No. 12-1036

IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a state's *parens patriae* action is removable as a "mass action" under the Class Action Fairness Act when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common-law authority to assert all claims in the complaint.

PARTIES AND RULE 29.6 STATEMENT

In addition to the parties listed in the caption, Respondents include AU Optronics Corporation America, Incorporated; Chi Mei Corporation; Chimei Innolux Corporation, formerly known as Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Incorporated, formerly known as International Display Technology USA, Incorporated; CMO Japan Company, Limited, formerly known as International Display Technology, Limited; Hannstar Display Corporation; LG Display Company, Limited, formerly known as LG Phillips LCD Company, Limited; LG Display America, Incorporated, formerly known as LGD LCD America, Incorporated; Samsung Electronics Company LTD; Samsung Semiconductor, Incorporated; Samsung Electronics America, Incorporated; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Company, Limited, formerly known as Toshiba Matsushita Display Technology Company, Limited; Toshiba America Electronic Components, Incorporated; Toshiba America Information Systems, Incorporated; and Chunghwa Picture Tubes Ltd. The following parties were Defendants below but since have been voluntarily dismissed in the District Court: Hitachi, Limited; Japan Display East, Incorporated; and Hitachi Electronic Devices (USA), Incorporated.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Fifth Circuit (Pet. App. 1a–22a) is reported at 701 F.3d 796. The decision of the U.S. District Court for the Southern District of Mississippi (Pet. App. 23a-60a) is reported at 876 F. Supp. 2d 758.

JURISDICTION

The Fifth Circuit issued its decision on November 21, 2012 (Pet. App. 1a) and its Judgment and Mandate on the same date. *Id.* at 62a. The Fifth Circuit also issued an order denying rehearing on February 4, 2013. *Id.* at 63a-65a. The Petition for Writ of Certiorari was filed on February 19, 2013, and granted on May 28, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, is reproduced in full in the Joint Appendix, J.A. 52a-70a, with statutory provisions at J.A. 71a-91a. As most relevant here, CAFA provides:

> **(11)**
>
> **(B)**
>
> **(i)** As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711 (2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact,

except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

. . .

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)

(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

28 U.S.C. §1332.

Relevant provisions of the Mississippi Antitrust Act, Miss. Code § 75-21-1 *et seq.*, and the Mississippi Consumer Protection Act, *id.* at § 75-24-1 *et seq.*, are set forth at Pet. App. 66a-76a.

STATEMENT OF THE CASE

The question presented is whether the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, should be interpreted as eliminating the authority of a state attorney general, acting as the chief legal officer of a State, to bring a *parens patriae* action in state court, even when the State is the only plaintiff, the claims arise solely under state law, and the state attorney general has statutory and common-law authority to assert the claims.

The Fifth Circuit incorrectly held that CAFA makes state attorney general actions removable to federal court as so-called "mass actions" and thereby effects an extraordinary invasion into state sovereign prerogatives. Every other Court of Appeals to have considered the question has properly rejected the Fifth Circuit's interpretation of CAFA.

CAFA's text and structure make clear that state *parens patriae* suits are not "mass actions" under CAFA. If there were any doubt, principles of federalism would compel that removal statutes be narrowly construed. The tradition of *parens patriae* actions and the longstanding "real party in interest" test also confirm that the State is properly the sole plaintiff in an attorney general suit.

A. The CAFA Statute.

CAFA creates original jurisdiction in the federal districts pursuant to the diversity jurisdiction statute over "class actions" and "mass actions."

CAFA defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil

Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action" that seeks over $5,000,000 in aggregate damages. 28 U.S.C. § 1332(d)(1)(B), (d)(2)(A). *See generally Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

CAFA defines a "mass action" as a civil action in which "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional requirements under [28 U.S.C. § 1332(a)]." 28 U.S.C. § 1332(d)(11)(B)(i).

B. Background of this Case.

Respondents manufactured, marketed, sold, or distributed liquid crystal display ("LCD") panels, which are components of computers, televisions, mobile phones, and a wide variety of other commonly used electronic devices. Pet. App. 24a. Petitioner alleges that Respondents conspired between 1996 and 2006 artificially to limit the supply and increase the price of LCD panels, thereby increasing the price of every product containing such a panel during that time period. *Id.* at 24a-25a. Several Respondents and their co-conspirators pled guilty to criminal charges brought by the United States Department of Justice for this conduct and paid criminal fines to the United States government. *Id.* at 25a. None of those fines compensated Mississippi. *Id.*

On March 25, 2011, Mississippi commenced this action in state court, in the name of the State, pursuant to the Mississippi Antitrust Act ("MAA"),

Miss. Code § 75-21-1, *et seq*., and the Mississippi Consumer Protection Act ("MCPA"), *id.* at § 75-24-1, *et seq*. The Complaint asserts two claims by the State (one under the MAA, one under the MCPA), stemming from the Attorney General's independent authority and the State's sovereign and quasi-sovereign interests. *E.g*., Resp. App. 3a ("the State of Mississippi has a quasi-sovereign interest in the direct and indirect effect of defendants' illegal conspiracy on the state's economy and the citizens' economic condition").

The statutory provisions on which the State relies for its claims are different from the provisions on which a private individual or consumer would rely for a damages claim. For example, the MAA provides direct statutory authority for the Attorney General to pursue both monetary and injunctive relief ("suits at law or in equity") in the name of the State "to enforce the civil features of the antitrust laws." Miss. Code. § 75-21-37. Although the MAA creates a private right to enforce the antitrust laws and to seek personal recovery of damages and a $500 penalty, *id.* at § 75-21-9, the Attorney General's Complaint does not seek relief pursuant to that section of the statute.

Similarly, the MCPA provides direct statutory authority for the Attorney General to bring an action for injunctive relief where "proceedings would be in the public interest," *id.* at § 75-24-9, and for a court to issue "additional orders or judgments, including restitution." *Id.* at § 75-24-11. Like the MAA, the MCPA creates a separate, auxiliary private right to recover personal monetary losses where certain prerequisites are met. *Id.* at § 75-24-15. Again, the

Complaint does not assert a claim under Section 75-24-15.

The Complaint prays that "the Plaintiff, the State of Mississippi, be granted the following specific relief" (Resp. App. 65a), including:

- a permanent injunction pursuant to the MAA and MCPA prohibiting the Defendants from continuing to engage in anti-competitive behavior, *id.*;

- civil penalties of up to $10,000 per violation under the MCPA and of up to $2,000 per month, per Defendant under the MAA, to be awarded to "the State of Mississippi," and also, in accordance with the MCPA, "that defendants be ordered to restitute any and all monies to the State of Mississippi" for purchases of LCD products by the State and its citizens, *id.*; and

- "[t]hat Plaintiff, bringing this action on behalf of the State of Mississippi in its proprietary capacity on its own behalf, and on behalf of Mississippi residents, including local governmental entities," *id.*, be awarded "restitution and its damages in an amount according to proof," punitive damages under Mississippi law, and other relief, including pre- and post-judgment interest and attorney's fees and costs. *Id.* at 66a.

Mississippi's lawsuit is one of thirteen *parens patriae* lawsuits against most of the same defendants brought by the Attorneys General of Arkansas, California, Florida, Illinois, Michigan,

Missouri, New York, Oregon, South Carolina, Washington, West Virginia, and Wisconsin.[1]

Some of these cases alleged both state and federal claims and were commenced in federal court.[2] A consolidated multi-district litigation ("MDL") is pending in the Northern District of California and includes attorney general actions filed in federal court, as well as various private indirect purchaser class actions, including a Mississippi indirect purchaser class. *See In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827 (N.D. Cal. filed Apr. 20, 2007).

The indirect purchaser class action in the MDL, which includes Mississippi consumers, has settled. The MDL Court's preliminary approval order noted the statement of the settling defendants that the settlement would not foreclose *parens patriae* claims asserted by non-settling state attorneys general:

> At the hearing on the Proposed Settlements, all of the Settling Defendants agreed that

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[1] *Missouri ex rel. Koster, Arkansas ex rel. McDaniel, Michigan ex rel. Cox, West Virginia ex rel. McGraw, Wisconsin ex rel. Van Hollen v. AU Optronics Corp.*, No. 3:10-cv-3619 (N.D. Cal.); *Florida v. AU Optronics Corp.*, No. 3:10-cv-03517 (N.D. Cal.); *New York v. AU Optronics Corp.*, No. 3:11-cv-711 (N.D. Cal.); *Oregon ex rel. Rosenblum v. AU Optronics Corp.*, No. 3:07-md-1827 (N.D. Cal); *South Carolina v. AU Optronics Corp.*, No. 3:11-cv-00731-JFA (D.S.C.); *California v. AU Optronics Corp.*, No. CGC-10-504651 (San Francisco Super. Ct.); *Illinois v. AU Optronics Corp.*, No. 10 CH 34472 (Cir. Ct. of Cook County); *Washington v. AU Optronics Corp.*, No. 10-2-29164-4 (King County Dist. Ct.).

[2] *See* Compl. for Damages, Civil Penalties, Injunctive and Other Relief (Dkt. 1), *Missouri ex rel. Koster v. AU Optronics Corp.*, No. 3:10-cv-03619 (N.D. Cal. filed Aug. 17, 2010).

> the Proposed Settlements *were not intended to have any effect* on the above [state claims, including *parens patriae*] claims, and indicated that they would not seek dismissal of those claims based upon the Proposed Settlements.[3]

Five of the thirteen state attorneys general—from California, Illinois, Mississippi, South Carolina, and Washington—commenced their actions in their state courts asserting only state-law claims. Defendants removed each of these actions to federal court, asserting CAFA jurisdiction. In all five cases, the district court remanded the case to state court, finding CAFA jurisdiction lacking. *See* Pet. App. 15a n.3. In each case, except this one, the relevant court of appeals upheld the district court's remand order and opined that removal under CAFA was improper. *See AU Optronics Corp. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012), petition for cert. pending, No. 12-911; *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842 (9th Cir. 2011).

C. The District Court's Decision.

On June 9, 2011, Respondents removed this case to the federal District Court, contending that the

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[3] *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827, at 2 (N.D. Cal. Jan. 26, 2012) (Dkt. 4688) (emphasis added); *see also In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827, 2013 WL 1365900, *6 (N.D.Cal. Apr. 3, 2013) (Second Amended Order Granting Final Approval) (noting "the assurances Defendants made at the November 29, 2012, hearing that monetary claims, including *parens patriae* claims, of the non-Settling States who were not part of a defined damages class would not be released").

case was both a "class action" and a "mass action" under CAFA. Pet. App. 26a. The State moved to remand the case to state court and the District Court granted the motion. The District Court held this action was not a "class action" within the meaning of CAFA. *Id.* at 40a-44a. The District Court explained that it was constrained to follow the Fifth Circuit precedent in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418 (5th Cir. 2008), and to hold that the Attorney General's case was a "mass action," despite the District Court's view that the mass action provision addresses "mass joinder" situations involving a large group of named plaintiffs. Pet. App. 45a n.9. However, the District Court held that (even under Fifth Circuit precedent) the action was exempt from CAFA removal under the "general public" exception. *Id.* at 46a-52a.

D. The Court of Appeals' Decision.

The Fifth Circuit reversed the District Court's remand order. The Court of Appeals concluded the Attorney General's suit was not a "class action" under CAFA, *id.* at 2a-3a, but that it qualified as a "mass action" under *Caldwell.* The Fifth Circuit held that its *Caldwell* precedent required the court to "pierce the pleadings and look at the real nature of a state's claims," on a "claim-by-claim approach." *Id.* at 4a. The Court of Appeals opined that "the real parties in interest include not only the State, but also individual consumers residing in Mississippi." *Id.* at 6a. The Fifth Circuit determined that the "general public" exception of CAFA did not apply and indeed was "statutory surplusage" (*id.* at 10a n.1) under its interpretation of CAFA.

One member of the panel, Judge Elrod, concurred in the judgment but wrote separately to express agreement with the vigorous dissent in *Caldwell* by Judge Southwick. *Id.* at 15a-16a. Judge Elrod explained that "the claim-by-claim approach does not find a foothold in CAFA's text" and that nothing in the statutory language "suggest[s] that, in a case in which a single plaintiff brings suit, a court should dissect the complaint to determine whether that plaintiff is the sole beneficiary of each basis for relief." *Id.* at 17a. "Compounding the absence of textual support for the claim-by-claim approach is the Supreme Court's directive that removal statutes should be 'strictly construed.'" *Id.* at 18a (quoting *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002)). Further, Judge Elrod observed that "applying *Caldwell's* reasoning to CAFA's general public exception may render the exception a dead letter in this circuit. We should reconsider *Caldwell* and correct our course in this area of the law." *Id.* at 12a.

SUMMARY OF ARGUMENT

Ultimately, this is a case about federalism and respect for the institutional sovereignty of the States and their chief legal officers, legislatures, and judicial systems. Mississippi, acting through its Attorney General, filed this action in its own courts to enforce state antitrust and consumer protection statutes applicable only in Mississippi. Whatever "abuses" may have been CAFA's targets, they did not include *parens patriae* actions to vindicate the States' sovereign and quasi-sovereign interests, filed by their politically accountable chief legal officers. Such actions serve critical state needs, and there are

important and legitimate reasons for a state attorney general to choose to file them in state court.

I. The text, structure, and history of CAFA demonstrate that it does not extend to *parens patriae* actions. The CAFA "mass action" provision refers to a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i).

Parens patriae actions fall outside this definition. They do not propose a "joint[]" trial of claims of 100 or more "plaintiffs" on the ground that the otherwise separate claims of those plaintiffs "involve common questions of law or fact." The only *claims* or causes of action asserted are the claims of the State, which is the sole plaintiff. The CAFA mass action provision is aimed at the quite different situation where multiple named plaintiffs, each with his or her own claims, are joined in a single suit.

CAFA also provides that a "mass action" cannot be created by a defendant's joinder motion. In urging that the absent Mississippi consumers be treated as if they had been consolidated for purposes of removal, Respondents are attempting to achieve indirectly what CAFA bars them from doing directly.

The Court of Appeals' interpretation would lead to severe practical problems, further demonstrating that it cannot be a proper construction of the statute. For example, CAFA mandates that a federal court remand to state court "those plaintiffs" in a mass action whose "claims" do not satisfy the $75,000 jurisdictional amount in controversy requirement of federal diversity jurisdiction. In an action brought

by an attorney general, it would be wholly impractical for a court to ensure that each consumer in a State meets the federal amount-in-controversy threshold and to remand to state court particular consumers whose claims do not meet the federal diversity amount-in-controversy requirement.

Similarly, CAFA bars transfer of a mass action to another court "unless a majority of the plaintiffs in the action" request transfer. There is no mechanism for the hundreds of thousands (or millions) of absent consumers cited by the Court of Appeals to request or consent to transfer of the action.

In addition, CAFA contains a "general public" exception to mass action jurisdiction, which the Court of Appeals' interpretation would render a nullity.

Any doubts about the meaning of CAFA should be resolved against federal jurisdiction under the longstanding principle that jurisdictional statutes are narrowly construed. That principle has special force in this context because the Petitioner Attorney General is the chief legal officer of a sovereign State. CAFA should not be construed as interfering with the State's authority to pursue actions in its own courts under its own laws, because doing so would risk trampling on the sovereign dignity of the State and inappropriately transforming what is essentially a state-law matter into a federal case.

Legislative history confirms that CAFA does not encompass state *parens patriae* actions. CAFA's sponsors expressly reassured the States that CAFA would not cover attorney general actions.

II. The nature of *parens patriae* actions and the "real party in interest" test both demonstrate that an attorney general suit is not a mass action under CAFA. A *parens patriae* suit is a unique action by a State to advance its sovereign or quasi-sovereign interests. In such a suit, a State is properly the only plaintiff. Longstanding precedent establishes that, when a State sues in a *parens patriae* capacity, there is no need to certify a class or join additional parties (indeed, Mississippi law does not even permit class actions). Treating a *parens patriae* action as one "on behalf of" individual plaintiffs violates the fundamental principle behind attorney general actions and is inconsistent with this Court's decisions regarding the "real party in interest" test.

The Fifth Circuit's "claim-by-claim" approach improperly expands the power of a federal court to add parties to a lawsuit. Even if private citizens in Mississippi should be regarded as the real parties in interest (and they should not be), that would raise only a defective pleading issue to be addressed in state court. It would not support CAFA removal.

III. Even if this Court were to adopt a "claim-by-claim" approach, it should still reverse the judgment below, because in a *parens patriae* case the State would qualify as the real party in interest under the Fifth Circuit's test. In addition, this Court should find that CAFA's "general public" exception confirms that the statute does not extend to *parens patriae* actions, even under a "claim-by-claim" approach.

ARGUMENT

I. AN ATTORNEY GENERAL SUIT IS NOT A "MASS ACTION" UNDER CAFA.

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (citations omitted). CAFA does not change the rule that the party seeking federal jurisdiction bears the burden of persuasion on that issue. *See Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010). Respondents cannot meet their burden.

A. There Is No CAFA Jurisdiction On The Face Of The Complaint.

This Court has instructed that the "status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal." *Wisconsin Dept. of Corr. v. Schacht*, 524 U.S. 381, 390 (1998) (quoting *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938)).

On its face, the Complaint in this case does not give rise to federal jurisdiction. CAFA's "mass action" provision applies only when the monetary relief claims of 100 or more persons are proposed to be tried jointly. 28 U.S.C. § 1332(d)(11)(B)(i). In this case, there is one (and only one) plaintiff: the State, acting through its Attorney General. Accordingly, the 100-person numerosity requirement of CAFA cannot be satisfied, because this case does not

consist of an action brought to press the claims of any specific consumer or citizen of Mississippi, much less to try jointly the 100 or more individual claims that define a "mass action."

Further, CAFA requires at least minimal diversity – i.e., that at least one plaintiff be diverse from one defendant. 28 U.S.C. § 1332(d)(2)(A). Even this minimal diversity requirement cannot be met in this case, because the sole plaintiff (the State of Mississippi) is not a "citizen" for purposes of diversity jurisdiction. *See Moor v. Alameda Cnty.*, 411 U.S. 693, 717 (1973) ("There is no question that a State is not a 'citizen' for purposes of the diversity jurisdiction.").

Accordingly, the jurisdictional analysis in this case is straightforward: there is only one plaintiff in this case, and it does not qualify as a "citizen" for diversity jurisdiction. Hence, there is no federal jurisdiction under CAFA.

B. The Text of CAFA Provides That An Attorney General Suit Is Not A "Mass Action."

The Court of Appeals incorrectly transformed the straightforward jurisdictional issue into a much more complicated, and legally improper, inquiry. The Fifth Circuit followed its "claim-by-claim" approach (created out of whole cloth in its earlier *Caldwell* decision) to re-imagine the State's action as though it included Mississippi consumers who had purchased an LCD-containing product. That holding misinterpreted the CAFA statute and is inconsistent

with the decisions of every other circuit to consider the question.[4]

1. The First Clause of the "Mass Action" Definition.

The first clause of CAFA's "mass action" definition refers to a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). The second clause provides that "jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements." *Id.*

The text of CAFA's "mass action" definition thereby excludes *parens patriae* suits. Such actions do not propose a "joint[]" trial of claims of 100 or more "plaintiffs" on the ground that the otherwise separate claims of those plaintiffs "involve common questions of law or fact." Rather, a *parens patriae* suit involves one plaintiff, the State. The "mass action" definition is aimed at the quite different situation where multiple named plaintiffs are joined in a single suit. The language of the statute rules out the Court of Appeals' approach, for numerous reasons.

(a) The first clause of § 1332(d)(11)(B)(i) refers to the "*plaintiffs'* claims" (emphasis added) in

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[4] *See AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 392-94 (4th Cir. 2012), petition for cert. pending, No. 12-911 (filed Jan. 23, 2013); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 218-220 (2d Cir. 2013); *LG Display Co. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011); *Nevada v. Bank of America Corp.*, 672 F.3d 661, 670 (9th Cir. 2011).

specifying the claims of the "100 or more persons" at issue. Thus, although the first clause refers to "persons," the same clause equates "persons" with "plaintiffs." The second clause of § 1332(d)(11)(B)(i) then refers to them as "those plaintiffs" in providing that "jurisdiction shall exist only over those *plaintiffs* whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements." *Id.* (emphasis added).

Hence, CAFA makes federal jurisdiction turn on the claims of actual *plaintiffs* – i.e., formal parties to the suit – rather than non-plaintiffs or nonparties. *See* BLACK'S LAW DICTIONARY 1267 (9th ed. 2009) (defining "plaintiff" as "[t]he party who brings a civil suit in a court of law"); *see also* GARNER'S DICTIONARY OF LEGAL USAGE 681 (3d ed. 2011) ("the party who brings suit in a court of law"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011) ("The party that institutes a suit in a court.").

Even if the Court of Appeals were correct in imagining that Mississippi consumers were real parties in interest in this case (and the Court of Appeals was not correct, for reasons discussed in Part II, *infra*), those consumers are plainly not "*plaintiffs*" in this action. They were never named as plaintiffs or joined as parties, and Respondents never proposed to do so. Accordingly, the text of CAFA makes them irrelevant to the jurisdictional inquiry.

(b) The first clause of § 1332(d)(11)(B)(i) also refers (twice) to the "*claims*" of the plaintiffs, and the second clause of § 1332(d)(11)(B)(i) again refers to *"claims"* in providing that jurisdiction extends only

to plaintiffs whose "*claims*" in a mass action satisfy the $75,000 amount-in-controversy requirements. The term "claim" is used throughout § 1332(d)(11)(B), and in a special tolling provision, § 1332(d)(11)(D).

CAFA's repeated use of the term "claim" rules out the Fifth Circuit's approach. A "claim" entails "a right enforceable by a court" or "[a] demand for money, property, or a legal remedy to which one asserts a right." BLACK'S LAW DICTIONARY 281-82 (9th ed. 2009); *see also* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011) ("A demand for something as rightful or due."). As this Court has observed, the term "claim" is typically used "synonymously with 'cause of action.'" *Keene Corp. v. United States*, 508 U.S. 200, 210 (1993); *see also United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1728 (2011). This understanding of a "claim" as involving a formal demand and legal entitlement to relief is consistent with Federal Rule 23 itself, which speaks to the "claims or defenses of the class" and "the desirability . . . of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23(a)(3), (b)(3)(C).

The only *claims* or causes of action asserted in the instant case are the claims of the State under specific provisions of the MAA and MCPA. Regardless of whether Mississippi consumers have any interests that might be indirectly implicated by the State's lawsuit (*but see* Part II, *infra*), this case does not involve any *claims* asserted by the State's citizens. The *claims* of Mississippi residents were the subject of another action – the indirect purchaser action in the Northern District of California. When the indirect purchaser action settled, several of the

settling defendants assured the district court in California that the settlement did not release the State's *parens patriae* claims. *See* pp. 7-8, *supra*. The only *claims* at issue here are the State's claims under the MAA and MCPA.

(c) The first clause of § 1332(d)(11)(B)(i) refers to a "mass action" as a proceeding in which the claims in question are "proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332 (d)(11)(B)(ii). Hence, to constitute a mass action, a civil action must propose a "joint[]" trial of the "monetary relief claims of 100 or more persons," on the ground that they involve "common questions of law or fact." Even if this case could be said to involve the claims of 100 or more citizens of Mississippi (and it cannot), it would not propose a "joint[]" trial of such claims – and certainly not on the ground that they involve "common questions of law or fact." Rather, this action will involve solely a trial of the *State's* claims.

The "mass action" definition focuses on the actual *trial* proceeding itself. Congress specified that claims of 100 plaintiffs "consolidated or coordinated solely for pretrial proceedings" do not qualify as "mass actions." *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(IV). In other words, even if 100 or more Mississippi consumers had been formally added to this case as plaintiffs in the state court prior to removal, and even if those consumers had asserted their own, independent claims for monetary relief (neither of which happened in this case), those plaintiffs would not have created CAFA jurisdiction if their claims had been consolidated with the State's claim *purely for pretrial purposes*. CAFA limits the

numerosity component of "mass actions" quite severely by including only actions in which the proposed *trial itself* would address the claims of at least 100 plaintiffs, and the Court of Appeals erred by misinterpreting the statute to include imaginary claims by hypothetical Mississippi consumers that were never going to be part of the *trial* of the State's claims.

The statute's reference to "common questions of law or fact" underscores the Court of Appeals' mistake. That language echoes the federal class action rule, Fed. R. Civ. P. 23(b)(3) ("questions of law or fact common to class members"), which involves a rigorous analysis of the evidentiary proof that a class intends to offer at trial to demonstrate commonality and predominance. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Wal–Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011). A class representative cannot demonstrate the existence of "common questions" by loose reference to the interests of absent class members. Rather, the requisite "common questions" can be shown only through close analysis of the specific legal claims that absent class members possess and the precise manner in which they would be proven at trial. Here, only the State's claims will need to be proven at trial. There will be no need to inquire into non-existent class members' claims. The phrase "common questions of law or fact" confirms that CAFA's "mass action" definition refers not to *parens patriae* actions but instead to actions where multiple named plaintiffs are joined in a single suit asserting concrete legal claims that raise common questions of fact or law.

2. The Ban On The Creation Of A "Mass Action" By A Defendant's Joinder Motion.

In addition to requiring that a "mass action" include the claims of at least 100 plaintiffs "proposed to be tried jointly," subsection 1332(d)(11) provides that "the term 'mass action' shall *not* include any civil action in which . . . the claims are joined upon motion of a defendant." 28 U.S.C. § 1332(d)(11)(B)(ii)(II) (emphasis added). Hence, Congress anticipated that defendants might attempt to join the claims of additional plaintiffs in order to produce a "mass action" and specifically ruled out such a tactic by instructing that a defendant's joinder could not create a mass action eligible for removal under CAFA.

Respondents are attempting to achieve indirectly what they cannot accomplish directly. While never formally moving to consolidate the claims of absent Mississippi consumers, Respondents urge that those claims be treated as if they had been asserted and consolidated for purposes of removal under CAFA. The effort to "pierce the pleadings" to have the Court consider the claims of absent plaintiffs on a "claim-by-claim" basis is an impermissible end-run around the specific statutory ban on a defendant's joinder of claims to create a "mass action." Respondents' argument is foreclosed by the considered statutory limitations on the "mass action" definition.

3. The $75,000 Amount-In-Controversy Limitation In The "Mass Action" Definition.

The second clause in CAFA's "mass action" definition limits federal removal jurisdiction in a

"mass action" to "those plaintiffs" whose "claims" in a mass action satisfy the $75,000 jurisdictional amount in controversy requirements of federal diversity jurisdiction. 28 U.S.C. § 1332(d)(11)(B)(i) This clause reinforces Petitioner's interpretation because it presupposes the existence of individually identifiable "plaintiffs" whose claims do not meet the jurisdictional prerequisite and would therefore have to be remanded to state court, while the claims of other plaintiffs remain in federal court.

Although such a process makes sense in the context where multiple named plaintiffs (each with formally asserted, distinct claims) are joined in a single suit, it does not make sense in the context of a *parens patriae* action. In an action brought by an attorney general, it would be wholly impractical for a trial court to examine the circumstances of each consumer in a State, to ensure that each one meets the federal amount-in-controversy threshold, and to remand to state court the supposed "claims" of particular consumers (who had never sued in the first place) falling below the federal diversity amount-in-controversy requirement. In such a scenario, the consumers would not be before the court and would not have asserted any actual claims. There would be no way to obtain information about their situation, and the court would have to speculate about the nature of any "claims" they might later bring. As a purely administrative matter, it would not be feasible to conduct individualized judicial hearings to identify, investigate, and ascertain the potential claims of hundreds of thousands (or millions) of consumers.

The illogical and impractical nature of such a process confirms that the "mass action" definition

does not extend to attorney general suits. Indeed, in this very case, the District Court anticipated that the Fifth Circuit's jurisdictional approach would require it to sever and remand to state court the injunctive relief, civil penalty claims, and demand for restitution for individual losses less than or equal to the $75,000 jurisdictional amount required by 28 U.S.C. § 1332(d)(11)(B)(i). *See* Pet. App. 52a-53a.

Such an unworkable system would vastly complicate judicial administration, and there is no reason to interpret a jurisdictional statute to lead to such an unreasonable result. As this Court recognized in *Hertz*, a CAFA case, "administrative simplicity is a major virtue in a jurisdictional statute." 559 U.S. at 79. Accordingly, the Court "place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Id.* at 80; *see also Standard Fire*, 133 S. Ct. at 1350 ("when judges must decide jurisdictional matters, simplicity is a virtue"); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-32 (2002) (rejecting jurisdictional interpretation that would "radically expand the class of removable cases," and "undermine the clarity and ease of administration of the well-pleaded-complaint doctrine"); *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (A jurisdictional boundary "should . . . if possible, be a bright line, so that very little thought is required to enable judges to keep inside it.") (quoting ZECHARIAH CHAFEE, THE THOMAS M. COOLEY LECTURES, SOME PROBLEMS OF EQUITY 312 (1950) (in turn quoting *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring))).

4. The Provision Barring Transfer of Mass Actions Without Plaintiffs' Consent.

A similar practical problem arises from a provision in CAFA barring transfer of a mass action to another court "unless a majority of the plaintiffs in the action request transfer pursuant to section 1407." 28 U.S.C. § 1332(d)(11)(C)(i). Use of the word "plaintiffs" reinforces the interpretation of subsection (d)(11)(B) that throughout the statute "plaintiffs" means *named* parties.

Moreover, in a *parens patriae* action, the State is the sole plaintiff. The thousands (or millions) of absent consumers cited by the Court of Appeals are not plaintiffs, and there is no mechanism through which they could request or consent to transfer of the action pursuant to 28 U.S.C. § 1407. Nothing in CAFA suggests a procedure for a district court to identify and communicate with absent consumers – let alone to determine their views on the issue of transfer. Again, the complex and burdensome implications of the Court of Appeals' approach are strong reasons to reject it as a matter of statutory interpretation.

5. The "General Public" Exception.

CAFA contains a "general public" exception to mass action jurisdiction, 28 U.S.C. § 1332(d)(11)(B)(ii)(III), which provides that the term "mass action" does not include any action in which "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." This provision is strong evidence that

Congress did not intend *parens patriae* suits to qualify as "mass actions." Indeed, as shown in Part III-B, *infra*, this provision mandates reversal in this case, even under the Fifth Circuit's "claim-by-claim" approach.

The Fifth Circuit acknowledged that its interpretation of CAFA would negate the "general public" exception by rendering it "statutory surplusage when the State brings consumer-related actions such as the one before us today." Pet. App. 10a n. 1. According to the Court of Appeals, under its "claim-by-claim" approach, "the public exception has no relevance." *Id.*; *see also id.* at 10a ("our finding vitiates the application of the exception"). This startling acknowledgement flies in the face of elementary principles of statutory interpretation. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted).[5]

The Fifth Circuit's interpretation, which sweeps *parens patriae* cases into federal court and renders the "general public" exception a dead letter, is inconsistent with the structure of the CAFA scheme and violates basic rules of statutory construction.

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[5] The Court of Appeals' assertion that the same "surplusage" would result under Petitioner's interpretation of the CAFA mass action definition (Pet. App. 10a n.1) is not true. Under Petitioner's construction, *parens patriae* suits filed by attorneys general are outside CAFA's scope, but the "general public" exception still has meaning because it applies to suits filed by private plaintiffs on behalf of the general public.

6. Other Federal Statutes Recognizing That *Parens Patriae* Actions Are Not Class Actions.

Other federal statutes, such as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), 15 U.S.C. § 15c, treat *parens patriae* actions as procedurally distinct from class actions. This Court has explained that, in adopting the HSR Act, "Congress focused on the difficulty of achieving class certification of consumer actions under Rule 23 of the Federal Rules of Civil Procedure and the complexity of measuring and distributing damages in such cases." *Illinois v. Abbott & Assocs.*, 460 U.S. 557, 573 n.29 (1983). "To remedy these problems, the 1976 [HSR] statute permits State attorneys general the right to institute *parens patriae* suits on behalf of State residents, [and] exempts such suits from the class action requirements of Rule 23." *Id.*

Congress thereby recognized that *parens patriae* actions are not "class actions." The distinction is particularly salient in Mississippi, whose law does not even permit class actions. Pet. App. 3a.

Although this case involves CAFA's definition of "mass action" rather than "class action," the Court of Appeals' decision creates a tension between CAFA and the HSR Act. Under the Court of Appeals' interpretation, *parens patriae* actions qualify as "mass actions," and thereby as "class actions," by virtue of the cross-references within CAFA. *See* 28 U.S.C. § 1332(d)(11)(A).

Congress is not absolutely precluded from using the same term in different ways in different statutes, but this Court often consults related or similar statutes in determining the meaning of statutory

terms. *E.g.*, *Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 150-51 (1984). Given that the HSR Act treats state *parens patriae* actions as distinct from class actions, CAFA should not be construed as providing precisely the opposite result. Thus, the Antitrust Modernization Commission took the position that CAFA "does not apply to *parens patriae* actions by state attorneys general." Report and Recommendations 272 (April 2007).

CAFA should be interpreted to exclude attorney general *parens patriae* actions, consistent with the HSR Act.

C. If There Were Any Statutory Ambiguity, Longstanding Principles of Federalism Would Be Dispositive.

If CAFA were unclear (and it is not), principles of federalism would dictate the proper result in this case: that CAFA does not extend to state *parens patriae* suits.

1. Narrow Construction of Removal Statutes.

Any doubts about the meaning of CAFA should be resolved against federal jurisdiction under the longstanding principle that jurisdictional statutes should be narrowly construed. *See Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986). This Court has adopted a policy of "strict construction" of removal statutes because of "'[d]ue regard for the rightful independence of state governments.'" *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). Hence, "statutory procedures

for removal are to be strictly construed." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (citing *Shamrock Oil* and *Healy*); *see also Holmes Group*, 535 U.S. at 832 ("our cases addressing removal require" "[d]ue regard for the rightful independence of state governments"). CAFA did not change that fundamental and longstanding rule. *See Hertz Corp.*, 559 U.S. at 96.

The Court of Appeals' decision violates that principle. The Fifth Circuit engrafted onto the text of CAFA a new and manipulable standard – nowhere grounded in the statutory language. The Court of Appeals consulted what it called "a series of diverse statements" in the Complaint, Pet. App. 5a, its assessment of "the injury [the Complaint] seeks to remedy with money damages," *id.*, "the statutory bases of the State's suit," *id.* at 6a, "common law *parens patriae* authority," *id.*, and the "nature of the injury in this case." *Id.* at 7a. The Fifth Circuit's "claim-by-claim" approach is not so much a jurisdictional *test* as an invitation to undertake an open-ended inquiry into a variety of considerations, without any explanation of how these factors work together or how they are to be weighed (if it all). The Fifth Circuit's proposal is the opposite of a clear and predictable jurisdictional standard.

Rather than narrowly construing CAFA, the Court of Appeals *expanded* it, via a fuzzy and impressionistic approach that will complicate jurisdictional inquiries, increase uncertainty as to the scope of CAFA, disregard the independence of state governments, and foster further litigation.

2. State Sovereignty Principles.

The principle favoring narrow construction of jurisdictional statutes has special force in this context because the Petitioner Attorney General is the chief legal officer of a sovereign state. Petitioner filed this action under Mississippi law in the Mississippi courts, on behalf of the State and its citizenry, to enforce state antitrust and consumer protection laws applicable only in Mississippi. To prevent States from pursuing their own actions in their own courts is to risk trampling on the dignity of the States, to which they are entitled "as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 709 (1999).

The Fifth Circuit's approach to CAFA would appear to allow removal of *parens patriae* actions on a routine basis, depriving States of the ability to use their own courts to implement state statutory schemes. The Court of Appeals' decision would risk making States dependent on federal courts for the interpretation and enforcement of their own laws. Yet this Court has held that principles of state sovereignty forbid a situation where the "'the course of [States'] public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent.'" *Id.* at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

There is an important Eleventh Amendment question at stake. This Court has never addressed "whether a state as a plaintiff suing defendants over whom it has regulatory authority in state court under its own state laws may be removed to federal

court on diversity grounds under CAFA, rather than federal question jurisdiction." *In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 711 (5th Cir. 2008); *see* Virginia F. Milstead, *State Sovereign Immunity and the Plaintiff State: Does the Eleventh Amendment Bar Removal of Actions Filed in State Court?*, 38 J. MARSHALL L. REV. 513, 543 (2004) (concluding that removal violates "[d]ignity, functioning of the states, and federalism").[6]

A State, by commencing an enforcement action under its own laws in its own courts, does not necessarily consent to removal of the suit to federal court. In *Lapides v. Board of Regents*, 535 U.S. 613 (2002), this Court held that a State's removal of a case to federal court constituted waiver of its Eleventh Amendment immunity, but it pointedly noted that "the Eleventh Amendment waiver rules are different when a State's federal-court participation is involuntary," *id.* at 622, as it is here. Waivers of state immunity are strictly construed, and consent to suit in state court is not equivalent to consent to suit in federal court. *E.g.*, *Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011).

This Court need not decide the Eleventh Amendment question in order to conclude that (at the bare minimum) the Court of Appeals' approach violates the "etiquette of federalism." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J.,

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[6] To be sure, the text of the Eleventh Amendment extends only to suits against States. However, sovereign immunity "is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Alden v. Maine*, 527 U.S. 706, 729 (1999); *see also Nevada v. Hall*, 440 U.S. 410, 418 (1979).

concurring). The decision below impermissibly interferes with the States' authority to enforce their own laws in their own courts and thereby offends the principle that States must be treated in a manner consistent with their sovereign status. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citing need to "accord[] the States the respect owed them as members of the federation"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (recognizing "the dignity and respect afforded a State").

One would expect a particularly strong expression of statutory language if Congress had genuinely intended to interfere with the prerogatives of a state attorney general in such an extraordinary manner. As this Court has noted, "considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983).

3. Federal Solicitude For State Courts.

The decision below inappropriately transforms what is essentially a state matter into a federal case and threatens to disrupt the well established procedures by which States use their own courts to enforce state antitrust, consumer protection, and other statutory schemes. Federalism and comity concerns militate in favor of allowing state attorney general lawsuits to be decided in state court.

This Court has long recognized that a State has legitimate reasons in ensuring that state courts are the forums in which unsettled questions of state law are resolved, particularly when those questions arise

under state regulatory schemes. For example, the abstention doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), allows a federal court to dismiss a case if it presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or if its adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976).

Similarly, the doctrine of *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), authorizes federal courts to abstain in cases raising issues "intimately involved with [the States'] sovereign prerogative," the proper adjudication of which might be impaired by unsettled questions of state law. *Id.* at 28. These principles of federalism and comity form "part of the common-law background against which the statutes conferring jurisdiction were enacted." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989).

The need to permit state courts to articulate state law is particularly acute in the case at bar. Petitioner brings the instant claims under the MAA and MCPA – statutory schemes enacted by the Mississippi legislature. The state legislature has made a considered judgment about what the public interest of Mississippi requires, and the statutory schemes provide for enforcement in state court by the Attorney General. The Fifth Circuit's decision in this case overrides that legislative judgment and strips the Mississippi legislature of its power to

devise a statutory scheme enforceable by the Attorney General in state court.

The Fifth Circuit expressed uncertainty over Mississippi law and cited the need for "a more authoritative precedent" than an "unpublished Mississippi state case (from a chancery trial court)." Pet. App. 6a, 7a. But any presence of state-law questions simply underscores the defect in the Fifth Circuit's interpretation of CAFA. A state court, not a federal court, is the proper forum for the adjudication of open questions under the MAA and MCPA. As Judge Easterbrook observed, in the course of bemoaning the proliferation of federal jurisdiction, "a coordinate system of jurisdiction in which federal courts apply rules of the states' creation presupposes a substantial body of decisions by state courts. It is hard to be a witty ventriloquist's dummy when the ventriloquist has laryngitis." *Proimos v. Fair Auto. Repair, Inc.*, 808 F.2d 1273, 1276 (7th Cir. 1987).

Nothing in CAFA indicates that Congress intended for quintessential state-law issues to be decided in federal court. The Court of Appeals' approach threatens to disrupt the enforcement of numerous state statutory schemes in state court.

D. Legislative History Confirms That CAFA Does Not Extend To State *Parens Patriae* Actions.

Because the text and structure of CAFA are clear, and because any ambiguity would need to be resolved in favor of a narrow construction of CAFA, there is no reason to consult legislative history in this case. However, that history confirms that CAFA does not encompass state *parens patriae* actions.

1. The CAFA Committee Report.

Nothing in the CAFA Committee Report warned the States that Congress was about to interfere with the prerogatives of their chief legal officers to bring *parens patriae* actions in state court. Instead, the CAFA Committee Report stated that the bill was consistent with "basic federalism principles" and "the intent of the Framers when they crafted our system of federalism." S. Rep. No. 109-14, 109th Cong., 1st Sess. 24 (Feb. 28, 2005). The Report explained that the legislation "promote[d] the concept of federalism and protects the ability of states to determine their own laws and policies for their citizens." *Id.* at 61.

The Report described "mass actions" as "suits that are brought on behalf of numerous *named* plaintiffs who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status." *Id.* at 46 (emphasis added). The Report thus underscored that "mass actions" are suits brought by multiple named plaintiffs – not *parens patriae* actions. *See also id.* ("Under subsection 1332(d)(11), any civil action in which 100 or more *named parties* seek to try their claims for monetary relief together will be treated as a class action for jurisdictional purposes.") (emphasis added). The Report also specified that a "mass action" meeting CAFA's jurisdictional requirements "would not be eligible for federal jurisdiction if . . . the defendants (not the plaintiffs) sought to join the claims." *Id.*; *see also* H.R. Rep. No. 108-144, at 35 (2003) (describing "mass actions" as "suits that are brought on behalf of hundreds or thousands of *named plaintiffs* who claim that their suits present common questions of

law or fact that should be resolved in a single proceeding in which large groups of claims are tried together, in whole or in part") (emphasis added).

The class action problems identified in the Committee Report have nothing to do with a *parens patriae* action brought by a single State, through its politically accountable chief legal officer, asserting claims under the State's own laws. Instead, the CAFA Committee Report cited the need to extend federal jurisdiction to "large-scale, interstate class actions involving thousands of plaintiffs from multiple states," S. Rep. No. 109-14, at 11, where "one state's courts try to dictate its laws to 49 other jurisdictions." *Id.* at 26. Those issues are not present here. "[T]he primary problem that the statute was intended to solve" (*Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2561 (2013)), has nothing to do with *parens patriae* actions brought by state attorneys general.

2. Express Reassurances To States That CAFA Did Not Include State Attorney General Actions.

During the congressional consideration of CAFA, an amendment was proposed clarifying that CAFA was not applicable to actions brought by a state attorney general. 151 Cong. Rec. S1157 (daily ed. Feb. 9, 2005). Forty-six state attorneys general wrote to Congress in support of the amendment, arguing that "certain provisions of [the bill] might be misinterpreted to hamper the ability of the Attorneys General to bring such actions, thereby impeding one means of protecting our citizens from unlawful activity and its resulting harm." *Id.* at S1158-59. CAFA's sponsors opposed the amendment

because they said it was "unnecessary," as it was "perfectly clear" that the bill would not apply to *parens patriae* actions, which were "excluded from the reach of the bill." 151 Cong. Rec. at S1163, S1164 (Sen. Hatch). For example, Sen. Cornyn assured the Senate:

> [W]e certainly do not need an amendment like this to protect the States or the attorneys general against a potential misinterpretation of S. 5, the Class Action Reform bill. . . . I think it is very plain that no power of the State attorney general is impeded by virtue of S. 5, or will be once it is signed into law. . . . [As to] statutes that are typical of every State-deceptive trade practice acts and consumer protection statutes-which . . . specifically authorize the attorney general to seek remedies on behalf of aggrieved consumers[,] . . . [t]his bill certainly would not encroach on that authority. . . . [W]hen State law and the State Constitution specifically provide for the right of an attorney general, a State attorney general, to sue on behalf of his State's citizens, then this bill, when made a law, will not in any way impede that endeavor.

Id. at S1161-62 (Sen. Cornyn). Each of the other CAFA proponents who spoke in opposition to the amendment made the same point: The statute would not affect cases brought under the *parens patriae* authority of state attorneys general. *Id.* at S1160 (Sen. Specter) (amendment "is not necessary"); *id.* at S1161 (Sen. Carper) ("For most attorneys general who wish to file a case on behalf of their citizens

against some defendant, they have the opportunity to use *parens patriae*."); *id.* at S1163 (Sen. Grassley) ("[B]ecause almost all civil suits brought by State attorneys general are *parens patriae* suits, similar representative suits or direct enforcement actions, it is clear they do not fall within this definition. That means that cases brought by State attorneys general will not be affected by this bill.").

Sen. Pryor concluded:

> I hope when this law, if it passes, S. 5, is challenged, and it will be at some point or be litigated at some point, and a State attorney general tries to pursue some sort of action and there is a challenge saying the State cannot do it, I hope the courts will recognize the legislative history we developed today. The intention of this Senate and the conference is not to limit any existing rights or any existing abilities of the State attorneys general in pursuing cases they may deem appropriate to pursue.

Id. at S1164.

Whatever force might be accorded legislative history in the ordinary case, such explicit reassurances on the floor of a House of Congress are meaningful in a world where the structural protections of federalism depend on political and procedural safeguards. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), and explaining that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created

limitations on federal power. The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation."). When the proponents of federal legislation expressly and repeatedly reassure the States that a bill will not trench on their sovereign prerogatives, this Court should be wary of according precisely the opposite interpretation to the statute.

For all these reasons, the text, structure, and history of CAFA all show that it does not cover state attorney general actions.

II. THE NATURE OF *PARENS PATRIAE* ACTIONS AND THE REAL PARTY IN INTEREST TEST CONFIRM THAT AN ATTORNEY GENERAL SUIT IS NOT A MASS ACTION UNDER CAFA.

Apart from the text and history of CAFA, the history of *parens patriae* actions and the longstanding real-party-in-interest test demonstrate that a State plaintiff is not a nominal party in an attorney general action.

A. A State Is Properly The Sole Plaintiff In A *Parens Patriae* Action.

The Fifth Circuit held that, under the "claim-by-claim" approach, both the State and private citizens of Mississippi are real "parties" in interest in this suit. Pet. App. 8a-9a. That holding is inconsistent with the nature of a *parens patriae* action, under which a State is properly the sole plaintiff in the action.

1. The Nature Of *Parens Patriae* Actions.

The "parent of the country" action was rooted in the English concept of the "royal prerogative," but has expanded from its common-law origins. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982). This Court has described the "prerogative of *parens patriae*" as "inherent in the supreme power of every State." *Id.*

A State is the real party in interest in a *parens patriae* case when it "articulate[s] an interest apart from the interests of particular private parties" and "express[es] a quasi-sovereign interest." *Id.* at 607. This Court has explained that one qualifying interest is the "power to create and enforce a legal code, both civil and criminal." *Id.* at 601. In addition, "a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Id.* at 607. This Court has recognized quasi-sovereign interests where the State (1) "allege[s] injury to a sufficiently substantial segment of its population," including the "indirect effects of the injury," and (2) alleges the kind of injury "that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.*

When a State identifies a quasi-sovereign interest in the claim asserted, it is not merely a "nominal party," but rather is the real party in interest, even where the benefits might accrue to particular individuals within the State. *Id.* at 608 ("a State does have an interest, *independent of the benefits that might accrue to any particular individual*") (emphasis added).

Here, Mississippi has alleged injury to a significant segment of its population – virtually every consumer who during the relevant time period purchased an LCD-containing product, which include laptops, desktop computer monitors, mobile phones, digital cameras, video cameras, televisions, car navigation systems, many kinds of toys, and other electronic devices. *See* Complaint, ¶¶ 145, 201 (Resp. App. 46a, 63a); *see also* Pet. App. 49a-50a. The District Court described the number of injured consumers as "hundreds of thousands if not millions," *id.* at 55a, and appropriately considered the indirect effects of the injury as well. *Id.* at 50a. The Complaint shows (as the Court of Appeals acknowledged) that the injury caused by Respondents includes "'generalized harm' to the State as a whole." Pet. App. 5a; *see also* Complaint, ¶¶ 1, 194(g) (Resp. App. 2a-3a, 62a). Because Mississippi has established that a sufficiently substantial segment of the State's population has been injured, it has articulated a State interest apart from the interests of those private individuals.

In addition, Mississippi's legislature has enacted antitrust and consumer protection statutes authorizing the Attorney General to address precisely the kind of injury alleged here, which independently confirms the State's sovereign and quasi-sovereign interest. *See* Pet. App. 66a-76a (setting out relevant portions of the Mississippi Antitrust Act and Mississippi Consumer Protection Act). Mississippi has asserted sovereign and quasi-sovereign interests in the Attorney General's enforcement of state consumer protection and antitrust laws, as recognized in *Alfred L. Snapp & Son*, 458 U.S. at 601 ("enforc[ing] a legal code, both

civil and criminal"). This Court has observed that a sovereign or quasi-sovereign interest is adequately articulated when "the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* at 607. Here, Mississippi has gone further by codifying the Attorney General's authority to enforce those laws in the name of the State as sole plaintiff.

Under the MAA, only acts "inimical to public welfare" are subject to enforcement. Miss. Code § 75-21-1. The MAA authorizes the Attorney General "to enforce the civil features of the antitrust laws of this state by appropriate legal proceedings and suits at law or in equity." *Id.* at § 75-21-37. It provides that "[a]ll such suits shall be brought by and in the name of the State of Mississippi upon the relation of the attorney general or an authorized district attorney." *Id.*

Similarly, the MCPA authorizes suit for injunctive relief by the Attorney General when "proceedings would be in the public interest." *Id.* at § 75-24-9. The MCPA authorizes other forms of relief in Attorney General actions, including damages, civil penalties, and a reasonable attorney's fee. *Id.* at §§ 75-24-11, 75-24-19(1)(b).

Nothing in this statutory authority requires the Attorney General in a *parens patriae* action to attempt to try citizens' claims jointly with the State's own claims. Indeed, Mississippi's statutory regime demonstrates a legislative preference for *parens patriae* actions over private actions. There are no private treble damages under either the MAA or MCPA (only claims for damages "and in addition a penalty of five hundred dollars" under the MAA, *id.*

at § 75-21-9), no class actions in Mississippi (Pet. App. 3a), and no attorney fee-shifting for private plaintiffs under the MAA and MCPA. Only the Attorney General is eligible to receive "a reasonable attorney's fee" under the MCPA, Miss. Code. § 75-24-19(1)(b), and only the Attorney General may recover civil penalties under the MAA and MCPA. *Id.* at §§ 75-21-7, 75-24-19(1)(b).

Mississippi has also asserted a quasi-sovereign interest in securing an honest marketplace and the economic well-being of its citizens. *See Alfred L. Snapp & Son*, 458 U.S. at 607 (recognizing State's "interest in the health and well-being—both physical and economic—of its residents in general"). Such economic interests are firmly established as sufficient bases for *parens patriae* actions. For example, in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), this Court recognized a quasi-sovereign interest in ensuring consumers' continued access to natural gas, noting that the "health, comfort, and welfare" of a substantial portion of State's population was "seriously jeopardized" by a threatened interruption in the supply of gas. *Id.* at 592. This Court opined that "the state, as the representative of the public, has an interest *apart from that of the individuals affected*. It is not merely a remote or ethical interest, but one which is immediate and recognized by law." *Id.* (emphasis added); *see also Maryland v. Louisiana*, 451 U.S. 725, 738-39 (1981) (affirming state authority to bring *parens patriae* action to challenge natural gas tax paid by consumers in the State).

In *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), this Court treated an antitrust claim as a quasi-sovereign interest because trade

barriers "may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets." *Id.* at 450. This Court found that "Georgia has an interest *apart from that of particular individuals who may be affected*. Georgia's interest is not remote; it is immediate." *Id.* at 451 (emphasis added).

The HSR Act, 15 U.S.C. § 15c(a), which codifies the authority of state attorneys general to sue as *parens patriae* in antitrust cases (as discussed in Part I-B-6, *supra*), reflects Congress' agreement that a State's interest in protecting its citizens from a restraint of trade is sufficient to provide the foundation for a *parens patriae* action.

Accordingly, Mississippi plainly has established the elements of a *parens patriae* action and is the proper plaintiff in this case. A State has a separate and distinct interest in ensuring that its economy is free from anticompetitive and deceptive conduct, and its interest in that regard does not merely duplicate the private interests of its citizens.

2. A State's Ability To Bring A *Parens Patriae* Case As The Sole Plaintiff.

The Court of Appeals did not deny that the State was *a* proper plaintiff in this case. Pet. App. 6a-8a. Rather, it held that "the real parties in interest in this suit include both the State and individual consumers of LCD products." *Id.* at 8a-9a. The Court of Appeals' holding misconstrues the *parens patriae* doctrine. In a *parens patriae* action, the

State may prosecute the case as the *sole* real party in interest, without joining or naming citizens as additional plaintiffs, because the State has its *own* sovereign or quasi-sovereign interest to assert. The State is not simply a vehicle for the assertion of private claims.

This Court has long recognized the distinction between *parens patriae* suits and private actions by citizens of a state. *See Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("[I]t must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. . . . That suits brought by individuals, each for personal injuries threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."). *Parens patriae* actions need not (and in fact ordinarily do not) involve the joinder of the constituent citizens who are represented by the State. As this Court has opined, *parens patriae* actions are cases in which the State, by definition, "'must be deemed to represent all its citizens.'" *New Jersey v. New York*, 345 U.S. 369, 373 (1953). *Parens patriae* cases are typically not subject to intervention and joinder by individual citizens: "Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.*

Absent a compelling showing of inadequate representation, an individual citizen is typically not even *permitted* to intervene in a *parens patriae* case. *See United States v. Hooker Chem. & Plastics Corp.* 749 F.2d 968, 985 (2d Cir. 1984) (per Friendly, J.) (there must be "a strong affirmative showing that

the sovereign is not fairly representing the interests of the applicant"); *see also United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999) ("The proponent of intervention must make a particularly strong showing of inadequacy in a case where the government is acting as *parens patriae*.").

The Fifth Circuit's "claim-by-claim" approach would have led to different results in this Court's leading *parens patriae* decisions, making those cases removable under CAFA. For example, under the Fifth Circuit's approach, the Commonwealth of Puerto Rico would not have been the sole plaintiff in *Alfred L. Snapp & Son*. The farmers who lost their jobs because of the discrimination that formed the basis of the lawsuit would have been "real parties in interest," rendering the case a "mass action" under CAFA. The farmers certainly had a right to file suits against the discrimination.[7] But that did not alter the nature of Puerto Rico's interests.

Similarly, the citizens of Missouri who were injured by the flow of sewage from Illinois in *Missouri v. Illinois* would have qualified as "real parties in interest," and the *parens patriae* action in that case would have been removable as well. *See Missouri v. Illinois*, 180 U.S. 208, 211–12 (1901) (describing injuries to people and businesses). The same could be said of the group of citizens who were deprived of access to natural gas in *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923) ("The[ ]

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[7] *Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Son, Inc.*, 469 F. Supp. 928, 934 (W.D. Va. 1979), *rev'd*, 632 F.2d 365 (4th Cir. 1980), *aff'd sub nom. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) (noting lawsuits filed by individual workers).

[citizens'] health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream.").

In fact, "[w]hen the focus is on real parties in interest, all the Court's classic *parens patriae* cases begin to seem like removable class actions." Alexander Lemann, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 COLUM. L. REV. 121, 140 (2011). The more a State's action asserts a sovereign or quasi-sovereign interest (and thus the more clearly it is a legitimate *parens patriae* action), the more likely the Fifth Circuit's approach would find it removable under CAFA. After all, it is unlikely that a sovereign or quasi-sovereign interest would be based on injury to less than 100 citizens or involve less than $5 million in controversy. *Id.*

There is nothing in CAFA to suggest that it works such a radical change. The Fifth Circuit's "claim-by-claim" approach overturns the longstanding recognition that the State is the only proper plaintiff in a typical *parens patriae* case. The new approach would substantially recast (if not effectively eliminate) the authority of a State to bring a *parens patriae* action in its own courts.

B. The Real Party In Interest Test Confirms That A State Is the Sole Plaintiff In An Attorney General Action.

1. The "Claim-by-Claim" Approach's Inconsistency With Settled Precedent.

The Fifth Circuit's "claim-by-claim" approach is impermissible for another reason: it is inconsistent

with the well established test for determining the "real party in interest," which confirms that a State is the proper plaintiff in a *parens patriae* case.

This Court has always evaluated whether a State is the real party in interest by evaluating the complaint and record *as a whole*. The Fifth Circuit expressly rejected the approach of "look[ing] to a state's complaint 'as a whole.'" Pet. App. 4a. Yet that test is exactly what this Court has mandated. In *In re New York*, 256 U.S. 490 (1921), for example, this Court determined whether a State was the real party in interest by looking at "the essential nature and effect of the proceeding, as it appears from the entire record." *Id.* at 500; *see also Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 374 (1945) ("The government's interest must be determined in each case 'by the essential nature and effect of the proceeding, as it appears from the entire record.'") (citation omitted); *In re Ayers*, 123 U.S. 443, 492 (1887) (instructing courts to "consider[] the nature of the case as presented on the *whole record*") (emphasis added).

In *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), where this Court upheld the power of a State to sue as *parens patriae* on behalf of individual shippers in an antitrust case, this Court considered the "gravamen" of the complaint as a whole: "This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers." *Id.* at 452.

Moreover, this Court has held that the State is the real party in interest where it has the power to control the litigation. However, the Fifth Circuit did not even consider that factor in its analysis. In *Kansas v. Colorado*, 533 U.S. 1 (2001), an original action in which one State filed suit seeking monetary relief against another, this Court held that the State was a proper plaintiff and that its requested relief did not run afoul of the Eleventh Amendment, even though damages were calculated in part on injuries to individual citizens, because "the record in this case plainly discloses that the State of Kansas has been in full control of this litigation since its inception. Its right to control the disposition of any recovery of damages is entirely unencumbered." *Id.* at 8.[8] *see also Knapp v. W. Vermont R. Co.*, 87 U.S. 117, 123 (1873) (trustees who sued for benefit of others and not themselves were real parties in interest where the claim accrued to them, they controlled the litigation and were responsible for conducting it, and where beneficiaries could not prevent institution or prosecution of actions or exercise any control over them).

The only cases holding that the named plaintiff was not the real party in interest are those where none of the relief benefitted the plaintiff State, and all of the relief benefitted a limited number of other parties. *E.g.*, *Oklahoma v. Cook*, 304 U.S. 387, 395 (1938); *Oklahoma v. Atchison, T. & S. F. R. Co.*, 220

[8] This Court rejected an objection that Kansas was not the real party in interest because damages were to be based in part on losses suffered by farmers. 533 U.S.. at 6-7. "[N]either the measure of damages that we ultimately determine to be proper nor our method for calculating those damages can retrospectively negate our jurisdiction." *Id.* at 9.

U.S. 277, 289 (1911). Even these holdings support Petitioner here, because the conclusion that the State was merely a nominal party required an analysis of the complaint as a whole.

Not surprisingly, every other Court of Appeals to have considered the real-party-in-interest question has rejected the Fifth Circuit's "claim-by-claim" approach in favor of the "whole case" approach. *See* n. 4, *supra*. The concurring judge below observed that "every court of appeals to address the issue since *Caldwell* has rejected its approach." Pet. App. 16a. The Fifth Circuit, in both *Caldwell* and the case below, ignored this Court's required framework and created its own ill-advised test.

The Fifth Circuit pointed to no language in CAFA, and in fact there is no statutory language to support a claim-by-claim approach in evaluating the real party in interest in a *parens patriae* case. Nothing in CAFA provides that when there is one plaintiff, such as a State bringing a *parens patriae* action, the plaintiff's claims should be deconstructed to determine the real party in interest.

Indeed, a "claim-by-claim" approach is inconsistent with longstanding jurisdictional principles. Article III, § 2 refers to "Cases" and "Controversies," not "claims." Congress demonstrated its agreement with this concept in the codification of supplemental jurisdiction in 28 U.S.C. § 1367, which authorizes courts to exercise jurisdiction over additional claims when those claims "form part of the same case or controversy under Article III of the United States Constitution." Hence, "claims are not to be treated independently;

they are to be examined in the context of how they relate to the larger case or controversy at issue."[9]

2. The Limited Power of a Court To Add Plaintiffs To A Lawsuit.

The "claim-by-claim" approach is illegitimate for another reason: even if private citizens in Mississippi could be regarded as real parties in interest (and they should not be), that would raise only a defective pleading issue to be addressed in state court. It would not support CAFA removal. If a State has not stated a proper *parens patriae* claim, its suit will be vulnerable to dismissal in state court, under state law. However, such a defect would not warrant removal of the action to federal court. At the removal stage, a federal court may neither order private parties added to the action nor treat the complaint as if those parties are present, and thereby justify removal. Any conjecture about future parties to be added to a lawsuit could not justify removal, in view of the rule that, "[f]or jurisdictional purposes, [judicial] inquiry is limited to examining the case as of the time it was filed in state court." *Standard Fire*, 133 S. Ct. at 1349 (internal quotation marks omitted). Subsequent events cannot create removal jurisdiction after the fact.

Nor do federal courts have the power simply to add parties to a lawsuit, based on their assessment of the real parties in interest. In *Lincoln Property Co. v. Roche*, 546 U.S. 81 (2005), this Court opined

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[9] Michael Jaeger, *Should They Stay or Should They Go: Can State Attorneys General Avoid Removal of Parens Patriae Suits to Federal Court Under the Class Action Fairness Act?* 46 LOY. L.A. L. REV. 327, 351 (2012).

that, in determining jurisdiction, the federal courts have "no warrant . . . to inquire whether some other person might have been joined." *Id.* at 93 (federal courts should not "inquir[e] outside of the case in order to ascertain whether some other person may not have an equitable interest in the cause of action") (citing *Knapp v. Railroad Co.*, 87 U.S. 117 (1873)). In reviewing prior decisions "employing 'real party to the controversy' terminology in describing who counts and who can be discounted for diversity purposes," *id.* at 91, the *Lincoln Property* Court noted these decisions fell into one of two categories: (1) using an "improperly or collusively" named party to create federal jurisdiction, or (2) using such a party to defeat federal jurisdiction. *Id.* at 91-92 (citations omitted). If the former category, the appropriate remedy is to dismiss the case for lack of subject matter jurisdiction. *See*, e.g., *Little v. Giles*, 118 U.S. 596, 600-07 (1886). If the latter, the remedy is to disregard the citizenship of the nominal party. *See*, *e.g.*, *Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146, 152 (1914).[10]

In no event is it permissible simply to pretend as though an absent party has been added or to compel the plaintiff to add unnamed parties to its lawsuit. A court cannot force the Attorney General to litigate in the posture of a plaintiff in a mass action or as a class representative, in order to confer federal jurisdiction. *See* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE &

[10] In *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980), this Court conducted the real party in interest inquiry. The purpose, however, was to determine the real party in interest status of the named plaintiffs, not to add parties.

PROCEDURE § 1785 (3d ed. 1998) (recognizing the principle that a court "should not force the parties to try an action as a class suit when they prefer to litigate in their individual capacities").

Adding hundreds of thousands (or millions) of consumers as named plaintiffs in a *parens patriae* case is neither permissible nor practical, and the Fifth Circuit provided no clue as to how such an extraordinary step was to be taken. In the previous *Caldwell* case, the Fifth Circuit left it to the district court to determine how the individual Louisiana insurance policyholders could be added to the action, 536 F.3d at 430, with no suggestion of how the Louisiana Attorney General could possibly force private plaintiffs to join. Not surprisingly, none were ever added in that case, and the task would be utterly impossible here and in many other proceedings. The instant action involves "hundreds of thousands if not millions" (Pet. App. 55a) of consumers in Mississippi, with no paper trail of their purchases and relatively small losses to trace. *Id.* at 50a. As the District Court acknowledged, "electronics retailers permit customers to pay with cash and do not record personally identifiable information on every transaction. It is unlikely that the defendants have records identifying every Mississippian who purchased a product containing a LCD panel between 1996 and 2006." *Id.* Any attempt to add consumers as plaintiffs in this case would be futile.

The "claim-by-claim" approach, in other words, is a recipe for confusion, overreaching, and inconsistency. It departs from settled principles regarding the real-party-in-interest inquiry and should be rejected.

III. EVEN UNDER A "CLAIM-BY-CLAIM" APPROACH, THE JUDGMENT BELOW SHOULD BE REVERSED.

Even if this Court were to adopt the Fifth Circuit's "claim-by-claim" approach, it should still reverse the judgment below.

A. The State Is The Real Party In Interest In A *Parens Patriae* Case, Even Under A "Claim-by-Claim" Approach.

Even under the "claim-by-claim" approach, the Fifth Circuit erred in not finding that Mississippi is the real party in interest in this case, because it possesses both statutory and common-law *parens patriae* authority to assert the relief requested in the Complaint, pursuant to its sovereign and quasi-sovereign interests.

There are only two claims in this case: a claim by the State under the MAA and a claim by the State under the MCPA. Resp. App. 60a-64a (Complaint). In both cases, the statutory provisions on which the State relies are not those that a private citizen or consumer could invoke in bringing a damages claim against a defendant. The Complaint states that "Plaintiff, the State of Mississippi" seeks "its damages" and "restitution," to be awarded to "Plaintiff, the State of Mississippi," not to individual purchasers. *Id.* at 65a-66a. Hence, proceeding "claim by claim" in this case should have led the Court of Appeals to the obvious conclusion that both of the relevant legal claims in this case belong to the State, and neither belongs to Mississippi consumers.

The Fifth Circuit's approach of referring to "diverse statements" in a complaint and seeking to

infer "the nature of the injury involved" (Pet. App. 5a) is not an administrable jurisdictional test. The State is clearly the only real party in interest when *all* of the relief requested relates to the State's claims and *none* pertains to unasserted and purely hypothetical claims of individual consumers. The Court of Appeals spoke of the risk that the State might "extinguish the right and remedy the consumer has for his injury." Pet. App. 8a. But the claims of the State are entirely separate from those of consumers.

The Fifth Circuit attempted to draw a distinction between the government's ability "to seek restitution for its own injury" and its ability to seek restitution "for injuries suffered by parties other than the State." Pet. App. 6a. But even if the amount of restitution is computed according to transactions involving individual consumers, the relief sought remains restitution "to the State." Moreover, the remedy has a sufficient statewide deterrent effect on the defendants and other commercial actors as to qualify as a quasi-sovereign interest.

This Court has long upheld the power of the government to seek restitution based on injuries suffered by consumers and citizens, rather than the government's own pecuniary losses, even where the individual citizens and consumers might have a damages remedy available to them. *E.g.*, *Porter v. Warner Holding Co.*, 328 U.S. 395, 401 (1946) (upholding authority of government to seek restitution even where statute "authorizes an aggrieved purchaser or tenant to sue for damages on his own behalf").

The Fifth Circuit speculated that "Mississippi could obtain restoration for harm to individual citizens, yet keep that money for itself." Pet. App. 8a. This Court rejected precisely such speculation as a basis for concern in *Kansas v. Colorado*, 533 U.S. at 9 (discussed at p. 48 & n. 8, *supra*), and in *Texas v. New Mexico*, 482 U.S. 124 (1987), where this Court held that enforcement of an interstate water compact by means of a recovery of money damages was within a State's proper pursuit of the "general public interest" in an original action, regardless of where the damages might ultimately flow. The Court noted the concern that "a money judgment might find its way into the general coffers of the State, rather than benefit those who were hurt." *Id.* at 132 n.7. That possibility was immaterial to this Court's holding:

> [T]he sovereign State was a proper plaintiff. It is wholly consistent with that view that the State should recover any damages that may be awarded, money it would be free to spend in the way it determines is in the public interest.

Id. (citation omitted). Speculation regarding the future disposition of any recovery cannot diminish a State's role as the real party in interest.[11]

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[11] The MCPA provides for a state court's discretionary authority to "make such additional orders or judgments, including restitution, as may be necessary to restore to any person in interest any monies or property," pursuant to § 75-24-11. Even if a state court in this case subsequently entered orders directing the payment of monies to individual Mississippi consumers (an entirely conjectural future possibility), that would not alter the conclusion that the State is the real party in interest.

B. The "General Public" Exception Confirms That An Attorney General Suit Is Not A "Mass Action."

Even if the claim-by-claim approach were permissible, this Court should still reverse the judgment below under the "general public" exception of 28 U.S.C. § 1332(d)(11)(B)(ii)(III), which provides that the "mass action" definition "shall not include" a suit in which "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." The Court of Appeals' interpretation of this provision as a nullity (Pet. App. 9a-10a & n.1) offends basic principles of statutory interpretation. *See* p. 25, *supra*. Even under the claim-by-claim approach, the "general public" exception would exclude Mississippi's suit from the "mass action" definition.

The first prong of the "general public" exception refers to an action "on behalf of the general public," in contrast to "individual claimants or members of a purported class." Even under the Fifth Circuit's view that Mississippi consumers were real parties in interest, Pet. App. 6a-9a, the number of Mississippi consumers injured by Respondents' misconduct is clearly so high that the instant case qualifies as being brought "on behalf of the general public." The enormous group of affected consumers cannot be considered merely "individual claimants or members of a purported class," within the meaning of the statutory exception.

The affected consumers number in the "hundreds of thousands if not millions." Pet. App.

55a. As the District Court found, the LCD-containing electronic devices at issue include such commonly used products as mobile phones, televisions, toys, and computers. *See* p. 40, *supra*. The Court opined that, "[i]f this collection of items did not implicate the overall economic well-being of Mississippi's citizens, then the Court would be hard pressed to find something which does." Pet. App. 50a. The District Court properly concluded that "[t]he alleged price-fixing was so broad and pervasive as to affect the general public, and the State's claims in this suit are asserted on behalf of the general public." *Id.*

The District Court's construction of the phrase "general public" was correct. The "general public" refers to "ordinary people in society, rather than people who are considered to be important or who belong to a particular group."[12] The term need not imply 100% coverage of the entire citizenry, and statutes use the term "general public" in circumstances where only a portion of the populace is involved in the activities in question. The Bankruptcy Code, for example, imposes disclosure requirements for advertisements "of bankruptcy assistance services . . . directed to *the general public*." 11 U.S.C. § 528(a)(3) (emphasis added). Similarly, federal law prohibits discrimination on the basis of disability in "transportation by bus, rail, or any other conveyance (other than by aircraft) that

[12] MACMILLAN DICTIONARY (available at http://www.macmillandictionary.com) (last visited July 16, 2013); *see also* RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2d ed. 2000) (general: "not limited to one class, field, product, service, etc.; miscellaneous: *the general public*").

provides the *general public* with general or special service." 42 U.S.C. § 12181(10) (emphasis added).

It would be unreasonable to restrict the "general public" exception to instances in which literally every citizen of a State has a stake in the matter before the court. The "general public" exception is not limited to suits for injunctive relief but also applies to actions for damages. 28 U.S.C. § 1332(d)(11)(B). No action for damages, whether an antitrust, environmental, or consumer protection case, includes every member of the citizenry. No products (even such common ones as milk, gasoline, and cellphones) are used by every consumer. All actions concerning such products involve a "subset" of citizens. Further, when a State protects the integrity of a market, it protects all product buyers and *potential* buyers. Thus, when a State brings a consumer protection or antitrust case, it vindicates the interests of all those unidentified would-be purchasers who did not buy a product because of an inflated price or a deceptive marketing practice. Accordingly, the first prong of the "general public" exception is met here.

The second prong of the "general public" exception requires that the action be brought "pursuant to a State statute specifically authorizing such action." There can be no doubt that the second prong is met in this case. Petitioner's action was filed pursuant to both the MAA and the MCPA, and both statutes specifically authorize the Attorney General to bring precisely the kind of suit involved here. *See* pp. 40-42, *supra.* Under any interpretation of the "general public" exception, the second prong is clearly satisfied.

Accordingly, even if this Court were to adopt a "claim-by-claim" approach, it should still reverse the judgment below by applying the "general public" exception.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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