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 United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

When a state attorney general brings a civil action asserting restitution claims under state law on behalf of thousands of private purchasers to "restore to any person in interest" the money they allegedly overpaid, are the injured persons the real parties in interest to those restitution claims, and therefore is the action one "in which monetary relief claims of 100 or more persons are proposed to be tried jointly" under the Class Action Fairness Act?

RULE 29.6 STATEMENT

Respondents refer to the Rule 29.6 statement included in the Brief for Respondents filed with this Court on April 24, 2013.

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INTRODUCTION AND STATEMENT OF THE CASE

The Class Action Fairness Act of 2005 ("CAFA") radically altered the grounds for removing certain types of actions from state court to federal court under diversity jurisdiction. Concerned about abuses in state-court adjudication of class actions, Congress abrogated the judge-made "complete diversity" rule, replacing it with a more easily satisfied "minimal diversity" standard under which removal turns on whether there is *any* diversity of citizenship between the two sides of the action. Congress further provided that a "mass action," defined 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," 28 U.S.C. § 1332(d)(11)(B)(i), shall be deemed to be removable as a class action if it "otherwise meets" the applicable statutory requirements, *id.* § 1332(d)(11)(A).

As the Fifth Circuit held below, the plain language of the mass-action definition requires that a court analyze the real parties in interest to the claims to determine if the action is one "in which monetary relief claims of 100 or more persons" are to be tried jointly. That plain-language construction finds support in more than a century of jurisprudence analyzing diversity jurisdiction by looking to the real parties in interest. Moreover, this Court has held that when the government, incident to its law-enforcement powers, seeks restitution for overpayments by private persons, those injured persons are the real parties in interest whose claims are adjudicated by the court ordering restitution.

The Fifth Circuit properly construed the Mississippi Attorney General's private-purchaser restitution claims under Mississippi law to seek restitution on behalf of those injured persons. Because those claims are on behalf of more than 100 persons for amounts in excess of $5 million, the action was properly removed as a mass action.

There is no statutory exemption for state attorney general actions, whether described as *parens patriae* or otherwise. Indeed, CAFA was designed to capture statutory *parens patriae* actions brought by state attorneys general on behalf of injured persons. The Attorney General's contentions that removal here would constitute "an extraordinary invasion into state sovereign prerogatives," and "[u]ltimately, this is a case about federalism and respect for the institutional sovereignty of States," Br. 3, 10, are misguided. CAFA does not abridge any sovereign power of the attorney general to enforce state law; the only question here is whether there is a federal forum when an attorney general brings claims where a sufficient number of private persons are the real parties in interest. Congress has plenary authority under Article III to create federal jurisdiction so long as there is minimal diversity; federal courts faithfully apply state law under the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); Congress has appropriately balanced federalism concerns elsewhere in CAFA; an attorney-general's action is removable only when it alleges (as here) claims of 100 or more persons, in addition to his own claims. This action—brought against out-of-state defendants by private plaintiffs' lawyers retained by the Attorney General and duplicating allegations of private class actions—is exactly the type of mass action Congress

intended to be removed to federal court. This Court should affirm the judgment below.

1. ***Legislative Background.*** In enacting CAFA, Congress found that state courts often have a "bias against out-of-State defendants" and also attempt to "impose their view of the law" on defendants from other states. J.A. 54a. Recognizing that plaintiffs were "keeping cases of national importance out of Federal court," and determined to exercise its full Article III power to authorize diversity jurisdiction, *id.*, Congress relaxed federal jurisdictional requirements for "class actions" and "mass actions."

Before CAFA, it was difficult to remove state-law class actions to federal court. This Court had interpreted the federal diversity-jurisdiction statute to require complete diversity of citizenship, even though Article III only requires minimal diversity between any plaintiff and defendant. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967). Plaintiffs' counsel could prevent removal simply by naming at least one in-state or non-diverse class representative, even if most class members and the defendants were citizens of other states. *See Snyder v. Harris,* 394 U.S. 332, 340 (1969). Moreover, claims could not be aggregated to satisfy the amount-in-controversy requirement. *Id*. And the presence of a state plaintiff (a non-diverse party) would destroy complete diversity. *See Moor v. County of Alameda*, 411 U.S. 693, 717 (1973).

To protect out-of-state defendants from class-action abuses in state court, CAFA facilitated removal by abolishing the rules that required complete diversity among named representatives and that prohibited aggregation of amounts-in-

controversy. Under CAFA, diversity jurisdiction exists over class actions with more than $5,000,000 in controversy in aggregate if *any* person "named or unnamed" falling "within the definition of the proposed . . . class" is a "citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(1)(D) and (2)(A). Section 1332(d)(2)(C) provides a similar standard where a foreign defendant is involved. State-court class actions meeting the statutory requirements are removable to federal court. *Id.* § 1453. To balance federalism concerns, Congress withheld federal jurisdiction of certain class actions of principally state concern, *id.* § 1332(d)(4) & (5), and gave district courts discretion to decline jurisdiction over certain other actions involving local state issues and parties, *id.* § 1332(d)(3).

Congress also authorized removal of "mass actions," defined as "any civil action (except [a class 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," subject to certain exclusions. *Id.* § 1332(d)(11)(B)(i) & (ii). Congress applied the same jurisdictional rules to mass actions as it applied to class actions, including the $5 million amount in controversy and minimal diversity. Section 1332(d)(11)(A) provides that a "mass action shall be *deemed to be a class action* removable" to federal court if it "otherwise meets" the requirements of CAFA class action jurisdiction, as stated in "paragraphs (2) through (10)" of § 1332(d) (emphasis added). Paragraph (2) is the minimal-diversity provision. Thus, "Congress enacted [CAFA] . . . to grant the federal courts a form of minimal diversity jurisdiction over . . . mass actions in which any . . .

mass action member is diverse in citizenship with regard to any defendant . . . ." 13E Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3606 (3d ed. 2011).

During consideration of the bill that became CAFA, forty-six state attorneys general expressed concern that CAFA would allow removal of attorney-general *parens patriae* actions "on behalf of consumers" seeking restitution under state "consumer protection and antitrust statutes." They supported an amendment to CAFA "exempting all actions brought by State Attorneys General from" its provisions. 151 CONG. REC. S1157, 1158-59 (daily ed. Feb. 9, 2005). The Senate decisively rejected such an amendment proposed by Senator Pryor by a 60-39 vote. *Id.* at S1165.

2. ***Factual Background Of Criminal And Civil LCD Price-Fixing Actions.*** This action is one of more than 150 actions that have been filed across the country, asserting the same or similar claims, against the same defendants, based on the same alleged global price-fixing conspiracy in the thin-film transistor, liquid crystal display ("TFT-LCD" or "LCD") industry.

In December 2006, news reports revealed a federal grand jury investigation into the LCD industry. Resp. App. 43a. Some alleged conspirators entered guilty pleas and paid criminal fines. Resp. App. 2a.

As is common upon the revelation of corporate grand-jury investigations, within days the class-action plaintiffs' bar filed dozens of putative class actions against LCD manufacturers. Eventually,

plaintiffs filed more than 150 actions across the country (including more than 100 putative class-actions) seeking treble damages, attorneys' fees, and injunctive relief under the Clayton Act, 15 U.S.C. §§ 15, 26, as well as unjust enrichment and restitution under various state laws.

The DOJ investigation had no particular connection to Mississippi. Defendants sold billions of dollars' worth of LCD panels in international commerce from 1996 through 2006, the relevant period alleged in the complaint. *Id.* at 11a-12a. No defendant is a Mississippi resident: all twenty-two are part of multinational corporate families headquartered in Asia. *Id.* at 3a-10a. The alleged conspiratorial activities occurred mostly in Asia. *Id.* at 23a-24a. None is alleged to have occurred in Mississippi. This action accordingly bears all the hallmarks of the "'interstate cases of national importance'" that CAFA intended to be removable to federal court. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (quoting Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (2005)). The only connection to Mississippi is that many of its citizens, businesses, and governmental entities purchased products containing LCD panels.

Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation centralized all federal LCD actions for coordinated pretrial proceedings in the U.S. District Court for the Northern District of California. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL Docket No. 1827 (N.D. Cal.). The MDL proceeding included all of the various direct- and indirect-purchaser class actions as well as actions by "opt-out" plaintiffs and the attorneys general of

several states. Defendants have settled class actions by private purchasers of products containing LCD panels (including Mississippi purchasers), and obtained full releases of claims as part of those settlements.[1]

3. ***The Attorney General's Complaint.*** In 2011, after the conclusion of the DOJ investigation, the Mississippi Attorney General filed this suit in Mississippi state court against the same group of defendants named in the prior LCD actions. Resp. App. 2a-67a. As is common, private plaintiffs' lawyers represented the Attorney General, and much of the complaint is a carbon copy of the earlier-filed class actions. Indeed, of the 206 paragraphs of allegations in the Attorney General's complaint, 176 are identical or nearly identical to the paragraphs in the consolidated indirect-purchaser class-action complaint filed in the MDL proceeding. *Compare*

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[1] The Attorney General incorrectly states that the "settling defendants" agreed that these settlements do not foreclose non-settling States from asserting *parens patriae* claims on behalf of the same consumers who settled their claims. Br. 7. All defendants contend that the settlements foreclose such claims; no defendant ever stipulated otherwise. The very order the Attorney General cites, *see* Br. 48 n.8, makes clear that three defendants (AUO, LG, and Toshiba) "have not stipulated that their Settlement Agreements would have no preclusive effect on *any* claims brought by a non-Settling State." *In re TFT-LCD (Flat Panel) Antitrust Litig.,* No. M 07-1827 SI, 2013 WL 1365900, at *6 (N.D. Cal. Apr. 3, 2013). The remaining defendants agreed only that their settlements with a nationwide injunctive relief class did not bar States from bringing monetary relief claims on behalf of consumers who were not party to a class action settlement of monetary relief claims. *See* MDL Dckt. Nos. 4659 at 4-17 (transcript of preliminary approval hearing); 5730.

Resp. App. 3a-63a at ¶¶ 3-34, 36-37, 40-50, 52-97, 101-43, 145-80, 183-90, 192-94, 196-99, 202 *with* Indirect-Purchaser Pls.' Second Consolidated Am. Compl., *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827 SI, MDL Docket No. 1827 (N.D. Cal. Dec. 5, 2008), ECF No. 746, ¶¶ 1-2, 7, 10-16, 67-100, 101-85, 187-227, 240-48, 250-53, 285.

The Attorney General has conceded the copycat nature of this action. After defendants removed the case to the U.S. District Court for the Southern District of Mississippi, J.A. 19a, D.E. 1, the Attorney General filed a "Notice of Potential Tag-Along Action," advocating transfer of the action to the federal MDL proceeding:

> This action involves substantially duplicative or overlapping parties and concerns the same wrongful acts and occurrences as those involved in the more than 100 civil actions currently pending in MDL-1827: *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827-SI (N.D. Cal. Filed Apr. 20, 2007).

J.A. 22a; *see also* J.A. 24a.

The Attorney General's complaint asserts two counts, alleging violations of (1) the Mississippi Consumer Protection Act ("MCPA"), Miss. Code Ann. § 75-24-1, et seq., and (2) Mississippi's Antitrust Act ("MAA"), Miss. Code Ann. § 75-21-1, et seq. Resp. App. 2a, 60a–64a (¶¶ 192-206). These two Mississippi statutes are the sole bases for each claim for relief. Resp. App. 2a.

Some of the claims for relief are solely on behalf of the State of Mississippi, including for example, the claim for injunctive relief. Resp. App. 65a. The

claims for restitution, on the other hand, are expressly on behalf not only of the State but also private purchasers of products containing LCD panels. The complaint includes allegations like:

1) Resp. App. 2a (citing need to address "*restitution for consumers or governmental entities which purchased products* at an artificially inflated price. . . . Attorney General . . . brings this action *on behalf* of . . . natural persons residing in the State "); ¶1 (The attorney general brings this suit . . . "*on behalf of Mississippi citizens*.");

2) Resp. App. 3a ¶2 ("[R]elief is sought *on behalf of* . . . *consumers* . . . who bought a wide range of price-fixed products.");

3) Resp. App. 12a ¶ 42 ("Defendants' conspiracy has resulted in an *adverse monetary effect on indirect-purchasers throughout Mississippi*.");

4) Resp. App. 46a ¶ 145 ("Defendants' conspiracy to raise, fix, or maintain the price of LCD panels at artificial levels *resulted in harm to Plaintiff and other indirect-purchaser consumers in Mississippi* . . . .").

The complaint is replete with other allegations that "*Plaintiff and other Mississippi indirect purchasers* have paid supra-competitive, artificially inflated prices for LCD products[.]"), Resp. App. 61a ¶ 194(f) (emphasis added); *see also id.* 53a ¶ 169, 58a ¶ 182, leading to the Attorney General's request "that defendants be ordered to restitute any and all monies to the State of Mississippi for its purchases of its purchases [sic] of LCD products *and the purchases of its citizens*") (emphases added).

These repeated allegations seeking monetary restitution for both the State and private purchasers in Mississippi rely expressly upon Section 75-24-11 of the MCPA. *See* Resp. App. 65a ¶ 2 (seeking "[i]n accordance with Miss. Code § 75-24-11 that defendants be ordered to restitute any and all monies to the State of Mississippi for its purchases . . . of LCD products and the purchases of its citizens"). Section 75-24-11 of the MCPA provides for:

> restitution, as may be necessary to *restore to any person in interest any monies* . . . which may have been acquired by means of any practice prohibited by this chapter . . . .

Pet. App. 72a (emphasis added). Section 75-24-11 further provides for "the *appointment of a receiver*," who can distribute the appropriate restitution monies to "any person in interest." *Id.* (emphasis added).

The Attorney General's 2011 complaint is not driven by the need for an injunction against conduct that he concedes ended in 2006. Br. 4. Rather, the Attorney General contemplates potentially enormous recovery. His contingency-fee arrangement with private lawyers, for example, provides: "Assume Recovery by the State of Mississippi of a monetary, sum, benefit, or value equal to $600,000,000.00." Retention Agreement (March 24, 2011), www.agjimhood.com/images/uploads/forms/LCDAgreement.pdf.

4. ***Removal Proceedings In The District Court.*** Defendants timely removed this action to the U.S. District Court for the Southern District of Mississippi under CAFA as a "mass action" under 28 U.S.C. § 1332(d)(11), and as a "class action" under 28

U.S.C. § 1332(d)(2). Resp. App. 74a. The Attorney General unsuccessfully moved to have this action centralized with the other LCD actions in the MDL proceeding, and filed a motion to remand the action to state court. J.A. 24a-25a.

The district court concluded that the action qualified as a "mass action" under CAFA. Pet. App. 44a. It reasoned that both the MCPA and the MAA give Mississippi consumers a right to sue for their injuries, which made them "real parties in interest with respect to the State's request for restitution on their behalf." Pet. App. 39a. Accordingly, it held that "this suit is a mass action because there are more than 100 real parties in interest that seek a joint trial on common questions of law or fact." Pet. App. 44a-45a. Nevertheless, the court remanded the action on the grounds that it fell within the provision that applies "when all of the claims in the action are asserted on behalf of the general public, 28 U.S.C. § 1332(d)(11)(B)(ii)(III)." *Id.* at 44a-52a.

5. ***Decision Of The Court Of Appeals.*** The Fifth Circuit reversed, upholding removal under CAFA's mass-action provision and holding that the general-public provision does not apply. Pet. App. 1a-12a. The Fifth Circuit concluded that "[a]t its core, this case practically can be characterized as a kind of class action in which the State of Mississippi is the class representative," *id.* at 10a, and agreed with the district court that the "real parties in interest in Mississippi's suit are those more than 100 persons who, by substantive law, possess the right sought to be enforced[.]" *Id.* at 5a. Applying a claims-based analysis, rather than a "whole-case" approach, the court held that given the restitution demand, both

"the State (as a purchaser of LCD products) and individual citizens who purchased the products within Mississippi possess 'rights to be enforced,'" and thus "the real parties in interest include not only the State, but also individual consumers residing in Mississippi." *Id.* at 5a-6a. It noted that "it is undisputed" that the relief sought "satisfies the amount in controversy requirement," *id.* at 4a, and that "there are more than 100 consumers." *Id.* at 9a.

While agreeing with the district court that this case is a mass action, the Fifth Circuit parted company as to CAFA's general-public provision. That provision does not apply because the "requirement that 'all of the claims' be asserted on behalf of the public is not met here." *Id.* at 9a. "[I]ndividual consumers . . . are real parties in interest." *Id.* Therefore, the Fifth Circuit upheld federal jurisdiction and removal to federal court.

SUMMARY OF ARGUMENT

CAFA authorizes removal to federal court of a "mass action" on the same terms as qualifying class actions. It defines a "mass action" as any civil action, other than a class 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) (emphasis added).

Thus, as a matter of plain language, a federal court applying that definition must determine whether any "monetary relief claims" "in" the action belong to "100 or more persons." Contrary to the Attorney General's contentions, determination of a mass action does not turn on the character of the

action as a whole. Rather, the district court must undertake a claims-based analysis. Other provisions of the statute, including enumerated exclusions from the mass-action definition, likewise turn on the analysis of claims.

Similarly, the plain language requiring a determination of the "persons" to whom the "monetary relief claims" belong necessarily requires a determination of the real parties in the interest to the claim. That is the longstanding rule in over a century of this Court's jurisprudence under the diversity statute, and Congress is presumed to legislate in light of those precedents. The Attorney General insists that this Court should discard that jurisprudence and interpret "persons" to mean "named plaintiffs." But Congress did not use the term "named plaintiffs" in CAFA's "mass action" definition. Indeed, the minimal-diversity provision that applies to mass actions makes plain that jurisdiction over mass actions is determined on the basis of both named and unnamed plaintiffs. Congress has used the term "named plaintiffs" in other jurisdictional statutes, and did not do so here. The Attorney General argues that the term "plaintiffs" in other mass-action provisions of CAFA must refer to named plaintiffs, but regardless that does not trump the plain meaning of the different term "persons."

Despite the explicit directive in CAFA that courts undertake a claims-based analysis, the Attorney General insists that the appropriate test derived from this Court's sovereign immunity precedents requires analysis of the "essential nature of the proceeding." The Attorney General wrenches that phrase out of

context, and ignores that this Court has expressly held that in multi-claim actions, the state's status as a real party in interest must be determined for each claim, and not on the basis of the case as a whole. Pre-CAFA appellate authorities have used the sovereign-immunity test in determining "complete diversity," which does not require a claims-based analysis. But CAFA replaces the complete-diversity rule with a minimal-diversity rule, and explicitly requires claim-based analysis in determining mass-actions.

Here, the thousands of Mississippi persons allegedly injured by paying excessive prices are the real parties in interest to the Attorney General's private-purchaser restitution claims. Indeed, this Court has recognized in an analogous federal context that injured purchasers are the real parties in interest when the government requests restitutionary relief. The Attorney General baldly claims that Mississippi has a contrary rule permitting restitution for consumer payments to be paid to the State, and not to the injured persons, and that the Court cannot pierce the pleadings to question its claim. To the contrary, this Court has always conducted an independent analysis of the state law creating the right of action in assessing diversity requirements. Here, the Mississippi consumer-protection statute only authorizes a court to "restore to any person in interest any monies" unlawfully acquired by the defendant from them; only the consumer making the overpayment is the "person in interest" to whom moneys can be "restore[d]." The Fifth Circuit properly so held, in a construction of state law entitled to deference, as

have other state supreme courts interpreting language from the same uniform act.

None of the Attorney General's other arguments has force. The strict-construction principle recognized in some of this Court's precedents was expressly predicated on congressional *policy* in successive past jurisdiction and removal statutes; they do not apply to CAFA, which abandoned that policy in dramatically broadening diversity jurisdiction and removal of class and mass actions. The Attorney General's invocation of *parens patriae* standing is of no moment. The common-law *parens patriae* standing doctrine has no application here. Nor does CAFA include any implied exemption of any statutory *parens patriae* actions that are effectively representative actions. In the mass-action definition, Congress consciously mimicked the language of those statutes, which authorize attorneys general to assert "monetary relief claims" on behalf of natural "persons"; they are plainly within CAFA's reach. Likewise, the provision excluding from the mass-action definition actions where "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)" does not aid the Attorney General. It is not surplusage because it clarifies the scope of the mass-action definition, and because some mass actions may indeed fall within its scope. In any event, the Attorney General cannot shelter under this provision because he does not assert exclusively general-public claims.

Nor does CAFA, properly interpreted, raise federalism concerns. Congress unquestionably has the Article III power to authorize removal of state

attorney general "mass actions"; CAFA does not abridge any sovereign or quasi-sovereign interest of a State, or any substantive right to enforce state laws. This is only a question of forum, and federal courts faithfully enforce state law. Through CAFA, Congress sought to limit biases and abuses in state court, largely instigated by the same plaintiffs' bar that brings class actions and attorney-general actions under contingency fee arrangements.

Finally, the legislative history does not avail the Attorney General. To support his "named plaintiffs" theory, the Attorney General invokes a Senate report that was issued *after* CAFA's enactment, which courts have rightly deemed irrelevant. The defeat of an amendment to exempt state attorney-general actions hardly establishes that such actions were already exempt; even if some Members thought so, many others opposed the amendment because it would create a loophole for the plaintiffs' bar to exploit. Nothing in the legislative history trumps the plain meaning of the mass-action provision, and this Court should affirm the judgment below.

ARGUMENT

I. The Attorney General's Action Is One "In Which Monetary Relief Claims Of 100 Or More Persons Are Proposed To Be Tried Jointly."

A. Every Sentence Of CAFA's "Mass Action" Definition Requires Analyzing The "Claims" Within The Action.

"[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others," and "must presume that a legislature says in a

statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). CAFA defines a "mass action" as "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)." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added).

It could not be plainer that the mass-action definition requires analysis of the "claims" within an action rather than the "whole case." Every clause refers to "claims," starting with the determination of whether the civil action is one "*in which* monetary relief *claims* of 100 or more persons are proposed to be tried jointly. . . ." 28 U.S.C. § 1332(d)(11)(B) (emphasis added). A court must analyze the complaint to determine whether the requisite type of claims ("monetary relief claims") exist on behalf of the requisite number and type of claimants ("100 or more persons"). Under the plain language, the existence of other claims is irrelevant as long as the action includes "monetary relief claims of 100 or more persons." The remainder of the mass-action definition likewise requires the court to determine whether the requisite claims "are proposed to be tried jointly" and "involve common questions of law or fact." *Id.*

The four provisions in the next subsection, 1332(d)(11)(B)(ii)(I)-(IV), confirm the necessity of a

claims-based approach, providing that a mass action "shall not include any civil action in which—

> (I) all of the *claims* in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;
>
> (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."

(emphases added). Indeed, the first provision of subsection (B)(ii)—which excludes actions in which "*all of the claims in the action* arise from an event or occurrence in the State in which the action was filed" (emphasis added)—demonstrates that Congress knows precisely how to put the character of a "whole case" at issue when it so intends. CAFA clearly calls for a claim-based analysis of whether the mass-action definition is satisfied.

B. The Mass-Action Requirement Of "Monetary Relief Claims Of 100 Or More *Persons*" Looks To The Real Parties In Interest To The Claims.

The CAFA mass-action requirement that the action include "monetary relief claims of 100 or more persons" is not based, as the Attorney General

contends (Br. 16-17), solely on the number of named plaintiffs. Rather, the statute by its plain text—referring to the "claims of 100 or more *persons*"—addresses the persons to whom the claim belongs, *i.e.,* the real parties in interest *to the claims* (the persons entitled to the "monetary relief"). 28 U.S.C. § 1332(d)(11)(B)(i). This comports with the settled diversity-jurisdiction rule that "[f]or purposes of jurisdiction in the federal courts, regard is had to the real, rather than to the nominal, party," and "*the real party in interest is not the nominal plaintiff, but the party for whose benefit the recovery is sought*[.]" *Stewart v. Baltimore & Ohio R.R. Co.*, 168 U.S. 445, 449-50 (1897) (emphasis added); *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980) ("a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy"); *see also Ex parte Nebraska*, 209 U.S. 436, 445 (1908) ("If the nature of the case is such that the State of Nebraska is the real party plaintiff, the Federal court will so decide for all purposes of jurisdiction, *even though the State were not named as a party plaintiff*.") (emphasis added); *Mo., Kan. & Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 59-60 (1901) (conducting a diversity analysis and declaring that a state is a real party in interest regarding a claim if the relief "inures" to the state, and rejecting the idea that "a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders . . . , and in securing compliance with all its laws" is sufficient to make a State a real party in interest to a claim). *Cf. United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents. . . .").

Notwithstanding this plain meaning, the Attorney General (Br. 16-17) contends that Congress meant to say "claims of 100 or more named plaintiffs" when it used the phrase "claims of 100 or more *persons*," pointing to the use of the term "plaintiffs" elsewhere in the mass-action definition. Br. 16-17. But Congress did not use the term "named plaintiffs," even though it knows how to do so. The Magnuson Moss Act's jurisdictional provision, for example, permits a class action to be brought in federal court, unless, among other things, "the number of *named plaintiffs* is less than one hundred." 15 U.S.C. § 2310(d)(3)(C) (emphasis added).[2]

CAFA's minimal-diversity provisions confirm the plain meaning of "persons" by providing that *unnamed* persons may satisfy the minimal-diversity requirement for class or mass actions. Minimal diversity is satisfied when "any member of a class of *plaintiffs*" is a citizen of a State different from any defendant. 28 U.S.C. § 1332(d)(2) (emphasis added). "Class members" under CAFA means the "persons (*named or unnamed*) who fall within the definition of the proposed or certified class in a class action." *Id.*

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[2] This Court's own opinions, which repeatedly use "plaintiff" to refer to unnamed class members, undermine the Attorney General's contention that "plaintiffs" refers only to "named plaintiffs." *See, e.g.*, *Exxon Mobil Corp. v. Allapattah*, 545 U.S. 546, 549 (2005) (where "at least one *named plaintiff* in the action satisfies the amount-in controversy requirement, § 1367 does authorize supplemental jurisdiction over the claims of *other plaintiffs* in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount") (emphasis added); *Zahn v. Int'l Paper Co.* 414 U.S. 291, 297-99 (1973) (describing a class action as being "brought on behalf of *plaintiffs* with separate and distinct claims") (emphasis added).

§ 1332(d)(1)(D) (emphasis added). This minimal-diversity requirement applies to mass actions, which are deemed class actions under CAFA if they otherwise meet the requirements of § 1332(d)(2)-(10). *See id.* § 1332(d)(11)(A). Because minimal diversity can be satisfied by unnamed persons whose claims are joined in a mass action, the State's proposed construction of "persons" in the mass action definition as referring only to named plaintiffs is untenable.

CAFA's "general public" provision also demonstrates Congress's intent that a mass action may consist of claims brought on behalf of unnamed persons. This provision provides that a "mass action" shall not include an 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*) . . . ." 28 U.S.C. § 1332(d)(11)(B)(ii)(III). Thus, a "mass action" expressly may include representative "claims . . . on behalf of individual claimants or members of a purported class." *See also, e.g.*, Enrique Schaerer, *A Rose By Any Other Name: Why A Parens Patriae Action Can Be A "Mass Action" Under the Class Action Fairness Act*, 16 N.Y.U. J. PUB. POL'Y 39, 61 (2013) (observing that the "general public" provision's reference to "'members of a purported class' makes sense only if non-class, representative actions fall within the scope of a CAFA mass action").

Accordingly, CAFA by its plain text requires that a removing defendant invoking mass-action jurisdiction must (1) identify at least one real party in interest (named or unnamed) who is diverse from any one defendant, and (2) show that the action

includes claims of "100 or more persons," *i.e.*, 100 or more real parties in interest. The presence of a State party can no longer destroy diversity, *see supra* 3, nor is it material that the State may have asserted its own claims in the same action. The action is removable so long as it is one "in which" claims of 100 or more persons are proposed to be tried jointly. 28 U.S.C. § 1332(d)(11)(B)(i).

1. The meaning of "persons" does not depend on the meaning of "plaintiffs" in CAFA's mass action provisions.

The Attorney General seeks to avoid the plain meaning of "persons" in CAFA's mass-action definition by focusing on Congress's employment of the separate term "plaintiffs" in CAFA's mass-action provisions. Specifically, section 1332(d)(11)(B)(i) includes a requirement that the claims in the action be proposed for joint trial "on the ground that the plaintiffs' claims involve common questions of law or fact," and also provides that, once a mass action is removed, CAFA diversity "jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection [1332](a)" of at least $75,000. 28 U.S.C. § 1332(a), (d)(11)(B)(i). In addition, CAFA's MDL transfer provision provides that, once removed, a "mass action" may not be transferred under the multidistrict litigation procedures of 28 U.S.C. § 1407 "unless a majority of the plaintiffs in the action request transfer. . . ." *Id.* 1332(d)(11)(C)(i). The Attorney General contends that Congress's usage of the term "plaintiffs" in these provisions compels a

construction of "persons" to mean "named plaintiffs." Br. 16-18, 21-24. His arguments fail.

As demonstrated *supra*, it is clear that "persons" means real parties in interest in section 1332(d)(11)(B)(i), and that the term "plaintiffs" in 1332(d)(2)'s minimal-diversity language as applied to mass actions must include unnamed real parties in interest. However, it is not inexorable that a word has the same meaning everywhere in the statute, and meaning will depend on context. *Envt'l. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). Thus, even though the term "plaintiffs" in CAFA's minimal-diversity provision, § 1332(d)(2), necessarily applies to unnamed plaintiffs, in the different context of the transfer provision, 1332(d)(11)(C)(i) (a procedural provision), the term "plaintiffs" is best construed to refer to the actually appearing party who is prosecuting an action, whether on his own behalf or on behalf of a represented party.

The meaning of the term "plaintiffs" in section 1332(d)(11)(B)(i) likewise depends on context. But that is immaterial to the question before the Court. Regardless of how the term "plaintiffs" is construed, its meaning cannot alter the plain meaning of "persons" as real parties in interest. The Attorney General's proposal that "persons" always means "named plaintiffs" would discard over a century of this Court's jurisprudence determining the "person" to whom "claims" belong as the real parties in interest and cannot be adopted.

Either construction of the term "plaintiffs" harmonizes with the plain meaning of "persons" as the real parties in interest. CAFA's mass-action definition can be read naturally to give "persons" and

"plaintiffs" distinct meanings. *See Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning"). The word "persons" in the phrase "monetary relief claims of 100 or more persons" can be read naturally to mean the individuals or business entities to whom such claims belong, while "plaintiffs" can be read naturally as referring to the party or parties bringing an action.

On the other hand, if "persons" and "plaintiffs" should have the same meaning in 1332(d)(11)(B)(i)'s "mass action" definition, that would not justify abandoning the plain meaning of "persons" under the historic real-party-in-interest test. The proper approach would be to construe the term "plaintiffs" as including both named and unnamed real parties in interest. *Cf. Title Guar. & Surety Co. v. Allen,* 240 U.S. 136, 140-41 (1916) (holding under prior diversity statute that, if the state is a nominal plaintiff, the represented individuals must each meet jurisdictional amount in controversy); *Hickman,* 183 U.S. at 59-60 (referring to "real party plaintiff").

Either interpretation avoids the administrative issues the Attorney General fears. If the $75,000 amount-in-controversy clause applies only to named plaintiffs, and "persons" continues to mean real parties in interest, the feared administrative tasks disappear because CAFA mass-action jurisdiction extends to claims of unnamed real parties in interest in a mass action as long as one named plaintiff representing them has a claim exceeding $75,000.

If "plaintiffs" includes both named and unnamed plaintiffs, the $75,000 amount-in-controversy clause

is readily administrable. In some circumstances, defendants may be able to identify from their payment records any persons who may have claims for overpayments and prove the requisite amount in controversy even for unnamed parties. But so long as defendants can prove that at least one person satisfies the $75,000 threshold—and here there are many—then unnamed plaintiffs with insufficient claims may remain in federal court under supplemental jurisdiction under § 1367(a), just as unnamed class members do under the holding of *Allapattah*. *See* 545 U.S. at 559 ("If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a "civil action" within the meaning of § 1367(a)[.]"). There would be no need, as the Attorney General suggests, Br. 22, "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[.]"[3]

This Court need not resolve the proper operation of the $75,000 amount-in-controversy clause, because it does not concern the removability of the "action" (and the Attorney General does not contend

[3] Even if supplemental jurisdiction were not available, any remands based on the $75,000 clause would not jeopardize satisfaction of the numerosity requirement of "monetary relief claims of 100 or more persons" or the $5,000,000 amount-in-controversy requirement because "[f]or jurisdictional purposes, our 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). Otherwise, a "mass action" would have a $7,500,000 amount-in-controversy requirement (100 x $75,000) rather than the $5,000,000 requirement set by Congress. *See* 28 U.S.C. §§ 1332(d)(2) – (d)(11)(A).

otherwise, *see* Br. 21-23). This clause concerns the potential disposition, post-removal, for any "plaintiffs whose claims in a mass action" do not exceed $75,000. The Fifth Circuit accordingly did not reach that question. The salient point is that the Attorney General's belt-and-suspenders approach to statutory construction is untenable: the meaning of "plaintiffs" in CAFA does not alter the plain meaning of "persons" as referring to real parties in interest.

2. The Attorney General's complaint proposes to try jointly the monetary relief claims of more than 100 persons.

Nor can the Attorney General change the nature of the jurisdictional inquiry by baldy claiming that only his claims would be tried. Br. 19-20. As noted above, the Attorney General seeks restitution for numerous persons in Mississippi. Resp. App. 65a ¶ 3. By seeking to resolve those claims in this action, the State has already "proposed" that the "monetary relief claims" of more than 100 persons be tried along with the State's. The State offers no explanation of how those claims could be resolved but in a joint trial. There is only one complaint. The State's claims are supported by the same allegations of law and fact that support the individual claims. And the Attorney General has acknowledged common questions: "[T]his action involves substantially duplicative or overlapping parties and concerns the same wrongful acts and occurrences as those involved in the more than 100 civil actions currently pending in MDL-1827." J.A. 22a, D.E. 10, Ex. 1; *see also* J.A. 24a, D.E. 18 ("There is no dispute that the State's action includes the common facts presented in the MDL.").

This action is similar to a class action where liability for consumer overpayments would be tried jointly and individual issues of relief would be tried in a second phase.

3. Nothing in CAFA supports a novel inquiry into a putative real party in interest in "the whole case."

To escape the plain meaning of the statute, the Attorney General, and the courts of appeals in his camp, have invented (with no textual basis in CAFA) a novel concept that the real party in interest in a CAFA action is determined based on "the whole case," rather than by analysis of individual claims. The Seventh Circuit initiated this error, seizing on language in this Court's sovereign immunity precedents that "[w]hether a state is *the* real party in interest in a suit 'is a question to be determined from the "*essential nature and effect of the proceeding*."'" *LG Display Co. v. Madigan*, 665 F.3d 768, 773 (7th Cir. 2011) (quoting *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 250 (7th Cir. 1981) (quoting *Ford Motor Co. v. Dep't of Treasury of State of Indiana*, 323 U.S. 459 (1945)). Other courts of appeals followed suit:

> We are therefore satisfied to resolve [this case] by adopting the whole-case approach and rejecting the claim-by-claim approach. In so doing, we conclude that *the nature and effect of these actions* demonstrate that South Carolina is *the* real party in interest, a fact that is unencumbered by the restitution claims. We therefore agree with the Ninth and Seventh Circuits that a claim for restitution, when tacked onto other claims being properly pursued by the State, alters neither the State's

> quasi-sovereign interest in enforcing its own laws, nor *the nature and effect of the proceedings*. . . .

AU Optronics v. South Carolina, 699 F.3d 385, 394 (4th Cir. 2012) (emphasis added); *Nevada v. Bank of Am.*, 672 F.3d 661, 670 (9th Cir. 2012).

As an initial matter, even if these circuits were correct that this Court's sovereign-immunity jurisprudence employed a whole-case approach, that would not trump CAFA's explicit directive to undertake a claims-based analysis: *i.e.,* to determine whether the "claims" belong to "100 or more persons." 28 U.S.C. § 1332(d)(11)(B)(i). A determination of whether a person is a real party in interest to a claim under CAFA's minimal-diversity and mass-action provisions is a different inquiry from whether the state is the real party *defendant* in a suit against state officers.

The "whole case" circuits' fixation on "the nature and effect of the action," and their elevation of that consideration above CAFA's textual mandate to analyze the claims within an action, stem from their *misreliance* on this Court's state sovereign-immunity precedents, in particular *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459 (1945). The question in *Ford* was whether the plaintiff could sue in federal court for a state tax refund when naming only state officials, rather than the State, as defendants. This Court held: "[T]he nature of a suit as one against the state is to be determined by *the essential nature and effect of the proceeding*. And when the action is in essence one for the recovery of money from the state, the state is *the* real, substantial party in interest and is entitled to invoke

its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 464 (emphasis added).

Significantly, *Ford* involved a single claim. In sovereign-immunity cases involving multiple claims, the rule is that "[a] federal court must examine *each claim* in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U. S. 89, 121 (1984) (emphasis added). In *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 390 (1998), this Court affirmed that real-party-in-interest analysis applied "to each claim rather than [the] case as [a] whole," *id.* at 390, and held in a removal case that even though the Eleventh Amendment barred jurisdiction over one claim, the federal court could proceed with "the remaining claims in the case before us," *id.* at 392-93. And in *Papasan v. Allain*, 478 U.S. 265 (1986), this Court held that "trust claims" against state officers for monetary relief were barred, but a claim for an injunction to redress a constitutional violation was not. *Id.* at 279-80. Thus, a court will evaluate claims against state officers based on "'the essential nature and effect of the proceeding, as it appears from the entire record,'" *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 278 (1997), but the inquiry still proceeds claim by claim. This Court's sovereign-immunity jurisprudence refutes the "whole-case" approach.

The Seventh Circuit in *Madigan* first took a wrong turn in importing *Ford*'s analysis into CAFA's mass-action removal analysis. The earlier Seventh Circuit case on which *Madigan* relied, *Nuclear Engineering*, properly relied on *Ford* to determine

whether a State was "a" real defendant in interest to test *complete diversity*: "States are not considered 'citizens' for purposes of diversity jurisdiction and therefore diversity jurisdiction may not be asserted over an action to which a state is *a* real party in interest. When a state official is a party to a proceeding over which diversity jurisdiction is alleged, whether the respective state is itself *the* real party in interest is a question to be determined from the '*essential nature and effect of the proceeding*." 660 F.2d at 250 (quoting *Ford*, 323 U.S. at 464) (emphasis added).

Looking to the "essential nature and effect of the proceeding" for whether a State is "a" real party in interest to test *complete diversity* cannot be the appropriate analysis for the minimal-diversity or the "monetary relief claims of 100 or more persons" requirements under CAFA's mass-action provision. "In contrast to the [complete] diversity requirement, most of the other statutory prerequisites for federal jurisdiction, including the federal-question and amount-in-controversy requirements, can be analyzed *claim by claim*." *Allapattah*, 545 U.S. at 554 (emphasis added).

Like the other jurisdictional tests described in *Allapattah*, CAFA's mass-action provision requires a claim-by-claim analysis, considering the real parties in interest for each claim. CAFA's purpose was to abrogate the complete diversity rule in favor of minimal diversity. Furthermore, as to States, and their special, diversity-destroying status under the complete diversity rule, Congress necessarily acknowledged that CAFA's new class-action and mass-action provisions meant that the State's

presence, either as a real party in interest or a named party, would *not* preclude minimal diversity because Congress expressly excluded from removal any class or mass action in which "the *primary defendants* are States, State officials, or other governmental entities . . . ." 28 U.S.C. § 1332(d)(5)(A) (emphasis added). Congress provided no such exclusion for actions in which a State is a plaintiff, primary or otherwise.

Thus, there is no warrant in CAFA or this Court's jurisprudence for a "whole case" approach. When Congress wanted the removability of a purported "mass action" to hinge on the character of the action *in toto*, as opposed to specific claims, Congress twice used plain language, "all of the claims in the action," 28 U.S.C. §§ 1332(d)(11)(B)(ii)(I)-(III), in provisions that do not apply here. *Supra* 17-18. But to determine whether an action consists of "monetary relief claims of 100 or more persons," a federal court must determine the real parties in interest to the specific claims.

4. The injured persons are real parties in interest to restitution claims asserted by the State based on their alleged overpayments.

There is no question that the injured persons who allegedly paid excessive prices because of unlawful conduct are the real parties in interest to claims for restitution of those overcharges. In an analogous federal-law context, this Court held that even where a government officer brings an action for restitution in equity, the individuals harmed by overcharges are real parties in interest. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 401 (1946). In *Porter*, this Court

upheld the power of the Price Administrator (*i.e.*, the Government) under the Emergency Price Control Act to seek restitution in equity for overcharges to individual tenants as ancillary to his statutory authority to seek injunctive relief. The Court held that:

> [The District Court] may act so as to adjust and reconcile competing claims and so as to accord *full justice to all the real parties in interest*; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced.

Id. at 398. Thus, a restitution claim for overpayment belongs to the person injured by the overcharge as the real party in interest, even if the individual is not the one asserting his or her own claim.

Notwithstanding *Porter*, the Attorney General avers that the federal courts must accept his characterization of the state-law restitution claim in the complaint as belonging to the State and not the injured parties. Br. 53-54. The Attorney General's argument is unsound.

First, a plaintiff's characterization of state law and of the real parties in interest in its pleadings is never dispositive in diversity-jurisdiction cases. The fact that the State is the only named plaintiff does not end the inquiry. The Court will "look beyond the pleadings" to discover the real parties to the controversy because "[d]iversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who are

defendants." *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941). Moreover, this Court will independently "look to state law to determine the nature and extent of the right to be enforced in a diversity case." *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 352-53 (1961).

Second, the Attorney General's *authority* is not in question before this Court. Defendants have assumed, for purposes of this appeal only, that the Attorney General has the authority to bring MCPA claims for restitution. The only issue is a jurisdictional one, asking whether 100 or more persons are real parties in interest to those claims.

Third, the Attorney General has twisted the words in the complaint, "restitution to the State," into a basis for arguing that these claims are only on behalf of the State. Br. 54. The Attorney General cannot change the complaint's plain language, which seeks restitution under the MCPA based on the purchases of Mississippi citizens and "on behalf" of them. Resp. App. 65a.

Fourth, as the Fifth Circuit held, under Mississippi law, the individual purchasers are the real parties in interest for the restitution claims for their overpayments. Pet. App. 8a-9a. The Attorney General asserts a variety of claims in this case. Resp. App. 64a-66a. One claim is under Section 75-24-11 of the MCPA for restitution based on the State's "purchases of LCD products and the purchases of its citizens." *Id.* at 65a. Thus, the Attorney General seeks restitution for both the State's purchases *and* the purchases by individual Mississippi consumers. The Fifth Circuit correctly interpreted Mississippi law by holding that "the real parties in interest are

both the State and consumers." Pet. App. 7a. The Court generally defers to the courts of appeals' interpretation of state law within their circuits. *See McMillian v. Monroe County*, 520 U.S. 781, 787 (1997); *Pembaur v. Cincinnati*, 475 U.S. 469, 485 n.13 (1986).

The plain language of Section 75-24-11 of the MCPA supports the Fifth Circuit's holding that consumers are real parties in interest for restitution claims based on their overpayments. Section 75-24-11 only permits the court to order "restitution . . . to *restore* [money] to any person in interest[.]" Pet. App. 72a (emphasis added). The only "person in interest" to whom money can be restored is a consumer who allegedly overpaid for LCD-panel products. Section 75-24-13 makes clear that a consumer "may participate . . . in the distribution of the assets to the extent he has sustained out-of-pocket losses." *Id.* at 73a. Moreover, the restitution claims must belong to the individual consumers because the MCPA allows any consumer to bring a separate action for violations of the MCPA, Pet. App. 73a, and Mississippi does not allow double recovery for the same harm. *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So. 2d 703, 711 (Miss. 2005) ("double recovery for the same harm is not permissible").

Section 75-24-11 tracks the language of the 1970 Uniform Consumer Protection Act (UCPA) prepared by the Council of State Governments, and Mississippi state courts will construe the MCPA consistent with the practice in other states. *See, e.g., Cole v. Nat'l Life Ins. Co.*, 549 So. 2d 1301, 1306, 1308 (Miss. 1989). The Supreme Court of Arizona has interpreted the "restore to any person in interest"

language of the UCPA not to authorize the court to disgorge consumer overpayments to the State. *State ex rel. Horne v. AutoZone, Inc.*, 275 P.3d 1278, 1282-83 (Ariz. 2012). So did the Supreme Court of Iowa under its then-existing UCPA statute. *State ex rel. Miller v. Santa Rosa Sales and Mktg., Inc.*, 475 N.W. 2d 210, 213 (Iowa 1991) ("This statutory language authorizes the attorney general to recover restitution for Iowa consumers. However, there is no language in section 714.16 which gives authority to award unclaimed restitution funds to the state.").

Thus, while injured consumers may not be parties for procedural or discovery purposes, restitution orders in attorney-general actions entail resolution of "consumer claims" to money unlawfully acquired by the defendant. *State ex rel. Kidwell v. Master Distribs., Inc.*, 615 P.2d 116, 126 (Idaho 1980); *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 553 P.2d 423, 438 (Wash. 1976); *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 416 (Alaska 1982) ("as to the restitution claim the State is attempting to enforce the rights of a class of private individuals," and "must be regarded as acting in a representative capacity"); *Kugler v. Romain*, 279 A.2d 640, 649 (N.J. 1971) (attorney general's restitution claims were "in the nature of a class action"); *see generally* Mary Dee Pridgen, *Consumer Protection and the Law* §§ 7-13 to 7-14 (Nov. 2012). Injured purchasers are the "person in interest" to whom money must be "restored" under the MCPA, and thus are the real parties in interest under CAFA.

It does not matter that the Attorney General has asserted claims for injunctive relief and civil penalties, and proprietary claims for restitution of

the State's own overpayments. The Attorney General has also asserted restitution claims for overpayments that belong to consumers numbering in the thousands, at a minimum, and thus this is a removable mass 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) (emphasis added).

II. The Attorney General's Arguments In Derogation Of The Plain Meaning Of The CAFA Mass-Action Statute Are Unavailing.

The Attorney General advances an array of counterarguments, but none overcomes the plain language of the CAFA mass-action statute.

A. No Canon Of Strict Construction Applies To CAFA.

The Attorney General claims that CAFA is subject to a rule of strict construction sometimes applied to removal statutes, citing principally *Healy v. Ratta*, 292 U.S. 263 (1934), *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), and *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002). *See* Br. 27-28. Those cases make clear that strict construction was a judicial gloss on restrictive *congressional* policy of past jurisdictional and removal statutes; those cases have no application to CAFA, which adopts a contrary policy of expanding federal diversity jurisdiction over (and removal of) class and mass actions.

Healy was a federal-question case involving no question of removal. The Court stated that "[d]ue regard for the rightful independence of state

governments" required confining jurisdiction to the precise limits of the statute, 292 U.S. at 270, but it announced no general, constitutionally-based policy of strict construction. Rather, this Court stated that "[t]he *policy of the statute* calls for its strict construction." *Id.* (emphasis added). The Court recounted that "[f]rom the beginning suits between citizens of different states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount," and "[p]ursuant *to this policy* the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount." *Id.* at 268-69 (emphasis added). Thus, the *Healy* rule of strict construction is derived from the policy of prior jurisdictional statutes (which Congress is free to abandon).

This Court applied *Healy's* policy-based canon of strict construction to the diversity-jurisdiction statute in *Snyder v. Harris*, 394 U.S. 332 (1969). In affirming the rule against aggregation of class-action claims in determining the amount in controversy, this Court noted that "the congressional purpose in steadily increasing through the years the jurisdictional amount requirement" served "to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship jurisdiction." *Id.* at 339-40.

In *Shamrock*, this Court invoked *Healy* in the removal context, likewise reasoning that "the *policy of the successive acts of Congress* regulating the jurisdiction of federal courts is one calling for the

strict construction of such legislation." 313 U.S. at 109 (emphasis added). The Court noted that, after extending the right of removal to any party in 1875, Congress returned to its earlier rule of limiting the right of removal to defendants in 1887. *Id.* at 105-06. This Court declared this history to be of "controlling significance as indicating the Congressional purpose to narrow the federal jurisdiction on removal." *Id.* at 108. *See also Syngenta*, 537 U.S. at 32 (applying same canon to same statute).

No such policy-based canon of strict construction applies to CAFA. CAFA radically reshaped the landscape of diversity jurisdiction and removal, embodying a new congressional policy "to move as many class and mass actions as possible into the federal courts." 13F Wright and Miller, *Federal Practice and Procedure* § 3623, at 27 (3d. ed. 2013). In CAFA, Congress expressly sought to cure "[a]buses in class actions [that] undermine the national judicial system," and to enable removal of class and mass actions from state courts that often "demonstrate bias against out-of-State defendants[.]" J.A. 53a-54a. Far from *limiting* diversity jurisdiction over class and mass actions, as past statutes did, Congress took numerous measures in CAFA to *expand* it. For class and mass actions, it abrogated the rule of complete diversity in favor of minimal diversity, 28 U.S.C. § 1332(d)(2)(A)-(C); abandoned the rule against aggregation of amounts in controversy, *id.* § 1332(d)(6); and allowed even unnamed members of a class or mass action to count for purposes of diversity of citizenship and amount in controversy, *id.* § 1332(d)(1)(D).

Congress also returned to "the concept of diversity jurisdiction as intended by the framers of the United States Constitution." J.A. 53a-54a. "The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). Diversity jurisdiction in the federal courts is premised upon this apprehension of state prejudice against out-of-state parties. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.); *see also Pease v. Peck*, 59 U.S. (18 How.) 518, 520 (1856); *Allapattah*, 545 U.S. at 553-54. Congress determined that expanding removability to federal court was necessary to counteract state court biases in class and mass actions. "[O]nly in the federal courts is an out-of-state litigant always afforded the best available pleading practices and pre-trial and trial procedures, a judge free of the pressures of re-election or reappointment, and a jury without parochial attachment to a single county or municipality." James W. Moore and Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 22 (1964).

The Attorney General incorrectly asserts that *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), applied the canon of strict construction in a post-CAFA case, but that case only addressed the burden of proving jurisdictional facts: "The burden of persuasion for establishing jurisdiction, of course, remains on the party asserting it. When challenged on *allegations of jurisdictional facts*, the parties must support their

allegations by competent proof." *Id.* at 96-97 (emphasis added).[4]

Whatever Congress's past policies, there is no policy of restricting federal court jurisdiction in CAFA that warrants strict construction of its class- and mass-action provisions. As this Court declared in *Allapattah*,

> We must not give jurisdictional statutes a more expansive interpretation than their text warrants, but it is just as important not to adopt an artificial construction that is narrower than what the text provides. No sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of federal jurisdiction within appropriate constitutional bounds. Ordinary principles of statutory construction apply.

545 U.S. 546, 558 (2005). Indeed, to the extent that this Court finds any provision of CAFA to be ambiguous, the proper canon to invoke is the principle that when "the Act is remedial, it is to be construed broadly to effectuate its purposes." *Jefferson Cnty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 159 (1983).

The Attorney General's invocation of policy-based canons strictly construing removal statutes is

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[4] Other cases cited by the Attorney General are similarly inapposite. *Holmes Group v. Vornado Air*, 535 U.S. 826 (2002), was not a removal case; the Court merely held that a patent-law counterclaim filed in federal court cannot confer "arising under" patent jurisdiction. *Merrell Dow Pharm. v. Thompson*, 478 U.S. 804 (1986), likewise did not address diversity jurisdiction.

particularly inapposite. CAFA not only dramatically expanded the scope of class and mass actions removable in 28 U.S.C. § 1453, exempting them from four procedural rules that apply to removal generally. **First**, CAFA removal is not subject to the typical one-year limitation period on removal. 28 U.S.C. § 1453(b). **Second**, CAFA removal does not require the consent of all defendants. *Compare id.* § 1446(b)(2)(A) *with id.* § 1453(b). **Third**, under CAFA, even a defendant who is a citizen of the state in which the action was filed may remove the action to federal court. *Compare id.* § 1441(b)(2) *with id.* § 1453(b). **Fourth**, in cases removed to federal court under CAFA, unlike ordinary removal cases, orders of remand to state court are appealable. *Compare id.* § 1447(d) *with id.* § 1453(c)(1). CAFA expressly applied each of these four changes to removal of both class actions and mass actions. 28 U.S.C. § 1332(d)(11)(A) ("For purposes of this subsection *and section 1453*, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10).") These changes to the normal removal procedure underscore Congress's intention to facilitate and encourage removal under CAFA.

Finally, even outside of CAFA, the *Shamrock* policy-based canon of strict construction of removal statutes has little current vitality. In *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), interpreting 28 U.S.C. § 1441, this Court stated that "whatever apparent force this argument might have claimed when *Shamrock* was handed down has been qualified by later statutory development." *Id.* at 697. *See also* 16 James W. Moore, *Moore's Federal Practice*, § 107.5 (2013) ("[r]ecent developments have cast some doubt on the axioms that removal is

strictly construed and that a presumption exists against removal").

B. Neither Common-Law *Parens Patriae* Nor Statutory "*Parens Patriae*" Is At Issue Here.

1. The common-law *parens patriae* is a federal-court standing doctrine unrelated to CAFA's "mass action" definition.

Despite the lack of textual support, the Attorney General argues that CAFA categorically exempts "*parens patriae*" or state attorneys general actions. *E.g.*, Br. 3. "*Parens patriae*" is a standing doctrine. It is not, as the Attorney General asserts, a type of claim or cause of action. Br. 7, 19, 50. Labeling an action "*parens patriae*" says nothing about whether the action includes "monetary relief claims of 100 or more persons."

The American common-law *parens patriae* standing doctrine developed primarily through this Court's original-jurisdiction cases, in which jurisdiction hinged on whether the State had standing as a real party in interest. *See Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602-04 (1982); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). Under this doctrine, "a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Id.* at 665. A quasi-sovereign interest is one involving the welfare of its residents in general or the State's place in the federal system, and must involve assertion of "an interest apart from the

interests of particular private parties." *Snapp*, 458 U.S. at 607.

Under CAFA, however, the question is not whether the State has standing to sue, but whether more than 100 persons, one of whom is diverse from any defendant, are real parties in interest for any claim asserted by the Attorney General. Labeling this entire action as *parens patriae* is unrelated to this jurisdictional question under CAFA. Indeed, in this action the Fifth Circuit did not address the *parens patriae* standing issue. Pet. App. 7a; *see also Louisiana ex rel. Caldwell v. Allstate Ins. Co.,* 536 F.3d 418, 429 (5th Cir. 2008).

The Attorney General cannot deny that States often assert multiple claims in different capacities in a single suit, R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's *The Federal Courts and the Federal System,* 259 (6th ed. 2009) ("States can bring suit in a number of different capacities—and sometimes in more than one capacity in a single litigation."), and this Court has made clear that *parens patriae* standing is assessed claim by claim. *See, e.g.*, *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923) (distinguishing North Dakota's claim for injunctive relief to vindicate a quasi-sovereign interest from its claim for a "monetary decree" brought on behalf of individual farmers); *Pennsylvania*, 426 U.S. at 665-66 (assessing first "the claims brought by the plaintiff States on their own behalf" and then evaluating Pennsylvania's "claim against New Jersey as parens patriae on behalf of its citizens"). Thus, the Attorney General is mistaken in arguing that *parens patriae* standing somehow imbues special characteristics to an *entire* action.

Steering even further from CAFA's text and the facts of this action, the Attorney General argues that if the Court focuses on the real parties in interest, all classic *parens patriae* cases seem like removable class actions. Br. 45-46. This is untrue. Actions for injunctive relief are not removable as mass actions, which are limited by definition to claims for "monetary relief." 28 U.S.C. § 1332; *see Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Missouri v. Illinois*, 180 U.S. 208, 211-12 (1901).

Moreover, the Attorney General cites two *parens patriae* actions involving monetary relief claims that also would not have been mass actions under CAFA. Br. 55 (citing *Kansas v. Colorado*, 533 U.S. 1 (2001) and *Texas v. New Mexico*, 482 U.S. 124 (1987)). Those cases involved violations of an interstate compact where individual citizens' financial losses were considered only as "the measure of damages" for the contractual breach. *Kansas*, 553 U.S. at 8-9. But only the State was a real party in interest, as it was the only party to the compact, and the damages belonged to the State, whose discretion as to the "disposition of any recovery of damages [was] entirely unencumbered." *Id.* at 8.

Finally, the Attorney General alleges that the State has a quasi-sovereign interest based on alleged "injury to a significant segment of [Mississippi's] population[.]" Br. 40. Again, the existence of a purported quasi-sovereign interest in an action does not prevent private parties from being real parties in interest for jurisdictional purposes for the claims asserted on their behalf. The restitution claims for consumer overpayments redress injuries to private interests regardless of whether defendants' alleged

conduct may have also implicated the state's sovereign and quasi-sovereign interests. Even if the State has standing to assert restitution claims on behalf of individual citizens—whether through common-law or statutory *parens patriae* standing, or some other basis as a representative party in its sovereign or proprietary capacity—the restitution claims are still "monetary relief claims" on behalf of "100 or more" private persons.

2. Congress knew "mass actions" would include statutory "*parens patriae*" actions asserting "monetary relief claims" on behalf of numerous "persons."

There is a special, pre-CAFA historical context for "monetary relief claims" filed by state attorneys general in antitrust cases on behalf of numerous "persons," illustrating that (1) Congress crafted CAFA's "mass action" definition to capture those actions, and (2) the mere label of "*parens patriae*" does not determine mass-action removability.

In the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, Congress used the term "*parens patriae*" to describe a new action under the Clayton Act for state attorneys general. Prior to HSR, this Court had held that the Clayton Act did not authorize a state *parens patriae* action for money damages for injury to its quasi-sovereign interest in the general economy. *Hawaii v. Standard Oil of California*, 405 U.S. 251, 262-64 (1972). The Ninth Circuit took the *Hawaii* decision a step further, holding that a State could not proceed in a representative capacity as *parens patriae* to obtain antitrust damages for injuries suffered by individuals

(which are not quasi-sovereign interests). *California v. Frito-Lay*, 474 F.2d 774 (9th Cir. 1973).

Congress responded by enacting the Clayton Act's "*parens patriae*" provisions, 15 U.S.C. §§ 15c-15h, as part of HSR to overrule *Frito-Lay* (but not *Hawaii*). *See, e.g.*, *Allstate*, 536 F.3d at 427 n.5; Irving Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 Colum. L. Rev. 679, 713 n.195 (1977). HSR provided that "[a]ny attorney general of a State may bring a civil action . . . as parens patriae *on behalf of* natural persons residing in such State . . . to secure *monetary relief* . . . for injury sustained by such *natural persons* to their property . . . ." 15 U.S.C. § 15c(a)(1). This new action had nothing to do with the "quasi-sovereign" interests required for common-law *parens patriae* standing. *See Snapp*, 458 U.S. at 601. Instead, the new action was actually a representative action for "monetary relief" on behalf of "natural persons," similar to a class action, with such persons entitled to claim against any damages recovered, and any judgment constituting res judicata as to any person who did not opt out. 15 U.S.C. § 15c(b)(3) ("[F]inal judgment . . . shall be res judicata as to any claim . . . by any person on behalf of whom such action was brought and who fails to [opt out] . . . .").

Prior to CAFA's enactment, between 1976 and 2003, fourteen states (although not Mississippi) adopted "mini-HSR" legislation likewise expressly authorizing actions for "monetary relief" on behalf of

"persons" (or sometimes "natural persons") by state attorneys general.[5]

This Court has emphasized that such statutory "*parens patriae*" actions vindicate rights belonging to injured persons, not a State, and do *not* create any right of recovery distinct from that belonging to the individual. *See, e.g.*, *Kansas v. UtiliCorp United*, 497 U.S. 199, 219 (1990) ("[HSR] did not establish any new substantive liability. Instead, 'it simply created a new procedural device—*parens patriae* actions by States on behalf of their citizens—to enforce existing rights of recovery under § 4 of the Clayton Act'" for persons injured in their business and property) (quoting *Pennsylvania v. Mid-Atlantic Toyota*, 704 F.2d 125, 128 (4th Cir. 1983)).

Thus, rather than enabling suit to protect or vindicate a State's "quasi-sovereign" interest as *parens patriae*, the federal and state HSR "*parens patriae*" provisions authorizing state attorneys general to bring actions for "monetary relief" on behalf of injured "persons" are the functional equivalent of class actions, but enabling state attorneys general rather than class representatives

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[5] *See* R.I. Gen. Laws § 6-36-12 (1979) (A.G. action "as parens patriae on behalf of persons" in the state "to secure monetary relief"); *see also* Alaska Stat. § 45.50.577 (2003) Ark. Code Ann. § 4-75-315 (2003); Cal. Bus. & Prof. Code § 16760 (2002); Or. Rev. Stat. § 646.775 (2001); Idaho Code Ann. § 48-108 (2000); Fla. Stat. Ann. § 542.22 (1997); 6 Del. Code Ann. tit. 6, § 2108 (1995); S.D. Codified Laws § 37-1-23 (1980); Mass. Gen. Laws Ann. ch. 93 § 9 (1978); W. Va. Code § 47-18-17 (1978). Some state statutes use the term "damages" or "monetary damages" instead of "monetary relief." *See* Okla. Stat. Ann. tit. 79, § 205 (1998); Colo. Rev. Stat. Ann. § 6-4-111 (1992); Conn. Gen. Stat. § 35-32 (1976).

to bring the action. *Mid-Atlantic Toyota*, 704 F.2d at 128 ("[T]he Act was aimed primarily at enlarging the potential for consumer recovery . . .").

On its face, CAFA's mass-action provision applies to class-action substitutes brought by state attorneys general; indeed, Congress used the exact same terms of "monetary relief" and "persons" found in the state HSR acts. Congress, in enacting CAFA, must be assumed to have been aware of that potential application given the spate of state legislation following Congress's own enactment of a "*parens patriae*" action. *See, e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (stating that "[w]e generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts" after observing that at least fifteen states had enacted statutes that "were solidly entrenched at the time of" Congress's enactment). That Congress did not exclude suits brought by attorneys general despite that knowledge only further confirms that these suits can qualify as "mass actions."

C. The "General Public" Provision Does Not Aid The Attorney General.

Faced with authority that supports the claim-by-claim and real-party analysis, the Attorney General argues that applying such an approach would run afoul of CAFA's "general public" provision, rendering it surplusage. Br. 25. That provision provides that "the term 'mass action' shall not include any civil 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." 28 U.S.C. § 1332(d)(11)(B)(ii)(III).

The State's argument starts from a false assumption. The State assumes that the "general public" provision must be an *exception* that carves out a category of actions that would otherwise be mass actions, as opposed to a *clarification* of the scope of the defined term "mass action." Congress drew an express distinction between claims "on behalf of the general public" and claims "on behalf of individual claimants." Even if the phrase "monetary claims of 100 or more persons" were ambiguous as to whether it included an action asserting exclusively claims on behalf of the general public, Congress removed that ambiguity by expressly excluding such an action from the mass-action definition. A provision that has the purpose of clarifying what is and is not permitted is not surplusage, but beneficial interpretive guidance. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 98 (2006) (rejecting surplusage argument where statutory section "clarifies that administrative offsets are not covered by" the statute); *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) (the statutory phrase "and costs" would "not be superfluous if Congress included it to remove doubt that defendants may recover costs when plaintiffs bring suits in bad faith").

In any event, there can be claims on behalf of the general public that are also "monetary relief claims of 100 or more persons" who are the real parties in interest. As the Attorney Generally concedes in a footnote, the provision could apply to suits "by private plaintiffs on behalf of the general public." Br. 25 n.5. "[A]n action to recover civil penalties 'is

fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" *Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009) (citations omitted). Some States assign the State's right to collect civil penalties to private litigants, *see* Cal. Lab. Code § 2699 (permitting employees to bring representative action on the State's behalf but keep a portion of the collected penalties as incentive to sue); *Statutory Penalties – A Legal Hybrid*, 51 HARV. L. REV. 1092 (1938) ("[T]he action may be allowed to the injured party, to the state, or to anyone . . ."); making the private litigant a joint real party in interest with the State, *see Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 284-85 (2008) (partial assignees are a real party in interest); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73 (2000) (relator gained an interest in the lawsuit by "a partial assignment of the Government's damages claim"). CAFA's "general public" provision serves to exclude those suits from the definition of "mass action." *See* Schaerer, 16 N.Y.U. J. PUB. POL'Y at 80 n.219 (provision "may still apply where hundreds of private parties assert monetary claims only on behalf of the general public under, for example, a private attorney general act (PAGA)").

These suits are not uncommon. The lower courts have understood when private suits are on behalf of the "general public" and when they are not. *See, e.g.*, *Sample v. Big Lots Stores Inc.*, No. 10-3276, 2010 WL 493992, at *5 (N.D. Cal. Nov. 30, 2010) (remanding action under CAFA: "Unlike the antitrust damages sought on behalf of policyholders in *Caldwell*, PAGA's civil penalties are not meant to compensate unnamed

employees because the action is fundamentally a law enforcement action.").

Nor are civil penalty suits the only way in which the "general public" provision has meaning. An action where 100 cities or government agencies joined together to sue might qualify as a "mass action" under 28 U.S.C. § 1332(d)(11)(B)(i), but nonetheless be excluded from the term by the "general public" provision. *Cf. Moor*, 411 U.S. at 721 (counties are citizens for diversity purposes).

Regardless, as the Fifth Circuit correctly held, Pet. App. 9a., the Attorney General cannot find shelter under the "general public" provision because that provision applies only when (1) "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)" and (2) "pursuant to a State statute specifically authorizing such action." 28 U.S.C. § 1332(d)(11)(B)(ii)(III). The restitution claims for consumer overpayments are not asserted "on behalf of the general public" but rather "on behalf of individual claimants" (the injured persons who are the real parties in interest in the restitution claims). Moreover, the Attorney General can point to no provision of any state statute "specifically authorizing" it to seek restitution relief on behalf of the general public as opposed to affected individuals.

Sensing vulnerability, the Attorney General argues alternatively that even under the claim-by-claim approach, the number of claims here is so large it should be deemed to be on behalf of the general public. Br. 56. The Attorney General cites no textual basis for this argument as there is none to cite. Congress's purpose in passing CAFA was to make

sure high-exposure, class-like cases could be brought to federal court. *See supra* 3-5. Equally problematic, having wrongly claimed that defendants' construction would render the "general public" provision redundant, the Attorney General, himself, advances an argument that would render void the provision's parenthetical clause "(and not on behalf of individual claimants or members of a purported class)." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011) (The canon against surplusage "assists only where a competing interpretation gives effect to every clause and word of a statute.") (internal quotation marks omitted). The Attorney General asserts restitution claims on behalf of individual consumers. Consequently, not "all claims" in this action are asserted on behalf of the "general public" and the provision does not apply.

III. Congress Accommodated Federalism Concerns In CAFA.

Ignoring that diversity jurisdiction generally, and CAFA's new minimal-diversity standards in particular, seek to protect out-of-state defendants from the potential state-court biases, the Attorney General also argues: "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." Br. 10. Ultimately, in fact, this is a case about statutory interpretation and federal jurisdiction, addressing how, not if, Congress chose to exercise its plenary authority. Congress has Article III power to authorize removal of mass actions, even if they include claims by state plaintiffs. *See* U.S. Const. art. III, § 2; *Alden v. Maine*, 527 U.S. 706, 715-19

(1999). Regardless, CAFA expressly carved out several federalism-driven exclusions from removal—none of which mention actions brought by States or state attorneys general. Indeed, CAFA's sole mention of state attorneys general is in the Section 1715 requirement that state attorneys general be notified of class settlements. Furthermore, the Attorney General's retreat to CAFA's demonstrably unreliable legislative history in search of an implied exclusion from removal is in vain; indeed, the final legislation omitted an exclusion for state attorney general actions contained in prior versions of the bill.

Thus, despite the Attorney General's plea to the contrary, allowing removal here would not affect the Attorney General's authority or invade a sovereign interest. It would simply allow the case to proceed in federal court.

A. CAFA Addressed Federalism Concerns By Specifying Certain Exclusions From Removal That Are Inapplicable Here.

CAFA specifies several exclusions from removal that demonstrate Congress's deliberate attention to federalism concerns. Significantly, the Attorney General has never claimed that any such exclusions apply here.

First, accommodating sovereign-immunity concerns, CAFA does not provide diversity jurisdiction for any class or mass action in which "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief[.]" 28 U.S.C. § 1332(d)(5)(A).

Second, CAFA excludes mass actions in which "all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State[,]" such as a disaster like a chemical spill. 28 U.S.C. § 1332(d)(11)(B)(ii)(I).

Third, CAFA does not extend diversity jurisdiction to any class or mass action relating to corporate governance that arise under the laws of the State of incorporation. 28 U.S.C. § 1332(d)(9)(B).

Fourth, CAFA does not extend diversity jurisdiction to class and mass actions in which greater than two-thirds of the members of the proposed plaintiff classes, and at least one defendant "from whom significant relief is sought," are citizens "of the State in which the action was originally filed," if no similar class action has been filed against any defendant within the last 3 years. 28 U.S.C. §§ 1332(d)(4)(A)(i)(II)(aa)-(A)(ii). Thus, Congress decided that even for otherwise local controversies there would be no exclusion from removal for copycat actions, like this one.

These exclusions, among others, demonstrate Congress's sensitivity to federalism concerns in CAFA, none of which yielded any exclusion for state attorney general actions as *parens patriae* or otherwise. An action brought by a State could qualify for one of these exclusions, but it is undisputed that this action does not.

B. The Legislative History Shows Only That CAFA Once Had, But Eliminated, An Exclusion For State Attorney General Actions.

The Attorney General concedes that "there is no reason to consult legislative history in this case." Br. 33. He nonetheless relies on it to argue that the "mass action" provision should be read to apply only to "monetary relief claims of 100 or more *named plaintiffs*" and, separately, that actions by state attorneys general are categorically excluded. *See* Br. 33-38. Relying on legislative history for statutory construction, of course, "has a tendency to become . . . an exercise in 'looking over a crowd and picking out your friends.'" *Allapattah*, 545 U.S. at 568 (citation omitted).

That observation applies with special force here because "CAFA's legislative history is particularly suspect in that it represents the views of only a handful of legislators." *Erie Ins. Exch. v. Erie Indem. Co.*, 722 F.3d 154, 160 n.6 (3d Cir. 2013). Specifically, "the Senate report was issued ten days after the enactment of the CAFA statute, which suggests that its probative value for divining legislative intent is minimal." *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954 n.5 (9th Cir. 2009). Therefore, the Attorney General's reliance on that post-enactment report's description of "mass actions" as being "brought on behalf of numerous named plaintiffs," Br. 34, contributes little to construing the distinctly different words that Congress enacted in CAFA: "the authoritative statement is the statutory

text, not the legislative history or any other extrinsic material." *Allapattah*, 545 U.S. at 568.

If CAFA's legislative history has any probative value, it shows that proposed versions of CAFA included an exclusion from removal for state attorney general actions that was dropped from the final legislation. "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *see also*, *e.g.*, *Arizona v. California*, 373 U.S. 546, 580-81 (1963) (construing the deletion of limiting language from a bill considered by the 69th Congress to signify that no such limitation was intended in the final version enacted into law by the 70th Congress).

Congress considered the first CAFA bill in 1998. S. 2083, 105th Cong. (1998). The first reference to an exclusion for state attorney general actions appeared three years later in the proposed Class Action Fairness Act of 2001. S. 1712, 107th Cong. (2001). That bill revised the definition of removable class actions to include "civil actions" filed by a "named plaintiff [who] purports to act . . . for the interests of the general public, seeks a remedy of damages, restitution, disgorgement, or any other form of monetary relief, *and is not a State attorney general*[]" *Id.* § 4(d)(9)(A)(i) (emphasis added). This language, though maintained in the next version of the bill considered by the 108th Congress, S. 274, 108th Cong. (2003), was ultimately removed upon its report out of the Judiciary Committee in that same Congress. S. 274, 108th Cong. (as reported by S. Comm. on the Judiciary, June 2, 2003). No reference

to state attorneys general, other than in the settlement notice provision that ultimately became Section 1715, appeared in any subsequent bill or the enacted law. (Likewise, the reference to "named plaintiff" in the prior bill was eliminated, never reappeared, and was not enacted.)

Moreover, as noted above, 46 state attorneys general sought a CAFA exemption for attorney-general actions, but the Pryor amendment was decisively defeated in the Senate. *Supra* 5.

The Attorney General selectively quotes five senators from the floor debate who voted against the amendment, contending that they did so because the amendment was "unnecessary." Br. 36-37. *But see* Jacob Durling, Note, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, 83 U. COLO. L. REV. 549, 580-81 (2012) ("Basing a view of the legislative history on this point ignores the larger reasons behind CAFA's enactment. CAFA was intended to address abusive litigation practices.").

The Attorney General never mentions that the same senators he quotes feared that the Pryor amendment would undermine CAFA's purposes:

▪ SPECTER: "[P]roviding that any civil action brought by or on behalf of the attorney general in a State would be excluded so that there would be latitude for the attorney general to deputize private attorneys to bring their class actions and to find an exclusion, which is a pretty broad exclusion, not to

use pejorative terms, but [is] a pretty broad loophole." 151 CONG. REC. S1157 at S1161.[6]

▪ CORNYN: "[T]his amendment as worded—and I know this is not his intention—would create a loophole big enough to drive a truck through, that could cause substantial mischief that is intended to be prevented by this very bill." *Id.*

▪ GRASSLEY: "Although this amendment sounds good, and there was a good presentation made by the authors of the amendment, it is potentially harmful and could lead to gaming by class action lawyers." *Id.* at S1163.

▪ HATCH: "At best, this amendment is unnecessary. At worst, it will create a loophole that some enterprising plaintiffs' lawyers will surely manipulate in order to keep their lucrative class action lawsuits in State court." *Id.*

* * *

The only conclusive point that can be drawn from CAFA's legislative history is that Congress considered and rejected an exclusion for state attorney-general actions. Nothing in that history trumps CAFA's plain language, which authorizes removal of this action because the attorney general has brought restitution "claims" that belong to "100 or more persons" for joint trial.

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[6] *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 493, 498, 524 (2012) ("[S]tate attorneys general can and do engage in litigation that bears a striking resemblance to the much-maligned damages class action. . . . [A]ttorneys general sometimes hire private counsel to litigate state cases on a contingency basis.").

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted.

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