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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Henry L. Parr, Jr.
Counsel of Record
Wallace K. Lightsey
Sarah S. Batson
Wade S. Kolb, III
WYCHE, P.A.
44 East Camperdown Way
Greenville, SC 29601
(864) 242-8200
hparr@wyche.com

William W. Wilkins
Kirsten E. Small
NEXSEN PRUET, LLC
55 East Camperdown Way
Post Office Drawer 10648
Greenville, SC 29603
(864) 370-2211

Stephen B. Kinnaird
Lee F. Berger
Sean D. Unger
PAUL HASTINGS LLP
875 15th Street, NW
Washington, DC 20005
(202) 551-1772

Counsel for Petitioners LG Display Co., Ltd., et al.

Carl L. Blumenstein
NOSSAMAN LLP
50 California Street
34th Floor
San Francisco, CA 94111
(415) 438-7219

Counsel for Petitioners AU Optronics Corp., et al.

Dated: March 5, 2013

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The disclosures made in the Petition for Writ of Certiorari remain accurate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITY

INTRODUCTION

The entrenched circuit conflict presented by the Petition ("Petition" or "Pet.") would call for this Court's review even if there were no other reasons for certiorari. Implicitly acknowledging this, the State's Brief in Opposition ("Opposition" or "Opp.") pretends that there is no conflict and makes that argument the leader of its parade of arguments against certiorari. None of them has merit.

ARGUMENT

1. The Fourth Circuit's decision is part of an entrenched circuit split and conflicts with this Court's opinions.

a. There is a genuine circuit split.

The State attempts to hide the split by inaccurately portraying Fifth Circuit case law. Despite the obvious conflict between the Fifth and Fourth Circuits, the State insists, remarkably, that "there really is no split." Opp. 9. According to the State, the Fourth Circuit's holding would have been "the same" even if it had followed the Fifth Circuit's decision in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418 (5th Cir. 2008) ("*Caldwell*"). *Id.* The State contends the "logic of *Caldwell* dictates" the Fourth Circuit's conclusion that the State is the only real party in interest with respect to the restitution claims and, thus, the requisite minimal diversity is lacking. *Id.*

Mississippi ex rel. Hood v. AU Optronics Corp., 701 F.3d 796 (5th Cir. 2012) ("*Hood*") shows the State's argument is false. *Hood* involves nearly identical restitution claims asserted by a state against Petitioners and others on behalf of certain citizens, based on effectively the same alleged conspiracy and almost identical state statutory language. In *Hood,* the Fifth Circuit applied the principles of *Caldwell* to find that CAFA mass action jurisdiction exists. Contrary to the Fourth Circuit, the Fifth Circuit recognized that Mississippi citizens are real parties in interest for claims asserted by the state attorney general on their behalf. *Hood*, 701 F.3d at 802. The circuit split could hardly be clearer. In the Petition for Writ of Certiorari filed in connection with *Hood* (No. 12-1036) ("*Hood* Petition"), the State of Mississippi describes the circuit conflict as "unusually concrete and well suited to this Court's review." *Hood* Petition at 13. The State does not attempt to challenge Petitioners' assertion that *Hood* "illustrates the conflict." Pet. 19-20. In fact, contradicting its own lead argument, the State recognizes the conflict when it admits that the Fourth Circuit has "definitively rejected the Fifth Circuit's" application of CAFA's minimal diversity requirements. Opp. 15.

The State's no-conflict argument rests on two erroneous contentions. First, the State takes two sentences in a footnote in *Caldwell* out of context. At the end of footnote 5 in *Caldwell*, the Fifth Circuit noted that it need not address whether a statute giving an attorney general the right to bring *parens patriae* antitrust actions would prevent removal under CAFA because Louisiana had no such statute.

536 F.3d at 427 n.5. The State asserts that this dicta proves that the Fifth Circuit would have reached a different result had it been confronted with the restitution language in the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10 *et seq*. ("SCUTPA"), which the State claims authorizes it to seek restitution on behalf of the allegedly injured individuals here. Opp. 9. The State ignores language in *Caldwell* showing otherwise. The attorney general's statutory standing to bring the claims in *Caldwell* was in dispute, but the dispute did not affect the result. The Fifth Circuit assumed that the attorney general in *Caldwell* had "standing to bring . . . a representative action," 536 F.3d at 429, and concluded, nevertheless, that the individuals injured by the alleged conduct were entitled to the damages sought and were, thus, the real parties in interest, establishing the requisite minimal diversity. *Id.* at 429-30. There is no basis for thinking that statutory language authorizing an attorney general to act, such as that in § 39-5-50(b) of SCUTPA, would have altered the result in *Caldwell*. Explicit statutory authorization for an attorney general to proceed on behalf of the injured citizens of a state does not change the fact that the citizens are the real parties in interest entitled to the recovery sought.

Second, the State attempts to distinguish these actions from *Caldwell* by suggesting that SCUTPA, unlike the statute in *Caldwell,* does not provide a "private right of action." Opp. 9. It argues that SCUTPA's private right of action provision, § 39-5-140, is "a different statute." *Id.* This is false.

Section 39-5-50, under which the State claims restitution, and § 39-5-140, which provides a private right of action, are both part of the same statute, SCUTPA. SCUTPA makes clear that the South Carolinians who would receive any restitution awarded in these actions have the right to bring their own private actions for restitution under SCUTPA. *See* Pet. 9.

b. The Fourth Circuit's decision conflicts with this Court's decisions.

The State contends that the decision below does not conflict with either *Missouri, Kansas & Texas Ry. v. Hickman,* 183 U.S. 53 (1901) ("*Hickman*") or *Navarro Savings Ass'n v. Lee,* 446 U.S. 458 (1980). But the State is wrong.

The State insists that *Hickman* is inapplicable because it did not involve multiple parties and claims. Opp. 10. But the State provides no support for this argument. *Hickman* makes clear that, for purposes of diversity jurisdiction, an unnamed party to a claim is a real party in interest to that claim when "the relief sought is that which inures to it alone." 183 U.S. at 59; Pet. 22-23. There is no suggestion in *Hickman* that the principle would not apply to the claims for restitution here or that the presence of other real parties in interest to other claims would matter. The Fourth Circuit's opinion conflicts with *Hickman* because the Fourth Circuit refused to recognize the citizens who will receive any

restitution awarded in these actions as real parties in interest.[1]

The State says that *Navarro* is inapplicable because it is limited to cases involving trusts and insists that, in any event, the Fourth Circuit complied with *Navarro* when it determined that the State was the real party in interest. Opp. 11. The State is wrong because *Navarro's* principle applies beyond trusts and requires determination of the real parties in interest based on who will receive the recovery sought by a claim.[2] *See*, *e.g.*, *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857, 861-62 (2d Cir. 1995) (applying *Navarro* to conclude that entities for whom recovery was sought were the real parties in interest for diversity purposes). The Fourth Circuit's opinion conflicts with *Hickman* and *Navarro* because it does not recognize that the citizens who will receive any restitution awarded are real parties in interest to their restitution claims.

---

[1] The Fourth Circuit's opinion also conflicts with *U.S. Fidelity & Guaranty Co. v. United States*, 204 U.S. 349 (1907) ("*Guaranty*"), which specifically reaffirmed the principle of *Hickman*. *Id.* at 356; Pet. 22 n.17.

[2] The State quotes from Charles Alan Wright & Mary Kay Kane, Law of Federal Courts § 70, 492-93 (6th ed. 2002), Opp. 11, but that quotation relates to standing under Rule 17(a), Fed. R. Civ. P., not diversity jurisdiction. *Navarro* explained the difference between the real party in interest inquiry under Rule 17(a) as opposed to the inquiry for purposes of diversity jurisdiction. For example, "a labor union may file suit in its own name as a real party in interest under Rule 17(a). To establish diversity, however, the union must rely upon the citizenship of each of its members." 446 U.S. at 463 n.9.

2. The conflict should be resolved now in these actions.

a. The conflict should not be allowed to continue and is clearly presented here.

The State says the conflict is tolerable. Opp. 15. Not so. CAFA cannot achieve Congress's purpose unless all federal courts apply CAFA's minimal diversity requirement consistently with CAFA's text. *See* Pet. 31-35. Currently, actions like these are litigated in federal court in the Fifth Circuit but are remanded to state court in the Fourth and Ninth Circuits. Private counsel who want to team with state attorneys general to be able to bring the equivalent of a class action and keep it in state court despite CAFA are likely to choose states in the Fourth and Ninth Circuits rather than the Fifth. This is intolerable to our federal system. CAFA mass action jurisdiction should be the same nationwide and should not depend on which state is the plaintiff or which circuit is the forum.

The conflict also imposes an unnecessary burden on courts and litigants. As long as the conflict exists, defendants in similar actions will remove based on Fifth Circuit precedent and face remand motions based on Fourth Circuit precedent. Litigants will do this in order to preserve their right to remove or remand under the circuit precedent that favors their position, hoping this Court will ultimately adopt the position that favors them. In the Fourth and Ninth Circuits, the cases will be remanded. In the Fifth Circuit, remand motions will be denied. Litigants and courts in other circuits will

also be burdened with similar unnecessary removals and remands. Resolving the conflict now will spare courts and litigants the significant burden of continually dealing with the issues presented by the conflict.

The State suggests that the conflict may correct itself. Opp. 15, 18. But the Fifth Circuit denied rehearing and rehearing en banc in *Hood* without dissent and without any judge requesting a poll. Order Denying Rehearing and Rehearing En Banc, *Hood* (5th Cir. Feb. 4, 2013) (No. 12-60704). And there was no dissent in the conflicting decisions by the Fourth and Ninth Circuits.

The State contends that review is unnecessary because the Fifth Circuit's opinion is a mere "outlier." Opp. 15-17. This argument has no substance. The Fifth Circuit's approach fits CAFA's minimal diversity text and codified findings and purposes. *See* Pet. 5-6, 15-16. Neither the Fourth nor the Ninth Circuit attempted to explain how its approach complies with CAFA's text. The fact that the circuit split is two to one on this important issue does not justify denying review.

Finally, the State argues that *Hood* is a better vehicle for resolving the conflict. Opp. 18. But the State offers no support for this argument other than the fact that the State agrees with the Fourth Circuit and disagrees with *Hood*. This Petition is an ideal vehicle to resolve the conflict. This important issue of federal jurisdiction is squarely presented.

b. The State does not contest key points.

The Petition explains that South Carolina citizens, not the State, will receive any restitution awarded in these actions, Pet. 8-9, and that their citizenship satisfies the requirements stated in CAFA's minimal diversity text, Pet. 5-6. The Opposition does not attempt to contest this explanation.[3] Like the Fourth Circuit's opinion below, the State offers no explanation as to how CAFA's minimal diversity text permits the diverse citizenship of these South Carolina citizens to be ignored for purposes of CAFA mass action jurisdiction. The Opposition does not even quote the

[3] The State does deny that its private counsel engaged in gamesmanship when they withdrew restitution claims from the MDL proceeding and then sought restitution in these actions in state court. The State also accuses Petitioners of including "factual errors" in their Statement of the Case. Opp. 4-5. The State is mistaken. Petitioners have not misrepresented the record with respect to the inclusion of South Carolina claims in the MDL proceeding. The initial claims for unjust enrichment brought by South Carolina citizens in the District of South Carolina were transferred to the MDL Proceeding. A consolidated amended complaint was then filed naming South Carolina citizens as part of a nationwide class, and after the MDL court indicated it would not allow a single nationwide class for unjust enrichment, a second amended complaint was filed that abandoned the South Carolina unjust enrichment claims but included the South Carolina citizens for purposes of seeking injunctive relief. A year later, the MDL court administratively closed all individual class actions transferred to the MDL.

language of CAFA's minimal diversity standard.[4] The Fourth Circuit's failure to comply with CAFA's text is alone a sufficient reason for certiorari.

3. The Fourth Circuit's decision was erroneous.

a. The Fourth Circuit's decision conflicts with the plain meaning of CAFA's text.

The State contends that CAFA's plain language requires remand of the actions. Opp. 13-14. The opposite is true. Although the Opposition purports to rely on CAFA's plain language, it makes no serious attempt to analyze either CAFA's language or the way its intricate provisions interact. To the extent it pays any attention to the actual language of CAFA, the State focuses on CAFA's mass action definition, § 1332(d)(11)(B)(i), *see* Opp. 14, and not its minimal diversity requirement, § 1332(d)(2). Neither CAFA's minimal diversity language nor its mass action provision supports the Fourth Circuit's decision.

CAFA's plain language shows that both named and unnamed persons in a mass action satisfy CAFA's minimal diversity requirement.

[4] The State does, however, mischaracterize Petitioners' interpretation of CAFA when it contends that Petitioners' position means that every state enforcement action that includes restitution would be in federal court under CAFA. Opp. 2. There was confusion about this initially at oral argument, but Petitioners corrected this during the argument of LG Display's appeal, pointing out that CAFA's text excludes major categories of these actions from mass action jurisdiction.

CAFA's requirements and definitions in § 1332(d)(1)-(2) apply with equal force to both class and mass actions because, as § 1332(d)(11)(A) explains, "a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs." Those provisions in turn provide that CAFA's minimal diversity requirement is met where "any *member of a class* of plaintiffs is a citizen of a State different from any defendant," § 1332(d)(2)(A) (emphasis added), and define "member of a class" as "the persons *(named or unnamed)* who fall within the definition of the proposed class," § 1332(d)(1)(D) (emphasis added). If an unnamed member of a class action may satisfy CAFA's minimal diversity requirement, so too must an unnamed member of a mass action. And in the mass action context, a member of a mass of plaintiffs must mean a member of the group of "100 or more persons [whose claims] are proposed to be tried jointly," § 1332(d)(11)(B)(i), whether that member is named or not.

This conclusion is buttressed by CAFA's use of the critical term "persons" at the heart of its definition of "mass action." Section 1332(d)(11)(B)(i) defines a mass action as "any civil action . . . in which monetary relief claims of 100 or more *persons* are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact . . . ." (emphasis added). The State seizes upon the use of the term "plaintiffs" in this definition, citing Black's Law Dictionary, but casts aside the use of "persons" as well as CAFA's focus on "persons (named or unnamed)." *See* Opp. 14. Petitioners agree that "courts must presume that a

legislature says in a statute what it means and means in a statute what it says there." Opp. 13, quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). But it is the State that proposes words be read into and out of CAFA, effectively substituting the phrase "named plaintiffs" for the terms "persons" and "plaintiffs" in the mass action definition. Opp. 14. Congress did not say a mass action involves the claims of "100 or more named plaintiffs" but 100 or more "*persons*," and while the use of "plaintiffs" may sometimes refer to persons actually named in a complaint, that is not always the case. *See*, *e.g.*, *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 292, 301 (1973) (concluding that "each *plaintiff* in a Rule 23(b)(3) class action must satisfy the jurisdictional amount" and affirming a lower court decision throwing out a suit where the "named plaintiffs" but not "every individual owner in the class" could do so (emphasis added)).

b. The Fourth Circuit's decision conflicts with CAFA's purpose.

The State insists the Fourth Circuit's decision is "consistent with CAFA's purpose," citing not the legislative history adopted as part of CAFA but instead isolated quotations from Senate Report 109-14 and snippets from the floor debate. Opp. 19-21. These sources are not a reliable guide to Congress's intent. "[T]he authoritative statement" for statutory interpretation "is the statutory text, not the legislative history or any other extrinsic material," because "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005).

Moreover, statements of "the views of a single legislator, even a bill's sponsor, are not controlling." *Mims v. Arrow Fin. Servs.*, 132 S. Ct. 740, 752 (2012). The Senate Report is particularly "questionable [as a] source of congressional intent" because it was "issued 10 days *after* CAFA was signed into law." *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 177 (4th Cir. 2011) (emphasis in original). In contrast to the State, Petitioners rely upon a statement of purpose that is part of CAFA. *See* App. 99a-101a. In CAFA's "Findings and Purposes" section,[5] Congress set out, as part of CAFA, both the "abuses" it recognized in the "class action device," Findings and Purposes (a)(2), and its intent to correct these abuses by "providing for Federal court consideration of interstate cases of national importance," *id.* (b)(2).

CONCLUSION

The circuit conflict and the conflict with this Court's decisions as well as CAFA's text and purpose call for review by this Court now in these actions.

[5] Pub. L. 109-2, § 2, 119 Stat. 4 (Feb. 18, 2005) (codified as mended at 28 U.S.C. § 1711, Findings and Purposes).

Respectfully submitted

Henry L. Parr, Jr.
Counsel of Record
Wallace K. Lightsey
Sarah S. Batson
Wade S. Kolb, III
WYCHE, P.A.
44 E. Camperdown Way
Greenville, SC 29601
Tel.: (864) 242-8200
hparr@wyche.com

Stephen B. Kinnaird
Lee F. Berger
Sean D. Unger
PAUL HASTINGS LLP
875 15th Street, NW
Washington, DC 20005
Tel.: (202) 551-1772

Counsel for Petitioners
LG Display Co., Ltd. and
LG Display America, Inc.

William W. Wilkins
Kirsten E. Small
NEXSEN PRUET, LLC
55 E. Camperdown Way (29601)
Post Office Drawer 10648
Greenville, SC 29603-0648
Tel.: (864) 370-2211

Carl L. Blumenstein
NOSSAMAN LLP
50 California Street, 34th Floor
San Francisco, CA 94111
Tel.: (415) 438-7219

Counsel for Petitioners
AU Optronics Corporation and
AU Optronics Corporation America