No. 12-911

In The Supreme Court of the United States

AU OPTRONICS CORPORATION, *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: February 25, 2013

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QUESTION PRESENTED

Whether the Court of Appeals for the Fourth Circuit correctly determined that this *parens patriae* action is not removable as a "mass action" under the Class Action Fairness Act when the State attorney general's causes of action could only be brought in the name of the State, making it the real party in interest, such that this action was properly remanded to state court.

PARTIES AND RULE 29.6 STATEMENT

Respondent State of South Carolina is the only named party-plaintiff in the underlying matter. Petitioners AU Optronics Corporation, AU Optronics Corporation America, LG Display Co., Ltd., and LG Display America, Inc. are the named party-defendants.

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INTRODUCTION

The petition for writ of certiorari does not raise any question that warrants review by this Court.

This Court denied certiorari in *CVS Pharmacy, Inc. v. West Virginia ex rel. McGraw*, 132 S. Ct. 761, 181 L. Ed. 2d 484 (2011), a case in which the Fourth Circuit held that an action brought by the Attorney General of West Virginia against six pharmacy operators was not removable under the Class Action Fairness Act ("CAFA") because the action was not similar to a class action, and instead was a classic *parens patriae* action. In *CVS Pharmacy, Inc.*, the petitioners also asserted the Fourth Circuit's decision conflicted with the Fifth Circuit's real party in interest approach in *State of Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418 (5th Cir. 2008).

The present case is equally unworthy of review given the similar positions presented.[1]

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[1] In *CVS Pharmacy, Inc.*, the question presented was the following:

> When a state attorney general claims *parens patriae* authority and sues out-of-state defendants on behalf of private individuals under a state statute which requires that any recovery go to those individuals rather than the state, may the defendants remove the case as a "class action" under CAFA on the ground that such private individuals are real parties in interest?

See Petition for Writ of Certiorari, 2011 WL 3706738 (U.S.).

JURISDICTION

Jurisdiction is proper under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

The Fourth Circuit has not interpreted CAFA's minimal diversity requirement in a manner that is in conflict with the Fifth Circuit,[2] CAFA's text,[3] and this Court's diversity jurisprudence. Although only one plaintiff exists in the underlying complaint, the Petitioners assert the case is a "mass action" under CAFA. They seek to have every single enforcement action brought by the State of South Carolina (hereinafter "the State") subject to federal court jurisdiction if the action includes a claim for restitution, regardless of the State's real interest in the action.[4]

It is alleged that Petitioners engaged in a conspiracy to restrict output and control prices of TFT-LCD panels, in violation of state antitrust and

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[2] *See Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008).

[3] A CAFA mass action is defined as a civil action in which the 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). A mass action meeting this definition is deemed a class action removable under 1332(d)(2) through (10). *Id.* § 1332(d)(11)(A).

[4] Oral Argument at 14:30, *AU Optronics v. South Carolina*, 699 F.3d 385 (4th Cir. 2012) (No. 11-0254), *available at* http://www.ca4.uscourts.gov/ (follow "Argument Calendar" hyperlink; then follow "Listen to Oral Argument Audio Files").

unfair trade practice laws. App. 64a, 65a. The Antitrust Division of the United States Department of Justice pursued criminal investigations. In 2009, the LG Display Petitioners pled guilty and agreed to pay a $400 million fine for "participating in a conspiracy among major TFT-LCD producers, the primary purpose of which was to fix the price of TFT-LCD sold in the United States and elsewhere."[5] In 2012, a federal jury in San Francisco found the AU Optronics Petitioners guilty of participating in the same conspiracy and the Court ordered those Petitioners to pay a $500 million criminal fine.[6]

No jurisdictional "gamesmanship" occurred when the State filed its complaint. It was stated the only way it statutorily could be: in the name of the State for the public's interest.

Pursuant to S.C. Code Ann. § 39-3-180,[7] the State has alleged in its complaint that it is entitled to recover against Petitioners civil forfeiture of up to $5,000 per day of any violation of the South Carolina Antitrust Act, S.C. Code Ann. § 39-3-130. App. 64a, 65a. That cause of action must be brought in the "name of the State," and the penalty must be

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[5] *See* Plea Agreement, *United States v. LG Display Co., Ltd, et al.*, Case No. Cr-08-803 (SI) (N.D. Cal. Dec. 17, 2008) (ECF No. 14)

[6] *See* Judgment, *United States v. AU Optronics Corp.*, Case No. Cr-09-0110 (SI) (N.D. Cal. Oct. 2, 2012) (ECF No. 976).

[7] All of the relevant state statutes were included in Petitioners' appendix at the end of their Brief, beginning at App. 102a through App. 108a.

forfeited to the State Treasury. *See* S.C. Code Ann. § 39-3-180. App. 103a.

Pursuant to S.C. Code Ann. § 39-5-110(a), the State has alleged in its complaint that it is entitled to recover against Petitioners civil penalties of up to $5,000 per violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). App. 66a. Only the attorney general may petition the court for this relief on behalf of the State. *See* S.C. Code Ann. § 39-5-110(a)-(b). App. 107a.

The State also alleged in its complaint against Petitioners that it "is entitled to restitution, pursuant to S.C. Code Ann. § 39-5-50, on behalf of the Citizens of the State of South Carolina" as a result of the violations of state law. App 65a. The attorney general must bring this action in the name of the State, and only if the attorney general believes such action to be in the public's interest. *See* S.C. Code Ann. §§ 39-5-50(a)-(b). App. 105a-106a.

Petitioners' statement of the case contains factual errors. South Carolina consumers are not included in the certified group of indirect purchaser plaintiffs in *In re TFT-LCD (Flat-Panel) Antitrust Litigation*, MDL No. 3:07-md-01827-SI (N.D. California) ("the MDL Proceeding").[8] The 2007 South Carolina class actions referred to by

[8] *See* Order Granting Indirect Purchaser Pls.' Motion for Class Certification; Den. Defs.' Motion To Strike Modified Class Definitions; Granting Motions To Strike Untimely Declarations, *In Re: TFT-LCD (Flat Panel) Antitrust Litigation*, No. M:07-1827-SI (N.D. Cal. Mar. 28, 2010) (ECF No. 1642).

Petitioners[9] were administratively closed by Order of District Court Judge Susan Illston dated November 17, 2009, after a Consolidated Amended Complaint filed by the indirect purchaser plaintiffs excluded South Carolina from the class definition.[10]

Settlements in the MDL Proceeding, totaling more than $538 million, will pay consumers in 24 states and the District of Columbia; however, South Carolina citizens were not included in the MDL settlement because they are not part of the certified class of consumers.[11]

REASONS FOR DENYING THE PETITION

The State presents this Brief in Opposition to the Petition for Writ of Certiorari. Petitioners fail to present any substantial reason for this Court to grant the Petition. The Fourth Circuit's holding does not conflict with decisions from other Circuit Courts

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[9] *See* Petition, p. 8.

[10] *See* Order Administratively Closing Cases, *In Re: TFT-LCD (Flat Panel) Antitrust Litigation*, No. M:07-1827-SI (N.D. Cal. Nov. 17, 2009) (ECF No. 1385 & 1385-1)

[11] *See* Order Granting Preliminary Approval of Combined Class, *Parens Patriae*, And Governmental Entity Settlements, *In Re: TFT-LCD (Flat Panel) Antitrust Litigation*, No. M:07-1827-SI (N.D. Cal. Jan. 26, 2012) (ECF No. 4688). Judge Illston found that the scope of that settlement "does not include . . . the release of any proprietary state claims brought by any state other than a Settling State, whether for damages, injunctive relief, or other equitable relief, including *parens patriae* claims for unjust enrichment or disgorgement of profits." *Id.*, p. 2. South Carolina is not a Settling State because it was not part of the certified class.

of Appeals. Likewise, the Fourth Circuit's decision does not conflict with this Court's jurisprudence. Furthermore, the time is not right for the Court to address this issue because to the extent the Fifth Circuit differs from the remaining Circuit Courts in its view of this issue, the Fifth Circuit is an outlier in which its own judges question its view, thus making this issue unimportant and unlikely to reoccur. Also, another Petition for Writ of Certiorari currently pending before this Court presents a more suitable vehicle for this Court should it wish to resolve this issue. Finally, the Fourth Circuit's decision is wholly consistent with the purpose of CAFA.

1. No Genuine Circuit Split Exists On This Issue.

Certiorari should be denied because the Fourth Circuit's decision does not conflict with the decisions of any Circuit Court of Appeals, despite the Petitioner's arguments to the contrary. Rather, the Fourth Circuit simply applied the well-developed and widely-accepted law among the Circuit Courts. *See Nevada v. Bank of Am. Corp.*, 672 F.3d 661 (9th Cir. 2012); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768 (7th Cir. 2011).

Specifically, the Fifth Circuit's decision in *State of Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418, 422 (5th Cir. 2008), does not represent a square split with the Fourth Circuit's decision as the Petitioners argue. Even the Fourth Circuit's opinion in this case recognized that any disagreement among the Circuits is not square, emphasizing that "sister circuits have disagreed

somewhat." *AU Optronics Corp. v. State of South Carolina*, 699 F.3d 385, 392 (4th Cir. 2012) (emphasis added) (citing *Caldwell*, 536 F.3d 418). The Fifth Circuit's decision in *Caldwell* involved a narrower issue than that presented to the Fourth Circuit, as well as a far different state statute than is at issue in the State's case; thus, the two courts understandably reached different results.

In *Caldwell*, a case the Fifth Circuit decided only three years after CAFA was enacted, the Louisiana attorney general sued Allstate Insurance Company and a number of other defendants under the Louisiana Monopolies Act ("LMA"). *Caldwell*, 536 F.3d at 422. In addition to seeking an injunction against defendants' alleged price fixing, the attorney general sued for treble damages for policyholders residing in Louisiana. *Id.* at 422-23. Significantly, the only provision of the LMA that provides for treble damages provides individual victims the right to seek them. *Id.* at 429. Therefore, Louisiana law did not provide a direct statutory pathway for the attorney general to assert the right to recoup treble damages. The defendants removed the case to federal court on the grounds that the lawsuit was a "class action" or "mass action" and hence removable under CAFA. *Id.* at 422.

On appeal from the district court's refusal to remand, the Fifth Circuit determined that because the attorney general failed to raise any objection on appeal to the district court's "decision to pierce the pleadings or [its] procedure for doing so," the issue was waived. *Id.* at 425. Thus, the "narrow" issue before the Fifth Circuit in *Caldwell* was who are the

real parties in interest in the case before it: the individual policyholders or the State? *Id.* at 429. To determine the real parties in interest, the district court looked to the language of the LMA, under which the attorney general had sued. The Fifth Circuit held that, because the real parties in interest were the policyholders—who alone possessed the right to pursue the claim—the attorney general was only a "nominal party" with respect to the claim for treble damages, and the case was a mass action under CAFA. *Id.* at 432.

However, the court acknowledged that its conclusion addressed only the narrow question before it. Specifically, the *Caldwell* court noted that its decision did not address the issue of whether actions brought by a state attorney general pursuant to a specific statutory grant would be shielded from CAFA jurisdiction. *Id.* at 427 n.5.

Here, the State of South Carolina's case presents the issue that the *Caldwell* court acknowledged its case did not involve: an action brought by a state attorney general pursuant to a specific statutory grant.[12] Unlike the statutes involved in *Caldwell*, the statutes involved here directly provide the State, through its Attorney General, with the right to pursue enforcement actions against those it believes are violating the State's anti-trust and anti-trade law and to recover monetary relief for these violations.

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[12] The cases in the Seventh and Ninth Circuits also presented the same issue. *See Bank of Am. Corp.*, 672 F.3d 661; *Madigan*, 665 F.3d 768.

S.C. Code Ann. § 39-5-50 expressly and directly authorizes the Attorney General to bring a claim to recover restitution for harm to the general public. South Carolina is the real party in interest. In accord with the Fifth Circuit's decision in *Caldwell*, even if a Court focused only on the restitution remedy pled in the South Carolina Complaint, one could still conclude that the State is the proper party plaintiff or "real party in interest." The logic of *Caldwell* dictates that such a broad, statutorily-derived authority necessarily makes South Carolina the real party in interest for purposes of its SCUTPA claim. As such, there really is no split between the Fourth and Fifth Circuits.

Defendants assert that individual citizens have a private right of action under a different statute, section 39-5-140. *See* Petition, pp. 9, 17. However, it is undisputed that the State did not plead a cause of action under that statute.[13] App. 57a-68a.

Therefore, even under the Fifth Circuit's analysis, the case before the Fourth Circuit would have likely been decided the same. As a result, no square Circuit Court split exists on this issue, and certiorari should be denied.

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[13] Section 39-5-140 is actually irrelevant and would be ignored when determining federal jurisdiction. *Vaden v. Discover Bank*, 556 U.S. 49, 60-61 (2009) ("The well-pleaded complaint rule applies to the original jurisdiction of the district courts as well as to their removal jurisdiction.").

2. The Fourth Circuit's Decision Does Not Conflict With This Court's Decisions.

Contrary to the Petitioners' assertions, the Fourth Circuit's decision does not conflict with this Court's decisions in *Missouri, Kansas, & Texas Railway Co. v. Hickman*, 183 U.S. 53 (1901) and *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980). Those cases address issues not present in this case. In *Hickman*, the Court determined that because the state would not recover *any* money for the state, and the results of the lawsuit would not "inure to the benefit of the state *in any degree*," the state was not the real party in interest. 183 U.S. at 59 (emphasis added). Moreover, any recovery the state may have received for its own benefit was speculative. *See id.* at 60.

This Court did not address—nor did it analyze—the situation in which both the state *and* the citizens affected by the conduct alleged in the complaint may benefit from a recovery, which was the situation before the Fourth Circuit. Thus, *Hickman* afforded no opportunity to this Court to identify the real party in interest in such a circumstance, and thus, *Hickman* did not provide clear guidelines for the Fourth Circuit to follow.

Here, as the Fourth Circuit correctly concluded, the State is seeking "'substantial relief that is available to it alone.'" *AU Optronics*, 699 F.3d at 393 (quoting *Bank of Am. Corp.*, 672 F.3d at 672). That the State may recover for its own benefit is not speculative because the South Carolina Code permits the State to file a lawsuit for these claims

and to receive a direct recovery. Nothing in this Court's opinion in *Hickman* would have compelled the Fourth Circuit to ignore the State's substantial interest in the lawsuit and to have instead identified the State's unnamed citizens as the real parties in interest.

Navarro Savings is even less instructive on this issue so that the Fourth Circuit's opinion in no way conflicts with it. That case involved a question of whether, for jurisdictional purposes, the trustees or the beneficiaries of an express trust were real parties in interest for jurisdictional purposes. *Navarro Savings Ass'n*, 446 U.S. at 461-62. The Court in *Navarro* relied on long-standing principles unique to trust law to determine that the trustees were the real parties in interest. *Id.* at 463-65. The State of South Carolina is not a trust.

In fact, the Fourth Circuit's opinion *is* consistent with *Navarro*, in so much as *Navarro* requires the court to determine the real party in interest when considering jurisdictional issues. The Fourth Circuit determined that the State is the real party in interest. *AU Optronics*, 699 F.3d at 394. It then decided that it lacked jurisdiction over its lawsuit against the Petitioners. *Id.*

A real party in interest is the party that "possesses the right sought to be enforced." Charles Alan Wright & Mary Kay Kane, Law of Federal Courts § 70, at 492-93 (6th ed. 2002). *See also Navarro*, 446 U.S. at 465-466. As set forth fully above, the citizens of South Carolina do not have statutory authority to enforce their rights by

bringing a complaint to assert a cause of action under section 39-5-50(a) or (b). The fact that the action must be brought in the name of the State uniquely situates the State as the only real party in interest.

Importantly, not only does the Fourth Circuit's decision not conflict with this Court's precedent, it complies with its precedent. *See United States Fidelity & Guaranty Company v. United States*, 204 U.S. 349, 27 S. Ct. 381, 51 L. Ed. 516 (1907).[14]

Likewise, the Fourth Circuit's decision complies with a long-standing rule of this Court that removal statutes should be strictly construed. *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002). This rule is particularly relevant when a state has chosen to file a lawsuit in its own courts—as the State has done in this case—because removal of these lawsuits implicates federalism concerns. Indeed, this Court has urged cautious consideration of such cases, stating that "considerations of comity [should] make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983); *see also West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir.

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[14] This Court held that the United States was not "merely [a]nominal or formal party" when it had the power to bring the suit and control the litigation. *Id.* at 356-57, 27 S. Ct. 381. The State has the statutory power to bring the present enforcement action and is the only party who can control the litigation, including the claim for restitution.

2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 761 (Nov. 28, 2011).

Here, no clear rule under CAFA demands that the federal courts should "snatch" a *parens patriae* lawsuit brought by the state's attorney general from the state court in which the state elected to file the lawsuit; rather, the plain language of CAFA compels a clear rule to the contrary.

Indeed, as the State argued in its brief to the Fourth Circuit,[15] and as the Seventh Circuit also noted, the plain language of CAFA forecloses an argument that CAFA extends federal jurisdiction to a *parens patriae* lawsuit as a "mass action." *See Madigan*, 665 F.3d 768 at 772 (noting that by its plain terms, CAFA's mass action provision, § 1332(d)(11), does not apply to plaintiffs' claims in this case, as none of the seven state court actions involves the claims of one hundred or more plaintiffs, and neither the parties nor the trial court had proposed consolidating the actions for trial); Respondent's Brief to the Fourth Circuit, pp. 13-16.

As this Court has acknowledged time and time again, courts must always turn first to one cardinal rule of statutory construction: "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). If the words of a statute are

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[15] This Court may affirm the decision below "on any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984).

unambiguous, then the court should go no further; "'judicial inquiry is complete.'"[16] *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

When examining the plain language of § 1332(d)(11), the provision references both "claims of 100 or more persons" and that the claims brought must be "plaintiffs' claims." Furthermore, "plaintiff" is commonly defined as a "party who brings a civil suit in a court of law." Black's Law Dictionary (9th ed. 2009). When interpreting these phrases in context with each other, this provision can only be read to apply strictly to plaintiffs named in the well-pleaded complaint, i.e. parties who brought the civil suit. In this case, the complaint names only one plaintiff: the State of South Carolina. The Attorney General is exercising his quasi-sovereign power on behalf of the State, rather than prosecuting consumers' claims that share common questions of law or fact. Thus, under the plain language of CAFA, the State's action is not a mass action.

Therefore, the Fourth Circuit's opinion does not conflict with this Court's jurisprudence and is, in fact, consistent with this Court's jurisprudence.

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[16] Despite this clear directive from the Court, the Petitioners stray into legislative history to support its Petition. *See* section 4 of the Petition. Moreover, if a loophole exits as Petitioners urge in that same section, that loophole is for Congress to close. *See DiPierre v. United States*, ___ U.S. ____, 131 S. Ct. 2225, 2233 (2011) (providing that the Court must construe a statute based on the actual text, despite Congress's inartful drafting).

3. The Time Is Not Right To Address This Issue.

(a) The Fifth Circuit is an outlier, which makes this issue unimportant and unlikely to reoccur.

Even if the Circuit Courts were squarely split on this issue, such a lopsided split as is involved in this case is not an "intolerable evil" that certiorari is needed to correct; judicial patience may result in the error correcting itself. *See* Robert L. Stern, et. al, Supreme Court Practice 229 (8th ed. 2002). The Fifth Circuit is undoubtedly an outlier on this issue, and every other Circuit Court considering this issue has definitively rejected the Fifth Circuit's claim-by-claim approach that effectively rewrites CAFA to define a "mass action" to include all parens patriae lawsuits.[17] *See AU Optronics Corp. v. State of South Carolina*, 699 F.3d 385 (4th Cir. 2012); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661 (9th Cir. 2012); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768 (7th Cir. 2011). Indeed, unlike the unanimous panels in the Fourth, Ninth, and Seventh Circuits, the panel in the Fifth Circuit's *Caldwell* was divided, with Judge Southwick strongly dissenting. *Caldwell*, 536 F.3d

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[17] Additionally, district courts outside of the Fifth Circuit that have considered this issue have rejected *Caldwell*'s claim-by-claim analysis. *See Illinois v. AU Optronics Corp.*, 794 F. Supp. 2d 845 (N.D. Ill. Jun. 6, 2011); *In Re: TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827, 2011 U.S. Dist. LEXIS 17793, 2011 WL 560593, *3 (N.D. Cal. Feb. 15, 2011); *Missouri ex rel. Koster v. Portfolio Recovery Assoc., Inc.*, 686 F. Supp. 2d 942, 945-46 (E.D. Mo. 2010); *Illinois v. SDS West Corp.*, 640 F.Supp. 2d 1047, 1050-53 (C.D. Ill. 2009).

at 433-36 (Southwick, J. dissenting) (arguing that the case should have been remanded because the court did not have jurisdiction under CAFA when the case was not pleaded as a mass action or class action).

Even more telling of the weakness of the Fifth Circuit's position is Judge Elrod's vigorously-argued, concurring opinion in the Fifth Circuit's most recent CAFA case analyzing the jurisdictional requirements of a mass action, *State of Mississippi ex rel. Hood v. AU Optronics*, 701 F.3d 796 (5th Cir. 2012) (holding, when applying a claim-by-claim approach, an attorney general-filed *parens patriae* lawsuit against AU Optronics for allegedly violating Mississippi's Consumer Protection Act and Antitrust Act was a mass action under CAFA, and thus, removal to federal court was proper). In a concurring opinion that reads more like a strong dissent, Judge Elrod questioned the majority's choice to continue its allegiance to the rules it pronounced in 2008 in *Caldwell*, well before the issue had a chance to percolate through the other Circuit Courts for consideration in 2011 and 2012. *See id.* at 804 (Elrod, J. concurring). Judge Elrod, acknowledging that the majority's opinion labeled the attorney general's lawsuit as a mass action because the majority's claim-by-claim analysis concluded that Mississippi consumers were the real parties in interest for the State of Mississippi's restitution claim, pointedly stated:

> This result is the exact opposite of the outcome in many other similar lawsuits around the country. That so many

> other courts are reaching a different result in cases that involve similarly-situated litigants and nearly identical claims suggests that *we should consider whether we have staked out the correct position*. I believe that we have not.

Id. at 804-05 (emphasis added).

Thus, the Fifth Circuit is an outlier on this issue, and it cannot manage to shore up full support among its own deciding judges. Courts outside of the Fifth Circuit are unlikely to follow its lead[18] such

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[18] The Second Circuit, in an opinion released on January 9, 2013, illustrates that other courts are unlikely to follow *Caldwell*. *See Purdue Pharma L.P. v. Commonwealth of Kentucky*, No. 11-4087-mv, 2013 WL 85918 (2d Cir. Jan. 9, 2013). In *Purdue Pharma*, the Second Circuit was asked by Purdue, which had been sued by the Commonwealth of Kentucky, for leave to appeal the district court's order to remand the case to state court. *Id.* at *1. Purdue had removed the case to federal court under CAFA's class action provisions. *Id.* In support of its argument for removal, Purdue urged the court to accept many of the same arguments Petitioners presented below, none of which the court found convincing. *Id.* at *6. Notably, Purdue argued that the court should assess the appropriateness of the removal using *Caldwell*'s claim-by-claim approach. *Id.* at *7. The court expressly "decline[d] that invitation." *Id.* Not only did the court note that *Caldwell* applied to mass actions rather than the class actions, which was the issue before the Second Circuit, the court also noted that *Caldwell* had been "roundly criticized," and the whole-complaint approach represents the majority rule. *Id.* In the end, the Second Circuit decided that it could decide the matter before it without having to reach the issue of whether to apply a claim-by-claim approach or a whole-complaint approach. *Id.* at *8.

that this issue is unlikely to recur, except perhaps within the Fifth Circuit.

However, given the split among the Fifth Circuit's own judges, the Fifth Circuit may be well on a path to correct its own error. Therefore, because this issue is neither recurring nor important as the Petitioners argue, the rare grant of certiorari is unnecessary to resolve the issue.

(b) Another case is a better vehicle for resolving this issue, should the Court decide to do so.

On February 19, 2013, the State of Mississippi filed in this Court a Petition for Writ of Certiorari, asking this Court to review the Fifth Circuit's decision in *Hood*. In *Hood*, the Fifth Circuit staunchly adhered to its precedent, and under *Caldwell*, it applied a claim-by-claim approach to hold that an attorney general-filed *parens patriae* lawsuit—of which the Petitioners are also named as defendants for alleged violations of Mississippi's Consumer Protection Act and Antitrust Act—was a mass action under CAFA. Thus, the Fifth Circuit held that removal of the *parens patriae* lawsuit to federal court was proper. *Hood*, 701 F.3d at 800-02.

The Fifth Circuit's only mention of the Ninth Circuit's decision in *Nevada v. Bank of America* or the Seventh Circuit's decision in *LG Display Co., Ltd. v. Madigan* occurred in a citation supporting the court's statement that other courts take the whole-complaint approach when determining the real party in interest. *Id.* at 800. The Fifth Circuit made no

mention of the Fourth Circuit's disposition of this case, which the Fourth Circuit had decided almost a month prior. The Fifth Circuit did not otherwise analyze the whole-complaint approach. Many of these weaknesses in the Fifth Circuit's opinion were pointed out in Judge Elrod's concurring opinion, and she urged the majority to revisit the Fifth Circuit's incorrect position on this issue. *Id.* at 804-05 (Elrod, J. concurring).

As previously mentioned above, the Fifth Circuit is the outlier; the State in this case has received the correct remedy as is supported by the well-reasoned opinions by all of the other Circuit Courts deciding this issue. Thus, if the Court were going to grant certiorari in any case, it should do so in *Hood* to correct the erroneous decision of the Fifth Circuit and to provide the State of Mississippi with relief that is consistent with the rest of the Circuit Courts. Therefore, certiorari should not be granted in this case.

4. The Fourth Circuit's Decision Is Consistent With CAFA's Purpose.

Petitioners stray deep into the legislative history of CAFA in section 4 of the Petition, and then claim this case is one of national importance because the Fourth Circuit's approach thwarts the purpose of CAFA. Having relied upon legislative history, Petitioners should have informed the Court of those portions which weigh against their positions.

The Senate Report explains that CAFA's mass action provision "expands federal jurisdiction over

mass actions – suits that are brought on behalf of numerous *named* plaintiffs . . . ." *See* S. Rep. No. 109-14, at 46 (2005) (emphasis added), *reprinted in* 2005 U.S.C.C.A.N. 3, 40.[19]

The Senate report further explained that the "mass action" provision was not intended to sweep in any case that might affect a lot of people; instead, it was aimed at cases that "are simply class actions in disguise . . . [and that] often result in the same abuses." S. Rep. No. 109-14, at 41, *reprinted in* 2005 U.S.C.C.A.N. at 44.

The "mass action" language was directed particularly at the handful of states that have no formal class action rules and use judicial claim-aggregation principles instead. *See* 151 Cong. Rec. S1235-36 (daily ed. Feb. 10, 2005) (statement of Sen. Durbin); *Anwar*, 676 F. Supp. 2d at 297 ("CAFA's legislative history makes clear that Congress envisioned 'mass actions' as claims by multiple plaintiffs 'consolidated by State court rules,' but not otherwise pled as class actions.") (citing 151 Cong. Rec. S1151 (daily ed. Feb. 9, 2010) (statement of Sen. Reid)).

This *parens patriae* action by the State bears no resemblance to a CAFA "mass action" because

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[19] In the Senate Report and debates in both houses, legislators spoke exclusively of "plaintiffs." *See*, *e.g.*, 151 Cong. Rec. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("The Federal Court would have jurisdiction over the mass action because there are more than 100 plaintiffs . . . ."); 151 Cong. Rec. S1097 (daily ed. Feb. 8, 2005) (statement of Sen. Feingold) ("[The Act] simply requires that the plaintiffs be seeking damages of more than $75,000 for the case to be considered a mass action . . . .").

there is only one plaintiff. Any attempt to recast it as such was properly rejected by the Fourth Circuit, which applied CAFA's minimal diversity requirement consistently with CAFA's text.

CONCLUSION

Because the Petitioners have presented no compelling reasons for this Court to grant certiorari, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 25, 2013