No. 12-1036

IN THE

Supreme Court of the United States

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

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

CAFA's "mass action" provision, 28 U.S.C. § 1332(d)(11)(B)(i) (reprinted at J.A. 78a-80a), does not eliminate the States' authority, acting through their politically accountable chief legal officers, to bring *parens patriae* actions seeking monetary relief in state court.

Ultimately, this case is about federalism, as demonstrated by the 46 States supporting Petitioner as amici. States have compelling reasons to file *parens patriae* actions in state courts and should not be made dependent on federal courts to enforce state law. Indeed, during CAFA's enactment, the statute's proponents assured state attorneys general that it would not include *parens patriae* actions.

The proper jurisdictional analysis is straightforward. In a state-law *parens patriae* action, the State is the only "plaintiff," and the "claims" belong solely to the State. Because a State is not a "citizen" for diversity purposes, there is no federal subject-matter jurisdiction.

CAFA is silent regarding *parens patriae* actions. Respondents nonetheless contend that it has the effect of sweeping such actions into federal court. Respondents' argument requires them to prove *each* of the following: (i) CAFA adopts a "real-party-in-interest" test, Resp.Br.19; (ii) consumers should be deemed "unnamed real parties in interest" for purposes of restitution claims, *id.* at 23; and (iii) States' actions should be re-imagined for removal purposes as though they included those consumers. *Id.* Every step of the argument is flawed.

First, CAFA's text and structure show that it cannot be extended to *parens patriae* actions via Respondents' "real-party-in-interest" approach. CAFA's "mass action" definition refers to actual "plaintiffs" asserting concrete "claims," not to "unnamed real parties in interest." Respondents implausibly suggest that the term "plaintiffs" has two different meanings *seventeen words apart* in the same CAFA subsection. Resp.Br. 23.

Respondents' convoluted statutory interpretation would turn a jurisdictional scheme (where simplicity and administrability are prime virtues) into a procedural nightmare. Trial courts would be forced to ascertain the value of hypothetical and unasserted "claims" by thousands or millions of consumers, as well as those consumers' views on venue transfer, and to remand to state court "claims" of consumers that had never been brought in the first place.

Even if CAFA adopted Respondents' "real-party-in-interest" test, the State would meet it. The relevant "claims" belong to the State, not consumers. Regardless of whether consumers might ultimately benefit, they are not the legal holders of the claims asserted by the State in its own name under the Mississippi Antitrust Act ("MAA") and Mississippi Consumer Protection Act ("MCPA").

Respondents ignore the nature of *parens patriae* actions, in which States assert their *own* sovereign and quasi-sovereign interests. Even if consumers might indirectly benefit from state restitution claims, such claims vindicate *public* rights, not *private* ones.

If Respondents believe Mississippi lacks legal authority to assert its claims, their proper recourse

is a motion to dismiss under Mississippi law in state court, not removal. The "real-party-in-interest" test does not justify re-imagining the State's action for removal purposes as though it included phantom "claims" by consumers.

I. *PARENS PATRIAE* ACTIONS ARE NOT "MASS ACTIONS" UNDER CAFA.

A. CAFA's Text Is Dispositive.

1. The "Mass Action" Definition Focuses On Actual "Plaintiffs" Asserting "Claims."

CAFA does not adopt Respondents' "real-party-in-interest" test. CAFA refers to "plaintiffs" (actual parties) and "claims" (court-enforceable causes of action). Pet.Br. 16-18. The only "plaintiff" in a *parens patriae* action is the State, and the only "claims" are the State's.

Respondents' argument that the term "plaintiffs" includes "unnamed real parties in interest" (Resp.Br. 23) violates settled definitions of "plaintiff" as denoting a formal party to a lawsuit. Pet.Br. 17. Real parties in interest who do not appear in a lawsuit are not "parties." *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 935 (2009).

Respondents cite CAFA's reference to the "monetary relief claims of 100 or more persons" and propose that "persons" need not be limited to "plaintiffs." Resp.Br. 18-22. But the statutory provision itself equates "persons" with "plaintiffs." The first clause of § 1332(d)(11)(B)(i) refers to the "*plaintiffs*' claims" (emphasis added) in specifying

the claims of the "100 or more persons" at issue. The second clause then refers to the same "persons" as "*those plaintiffs*" in providing that "jurisdiction shall exist only over *those plaintiffs* whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements." *Id.* (emphasis added).

CAFA also refers to "plaintiffs" in the *plural*. Even under Respondents' interpretation, the statute would not encompass *parens patriae* actions, which (even if they could be said to contain many "unnamed real parties in interest") have only *one* plaintiff: the State.

Moreover, CAFA uses the phrase "persons (named or unnamed)" only in the "class action" definition of § 1332(d)(1)(D). This phrase is specifically *not* included in the definition of a "mass action." *See* 28 U.S.C. § 1332(d)(11)(A) (referring to subparagraphs 1332(d)(2)-(10)); *id.* § 1332(d)(11) (B)(i) ("class action" definition excluded). Respondents disregard CAFA's distinction between "plaintiffs" and "persons (named or unnamed)."

Respondents cite the Magnuson-Moss Act. Resp.Br. 20. But the Act refers to a "plaintiff" as a formal party to a lawsuit, 15 U.S.C. § 2310(d)(2), and therefore supports Petitioner's interpretation.[1]

[1] The reference in 15 U.S.C. § 2310(d)(3)(C) to "named" plaintiffs (Resp.Br. 20) does not help Respondents. It distinguishes between class representatives and absent class members. Resp.Br. 20 n.2; *Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002). However, there is no need for a similar approach in *parens patriae* actions, where consumers are not parties.

2. A "Mass Action" Must Propose To Try The "Claims" "Jointly."

To constitute a "mass action," a civil action must propose a "joint[]" trial of the "monetary relief claims of 100 or more persons," on the ground that they involve "common questions of law or fact." Thus, the statute contemplates a (1) joint trial of (2) actual claims of (3) genuine plaintiffs.

That will not occur here. The undefined "claims" of "unnamed persons" will not and cannot be "tried jointly" in any meaningful way. The trial will involve the State's claims, rather than the phantom "claims" of thousands of consumers.

Respondents' argument that "[e]very sentence of CAFA's 'mass action' definition" refers to "claims" (Resp.Br. 16) (quoting heading) proves Petitioner's point: CAFA uses the term "claims," not "abstract interests" or "indirect benefits."

The need for precision in defining "claims" is underscored by CAFA's tolling provision, which suspends limitations for "claims" during removal to federal court. 28 U.S.C. § 1332(d)(11)(D). That provision is unworkable unless "claims" are clearly defined. Abstract interests of unnamed persons do not count.

Respondents maintain that *parens patriae* cases are analogous to class actions. Resp.Br. 27. However, in a class action, absent class members assert the same legal claims as class representatives. Here, it is uncontested that Mississippi consumers *cannot* assert the same claims as the State. Pet.Br.

5. These consumers are not comparable to absent class members in a class action. *See* Part II, *infra.*

Respondents point to the Hart-Scott-Rodino ("HSR") Act, Resp.Br. 47-48, but the HSR Act rejects Respondents' class action analogy. *See Illinois v. Abbott & Assocs.*, 460 U.S. 557, 573 n.29 (1983) (HSR Act "exempts such suits from the class-action requirements of Rule 23"). The HSR Act reflects Congress' understanding that *parens patriae* actions do *not* involve "joint[]" trials of individual claims. The Act authorizes proof of aggregate damages in *parens patriae* actions on a state-wide statistical basis, without proof of individual loss by consumers. 15 U.S.C. § 15d.[2]

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

Respondents ignore § 1332(d)(11)(B)(ii)(II), which provides that a defendant's joinder motion cannot create a "mass action" eligible for removal. Respondents have no answer to the fact that they are trying to achieve indirectly what CAFA bans them from accomplishing directly.

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[2] Respondents incorrectly argue the HSR Act shows the rights at issue "belong[] to injured persons." Resp.Br. 47. In fact, the Act creates an enforcement right in the States rather than consumers. *See* 15 U.S.C. § 15c(a)(1). In any event, the MAA and MCPA create new causes of action for the State in its own name.

4. Respondents' Interpretation Would Create An Administrative Nightmare.

CAFA provides that federal subject-matter jurisdiction in a "mass action" "shall exist *only* over those plaintiffs whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). Respondents would require a trial court to identify consumers harmed by the defendants' conduct, examine the circumstances of each consumer, ensure that each meets the $75,000 threshold, and remand to state court the supposed "claims" of consumers (who had never sued in the first place) falling below the threshold. The nightmare is not conjectural. *See* Pet.App. 52a-54a; *Mississippi ex rel. Hood v. Entergy Miss., Inc.*, 2012 WL 3704935, *9 (S.D.Miss. Aug. 25, 2012) (confirming requirement to remand "individual claims" below $75,000); *Hood ex rel. Mississippi v. JPMorgan Chase & Co.*, 2013 WL 3946002, *14 (S.D.Miss. July 31, 2013) (requiring discovery to identify consumers and determine amount in controversy for each).

Similarly, CAFA bans transfer of a mass action to another court "unless a majority of the plaintiffs in the action" consent. 28 U.S.C. § 1332(d)(11)(C)(i). Respondents offer no procedure for a district court to identify and communicate with consumers – potentially "millions" in this case, Pet.App. 55a – let alone to determine their views on transfer.

Respondents assert that this Court need not resolve these practical problems because they do "not concern the removability of the 'action.'" Resp.Br. 25. But the problems flow inexorably from

Respondents' flawed statutory interpretation, which is a powerful reason to reject it. "[S]implicity is a virtue" in jurisdictional statutes. *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1350 (2013).

Respondents resort to the dubious argument that the term "plaintiffs" means one thing in the first part of § 1332(d)(11)(B)(i) and something else seventeen words later in the *same sentence*. Resp.Br. 23. "[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S.Ct. 1997, 2004-05 (2012) (internal quotation marks omitted). *Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (Resp.Br. 23), which involved two different air pollution control schemes, is inapposite.

Respondents' theory that supplemental jurisdiction (Resp.Br. 25) would prevent the administrative nightmare is unavailing. Supplemental jurisdiction does not apply where "expressly provided otherwise by Federal statute." 28 U.S.C. § 1367(a). Here, CAFA expressly provides "otherwise." In the last clause of § 1332(d)(11)(B)(i), Congress explicitly excluded jurisdiction over claims less than $75,000.

Further, § 1367(b) provides that supplemental jurisdiction does not extend to claims "by persons proposed to be joined as plaintiffs," which is effectively what Respondents seek to do with respect to Mississippi consumers. Supplemental jurisdiction may be declined where there are "novel or complex issue[s] of State law" or state-law claims that "substantially predominate." 28 U.S.C. § 1367(c)(1),

(c)(2). Finally, supplemental jurisdiction must be construed narrowly where principles of federalism are at stake. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-46 (2002).

5. The "General Public" Exception Is Further Evidence That CAFA Excludes *Parens Patriae* Actions.

Respondents argue that the "general public" exception was meant to clarify any ambiguity in CAFA. Resp.Br. 49. To the extent the exception clarifies, it reaffirms that CAFA excludes *parens patriae* actions.

The exception clarifies that CAFA does not include actions brought on "behalf of the general public." As shown at Pet.Br. 56-58, *parens patriae* actions typically qualify as suits filed on "behalf of the general public."

Even an article published by Respondents' amicus DRI concludes that "enforcement actions filed by State AGs are specifically excluded from the statute's coverage." Peter M. Cummins, *Parens Patriae Suits Filed by State AGs*, FOR THE DEFENSE 39, 40 (Feb. 2008). Other authorities agree. Pet.App. 47a (citing articles).

Respondents acknowledge the "general public" exception applies where the State's recovery is "'not meant to compensate unnamed'" persons. Resp.Br. 50-51 (citation omitted). That concession covers this case, because the State's restitution claim vindicates public rights, not private rights. *See* Part II-A, *infra*.

B. If There Were Any Statutory Ambiguity, Principles Of Federalism Would Be Dispositive.

If there were any doubt, federalism would compel that CAFA be narrowly construed. Respondents contend that CAFA altered the traditional rule compelling narrow construction of removal statutes. Resp.Br. 36-42. But in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), a CAFA case, this Court continued to cite decisions applying the traditional rule. *See id.* at 96 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Respondents' CAFA cases also reaffirm the traditional rule. *E.g.*, *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir.), *cert. denied*, 558 U.S. 934 (2009) (cited at Resp.Br. 55).

Respondents argue that "strict construction" reflects a congressional "policy" which the legislature may alter. Resp.Br. 36. But the "policy" in question is a fundamental one: "'[d]ue regard for the rightful independence of state governments.'" *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941)). This principle is far too deeply rooted to be cast aside absent explicit congressional direction. "[A] 'strict construction' of the federal removal statutes" is one of the "bedrock principles of removal jurisdiction" and reflects this Court's "long tradition of respect for the autonomy and authority of state courts." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 17-18 (2003) (Scalia, J., dissenting). This Court presumes that "'the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not

unduly interfere with the legitimate activities of the States.'" *Levin v. Commerce Energy, Inc.*, 130 S.Ct. 2323, 2336 (2010).[3]

Nothing in CAFA abrogates this principle. Indeed, Respondents acknowledge that CAFA provisions "demonstrate Congress's sensitivity to federalism concerns." Resp.Br. 54. Far from restricting state attorneys general, CAFA expanded their authority over class action settlements. 28 U.S.C. § 1715.

Respondents also concede that CAFA's findings refer to "the concept of diversity jurisdiction as intended by the framers of the United States Constitution." Resp.Br. 39 (citing J.A. 53a-54a).[4] The framers intended to protect the independence of state governments. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

Respondents' interpretation would substantially interfere with the authority of States to enforce their own laws in their own courts. Such a result is inconsistent with the States' status "as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999). Respondents' approach would make States dependent on federal courts for the interpretation

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[3] *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003) (cited at Resp.Br. 41), is inapposite. It involved removal of a federal cause of action under the Fair Labor Standards Act, not a state-law claim removed under diversity.

[4] Contrary to Resp.Br. 38-39, *parens patriae* actions do not implicate traditional concerns of diversity jurisdiction, which has never been available where the State is the sole plaintiff. A State is not a "citizen" for purposes of diversity. *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894).

and enforcement of their own laws, which this Court has suggested would be constitutionally problematic. *Id.* at 750.

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

This Court need not consider legislative history to reverse. Nevertheless, CAFA's proponents assured the States that the bill would not cover *parens patriae* actions. Pet.Br. 35-37. On that basis, Congress rejected the Pryor amendment. Resp.Br. 56-58. As Sen. Grassley explained,

> [T]he amendment is not necessary. . . .If State attorneys general want to recover on behalf of their citizens, they can always bring actions as *parens patriae* suits under statutes that authorize representative actions or even as direct enforcement actions. Again, such lawsuits will not be subject to this bill.

151 Cong. Rec. S1163 (daily ed. Feb. 9, 2005) (assuring that such suits would proceed "in State court"); *see also id.* at S1161-62 (Sen. Cornyn); *id.* at S1163-64 (Sen. Hatch).

Respondents contend that the Pryor amendment was defeated for fear it would create a "loophole" in CAFA (Resp.Br. 57-58) but fail to cite the actual "loophole" language the bill's proponents found troubling. The amendment purported to exempt from CAFA "any action brought by, or *on behalf of*, the Attorney General of any State." 151 Cong. Rec. S1157 (emphasis added). Senators expressed concern that the phrase "on behalf of the Attorney

General" would "allow plaintiffs' lawyers to bring class actions and simply include in their complaint a State attorney general's name *as a purported class member*, arguably to make their class action completely immune to the provisions of this bill. . . . That creates a very serious loophole in this bill." *Id.* at S1163 (Sen. Grassley) (emphasis added). Rejecting this "loophole" was perfectly consistent with assuring the States that CAFA never included *parens patriae* actions in the first place.

Respondents now disavow the 2005 CAFA committee report as post-enactment history. Resp.Br. 55. That is unsurprising; the report equates "persons" with "named plaintiffs." S. Rep. No. 109-14, at 46 (Feb. 28, 2005). However, the disavowal weakens Respondents' argument. *Caldwell*, which created the rule followed below, relied on the committee report. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008). Respondents' own amici rely on the committee report. Allstate Br. 14, 19; DRI Br. 3, 21; PhRMA Br. 4, 5, 10. The treatise cited by Respondents to argue that CAFA altered the traditional "narrow construction" rule for removal statutes relies on nothing but the committee report. Resp.Br. 38 (citing 13F Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 3623, at 27 & n.37 (3d ed. 2013)).

Even without the 2005 committee report, the legislative history supports Petitioner. Respondents ignore the 2003 committee report addressing a predecessor bill, which described "mass actions" as suits involving "hundreds or thousands of *named* plaintiffs." S. Rep. No. 108-123, at 42 (2003) (emphasis added). The 2005 floor debate referred to

"mass actions" as being initiated by "a complaint in which 100 or more plaintiffs are named" (151 Cong. Rec. H729 (daily ed. Feb. 17, 2005) (Rep. Sensenbrenner)) and as actions by multiple plaintiffs "consolidated by State court rules." *Id.* at S1151 (daily ed. Feb. 9, 2005) (Sen. Reid).

II. CONSUMERS ARE NOT "REAL PARTIES IN INTEREST" IN THIS CASE.

Even if CAFA adopted Respondents' "real-party-in-interest" approach – and it does not – consumers would not be "real parties in interest" here. The claims at issue belong to the State, not consumers.

A. The Claims Belong To The State Alone.

A real party in interest is the "'legal holder of the claim.'" *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 280 (2008). The MAA and MCPA explicitly authorize the Attorney General to sue "in the name of the State" to assert the claims in this case, without the participation of consumers. Miss. Code §§ 75-21-37, 75-24-9.

Respondents do not dispute that the statutory provisions invoked by the State are different from those on which consumers would rely for damages claims. Pet.Br. 5. Indeed, Mississippi consumers pursued their own claims as indirect purchasers in a federal MDL proceeding. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827 (N.D. Cal.).[5]

[5] Contrary to Respondents' suggestion (Resp.Br. 7 n.1), the federal MDL court opined that proposed consumer settlements would *not* release "*parens patriae* claims" of non-settling States and at a hearing "all of the Settling Defendants agreed." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, at 2

1. Mississippi's "Restitution" Claim Belongs To The State, Not Consumers.

The Complaint prays that "the Plaintiff, the State of Mississippi, be granted" relief, including "restitution and its damages in an amount according to proof." Resp.App. 65a-66a. Respondents incorrectly suggest that the word "restitution" means that the State is asserting claims belonging to consumers. Resp.Br. 9. To the contrary, the "restitution" Mississippi seeks is disgorgement of Respondents' ill-gotten gains. *See, e.g.*, *Harris Trust and Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000) (restitution remedy involves "disgorgement of proceeds"); *McCandless v. Furlaud*, 296 U.S. 140, 167 (1935) ("restitution of illicit profits").

The Complaint's general allegations that consumers have suffered harm do not mean that the claims "belong" to them, nor do the allegations constitute requests that individuals be directly awarded relief. Mississippi seeks to disgorge Respondents' gain, and consumer purchases are relevant as evidence of that gain.

The "on behalf of" language in the Complaint (Resp.Br. 9) does not change the nature of the State's action. *Parens patriae* cases are always filed "on behalf of" someone else. A sovereign or quasi-

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(N.D.Cal. Jan. 26, 2012) (Dkt. 4688). When defendants later proposed contrary language for the final approval order, *id.* at Dkt. 5600-5 ¶11, the federal MDL court crossed out defendants' proposed language. *Id.* at Dkt. 6130 ¶11; *see also In re Tricor Indirect Purchaser Antitrust Litig.,* 2009 WL 3460769, *1 (D.Del. Oct. 28, 2009).

sovereign interest "is precisely the type of interest that the State, as *parens patriae*, represents *on behalf of* its citizens." *South Carolina v. North Carolina*, 558 U.S. 256, 274 (2010) (emphasis added).

Respondents assert that Mississippi's Complaint echoes private complaints. Resp.Br. 7-8. In truth, all complaints borrowed heavily from the Department of Justice's criminal allegations against Respondents.

2. The Speculative Possibility Of Consumer Recovery Cannot Justify Removal.

Respondents contend that Petitioner's action seeks to "restore" monies or property "to any person in interest" in Mississippi. Resp.Br. 10, 14, 34. Having attempted to rewrite CAFA and Mississippi's Complaint, Respondents now rewrite the Question Presented to insert the word "restore." *Id.* at i.

However, the Complaint does not seek to "restore" money or property to consumers. In focusing on the term "restore," Respondents quote not the Complaint but language in the MCPA, which provides a Chancery Court with authority to "make such additional orders or judgments, including restitution, as may be necessary to restore to any person in interest any monies or property" acquired by a defendant through prohibited means. Miss. Code § 75-24-11.

While the private suit provision empowers an individual seeking damages to "bring an action at law," *id.* § 75-24-15(1), the MCPA underscores that consumers are not the legal owners of the State's restitution claims, but rather are wholly dependent on the State's *parens patriae* action. *If* the Attorney

General brings an enforcement action, and *if* the court appoints a receiver in equity, the receiver *may* collect money or property "derived by means . . . prohibited by this chapter." *Id.* § 75-24-13. Any persons who have suffered loss "may participate with general creditors in the distribution of the assets," capped by the injured party's out-of-pocket loss. *Id.*

Moreover, Respondents' multi-step conjecture involves future, discretionary actions of the state court and any possible receiver. The state court has not appointed a receiver in this case, and no collection or distribution of assets has occurred. Respondents' speculation cannot provide a basis for removal at this time. "For jurisdictional purposes, [judicial] inquiry is limited to examining the case 'as of the time it was filed in state court.'" *Standard Fire*, 133 S.Ct. at 1349.

3. Respondents Concede That Future Disposition Of Any Recovery Is Immaterial.

Respondents acknowledge that both *Kansas v. Colorado*, 533 U.S. 1 (2001), and *Texas v. New Mexico*, 482 U.S. 124 (1987), are examples of "*parens patriae* actions involving monetary relief claims that also would not have been mass actions under CAFA." Resp.Br. 44. This concession is fatal, because the instant case is indistinguishable.

Both here and in those cases, States asserted rights in their own names – here, rights under the MAA and MCPA, and in *Kansas* and *Texas*, rights under water compacts. In both *Kansas*, 533 U.S. at 7-8, and *Texas*, 482 U.S. at 132 n.7, the State's restitution request was based on harm to individual

citizens. Indeed, in *Texas* this Court noted that the funds might be distributed to consumers or retained by the State. *Id.*

If (as Respondents concede) CAFA would not extend to the suits in *Kansas* and *Texas*, it does not apply here, either.

B. Respondents Misapprehend The Nature Of A *Parens Patrie* Case.

The tradition of *parens patriae* actions confirms that the State is properly the sole real party in interest. Respondents contend that, even if the State establishes *parens patriae* authority, this "does not prevent private parties from being real parties in interest." Resp.Br. 44. Respondents misstate the nature of *parens patriae* power. Once the State has demonstrated such authority, it may sue as the *sole* party in interest, without the joinder or intervention of additional parties. *New Jersey v. New York*, 345 U.S. 369, 373 (1953). The State has its own interest, "apart from the interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex. rel. Barez*, 458 U.S. 592, 607 (1982).

This Court has stressed the factor of control in determining the real party in interest. *Kansas*, 533 U.S. at 8; *Knapp v. W. Vermont R. Co.*, 87 U.S. 117, 123 (1873). Mississippi has the sole right to control this litigation, and the "unnamed persons" cited by Respondents will not appear. The State will exercise 100% of the control and is the *sole* real party in interest.

Respondents' cases do not help them. In *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980) (cited at Resp.Br. 19), this Court explained that the

"'residence of those who may have the equitable interest' is simply irrelevant," *id.* at 463, and such "'beneficiaries [are] not necessary parties and their citizenship [is] immaterial.'" *Id.* at 464. Mississippi consumers are similarly situated.

Missouri, Kansas & Texas Railway Co. v. Hickman, 183 U.S. 53 (1901) (cited at Resp.Br. 19, 24), involved an action that would not result in any recovery for the State and would not inure "in any degree" to the State's benefit. *Id.* at 59. Here, Mississippi seeks restitution *to the State* and has a sufficient interest to make it the sole real party in interest, even with respect to the restitution claim.

C. Respondents' Approach Conflicts With Longstanding Practice.

Respondents' approach would upset longstanding practice under which States and federal agencies seek restitution as sole plaintiffs, notwithstanding the possibility that consumers might ultimately receive some of the recovery. Restitution remedies are a matter of public, not private, right and confer no ability on private citizens to intervene. *E.g.*, *Getty Oil Co. v. Dep't of Energy*, 865 F.2d 270, 275 (Temp.Emer.Ct.App. 1988) ("[E]nforcement of a remedial restitution is the exclusive right of the government."); *see also SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 96 (2d Cir. 1978) (Friendly, J.) (SEC disgorgement actions).

This Court has upheld the Government's power to seek restitution in cases involving harm to consumers, without requiring that consumers be made parties to the litigation, and has afforded discretion in whether and how to distribute any recovery. *E.g.*, *Mitchell v. Robert DeMario Jewelry*,

361 U.S. 288, 296 (1960); *United States v. Moore*, 340 U.S. 616, 620 (1951). Often the Government does not make a distribution to consumers, particularly where it is impractical to do so. *E.g.*, *United States v. Exxon Corp.*, 773 F.2d 1240, 1284-86 (Temp.Emer.Ct.App. 1985), *cert. denied*, 474 U.S. 1105 (1986).[6]

Respondents' contrary approach would deem consumers the "owners" of the Government's "claims" and disrupt the settled practice by which agencies and courts administer a wide range of consumer protection statutes.

D. The Retention Of Private Counsel Is Irrelevant.

Retention of private counsel (Resp.Br. 7) is a matter within the sovereign authority of a State. There is a long tradition of reliance on private attorneys by all levels of government. *See Filarsky v. Delia*, 132 S.Ct. 1657, 1663 (2012). The issue is irrelevant to the Question Presented and does not change the nature of a *parens patriae* action.

Here, the Attorney General, pursuant to a delegation of authority from the Mississippi legislature, has retained private counsel to assist in certain *parens patriae* actions. Some attorneys general have made a similar decision; others have

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[6] Respondents exaggerate *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), as holding that a Government restitution claim "belongs" (Resp.Br. 32) to consumers. In fact, this Court did not require that consumers be made parties and stressed that any distribution was committed to the trial court's "equitable discretion." 328 U.S. at 399. The Court referred generally to "real parties in interest" (*id.* at 398), not to consumers in particular.

not. Counsel for Respondent Samsung entered into a contingency contract to represent the State of Minnesota in a *parens patriae* action.[7] One of Respondents' own authorities explains that "[p]rivate firms often have the necessary expertise that makes it cost effective for attorneys general offices with limited budgets to outsource particularly esoteric or complex work."[8]

The implication that retention of private counsel impairs an attorney general's control of the action is unfounded. *Every retainer agreement* obtained through amicus DRI's own research expressly mandates that the "AG retains control."[9] The retention agreement in the present case is the same, and the required control has been fully exercised.[10] Every court to consider the issue has upheld

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[7] *State ex rel. Swanson v. 3M Co.*, 2013 WL 3284285, *2 (Minn.Ct.App. July 1, 2013), *review granted*, Nos. A12-1856, A12-1867 (Minn. Sept. 17, 2013).

[8] 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, 558 (2012) (cited at Resp.Br. 57).

[9] http://www.huschblackwell.com/files/Publication/d7a63e97-943-ce9-9a5a-aa61a6bfdd92/Presentation/Publication Attachment/026393d9-9aaa-48aa-bc82-abb484163812/McMeyer_Final_ 0611.pdf (Appendix B, DRI Master Chart of Contracts).

[10] www.agjimhood.com/images/uploads/forms/LCD Agreement.pdf. Citing a standard exhibit that is not LCD-specific, Respondents imply the signatories expected a high-value recovery. Resp.Br. 10. But the exhibit makes no prediction and is merely illustrative of fee calculations, based on hypothetical recoveries.

retention agreements where an attorney general retained ultimate control of the litigation.[11]

III. RESPONDENTS' ARGUMENTS GO TO THE MERITS, NOT REMOVAL.

A. If Respondents Believe The Attorney General Lacks Authority To Seek The Requested Relief, They Should Seek Dismissal, Not Removal.

Respondents argue (citing decisions from Arizona and Iowa) that the MCPA does not "authorize the court to disgorge consumer overpayments to the State." Resp.Br. 35. (Two pages earlier, Respondents state that "the Attorney General's authority is not in question before this Court." *Id.* at 33 (emphasis omitted)).

Any objection to the Attorney General's authority under Mississippi law would be misplaced. *Hood ex rel. Mississippi v. BASF Corp.*, 2006 WL 308378, *3-4 (Miss.Ch.Ct. Jan. 17, 2006) (Mississippi Attorney General has statutory and common law authority to sue as *parens patriae* under MAA and MCPA).

If Respondents believe the Attorney General lacks legal authority to assert claims in the Complaint, the proper recourse is a motion to dismiss under Mississippi law in state court. If Respondents believe that a portion of the requested relief is duplicative (Resp.Br. 34), that issue should

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[11] *E.g.*, *Merck Sharp & Dohme Corp. v. Conway*, 2013 WL 2297179, *5 (E.D.Ky. May 24, 2013), *appeal docketed*, No. 13-5729 (6th Cir.); *San Francisco v. Philip Morris, Inc.*, 957 F.Supp. 1130, 1135 (N.D.Cal. 1997).

similarly be raised on the merits. If Respondents believe there are unsettled issues of state law regarding the Attorney General's authority, they should be decided by a Mississippi court.

B. The Real-Party-In-Interest Test Does Not Allow Respondents To Re-Imagine The Attorney General's Action As Though It Included Consumers.

The "real-party-in-interest" test – even if it applied – would not authorize Respondents to remove this case by re-imagining it as though it included Mississippi consumers. This Court has held that if the "named party's interest is real, the fact that other interested parties are not joined 'will not affect the jurisdiction of the [federal courts].'" *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 93 (2005) (quoting *Little v. Giles*, 118 U.S. 596, 603 (1886)); *cf.* Fed.R.Civ.P. 17(a)(1) (parties "authorized by statute" may "sue in their own names without joining the person for whose benefit the action is brought"). Respondents do not even cite *Lincoln*, let alone respond to it.

The cases cited by Respondents involve instances where the absence of real parties in interest provided a basis for dismissal, not removal, Resp.Br. 19 (citing *Stewart v. Baltimore & Ohio R.R. Co.*, 168 U.S. 445 (1897) (dismissal, which Court reversed); *Navarro*, 446 U.S. at 461 (same)), or instances where a State's presence in an action was challenged on the ground that it had no genuine interest. *See Ex parte Nebraska*, 209 U.S. 436, 445 (1908). In *Hickman*, 183 U.S. at 59-60, a state-created board of railroad commissioners filed suit in state court against a

railroad; the State was not a named party but unsuccessfully argued that it could prevent removal as the "real party in interest."

This case is different from those situations. Respondents do not seek to dismiss Mississippi's action on the ground that consumers are necessary parties, nor do they contend that the State should be dismissed as a plaintiff. Rather, they seek to recast the case as though "unnamed" "real parties in interest" had been added. Nothing in the "real-party-in-interest" test authorizes a removing defendant to re-imagine an action in such a fashion.

IV. IF IT REACHES THE ISSUE, THIS COURT SHOULD REAFFIRM THE "WHOLE CASE" APPROACH.

This Court need not consider either the "whole case" or "claim-by-claim" approach unless it concludes that: (i) CAFA incorporates a real-party-in-interest test, and (ii) consumers qualify as real parties in interest. In that event, this Court should reaffirm the traditional, "whole case" approach used by this Court and every Circuit other than the Fifth Circuit. However, even under a "claim-by-claim" approach, this Court should reverse. Pet.Br. 53-55. Respondents ignore Mississippi's showing that, even under a claim-by-claim analysis, the State is the real party in interest in a *parens patriae* action where it satisfies either the "substantial segment" or "lawmaking powers" test. *Id.* at 39-41.

The "whole case" approach properly follows this Court's instruction that whether a State is the real party in interest depends on "the essential nature and effect of the proceeding, as it appears from the entire record." *In re New York*, 256 U.S. 490, 500

(1921). That determination must be made according to whether the State is asserting sovereign or quasi-sovereign interests, not on the basis of the specific relief sought. *Snapp*, 458 U.S. at 607. A restitution claim reflects the State's quasi-sovereign interests because it advances the State's independent interest in enforcing its antitrust and consumer protection laws, even if consumers might ultimately receive part of the restitution award indirectly. Pet.Br. 39-43. The State possesses its own quasi-sovereign interests in seeking restitution, "independent of the benefits that might accrue to any particular individual." *Snapp*, 458 U.S. at 608. The State also seeks injunctive relief, civil penalties, and damages for its own purchases, all of which confirm the State's own interests.

Respondents' attack on the "whole case" approach (Resp.Br. 27-31) is misplaced. Even the cases they cite support it. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 277-78 (1997) (looking to "the essential nature and effect of the proceeding") (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945)) (cited at Resp.Br. 29); *Ex parte Nebraska*, 209 U.S. at 445 ("[W]hether the state of Nebraska is the real party plaintiff must be determined from the consideration of the nature of the case as disclosed by the record.") (cited at Resp.Br. 19). Respondents do not deny that supplemental jurisdiction and Article III's reference to "Cases" and "Controversies" support the "whole case" approach. Pet.Br. 49-50.

Respondents note that sovereign immunity defenses are analyzed claim-by-claim, to ensure that a plaintiff cannot circumvent the Eleventh Amendment. Resp.Br. 28-30. But that

demonstrates judicial solicitude *in favor of* States and provides no basis for diminishing their sovereignty by discounting their *parens patriae* interests.

Further, proceeding "claim-by-claim" in the sovereign immunity context leads to dismissal of barred claims. Here, Respondents' novel approach would require federal courts to bifurcate *parens patriae* actions, leaving "restitution" claims in federal court while remanding injunctive, civil penalty, and other claims to state court. Such bifurcation would interfere with state enforcement actions.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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