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No. 12-

IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
Petitioner,

v.

AU OPTRONICS CORP., ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state's *parens patriae* action is removable as a "mass action" under the Class Action Fairness Act when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common-law authority to assert all claims in the complaint.

PARTIES AND RULE 29.6 STATEMENT

In addition to the parties listed in the caption, Respondents include AU Optronics Corporation America, Incorporated; Chi Mei Corporation; Chimei Innolux Corporation, formerly known as Chi Mei Optoelectronics Corporation; Chi Mei Optoelectronics USA, Incorporated, formerly known as International Display Technology USA, Incorporated; CMO Japan Company, Limited, formerly known as International Display Technology, Limited; Hannstar Display Corporation; Hitachi, Limited; Japan Display East, Incorporated; Hitachi Electronic Devices (USA); LG Display Company, Limited, formerly known as LG Phillips LCD Company, Limited; LG Display America, Incorporated, formerly known as LGD LCD America, Incorporated; Samsung Electronics Company LTD; Samsung Semiconductor, Incorporated; Samsung Electronics America, Incorporated; Sharp Corporation; Sharp Electronics Corporation; Toshiba Corporation; Toshiba Mobile Display Company, Limited, formerly known as Toshiba Matsushita Display Technology Company, Limited; Toshiba America Electronic Components, Incorporated; Toshiba America Information Systems, Incorporated; and Chunghwa Picture Tubes Ltd.

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PETITION FOR WRIT OF CERTIORARI

Petitioner State of Mississippi, ex rel. Jim Hood, Attorney General, respectfully petitions for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 701 F.3d 796. *See also* Pet. App. at 1a–22a. The decision of the U.S. District Court for the Southern District of Mississippi is reported at 876 F. Supp. 2d 758. *See also* Pet. App. at 23a–60a.

JURISDICTION

The Fifth Circuit issued its decision on November 21, 2012, *id.* at 1a, and issued its Judgment and Mandate on the same date, *id.* at 62a.[1] This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, provides in part:

> **(d)**
>
> **(1)** In this subsection—
>
> **(A)** the term "class" means all of the class members in a class action;

---

[1] The Fifth Circuit issued an order denying rehearing on February 4, 2013. Pet. App. at 63a–65a. This petition is timely without regard to the rehearing petition.

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as 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 civil action within the scope of section 1711 (2)) 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).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

. . .

(III) all of the claims in the action are asserted on behalf of the general public (and not on

> behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or
>
> . . .
>
> **(C)**
>
> **(i)** Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

28 U.S.C. §1332.

Relevant provisions of the Mississippi Antitrust Act, Miss. Code Ann. § 75-21-1 *et seq.*, and the Mississippi Consumer Protection Act, *id.* § 75-24-1 *et seq.*, are set forth in the Appendix.

STATEMENT OF THE CASE

In 2008, the Fifth Circuit became the first court of appeals to address the question of whether a state's *parens patriae* lawsuit is removable to federal court as a "mass action" under CAFA.[2] *See*

[2] A CAFA mass action is defined as a civil action in which the monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact. 28 U.S.C. § 1332(d)(11)(B)(i). A mass action meeting this definition is deemed a class action for purposes of CAFA removal. *Id.* § 1332(d)(11)(A).

Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418 (5th Cir. 2008). The court answered the question in the affirmative.

Since then, three circuits have addressed exactly the same question, and each has reached the *opposite* conclusion:

- *AU Optronics Corp. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012), *petition for cert. filed*, No. 12-911 (Jan. 23, 2013);
- *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); and
- *Nevada v. Bank of America Corp.*, 672 F.3d 661 (9th Cir. 2011).

In the decision below, the Fifth Circuit reaffirmed its dissonant position. *See* Pet. App. at 4a–5a.

This circuit conflict has led to inconsistent jurisdictional outcomes. Indeed, this circuit conflict is so profound that cases involving the *same claims*, arising out of the *same conduct* by the very *same Defendants* have been remanded to state court in the Fourth, Seventh, and Ninth Circuits, but retained in federal court in the Fifth Circuit.[3] The Fourth, Seventh, and Ninth Circuits found no federal jurisdiction; the Fifth Circuit found federal jurisdiction as a CAFA mass action. Absent review by this Court, federal jurisdiction over state *parens patriae* lawsuits will continue to depend entirely on

[3] Compare the decision below with *South Carolina*, 699 F.3d at 392; *Madigan*, 665 F.3d at 773; and *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848-49 (9th Cir. 2011).

the location of the federal court to which the suit is removed.

Review is also amply warranted because the Fifth Circuit's judgment runs counter to elementary principles of federalism and state sovereignty and conflicts with this Court's precedent regarding the nature of *parens patriae* actions, the "real party in interest" test, and the narrow construction of removal statutes. The Fifth Circuit's decision prevents state attorneys general from bringing *parens patriae* suits in state court, even when the state is the sole plaintiff, the claims arise under state law, and the state attorney general has statutory and common-law authority to assert the claims. Nothing in CAFA supports such an invasion into state sovereign prerogatives.

The same question presented is currently pending before this Court in the certiorari petition in *AU Optronics Corp. v. South Carolina*, No. 12-911. In that case, petitioners AU Optronics Corporation, AU Optronics Corporation America, LG Display Co., Ltd., and LG Display America, Inc.—all of which are respondents here and were Defendants in the courts below in this case—urge this Court to grant certiorari over essentially the same question presented, on the basis that there is a clear and substantial circuit split regarding the interpretation of CAFA with respect to *parens patriae* actions.

Mississippi submits that the instant petition is a better vehicle for deciding this question. While the Fifth Circuit's approach has been disavowed by every other court of appeals to consider the question, in the decision below, the Fifth Circuit reaffirmed its precedent and its conflict with three other circuits. The decision in this case contains a full explication of

the Fifth Circuit's views, and all relevant dimensions of the question are squarely before this Court.

This Court's review is warranted.

I. Background

On March 25, 2011, Mississippi commenced this action in state court, alleging that Defendants had engaged in price fixing of liquid crystal display (LCD) panels. Pet. App. at 24a. The lawsuit was brought in the name of the State, asserting claims under the Mississippi Antitrust Act (MAA) and the Mississippi Consumer Protection Act (MCPA).

As remedies, the complaint sought: (1) a permanent injunction prohibiting the Defendants from continuing to engage in anti-competitive behavior; (2) civil penalties of up to $10,000 per violation under the MCPA; (3) civil penalties of up to $2,000 per month, per Defendant under the MAA; (4) restitution to the State for its own losses caused by purchasing LCD panel products during the relevant time period; (5) restitution to the State on behalf of its citizens and local governments who suffered losses by purchasing LCD panel products during the relevant period; (6) punitive damages; and (7) other relief, including costs, pre- and post-judgment interest, and attorney's fees. *Id.* at 25a–26a.

Mississippi's lawsuit is one of thirteen *parens patriae* lawsuits against most of these same Defendants brought by the Attorneys General of Arkansas, California, Florida, Illinois, Michigan, Missouri, New York, Oregon, South Carolina, Washington, West

Virginia, and Wisconsin.[4] Some of these cases alleged both state and federal claims and were commenced in federal court.[5] A consolidated multi-district litigation (MDL) is pending in the Northern District of California and includes some of these attorney general actions as well as various private indirect purchaser class actions (including a Mississippi indirect purchaser class).[6] *See In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827 (N.D. Cal. filed Apr. 20, 2007).

Five of the thirteen state attorneys general—from California, Illinois, Mississippi, South Carolina, and Washington—commenced their actions in their state courts asserting only state law claims. Defendants removed each of these actions to federal

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[4] *Missouri ex rel. Koster, Arkansas ex rel. McDaniel, Michigan ex rel. Cox, West Virginia ex rel. McGraw, Wisconsin ex rel. Van Hollen v. AU Optronics Corp.*, No. 3:10-cv-3619 (N.D. Cal.); *Florida v. AU Optronics Corp.*, No. 3:10-cv-03517 (N.D. Cal.); *New York v. AU Optronics Corp.*, No. 3:11-cv-711 (N.D. Cal.); *Oregon ex rel. Rosenblum v. AU Optronics Corp.*, No. 3:07-md-1827 (N.D. Cal); *South Carolina v. AU Optronics Corp.*, No. 3:11-cv-00731-JFA (D.S.C.); *California v. AU Optronics Corp.*, No. CGC-10-504651 (San Francisco Super. Ct.); *Illinois v. AU Optronics Corp.*, No. 10 CH 34472 (Cir. Ct. of Cook County); *Washington v. AU Optronics Corp.*, No. 10-2-29164-4 (King County Dist. Ct.).

[5] *See* Compl. for Damages, Civil Penalties, Injunctive and Other Relief (Dkt. 1), *Missouri ex rel. Koster v. AU Optronics Corp.*, No. 3:10-cv-03619 (N.D. Cal. filed Aug. 17, 2010).

[6] The indirect purchaser class action pending in the MDL, including the case on behalf of Mississippi consumers, has settled. The MDL Court's preliminary approval order indicated that the settlement would release all claims brought by the individual claimants but would not foreclose *parens patriae* claims being asserted by non-settling state attorneys general. *See In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827 (N.D. Cal.) (Dkt. 4688).

court based upon CAFA jurisdiction. In all five cases, the district court remanded the case to state court, finding CAFA jurisdiction lacking. *See* Pet. App. at 15a n.3. In each case, *except for this one*, the circuit court upheld the district court's remand, agreeing that CAFA jurisdiction was lacking.[7]

II. The District Court's Decision

On June 9, 2011, Defendants removed this case on the grounds that it was either a "class action" or a "mass action" under CAFA. *Id.* at 26a. The district court granted the State's motion to remand, finding that Mississippi had filed the action to "protect the State's 'quasi-sovereign interest' in its economy and its citizens' economic well being." *Id.* at 24a. The district court found that "[w]ith this and other language, the Attorney General invoked his authority to file suit as *parens patriae* on behalf of the State and its citizens." *Id.*

First, the district court found that this action was not a class action within the meaning of CAFA. *Id.* at 40a–44a. Second, the district court found that, under the binding Fifth Circuit precedent of *Caldwell*, the Attorney General's lawsuit constituted a "mass action" under CAFA. *Id.* at 44a. *Caldwell* mandates a "claim-by-claim" analysis to determine CAFA jurisdiction, instructing that courts must isolate each claim for relief in a *parens patriae* lawsuit to count up the number of consumers who may benefit from that claim. If it appears there may be more than 100 such beneficiaries, the lawsuit is a "mass action" within the meaning of CAFA. *See* 536 F.3d at 429–30.

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[7] *See* cases cited *supra* note 3.

Despite its conclusion that the case qualified as a "mass action" under *Caldwell*, the district court nevertheless remanded the case because it found that all of the claims had been asserted "on behalf of the general public (and not on behalf of individual claimants or members of a purported class)" and, therefore, fell into the "general public exception" to CAFA mass action jurisdiction. Pet. App. at 48a–52a. The district court cited substantial scholarly commentary supporting the view that CAFA does not apply to *parens patriae* actions by state attorneys general. *See id.* at 47a.

III. The Court of Appeals' Decision

The Fifth Circuit reversed the district court's remand order. As a preliminary matter, citing the binding precedent of *Caldwell*, the Fifth Circuit agreed with the district court's conclusion that Mississippi's lawsuit was a mass action within the meaning of CAFA. *Id.* at 4a–5a. Applying the claim-by-claim approach mandated by *Caldwell*, the Court of Appeals opined that "the real parties in interest include not only the State, but also individual consumers residing in Mississippi." *Id.* at 6a.

However, the Court of Appeals reversed the district court's ruling that the general public exception was applicable. The Fifth Circuit acknowledged that its decision, finding the exception inapplicable, "may render such statutory exception a dead letter." *Id.* at 9a. As a result, the Court indicated that it "welcome[d] congressional clarification of this issue." *Id.* at 10a.

Judge Elrod, concurring in the judgment, wrote separately to urge reconsideration of the *Caldwell* decision: "*Caldwell*'s claim-by-claim

approach is problematic when applied to CAFA's 'mass action' provision in *parens patriae* suits such as the instant case." *Id.* at 12a. While acknowledging that the majority opinion in this case was "a fair application" of Fifth Circuit binding precedent, the concurrence nonetheless recognized that "every court of appeals to address the issue since *Caldwell* has rejected [the Fifth Circuit's] approach." *Id.* at 12a, 16a (citing *South Carolina*, 699 F.3d at 393-94; *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670 (9th Cir. 2012); *Madigan*, 665 F.3d at 773-74).

Specifically, Judge Elrod noted:

> Here, as the majority opinion shows, applying the claim-by-claim approach leads to the conclusion that Mississippi consumers are the real parties in interest with respect to the state's restitution claim, so this is a "mass action" under CAFA. This result is the exact opposite of the outcome in many other similar lawsuits around the country. That so many other courts are reaching a different result in cases that involve similarly-situated litigants and nearly identical claims suggests that we should consider whether we have staked out the correct position. I believe we have not.

Pet. App. at 14a–15a (footnotes omitted).

The concurrence also pointed to the lack of statutory support for the claim-by-claim approach and its consequential nullification of the general public exception. First, "the claim-by-claim approach does not find a foothold in CAFA's text." *Id.* at 17a. Indeed, nothing in the text "suggest[s] that, in a case in which a single plaintiff brings suit,

a court should dissect the complaint to determine whether that plaintiff is the sole beneficiary of each basis for relief." *Id.* "Compounding the absence of textual support for the claim-by-claim approach is the Supreme Court's directive that removal statutes should be 'strictly construed.'" *Id.* at 18a (quoting *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002)). Further, Judge Elrod observed that "just as troubling, applying *Caldwell's* reasoning to CAFA's general public exception may render the exception a dead letter in this circuit. We should reconsider *Caldwell* and correct our course in this area of the law." *Id.* at 12a.

Mississippi filed a petition for rehearing en banc, which was denied on February 4, 2013. *Id.* at 64a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's judgment warrants plenary review by this Court. First, it is beyond reasonable dispute that the Fifth Circuit's decision directly conflicts with the decisions of the Fourth, Seventh, and Ninth Circuits. The Fifth Circuit's judgment also conflicts with this Court's precedent regarding the nature of *parens patriae* actions, the real party in interest test, and the requirement that removal statutes such as CAFA be strictly construed. The decision below involves an important and recurring issue of federal law and runs counter to deeply-rooted principles of federalism. The Fifth Circuit's decision will result in additional, wasteful jurisdictional battles and administrative

complexity.[8] Review by this Court is amply warranted.

I. The Fifth Circuit's Judgment Conflicts with Decisions in Other Circuits.

The Fifth Circuit's conclusion that *parens patriae* actions brought by state attorneys general are removable under CAFA as mass actions is at odds with every other circuit court that has addressed the issue, as acknowledged by the concurrence in the Fifth Circuit's decision below. *Id.* at 16a–17a.

The circuit conflict regarding the removability of *parens patriae* actions under CAFA is unusually concrete and well suited to this Court's review. The conflict is not abstract. Several of the cases involve *the very same LCD lawsuits* against the *very same Defendants.* Accordingly, the circuit conflict has produced *different* results in the *same litigation.* As the concurring opinion in the court below explained, the outcome here is the "exact opposite" of the outcome of all other LCD price-fixing *parens patriae* cases proceeding in various state courts against these very same Defendants. *Id.* at 14a, 15a & n.3.

The circuit split is intolerable as a matter of federalism. Whether a state, through its attorney general, may assert a *parens patriae* action in state court should not depend on where that state is

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[8] Indeed, the circuit split on whether *parens patriae* suits are removable as mass actions under CAFA has initiated two petitions for a writ of certiorari in the past month alone: *AU Optronics Corp. v. South Carolina* and the instant petition. These petitions further demonstrate that the split is deep and mature, and will not be resolved absent plenary review by this Court.

located. Nor should the interpretation of the CAFA removal provision be circuit-dependent. A uniform, nationwide rule affirming the authority of state attorneys general to bring *parens patriae* actions in state court is appropriate.

Further, the instant case presents the best vehicle for resolving the circuit split. The Fifth Circuit has taken a solitary approach in applying the CAFA removal statute to *parens patriae* actions. Its approach has been rejected by every subsequent court of appeals to consider the question. And, based upon its judgment below, it is clear that *Caldwell*'s claim-by-claim approach will continue to be applied in the Fifth Circuit to *parens patriae* claims. The opinion in this case contains a full explication of the Fifth Circuit's views, so all relevant dimensions of the question are squarely before this Court. The issue is cleanly presented by the instant case and ripe for this Court's consideration.

A. Seventh Circuit

The Seventh Circuit was the first circuit to reject *Caldwell*'s holding that a *parens patriae* lawsuit is a mass action within the meaning of CAFA. In *LG Display Co. v. Madigan*, the Illinois attorney general brought a *parens patriae* lawsuit against some of the same Defendants being sued by Mississippi in this case, based upon violations of the Illinois Antitrust Act. 665 F.3d at 773. Defendants removed Illinois's lawsuit to federal court under CAFA.

Defendants urged the Seventh Circuit to follow *Caldwell*'s holding and separately determine the real parties in interest in each of Illinois's claims in order to find out "what's *really* going on in this

suit." *Id.* at 772 (emphasis in original). Defendants conceded that there was only one plaintiff and also that Illinois was the real party in interest for the enforcement-related claims. They nevertheless claimed that the 100 or more residents of Illinois on whose behalf the Illinois attorney general was seeking restitution were the real parties in interest for that claim. *Id.* at 772-73.

The Seventh Circuit discussed *Caldwell* at length and concluded that the district court was correct in rejecting *Caldwell's* claim-by-claim approach. *Id.* at 773 ("The district court was in good company; claim-by-claim analysis has been questioned by a number of courts." (citations omitted)). The Seventh Circuit noted that the Fifth Circuit did not adopt its approach "based on any language in CAFA itself, nor is there any language to be found." *Id.* The Seventh Circuit also rejected the Fifth Circuit's attempt to "rationalize[ ] its claim-by-claim approach as consistent with Congress' intent." *Id.* Looking at the complaint as a whole, the court held that Illinois's *parens patriae* suit was not a mass action under CAFA.

The Seventh Circuit's holding—that CAFA jurisdiction was lacking over the *parens patriae* lawsuit—is directly contrary to the Fifth Circuit's decision with respect to the very same Defendants in this case.

B. Ninth Circuit

In *Nevada v. Bank of America*, the Ninth Circuit expressly considered the Fifth Circuit's claim-by-claim approach and rejected it. 672 F.3d at 669. In that case, the Nevada attorney general filed a *parens patriae* lawsuit against Bank of America,

alleging the bank misled Nevada consumers in mortgage transactions. The defendants removed the action to federal court under CAFA.

The Ninth Circuit rejected defendants' argument that the case was removable as a mass action. The court noted that the two circuits that had already addressed the issue had "reached conflicting results." *Id.* at 668. In declining to follow *Caldwell's* claim-by-claim approach, the Ninth Circuit instead examined "'the essential nature and effect of the proceedings as it appears from the entire record.'" *Id.* at 670. The court found that Nevada's status as the real party in interest was "not diminished merely because it has tacked on a claim for restitution." *Id.* at 671. Instead, the court concluded that the "Complaint, read as a whole, demonstrates that Nevada is the real party in interest in this action, . . . so the action falls 99 persons short of a 'mass action.'" *Id.* at 672.[9]

The Ninth Circuit's decision in *Bank of America* is flatly contrary to the decision in this case.

C. Fourth Circuit

In October 2012, the Fourth Circuit joined the Seventh and Ninth Circuits in rejecting the Fifth Circuit's claim-by-claim approach. The context was another *parens patriae* action against some of the same Defendants involved in this case. *AU*

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[9] The Ninth Circuit had already addressed whether a *parens patriae* action brought by the attorneys general of Washington and California against some of these same LCD Defendants was removable under CAFA as a *class* action. In *Washington v. Chimei Innolux Corp.*, the Ninth Circuit held that the two states' *parens patriae* lawsuits were not removable as class actions. 659 F.3d 842 (9th Cir. 2011).

Optronics Corp. v. South Carolina, 699 F.3d 385, 392 (4th Cir. 2012).[10]

South Carolina asserted claims under a statutory scheme strikingly similar to the state laws under which Mississippi sues here.[11] The Fourth Circuit analyzed *Caldwell* at length and became the third circuit court of appeals to decline to follow it. In its opinion, the Fourth Circuit explicitly acknowledged the circuit split: "[o]ur sister circuits have disagreed somewhat on whether to apply the 'whole-case approach' or the 'claim-by-claim approach' to the resolution of similar jurisdictional disputes." *Id.*

The Fourth Circuit rejected the Fifth Circuit's claim-by-claim approach to *parens patriae* actions:

> The State, in these *parens patriae* actions, is enforcing its own statutes in seeking to protect its citizens against price-fixing conspiracies. That the statutes authorizing these actions in the name of the State also permit a court to award restitution to injured citizens is incidental to the State's overriding interests and to the substance of these proceedings. Those citizens are not named plaintiffs here, and they need not be considered in the diversity analysis of the State's claims.

Id. at 394. The Fourth Circuit concluded: "We therefore agree with the Ninth and the Seventh Circuits that a claim for restitution, when tacked

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[10] On January 23, 2013, Defendants filed a petition for certiorari with this Court as No. 12-911.

[11] *Compare* Miss. Code Ann. §§ 75-24-9 & 75-24-11, *with* S.C. Code § 39-5-50.

onto other claims being properly pursued by the State, alters neither the State's quasi-sovereign interest in enforcing its own laws, nor the nature and effect of the proceedings."[12] *Id.*

Thus, in its judgment below and in its decision in *Caldwell*, the Fifth Circuit is in conflict with the Fourth, Seventh, and Ninth Circuits, which will inevitably lead to inconsistent jurisdictional outcomes. Only this Court can resolve the conflict among the circuits regarding whether a *parens patriae* lawsuit brought in state court by a state attorney general pursuant to state statutes and common law is removable as a mass action under CAFA.

II. The Fifth Circuit's Judgment Conflicts with Decisions of this Court.

A. *Parens patriae* actions

Parens patriae actions are cases in which the state, by definition, "'must be deemed to represent all its citizens'" and not be subject to intervention and joinder by such constituent individuals in the absence of a showing of "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373-74 (1953). This Court has described the "prerogative of *parens patriae*" as "inherent in the supreme power of every state," and opined that it is "often necessary to be exercised in the interests of humanity, and for the

[12] In reaching its holding, the Fourth Circuit cited as instructive *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, which held that a *parens patriae* action is not removable as a class action. 646 F.3d 169, 174, 176 & n.2 (4th Cir. 2011).

prevention of injury to those who cannot protect themselves." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 600 (1982) (quoting *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)).

In *Snapp*, this Court confirmed a state's standing to sue as *parens patriae* to protect its sovereign and quasi-sovereign interests. These fundamental interests include "the power to create and enforce a legal code," *id.* at 601, and the protection of the "health and well-being—both physical and economic—of its residents in general," *id.* at 607. Furthermore, this Court's precedent rejects the view that *parens patriae* actions should involve the joinder of the constituent citizens on whose behalf the state seeks to act.[13]

The Fifth Circuit's judgment conflicts with this precedent. In reaching its decision below, the Fifth Circuit determined that removal jurisdiction existed under CAFA because Mississippi citizens were the real parties in interest for Mississippi's restitution claim. Pet. App. at 5a–6a. In undertaking that analysis, the Fifth Circuit answered a question it need not have ever asked and failed to apply this Court's instruction that a state has the authority to vindicate its *own* interest in bringing a *parens patriae* action.

Mississippi law grants the Attorney General direct authority to bring such an action on

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[13] Unless individual monetary relief claims "are proposed to be tried jointly," CAFA's mass action definition is not satisfied. 28 U.S.C. § 1332(d)(11)(B)(i).

behalf of citizens in the State.[14] Nothing in that authority requires that *parens patriae* cases attempt to try citizens' claims jointly. To the contrary, the point of *parens patriae* cases is to permit a state's appointed officer to bring claims on behalf of the whole state and its citizens in the absence of direct participation of and control by individuals.[15]

Under this Court's precedent, there is one plaintiff in this case: the State. The Fifth Circuit's judgment, finding the State's *parens patriae* action to be a mass action, is thus contrary to this Court's precedent.

B. Real party in interest test

The Fifth Circuit's judgment is inconsistent with this Court's precedent regarding the real party in interest test. Federal courts should generally not interfere with the nomenclature of the complaint and the parties selected for inclusion, absent the use of "an *unacceptable* device to defeat diversity."

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[14] Provisions of both the MAA and the MCPA establish that the Attorney General possesses the authority to assert claims for monetary and injunctive relief in the name of the State on behalf of the public interest and for the public welfare. Miss. Code Ann. §§ 75-21-1, -21-37, -24-9, -24-11. The Attorney General also possesses "the powers of the Attorney General at common law," *id.* § 7-5-1, which powers include "the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the state, preservation of order and the protection of public rights," *Gandy v. Reserve Life Ins. Co.*, 279 So. 2d 648, 649 (Miss. 1973) (citations omitted).

[15] Under the MCPA, intervention by or joinder of individuals is not expressly authorized where the Attorney General has sued in the name of the State on behalf of unnamed citizens. *See generally* Miss. Code Ann. § 75-24-1 *et seq.*

Lincoln Prop. Co. v. Roche, 546 U.S. 81, 93 (2005) (emphasis added) (quoting 16 James Wm. Moore et al., *Moore's Federal Practice* § 107.14[2][c], at 107-67 (3d ed. 2005)).

This Court has consistently held that a state's overall interest in the case it has brought in its name is the determinative inquiry, not who may ultimately benefit from the relief sought. When determining whether a state is suing properly under its *parens patriae* authority, and therefore as the real party in interest for jurisdictional purposes, this Court has considered the "gravamen" of the complaint as a whole, and *all* the interests sought to be realized therein. *See Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 452 (1945) (holding that state was not merely nominal party where it sued for damages and injunctive relief in both its proprietary capacity and as *parens patriae* on behalf of individual shippers, and "the gravamen of [the suit] runs far beyond the claim of damage to individual shippers"); *cf. In re State of New York*, 256 U.S. 490, 500 (1921) (holding that whether a state is the real party in interest is to be determined "by the essential nature and effect of the proceeding, as it appears from the entire record").

Even where the state seeks a mix of proprietary relief and relief on behalf of private citizens, a state may sue as the *sole* plaintiff and real party in interest for purposes of jurisdiction. *See Kansas v. Colorado*, 533 U.S. 1, 8–9 (2001) (where state filed suit seeking to prevent continued harm to public and sought monetary relief, even calculated in part on injuries to individual citizens, Court held that state "unquestionably" demonstrated it is the real party in interest for purposes of jurisdiction). This is true even if private injury stands as the basis

for relief to the state alone. *Texas v. New Mexico*, 482 U.S. 124, 132 n.7 (1987) (holding that request for restitution to the state, even though based on calculation of harm to individual citizens, would benefit the state, creating a general public interest sufficient to establish that state was proper plaintiff).

Finally, this Court considers a state the real party in interest when it seeks monetary relief on behalf of consumers where a sufficiently significant segment of its population has been harmed. *Snapp*, 458 U.S. at 607; *see also Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (state may act as real party in interest as representative of its citizens where injury alleged affects general population of state in substantial way). The named plaintiff is the real party in interest where it (rather than individual beneficiaries) controls the litigation.[16]

The Fifth Circuit's judgment conflicts with these decisions. In none of these cases has this Court looked to the citizenship of private parties for jurisdictional purposes, nor has it required that they be joined to the litigation. As long as the named party seeks relief that benefits the named plaintiff in such circumstances, "the fact that others are interested who are not necessary parties, and are not made parties," will not give cause to question the

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[16] *See Kansas*, 533 U.S. at 8-9 (Kansas not mere nominal party where it sued in *parens patriae* and had right to control litigation while injured individual citizens did not); *Knapp v. R.R. Co.*, 87 U.S. 117, 123 (1873) (trustees who sued for benefit of others and not themselves were real parties in interest where claim accrued to them, they controlled the litigation and were responsible for conducting it, and where beneficiaries could not prevent institution or prosecution of actions or exercise any control over them).

plaintiff's real interest. *Little v. Giles*, 118 U.S. 596, 603 (1886). The only cases holding that a named state plaintiff is not the real party in interest for purposes of federal jurisdiction are those where *none* of the relief benefited the state and *all* of the relief benefited a limited number of other parties.[17]

The Fifth Circuit acknowledged this is not a case where *none* of the relief benefits the state and *all* of the relief benefits a limited number of other parties. Pet. App. 5a (noting that Mississippi's lawsuit included allegations that "the injury is 'generalized harm' to the State as a whole," as well as harm to numerous individual Mississippi consumers). Yet the Fifth Circuit held that the State was "*not* the sole party in interest" and that individual citizens who purchased LCD products within Mississippi were also real parties in interest. *Id.* (emphasis in original). But this "sole party in interest" standard is contrary to this Court's instruction that federal courts look to the "gravamen" of the complaint as a whole. *See Georgia*, 324 U.S. at 452.

As demonstrated above, the Attorney General has been charged by statute and is permitted by

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[17] *See Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395 (1938) (holding that "the State must show a direct interest of its own and *not merely* seek recovery for the benefit of individuals who are the real parties in interest" (emphasis added)); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 289 (1911) (state held to be nominal party for purposes of federal jurisdiction where it did not seek to protect its own property or any other interest, but sought "*only* to vindicate the wrongs of *some* of its people" (emphasis added)); *Mo., Kan. & Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 59 (1901) (unnamed party is real party in interest "when the relief sought is that which inures *to it alone*" (emphasis added)).

common law to seek restitution to the State, civil penalties, and injunctive relief for antitrust violations and deceptive pricing, in the name of the State as *parens patriae*. There is nothing "unacceptable" about invoking that power. Therefore, under this Court's precedent, Mississippi is entitled to sue as the sole plaintiff without being removed to federal court. Mississippi seeks injunctive relief for the whole State, civil penalties to be paid to the State, and restitution calculated based on far-reaching consumer and proprietary injuries to the State. Further, Mississippi prosecutes this lawsuit in its own name, and controls the litigation apart from any individual citizens.

The Fifth Circuit's judgment has improperly expanded federal jurisdiction.

C. Strict construction of removal statutes

1. Removal statutes generally

This Court has long held that statutory procedures for removal must be strictly construed. Where there is any doubt about the reach of a removal statute, this Court has firmly established that any doubts must be resolved against removal. A presumption against removal comports with the broader principle that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Federal subject-matter jurisdiction "is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (citations omitted). "The dominant note" in the approach to diversity

jurisdiction" is "jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business." *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941) (citation omitted).

This Court has explained that "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [removal legislation]. . . . 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'" *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 108–09 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)); *see also Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002). Hence, "statutory procedures for removal are to be strictly construed." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (citing *Shamrock Oil* and *Healy*); *see also Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971) ("[W]e should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts.").

2. Removal under CAFA

The strict construction rule has not been altered by CAFA. In *Hertz Corp. v. Friend*, this Court confirmed that, in the CAFA context, the "burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it." 130 S. Ct. 1181, 1194 (2010) (citing *Kokkonen*, 511 U.S. at 377; *McNutt v. Gen. Motors*

Acceptance Corp. of Ind., Inc., 298 U.S. 178, 189 (1936)). Therefore, for a *parens patriae* action to be removable under CAFA, Defendants must show that the statute being strictly construed authorizes such removal.

Nothing in the language of CAFA either contemplates or authorizes removal of a *parens patriae* action when the state is the sole plaintiff, the claims arise under state law, and the state attorney general has statutory and common-law authority to assert the claims. To establish diversity jurisdiction under CAFA's "mass action" provision, Defendants were required to demonstrate that the State's complaint constituted

> [a] civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the *plaintiffs'* claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [28 U.S.C. § 1332(a)].

28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added).

Congress's use of the word "plaintiffs" demonstrates that a mass action refers to an action where individually injured persons lend their names, as *parties*, to a complaint. CAFA provides that "jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)," i.e., greater than $75,000 for each individual person. This language is additional confirmation that the group of "100" must comprise actual, named "plaintiffs."

The Fifth Circuit's interpretation would improperly conflate two separate inquiries: (1) whether the case is a mass action, and (2) whether the State is a nominal or real party in interest. The CAFA requirement that a case satisfy the "mass action" definition under § 1332(d)(11)(B)(i) is distinct from whether the State is merely a nominal party or a real party in interest for purposes of establishing diversity under § 1332(d)(2).

The Fifth Circuit's interpretation would also nullify the general public exception provided under CAFA. Strict rules of statutory construction advise that statutes should be construed so as to avoid rendering any statutory language superfluous. The general public exception provides that a suit is not a mass action if "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class)." *Id.* § 1332(d)(11)(B) (ii)(III). As the concurrence below noted, application of *Caldwell* renders this exception a nullity in the Fifth Circuit. Pet. App. at 20a.

III. The Removal Question at the Center of This Circuit Conflict Is an Important and Recurring Issue.

A. Federalism implications

Review of the Fifth Circuit's judgment is necessary to preserve deeply-rooted principles of federalism. Under our federal system, "[s]tates possess sovereignty concurrent with that of the Federal Government." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). This system of dual sovereignty requires that states be treated in a manner that is consistent with their status as sovereigns and that

preserves the dignity to which they are entitled. *See Alden v. Maine*, 527 U.S. 706, 715, 748 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (recognizing "the dignity and respect afforded a State"); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (emphasizing the need to "accord[] the States the respect owed them as members of the federation").

Accordingly, this Court's precedent establishes that non-consenting states are entitled to sovereign immunity from being haled into any court. *See Alden*, 527 U.S. at 718; *see also Hans v. Louisiana*, 134 U.S. 1, 12 (1890). Such sovereign immunity is far reaching, and extends to protect states that bring suit in their own state courts. *See Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983). Considerations of comity should make federal courts "reluctant to snatch" those cases "unless some clear rule demands it." *Id.* No rule requires such an extraordinary result in this case.

State courts have "inherent authority, and are thus presumptively competent, to adjudicate claims arising *under the laws of the United States*." *Tafflin*, 493 U.S. at 458 (emphasis added). Federal courts should be most reluctant to compel removal of a state's case that involves matters of state law. Here, the claims arise under *state law*, where the particular expertise of state courts is at its height, and where federal courts are constrained by the doctrine of *Erie R. Co. v. Tompkins*. *See* 304 U.S. 64, 78 (1938). Indeed, it is "particularly desirable" for a federal court to decline to exercise jurisdiction "when the result is to permit a State court to have an opportunity to determine questions of State law." *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 n.29

(1943). State law matters are best left to state courts because they "presumably have greater expertise" over state law. *Tafflin*, 493 U.S. at 465. "To hold otherwise would . . . denigrate the respect accorded coequal sovereigns." *Id.* at 466.

Federalism also favors leaving matters of state policy to state courts in order to avoid interfering with the policy concerns of the state. For example, this Court has explained that federal courts must abstain from deciding cases that present a particularly important question of state policy due to the need to maintain "harmonious federal-state relations in a matter close to the political interests of a State." *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959). This principle applies equally to CAFA. The Senate Committee Report recognized that CAFA "promotes the concept of federalism and protects the ability of states to determine their own laws and policies for their citizens." S. Rep. No. 109-14, at 57 (2005).

Here, the Attorney General filed this action in Mississippi state court, on behalf of the State, to enforce state antitrust and consumer protection laws applicable only in Mississippi. State law governs whether the Attorney General has the ability to seek the relief requested in the State's complaint. Moreover, as a matter of policy, the Mississippi legislature chose to provide the Attorney General with the power to seek that relief. Federalism favors leaving these matters to the court best equipped for interpreting Mississippi law: Mississippi state court. Nothing in CAFA provides a "clear rule" directing removal or subordinating the State's sovereign dignity.

B. Recurring jurisdictional battles and administrative complexity

The circuit conflict created by *Caldwell*'s claim-by-claim approach virtually assures extended jurisdictional battles in every *parens patriae* case filed in every circuit that has not yet addressed the issue. Defendants facing *parens patriae* actions in these circuits are consistently arguing that *Caldwell* stands for the proposition that a *parens patriae* lawsuit is removable. *See In re Oxycontin Antitrust Litig.*, 821 F. Supp. 2d 591, 602 (S.D.N.Y. 2011), *appeal denied sub nom. Purdue Pharma L.P. v. Kentucky*, 2013 WL 85918, at *7 (2d Cir. Jan. 9, 2013) (rejecting defendant's invitation to adopt the *Caldwell* approach to the class action provision); *Colorado Civil Rights Comm'n v. Wells Fargo Bank & Co.*, 2011 WL 2610205, at *3–5 (D. Colo. July 1, 2011) (rejecting defendant's invitation to adopt the claim-by-claim approach in determining the real party in interest); *Connecticut v. Moody's Corp.*, 2011 WL 63905, at *2–3 (D. Conn. Jan. 5, 2011) (rejecting defendant's invitation to adopt *Caldwell*'s real party in interest analysis); *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 447 (E.D. Pa. 2010) (applying the *Caldwell* approach); *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 944 (E.D. Mo. 2010) (rejecting defendants' invitation to adopt the *Caldwell* approach).

Further, the claim-by-claim approach raises more questions than it answers. The *Caldwell* decision itself foreshadowed the complexity which results from applying its test. In *Caldwell*, the court ordered that unnamed consumers be added as plaintiffs, leaving how to accomplish this feat of joinder to the "well-able hands" of the district court.

Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 430 (5th Cir. 2008). The dissent noted that the majority was essentially ordering the case to be "deformed." *Id.* at 432 (Southwick, J., dissenting).

Indeed, the only two district court judges in the Fifth Circuit to apply *Caldwell*, including the district court below, have highlighted the administrative, jurisdictional, and logistical complexities the decision creates. These district court judges' explicit acknowledgement of the hurdles imposed by the Fifth Circuit approach is further proof that CAFA jurisdiction was not intended to be expanded to sweep *parens patriae* actions into federal court under the rubric that they are mass actions.[18]

In *Entergy*, the district court, noting that it was "duty-bound" to follow *Caldwell*, ruled that a *parens patriae* action brought by the state was a mass action under CAFA. *Mississippi ex rel. Hood v. Entergy Mississippi, Inc.*, No. 3:08cv780, 2012 WL 3704935, at *16 n.6 (S.D. Miss. Aug. 25, 2012). The court enumerated some of the difficulties this

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[18] Application of the *Caldwell* claim-by-claim test will without question result in the vast majority of *parens patriae* cases brought in the Fifth Circuit being removed to federal court. The test itself essentially dictates this outcome, as it is unlikely that a quasi-sovereign interest could be based on injury to fewer than 100 citizens. Almost all *parens patriae* lawsuits include at least one claim that seeks some kind of restitution on behalf of the state's consumers. *See* Alexander Lemann, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 Colum. L. Rev. 121, 140 (2011). Hence, lawsuits that had previously been considered quintessentially state court matters will all be transformed into federal cases. There is no evidence in the language of CAFA demonstrating that it was intended to trample on States' sovereign dignity in this way.

entailed: "[a] key challenge in applying the *Caldwell* rationale to *parens patriae* lawsuits" is that it requires the district court to "not only rewrite the plaintiff's complaint but to force the plaintiff to recruit or name parties not initially in the lawsuit." *Id.* (citing *Caldwell*, 536 F.3d at 433 (Southwick, J., dissenting)). The court also noted that the claim-by-claim analysis leads to "awkward litigation gymnastics" when applied to *parens patriae* actions brought by individual attorneys general and removed under CAFA. *Id.*

These "awkward litigation gymnastics" were presaged by the district court below. Although finding this case was a mass action under *Caldwell*, the district court nonetheless remanded this case pursuant to CAFA's general public exception. Pet. App. at 52a. In a section entitled "The Future of this Case," the district court set forth its understanding of what the law would require if the Fifth Circuit were to reverse its remand order. *Id.* at 52a–56a.

First, the district court anticipated that if the case remained in federal court as a mass action, the injunctive relief, civil penalty claims, and restitution claims for individuals with losses less than or equal to $75,000 would be severed. This severance would be in accordance with CAFA's mandate that federal jurisdiction only extends to those plaintiffs in a CAFA mass action whose claims satisfy the $75,000 jurisdictional amount. *Id.* at 52a–53a. The district court certified that guidance from the Fifth Circuit on this issue would help the case proceed if the case remained in federal court.

The district court also sought guidance on whether or not the part of the case that remained in federal court could be transferred to the pending

MDL. *See id.* 55a-56a. CAFA bars transfer of a mass action to another court unless the majority of the plaintiffs consent. 28 U.S.C. § 1332(d)(11)(C)(i). But there is no mechanism through which a majority of Mississippi consumers, who would be deemed to be the real parties in interest—although not plaintiffs—could consent to transfer. Neither the majority opinion nor the concurrence provided guidance on these issues.

The Fifth Circuit's mandate that, in every *parens patriae* lawsuit, the pleadings must be pierced and the complaint dissected claim-by-claim to deduce the true nature of the proceedings, to see if the attorney general is acting, in effect, as a class representative, is at odds with this Court's admonition that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010) (citing *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment)). According to this Court:

> Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits.

Id. (citation omitted).

Under the Fifth Circuit's claim-by-claim test, enormous time, expense, and judicial resources will be expended determining whether, despite the presence of only one plaintiff, persons other than the State may benefit from the State's lawsuit and

therefore must be found and added as plaintiffs, thereby completely reforming the nature of the lawsuit.

This Court has instructed that jurisdictional statutes must be interpreted to promote administrative simplicity. The Fifth Circuit's approach burdens the federal judiciary and runs afoul of that goal.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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