claims invade State sovereign interests and seeks duplicative recovery from the same defendant.

The prejudice to amici States here is both as fundamental as the structure of the Republic and as prosaic as the problem of distributing funds among plaintiffs.

Structural sovereignty. Allowing these claims to advance would threaten States' sovereign interest in vindicating their citizens' rights—*all* of its citizens' rights—when confronted with societal harms. Statewide, collective harms are not rights that political subdivisions can litigate or settle—especially when the State already has.

The Supreme Court long ago described the grand architecture of the Republic. "The soil and the people within these limits are under the political control of the

government of the United States, or of the states of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies, with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these." *United States v. Kagama*, 118 U.S. 375, 379 (1886). Political subdivisions are not sovereigns, but are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. at 607 (1991).

The States have "extraordinarily wide latitude" in "creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). This "near-limitless sovereignty" to "design [a] governing structure as it sees fit," means that a State "may give certain powers to cities, later assign the same powers to counties, and even reclaim them for itself." *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary (BAMN)*, 572 U.S. 291, 327 (2014) (Scalia, J., concurring). States' choices about "[w]hether and how" to give power to political subdivisions "is a question central to state self-government." *City of Columbus v. OursGarage & Wrecker Serv.*, 536 U.S. 424, 437 (2002). This structuring is a key part of how "a State defines itself as a sovereign. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). In short: "Ours is a 'dual system of government,' . . . which

has no place for sovereign cities." *Cmty. Commc'ns Co. v. City of Boulder, Colo.*, 455 U.S. 40, 53 (1982) (citation omitted).

The fact that the State, and not its subdivisions, provides the cornerstone of sovereignty has consequences for litigation. A State's sovereignty means it may, as "a representative of the public," sue to right a wrong that "limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States." *Georgia v. Pa. R. Co.*, 324 U.S. 439, 450-51 (1945); *cf. Thornton v. State Farm Mut. Auto Ins. Co.*, No. 1:06-cv-00018, 2006 U.S. Dist. LEXIS 83972 (N.D. Ohio Nov. 17, 2006) (denying class certification in view of defendant's settlement with multiple states' attorneys general).

To protect their people, States have, for example, "represent[ed] the interests of their citizens in enjoining public nuisances." *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 603 (1982). States have also succeeded in protecting their citizens' economic interests. *See id*; *Georgia v. Pa. R. Co.*, 324 U.S. 439. The States have, the Court has said, "a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp*, 458 U.S. at 607. If that health and well-being are injured, "'the *State* is the proper party'" to vindicate and protect the citizens' interests. *Id.* at 604 (citation omitted) (emphasis added).

This same point shows up in both decisions recognizing a state attorney general's unique role in protecting a State's citizens, and in positive-law provisions giving attorney generals the power to vindicate state interests. Court decisions, for example, favor attorney-general suits over class actions, and deny political-sub-division intervention in a State's lawsuit. *See, e.g., Envtl. Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) (per curiam) ("[A] state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens."); *Thornton*, 2006 U.S. Dist. LEXIS 83972, at *8. In positive law, a State's Attorney General is often empowered to vindicate the peoples' common interests in consumer-protection laws, antitrust restrictions, or public-nuisance abatement. *E.g.* Ohio Rev. Code §1345.07(A); Ohio Rev. Code §109.81(A); §3767.03; Ohio Rev. Code §3719.10. Ever federal statute that includes the words 'parens patriae' recognizes only a State's Attorney General's power to act on behalf of its citizens. *E.g.* 12 U.S.C. §5538; 15 U.S.C. §§15c-15h, 45b-45c, 6103, 6309, 6504; 18 U.S.C. §§248, 1595; 42 U.S.C. §1320d(d); 49 U.S.C. §14711. No federal statute affords similar standing to a political subdivision.

States are prejudiced in another way if these subdivision claims are permitted to advance. "[I]f courts consistently allow parallel or subsequent class actions in spite of state action, the state's ability to obtain the best settlement for its residents may be impacted, since the accused may not wish to settle with the state only to have

the state settlement operate as a floor on liability or otherwise be used against it." *Thornton v. State Farm Mut. Auto Ins. Co*., No. 1:06-cv-00018, 2006 U.S. Dist. LEXIS 83972, at *8 (N.D. Ohio Nov. 17, 2006). A parallel MDL on behalf of political subdivisions is equally offensive. Political subdivision MDLs have made settlement more difficult for the States. The multistate settlement with opioid distributors was delayed for years because of the competing claims from political subdivisions pending in MDL. See NAAG Ltr. Brief of 38 State Attorneys General, (MDL 2804 Doc ID 1951)(July 23, 2019). As Judge Polster acknowledged, "Now it's easy to set -- establish a team of 50 AGs. It's 50 men and women. That kind of team has been put together in lots of other lawsuits very effectively. They were here from the beginning. It's not so easy with 2000 litigating cities and counties and potentially 20 or 30,000 others." (MDL 2804 Trans. at 48:9-14)

State Attorney Generals make better plaintiffs. *In re Glenn W. Turner Enters. Litig.*, 521 F.2d 775, 779 (3d Cir. 1975) (reversing order in a multi-district class action that interfered with a state attorney general's prior litigation against the same defendant). *cf.* 5 James Wm. Moore et al., Moore's Federal Practice §23.46[2][c] (3d ed. 2007) ("Some courts … precluded class action litigation where there is some reason to believe that the attorney general may pursue similar relief."); *Thornton*, 2006 U.S. Dist. LEXIS 83972 (denying class certification in view of defendant's settlement with multiple states' attorneys general).

Unlike political subdivisions, States have standing to sue "without regard to proximate cause." *Allegheny Gen. Hosp. v. Philip Morris*, 228 F.3d 429, 436 (3d Cir. 2000). As parens patriae, a State has standing to assert claims based on harms to the health and welfare of its citizens. *Snapp*, 458 U.S. at 607; *see also Georgia*, 324 U.S. at 447; *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 131 (9th Cir. 1973). A State's ability to bring such claims—and its political subdivisions *inability* to do so—means that a State is better able to seek justice for its citizens.

Second, the State can maintain claims otherwise barred by statutes of limitations. Statutes of limitations generally do "not apply as a bar to the rights of the state." *State v. Sullivan*, 38 Ohio St. 3d 137, 138 (1988). But, because "the rule is an attribute of sovereignty only, it does not extend to townships, counties, school districts or boards of education, and other subdivisions of the state." *Id*. at 139; *State ex rel. Bd. of Edn. v. Gibson*, 130 Ohio St. 318, syll. para. 2 (1935). As with proximate-cause defenses, the State is able to avoid limitations defenses that might block political subdivisions from recovering. In other words, States can collect damages for political subdivisions that are otherwise unavailable to the subdivisions.

B. Attorneys General May Resolve Claims on Behalf of Political Subdivisions Without Their Consent

As Chief Law Officers, State Attorneys General have broad powers and authorities. "[T]he attorneys general of our states have enjoyed a significant degree of

autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest." *Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268-69 (5th Cir. 1976). State Attorney General "powers extend to institution of suits under federal law without specific authorization of the individual government entities who allegedly have sustained the legal injuries asserted …." *Id*. at 274.

The multistate settlement of opiate related claims against McKinsey, including releasing the claims of instrumentalities of the State, is an invocation of the Statewide Concern Doctrine. This doctrine represents an exception to local "home rule" and gives the State authority over local matters where those local matters impact the general public. "[E]ven if there is a matter of local concern involved, if the regulation of the subject matter effects the general public of the state as a whole more than it does the local inhabitants the matter passes from what was a matter for local government to a matter of general state interest." *Cleveland Electric Illuminating Co. v. Painesville*, 15 Ohio St. 2d 125, 129,239 N.E.2d 75, 78 (1968). *See also, Complaint of City of Reynoldsburg v. Columbus S. Power Co.*, 2012-Ohio-5270, ¶

35, 134 Ohio St. 3d 29, 37, 979 N.E.2d 1229, 1237. The opioid crisis is of national scale. It is only appropriate for State Attorneys General to utilize the statewide concern doctrine to confront it as part of a Multistate settlement.

Nor is this novel. An excellent example of this come from the dairy industry. Over the course of the last several decades, there have arisen various kerfuffles over the price of milk, including allegations of price gouging, bid rigging, antitrust and the like. Several of these allegations focused on "school milk" pricing. Because of federal mandates the demand for school milk has historically been inelastic, leading to opportunities for price manipulation. This ultimately led to a case very instructive to the present motion.

In *Nash Cty. Bd. of Ed. v. Biltmore Co.,* a county board of education antitrust suit against various local and national dairies found the barndoors closed to its claim by an earlier settlement by the North Carolina Attorney General. 640 F.2d 484 (4th Cir. 1981). The AG's suit sought relief for damages suffered by all public-school districts in the State. Shortly after the Attorney General entered a consent decree with the dairies, the Nash County Board of Education brought its independent action. The District Court granted summary judgment in favor of the defendants on the basis of res judicata. *Id*. at 486. On appeal, the school district claimed it could not be bound to the consent decree because it did not consent. The Fourth Circuit found the Attorney General's consent to more than suffice. *Id*. at 487.

The *Biltmore* court directly confronted the issue of whether a State Attorney General could settle a claim on behalf of a political subdivision through the lens of privity. "At common law, an attorney general, in the absence of some restriction on his powers by statute or constitution, has complete authority as the representative of the State or any of its political subdivisions to recover damages (whether under state or federal law) alleged to have been sustained by any such agency or political subdivisions, even though those subdivisions may not have affirmatively authorized suit." *Id*. at 494. The court reasoned that because the claims asserted by each were for the same conduct, the same injury, and sought similar relief, the parties were in privity and res judicata applied. *Id*. 495.

The Fourth Circuit readily dismissed the school district's argument that because it had independent statutory authority to bring litigation on its own behalf, the attorney general could not. "It would seem self-evident that common sense dictates that when an alleged wrong affects governmental units on a state-wide basis, the state should seek redress on their behalf as well as on its own rather than parceling out the actions among local agencies." *Id*. at 496. This is precisely what occurred here. As part of a multistate settlement, State Attorneys General resolved their own claims and those of their political subdivisions.

When the school district protested that the Attorney General did not consult with it, the Fourth Circuit explained that the concept was "almost ludicrous," in a

manner which foretold the quagmire that awaits this court if it denies the motion, and that was created in MDL 2804:

> The Attorney General as legal representative of the sovereign and its constitutional subdivisions had both common law and statutory power to bind the State and the subdivisions by his acts. Moreover, it goes without saying that the Attorney General is not limited in his authority to settle or compromise claims by a requirement of consultation with those agencies which might be tangentially affected by a proposed settlement. Here the claims involved both the State and numerous school districts. To impose a requirement that the Attorney General to whom authority was granted expressly by statute, must consult with and obtain the consent of every school district before he may exercise his statutory authority would not only be a voiding of the Attorney General's statutory authority but, in addition, would be the creation of a cumbersome system leading to almost ludicrous results. By engrafting this restriction upon the Attorney General's authority, the State's legal representative, in attempting to exercise his statutory authority, would be buffeted from hither to yon according to the whims of various local agency directors. Clearly the Attorney General's failure to consult with the Board prior to settlement in no way denigrates the legal significance of the consent decree.

Id. This one paragraph concisely and persuasively explains the error of the subdivision plaintiffs here. Their claims have been resolved by their superior States, on a statewide basis. The subdivisions are powerless to interfere or demand their own separate or additional remedy. "Justice and judicial economy is best served by having the largest governmental unit sue on behalf of all its parts rather than having multiple suits brought by various political subdivisions within the State." *Illinois v. Associated Milk Producers, Inc*., 351 F. Supp. 436, 440 (N.D. Ill. 1972).

CONCLUSION

Federal courts should "pause" before "intrud[ing] into the proper sphere of the States." *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring). By requesting that this motion be addressed preliminarily, this Court is conducting such a pause. Here, allowing political subdivisions to advance claims that State's have already resolved on a statewide basis would be a perilous intrusion. After reviewing the briefing on this matter, Amici States hope the Court concludes that the Motion to Dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this Memorandum was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Charles Miller
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