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 Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

## BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. The enforcement of consumer protection laws involves both governmental litigation, such as the state *parens patriae* action at issue here, and private enforcement through individual lawsuits and class actions. Public Citizen has a longstanding interest in preserving the viability of each of these distinct mechanisms for protection of the rights of consumers and members of the public generally.

Public Citizen also has an interest in the proper construction of the jurisdictional provisions of the Class Action Fairness Act (CAFA). Public Citizen was an active participant in the legislative process leading to CAFA's enactment, and although opposing the bill in general, played a part in and closely followed the discussions that led to many of the compromises that were incorporated in the legislation as finally enacted. Public Citizen is particularly concerned that the Fifth Circuit's construction of CAFA's "mass action" provision to encompass state *parens patriae* actions departs from the plain language and intent of CAFA. Public Citizen believes that its perspective on CAFA's lan-

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[1] This brief was not authored in whole or part by counsel for a party. No one other than *amicus curiae* or its counsel made a monetary contribution to preparation or submission of this brief. All counsel received 10 days' notice of filing. Letters of consent to filing from counsel for all parties are on file with the Clerk.

guage and history may be of assistance to the Court in considering both the importance of this case and the degree to which the decision below has distorted CAFA—considerations that bear heavily on the decision whether to grant review in this case.

## REASONS FOR GRANTING THE WRIT

### I. The Court Should Grant Review in This Case to Resolve a Significant Conflict Among the Circuits.

The conflict among the circuits over the question whether a statutorily authorized *parens patriae* action is a "mass action" subject to removal under CAFA provides more than ample reason for a grant of certiorari in this case. The conflict is direct, and the positions of the circuits are irreconcilable, as evidenced by the opposite results reached by other circuits in cases involving claims based on exactly the same alleged price-fixing scheme at issue here. *See AU Optronics Corp. v. South Carolina,* 699 F.3d 385 (4th Cir. 2012); *LG Display Co. v. Madigan,* 665 F.3d 768 (7th Cir. 2011).

This overt conflict cannot be explained away on the basis of some difference in the nature of the authority exercised by the state officials bringing the actions. In this case, the attorney general of the state of Mississippi has brought suit under statutes expressly authorizing actions seeking injunctive relief and civil penalties, as well as recovery of damages, on behalf of the state itself, as well as under his *parens patriae* authority to seek recoveries on behalf of injured citizens of the state. *See* Pet. 20, nn.14–15. The Fifth Circuit, following its previous decision in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418 (5th Cir. 2008), held that such an action is a mass action

under CAFA because the "real parties in interest" with respect to some of the claims are individual citizens of the state. Cases brought under statutory and common-law authority of exactly the same nature, with a similar mix of claims for relief on behalf of the state and for recoveries that may ultimately benefit individuals, have been held not to be mass actions by the Fourth, Ninth, and Seventh Circuits. *AU Optronics v. South Carolina,* 699 F.3d at 393–94; *Nevada v. Bank of Am. Corp.,* 672 F.3d 661, 669–70 (9th Cir. 2012); *Madigan,* 665 F.3d at 771. Those decisions, moreover, have explicitly rejected the decisional rule applied by the Fifth Circuit in this case—namely, its so-called "claim by claim" approach to determining the "real party in interest" in such cases. *See AU Optronics v. South Carolina,* 699 F.3d at 394; *Nevada v. Bank of Am. Corp.,* 672 F.3d at 670; *Madigan*, 665 F.3d at 773.

The conflict is by now thoroughly entrenched. In the court below, Judge Elrod's concurring opinion pointed out the conflict among the circuits and, while recognizing that the panel was bound by the holding of *Caldwell*, urged the court as a whole to "reconsider that precedent and adopt a different approach for analyzing the removal of *parens patriae* suits under CAFA." Pet. App. 22a. The Fifth Circuit's denial of rehearing en banc in the face of Judge Elrod's call for reconsideration of precedent indicates that the court below will not, left to its own devices, bring its rule into conformity with the standards applied by the majority of the other circuits. Moreover, because the competing arguments have been thoroughly fleshed out in the opinions of a substantial number of appellate and district courts, there is no reason to let the conflict simmer in the lower courts any longer.

The issue is important and recurring. In the space of only five years, a significant number of cases presenting the issue have reached the appellate courts (as have an equally significant number raising the related issue of whether *parens patriae* actions should be treated as conventional class actions under CAFA, *see Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 212–13 (2d Cir. 2013) (citing cases)). A number of others have been decided at the district court level. *See* Pet. 30 (citing cases). The number of cases reflects that state attorneys general are very active in bringing litigation that combines claims seeking injunctions and penalties for violations of state statutes with claims for monetary relief for the benefit of both the state itself (which often is injured by antitrust violations, unfair trade practices, and the like in its capacity as a consumer as well as its sovereign capacity) and injured citizens.

Until this Court resolves the issue, such cases will be treated radically differently in the Fifth Circuit than they are in the Fourth, Seventh and Ninth Circuits, and defendants in other circuits will continue to raise the issue by attempting to remove state *parens patriae* actions under CAFA. Whether such actions may proceed in the state courts chosen by state officials as the appropriate fora for assertion of their claims or may instead be imposed on the federal courts at the election of defendants is an important question that demands resolution by this Court.

This case is a particularly apt choice for resolving the issue, which is also before the Court in No. 12-

911, *AU Optronics Corp. v. South Carolina*.[2] Here, the Attorney General of Mississippi has associated counsel with substantial experience and expertise in proceedings before this Court, helping to ensure that both sides of the issue will be very ably presented to the Court, as review of the petition confirms.

## II. The Fifth Circuit's Decision Is Contrary to CAFA's Text and Purposes.

### A. The Plain Language of Section 1332(d)(11) Excludes *Parens Patriae* Actions from the Definition of Mass Actions.

Review of the decision below is particularly appropriate because the decision is incorrect and, if allowed to stand, would plunge both the federal and state courts into a procedural morass as they attempted to deal with the complexities inherent in recasting a state officer's *parens patriae* action as a mass action under CAFA.

As the Seventh Circuit recognized in *Madigan*, the Fifth Circuit's "claim by claim" approach to determining the "real parties in interest" in a *parens patriae* action is not only incorrect, but beside the point: The plain language of CAFA's mass action provision forecloses the possibility of federal jurisdiction over a *parens patriae* action filed by a state attorney general. *See Madigan*, 665 F.3d at 772.

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[2] The petition in that case seeks review of the Fourth Circuit's opinion in *AU Optronics v. South Carolina,* 699 F.3d 385, one of the appellate decisions that directly conflicts with the decision of the Fifth Circuit below.

The mass action provision is an exception to the principle that "class actions" under CAFA include only "civil action[s] filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). Every court of appeals to have considered the issue has agreed that that definition does not encompass a *parens patriae* action, which is not brought under Rule 23 or any of its state analogs. *See Purdue Pharma*, 704 F.3d at 212-13.

CAFA's mass action provision, 28 U.S.C. § 1332(d)(11)(A), however, expands CAFA's jurisdiction over class actions to include a narrow category of cases that are not class actions by providing that a mass action shall also "be deemed to be a class action" for CAFA jurisdictional purposes (if it otherwise meets CAFA's jurisdictional requirements). CAFA goes on to define a mass action as "any civil action" (other than a true class action filed under Rule 23 or a state analog) "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." *Id.* § 1332(d)(11)(B)(i).

This definition on its face does not encompass a *parens patriae* suit. Such an action does not propose a "joint trial" of claims of 100 or more "plaintiffs" on the ground that the otherwise separate claims of those plaintiffs "involve common questions of law or fact." Although a *parens patriae* action may involve an effort by the state to obtain relief that will ultimately benefit individual citizens of the state who have been injured, the action encompasses the claims of a single

plaintiff—the state, proceeding through its relator, the attorney general. The idea that a complaint advancing such a plaintiff's claims can be described as proposing a "joint trial" of the claims of multiple plaintiffs stretches English usage further than the language allows. The terms used in CAFA's definition of a mass action are plainly aimed at describing cases involving "the joinder of multiple plaintiffs in a single suit." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 763 (7th Cir. 2008).

That mass actions under CAFA include only actions where claims of multiple named plaintiffs are joined for purposes of trial is confirmed not only by the plain language of the primary definition of the term, but also by the limitation on federal jurisdiction that immediately follows and is incorporated in the statutory definition: "except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a) [of section 1332]." 28 U.S.C. § 1332(d)(11)(B)(i). This language not only presupposes the existence of individually identifiable "plaintiffs," but also imposes, at a minimum, an obligation on a court to remand claims of any particular plaintiffs whose claims would not meet the amount-in-controversy requirement for conventional diversity jurisdiction under § 1332(a).[3]

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[3] The lower courts have not resolved whether establishing that there are individual plaintiffs whose claims exceed $75,000 is part of the defendant's threshold burden to establish the propriety of removal. *Compare Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006) (remanding case where defendant failed to show that even one plaintiff had claims whose value exceeded $75,000), *with Lowery v. Alabama Power Co.,* 483 F.3d 1184,

(*Footnote continued*)

As the Eleventh Circuit has recognized, the language of the "except" clause refers "to individual plaintiffs and their claims." *Lowery*, 483 F.3d at 1205. The clause unambiguously reflects Congress's intent that the mass action provision apply to instances where individual named plaintiffs have filed claims jointly (or proposed a joint trial of separately filed actions). Only in that circumstance does it make sense to provide that jurisdiction is limited to those plaintiffs whose claims would otherwise be subject to jurisdiction under §1332(a).

Indeed, implementing the statutory command that claims of individual plaintiffs that do not meet the amount-in-controversy requirement of § 1332(a) be remanded to state court would prove a procedural nightmare if the Fifth Circuit's view that *parens patriae* actions are mass actions were to prevail. The district court would be obligated either to identify the individual citizens who might ultimately receive relief if the state's claims were successful and remand those whose potential claims did not exceed $75,000, or else to remand to the state court a parallel *parens patriae* action on behalf of those citizens with losses not ex-

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1203–07 (11th Cir. 2007) (expressing doubt that showing the existence of plaintiffs with claims exceeding $75,000 is a threshold requirement). Nonetheless, there is no disagreement that individual plaintiffs whose claims do not exceed $75,000 are outside of federal jurisdiction, and their claims must be remanded to state court if they are included in a mass action otherwise subject to removal under CAFA. *See also* S. Rep. No. 109-14, at 47 (2005) ("[A]ny claims that are included in the mass action that standing alone do not satisfy the jurisdictional amount requirements of Section 1332(a) (currently $75,000), would be remanded to state court.").

ceeding $75,000, while retaining only a *parens patriae* action seeking recoveries to benefit citizens with losses exceeding $75,000. The first alternative would likely be impossible, or at least extremely burdensome, while the second would result in significant duplication of effort between the state and federal court systems. Adding to these complexities, the state's own claims for damages that *it* suffered, as well as claims for penalties and injunctive relief as to which the state is concededly the real party in interest, would also likely require remand, as they do not fall within federal jurisdiction under § 1332(a). And at the end of the day, any resolution of whatever part of the case remained in the federal system would not be binding on any person who lacked an individual claim that was not subject to jurisdiction under § 1332(a).

### B. CAFA's History Confirms What Its Language Provides: *Parens Patriae* Actions Are Not Mass Actions.

That Congress did not intend the strange consequences described above is confirmed not only by the language of the mass action provision, but also by CAFA's legislative history. The forerunner of the mass action provision first appeared in a version of CAFA introduced in the House of Representatives in the 107th Congress, which provided that a civil action that is not otherwise a class action (because not filed under Rule 23 or one of its state analogs) would be "deemed" a class action if "monetary relief claims in the action are proposed to be tried jointly in any respect with the claims of 100 or more other persons on the ground that the claims involve common questions of law or fact." H.R. 2341, 107th Cong. § 4(a)(2) (2001). The bill's sponsor explained that the provision

was aimed at actions in which a "multitude of plaintiffs" sought relief. H.R. Rep. No. 107-370, at 97 (2002) (statement of Rep. Goodlatte in Committee mark-up session).

Versions of CAFA introduced in both the House and Senate in the 108th Congress included similar provisions. *See* H.R. 1115, 108th Cong. § 4(a)(2) (2003); S. 274, 108th Cong. § 4(a)(2) (2003). Committee reports on both bills confirmed what the plain language of the bills indicated: The statutory language is aimed at actions in which claims of individually identified plaintiffs are joined for purposes of trial. In virtually identical language, the reports described the "mass actions" that would be deemed to be class actions as "suits that are brought on behalf of hundreds or thousands of *named plaintiffs* who claim that their suits present common questions of law or fact that should be resolved in a single proceeding in which large groups of claims are tried together, in whole or in part." H.R. Rep. No. 108-144, at 35 (2003) (emphasis added); *see* S. Rep. No. 108-123, at 42 (2003) (using identical language except for the addition of "simultaneously" before "in a single proceeding").

The House Report also included the bill's sponsor's explanation that the mass action provision was aimed in large part at mass joinder proceedings in Mississippi and West Virginia state courts, in which mass actions had been "used to consolidate for trial the claims of as many as 8,000 plaintiffs …." H.R. Rep. No. 108-144, at 94. The sponsor explained that mass actions were effectively "opt-in class actions in the sense that they *include only those claimants who*

*have affirmatively consented to the inclusion of their claims in the action*." *Id*. at 92 (emphasis added).

CAFA's definition of mass actions was altered to its final form—actions "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 [28 U.S.C. § 1332] subsection (a)"—later in the 108th Congress, in S. 2062 (2004). The legislation ultimately enacted as CAFA in the 109th Congress, Pub. L. No. 109-2 (2005), was identical to S. 2062. Although the wording was slightly different from that in the bills that were the subjects of the 2003 House and Senate Reports, the differences, including the explicit references to "plaintiffs," made even clearer that the provision was aimed at cases in which claims of individual named plaintiffs were joined.

The Senate Report on the legislation as finally enacted, moreover, again referred to mass actions as "suits that are brought on behalf of numerous *named plaintiffs* who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status," and it explained that under the mass action provision, "any civil action in which 100 or more *named parties* seek to try their claims for monetary relief together will be treated as a class action for jurisdictional purposes." S. Rep. No. 109-14, at 46 (2005) (emphasis added).

The drafting history thus underscores what the statutory language itself makes plain: The mass ac-

tion provision applies to cases in which claims of multiple named plaintiffs are joined. *Parens patriae* actions by state attorneys general do not meet that description.

Indeed, the statute's history reveals that in the final debates over CAFA, Congress considered and decisively rejected the possibility that the statutory language might provide for federal jurisdiction over *parens patriae* actions. When CAFA reached the Senate floor for final consideration in February 2005, Senator Pryor introduced an amendment that would have provided that the term "class action" in CAFA's jurisdictional provisions would "not include any civil action brought by, or on behalf of, any [state] attorney general." 151 Cong. Rec. S1157 (Feb. 9, 2005). As Senator Pryor explained, the amendment was not intended to alter CAFA's scope, but merely to "clarif[y]" it, *id*. at S1158, to address concerns expressed by state attorneys general that the statute might be "misconstrued" to apply to *parens patriae* actions. *Id.* (quoting letter from 46 state attorneys general).

CAFA's sponsors opposed the amendment not, as they carefully explained, because they intended CAFA to cover *parens patriae* actions, but because the amendment was "unnecessary," *id*. at S1163 (Sen. Hatch), as it was "perfectly clear" that the bill would not apply to parens patriae actions, which were "excluded from the reach of the bill." *Id*. at S1164. Each of the other CAFA proponents who spoke in opposition to Senator Pryor's amendment made the same point: The statute would not affect cases brought under the *parens patriae* authority of state attorneys general. *Id*. at S1160 (Sen. Specter), S1161 (Sen.

Carper), S1161-62 (Sen. Cornyn), S1163 (Sen. Grassley). Senator Grassley's remarks are typical:

> [I]n my judgment, the amendment is not necessary. I will explain. State attorneys general have authority under the laws of every State to bring enforcement action to protect their citizens. Sometimes these law[suit]s are parens patriae cases, similar to class actions in the sense that the State attorney general represents the people of that State. In other instances, their actions are brought directly on behalf of that particular State. But they are not class actions; rather, they are very unique attorney general lawsuits authorized under State constitutions or under statutes.
>
> One reason this amendment is not necessary is because our bill *will not affect those lawsuits*.

*Id.* (emphasis added).

In short, CAFA's supporters unanimously disclaimed any intent to bring *parens patriae* actions within federal jurisdiction. Accordingly, Senator Pryor's amendment was rejected. *Id.* at S1165. The debate over the amendment strongly underscores what is evident from the text of the statute and the explanations offered in the committee reports: CAFA does not authorize a *parens patriae* action to be deemed a class action for purposes of CAFA jurisdiction.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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