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

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE* DRI[1]

DRI is an international organization that includes more than 22,000 attorneys engaged in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system. DRI's members routinely defend clients in class action litigation across the nation. DRI has long been a voice in the ongoing effort to make the civil justice system fairer, more efficient, and – especially on national issues – consistent.

To promote its objectives, DRI participates as amicus curiae in cases that raise issues of vital concern to its membership, their clients, and the judicial system. This is such a case. DRI believes that resolution of the important jurisdictional issues raised by this case is critical because the approach advanced by Petitioner will eviscerate the protections that the Class Action Fairness Act of 2005 ("CAFA") affords. The issue presented affects a substantial number of cases of nationwide importance that are potentially removable under CAFA.

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[1] Pursuant to Supreme Court Rule 37.6, DRI certifies that no counsel for any party authored this brief, either in whole or in part, and that no entity or person, aside from DRI, its members, and its counsel, made a monetary contribution to the brief's preparation or submission. DRI further certifies that counsel of record for both parties received timely notice of DRI's intent to file this brief. Counsel consented to the briefs' filing in letters that are on file with the Clerk's office.

The decision below, if reversed by this Court, would allow plaintiffs' lawyers to avoid federal review of cases with national implications by teaming up with state attorneys general to bring class or mass actions seeking to recover huge awards under the guise of a parens patriae action and thus avoid the removal provisions that Congress enacted for class and mass actions.

Because the right of removal is an issue of particular significance to defendants, DRI's members and their clients are frequently confronted with the issues raised by this case. Collaboration between some state attorneys general and plaintiffs' class action lawyers has resulted in a number of serious problems for the civil justice system. Indeed, DRI, alone and also in conjunction with other legal organizations, has conducted seminars studying these lawsuits and the problems they create long before this case. In July 2010, DRI, through the National Foundation for Judicial Excellence (NFJE), held its Sixth Annual Judicial Symposium. The Symposium included, among other related topics, a discussion lead by Professor Donald G. Gifford of the University of Maryland School of Law on "*Public Nuisance: An Overview of the Use of an 800-Year-Old Doctrine to Support Mass Liability and Parens Patriae*." See http://nfje.net/Resources/aspx. Professor Gifford highlighted concerns about the stretching of common law doctrines in ways that can harm the civil justice system. Similarly, Lawyers for Civil Justice, a national organization of corporate counsel and defense lawyers supporting civil justice reform (LCJ), featured a panel with attorneys general from Alabama and South Carolina at its most recent meeting to discuss these issues. Among the materials included as a part of this panel was testimony on the

topic of contingent fees and conflicts of interest created when state attorneys general team up with plaintiffs' class action lawyers.

In sum, the issue is critically important to DRI's members and their clients, as well as the defense bar at large. This Court's review and affirmance of the decision below will prevent unseemly and unfair forum-shopping and bring consistency and predictability to removal actions.

SUMMARY OF ARGUMENT

The enactment of the Class Action Fairness Act of 2005 ("CAFA") brought amount a major change in diversity jurisdiction. Congress saw abuses in the current class action scheme, particularly by lawyers "gam[ing] the procedural rules [to] keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes..." S. Rep. No. 109-14, p. 5 (2005). This gamesmanship was facilitated by jurisdictional requirements mandating complete diversity for federal court removal. 28 U.S.C. § 1332(a). Congress therefore enacted CAFA to open federal-court doors and ensure that "interstate cases of national importance" were litigated in a federal forum, free from the state-court biases out-of-state defendants were forced to endure. *Johnson v. Advance America*, 549 F.3d 932, 935 (4th Cir. 2008), citing CAFA § 2(b)(2). CAFA dispensed with the traditional requirement of complete diversity, opting instead to require only minimal diversity for federal court removal. 28 U.S.C. § 1332(d)(2)(A). It also permitted the removal of "mass actions," by deeming those 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" to be class actions. 28 U.S.C. § 1332(d)(11)(A)-(B)(i).

Despite clear Congressional intent that mass actions such as the one at issue here be litigated in federal court, plaintiffs continue to find ways to keep these suits in state court where certification standards are more lax and a "home-court" advantage works to the demise of defendants. As exemplified by this case, one way plaintiffs can accomplish this is through improper use of the "parens patriae" doctrine. A doctrine of standing, parens patriae allows a state, typically through its attorney general, to bring suit to recover damages on behalf of its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 594, 600 (1982). However, it has become increasingly common for private plaintiffs' lawyers to team up with state attorneys general to pursue monetary claims of large numbers of people using the parens patriae label. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L.Rev. 913, 964-68 (2008) ("[I]n most…parens patriae litigation against product manufacturers, state attorneys general…have hired private attorneys, almost invariably chosen from a small cadre of sophisticated plaintiffs' mass products litigation firms…"). Even more alarming, these private plaintiffs' lawyers are working under contingency fee agreements – much like the contingency fee retention agreement in this case. Retention Agreement (March 24, 2011), www.agjimhood.com/images/uploads/forms/LCDAgreement.pdf. As a result, private plaintiffs' lawyers purporting to represent the state seek to

maximize their fees rather than the public interest. David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 Mich. St. L. Rev. 423, 436 (2010). Permitting private class-action lawyers working on a contingent-fee basis to partner with state attorneys general in hopes of circumventing CAFA's minimal-diversity removal perpetrates the jurisdictional gamesmanship Congress sought to avoid in the first place and creates a host of problems.

Congress' intent to keep parens patriae actions within CAFA's reach is exemplified by its refusal to adopt an exclusion for removal of parens patrie actions. 151 Cong. Rec. S1157, 1158-59, 1165 (daily ed. Feb. 9, 2005). And yet Petitioner urges this Court to adopt a rule which would effectively rob defendants of CAFA's protections. DRI knows all too well the ramifications to defendants nationwide should they be forced to litigate mass actions that would otherwise be removed to federal court in a state forum. The threat of certification in a state forum places insurmountable pressure on out-of-state defendants to settle, even if an adverse judgment seems "improbable." See *Thorogood v. Sears, Roebuck and Co*., 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc*., 51 F.3d 1293, 1298 (7th Cir. 1995). Creative labeling should not allow private plaintiffs' lawyers, working in conjunction with state attorneys general, to circumvent the protections that CAFA intended to provide to defendants. But if this Court adopts the position advocated by Petitioner, this is exactly what will occur. Only by adhering to the Fifth Circuit's "claim-by-claim" approach can the judiciary prevent mass actions which belong in federal court from being adjudicated in a

state forum by attorneys general and private plaintiffs' lawyers - working under a contingent fee agreement - using the "parens patriae" label.

ARGUMENT

I. Through Its Enactment Of CAFA, Congress Intended That Mass Actions Such As The One At Issue Be Litigated In A Federal Forum, And That Plaintiffs' Lawyers Not Be Permitted To Circumvent Removal By Teaming Up With State Attorneys General And Labeling The Mass Action A "Parens Patriae" Action.

A. Congress intended the Class Action Fairness Act of 2005 to allow for a federal forum to curtail class action abuses, including gamesmanship by plaintiffs' counsel and others designed to defeat removal jurisdiction.

Congress' enactment of the Class Action Fairness Act of 2005 ("CAFA") ushered in a new era in diversity jurisdiction. Prior federal jurisdictional requirements mandated complete diversity for removal to federal court. In short, every plaintiff had to be diverse from every defendant. 28 U.S.C. § 1332(a). As a result, a great number of class suits were being tried in state courts. This, in turn, exposed defendants to a phenomenon known as "homecooking" – bias that out-of-state defendants experience when forced to litigate in plaintiff-friendly state courts. Jacob Durling, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, 83 U. Colo. L. Rev. 549, 550 (Winter 2012). As a

result of "homecooking," plaintiffs were more likely to have problematic classes certified and were more likely to receive higher damages awards. *Id*. The federal appellate circuits have uniformly confirmed this Congressional finding that state and local courts often act "in ways that demonstrate bias against out-of-State defendants[.]" CAFA § 2(a)(4), Pub. L. 109-2, § 2, 119 Stat. 4, 5 (2005), 28 U.S.C. § 1711 note., cited in *Hart v. FedEx Ground Package System Inc*., 457 F.3d 675 (7th Cir. 2006); *Johnson v. Advance America*, 549 F.3d 932, 935 (4th Cir. 2008); *In re Hannaford Bros. Co. Customer Data Security Breach Litigation*, 564 F.3d 75, 80-81 (1st Cir. 2009).

Recognizing the abuses attendant with the current jurisdictional scheme, which largely fell on defendants, Congress passed CAFA to increase defendants' access to federal courts in class action lawsuits. Pub. L. No. 109-2 at § 2(b)(2) (2005). Simply stated, CAFA was enacted to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." *Johnson*, 549 F.3d at 935, citing CAFA § 2(b)(2). To achieve its broad jurisdictional goals, CAFA dispensed with the traditional requirement of complete diversity, opting instead to require only minimal diversity for federal court removal. 28 U.S.C. § 1332(d)(2)(A). Accordingly, CAFA permits removal when diversity of citizenship exists between any class defendant and any named or unnamed person on whose behalf the action is filed. *Id*., § 1332(d)(1)(D).

Also, for the first time, CAFA permitted removal of 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)(A)-(B)(i). Such "mass actions" are deemed to be "class actions" for removal purposes, provided the jurisdictional amount requirement is satisfied. *Id*.

CAFA's language reflects a clear purpose to facilitate, rather than hinder, removal of such mass actions of national importance. Indeed, CAFA was intended to extend federal court jurisdiction over "interstate cases of national importance under diversity jurisdiction." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4-5 (2005). To accomplish this purpose, CAFA loosened the rules governing removal of class actions and mass actions, to facilitate the uniform resolution of major multi-party disputes in federal court. A Congressional expansion of federal diversity jurisdiction is rare; CAFA marks the first time that Congress acted to *expand* diversity jurisdiction since it enacted the First Judiciary Act of 1789.

Despite CAFA's explicit intent to increase the ability of defendants to remove large interstate class and mass actions to federal court for adjudication, plaintiffs continue to manipulate their claims in order to avoid CAFA removal. See, e.g., *Lowdermilk v. U.S. Bank National Ass'n*, 479 F.3d 994, 998-99 (9th Cir. 2007) overruled on other grounds, 2013 WL 4516757 (9th Cir. 2013) ("[I]t is well established that the plaintiff is 'master of her complaint' and can plead to avoid federal jurisdiction."); Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. Legis. 76, 109 (2009) ("There is an

overwhelming fear of 'gamesmanship' on the part of plaintiffs' lawyers to avoid federal diversity jurisdiction.") Some state attorneys general are engaging in similar efforts to evade CAFA's clear language and keep mass actions in state court, which they perceive to provide a more favorable forum for the state attorney general acting on behalf of local citizens. Even more alarming, attorneys general and private plaintiff class action lawyers are joining forces, through contingency fee agreements, to circumvent removal of these mass actions that rightfully belong in a federal forum. This case is but one example of how some state attorneys general and private plaintiff class action attorneys are joining forces to evade CAFA's jurisdictional reach.

B. It is increasingly common for state attorneys general - acting through plaintiff class action lawyers with contingency fee agreements - to bring mass actions in state courts as parens patriae actions.

The "parens patriae" doctrine recognizes the principle that a state, when a party to a suit involving a matter of sovereign or quasi-sovereign interest, represents all of its citizens and therefore has standing. 72 Am. Jur. 2d States, Etc. § 94 (2013). An exception to the normal standing rules, the parens patriae standing doctrine allows a state to bring suit and recover damages for its quasi-sovereign interest. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 594, 600 (1982). Common law parens patriae standing simply means that a State has "an injury to what has been characterized as a 'quasi-sovereign' interest." *Id.* at 601. A practice "long

embedded in Anglo-American law," the parens patriae action has "expanded in this century." *Com. of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Sons, Inc.*, 632 F.2d 365, 368 (4th Cir. 1980), citing *Louisiana v. Texas*, 176 U.S. 1 (1900), and *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). See also Alexander Lemann, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 Colum. L. Rev. 121, 122, 132-33 (2011) ("[P]arens patriae…has been an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents.").

Parens patriae actions share much in common with damages class actions. Margaret Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 499-500 (2012) ("[P]arens patriae and other public actions…share much in common with damages class actions…Like class actions, representative suits by state attorneys general adjudicate the rights of individuals who play no direct role in the conduct of the case."). But they are unique in at least one major respect – they allow for state attorneys general to label what are really class or mass actions as parens patrie actions in an effort to avoid federal court removal. This is so even though CAFA does not exclude "parens patriae" actions.

It is increasingly common for state attorneys general to pursue monetary claims of large numbers of people using the parens patriae label. For example, in *Nevada v. Bank of America Corp*, 672 F.3d 661, 670 (9th Cir. 2012), the Nevada Attorney General brought a parens patrie action in state court to protect "the hundreds of thousands of homeowners in the state"

allegedly deceived by the bank. Again, in *West Virginia ex rel. McGraw v. Comcast Corp*., 705 F.Supp.2d 441 (E.D. Pa. 2010), the State of West Virginia attorney general sought to adjudicate claims of 89,000 premium cable subscribers under the parens patriae doctrine. In *Louisiana ex rel. Caldwell v. Allstate Ins. Co*., 536 F.3d 418, 421 (5th Cir. 2008), the attorney general for the State of Louisiana, along with counsel from a number of private law firms, filed a state court lawsuit on behalf of claims of policy holders of six insurance companies, styled as a parens patriae action. The attorney general of West Virginia brought a parens patriae action in *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc*., 748 F. Supp. 2d 580, 589-90 (S.D. W. Va. 2010), on behalf of consumers against six defendants for excess charges paid for generic drugs. See also *Mississippi ex rel Hood v. Entergy Miss., Inc*., No. 3:08-cv-780-HTW-LRA, 2012 WL 3704935, *9 (S.D. Miss. Aug. 25, 2012) ("*Entergy*") (claims of electric utility consumers).

In most parens patriae actions, the attorney general retains private counsel to manage and try the cases on behalf of the state. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L.Rev. 913, 964-68 (2008) ("[I]n most…parens patriae litigation against product manufacturers, state attorneys general…have hired private attorneys, almost invariably chosen from a small cadre of sophisticated plaintiffs' mass products litigation firms…"). Most of the time, private plaintiffs' firms are brought in on a contingency-fee basis. 126 Harv. L. Rev. at 493, 498, 524 ("[S]tate attorneys general can and do engage in litigation that bears a striking resemblance to the much-maligned class

action…"[A]ttorneys general sometimes hire private counsel to litigate state cases on a contingency basis."). This was first seen in the tobacco litigation of the 1990s, where trial attorneys received $14 billion nationally in attorney fees under the $246 billion Tobacco Master Settlement Agreement. Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront To The Neutrality Doctrine?*, 42 Colum. J.L. & Soc. Probs. 587, 588 (Summer 2009).[2]

Since then, state attorneys general have continued to hire private class action attorneys to represent government interests through contingency fee contracts. In Rhode Island, for example, the attorney general used private plaintiffs' lawyers to represent the state in a fight against former lead paint manufacturers spanning a five-year period. See *State v. Lead Industries, Ass'n, Inc*., 951 A.2d 428 (R.I. 2008). Similarly, in *Oklahoma ex rel Edmondson v. Tyson Foods, Inc*., No. 05-CV-329-GKF-SAJ (N.D. Okla.), Oklahoma's attorney general retained three private plaintiffs' firms on a contingency fee basis to sue the poultry industry for polluting the state's waters. In that case, the fee contract guaranteed private counsel at least one third of the total value of any monetary damages recovered, but allowed for recovery of up to 50%. (Motion of Tyson Foods, Inc. et al for Judgment

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[2] Similarly, a suit brought by the South Carolina attorney general after a 1996 river oil spill threatened to result in a $1.48 million fee to two private lawyers hired by the attorney general, even though the suit was quickly settled before pretrial discovery. John Monk, *Lawyers May Get $1.48 Million from State; Controversial Fees is for Work S.C. Hired Them to Do in Wake or Reedy River Oil Spill in 1996*, The State (Columbia, S.C.), Nov. 17, 2000.

s a Matter of Law in Light of Plaintiff's Constitutional Violations at 2, *Oklahoma v. Tyson Foods, Inc*., No. 05-cv-00329-GKF-SAJ (N.D. Okla Feb. 28, 2007). See also *County of Santa Clara v. Superior Court*, 235 P.3d 21, 25 (2010) (wherein public entities were represented both by their own government attorneys as well as several private law firms hired on a contingent-fee basis).

In this case, the Mississippi Attorney General entered into a contingency-fee retention agreement with a private law firm to file this action in state court against all out-of-state defendants. Retention Agreement (March 24, 2011), www.agjimhood.com/images/uploads/forms/LCDAgreement.pdf (giving plaintiff's lawyer power to "investigate, research and file the Claims in any appropriate Court or Courts before any appropriate governmental agency.") The retention agreement sets forth a contingency fee schedule under which the private law firm stands to make millions of dollars, the precise amount based upon how much the State of Mississippi recovers and whether the case is resolved before or after the commencement of formal proceedings. (*Id*., Exhibit "A", Counsel Retention Agreement, Matter Settled Prior to Initiation of Litigation, p. 5; Exhibit "B", Counsel Retention Agreement, Matter Resolved After Initiation of Litigation, p. 7). In addition, both contingent fee schedules operate cumulatively in order to provide the private plaintiffs' lawyer with a maximum recovery.

Permitting private class-action lawyers working on a contingent-fee basis to partner with state attorneys general in hopes of circumventing CAFA's minimal-diversity removal perpetrates the jurisdictional

gamesmanship Congress sought to avoid in the first place and creates a host of ethical problems. Private plaintiffs' lawyers purporting to represent the state but paid on a contingency fee basis seek to maximize their fees rather than the public interest, a phenomenon which even critics generally in support of contingency fee arrangements have recognized. David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 Mich. St. L. Rev. 423, 436 (2010). As one legal scholar stated, "[i]t is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue to the common good or the public interest than their counterparts in private practice[.]" Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest*?, 41 B.C. L. Rev. 789, 789 (2000). Private plaintiffs' lawyers bringing these parens patriae actions will likely steer the litigation in a direction that "places their own financial interests over those of their putative public supervisors and the public interest these officials are supposed to represent." 2010 Mich. St. L. Rev. at 442. Stated another way, rather than "do the right thing" for the State's citizens, private plaintiffs' lawyers may control parens patriae actions in a manner which seeks to maximize recovery under their retention agreements.[3] In testimony before the

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[3] Additionally, some have questioned whether attorneys general act within their statutory authority when appointing plaintiffs' lawyers to act as "special attorneys general." David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 Mich. St. L. Rev. 423 (2010).

Subcommittee on the Constitution of the Committee on the Judiciary, the Honorable Bill McCullum expressed a related concern: "I am also very concerned that, when state attorneys general elect to retain contingent fee plaintiff counsel to pursue litigation on behalf of the state, there is a substantial risk of, and opportunity for, 'pay-to-play' schemes and other types of abuse in which political contributions from plaintiff firms are traded for contingent fee contracts." (Testimony of the Honorable Bill McCullum on Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law, Before the Subcommittee on the Constitution of the Committee on the Judiciary, United States House of Representatives, Feb. 2, 2012).

Because state attorneys general are compensated on a salary basis and do not retain fees as personal profit, these ethical concerns are eliminated when private plaintiffs' lawyers are not part of a parens patriae suit. "At best, the fees go to fund future enforcement efforts by the attorney general's office. Thus…[public attorneys] do not share private counsels' strong incentives to maximize their fees." 126 Harv. L. Rev. 517. Accordingly, the "government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved" remains intact. *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 351(Cal. 1985).

In contrast, contingency fee arrangements have been said to validate "private attorneys who are clothed with the mantle of state authority, but who are unrestrained by the constitutional checks and ethics obligations on the exercise of that authority." Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront To The Neutrality Doctrine?*,

42 Colum. J.L. & Soc. Probs. 587, 595 (Summer 2009). Accordingly, some courts are disallowing use of contingency fee agreements in parens patriae actions. The Louisiana attorney general hired private law firms to investigate and prosecute environmental damages claims in *Meredith v. Ieyoub*, 700 So.2d 478 (La. 1997); however, the Louisiana Supreme Court struck down the contingency fee arrangement. In 2007, the Superior Court of California considered whether a county attorney could hire a contingency fee attorney to represent the county in litigation. *Santa Clara v. Atl. Richfield Co.*, No. 1-00-cv-788657, slip op. at 2, (Cal. Super. Ct. Apr. 4, 2007). Ultimately, the court held that outside counsel must be precluded from operating under a contingency fee arrangement on behalf of the government. *Id*. The Supreme Court of California subsequently held that public entities were not categorically barred from engaging private counsel under contingent fee arrangements, but that retainer agreements must specify matters that contingent-fee counsel must present to government attorneys for decision. *County of Santa Clara v. Superior Court*, 235 P.3d 21, 40 (2010).

In the federal system, this practice is not allowed. President George Bush signed an executive order in 2007 forbidding the federal government from entering into contingency fee agreements. John O'Brien, Bush Bans Contingency Fee Arrangements, LEGAL NEWSLINE, May 17, 2007, http://legalnewsline.com/news/195296-bush-bans-contingency-fee-arrangements. See also Exec. Order No. 13433, 72 Fed. Reg. 28441 (May 16, 2007). President Obama's administration has retained this policy. However, as discussed above, this has become a prevalent practice in the state court

system. This trend is only expected to increase in the future. Myriam Giles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 675 (2012) ("Parens patriae litigation…poised for a qualitatively new role in the enforcement landscape"). Accordingly, the time is ripe for this Court to issue a ruling which will prevent private plaintiffs' lawyers, working with a contingency-fee agreement, to team up with state attorneys general to bring mass actions under the guise of parens patriae to defeat Congress' intention that cases of national importance be litigated in a federal forum.

C. If state attorneys general, working in concert with plaintiff class action attorneys, are permitted to evade a federal forum by calling mass actions parens patrie actions, this Court will be adopting a rule contrary to Congressional intent and the plain language of CAFA, and which will cause a host of problems for defendants.

Petitioner asks this Court to adopt a rule that, in application, threatens to rob defendants of CAFA's protections. Stated another way, if this Court permits state attorneys general to bring large scale class actions using private plaintiff attorneys as special attorneys general under the label of parens patriae, the result will be a gaping exception to the removal power that Congress did not intend. When Congress debated amendments to CAFA, one of the major concerns was whether CAFA should apply to actions filed by state attorneys general. 151 Cong. Rec. S1157, 1158-59 (daily ed. Feb. 9, 2005). Nearly all of the fifty states' attorneys general advocated in favor of an exclusion for

parens patriae actions. *Id*. However, the Senate considered and rejected such an amendment. *Id*. at S1165. In Congress' view, parens patriae actions must be within CAFA's reach; otherwise, plaintiffs' lawyers and state attorneys general could circumvent removal to federal court simply through creative labeling. As Senator Hatch expressed, exempting actions by state attorneys general from removal would "create a loophole that some enterprising plaintiffs' lawyers [would] surely manipulate in order to keep their lucrative class action lawsuits in State court [and that]…it [would] not take long for plaintiffs' lawyers to figure out that all they need to do to avoid the impact of [CAFA] is to persuade a State attorney general to…lend the name of his or her office to a private class action." *Id*. at 1163-64 (quoted in *Caldwell*, 536 F.3d at 424). Characterizing the loophole that would be created by such an exception as "big enough to drive a truck though," Senator Cornyn aptly noted that this "could cause substantial mischief" CAFA was intended to prevent. *Id*. at S1161.

DRI knows all too well the ramifications to defendants nationwide should they be forced to litigate mass actions that would otherwise be removal to federal court in a state forum. Even in the usual course, "the vast majority of certified class actions settle, most soon after certification." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291-1291 (2002) ("[E]mpirical studies…confirm what most class action lawyers know to be true[.]"); see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to]

settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle."). Indeed, a 2005 study conducted by the Federal Judicial Center found that roughly 90% of the suits under review that were filed as class actions settled after certification. Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005). This is because class and mass actions place defendants in the untenable position of betting the company on the outcome of a trial.

Defendants, unwilling to roll the dice, are placed under intense pressure to settle, even if an adverse judgment seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). This is particularly true where out-of-state defendants are forced to litigate a mass action, labeled as a parens patriae action, in state courts that are clearly biased against defendants. During CAFA debates, the House Committee on the Judiciary noted research showing that some "magnet" State courts have demonstrated "a lax attitude toward class certification standards, a disregard for fundamental due process requirements, and a willingness to 'rubber-stamp' class action settlements that offer little if anything to the class members while enriching their lawyers." H.R. REP. 108-144, *8 (2003).

Adopting the position advocated by Petitioner will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone*, *supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). In short, by creating a gaping exception in removal power that Congress did not intend, out-of-state defendants will be forced to litigate what are really "mass actions" in state court, with all the attendant "home-court" biases working against defendants who have a statutory right to present their defenses in a federal forum. Creative labeling should not allow private plaintiffs' lawyers, working in conjunction with state attorneys general, to circumvent the protections that CAFA intended to provide to defendants. But if this Court adopts Petitioner's argument, this is exactly what will occur. In turn, this will allow abusive mass actions to progress more easily to certification – and legally unwarranted settlement. And the enhanced promise of a pay-off would trigger the filing of many more lawsuits, including "strike suits" brought by opportunistic plaintiffs' attorneys to obtain "the defendants' cost savings from avoiding the litigation, distraction, and reputation costs of responding to the plaintiffs' complaint" rather than the true worth of the claim. James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903, 970 (1996).

The strain this places on the individuals and businesses that DRI's members are regularly called on to defend cannot be overstated. Even before the rise of parens patriae mass actions, the attendant costs of a major lawsuit could sound the death knell for new companies and those suffering under today's current

economic climate. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 612 (Spring 2010). But allowing a state attorney general to circumvent removal of a mass action by using the parens patriae doctrine gives even more power in upfront settlement discussions to plaintiffs. "Such leverage can essentially force corporate defendants to pay ransom…" S. Rep. No. 109-15, 17 20-21 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21; Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (Winter 2010). This is completely at odds with the very purpose of CAFA.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* DRI respectfully urges the Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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