No. 12-1036

In the
Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,
PETITIONER,
v.
AU OPTRONICS CORP., ET AL.,
RESPONDENTS.

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

BRIEF OF *AMICI CURIAE* STATE OF ILLINOIS AND 45 OTHER STATES IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The "'prerogative of *parens patriae*'" is "'inherent in the supreme power of every state'" and allows each State to pursue litigation aimed at protecting "the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600, 602 (1982) (quoting *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)). States often rely on *parens patriae* authority when writing statutes—and filing suit to enforce those statutes—in areas of the law ranging from environmental protection and civil rights to, as in this case, antitrust and consumer protection. In its decision below, however, the Fifth Circuit imposed a novel limit on *parens patriae* authority. That court ruled that, if a *parens patriae* action seeks restitution for injured state residents (among other remedies), it is no longer a *parens patriae* action at all, but is instead a "mass action" subject to compelled removal to federal court under the Class Action Fairness Act of 2005 ("CAFA"). See 28 U.S.C. § 1332(d)(11).

The Fifth Circuit's approach forces States to litigate in federal court cases they bring in their own courts, under their own laws, for conduct occurring within their own borders. Worse, this approach encourages federal courts to override a State's determination that a particular action and mode of relief will serve the public interest. At the same time, the Fifth Circuit's rule has absurd practical consequences for the State as litigant and for the proper construction and consistent application of state law.

Because the decision below upends entrenched principles of federal-state comity and yields absurd results in practice, the *amici* States urge this Court to

reverse that decision and hold that Mississippi's *parens patriae* suit was not a mass action subject to federal removal under CAFA.

STATEMENT

The doctrine of *parens patriae* allows a State to sue to protect the interests of its residents. See *Alfred L. Snapp & Son,* 458 U.S. at 602 (explaining that States may bring civil lawsuits based upon "a set of interests that the State has in the well-being of its populace"). A State's properly asserted *parens patriae* action "must be deemed to represent all of [that State's] citizens." *New Jersey v. New York*, 345 U.S. 369, 372-373 (1953). And a lawsuit brought by a State to protect "the health and well-being—both physical and economic—of its residents in general" is a valid *parens patriae* action, so long as the State has an interest in the case "apart from the interests of particular private parties." *Alfred L. Snapp & Son*, 458 U.S. at 607.

Relying on its *parens patriae* authority, the State of Mississippi brought a civil action against respondents, manufacturers and distributors of liquid crystal display ("LCD") panels, in Mississippi state court alleging that respondents had fixed the prices of those panels in violation of the Mississippi Antitrust Act, Miss. Code Ann. §§ 75-21-1 *et seq.*, and the Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1 *et seq*. Pet. App. 24a.[1] In its complaint, Mississippi sought a

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[1] The issue in this case is whether Mississippi's lawsuit was removable under CAFA. The *amici* States take no position as to whether Mississippi law allowed Mississippi to pursue a *parens patriae* claim in this case, which is a question for the state court to address on remand.

permanent injunction, civil penalties, and punitive damages, as well as restitution to the State, local governments, and Mississippi residents for losses incurred from the purchase of LCD panel products. Pet. App. at 25a-26a.

Mississippi was not alone. Private indirect purchasers sued in a consolidated multi-district litigation ("MDL") in the Northern District of California based on the same alleged price-fixing scheme. See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-1827 (N.D. Cal. filed Apr. 20, 2007). Twelve other States filed their own lawsuits against many of these same respondents.[2] Four of those twelve States commenced their actions in their respective state courts and asserted only state-law claims. And like Mississippi, those States sought restitution for injured residents in tandem with claims for injunctive relief, civil penalties, and punitive damages.[3]

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[2] See *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. Kroger v. AU Optronics Corp.*, No. 3:10-cv-4346 (N.D. Cal.); *South Carolina v. AU Optronics Corp.*, No. 3:11-cv-731-JFA (D.S.C.); *California v. AU Optronics Corp.*, No. CGC-10-504651 (San Francisco Super. Ct.); *Illinois v. AU Optronics*, No. 10 CH 34472 (Cir. Ct. of Cook Cnty.); *Washington v. AU Optronics*, No. 10-2-29164-4 (King Cnty. Super. Ct.).

[3] See Compl. for Damages and Injunctive Relief (Dkt. 1), *California v. AU Optronics Corp.*, No. CGC-10-504651 (San Francisco Super. Ct. filed Oct. 15, 2010); Compl., *Illinois v. AU Optronics*, No. 10 CH 34472 (Cir. Ct. of Cook Cnty. filed Aug.

In the decision below, breaking with every other federal court of appeals to consider the issue,[4] the Fifth Circuit held that Mississippi's suit was a "mass action" partially brought to vindicate individual interests and thus subject to federal removal under CAFA. Pet. App. 5a. The court based its analysis principally on its prior decision in *Louisiana ex rel. Caldwell v. Allstate Insurance Company*, Pet. App. 4a, which held that federal courts may "'pierce the pleadings'" to determine whether a State's claim "'has been fraudulently pleaded to prevent removal,'" 536 F.3d 418, 425 (5th Cir. 2008) (quoting *Burchett v. Cargill, Inc.*, 48 F.3d 173, 175 (5th Cir. 1995)). The court in *Caldwell* drew from this Court's observation in *Alfred L. Snapp & Son* that a State cannot proceed as *parens patriae* when it "is only

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10, 2010); Ex. A. to Notice of Removal (Dkt.1-1), *South Carolina v. AU Optronics Corp.*, No. 3:11-cv-731-JFA (D.S.C. filed Mar. 25, 2011); Compl. for Injunction, Damages, Restitution, Civil Penalties and Other Relief Under the Washington State Consumer Protection Act, RCW 19.86, *Washington v. AU Optronics*, No. 10-2-29164-4 (King Cnty. Super. Ct. filed Aug. 11, 2010).

[4] See *AU Optronics v. South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3427 (U.S. Jan. 23, 2013) (No. 12-911); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670 (9th Cir. 2012); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011); see also *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 218-220 (2d Cir. 2013) (rejecting Fifth Circuit's "claim-by-claim" approach in rejecting argument that *parens patriae* action is removable as a "class action" under CAFA); *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011) (same); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 849-850 (9th Cir. 2011) (rejecting argument that *parens patriae* action is removable as a "class action" under CAFA).

acting as a nominal party" in holding that a State does not have its own, freestanding interest in restitution on behalf of one of its residents, and that a complaint asserting such an interest is pleaded fraudulently. *Id*. at 426 (citing *Alfred L. Snapp & Son*, 458 U.S. at 607). Judge Southwick dissented in *Caldwell*, however, arguing that it is not for a federal court to "force [a State] to litigate in the posture of a plaintiff in a mass action." *Id*. at 434 (Southwick, *J*., dissenting).

Relying on the narrow conception of state interest articulated in *Caldwell*, the decision below held that because Mississippi's complaint sought restitution for its residents, Mississippi was not proceeding as *parens patriae*. Pet. App. 7a. It declared that a State acts as *parens patriae* only if it is the sole party in interest in a civil action. Pet. App. 7a-8a. As a result, the Fifth Circuit held that Mississippi's complaint was a fraudulently pleaded multi-party action for private damages that qualified as a mass action under CAFA. Pet. App. 8a-9a.

SUMMARY OF ARGUMENT

Petitioner's brief explains the many ways in which CAFA's text and purpose make clear that CAFA does not authorize the removal to federal court of *parens patriae* actions alleging violations of state law. In this brief, State *amici* highlight two critical implications of the Fifth Circuit's ruling to the contrary, each of which is important to understanding that court's error in interpreting CAFA.

First, the removal to federal court of a state *parens patriae* action brought under state law in a state court based on in-state conduct is an affront to established

principles of federal-state comity. This Court has long recognized that forcing an unwilling State to proceed in federal court infringes upon that State's sovereign dignity. See, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 715, 748 (1999); *Hans v. Louisiana*, 134 U.S. 1, 12 (1890). For that reason, the Court has expressed reluctance "to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983). Yet that is precisely what the Fifth Circuit authorized here, and it did so without any clear indication that Congress intended that result.

That affront to the sovereign dignity of the State is compounded by the intrusion it represents into the sovereign "prerogative" of *parens patriae*. *Alfred L. Snapp & Son*, 458 U.S. at 600. By holding that Mississippi was not proceeding as *parens patriae* for at least some of its claims, the Fifth Circuit implicitly overruled Mississippi's determination that this litigation would be in the public interest. But "[a]s a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention." *Id.* at 612 (Brennan, *J.*, concurring). Thus, the decision of the court below to overturn a State's determination of the public interest is a further affront to the deference federal courts owe to the States as sovereign bodies.

Second, this lack of deference has several real-world effects. If the Fifth Circuit's rule were extended nationwide, numerous unsettled questions of state law would be channeled into the federal courts, which lack authority to render controlling pronouncements on those issues. Given the understandable reluctance expressed by many federal courts to announce

innovative interpretations of state law, this would stunt the development of legal doctrine in areas of great public interest. Requiring the adjudication of complex issues of state law in federal court also would increase the threat that similarly situated parties would receive differential treatment. These results would be felt in numerous areas, ranging from mass torts, civil rights, and environmental claims to the sorts of consumer fraud and antitrust actions at issue here.

Moreover, treating *parens patriae* suits as mass actions would be an administrative nightmare under CAFA. In a CAFA mass action, only those individuals with claims exceeding $75,000 may be removed to federal court. The decision below thus would require federal courts to (1) identify the unnamed beneficiaries of the State's enforcement action, (2) determine which, if any, have incurred damages in excess of $75,000, and (3) remand the claims of those who do not meet the amount in controversy requirement to state court. And CAFA would require all of this without offering federal district courts any mechanism for undertaking these tasks. Furthermore, in most cases the only party with a direct claim to more than $75,000 would be the State, meaning that, ironically from a comity perspective, only the State would be compelled to litigate its claims in federal court.

To make matters worse, CAFA authorizes transfer of a mass action from one federal court to another only if a majority of the plaintiffs consent. Thus, if an MDL has been convened, the court must obtain consent to transfer from a majority of all plaintiffs to a mass action with claims exceeding $75,000 (although there is no mechanism to identify these parties or to poll their preferences), and, if they do not consent, CAFA removal

would result in three courts litigating claims arising under a single State's law: an MDL court, for cases originally filed in federal court and completely diverse private party claims originally filed in state court; a second federal district court, for the claims removed as a mass action; and state court, for remanded claims.

ARGUMENT

I. THE FIFTH CIRCUIT'S HOLDING INTERFERES WITH STATES' SOVEREIGN RIGHT TO BRING *PARENS PATRIAE* ACTIONS TO ENFORCE THEIR OWN LAWS IN THEIR OWN COURTS.

The Constitution left "to the several States a residuary and inviolable sovereignty." The Federalist No. 39, p. 245 (C. Rossiter ed., 1961) (J. Madison). Among the "easily identifi[able]" interests a sovereign may pursue is "the exercise of sovereign power over individuals and entities within the relevant jurisdiction," which includes "the power to create and enforce a legal code, both civil and criminal." *Alfred L. Snapp & Son*, 458 U.S. at 601.

In this case, Mississippi pursued an action in state court to enforce its own antitrust and consumer fraud statutes. Still, the Fifth Circuit held that respondents could force the State to proceed with its claims in federal court, without any clear indication that Congress intended this result. Principles of federal-state comity dictate that, for Congress to create the state-sovereignty defeating rule the Fifth Circuit identified, CAFA must include a clear statement to that effect.

1. By any standard, the Fifth Circuit's decision cannot be reconciled with the sovereign "dignity" States

"retain" as "joint participants in the governance of the Nation." *Alden*, 527 U.S. at 715, 748. This Court repeatedly has recognized that forcing an unwilling State to proceed in federal court undermines its dignity as a sovereign. See, *e.g.*, *id.* at 715-718; *Hans*, 134 U.S. at 12; see also *Va. Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1645 (2011) (Roberts, *C.J.*, dissenting) (observing that "any time a State is haled into federal court against its will, 'the dignity and respect afforded that State * * * are placed in jeopardy'" (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997))). But that is precisely what happened here. Mississippi did not consent to litigate its claims in federal court, yet it must do so under the Fifth Circuit's rule.

That affront to Mississippi's dignity as a sovereign is all the more acute here because this case does not present any question of federal law. Mississippi seeks merely to enforce its own laws. As the Fourth Circuit observed in parting from the Fifth Circuit's rule, a declaration that a "State was not entitled to pursue its action in its own courts" would "inappropriately transform[] what is essentially a [state] matter into a federal case." *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011). There can be little doubt that such a transformation would "trampl[e] the sovereign dignity of the State" that made the choice to assert a claim under its own laws in a state forum. *Ibid.*

The decision below thus runs afoul of the "proper respect for state functions" that this Court requires. *Younger v. Harris*, 401 U.S. 37, 44 (1971). This "preference" for "comity" is well established, *Allen v. McCurry*, 449 U.S. 90, 96 (1980), for this Court long ago

acknowledged its "duty * * * to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States," *Taylor v. Carryl*, 61 U.S. 583, 595 (1857). Comity is "a bulwark of the federal system," *Allen*, 449 U.S. at 96, that is "'essential to the federal design,'" *Kowalski v. Tesmer*, 543 U.S. 125, 133 (2004) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999)).

Comity counsels federal courts to "endeavor" to avoid "undu[e] interfere[nce] with the legitimate activities of the States." *Younger*, 401 U.S. at 44. Federal courts must be "reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd.*, 463 U.S. at 21 n.22. And that is particularly true where, as here, a State seeks only to enforce its own laws in its own courts. Absent a clear federal interest in such an effort, federal courts must "forebear[]" and "avoid[] interference" with their state counterparts. *Covell v. Heyman*, 111 U.S. 176, 182 (1884).

Of course, the question presented in this case is whether Congress intended the anomalous result reached by the Fifth Circuit. But the foundational importance of state sovereignty and comity play a leading role in that analysis, for this Court has cited these considerations as the foundation for the rule that all removal statutes be "strictly construed." *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002); see also *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1194 (2010) (applying strict construction of removal statutes in CAFA context). And those factors take on even

greater significance when one of the parties is a State. See *Franchise Tax Bd.*, 463 U.S. at 21 n.22.

Indeed, this Court has long required an unambiguous declaration of legislative intent before it construes a Congressional enactment to intrude on state sovereignty. See *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-544 (2002). Like removal statutes, for example, federal laws purporting to abrogate a State's immunity from suit in federal or state court must include a "clear statement" to that effect. *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011) (federal court); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (state court). Similarly, this Court has recognized a "presumption" against federal preemption of state laws in areas traditionally regulated by the States. *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256 (2013). These rules all follow from the principle that federalism requires federal courts to "respect * * * the States as 'independent sovereigns in our federal system.'" *E.g. Wyeth v. Levine*, 555 U.S. 555, 565-566 n.3 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

Nothing in CAFA's language clearly subjects Mississippi's action to federal removal. And if one were to go beyond CAFA's text and consider its legislative history, that history shows that Congress did not intend to remove state *parens patriae* actions. See 151 Cong. Rec. S1157, 1162 (Feb. 9, 2005) (Senator Cornyn explaining that "when State law * * * specifically provide[s] for the right of * * * a State attorney general, to sue on behalf of his State's citizens," CAFA "will not in any way impede that endeavor"); accord *id*. at 1161 (statement of Senator Carper); *id*. at 1163 (statements of Senators Grassley and Hatch); *id*. at 1164 (statement

of Senator Pryor); *id*. at H746 (Feb. 17, 2005) (statement of Representative Sensenbrenner). As the Fourth Circuit has explained, considerations of comity and state sovereignty should make federal courts "most reluctant to compel such removal, reserving its constitutional supremacy only for when removal serves an overriding federal interest." *CVS Pharmacy*, 646 F.3d at 178. There is no such interest here.

2. The weight of a State's dignitary interest is all the more profound where, as here, a State is exercising its *parens patriae* authority.[5] This capacity—literally meaning "parent of the country"—derives from the English legal system and has long been understood as "inherent in the supreme power of every state." *Mormon Church*, 136 U.S. at 57. By any measure, it is a critical component of state authority. Perhaps most importantly, moreover, it is what allows a State to pursue litigation aimed at protecting "the well-being of its populace." *Alfred L. Snapp & Son*, 458 U.S. at 602.

To exercise *parens patriae* authority, a State need only possess a quasi-sovereign interest in the case. As this Court has explained, "a State has a quasi-sovereign interest in the health and well-being—both physical *and economic*—of its residents in general." *Id*. at 607 (emphasis added). Thus, States have a legitimate public

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[5] While *parens patriae* authority has its roots in the common law, modern state legislatures frequently draw upon it in crafting enforcement mechanisms for their public interest statutes. See, *e.g.*, 740 Ill. Comp. Stat. 10/7(2) (2010) (Illinois Antitrust Act authorizing Attorney General to "bring an action in the name of this State, as *parens patriae* on behalf of persons residing in this State, to recover the damages under this subsection or any comparable federal law").

interest in securing an honest marketplace for their residents. See *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 671 (9th Cir. 2012); see also *Georgia v. Penn. R. Co.*, 324 U.S. 439, 450-451 (1945) (conspiracy in violation of antitrust laws is a wrong "of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected").[6]

Nor is that interest diminished because a limited portion of the public also suffers directly from an unfair practice. See, *e.g.*, *Alfred L. Snapp & Son*, 458 U.S. at 609 (Puerto Rico properly relied on *parens patriae* authority to assert discrimination in employment claim involving 787 temporary job opportunities out of population of nearly 3 million Puerto Rican residents); *New York v. 11 Cornwell Co.*, 695 F.2d 34, 39-40 (2d Cir. 1982) (injury to fewer than twelve persons sufficient to support *parens patriae* authority because similarly situated persons could be affected in the future), vacated on other grounds, 718 F.2d 22 (2d Cir. 1983) (*en banc*). Instead, courts must look beyond the direct effects of an unfair trade practice and consider "the indirect effects of the injury * * * in determining

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[6] Numerous district courts also have acknowledged that the States' quasi-sovereign interest in protecting the economic well-being of their residents permits the States to exercise their *parens patriae* authority to secure an honest marketplace within their borders. See *Illinois v. SDS W. Corp.*, 640 F. Supp. 2d 1047, 1050-1051 (C.D. Ill. 2009); *Hood ex rel. Mississippi v. Microsoft Corp.*, 428 F. Supp. 2d 537, 543-544 (S.D. Miss. 2006); *Wisconsin v. Abbott Labs.*, 341 F. Supp. 2d 1057, 1062-1063 (W.D. Wisc. 2004); *Missouri ex rel. Webster v. Freedom Fin. Corp.*, 727 F. Supp. 1313, 1317 (W.D. Mo. 1989); *Maine v. Data Gen. Corp.*, 697 F. Supp. 23, 25 (D. Me. 1988); *New York v. Gen. Motors Corp.*, 547 F. Supp. 703, 707 (S.D.N.Y. 1982).

whether the State has alleged injury to a sufficiently substantial segment of its population." *Alfred L. Snapp & Son*, 458 U.S. at 607.

Because of the indirect effects unfair trade practices have on the marketplace as a whole, States have a quasi-sovereign interest in promoting a smoothly functioning economy, free of anticompetitive conduct, see *Texas v. Scott & Fetzer Co.*, 709 F.2d 1024, 1024-1028 (5th Cir. 1983); *Pennsylvania v. Mid-Atlantic Toyota Distribs., Inc.*, 704 F.2d 125, 131 (4th Cir. 1983), and in shielding the public from fraud, see *In re Edmund*, 934 F.2d 1304, 1311 (4th Cir. 1991). This is particularly true where the individual injury is small or diffuse, making it unlikely that anyone would litigate to obtain relief. See, *e.g.*, *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (observing that "individual consumers cannot be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small").

Undeniably, States view a competitive marketplace as an important public interest. Nearly every State has antitrust legislation to promote fair competition within its borders. The same is true of statutes prohibiting consumer fraud and deceptive trade practices. And in nearly every case, the States have vested at least partial responsibility for enforcing those laws with their respective Attorneys General. So it should come as no surprise that many States have whole divisions of their legal departments staffed by lawyers specializing in public interest litigation whose work is dedicated to bringing enforcement actions the State considers to be in the public interest. In fact, as explained, see *supra* p. 3, numerous States have brought lawsuits challenging the very conduct at issue in this case, either relying on

their own legal staff to do so or, in some instances, by overseeing outside counsel.

Thus, an action brought pursuant to one of these statutes is, by its very nature, an action a State deems to be in the public interest. That determination should receive deference. "As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention." *Alfred L. Snapp & Sons*, 458 U.S. at 612 (Brennan, *J.*, concurring); see also *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959) (federal-court abstention that avoids deciding cases of important state policy is favored to maintain "harmonious federal-state relations in a matter close to the political interests of a State").

To be sure, this Court has resisted attempts to invoke *parens patriae* standing when a State was "merely litigating * * * the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (*per curiam*); see also *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394 (1938). But those cases arose in the context of a State's attempt to invoke this Court's original jurisdiction. Thus, the rationale for questioning a State's assertion of public interest in those cases was that "if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated" and "the critical distinction, articulated in Art. III, § 2 of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate." *Pennsylvania*, 426 U.S. at 665-666. Surely that concern

has no relevance when a State proceeds against a private party.

Thus, there is likely a distinction between the quasi-sovereign interest sufficient to invoke this Court's original jurisdiction and one sufficient to proceed as *parens patriae* in an action against a private party. See *Alfred L. Snapp & Son*, 458 U.S. at 603 n.12 ("Admittedly, the discussion here and in other cases discussed below focused on the *parens patriae* question in the context of a suit brought in the original jurisdiction of this Court. There may indeed be special considerations that call for a limited exercise of our jurisdiction in such instances; these considerations may not apply to a similar suit brought in federal district court."); *id*. at 611 (Brennan, *J*., concurring) (emphasizing that requirements of Court's original jurisdiction and Eleventh Amendment raise "concerns that might counsel for a restrictive approach to the question of *parens patriae* standing" that are not present when a State sues a private party); see also *Pennsylvania*, 704 F.2d at 131 n.13 (distinguishing between "quasi-sovereign interest" for purposes of this Court's original jurisdiction and "public interest" for purposes of *parens patriae* standing).

So, at a minimum, it seems clear that unless a State is seeking to invoke this Court's original jurisdiction, federal courts should exercise caution before overriding a State's determination that it is advancing a substantial public interest by bringing an action to enforce state law. See *Alfred L. Snapp & Sons*, 458 U.S. at 612 (Brennan, *J*., concurring) ("I know of nothing—except the Constitution or overriding federal law—that might lead a federal court to superimpose its judgment for that of a State with respect to the

substantiality or legitimacy of a State's assertion of sovereign interest.").

3. Nevertheless, the Fifth Circuit chose to substitute its judgment for Mississippi's by declaring that Mississippi lacked a legitimate public interest in some of its claims. Pet App. 5a. And the court did so, not because it disputed that States have an interest in the economic well-being of their residents, but because some of the remedies Mississippi sought would also benefit individual residents directly. Pet App. 7a.

As an initial matter, however, that some residents experienced greater harm from challenged conduct, and will potentially reap greater benefits from a State's suit, is inherent in all *parens patriae* actions. See *Pennsylvania v. Kleppe*, 533 F.2d 668, 674-675 (D.C. Cir. 1976) ("And even where the most direct injury is to a fairly narrow class of persons, there is precedent for finding state standing on the basis of substantial generalized economic effects."). Thus, a State need not establish that a defendant's action affects every resident equally to assert a valid *parens patriae* suit. See *Maryland*, 451 U.S. at 738-739 (States have *parens patriae* interest to contest another State's tax on natural gas even though impact of tax varies among individual residents). A State need only establish some interest in the relief sought, not that no private party has any interest in such relief. See *Kansas v. Colorado*, 533 U.S. 1, 8-9 (2001) (Eleventh Amendment prohibition on suits by residents of one State against another State does not prohibit Court from awarding damages based on harm to individual farmers in suit between States); see also *Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980) (EEOC need not be class representative under Rule 23 to seek backpay for

private parties because when EEOC brings action, "albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination").

Yet more importantly, the Fifth Circuit's analysis is fundamentally at odds with a State's sovereign dignity. A State's judgment as to whether a particular remedy will serve the public interest is no less worthy of respect than its assertion of sovereign interest generally. Thus, to the extent judicial review of the assertion of sovereign interest is even permissible in a case that does not implicate this Court's original jurisdiction, but see *Alfred L. Snapp & Sons*, 458 U.S. at 612 (Brennan, *J.*, concurring), judicial review is deferential and based on the "gravamen" of the complaint only, *Georgia*, 324 U.S. at 452; see also *In re State of New York*, 256 U.S. 490, 500 (1921) (whether suit is *parens patriae* action is judged "by the essential nature and effect of the proceeding, as it appears from the entire record").

This rule recognizes that when a sovereign State pursues a series of remedies, even if one of those remedies would inure to the benefit of particular residents, such relief may also promote that State's quasi-sovereign interest. See *AU Optronics v. South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012) ("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."), petition for cert. filed, 81 U.S.L.W. 3427 (U.S. Jan. 23, 2013) (No. 12-911); *Nevada*, 672 F.3d at 671 ("That individual consumers may also benefit from this lawsuit does not negate Nevada's substantial interest in this case." (internal quotation marks omitted)). In contrast, the

Fifth Circuit's rule establishes, in effect, that a judgment as to the public benefit of a remedy will be second-guessed as a matter of law if it benefits any individual consumers directly.

Indeed, if the rationale for the Fifth Circuit's practice of "piercing the pleadings" in a state-initiated action is that a party cannot defeat federal jurisdiction through "ill-practice" or "fraud," see *Caldwell*, 536 F.3d at 424, then the Fifth Circuit's decision implies that a State invoking its *parens patriae* authority to pursue restitution as a type of relief in an enforcement action is engaging in "ill-practice" or "fraud," see *id.* at 433-434 (Southwick, *J.*, dissenting). A sovereign entity's assessments of its own public interest deserves far greater respect than that. See *Alfred L. Snapp & Sons*, 458 U.S. at 612 (Brennan, *J.*, concurring).

* * *

By construing Mississippi's *parens patriae* action as a CAFA mass action, the Fifth Circuit's rule represents a multi-layered intrusion upon the sovereign dignity of the States. It permits removal of an action brought in state court arising exclusively under state law regarding events occurring within that State to federal court. And it does so even though the only named plaintiff is a sovereign State. The rule announced below then disregards the quasi-sovereign interest the State has in securing an honest marketplace for its residents. And it allows federal courts to second-guess that State's evaluation of what promotes the interest of its citizenry.

Nothing about CAFA suggests that Congress sanctioned such a clear affront to "the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Absent a clear

indication of such an intention, there is no justification for the Fifth Circuit's decision.

II. THE FIFTH CIRCUIT'S RULE LEADS TO ABSURD RESULTS.

The consequences of the decision below are not merely abstract or academic. To the contrary, were this Court to endorse the Fifth Circuit's approach to CAFA removal, all federal courts would be required to entangle themselves in the resolution of numerous questions of state law in a wide array of subject areas. And the intricate rules of CAFA itself would make the administration of removed state-initiated enforcement actions unwieldy for the federal courts. In short, converting actions brought by States under state law in state court into federal actions would lead to a series of unworkable results that would only serve to further erode the sovereign dignity of the States.

A. The Fifth Circuit's Decision Steers State-Law Disputes Away From State Courts, Which Are Better Equipped To Resolve Them.

The decision below permitted respondents to remove Mississippi's suit, which asserted state-law claims only, to federal court on the theory that it was a mass action made up of numerous private claims fraudulently pleaded as a single *parens patriae* action. Pet. App. 7a-8a. If applied nationwide, the Fifth Circuit's rule will force States to litigate numerous state-law questions in federal court. Of course, the removal of state claims to federal court is one of CAFA's inherent byproducts. But the decision below will increase the volume of state issues that find their way to federal court. Moreover, those issues will be

concentrated in the meaning of laws designed by the States to promote the public's interests.

That result is not without consequences. "State courts are the principal expositors of state law," *Moore v. Sims*, 442 U.S. 415, 429 (1979), and "have the first and the last word as to the meaning of state statutes," *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952). So a decision from a federal court on a question of state law "cannot escape being a forecast rather than a determination." *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941); accord *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 122 n.32 (1984) ("when a federal decision on state law is obtained, the federal court's construction is often uncertain and ephemeral"). That fact alone raises at least two administrative concerns.

First, the *Erie* doctrine requires federal courts applying state law to limit their efforts, "to the extent possible, to applying state law as it currently exists, not creating new rules or significantly expanding existing ones." *Nolan v. CN8*, 656 F.3d 71, 76 (1st Cir. 2011); accord *Barfield v. Madison Cnty.*, 212 F.3d 269, 272 (5th Cir. 2000). Accordingly, federal courts are "extremely cautious about adopting substantive innovation in state law." *Berrington v. Wal-Mart Stores, Inc.*, 696 F.3d 604, 608 (6th Cir. 2012) (internal quotation marks omitted); accord *Kingman v. Dillard's, Inc.*, 643 F.3d 607, 617 (8th Cir. 2011). This longstanding practice means that diverting the myriad questions that arise when interpreting state public interest statutes to federal court will stunt the development of those laws. For that reason, this Court has noted that it is "particularly desirable" for federal courts to reach results that will "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).

Moreover, widespread application of the Fifth Circuit's rule will likely result in the unnecessary resolution of constitutional questions and, worse, in decisions striking down laws that state courts would have preserved with a saving construction. As this Court has observed, "[a]lmost every constitutional challenge" to a state law "offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore*, 442 U.S. at 429-430. Because state courts need not follow *Erie*, they may adopt such constructions. See, *e.g.*, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12 (1987) (had plaintiff asserted its claims in state rather than federal court, "it was entirely possible that the [state] courts would have resolved this case on state statutory or constitutional grounds, without reaching the federal constitutional questions"). Federal courts, however, *are* bound by *Erie* and thus must avoid novel interpretations of state law. See *Nolan*, 656 F.3d at 76. They are thus poorly placed to interpret state statutes to avoid constitutional problems.

Second, steering issues of state law to federal court increases the likelihood that courts will treat similarly situated parties differently. Cf. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594 (1968) (*per curiam*) (holding that federal court should abstain in favor of state court resolution of issues of state law because "[s]ound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other" parties); *Burford*, 319 U.S. at 327-328 (recognizing that allowing federal

courts to adjudicate certain state law claims would cause "[d]elay, misunderstanding of local law, and needless federal conflict with the State policy," and citing instances "where [a] federal court has flatly disagreed with the position later taken by a State court as to State law"). A federal court's construction of state law does not bind state courts. See *Moore*, 442 U.S. at 427. As a result, "[n]eedless decisions of state law should be avoided [by federal courts] both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (footnote omitted). Yet by routing more cases arising under state law to the federal courts, the Fifth Circuit's rule exacerbates the problem of inconsistent state-federal judicial outcomes.

Notably, each of these consequences will apply not only to claims arising under state antitrust and consumer protection statutes, but also in cases arising under many other state laws. States rely upon their *parens patriae* authority to bring a variety of enforcement actions. Chief among them are suits involving mass torts, see, *e.g.*, *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 962-963 (E.D. Tex. 1997), environmental claims, see, *e.g.*, *Georgia ex rel. Hart v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907), and civil rights, see, *e.g.*, *Massachusetts v. Bull HN Info Sys., Inc.*, 16 F. Supp. 2d 90, 102 (D. Mass. 1998). The decision below potentially would allow removal of actions brought by States to enforce state law in any of these areas if a private individual has a justiciable interest in the outcome. See Pet. App. 7a-8a (Mississippi not proceeding as *parens patriae* where it was not "sole party in interest"). The Fifth Circuit's

decision, therefore, may well presage the arrival of numerous state enforcement actions in the federal courts. If so, the development of state law will suffer as a result.

B. The Fifth Circuit's Decision Creates Complex Administrative Questions Under CAFA.

Treating actions filed as *parens patriae* enforcement actions as private mass actions also will give rise to duplicative, unwieldy litigation. CAFA defines a "mass action" as a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly * * * except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action" exceed $75,000. 28 U.S.C. § 1332(a), (d)(11)(B)(i). Construing that definition to reach actions brought originally by a State as the sole plaintiff creates a number of needless complexities.

First, the federal court would have to determine which unnamed, individual residents, if any, have claims exceeding $75,000. If the court could identify those unnamed plaintiffs, then the ones with claims that do not satisfy the amount-in-controversy requirement would be severed and remanded to state court.[7]

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[7] See *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1203-1207 & n.51 (11th Cir. 2007) (rejecting arguments that amount-in-controversy requirement (1) precludes exercise of federal jurisdiction over any individual claim in a mass action unless value of every claim in that mass action exceeds $75,000 and (2) allows exercise of federal jurisdiction over every claim in a mass action if value of any individual claim in that mass action exceeds $75,000, even if other claims valued at less than $75,000); Pet App. 52a-53a (district court decision relying on

Alternately, the federal court could keep a *parens patriae* action for the unnamed plaintiffs with claims that meet the amount-in-controversy requirement and then remand to state court a parallel *parens patriae* action for those with claims less than $75,000. In either case, in many state-initiated enforcement actions, the only party with a direct financial interest in excess of $75,000 will be the State itself. Thus, applying the mass action rule to a state enforcement action often will result in having only a single party forced to litigate its claims in federal court because of a defendant's removal under CAFA: the sovereign State.

Second, where, as here, an MDL has been convened, it is notable that CAFA bars transfer of a mass action from one federal court to another unless a majority of the plaintiffs consent. See 28 U.S.C. § 1332(d)(11)(C)(i). Application of that rule to a *parens patriae* action produces two undesirable results. First, if there are individuals other than the State with claims in excess of $75,000, they will be unnamed, and there is no obvious means for a federal court to identify them, contact them, and obtain their consent for transfer. Second, even if the federal court somehow manages to identify these individuals and request their consent, they may well refuse transfer. Thus, the Fifth Circuit's approach to CAFA removal creates the possibility (indeed, the likelihood, as this case shows) of claims under a single State's law proceeding in three courts simultaneously: (1) the MDL court, for cases originally filed in federal court and completely diverse private party claims originally filed in state court; (2) the federal district

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Lowery in discussing process of severing individual claims valued at less than $75,000).

court, as a result of removal under CAFA; and (3) the state court, for claims that did not meet the amount-in-controversy requirement for mass action removal. The net result is both a waste of judicial resources and an increase in the potential for inconsistent dispositions.

In short, the Fifth Circuit's rule effectively requires federal courts to rewrite a State's complaint as though it listed each and every claimant and then to apply procedural mechanisms that do not envision that redrafting, while forcing a State to litigate a mass action in spite of its professed intent to proceed as *parens patriae*. See *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-832 (2002) (plaintiff is "master of the complaint" and thus generally has the "choice of forum"). The result of this rewriting is burdensome and unworkable for both the parties and the courts. This Court has emphasized that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz*, 130 S. Ct. at 1193. Yet it is difficult to conceive of a more complex administrative procedure than the one compelled by the decision below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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