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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PARTIES AND RULE 29.6 STATEMENT

The Petition for Writ of Certiorari included as Respondents the following entities that have since been voluntarily dismissed in the district court: Hitachi, Limited; Japan Display East, Incorporated (formerly known as Hitachi Displays, Limited); and Hitachi Electronic Devices (USA), Incorporated. The remaining disclosures made in the Petition remain accurate.

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INTRODUCTION

There can be no doubt that certiorari should be granted in this case. The Brief for Respondents (Resp. Br.) acknowledges that "the petition presents an intractable conflict among the circuits on a recurring question of national importance." Resp. Br. at 1. Respondents also agree that "the circuit split has become intolerable because courts of appeals have issued conflicting decisions even in cases involving the same alleged conduct by the same defendants." *Id.* "And Respondents agree that the issue presented here has percolated through the courts sufficiently that it is ripe for this Court's review." *Id.* Respondents conclude that "[t]his is a compelling case for the Court's review," and "the Court should grant the petition." *Id.* at 12, 13.

Even Respondents AU Optronics Corporation, AU Optronics Corporation America, LG Display Co., Ltd., and LG Display America, Inc.—who have their own petition for certiorari pending in the related case of No. 12-911, *AU Optronics Corp. v. South Carolina*—urge this Court to grant certiorari in this case.

Accordingly, this Court should grant the instant Petition on the basis of Petitioner's Question Presented and hold No. 12-911 pending the decision in this case.

ARGUMENT

A. This Case Is The Best Vehicle To Review The Question Presented.

Respondents acknowledge that "[t]his case comes to the Court on a clean record with the issue crisply presented in a way that will enable the Court

to resolve the circuit conflict and provide authoritative guidance to the lower courts." Resp. Br. at 24.

Respondents do not dispute that the instant Petition is the best vehicle for deciding the Question Presented. Pet. at 6-7. The Fifth Circuit's approach has been disavowed by every other court of appeals to consider the question, and yet in the decision below the Fifth Circuit reaffirmed its precedent and its conflict with three other circuits.

Moreover, this case involves a full complement of defendants in the LCD litigation, whereas No. 12-911 involves only AU Optronics Corporation, AU Optronics Corporation America, LG Display Co., Ltd., and LG Display America, Inc. Because all defendants are represented here, this case is the better vehicle.

Further, as noted by amicus Public Citizen in support of the Petition (and as Respondents do not question), this case involves counsel (on both sides) with extensive experience before the Court, who will ensure that the issue is ably briefed and argued. Public Citizen Amicus Br. at 4-5. In short, this case is the best vehicle to review the Question Presented.

B. Respondents' Attempt To Reframe The Question Presented Is Improper.

While acknowledging that certiorari is warranted, Respondents object to the manner in which Petitioner has drafted the Question Presented. Resp. Br. at 1. Yet this Court has instructed that a petitioner generally has the prerogative to frame the question as he or she wishes. *See Yee v. Escondido*, 503 U.S. 519, 535 (1992) ("A litigant seeking review in this Court of a

claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below. While we have on occasion rephrased the question presented by a petitioner, or requested the parties to address an important question of law not raised in the petition for certiorari, by and large it is the petitioner himself who controls the scope of the question presented. The petitioner can generally frame the question as broadly or as narrowly as he sees fit." (citations omitted)).

The Question Presented by Petitioner is clearly and fairly stated, and Respondents' criticisms are misplaced.

1. The Question's Reference To A "*Parens Patriae* Action" Is Proper.

First, Respondents quibble about the wording of the Question Presented, on the ground that it "presumes that this case is a '*parens patriae* action' and that the State has 'common-law authority to assert all claims in the complaint.'" Resp. Br. at 1 (quoting Pet. at i). Respondents contend that "Petitioner's question presented leapfrogs over the issue of identifying the 'real' parties in interest." *Id.* at 15.

Respondents' contention that Petitioners have "leapfrogged" over the "real" party in interest issue is remarkable, given that an entire section of the Petition is devoted to the dimensions and application of the real party in interest test. *See* Pet. at 20-24 (Part II(B)).

More generally, Respondents' attempt to reframe the Question Presented is simply spin. The

Fifth Circuit decided the federal question regarding the removability of the Attorney General's lawsuit under CAFA, without denying (or even reaching) the Attorney General's statutory and common-law authority to bring the action. Rather, the Fifth Circuit held that, regardless of the Attorney General's *parens patriae* authority, the lawsuit met the CAFA definition of a "mass action":

> After analyzing the complaint, the relevant statutes, and the *parens patriae* authority of the State, we hold that the real parties in interest in this suit include both the State and individual consumers of LCD products.

Pet. App. at 8a-9a.

This case therefore presents the federal question of whether such a lawsuit by a state attorney general is a "mass action" subject to removal under CAFA. The plain text inquiry will be whether this case is an action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly," within the meaning of 28 U.S.C. § 1332(d)(11)(B)(i). This Court can decide that question without reaching issues of Mississippi law regarding the Attorney General's statutory or common-law authority, which this Court ordinarily would not review in any event. *See Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 628, 636 (1875). As this case comes to the Court, the sole question presented is a federal one—the proper interpretation of CAFA. That is exactly what Petitioner's Question Presented provides.

As part of their criticism of the phrasing of the Question Presented, Respondents allude (Resp. Br.

at 1-2) to the following passage in the Fifth Circuit's decision:

> *Even assuming arguendo that the State has parens patriae standing to bring the claims here (an issue that we do not decide), that standing does not change the fact that* Mississippi is acting, not in its *parens patriae* capacity, but essentially as a class representative.

Pet. App. at 7a (emphasis added).[1] Significantly, however, Respondents omit the emphasized portion of the Fifth Circuit's opinion. Resp. Br. at 1-2. Read as a complete sentence, the passage makes clear that the Fifth Circuit was not questioning or deciding the Attorney General's *parens patriae* authority to bring the instant lawsuit. The Court of Appeals simply decided as a matter of federal law that Mississippi's lawsuit was removable under CAFA.

In short, there is no merit to Respondents' argument that the Question Presented by Petitioner somehow "presumes" its own answer. Resp. Br. at 1. The Question fairly and accurately frames the federal law issue before this Court.

2. Respondents' Proposed Question Is Flawed.

Respondents propose their own question presented, which this Court should reject. It is Petitioner's prerogative to frame the question. *See Yee*, 503 U.S. at 535. Further, Respondents' question stacks the deck by ignoring all aspects of

[1] Most telling is the inherent contradiction between this "class representative" *dicta* and the Fifth Circuit's analysis and holding, in the same opinion, that Mississippi's suit "does not qualify as a 'class action' under the CAFA." Pet. App. at 3a.

Mississippi's complaint except for what Respondents describe as "monetary relief claims on behalf of particular citizens of the State." Resp. Br. at i. Respondents thereby overlook the State's proprietary claim, its injunctive relief and civil penalties claims, and also the quasi-sovereign interest of the State, acting through the Attorney General, which the complaint makes clear. Resp. App. at 2a-3a, 65a-66a.

As for the non-proprietary restitution sought, the "monetary relief" asserted in the complaint does not constitute "claims" of individual citizens or consumers, as suggested by Respondents' proposed question, but rather the State's own "claim" stemming from the Attorney General's independent statutory authority and the State's quasi-sovereign capacity. The statutory provisions on which the State relies for its claim are different from and independent of the provisions on which a private individual or consumer would rely for a damages claim.[2] In fact, the complaint states that "Plaintiff,

[2] The Mississippi Antitrust Act (MAA) provides direct statutory authority for the Attorney General to pursue both monetary and injunctive relief ("suits at law or in equity") in the name of the State "to enforce the civil features of the antitrust laws." Miss. Code. Ann. § 75-21-37. Only acts "inimical to public welfare" are subject to enforcement, *id*. § 75-21-1, and thus Mississippi's monetary claims are necessarily based on harm *to the public*. Although the MAA creates a private right to enforce the antitrust laws and to seek personal recovery of damages and a $500 penalty, *id.* § 75-21-9, the complaint does not seek relief pursuant to that section of the statute. Similarly, the Mississippi Consumer Protection Act (MCPA) provides direct statutory authority for the Attorney General to bring an action for injunctive relief, *id.* § 75-24-9, and, in the context of that action, to obtain "additional orders or judgments, including restitution," *id.* § 75-24-11. Like the MAA, the MCPA creates a separate, auxilliary private right to

the State of Mississippi" seeks "its damages" and "restitution," which may include disgorgement, to be awarded to "Plaintiff, the State of Mississippi," not to individual purchasers. Resp. App. at 65a-66a.

Moreover, Respondents' proposed question should be rejected because it improperly conflates the definitions of "class actions" and "mass actions," which are two separate categories in CAFA. *Compare* 28 U.S.C. § 1332(d)(1)(B) (definition of "class action"), *with id.* § 1332(d)(11)(B) (definition of "mass action"). Respondents seek to transplant the phrase "persons (named or unnamed)" from the definition of *class action* to the definition of *mass action*. Resp. Br. at 3-4.[3] Their proposed question then implicitly refers back to this notion of "unnamed" persons by using the phrase "on behalf of." *Id.* at i. Because of the potential confusion created by Respondents' phrasing, their proposed question should be rejected.

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recover personal monetary losses. *Id.* § 75-24-15. Again, Mississippi has never asserted that its claim for recovery arises under section 75-24-15.

[3] Respondents suggest by sleight-of-hand that "mass action" and "class action" are interchangeable because mass actions are "deemed" class actions pursuant to subsection (d)(11)(B). But contrary to Respondents' glossing, that determination is a two-step process. A removing party must prove that the definition of mass action is independently satisfied before it may be "deemed" a class action. Congress clearly stated that the reason that a "mass action" is deemed a "class action" is not so that their definitions could be muddled together, but rather so that, if the definition of mass action were met, such a case would also be "removable under paragraphs (2) through (10)." 28 U.S.C. § 1332(d)(11)(A). Without this "deeming" language in subsection (d)(11)(A), mass actions would not be removable.

3. Respondents' Attempt to Expand The Question Should Be Rejected.

Respondents also seek to reframe the Question Presented to enable the Court to address a second question: "whether 'class action' cases under 28 U.S.C. § 1332(d)(1)(B) should be evaluated for purposes of minimal diversity under the claim-by-claim or whole case approaches." Resp. Br. at 25. There is no reason to reframe the Question to permit that expansion. There is no conflict among the circuits with respect to the additional question that Respondents seek to argue. *See* Pet. App. at 2a-3a (holding that action by attorney general not brought under Rule 23 or other similar rule of judicial procedure is not "class action" under CAFA); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 212–13 (2d Cir. 2013) (same); *LG Display Co. v. Madigan*, 665 F.3d 768, 771–72 (7th Cir. 2011) (same); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848–49 (9th Cir. 2011) (same); *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 174–77 (4th Cir. 2011) (same).

Therefore, the issue before this Court should be limited to Petitioner's Question Presented: whether this case qualifies as a "mass action" pursuant to 28 U.S.C. § 1332(d)(11)(B)(i). This is the issue at the core of the circuit split.

C. Respondents' Merits Arguments Are Premature.

Unsurprisingly, Respondents state that they "strongly disagree with Petitioner" as to "the merits of how" the question presented should be resolved—although they agree that the question is one of "national importance." Resp. Br. at 1. Of course, consideration of the merits is premature at this

stage, and Respondents' attempt to preview their position should be disregarded.

Respondents' merits arguments are also flawed on their own terms. Respondents purport to focus on the text of CAFA. *Id.* at 16-17. But they overlook the key statutory language, which refers to civil 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." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). The instant action does not involve 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." The trial will involve the claims of the Attorney General, not an aggregated set of the State's citizens. CAFA's definition of a mass action is plainly aimed at cases involving the joinder of multiple plaintiffs in a single suit.

Respondents also ignore the fact that the text of CAFA presupposes the existence of individually identifiable plaintiffs whose claims do not meet the jurisdictional prerequisite and would therefore have to be remanded, while the claims of others remain in federal court. *See id.* § 1332(d)(11)(B) ("jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements").

This provision makes plain that attorney general actions do not constitute "mass actions" under CAFA. In a *parens patriae* case, there are no individually identifiable "plaintiffs"; the state, acting through the attorney general, is the sole plaintiff. Nor is it practical for a court to examine the circumstances of each citizen of the state and to

remand to state court claims of particular plaintiffs whose claims would not meet the federal diversity amount-in-controversy requirement. Yet under Respondents' approach, district courts would be obligated to identify the citizens who might benefit from the lawsuit and remand those whose potential claims did not exceed $75,000, an impossible task, particularly in an action on the scale of the present case.

Respondents cite CAFA's legislative history, Resp. Br. at 17, but it proves the opposite of what they claim. Committee reports on both the House and Senate bills described the "mass actions" that would be deemed 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 also* S. Rep. No. 108-123, at 42 (2003).

Respondents assert that Congress "considered and rejected" an amendment that would have clarified that CAFA was not applicable to actions brought by a state attorney general. Resp. Br. at 17. But Respondents fail to acknowledge that CAFA's sponsors opposed the amendment not because they intended CAFA to cover *parens patriae* actions, but because the amendment was "unnecessary," as it was "perfectly clear" that the bill would not apply to *parens patriae* actions, which were "excluded from the reach of the bill." 151 Cong. Rec. at S1163, S1164 (Sen. Hatch). 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).

Respondents claim that the whole-case approach is impermissibly "subjective." Resp. Br. at 20-22. Yet that approach is the majority rule, followed by every circuit outside the Fifth, and has proven fully administrable.

Respondents also ask the Court, without citing any authority, to ignore decades of legal precedent regarding the "real party in interest" test, which requires a court to determine if the State is merely a nominal party. Pet. at 20-24. Respondents contend that CAFA's minimal diversity requirement mandates a different approach. Resp. Br. at 22-24. But there is no reason to interpret CAFA as altering the longstanding test. The "real party in interest" inquiry does not vary based on whether diversity jurisdiction is minimal or complete. Only *after* a court determines that the party is nominal does the basis for diversity jurisdiction become relevant. Accordingly, this case is governed by the presumption that "Congress expects its statutes to be read in conformity with this Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997).

Respondents have little to say regarding the important principles of federalism at issue in this case, the need for a strict construction of removal statutes, and the recurring jurisdictional battles and administrative complexity that Respondents' approach would entail. Pet. at 24-33. These considerations are compelling reasons to grant review and to reverse the judgment below.

CONCLUSION

The Petition for Writ of Certiorari should be granted on the basis of Petitioner's Question Presented.

Respectfully submitted.

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