No. 12-1036

In the Supreme Court of the United States

STATE OF MISSISSIPPI,
Petitioner,
v.
AU OPTRONICS CORP., ET. AL,
Respondents.

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

BRIEF OF THE CENTER FOR STATE ENFORCEMENT OF ANTITRUST AND CONSUMER PROTECTION LAWS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. ("State Center") is a nonprofit public interest organization. Its mission is to enhance consumer welfare by supporting the fair and effective enforcement of antitrust and consumer protection laws at the state level. Among other things, it provides grants for experts, document management software and other resources for use by state law enforcement officers in investigations relating to potential violations of the antitrust and consumer protection laws; offers educational assistance grants for law enforcement officials in state attorney general offices; and facilitates access for state attor-

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, made a monetary contribution to the brief's preparation or submission.

neys general to economists with expertise in industrial organization and consumer protection issues.

The State Center is concerned that the decision below, if upheld, will significantly impair the ability of state attorneys general to prosecute actions in state court to restrain and redress violations of state antitrust and consumer protection laws. Vigorous enforcement of those laws is essential to secure the benefits of a fair and honest marketplace for the citizens of each state.

SUMMARY OF ARGUMENT

The Fifth Circuit's "claim-by-claim" approach to removal pursuant to the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat.4, erroneously construes the pleading of a claim for monetary relief — even though authorized by state law — as transforming a *parens patriae* lawsuit from a routine law enforcement action into one fraudulently pleaded to avoid federal jurisdiction. The Fifth Circuit's approach lacks any factual foundation, is inconsistent with CAFA's statutory framework, and diminishes the ability of state attorneys general to enforce fundamental state laws intended to secure the economic well-being of their citizens. Moreover, it puts undue weight on the attorney general's choice of counsel and unnecessarily enmeshes federal courts in difficult questions of state law best resolved by state courts.

ARGUMENT

I. *Parens Patriae* Lawsuits Are Actions to Enforce State Laws, Not Fraudulent Or Deceptive Pleadings Intended To Evade Federal Jurisdiction

A. The Fifth Circuit's "claim-by-claim" approach misconstrues the purpose of *parens patriae* actions

The "claim-by-claim" test used by the Fifth Circuit in CAFA removal cases requires a federal judge to determine whether a *parens patriae* pleading contains a claim that has been "fraudulently pleaded to prevent removal." Pet. App. 4a (citing *Louisiana ex rel. Caldwell v. Allstate Insurance Company,* 536 F.3d 418, 424-25 (5th Cir. 2008)). The claim found to have justified removal, in both *Caldwell* and the case below, was the attorney general's prayer for monetary relief in an action to enforce state antitrust and/or consumer protection laws. The *Caldwell* majority opinion, the genesis of the Fifth Circuit's "claim-by-claim" test, upheld removal of the

Louisiana attorney general's *parens patriae* action even though it assumed he had authority "extensive enough to allow the State to sue for treble damages . . . under state law." *Caldwell*, 536 F.3d at 429.

The Fifth Circuit's approach is based upon a fundamental misunderstanding regarding the purpose of *parens patriae* actions. Protecting their citizens from harm caused by anticompetitive schemes and other unfair or deceptive acts and practices is a core state interest of long-standing. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 ("a State has a quasi-sovereign interest in the health and well-being — both physical and economic — of its residents in general"). A lawsuit to vindicate that interest is a law enforcement action even though some state citizens may benefit more than others from a successful prosecution, whether the relief

obtained is restitution, damages, fines, penalties or an injunction.[2]

State laws to protect the economic well-being of businesses and consumers who participate in state and local markets are venerable and ubiquitous. They have not been recently enacted to abet efforts by state attorneys general to avoid federal jurisdiction. On the contrary, they reflect the states' legitimate historical efforts to prevent economic wrongdoing within their borders

[2] Indeed, many state law enforcement actions other than *parens patriae* actions confer disparate benefits on a state's citizens and would therefore be subject to removal under CAFA under the Fifth Circuit's approach. For example, a variety of state statutes authorize state administrative and law enforcement agencies to seek restitution. *See*, *e.g.*, CONN. GEN. STAT. § 36b-27(b)(1) (authorizing restitution in cases of securities fraud); GA, CODE. ANN. § 43-17-13(a)(2)(A)(iv) (same for unauthorized or dishonest solicitation for charities); IDAHO CODE ANN. § 26-1117(1)(b)(iv) (same for unauthorized banking and breach of state banking regulations); 820 ILL. COMP. STAT. § 60/20(a) (same for failure to fund employee trust fund); S.C. CODE ANN. § 39-73-320(d) (same for commodities fraud).

State antitrust laws predate the Sherman Act and have been widely adopted.[3] State consumer protection laws are also long-standing and virtually universal.[4] Moreover, many states provide specific statutory authorization to their attorneys general to seek damages or restitution for violations of state antitrust and consumer protection laws.[5] Indeed, recovery of monetary relief, especially treble damag-

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[3] A purpose of the Sherman Act, according to Senator Sherman himself, was to "supplement the enforcement" of state laws. 21 CONG. REC. 2457 (1890). At least thirteen states had enacted antitrust legislation prior to the passage of the Sherman Act in 1890. *See* James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918,* 135 U. PA. L. REV. 495, 499. Most states now have their own antitrust laws. *See* http://antitrustinstitute.org/~antitrust/content/statutes.

[4] The Mississippi Consumer Protection Act (MISS. CODE ANN. § 75-24-1, et seq.), which is the basis of Count I of the complaint herein, was enacted in 1974. Most states now have their own consumer protection laws. *See* http://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf.

[5] *See, e.g.,* ALASKA STAT. § 45.50.577; COLO.REV.STAT. § 6-4-111; FLA.STAT.ANN. § 542.22; IDAHO CODE § 48-108; 740 ILL. COMP. STAT. ANN. 107.2; NEB. REV. STAT. § 84-212; OHIO REV. CODE ANN. § 109.81; OKLA.STAT.ANN. TIT. 79, § 205; and R.I GEN. LAWS § 6-36-12.

es, can be an important deterrent to further violations of those laws and, thus, serves an important law enforcement purpose. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("The treble-damages provision . . . is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.").

When the states' chief law enforcement officers seek relief authorized by state laws to secure the benefits of a fair and honest marketplace, they are simply doing their jobs. *See, e.g., Clark Oil & Refining Corp. v. Ashcroft*, 639 S.W.2d 594 (Mo. 1982) ("By instituting the *parens patriae* damage actions, the attorney general has carried out his statutory and common law duty to enforce public rights and protect citizen consumers against violation of the antitrust laws."). A decision about what relief to seek — in this case to redress alleged violations of Mississippi's

antitrust and consumer protection laws — is no different in kind from that made by any prosecutor when filing a complaint. A claim for monetary relief in a *parens patriae* action provides no more justification for an inference of fraudulent or deceptive pleading than would a claim for restitution in a criminal proceeding. *Cf.* 18 U.S.C. § 2259 (authorizing restitution in criminal cases).

The Fifth Circuit's deprecation of state attorneys general is also inconsistent with the confidence reposed in them by CAFA itself. CAFA requires that notification of proposed class action settlements be provided to appropriate federal and state officials. 28 U.S.C.A. §1715. Absent a primary regulator, supervisor or licensing authority, that state official is the attorney general. *Id.* State attorneys general have vindicated Congress's confidence in them by object-

ing to class action settlements which they believe are unfair or inadequate.[6]

The "whole complaint" test used by the Fourth, Seventh and Ninth Circuits, in contrast to the Fifth Circuit's "claim-by-claim" test, correctly recognizes that *parens patriae* proceedings are law enforcement actions and that their essential nature is not transformed by the inclusion of a claim for monetary relief. Moreover, the "whole complaint" approach — in contrast to the Fifth Circuit's "claim-by-claim" approach — does not require an inference that a complaint has been pled fraudulently or de-

[6] *See, e.g.*, *Figueroa v. Sharper Image Corp.*, 517 F.Supp.2d 1292 (S.D.Fl. 2007) (proposed class action settlement rejected based in part on objections by attorneys general of 35 states and the District of Columbia); *In re American Investors Life Insurance Co. Annuity Marketing And Sales Practice Litigation*, 263 F.R.D. 226 (E.D. Pa. 2009)(release in proposed class action settlement amended in response to objections made by two state attorneys general); and *True v. American Honda Motor Co.*, 749 F.Supp.2d 1052 (C.D. Ca. 2010) (proposed class action settlement rejected based in part on objections by attorneys general of 26 states).

ceptively simply because it contains a claim for monetary relief. *See AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 393-4 (4th Cir. 2012) (claim for restitution "alters neither the State's quasi-sovereign interest in enforcing its own laws, nor the nature and effect of the proceedings … in seeking to protect its citizens against price-fixing conspiracies"); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768 (7th Cir. 2011)(a *parens patriae* action to enforce the Illinois Antitrust Act is not a "disguised class action or mass action" because it sought treble statutory damages in addition to civil penalties and injunctive relief); and *Nevada v. Bank of America Corp*., 672 F.3d 661, 671-72 (9th Cir. 2012) (Nevada's "sovereign interest in protecting its citizens . . . from deceptive mortgage practices" made it the real party in interest although restitution was sought in addition to civil penalties and injunctive relief).

The decision below, based on the Fifth Circuit's flawed "claim-by-claim" test, will seriously impede enforcement of state antitrust and consumer protection laws if allowed to stand. State attorneys general have limited resources to enforce these laws, which are critical to the proper functioning of state and local markets. Antitrust cases, in particular, are resource intensive.

The cost of litigating a case in federal court may increase substantially if it is transferred after removal to a distant forum. For example, in the case at bar, respondents sought after removal to have the case transferred to the United States District Court for the Northern District of California, over two thousand miles from the court where it was originally filed. Pet. App. 26a. Litigating cases across such enormous distances could be prohibitively expensive for many states. Such "jurisdictional gamesman-

ship," as practiced by defendants, could well deter the vigorous enforcement of state antitrust and consumer protection laws. Pet. App. at 4a.

B. Use of outside counsel by state attorneys general does not transform a law enforcement action into a class action or a mass action

A factor that influenced the C*aldwell* majority's decision to pierce the pleadings and subject them to a "claim-by-claim" analysis was the Louisiana Attorney General's use of private counsel.[7] The use of private counsel (especially those with special skills or expertise in a complex subject matter like antitrust), however, does not transform a law enforcement action into a class action or mass action. Nothing in the language or legislative history of CAFA suggests that a state attorney general should

[7] The majority opinion repeatedly adverts to use of private counsel (including in its very first paragraph) and even characterizes the Louisiana Attorney General and private counsel as "collectively Louisiana." *Id.*, at 421 and 423.

be barred from prosecuting a *parens patriae* action brought in state court for violation of state law based on his or her choice of counsel.

On the contrary, as the LCD antitrust litigation itself demonstrates, an attorney general's choice of counsel is irrelevant. Both the Mississippi and South Carolina attorneys general have relied on private counsel to assist in prosecuting their respective LCD *parens patriae* antitrust actions, while the Illinois, Washington and California attorneys general have not.[8] There is no basis to conclude, as a result, that one group of attorneys general has engaged in conduct that justifies removal, while the other has not. If anything, their different choices almost certainly reflect the disparate enforcement

[8] *Compare* the case at bar and *AU Optronics Corp. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012) with *LG Display Co., Ltd. V. Madigan*, 665 F.3d 768 (7th Cir. 2011) and *Washington v. Chimei*, 659 F.3d 842 (9th Cir. 2011).

resources available to the attorneys general in each state. [9]

Indeed, government antitrust enforcement agencies with far greater resources than Mississippi or South Carolina — or that of any individual state — have sometimes employed private counsel to assist in prosecuting complex antitrust cases. For example, the government enforcement action against Microsoft was the product of separate complaints filed by the United States and by New York on behalf of a group of states and the District of Columbia. *See New York v. Microsoft Corp.*, 209 F.Supp.2d 132 (D.D.C. 2002). Lead trial counsel for the United States was a prominent private trial attorney while

[9] Small states may have just one assistant attorney general with some antitrust responsibilities, while larger states may have full-time staffs dedicated to enforcing the antitrust laws. *See* "Offices of the Attorneys General Antitrust Contacts" *available at* http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-links/pdf/antitrust_chiefs.authcheckdam.pdf.

his state counterpart was a New York assistant attorney general; on appeal, the case was argued for the United States by a member of the Solicitor General's Office while the states were represented by a prominent appellate advocate from the private bar.[10]

The participation at trial by David Boies for the United States and on appeal by John G. Roberts, Jr. for the plaintiff states did not alter the fundamental character of the Microsoft litigation as a government law enforcement action. Indeed, there is a long tradition of reliance on private attorneys by

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[10] See "U.S. v. Microsoft, Key Players" *available* at http://www.washingtonpost.com/wp-srv/business/longterm/microsoft/keyplayers.htm; and *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). Similarly, the Federal Trade Commission has also retained private counsel to assist in certain matters. See "FTC Hires Beth Wilkinson To Lead Google Antitrust Investigation" *available at* http://www.paulweiss.com/practices/litigation/antitrust/news/ftc-hires-beth-wilkinson-to-lead-google-antitrust-investigation.aspx?id=9991.

government at all levels in a variety of matters.[11] In short, there is no basis to draw an adverse inference from the government's use of private counsel in a law enforcement action absent evidence that the responsible government officials improperly have ceded their authority to prosecute the action in the public interest.

II. Removal Of *Parens Patriae* Actions Inevitably Will Require Federal Courts To Resolve Significant Issues Of State Law Best Resolved By State Courts

In our federalist system, the states "are not relegated to the role of mere provinces or political corporations." *Alden v. Maine,* 527 U.S. 706, 715

[11] See, *e.g.*, *Filarsky v. Delia, 132 S.Ct. 1657, 1663* (2012) ("Even such a core government activity as criminal prosecution was often carried out by a mixture of public employees and private individuals temporarily serving the public. At the time § 1983 was enacted, private lawyers were regularly engaged to conduct criminal prosecutions on behalf of the State. Abraham Lincoln himself accepted several such appointments. In addition, private lawyers often assisted public prosecutors in significant cases.").

(1999). Each state is "endowed with all the functions essential to separate and independent existence." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (*quoting Texas v. White*, 7 Wall. 700, 725 (1869). It follows, accordingly, that "only state courts may authoritatively construe state statutes." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 579 (1996).[12]

State *parens patriae* statutes have one thing in common: they authorize law enforcement actions in the public interest. Otherwise, they are incredibly diverse. Thus, they police violations of a wide range of state laws, from antitrust (*e.g.*, COLO. REV. STAT. § 6-4-111; DEL. CODE ANN. TIT. 6, § 2108) to real es-

[12] *See also Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716-17 (1996) (quoting *La. Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 28 (1959) (Stewart, J., concurring) ("federal courts have the power to refrain from hearing . . . cases raising issues intimately involved with the States' sovereign prerogative, the proper adjudication of which might be impaired by unsettled questions of state law")) (quotation marks and brackets omitted).

tate fraud (*e.g.*, IND. CODE ANN. § 24-5-0.5-4(c)) to unfair or deceptive trade practices (*e.g.*, WASH. REV. CODE. § 19.86.080). They also authorize a variety of penalties and remedies, ranging from injunctive relief (*e.g.*, OKLA. STAT. ANN. TIT. 79, § 205) to disgorgement and restitution (*e.g.*, ARK. CODE § 4-75-212; IOWA CODE § 714.16) to treble damages (*e.g.*, CAL. BUS. & PROF. CODE § 16760; IND. CODE ANN. § 24-5-0.5-4(c)(3)). Moreover, some authorize the state attorney general to sue where no other party is allowed to sue (*e.g.*, ALASKA STAT. § 45.50.577(i)) or express a clear preference for actions brought by the attorney general over private actions (*e.g.* MD. CODE ANN., COM. LAW §11-209(c)).

The disparate language of these statutes and their unique nature as law enforcement actions virtually guarantee that they will raise significant, novel issues of state law. The Fifth Circuit's cookie-

cutter "claim-by-claim" approach to removal is, thus, not only inappropriate, but inevitably will enmesh the federal courts in exactly the types of issues that this Court has said are best resolved by state courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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