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

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.

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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

QUESTION PRESENTED

The Class Action Fairness Act ("CAFA") provides that its minimal diversity requirement for a class action is satisfied when any person "(named or unnamed) who fall[s] within the definition of [a] proposed . . . class," 28 U.S.C. § 1332(d)(1)(D), "is a citizen of a State different from any defendant." § 1332(d)(2)(A). It further provides that "a mass action shall be deemed to be a class action removable" under CAFA if it "otherwise meets" CAFA's requirements for federal jurisdiction over a class action. § 1332(d)(11)(A). In addition, *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 461 (1980) ("*Navarro*"), and other decisions of this Court establish that diversity jurisdiction must be based "only upon the citizenship of real parties to the controversy."

Whether the citizenship of the persons on whose behalf monetary relief claims are brought by a state may satisfy CAFA's minimal diversity requirement as set forth in 28 U.S.C. § 1332(d)(2)(A)-(C) and (d)(1)(D) for purposes of CAFA mass action jurisdiction even if those persons are not named plaintiffs?

PARTIES TO THE PROCEEDING

The named parties to the proceeding in the Fourth Circuit were Petitioners, AU Optronics Corporation, AU Optronics Corporation America, LG Display Co., Ltd., and LG Display America, Inc., and Respondent, the State of South Carolina.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

AU Optronics Corporation is a publicly traded company. AU Optronics Corporation has no parent corporation. No publicly held company owns more than 10% of AU Optronics Corporation's stock. AU Optronics Corporation America is a wholly owned subsidiary of AU Optronics Corporation and is not a publicly traded company.

LG Display Co., Ltd. is a publicly traded company. LG Display Co., Ltd. has no parent corporation. The only publicly held entity that owns 10% or more of the stock of LG Display Co., Ltd. is LG Electronics, Inc. LG Display America, Inc. is a wholly owned subsidiary of LG Display Co., Ltd.

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JURISDICTION

The Fourth Circuit entered the judgment on October 25, 2012. This petition is filed within 90 days of that entry. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Class Action Fairness Act of 2005, codified in part at 28 U.S.C. § 1332(d), provides in pertinent part:

> (d)(1) In this subsection–
>
> (A) the term "class" means all of the class members in a class action;
>
> . . .
>
> (D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which–

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

. . .

(11)(A) For purposes of this subsection and section 1453, 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.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a [class 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, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).
>
> . . .

The pertinent provisions of 28 U.S.C. § 1332(d); full text of Pub L. No. 109-2, § 2, 119 Stat. 4 (Feb. 18, 2005) (codified as amended at 28 U.S.C. § 1711, Findings and Purposes) ("CAFA Findings and Purposes"); and relevant provisions of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. §§ 39-5-10 *et seq.*; and the South Carolina antitrust laws, S.C. Code Ann. §§ 39-3-10 *et seq.*, are set forth in the Appendix.

STATEMENT OF THE CASE

The Fourth Circuit, as well as the Ninth Circuit, has interpreted CAFA's minimal diversity requirement in conflict with the Fifth Circuit, CAFA's text, and this Court's diversity jurisprudence. The Fourth Circuit's interpretation allows plaintiff's counsel to circumvent CAFA and

bring what is essentially a class action in state court without fear of removal under CAFA.[1] It thus undermines Congress's purpose in expanding federal diversity jurisdiction over class and mass actions through CAFA. The Fourth Circuit's decision here prevents removal of two actions that are based on an alleged international price fixing conspiracy. Each action involves restitution claims of a large number of South Carolina citizens against defendants from other nations and states.

Before CAFA, federal diversity jurisdiction under 28 U.S.C. § 1332 was available only when there was complete diversity of citizenship. As a result, class actions based on state law claims could be removed only if each class representative was a citizen of a different state from each defendant. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 199-200 (1990). This allowed plaintiff's counsel to keep many class actions in state court by naming at least one non-diverse class representative. Naming a state as a plaintiff, for example, would prevent diversity jurisdiction because a state is a non-diverse party. *See Moor v. County of Alameda*, 411 U.S. 693, 717 (1973).

Congress concluded that the limited availability of diversity jurisdiction resulted in "[a]buses in class actions [that] undermine[d] the National judicial system, the free flow of interstate

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[1] *Knowles v. Standard Fire Ins. Co.*, No. 11-8030, 2012 WL 3828891 (8th Cir. Jan. 4, 2012), *cert. granted*, 133 S. Ct. 90 (Aug. 31, 2012) (No. 11-14a50) (addressing whether plaintiff's counsel may avoid CAFA removal by attempting to reduce the amount claimed by a class), involves a different CAFA avoidance strategy.

commerce, and the concept of diversity jurisdiction as intended by the framers of the United States constitution." CAFA Findings and Purposes (a)(4). App. 100a. Among the "abuses" Congress identified was the fact that "State and local courts" were

- "keeping cases of national importance out of Federal court,"
- "sometimes acting in ways that demonstrate bias against out-of-State defendants," and
- "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." *Id.*

To prevent these abuses, CAFA expanded federal diversity jurisdiction for both class actions and mass actions. One of the critical changes CAFA made was to substitute minimal diversity for the complete diversity requirement. Under CAFA, plaintiff's counsel can no longer defeat removal by naming at least one class representative or one member of a mass action who is not diverse. A class action satisfies CAFA's minimal diversity requirement if any person "named or unnamed" falling "within the definition of the proposed . . . class" is a "citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(1)(D) and (2)(A).[2]

CAFA does not provide a separate minimal diversity definition for mass actions. Its mass action

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[2] Section 1332(d)(2)(C) provides a similar standard where a foreign defendant is involved.

provisions incorporate CAFA's minimal diversity language for class actions. A "mass action" is "any civil action (except a [class 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." § 1332(d)(11)(B) (emphasis added). Section 1332(d)(11)(A) provides that a "mass action shall be *deemed to be a class action* removable" to federal court under CAFA's class action provisions if it "otherwise meets" the requirements of CAFA class action jurisdiction, as stated in "paragraphs (2) through (10)" of § 1332(d) (emphasis added). Section 1332(d)(2) provides for minimal diversity jurisdiction based on the citizenship of "any member of a class of plaintiffs." Section 1332(d)(1), in turn, makes clear that the term "class of plaintiffs" means *all* class members, "named or unnamed." Thus, under § 1332(d)(2), supplemented by the definitions in § 1332(d)(1), minimal diversity exists in a CAFA mass action if any "member of a class of plaintiffs" is "a citizen of a State different from any defendant." "Class members" means "the persons (named or unnamed) who fall within the definition of the proposed . . . class . . . ." § 1332(d)(1)(D). In the context of a mass action, the phrase "member of a class of plaintiffs" means in practice "member of the group of persons whose monetary relief claims are to be tried jointly." *See* 13E Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3606 (3d ed. 2011) ("Congress enacted [CAFA] . . . to grant the federal courts a form of minimal diversity jurisdiction over . . . mass actions in which any . . . mass action member is diverse in citizenship with regard to any defendant . . . .").

Petitioners are defendants in two actions that the Fourth Circuit remanded. Each action ("Action") involves restitution claims of more than 100 persons who are South Carolina citizens and, thus, of diverse citizenship from Petitioners.[3] Each Action was brought in state court jointly by both private attorneys on a contingency basis[4] and the state attorney general representing the State as the only named plaintiff. The Actions seek statutory forfeitures and penalties for the State in addition to restitution for the citizens involved.[5] While there is no diversity between the State and Petitioners, there is at least minimal diversity between Petitioners and the citizens whose claims are being litigated in the Actions.

More particularly, the State seeks restitution "on behalf of" those "citizens" of South Carolina who allegedly suffered an ascertainable loss as a result of an international price fixing conspiracy. App. 58a ¶1, 65a ¶28. The State alleges that "foreign manufacturers," App. 58a ¶1, fixed the prices of liquid crystal display ("LCD") panels that are

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[3] LG Display Co., Ltd. and LG Display America, Inc. (jointly "LGD") are Korean and California entities. AU Optronics Corporation and AU Optronics Corporation America (jointly "AU") are Taiwanese and Texas entities.

[4] *See* Litigation Retention Agreement For Special Counsel Appointed by the South Carolina Attorney General as to Certain Anti-Competitive Activities By Manufacturers of LCD Panels, http://www.scag.gov/wp-content/uploads/2011/09/LCD-antitrust-litigation-retention-agreement-final-signed.pdf) (last visited Jan. 19, 2012).

[5] The complaints in the Actions are almost identical. Only the complaint against LGD is included in the Appendix.

components of various electronic products. App. 59a ¶6. The State's private counsel asserted common law restitution claims based on the same alleged conspiracy in a prior class action in federal court in South Carolina but withdrew those claims after that action was transferred to a multidistrict litigation proceeding in the Northern District of California (the "MDL proceeding"). The consolidated complaint in the MDL proceeding emphasized the international nature of the claims. It alleged a conspiracy "effectuated through a combination of group and bilateral discussions that took place in Japan, Korea, Taiwan, and the United States." Indirect-Purchaser Plaintiffs' Third Consolidated Amended Complaint at 25 ¶135, *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 07-1827 SI (N.D. Cal. April 29, 2011).[6]

While any forfeitures or civil penalties obtained in the Actions here will belong to the State, *see* S.C. Code Ann. §§ 39-3-180, 39-5-110(a), any restitution obtained must be paid to the citizens who suffered the loss. § 39-5-50(b). The restitution claims are allegedly based on § 39-5-50(b) of SCUTPA. That provision allows the court, in an action brought by the State, "to restore to any person

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[6] Litigation related to the alleged conspiracy has included a nationwide class action on behalf of direct purchasers, a nationwide class action on behalf of indirect purchasers, more than thirty actions by opt-out plaintiffs, and fourteen state attorneys general ("AG") actions. Seven LCD panel manufacturers have paid nearly $1.3 billion in criminal fines. Current settlements of direct and indirect purchaser class actions and AG suits when finalized are expected to exceed $1.5 billion. Other AG suits and suits by opt-out plaintiffs are pending. Additionally, antitrust authorities in Europe, Japan, Korea, and China, among others, have announced investigations and fines against LCD panel manufacturers.

who has suffered any ascertainable loss by reason of [a violation of SCUTPA] any moneys or property . . . which may have been acquired by means of [the violation]."

But SCUTPA does not give the State exclusive rights to seek restitution on behalf of the "citizens." Section 39-5-140(a) of SCUTPA gives these "citizens" the right to bring their own individual actions to recover such "ascertainable loss," independently of any action by the State. *See* App. 108a. South Carolina's prohibition on double recoveries, however, would prevent any citizen from pursuing an individual claim should the State obtain restitution on their behalf in the Actions.[7]

Petitioners removed each Action based on CAFA mass action jurisdiction, among other grounds. App. 76a–77a, 89a–91a. In the courts below, Petitioners contended that minimal diversity exists based on both CAFA's text and the longstanding principle that diversity jurisdiction is based on the citizenship of the real parties in interest. Petitioners asserted that the citizenship of the persons who would receive restitution in the Actions satisfies the minimal diversity requirement of CAFA's text. App. 75a ¶10, 77a ¶15, 88a ¶10, 90a ¶15. Under Petitioners' application of CAFA's text, the persons whose restitution claims are asserted are deemed to be members of a proposed class for purposes of minimal diversity, § 1332(d)(1)(D) and (d)(2)(A) and (C), because a mass action is "deemed

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[7] *See, e.g., Rutland v. S.C. Dep't of Transp.*, 734 S.E.2d 142, 145 (S.C. 2012) ("[I]t is 'almost universally held that there can be only one satisfaction for an injury or wrong.'").

to be a class action" under § 1332(d)(11)(A). Therefore, they satisfy the minimal diversity requirement of § 1332(d)(2)(A) and (C). Petitioners pointed out that looking to the citizenship of the persons whose claims form the mass action is further supported by CAFA's focus on "claims" of "persons" in § 1332(d)(11)(B)'s definition of a mass action.

In addition to the language of CAFA's minimal diversity requirement, Petitioners relied on the longstanding principle, recognized in *Missouri, Kansas & Texas Railway Co. v. Hickman*, 183 U.S. 53, 59 (1901) ("*Hickman*"), *Navarro*, and other decisions of this Court, as well as the Fifth Circuit's decision in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418, 424, 428 (5th Cir. 2008) ("*Caldwell*"), that diversity jurisdiction must be based on the citizenship of the real parties in interest, whether or not they are named plaintiffs. Petitioners agreed that the State is a real party in interest insofar as it seeks statutory penalties, but they urged the courts below to follow the approach of the Fifth Circuit in *Caldwell* (sometimes referred to as a "claim-by-claim" approach) and examine each claim asserted to determine whether any of the real parties in interest to that claim is diverse from any defendant. Petitioners asserted that, under this approach, each citizen who would receive restitution—just like an absent member of a class—is a real party in interest, satisfying CAFA's minimal diversity requirement.

The State moved to remand, contending that there is no diversity and, thus, no CAFA mass action

jurisdiction.[8] State of South Carolina's Memorandum in Support of Motion to Remand ("Mem. Remand") at 13, *South Carolina v. LG Display Co.*, No. 3:11-cv-00729-JFA (D.S.C. Sept. 14, 2011). The State asked the courts below to assess minimal diversity by looking only to the named plaintiff, the State, and ignoring the citizens whose restitution claims are asserted. *Id.* The State offered no analysis of CAFA's text. It simply asserted that minimal diversity does not exist because "there is no class or mass of plaintiffs bringing the action." Brief of Respondent at 27, *LG Display Co. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012).

In response to Petitioners' real-party-in-interest arguments, the State urged the courts to reject the Fifth Circuit's approach and follow a "whole case" approach that had been developed before CAFA for the purpose of determining whether there was complete diversity. The Ninth Circuit applied this approach to CAFA in *Nevada v. Bank of America Corp.*, 672 F.3d 661, 672 (9th Cir. 2012) ("*Bank of America*").[9] According to the State, to assess minimal diversity under CAFA in the Actions, a court need determine only whether the State is a real party in interest to the case as a whole, and

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[8] The State also challenged CAFA mass action jurisdiction on other grounds not reached by the Fourth Circuit and not relevant for purposes of this petition.

[9] The Seventh Circuit has similarly applied the "whole case" approach to determining real-party-in-interest status, but only regarding CAFA's mass action definition, § 1332(d)(11)(B), rather than its minimal diversity requirement, § 1332(d)(2)(A)-(C). *LG Display Co. v. Madigan*, 665 F.3d 768, 773-74 (7th Cir. 2011) ("*Madigan*").

once the court finds that the state "is a real party, with a substantial stake in the litigation, the real-party-in-interest inquiry ends" and the existence of other diverse real parties in interest does not create minimal diversity. Mem. Remand at 13. The State contended that it is the real party in interest in each Action because it has a "sovereign interest in enforcing [its] antitrust and unfair trade practice laws." Mem. Remand at 9. It further argued that the State was the only real party in interest under any approach because it controlled the Actions. Thus, the State concluded that CAFA's minimal diversity requirement was not satisfied because the State is not a citizen of any state and does not create diversity.

Petitioners opposed the State's version of the "whole case" approach. They pointed out that this "whole case" approach does not apply to CAFA's minimal diversity requirement because the State's "whole case" approach was developed to assess complete diversity, where the presence of a state as a real party in interest would prevent complete diversity regardless of the presence of other real parties in interest. Petitioners warned that applying that "whole case" approach here to ignore the citizenship of some of the real parties in interest would effectively impose a complete diversity requirement contrary to CAFA's minimal diversity language.

The district court acknowledged there were "conflicting federal court decisions around the country, often by divided panels," regarding CAFA mass action jurisdiction and that this was "one of

those very difficult calls for a trial judge to make." Transcript of Record at 3, *South Carolina v. LG Display Co.*, No. 3:11-cv-00729-JFA (D.S.C. Sept. 14, 2011). In the end, the district court rejected the approach of the Fifth Circuit's *Caldwell* decision, decided to follow the State's "whole case" approach, concluded that there is no diversity because the State is a real party in interest, and granted the motion to remand without explaining how its ruling complies with the applicable text of CAFA. App. 33a–37a.

Petitioners petitioned the Fourth Circuit for review under 28 U.S.C. § 1453(c)(1). The Fourth Circuit granted the petition and affirmed the district court's conclusion that the Actions lack the requisite minimal diversity. App. 20a. The Fourth Circuit's opinion did not explain how its ruling fits CAFA's text, which it quoted in a footnote but never mentioned in its analysis. App. 11a n.8. Instead, the Fourth Circuit simply relied on the "whole case" approach to real-party-in-interest determinations applied by the Ninth Circuit,[10] rejecting the Fifth Circuit's "claim-by-claim" approach. Even though it recognized that its ruling arguably conflicts with *Hickman*, App.12a, the Fourth Circuit examined the complaints as a whole, determined that the State is "the real party in interest" in each Action, refused to consider any other real parties in interest, and concluded that minimal diversity does not exist. It

[10] The Fourth Circuit noted that the Seventh Circuit also had applied the "whole case" approach in *Madigan*, App. 14a–15a, but failed to acknowledge that *Madigan* addressed CAFA's mass action definition, § 1332(d)(11)(B), rather than its minimal diversity requirement, § 1332(d)(2)(A)-(C).

declared that the fact that restitution claims are "tacked onto other claims . . . properly pursued by the State" does not prevent the State from being a real party in interest to the case as a whole. App. 19a. It asserted that the "citizens" who will receive any restitution awarded "are not named plaintiffs" and "need not be considered in [CAFA's] diversity analysis . . . ." App. 20a.[11]

REASONS FOR GRANTING THE PETITION

The issue presented is an important jurisdictional question affecting many cases throughout the country. Petitioners ask the Court to grant this petition because the Fourth Circuit's interpretation of CAFA's minimal diversity requirement (which is the same as the Ninth Circuit's interpretation) directly conflicts with the Fifth Circuit's interpretation, as well as CAFA's text and the jurisdictional principles this Court declared in *Hickman* and *Navarro*. Moreover, many courts have struggled with this issue and will continue to struggle with it until this Court resolves the circuit conflict. And, most importantly, this Court's review is necessary because the Fourth Circuit's opinion ignores CAFA's text and, as a result, misapplies CAFA's minimal diversity requirement in a way that creates an improper loophole. This loophole allows plaintiff's counsel to avoid removal under CAFA in

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[11] The Fourth Circuit concluded that resolving the appeal "on the issue of minimal diversity" made it unnecessary to address the other CAFA mass action jurisdictional requirements disputed in the appeal. App. 20a n.11. Implicitly, therefore, the Fourth Circuit must have determined that even if it had ruled in Petitioners' favor on all the other issues, the lack of minimal diversity would prevent jurisdiction.

interstate cases of national importance even though Congress intended to permit it.

1. The circuit conflict regarding CAFA's minimal diversity requirement is clear.

The Fourth Circuit's opinion acknowledges the circuit conflict when it notes that its "sister circuits have disagreed somewhat" on how to determine whether minimal diversity exists in this context. App. 14a. A member of the Fourth Circuit panel noted during argument that "the Supreme Court may have to resolve this . . . I guess they will."[12] Indeed, decisions from the Fifth, Fourth, and Ninth Circuits make clear that courts in the Fifth Circuit would find CAFA's minimal diversity requirement satisfied in this case, while the Fourth Circuit did not, and the Ninth Circuit would not. Each of these opinions involves an action brought in state court under a state consumer protection or antitrust act where a state, represented jointly by private counsel and the state attorney general, seeks restitution or some other form of monetary relief on behalf of certain citizens, along with fines and penalties for the state.

The Fifth Circuit in *Caldwell* adopted an approach that fits CAFA's minimal diversity language and is faithful to this Court's precedents. That approach determines whether minimal

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[12] Oral Argument at 14:25, *LG Display Co. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012) (No. 11-0255), *available at* http://www.ca4.uscourts.gov/ (follow "Argument Calendar" hyperlink; then follow "Listen to Oral Argument Audio Files").

diversity exists based on the citizenship of the persons, named and unnamed, whose claims are presented in the action.

In *Caldwell*, the Fifth Circuit recognized the existence of federal CAFA mass action jurisdiction over an action brought by the State of Louisiana represented by its attorney general and "a number of private law firms." 536 F.3d at 421. The State sued a group of insurance companies and a consulting company for violations of the Louisiana Monopolies Act. It sought "treble damages on behalf of Louisiana insurance policyholders," *id.* at 423, as well as injunctive relief on behalf of the State, *id.* at 430.

The state in *Caldwell* contended, similarly to the State in the Actions here, that there was no CAFA mass action or minimal diversity because the state was the only real party in interest. The Fifth Circuit rejected this argument based on its review of each of the claims asserted. (This has been called the "claim-by-claim" approach, even though the Fifth Circuit did not use that term.) The Fifth Circuit concluded that the claims for treble damages satisfied the minimal diversity requirement because, even if the state had standing and authority to seek treble damages on behalf of Louisiana policyholders,[13] the policyholders were the real parties in interest to those claims. *Caldwell* noted

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[13] Although "the parties vigorously debate[d]" the State's authority to seek treble damages on behalf of the policyholders, the Fifth Circuit assumed "*arguendo*" that the State had "authority to enforce" the treble damages remedy provided by state law. *Id.* at 429-30.

that the policyholders had the right to seek treble damages on their own, even if the state might also be entitled to seek treble damages on their behalf. *Id.* at 429. Because the policyholders' treble damages claims were being asserted, the Fifth Circuit concluded that the case fell within CAFA's mass action definition as an action involving "the monetary claims of 100 or more persons . . . proposed to be tried jointly" and, also, that the diverse citizenship of those persons satisfied CAFA's minimal diversity requirement even though they were not named plaintiffs. *Id.* at 430.

The South Carolina citizens whose restitution claims are involved in the Actions have the right to pursue these claims on their own under § 39-5-140(a) of SCUTPA.[14] Their diverse citizenship would have satisfied the minimal diversity requirement had the Fourth Circuit applied the Fifth Circuit's approach. But the Fourth Circuit applied a "whole case" approach to minimal diversity, the same approach the Ninth Circuit adopted in *Bank of America*, 672 F.3d at 672.

In *Bank of America*, the state alleged that the bank had defrauded certain Nevada consumers by misleading them about the terms of its home mortgaging processes. Rather than assessing minimal diversity—as the Fifth Circuit had in *Caldwell*—based on a consideration of each claim asserted, the Ninth Circuit looked "at the case as a whole," *id.* at 670, using an approach developed before CAFA to assess complete diversity. Its assessment of "the essential nature and effect of the

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[14] *See supra* p. 9.

proceeding as it appear[ed] from the entire record" led it to conclude that the state was "the real party in interest" due to "its interest in protecting the integrity of mortgage loan servicing" along with claims of the state itself. *Id.* (internal quotation marks omitted).

The Ninth Circuit concluded that the state's interest was "not diminished merely because it has tacked on a claim for restitution" to the claims asserted on behalf of the state. *Id.* at 671. Its analysis would have been appropriate had the pre-CAFA complete diversity requirement applied and the presence of the state been sufficient to prevent federal jurisdiction without regard to any other real parties in interest. But its approach was wrong because it led the court to ignore the diversity created by the Nevada consumers whose claims were asserted in the action, even though the consumers were entitled to pursue those claims separately on their own. *Nevada v. Bank of Am. Corp.*, No. 3:11-CV-00135-RCJ-RAM, 2011 WL 2633641, at *4 (D. Nev. July 5, 2011), *rev'd*, 672 F.3d 661 (9th Cir. 2012). The court made no effort to explain why it concluded that the state was "the" real party in interest, as opposed to "a" real party in interest along with the consumers. Nor did it attempt to explain how its ruling fit CAFA's instruction to treat a mass action as a class action and to consider the citizenship of both named and unnamed class members for purposes of determining minimal diversity. Its reasoning essentially restored the complete diversity requirement that CAFA had removed. Having determined that the state was the only "real party in interest in [the] action," the Ninth

Circuit ruled that "CAFA's minimal diversity requirement . . . [was not] satisfied." *Id.* at 672.

Applying the Ninth Circuit's approach to the Actions and quoting from *Bank of America*, the Fourth Circuit assessed minimal diversity based on its evaluation of "the Complaint, read as a whole" and concluded that the state is "the real party in interest" in the Actions and, thus, minimal diversity does not exist. App. 19a–20a. It noted that the South Carolina citizens whose restitution claims are involved "are not named plaintiffs" and declared that their citizenship "need not be considered." App. 20a. But it did not explain how it could ignore CAFA's command to consider both named and unnamed claimants in the diversity determination. It merely asserted that the state had a "quasi-sovereign interest in enforcing its own laws" and that "a claim for restitution, when tacked onto other claims being properly pursued by the State," does not alter the state's interest or "the nature and effect of the proceedings." App. 19a. By using the Ninth Circuit's "whole case" approach and ignoring the claims of South Carolina citizens, the Fourth Circuit mistakenly reimposed the complete diversity requirement that CAFA had removed.

The approach of the Fourth and Ninth Circuits to determining minimal diversity for purposes of CAFA conflicts with that of the Fifth Circuit and leads to inconsistent jurisdictional outcomes. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012) ("*Hood*") further illustrates the conflict. In *Hood*, the Fifth Circuit applied the principles of *Caldwell* to find that there

is federal mass action jurisdiction based on restitution claims identical to those asserted in the Actions here. *Hood* is an action against Petitioners as well as other LCD manufacturers. It seeks restitution "on behalf of" Mississippi citizens who, like the South Carolina citizens involved in the Actions, have the right to bring individual claims for any loss. The restitution claims are based on the Mississippi Consumer Protection Act ("MCPA"). Its relevant language is almost identical to the relevant language in SCUTPA.[15] The *Hood* restitution claims arise from the same international conspiracy alleged in the Actions. Applying *Caldwell*, the district court in *Hood* concluded that the citizenship of the citizens whose restitution claims form the mass action satisfies CAFA's minimal diversity requirement, but it remanded based on the mistaken belief that CAFA's public interest exception applied. The Fifth Circuit corrected that error, however, and confirmed that *Hood* will "proceed in federal, not state, court" based on CAFA mass action jurisdiction. *Hood*, 701 F.3d at 803 n.2.

In contrast, the Actions here, which are almost identical to *Hood*, were remanded to state court in South Carolina based on a lack of minimal diversity. And the district court in the California MDL proceeding also remanded two cases against Petitioners, similar to *Hood*, to state courts in California and Washington based on a lack of

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[15] Like SCUTPA § 39-5-50, the MCPA allows a court in an action brought by the state attorney general to "make such additional orders . . ., including restitution, as may be necessary to restore to any person . . . any monies . . . acquired by means of any practice" prohibited by the MCPA. Miss. Code Ann. § 75-24-11.

minimal diversity.[16] Like the Fourth Circuit, the district court in the MDL proceeding made no effort to apply CAFA's minimal diversity text but relied instead on the "whole case" rationale that the Ninth Circuit ultimately adopted in *Bank of America*. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 07-1827 SI, 2011 WL 560593, at *3 (N.D. Cal. Feb. 15, 2011) ("The Court is unpersuaded by defendants' argument that . . . federal courts are required to deviate from the traditional 'whole complaint' analysis when evaluating whether a State is the real party in interest in a *parens patriae* case."). Like the Ninth Circuit, the district court in the MDL proceeding failed to recognize that its application of the "whole case" approach restored the complete diversity requirement that CAFA had removed.

Only this Court can resolve the conflict among the circuits regarding the application of CAFA's minimal diversity requirement and ensure that CAFA's grant of a federal forum for class and mass actions is upheld consistently in all federal courts.

2. The Fourth Circuit's approach also conflicts with this Court's decisions in *Hickman* and *Navarro*.

In addition to conflicting with the Fifth Circuit, the Fourth Circuit's opinion conflicts with the real-party-in-interest jurisdictional principles established in *Hickman* and *Navarro*.

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[16] *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 07-1827 SI, 2011 WL 560593, at *5 (N.D. Cal. Feb. 15, 2011).

Hickman declared that an unnamed party should be considered a real party in interest for purposes of diversity jurisdiction when "the relief sought is that which inures to it alone." 183 U.S. at 59. *Hickman* was an action by railroad commissioners against a railroad to stop it from charging excessive rates to cross a bridge. The state court rejected the out-of-state railroad's removal petition on the ground that the state, although not a named party, was "the real party plaintiff," *id.* at 58, and thus prevented the complete diversity necessary for federal jurisdiction. This Court held that an unnamed party is a real party in interest for purposes of diversity jurisdiction when it receives "the relief sought."[17] *Id.* at 59. The Court concluded that the state was not a real party in interest in *Hickman* because the unnamed citizens who used the bridge were the ones who would benefit from the relief sought and they, not the state, were "the real parties in interest." *Id.* at 59-60. The Court rejected the idea that a state's "governmental interest in the welfare of all its citizens" made it a real party in

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[17] In *U.S. Fidelity & Guaranty Co. v. United States*, 204 U.S. 349 (1907), the Court reaffirmed that the real party in interest is "the party for whose benefit the recovery is sought" and evaluated the facts of the case to find that, based on "exceptional grounds," the United States was "a" real party in interest. *Id.* at 356-57. There, the United States sued on behalf of a subcontractor under its statutory authority to enforce a bond required of its contractor to ensure prompt payment for labor and materials. *Id.* at 357. The Court recognized the United States' unique and important interest in the suit: it "was a principal party to the contract," and the government has an interest in seeing that subcontractors for public works are timely paid so that its "contractors for such works are able to obtain materials and supplies with certainty and promptly" for future projects. *Id.* at 356.

interest for purposes of diversity jurisdiction, noting that "if that were so the state would be a party in interest in all litigation." *Id.* at 60.

The rule of *Hickman*[18] required the Fourth Circuit to ask who would receive the relief the State requested. Had it done so, it would have recognized that any restitution obtained would belong to the South Carolina citizens alone[19] and that their citizenship satisfies CAFA's minimal diversity requirement. But the Fourth Circuit followed the Ninth Circuit's "whole case" approach rather than *Hickman*.

The Fourth Circuit's opinion acknowledged its conflict with *Hickman*. It admitted that Petitioners found "arguable support for their proposition concerning the interests of individual South Carolina citizens" in *Hickman* but did not explain how its ruling can be reconciled with *Hickman's* principle.

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[18] In *Ex Parte Nebraska*, 209 U.S. 436 (1908), this Court applied the rule of *Hickman* to conclude that the state, although a named plaintiff, was not a real party in interest and, thus, did not destroy complete diversity. The Court remarked that the real-party-in-interest determination must be made based on "the whole record." *Id.* at 445. But it did not rule that any real party in interest could be ignored, and it did not use a "whole case" approach like that of the Fourth Circuit below. *Ex Parte Nebraska* involved only one claim and the application of the complete diversity requirement where the presence of the State as a real party would destroy jurisdiction. The Court did not suggest, as the Fourth Circuit apparently concluded, that there could be only one real party in interest, particularly in a case involving a minimal diversity standard and multiple claims for relief.

[19] *See supra* pp. 8-9.

App. 12a. The Ninth Circuit's *Bank of America* opinion ignored *Hickman* altogether,[20] even though the Ninth Circuit had relied extensively and primarily on *Hickman* in *Department of Fair Employment and Housing v. Lucent Technologies, Inc.*, 642 F.3d 728, 737-39 (9th Cir. 2011) ("*Lucent*"), to reject a key rationale of

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[20] Other courts have struggled to distinguish *Hickman* or have ignored it altogether, as did the Seventh Circuit in *Madigan* and the Ninth Circuit in *Bank of America*. For example, *Wisconsin v. Abbott Labs*, 341 F. Supp. 2d 1057, 1063 (W.D. Wis. 2004), used the "whole case" approach, reasoning that although *Hickman* seems to say that a state is not a real party in interest when seeking restitution for private parties, "lower courts have not strictly construed the language in [*Hickman*], but instead have focused on the state's interest, monetary or otherwise, in the context of the entire case." Likewise, *West Virginia v. Morgan Stanley & Co.*, 747 F. Supp. 332, 338 (S.D. W. Va. 1990), stated that while *Hickman* suggests "the state is the real party in interest for diversity purposes only when the relief sought inures to the benefit of the state alone[,] . . . subsequent cases have not been so limiting." But the court in *Morgan Stanley* cited no decision of this Court, or even of a court of appeals, as support for its conclusion that *Hickman* has been limited. In contrast, the Sixth Circuit in *Geeslin v. Merriman*, 527 F.2d 452, 454-56 (6th Cir. 1975), faithfully applied *Hickman* in determining that a state was not a real party in interest to an action brought by a state officer, noting that *Hickman*'s principles "have never been overruled." 527 F.2d at 455. Similarly, the Third Circuit in *Ramada Inns, Inc. v. Rosemount Memorial Park Ass'n*, 598 F.2d 1303, 1308 (3d Cir. 1979), applied *Hickman* in rejecting claims that a state's general governmental interests were sufficient to make it a real party in interest.

many decisions applying the "whole case approach"[21] and sustain diversity jurisdiction based on the citizenship of an employee who did not bring the action and was not named in the complaint.

The Fourth Circuit's opinion also violates the jurisdictional principle that this Court articulated in *Navarro*, *i.e.*, that diversity jurisdiction must be based on the citizenship of the real parties in interest. *Navarro* addressed whether complete diversity in a suit brought by the trustees of a Massachusetts business trust should be determined based on the citizenship of the trustees or the citizenship of the trust's shareholders. This Court concluded that jurisdiction must be determined based on the citizenship of the trustees who would receive and hold "legal title" to any recovery. 446 U.S. at 465. The Court based its decision on the principle that "a federal court must . . . rest jurisdiction only upon the citizenship of real parties to the controversy." *Id.* at 461.

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[21] Many decisions applying the "whole case" approach have declared that a state's standing to bring a claim is sufficient to make it "the" real party in interest for jurisdictional purposes. *See, e.g.*, *Illinois v. AU Optronics Corp.*, 794 F. Supp. 2d 845, 853 (N.D. Ill. 2011) (concluding that the state was the real party in interest based on its quasi-sovereign interest), *leave to appeal denied*, 665 F.3d 768 (7th Cir. 2011); *Illinois v. SDS West Corp.*, 640 F. Supp. 2d 1047, 1052-53 (C.D. Ill. 2009) (same). But in *Lucent*, the Ninth Circuit concluded that *Hickman* is inconsistent with that reasoning. It declared that, under *Hickman*, "a state can possess standing to bring forth a claim, but lack status as a real party in the controversy for the purposes of diversity jurisdiction." 642 F.3d at 738 n.5. "Any district courts that have held to the contrary," the Ninth Circuit explained, "are incorrect." *Id.*

This principle is well established,[22] and there is no suggestion that Congress intended CAFA to alter it. *See Hall v. United States*, 132 S. Ct. 1882, 1889 (2012) ("'We assume that Congress is aware of existing law when it passes legislation.'" (citation omitted)); *United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents."). Nevertheless, both the Fourth and Ninth Circuits applied CAFA's minimal diversity requirement in conflict with *Navarro*. Under *Navarro*, each circuit should have recognized that any person who would receive restitution is a real party in interest to the restitution claim and, therefore, a basis for satisfying CAFA's minimal diversity requirement. Neither circuit, however, was willing to consider the real parties in interest to the restitution claims involved in its respective case. Instead, in conflict with *Navarro*, both pursued a "whole case" approach in a way that caused them to ignore, for all practical purposes, the persons of diverse citizenship who were or are real parties in interest to the restitution sought. Neither court

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[22] *See also Caldwell*, 536 F.3d at 424 ("It is well-established that in determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels that the parties may attach."); *Koehler v. Dodwell*, 152 F.3d 304, 308 n.4 (4th Cir. 1998) (observing that the citizenship of a unnamed real party in interest is relevant to the question of diversity jurisdiction); *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 445-46 (E.D. Pa. 2010) ("*Comcast*") (observing that in the context of CAFA, real parties in interest should be considered plaintiffs for jurisdictional purposes); *Hood v. Hoffman-LaRoche, Ltd.*, 639 F. Supp. 2d 25, 29 (D.D.C. 2009) ("[T]his Court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." (internal quotation marks omitted)).

acknowledged that the "whole case" approach it used was developed to test complete diversity rather than CAFA's minimal diversity. Neither court even tried to explain why it believed that *Navarro* allowed it to ignore some of the real parties in interest or how its ruling otherwise complied with *Navarro's* requirement that jurisdiction must be based on "the real parties in interest."

Even if there were no circuit conflict, the conflict between the Fourth Circuit's opinion and the principles the Court established in *Hickman* and *Navarro* would merit this Court's review.

3. This is a recurring issue.

The proper application of CAFA's minimal diversity requirement in this context is a recurring issue. Lawsuits, like the Actions, where state attorneys general team with private counsel to pursue monetary claims of large numbers of people are increasingly common.[23] They are sometimes

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[23] *See, e.g., Bank of America*, 672 F.3d at 670 (claims of "hundreds of thousands of homeowners"); *Caldwell*, 536 F.3d at 422-23 (claims of policyholders of six insurance companies); *Comcast*, 705 F. Supp. 2d at 443, 444, 450 (claims of 89,000 cable television subscribers); *West Virginia ex rel. McGraw v. CVS Pharm.*, 748 F. Supp. 2d 580, 589-90 (S.D. W. Va. 2010) (claims of consumers against six defendants for excess charges paid for generic drugs); *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); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d 758, 761-62 (S.D. Miss. 2012) (claims of purchasers of products containing LCD panels), *rev'd*, 701 F.3d 796 (5th Cir. 2012); First Amended Complaint, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. MDL 07-1827, *Oregon v. AU*

referred to as *parens patriae* actions.[24] Their use is predicted to grow in the future.[25] This type of lawsuit allows private counsel and/or a state attorney general to bring a class action without having to satisfy the class action requirements in the

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Optronics, Individual Case, No. 3:10-cv-04346-SI (N.D. Cal. May 26, 2011) (claims of purchasers of products containing LCD panels). *See also* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 493, 498, 524 (2012) ("[S]tate attorneys general can and do engage in litigation that bears a striking resemblance to the much-maligned damages class action. . . . [A]ttorneys general sometimes hire private counsel to litigate state cases on a contingency basis."); 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."); Donald G. Clifford, *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 . . . .").

[24] "*Parens patriae*" is a standing concept. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 594, 600 (1982). Sometimes it refers to standing conferred by a statute that allows a state to pursue claims of citizens on their behalf. Other times it refers to common law *parens patriae* standing where a state may pursue a quasi-sovereign interest. *See Pennsylvania v. Mid-Atlantic Toyota Distribs., Inc.*, 704 F.2d 125, 129-30 and n.8 (4th Cir. 1983). *See also supra* note 21.

[25] 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").

Federal Rules or any comparable requirement of state law.[26] There is "no easy way to identify the universe of relevant cases" because "they almost always settle,"[27] but media reports reveal a constant and significant stream of these cases.[28]

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[26] Lemos, *supra* note 23, at 487 (observing that these actions bear "a striking resemblance to [a] . . . class action. Yet while private class actions are subject to a raft of procedural rules . . . , equivalent suits in the public sphere are largely free from constraint."); Giles & Friedman, *supra* note 25, at 668 ("[S]tate AGs can use parens patriae to get at many or most of the cases that would otherwise be the subject of class actions, and they can do so unconstrained by class action waivers and, at least for now, the other, lesser challenges that afflict class actions.").

[27] Lemos, *supra* note 23, at 498.

[28] *See, e.g.*, Press Release, Arizona Attorney General, AG Horne Obtains 10 Million Dollar Consumer Fraud Judgment Against Arizona Telemarketers (Dec. 12, 2012), *available at* https://www.azag.gov/press-release/ag-horne-obtains-10-million-dollar-consumer-fraud-judgement-against-arizona (announcing a judgment against defendants accused of "fraudulently telemarketing work-at-home business opportunities to consumers nationwide"); Press Release, Washington State Office of the Attorney General, States Throw the Book at Publishers Over e-Book Price-Fixing (August 29, 2012), *available at* http://www.atg.wa.gov/pressrelease.aspx?&id=30598 (reporting that publishers Hachette, HarperCollins and Simon & Schuster have agreed to pay consumers over $69 million to settle price fixing claims brought by the attorney generals for various states); Press Release, State of California Office of the Attorney General, Attorney General Kamala D. Harris Announces $40 Million Nationwide Settlement with Makers of Athletic "Toning" Shoes (May 16, 2012), *available at* http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-40-million-nationwide-settlement (discussing a settlement reached with the shoemaker Sketchers for false advertising claims); Press Release, Illinois Attorney

Defendants faced with these cases in state court typically rely on CAFA mass action jurisdiction to remove them to federal court. Each removal requires the application of CAFA's minimal diversity requirement. As a result, district courts have repeatedly faced the issue presented here.[29]

Now that the Fourth and Ninth Circuits have allowed plaintiff's counsel to use this type of action to avoid the federal jurisdiction Congress provided in CAFA, more of them will almost certainly use the strategy and bring lawsuits presenting the issue.

General, Attorney General Madigan Announces $25 Million Settlement For Vitamin Price Fixing Conspiracy (Dec. 2, 2009), *available at* http://illinoisattorneygeneral.gov/pressroom/2009_12/20091202.html (describing a nationwide settlement secured in conjunction with a private class action); Press Release, Attorney General of Texas, Attorney General Abbott Reaches $21 Million Settlement Benefitting Victims of Predatory Mortgage Lending (July 12, 2007), *available at* https://www.oag.state.tx.us/oagnews/release.php?id=2093 (describing funds secured for Texas consumers as a part of a $325 million nationwide settlement of predatory lending claims).

[29] *See, e.g.*, *Entergy*, 2012 WL 3704935, at *9 (minimal diversity found); *Hood*, 876 F. Supp. 2d at 769 (minimal diversity found), *rev'd on other grounds and remanded*, 701 F.3d 796 (5th Cir. 2012); *Bank of Am. Corp.*, 2011 WL 2633641, at *5 (minimal diversity found); *Illinois v. AU Optronics Corp.*, 794 F. Supp. 2d at 854-56 (minimal diversity absent), *petition for appeal denied*, 665 F.3d 768 (7th Cir. 2011); *Comcast*, 705 F. Supp. 2d at 447-50 (minimal diversity found).

4. This is an important issue that requires this Court's review.

This Court's review of the Fourth Circuit's ruling is necessary to ensure that this strategy does not undermine CAFA. Congress enacted CAFA to make diversity jurisdiction available to more class and mass actions. CAFA's minimal diversity requirement is a key component of this increased availability. Unless federal courts apply CAFA's minimal diversity requirement to mass actions consistently with CAFA's text, CAFA will not achieve its purpose.

CAFA's text states that Congress enacted CAFA to make federal diversity jurisdiction available "for interstate cases of national importance" in order to correct "abuses of the class action device." CAFA Findings and Purposes (b)(2) & (a)(2). Among those abuses were "State and local courts" "keeping cases of national importance out of Federal court," "sometimes acting in ways that demonstrate bias against out-of-State defendants," and "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." *Id.* at (a)(4). Congress sought to remedy abuses like this by allowing defendants to remove these cases under CAFA. *See Smith v. Bayer*, 131 S. Ct. 2368, 2382 (2011).

Before CAFA, the complete diversity requirement restricted many class and mass actions to state court. No class representative could be a citizen of the same state of any defendant. *See Carden*, 494 U.S. at 199-200. Because a state is not

a citizen for diversity purposes, there was no diversity jurisdiction for any class or mass action where a state was a class representative or brought claims on behalf of itself and others. *Moor*, 411 U.S. at 717 ("There is no question that a State is not a 'citizen' for purposes of the diversity jurisdiction."). Thus, class and mass actions brought by a state on behalf of others were confined to state court.

CAFA's minimal diversity requirement, § 1332(d)(2), made the federal courts more available to class and mass actions. Diverse citizenship of "any member of a class [or mass] of plaintiffs" is sufficient. And "named" and "unnamed" persons are included within the term "class members." § 1332(d)(1)(D). Thus, the diversity requirement is satisfied whenever any "member of a class of plaintiffs" "is a citizen of a State different from any defendant." In a mass action, the requirement is satisfied whenever any one of the "100 or more persons" whose claims are asserted "is a citizen of a State different from any defendant."[30] It makes no difference that a State might also be a plaintiff. And the diverse citizen need not actually be a named plaintiff.

The Fourth Circuit's ruling otherwise ignores CAFA's text and frustrates CAFA's purpose. Even though CAFA provides that "unnamed" persons can establish diversity, the Fourth Circuit refused to recognize the diverse citizenship of the persons whose restitution claims are asserted in the Actions because, in its words, "[t]hose citizens are not named plaintiffs." App. 20a. Without referring to anything

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[30] See *supra* pp. 5-6.

in CAFA that permitted it to ignore the citizenship of real parties in interest, the Fourth Circuit did just that. It based its determination on its own assessment of "the nature and effect of the proceeding." *Id.* It did not comply with CAFA's text and look to see if any of "the persons" whose claims constitute the mass action is "a citizen of a State different from any defendant." § 1332(d)(2)(A).

By refusing to allow the citizenship of "unnamed" persons to establish diversity, the Fourth and Ninth Circuits have provided a way around CAFA's minimal diversity provision. In those circuits, a state attorney general, either alone or together with private counsel, can now bring the claims of many persons in a single action that is essentially a class action with as much or more potential for abuse as a class action,[31] yet prevent removal under CAFA.

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[31] *See* Lemos, *supra* note 23, at 499-500 ("[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."); *id.* at 511-30 (demonstrating that *parens patriae* suits present "many of the same perils as damages class actions," including problems with conflicts of interest, lack of client monitoring and control, and "premature and inadequate" settlements); Lemann, *supra* note 23, at 132-33 ("Parens patriae suits therefore bear an inherent resemblance to class actions."); Peter E. Halle, 6 Bus. & Com. Litig. Fed. Cts. § 67:45 (3d ed. 2012) ("Many of the state-law *parens patriae* antitrust cases are brought to obtain restitution based on the alleged losses of individual citizens within the state, and are little different from private class actions or mass actions that could have been brought by the individuals.").

Congress was aware of this strategy when it enacted CAFA. It rejected a proposed amendment that would have exempted actions by state attorneys general from removal. Senator Hatch opposed the exemption. He feared that "it [would] create a loophole that . . . 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." *Caldwell*, 536 F.3d at 424 (quoting 151 Cong. Rec. S1157, 1163-64 (daily ed. Feb. 9, 2005)). The Fifth Circuit noted this history in *Caldwell*. *Id.* There, it appeared that private counsel had teamed with the state in an effort to bring what was essentially a class action in state court without being removed under CAFA. The private counsel representing the state in *Caldwell* had previously "filed, or attempted to file" "similar purported class actions . . . before the same federal district court" asserting "nearly identical claims as those alleged" by the state. *Id.* at 423. The Fifth Circuit prevented the loophole that Senator Hatch had feared by following CAFA's text and affirming mass action jurisdiction based on the diverse citizenship of the unnamed real parties in interest.[32]

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[32] *See* Jacob Durling, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, 83 U. Colo. L. Rev. 549, 569-70 (2012) ("Given the potential for abuse unmasked in *Caldwell*, it appears that the Fifth Circuit adhered to CAFA's framers' intent when it exposed Louisiana's parens patriae suit as a mass action in disguise.").

Allowing the Fourth Circuit's contrary ruling to stand will permit the loophole. The Fourth Circuit's interpretation of CAFA's minimal diversity provisions leaves plaintiff's counsel free to keep actions in state court, in spite of CAFA, by persuading a state to lend its name. State attorneys general, acting either alone or through private plaintiff's counsel, will be able to prevent CAFA mass action jurisdiction over cases that, like the Actions here, assert claims of large numbers of persons against international defendants and seek to apply a state's laws to conduct occurring in other nations and states.[33] Congress enacted CAFA to provide a federal forum for this type of action. Congress stated that it intended CAFA to prevent state courts from "keeping cases of national importance out of Federal court," "sometimes acting in ways that demonstrate bias against out-of-State defendants," and "impos[ing] their view of the law on other States and bind[ing] the rights of residents of those States." CAFA Findings and Purposes (a)(4). Congress's concerns are equally applicable to cases of international importance where a state might seek to impose its laws in other nations. This Court's attention is necessary to ensure that CAFA's minimal diversity requirement is applied according to its text and that federal jurisdiction is indeed made more freely available under CAFA as Congress intended.

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[33] *See supra* pp. 7-8.

CONCLUSION

The petition should be granted.

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
(864) 242-8200
hparr@wyche.com

Stephen B. Kinnaird
Lee F. Berger
Sean D. Unger
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005
(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
(864) 370-2211

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

Counsel for Petitioners
AU Optronics Corporation and
AU Optronics Corporation America