

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MISSISSIPPI, EX REL. JIM HOOD, :

4 ATTORNEY GENERAL, :

5 Petitioner : No. 12-1036

6 v. :

7 AU OPTRONICS CORPORATION, ET AL. :

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9 Washington, D.C.

10 Wednesday, November 6, 2013

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 11:06 a.m.

15 APPEARANCES:

16 JONATHAN S. MASSEY, ESQ., Washington, D.C.; on behalf of

17 Petitioner.

18 CHRISTOPHER M. CURRAN, ESQ., Washington, D.C.; on behalf

19 of Respondents.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next today in Case 12-1036, Mississippi v. AU Optronics
5 Corporation.

6 Mr. Massey.

7 ORAL ARGUMENT OF JONATHAN S. MASSEY

8 ON BEHALF OF THE PETITIONER

9 MR. MASSEY: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 The text and structure of the Class Action
12 Fairness Act of 2005, which is known as CAFA, show that
13 it does not extend to State parens patriae actions. If
14 there are any doubt on the matter, CAFA would have to be
15 narrowly construed as a matter of the principles of
16 federalism that are at issue here, as evidenced by the
17 46 States supporting Mississippi before the Court.

18 The disposition of the case today, we
19 believe, is straightforward. There is only one
20 plaintiff in this case, the State of Mississippi. It is
21 not a citizen for purposes of diversity jurisdiction,
22 and therefore, the requirements of even minimal
23 diversity, let alone the 100-person numerosity
24 requirement of CAFA, cannot be met.

25 Our friends on the other side want to use

1 the statute of CAFA to change that result. The mass
2 action definition is the key part of the statute issued
3 today. It is in the Joint Appendix at pages 79 to 80.

4 Essentially, the attempt to force State
5 actions into the mass action definition is a
6 square-peg-round-hole kind of problem. The mass action
7 definition addresses the situation of mass consolidation
8 or mass joinder, when there are 100 individual
9 plaintiffs or more in a case. And CAFA provides that
10 there's Federal jurisdiction over such a case.

11 But that does not apply to this situation.
12 CAFA refers to real plaintiffs asserting concrete claims
13 and further provides that those claims must be proposed
14 to be tried jointly. None of that happens in a *parens*
15 *patriae* case, where the State is the only Plaintiff.

16 JUSTICE GINSBURG: Mr. Massey, with respect
17 to that, there is a claim for restitution. I take it,
18 if the suit is successful, the money that's collected
19 will be distributed to all the people who are affected
20 by this conduct.

21 MR. MASSEY: Well, Justice Ginsburg, that's
22 very unlikely in this case. The Plaintiffs -- the
23 Plaintiff in this case is the State of Mississippi. The
24 consumers of Mississippi have already sued in an
25 indirect purchaser action that has been settled. So

1 they have received compensation.

2 The State does have a restitution claim
3 here. Your Honor is correct. And at page 65(a) of
4 the -- of the response to opposition of the Orange
5 Briefs, 65(a) describes the restitution claim.

6 The restitution claim seeks recovery to the
7 State of the money, not to consumers in Mississippi.
8 And what's likely to happen here -- and, frankly, what
9 happens very frequently when the Federal Trade
10 Commission or the Securities and Exchange Commission or
11 any other State or agency seeks restitution, the money
12 is recovered by the State.

13 And in a case like this, where it is very
14 difficult to trace the individuals, the consumers who've
15 been hurt -- after all, we're talking an LCD
16 price-fixing conspiracy. So every television, computer
17 monitor, phone, toy, digital camera, car navigation
18 system, there are no records, obviously, of who
19 purchased them, and it would cost so much money to
20 identify them --

21 JUSTICE KENNEDY: And you're asking for
22 \$10,000 for each one?

23 MR. MASSEY: Pardon me, Your Honor?

24 JUSTICE KENNEDY: You're asking for \$10,000
25 for each one?

1 MR. MASSEY: Well, the -- the complaint does
2 pray that. As the case goes forward, the Attorney
3 General -- and subject to all the procedures that occur
4 in Mississippi, will have to make a judgment about how
5 that money is to be distributed.

6 In the past, what I can tell you --

7 JUSTICE SOTOMAYOR: Let's assume a case
8 where -- forget about that the consumer action was
9 settled. And let's forget about a case in which the
10 damages are difficult to prove.

11 MR. MASSEY: Yes.

12 JUSTICE SOTOMAYOR: Let's think of a case in
13 which the damages can be determined, and the State comes
14 in on behalf of a class of consumers and says, we're
15 seeking their restitution. Does your argument change if
16 the facts are different?

17 MR. MASSEY: Our argument does not change.
18 I would say, in our case, the State -- just to be clear
19 about restitution -- the State is proceeding under
20 statutes that gives the -- the State the only cause of
21 action. Only the State can sue under these provisions.
22 If the State -- the -- the consumers have separate
23 damages statutes. The consumers would sue under
24 separate statutes in a different court.

25 So the -- the -- in a different court,

1 meaning in Mississippi, that would have to be in a
2 circuit court, court of law, as opposed to a court of
3 equity. But if a State were to seek restitution and to
4 distribute it to consumers, just to be clear, our
5 argument would not change because restitution is still a
6 public remedy.

7 And for years -- for decades, Federal
8 agencies and States have --

9 JUSTICE SOTOMAYOR: So is this a real
10 party-in-interest argument, or is it a statutory
11 argument that --

12 MR. MASSEY: It is --

13 JUSTICE SOTOMAYOR: -- the statute requires
14 named plaintiffs as opposed to -- named or unnamed
15 plaintiffs, but plaintiffs.

16 MR. MASSEY: Yes, named plaintiffs. The --
17 the simplest resolution of the case is simply a
18 statutory argument, that, on its face, the mass action
19 definition refers to plaintiffs. The only plaintiff is
20 the State. Even if the State has statutory authority to
21 seek restitution, it is still the only plaintiff.

22 So you would not even need to get into the
23 real party-in-interest test because the statute doesn't
24 refer to unnamed parties or to people who might be real
25 parties in interest. It refers simply to the

1 plaintiffs.

2 So it's simple --

3 JUSTICE ALITO: What do you do with
4 reference to persons?

5 MR. MASSEY: Yes, Your Honor. There is a
6 reference to persons in the mass action definition. It
7 occurs -- we believe, very strongly, that it
8 equates -- that -- that section continues and equates
9 persons with plaintiffs, and that the statute, in fact,
10 wouldn't -- would be absurd if it didn't because it
11 refers to the monetary claims of 100 or more persons, as
12 Your Honor has noted.

13 But then it says, "that are proposed to be
14 tried jointly on the ground that the plaintiffs' claims
15 involve common questions of law or fact." Those two
16 sets have to mean the same thing; otherwise, it doesn't
17 make any sense.

18 And furthermore, there are severe practical
19 problems that support our sort of
20 square-peg-and-round-hole problem.

21 JUSTICE ALITO: Well, I -- I realize that.

22 MR. MASSEY: Yes.

23 JUSTICE ALITO: But I'm not sure why that --
24 why it wouldn't make sense to read two different terms
25 in the same sentence to mean two different things.

1 MR. MASSEY: Well --

2 JUSTICE ALITO: The persons could be here,
3 the citizens of Mississippi, who were damaged by the
4 activity in question. The plaintiff -- plaintiffs,
5 here, there's one named plaintiff. The plaintiffs can
6 refer to -- to the person or entity or multiple people
7 or entities who were named as plaintiffs.

8 So why -- I don't see what the inconsistency
9 is.

10 MR. MASSEY: Well, because -- we think that
11 our reading is better because, if you're applying the
12 common question test, not to the persons who were in the
13 case, those abstract unnamed, unknown consumers, you're
14 not inquiring as to what their claims might be, you're
15 applying the common question test only to the plaintiff,
16 how could that -- how could that produce an
17 administrable result? You could have consumers -- you
18 never -- you would never know whether they presented
19 common questions.

20 And that -- that can't be what Congress was
21 thinking of because, then, you would have a license for
22 an unadministrable -- this is clearly a reference to the
23 kind of Rule 23 inquiry where, as this Court has
24 emphasized in class action case after class action case,
25 there has to be a rigorous analysis to ensure that there

1 are actual common questions based on the -- the actual
2 claims asserted.

3 And -- and we think that there's -- that any
4 other reading produces confusion, not just in this
5 section, but also in the remand section -- the \$75,000
6 remand section of the statute. CAFA provides that, if a
7 claim does not make -- does not reach the amount in
8 controversy requirement, it has to be remanded to State
9 court.

10 CHIEF JUSTICE ROBERTS: What if you have an
11 executor, and he's administering an estate in which 100
12 people have equal shares to the estate, and the estate
13 has a claim. And he brings it on behalf of the estate.
14 Now, is that covered as a mass action or -- or not?

15 MR. MASSEY: That, of course, is a different
16 case when it is not involving the government. But we
17 think Navarro would, essentially, address that
18 situation.

19 That's this Court's decision in 1980 that
20 held that the trustees of a business trust were the sole
21 real parties in interest and that the beneficiaries were
22 not, even though they stood to get money as a result of
23 the action, so I think that would address Your Honor's
24 question.

25 The text of the statute still would refer to

1 "plaintiff." So you would inquire, in that instance,
2 whether under State law -- this is what happened in
3 Navarro -- the Court inquired, does the executor have
4 the legal authority to represent the beneficiaries as
5 the sole plaintiff?

6 And if he or she does, then you would have
7 the single plaintiff situation, and you would not be
8 under CAFA.

9 JUSTICE GINSBURG: Mr. Massey, you envision
10 one proceeding, it could be a class action on behalf of
11 the individuals, that doesn't require everybody that
12 satisfy the amount in controversy, and then this action
13 by the Attorney General, which does, among other things,
14 seek restitution.

15 Isn't there an overlap between those two
16 claims? And how do we sort out -- you said -- at one
17 point, I think you described the restitution as
18 "disgorgement of ill-gotten gains."

19 MR. MASSEY: Yes, Your Honor.

20 JUSTICE GINSBURG: But, now, we have the
21 consumers who were affected, they've already been paid.
22 So how does it work for the Attorney General's suit?
23 What is the impact of the class action that has already
24 gone forward and been completed on the Attorney
25 General's claim?

1 MR. MASSEY: Yes, Your Honor.

2 The -- when the MDL judge entered the
3 settlement in the class, she indicated her view that it
4 would not preclude a parens case. Of course, it's open
5 on remand for the defendants to argue that the consumer
6 settlement bars the Attorney General's action. That
7 will have to be adjudicated on the merits in
8 Mississippi.

9 States are free to adopt different rules
10 about this. There is no case that we have found in
11 Mississippi squarely addressing this. There have been a
12 dozen or so parens cases over the last 10 years.

13 There is a case, though, from the State of
14 Washington, which is illustrative. It's actually on
15 page 35 of the Red Brief -- from our friend's brief, and
16 it's a case from the Washington Supreme Court in 1976,
17 called Ralph Winters Chrysler Plymouth.

18 In that case, the Washington Supreme Court
19 encountered the situation where the State had sought
20 restitution on behalf of consumers and sought to
21 distribute the money to consumers, and consumers also
22 brought separate damages actions.

23 And the Washington court said, there was no
24 double recovery, no preclusion problem, because the
25 restitution remedies were public in nature, and the

1 private damages actions proceeded under different
2 statutory authority for different claims.

3 And whether Mississippi would adopt that
4 approach, I don't know. But that illustrates, I think,
5 ultimately, that these are questions of State law, and
6 there is a longstanding tradition of restitution being a
7 public remedy.

8 After all, the government -- we've cited
9 some cases in the brief involving everything from rent
10 control to energy price regulation. The government
11 brings -- the Federal government, as well as State
12 governments, has brought restitution actions where it
13 has not returned money to consumers, has sometimes
14 done -- also sometimes has returned money, has -- but in
15 all those cases, consumers never participate. They are
16 never permitted to intervene.

17 CHIEF JUSTICE ROBERTS: Well, it would
18 make -- it would make no sense for a defendant in a
19 class action brought by consumers to ever settle the
20 case. It's going to have to pay twice. It's going to
21 have to pay consumers, and then it's going to have to
22 pay you because you can, say, well, we want restitution,
23 and we are not going to distribute it to the class
24 members, but we're entitled to it.

25 And I assume the amount of the restitution

1 is based on some estimate of the class -- the consumers'
2 claims.

3 MR. MASSEY: Well, the evidence -- the
4 evidence of loss is relevant. But the law is actually
5 well-settled in the lower courts -- there's not a
6 decision of this Court, but -- that a consumer releasing
7 his claim or her claim does not bar the State from
8 proceeding with a public parens patriae action.

9 The defendants, when they settled, there is
10 a little bit of disagreement in the brief, but the MDL
11 judge took the defendants as conceding that their
12 settlement with consumers would not bar a parens --

13 CHIEF JUSTICE ROBERTS: Is there -- is
14 there -- what is your understanding under Mississippi
15 law, which you know a great deal more than I do, about
16 any limits on a parens patriae action?

17 Let's say there was one purchaser in
18 Mississippi of LCDs, whatever, or two or three. Could
19 you bring a parens patriae action on their behalf?

20 MR. MASSEY: That would be a very different
21 case, Your Honor.

22 CHIEF JUSTICE ROBERTS: Well, I know,
23 but I'm trying --

24 MR. MASSEY: I think probably -- I think
25 very unlikely. I don't -- it depends on the -- for

1 example, let me -- let me just be clear --

2 CHIEF JUSTICE ROBERTS: Unlikely as a
3 practical matter or as a legal matter?

4 MR. MASSEY: Both. Both, Your Honor.

5 There are -- there are -- there's no bright
6 line. And after all, Snapp, which is the lodestar
7 parens case from this Court in 1982, involved only 787
8 workers. They were agricultural workers from Puerto
9 Rico. And the Court -- one of the objections was this
10 was not a sufficient quasi-sovereign interest to support
11 a parens patriae case.

12 And what this Court said was that you can't
13 just look at numbers because those people represent a
14 public interest. They were -- they alleged wage
15 discrimination, and there was a deterrent effect. So
16 that it wasn't really just 787. It was the entire
17 population of Puerto Rico.

18 JUSTICE KENNEDY: Are there parens patriae
19 actions where the State attorney general brings the
20 action in what is really a suit on behalf of private
21 parties? And, if so, do you call it private parens
22 patriae?

23 MR. MASSEY: Well, we don't think that
24 would be -- that is not a proper parens patriae case,
25 and the attorney general --

1 JUSTICE KENNEDY: In other words, parens
2 patriae has to have -- you have to ask for restitution?

3 MR. MASSEY: Well, no, no. The parens
4 patriae case, for example, here involves injunctive
5 relief, civil penalties, harm to the State as a
6 purchaser, itself, of LCD panels. And so restitution --
7 the remedy doesn't matter. But the -- the attorney
8 general has statutory authority in this case to bring a
9 case in the name of the State.

10 He is actually prohibited, under the State
11 Consumer Protection Act -- all parties are prohibited
12 from bringing a damages case on behalf of a private
13 consumer, except in that consumer's name, so --

14 CHIEF JUSTICE ROBERTS: Did the State
15 interest that's being -- the State interest that is
16 being asserted is damage to the consumers?

17 MR. MASSEY: Well, no. I mean, the State
18 interest is broader than that. It is the -- it is the
19 harm to Mississippi as a -- as a population, as an
20 entity from this price-fixing conspiracy, just as the
21 Federal government --

22 CHIEF JUSTICE ROBERTS: Because it harmed
23 members of the population of Mississippi, right?

24 MR. MASSEY: Well, yes, but I think -- I
25 think, in Snapp, the Court discussed how the -- when a

1 harm is broad enough, when it affects a substantial
2 segment of the population and affects them in their
3 economic capacity, there are indirect as well as -- as
4 well as direct effects that the State could be concerned
5 with.

6 Now, let me just --

7 JUSTICE SCALIA: What -- what are those?

8 MR. MASSEY: Well, in other words, there
9 are -- if people are harmed by a price-fixing
10 conspiracy, they have less money, they're not -- they --

11 CHIEF JUSTICE ROBERTS: Damage to -- having
12 less money is a damage to the consumer.

13 MR. MASSEY: Well, but that has a ripple
14 effect in the economy. Price-fixing conspiracies have a
15 public dimension.

16 And of course -- of course, if this -- any
17 challenge to whether this is a proper parens patriae
18 case or any case would be heard on the merits. We -- we
19 know the defendants will argue back in the Mississippi
20 courts that they have a series of defenses as to why
21 this case should not be brought.

22 One of them will be the attorney general
23 should not have brought it because it's outside his
24 authority. And that issue will be decided in
25 Mississippi. There is -- there is a case -- a vitamin

1 price fixing conspiracy case called the BASF case --

2 CHIEF JUSTICE ROBERTS: What prevents --
3 what prevents attorneys general from around the country
4 sitting back and waiting until every -- as private class
5 actions proceed, and as soon as one settles or one --
6 the plaintiffs' class prevails, taking the same
7 complaint, maybe even hiring the same lawyers, to go and
8 say, well, now we are going to bring our parens patriae
9 action, we know how the trial is going to work out, or
10 we know what the settlement is going to look like, and
11 we are going to get the same amount of money for the
12 State?

13 MR. MASSEY: Well, the -- if there is a
14 harm, as there was in this case, Federal criminal
15 allegations -- that there were guilty pleas and there
16 were 800 --

17 CHIEF JUSTICE ROBERTS: Well, that's got not
18 nothing to do with it, does it?

19 MR. MASSEY: Well, those are serious
20 matters, and I think the --

21 CHIEF JUSTICE ROBERTS: I'm sure it's a
22 serious matter when a plaintiff class recovers for, as
23 in this case, an antitrust violation or whatever and --
24 what's the answer? I'm sorry. I'm repeating my
25 question.

Official

1 MR. MASSEY: Well, I think the answer is
2 that the State has separate interests. The interest in
3 the -- that the State has qua State, yes, it should
4 bring cases where the public has been harmed. Of
5 course --

6 CHIEF JUSTICE ROBERTS: So the answer is
7 that there is nothing to prevent 50 attorneys general --
8 51, from saying, every time there is a successful class
9 action as to which somebody in my State purchased one of
10 the items, we are going to file a parens patriae action,
11 the complaint is going to look an awful lot like the
12 class action complaint, and we want our money?

13 MR. MASSEY: Well, I think that -- I think
14 that isn't going to happen because the State -- well,
15 the complaints are not the same. The State has its
16 own -- sues in its own name, in its own rights, and, of
17 course, the problem Your Honor is hypothesizing --

18 JUSTICE KENNEDY: Well, that means that it
19 could happen?

20 MR. MASSEY: Well, it could happen, right.
21 The State -- if the State has its own rights and its own
22 interests, it should sue. The attorney general is accountable to the
23 general public --

24 CHIEF JUSTICE ROBERTS: I'm sorry, counsel,
25 but you told me the State's own interest was in
26 protecting its consumers, so it would be able to file

1 this suit every time its consumers have been harmed, as
2 demonstrated either through settlement or suit. That's
3 the State interest, protecting its consumers.

4 MR. MASSEY: Well -- if -- if a State --
5 some States may adopt a different rule from Washington.
6 As the Washington court said, the State -- the consumer
7 claims would preclude a State attorney general action.
8 If a State does not -- if the State legislature
9 authorizes its attorney general to bring a suit when
10 this attorney general can identify harms to the State
11 that are separate from harms to consumers.

12 Your Honor is saying that -- that the two
13 are identical. They are not. And Snapp makes clear
14 that they are not. The State has a broader interest
15 than simply the compensation interest that an individual
16 has.

17 JUSTICE KENNEDY: Well, as a matter of
18 efficiency -- take the Chief Justice's hypo, the
19 hypothetical and back it up. The moment the class is
20 certified, why can't the attorney general join it and
21 say, now, our interest is a little different, but it's
22 so much the same that we want to join it, and we want to
23 join it as *parens patriae*. Would that prevent its
24 removal?

25 MR. MASSEY: If -- if the State attorney

1 general was combined with thousands of individual
2 claimants that, otherwise, would trigger CAFA, then --
3 then CAFA -- then you would be forced into this whole
4 case situation.

5 The whole case test, which you'd need not
6 reach here because the statute and the real
7 party-in-interest tests are clear, but under the whole
8 case test, you weigh whether the State has an -- the
9 essential nature proceed -- the essential nature of the
10 proceeding is that the State is the real party in
11 interest.

12 In the hypothetical you posit, I think it
13 would be removable. Obviously, it turns on the
14 particular facts, but, yes, if the State attorney
15 general is in court with 1,000 individual claimants,
16 that is probably a CAFA case.

17 That hasn't ever -- has never happened,
18 and in all of the districts outside the Fifth Circuit --
19 because the Fifth Circuit is the only court that has
20 adopted the rule that we -- that you're reviewing today,
21 every other circuit court has held that CAFA does not
22 extend to State parens patriae actions.

23 In all of those cases, the attorneys general
24 are not running around following class actions to try to
25 piggyback on top of them. They are not joining other

1 class actions. Those -- those --

2 CHIEF JUSTICE ROBERTS: But you can't
3 provide any reason why they wouldn't do so and,
4 presumably, would start doing so with greater frequency
5 if you prevail in this case.

6 MR. MASSEY: Well --

7 CHIEF JUSTICE ROBERTS: It doesn't have to
8 be the same case. It can be the next case on the
9 court's docket. The first case is In Re: LCD
10 Litigation, and the second case is State of Mississippi
11 v. LCD Manufacturers.

12 MR. MASSEY: Well, we don't think so. And
13 it certainly the State -- a State would be free to adopt
14 a -- a different rule as to preclusion. In other words,
15 a State legislature could say that a -- if -- if
16 consumers have recovered, the attorney general can't or
17 that the attorney general doesn't have statutory
18 authority in such cases.

19 But when the State legislature has told the
20 attorney general to enforce the public interest and
21 given him statutory authority to do so, he would be
22 derelict if he didn't honor the legislature's directive.

23 And that's what's happening here, that in a
24 series of cases involving vitamin price-fixing,
25 adulterated products, Google street view, where Google

1 found -- you know, downloaded data from people's
2 wireless networks, the attorney generals have responded
3 in those cases. Those are what these numbers are about.

4 CHIEF JUSTICE ROBERTS: And in every one of
5 those cases, there had been private class litigation
6 prior to the filing of parens patriae?

7 MR. MASSEY: No, I don't think there has --
8 I don't think there had been in virtually any of them.
9 The attorney general is -- is stepping into the breach
10 when the private lawyers have not brought class actions
11 because of the difficulties of bringing -- in bringing
12 class actions.

13 JUSTICE GINSBURG: Except we know that's not
14 true in this case because we already have a settled --

15 MR. MASSEY: There is a -- there was a class
16 action settlement here. That is true.

17 JUSTICE GINSBURG: Is your -- is your view
18 of what's called the mass action -- a mass action is you
19 have to have a sizeable number of plaintiffs, each one
20 with 75 -- at least \$75,000 at stake. Is that --

21 MR. MASSEY: Yes. Yes, Your Honor.

22 JUSTICE GINSBURG: And so they would all be
23 named plaintiffs.

24 MR. MASSEY: That's correct. That's
25 clearly -- the sort of mass consolidation is what the

1 mass action definition is addressing.

2 JUSTICE GINSBURG: Are there many actions of
3 that nature where there are hundreds of people, each
4 with a claim of 75,000 or more?

5 MR. MASSEY: There are. I don't -- I don't
6 know particular numbers. There are such cases that --
7 that are filed in Federal courts and when the -- when
8 the plaintiffs are individually identifiable.

9 JUSTICE GINSBURG: Why would you bring such
10 a claim in Federal courts in this mass action format?
11 I can see in Mississippi, it doesn't have class actions,
12 but if you're in Federal court, why would you ever have
13 a mass action, instead of a class action?

14 MR. MASSEY: Well, if you -- if you could
15 identify the plaintiffs, you don't need to go through
16 Rule 23. So if you know the 150 people who are -- who
17 are at issue, you can avoid all the certification
18 rulings and simply proceed on a consolidated basis. It
19 just cuts off sort of -- part of the inquiry. And --

20 JUSTICE KAGAN: Mr. Massey, if you are right
21 about what mass action means in this statute, what is
22 this exception about the general public doing?

23 MR. MASSEY: The general public. The --
24 it's doing two things. First, the -- as the amicus
25 brief of public citizen describes the legislative

1 genesis of it, it was really to address the California
2 unfair competition law situation, where there are
3 private attorneys general who are able to bring suits in
4 the name of the general interest -- the general public.
5 And they -- that was sort of the original genesis of it.

6 It is a separate reason to reverse. We
7 believe we meet it as well because it addresses a
8 situation where a State is -- where any litigant, State
9 or private, is representing the general public as
10 opposed to individual claimants.

11 And here, because restitution is a public
12 remedy and because the individual claimants cannot be
13 identified, the State is proceeding on the basis of the
14 general public of Mississippi. If anyone -- the
15 district court found -- it's in the Petition Appendix at
16 49a and 50.

17 The district court discusses the
18 traceability problems -- I'm sorry, I said the Petition
19 Appendix -- not the Joint Appendix.

20 JUSTICE BREYER: Can you tell me, when you
21 come back, where the money goes if you win?

22 MR. MASSEY: Yes. The money probably goes
23 to the State treasury because, in this case, it would be
24 too difficult to trace who gets -- who has been harmed.
25 The -- that's why the district court found that the --

1 given the ubiquity of the product and the fact that
2 there is no central record of whoever purchased a cell
3 phone in Mississippi, that the cost of -- of finding all
4 these people is -- is just not worth it.

5 There could be -- it could wind up in the
6 education program. The attorney general had mentioned
7 to me schools and things like that, but it's not going
8 to go -- it's very unlikely to go to the individual
9 consumers.

10 Thank you, Your Honor. If I could reserve my time.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Massey.

13 Mr. Curran?

14 ORAL ARGUMENT OF CHRISTOPHER M. CURRAN

15 ON BEHALF OF THE RESPONDENTS

16 MR. CURRAN: Mr. Chief Justice, and may it
17 please the Court:

18 The attorney general's interpretation of the
19 mass action definition requires this Court to conclude
20 that a mass action can only be one of the actions with
21 100 or more named plaintiffs and can never be a
22 representative action. That interpretation cannot be
23 squared with the statutory language, the purpose of the
24 Act, and the structure of the Act.

25 Justice Kagan, you referred to the general

1 public provision. That provision expressly refers to
2 the possibility of a representative action. In the
3 parenthetical language in that provision and -- you
4 know, I look at it on the -- in the Act form on 66a, but
5 it's, of course, in the codification as well, on page
6 79a of the Joint Appendix -- the parenthetical there
7 says that -- that this exclusion does not apply in cases
8 where the action is not on behalf of individual
9 claimants or members of a purported class.

10 So in other words, this exclusion under the
11 mass action definition is contemplating a situation
12 where there are individual claimants or members of a
13 purported class. That -- that has to be beyond the
14 named plaintiff.

15 In another example, farther down in the
16 exceptions to the mass action definition, there's a
17 reference to Section 1407, which is the MDL transfer
18 provision. There, again, there's reference to the
19 possibility of a mass action being converted into a Rule
20 23 class action.

21 Those provisions don't make sense, unless
22 it's possible for a mass action to be a representative
23 action.

24 JUSTICE SOTOMAYOR: So how do you remand a
25 case when it involves unnamed plaintiffs? Not a

1 proposed class because you -- if you have a proposed
2 class, that could be persons, and you could identify
3 those. But under your theory, what does a court do to
4 figure out which of all of those unnamed people have
5 claims above or below \$75,000?

6 MR. CURRAN: Well -- well, a couple of
7 things. Number one, it -- it may well be that the mass
8 action definition, a use of persons, that, of course,
9 our position is that is unnamed. Those are real parties
10 in interest of the claims. The reference to plaintiffs
11 may well be, as the attorney general posits, the named
12 plaintiffs.

13 So the \$75,000 requirement -- and Justice
14 Ginsburg referred to this -- this as well, that -- that
15 can make perfect sense. It's -- it's a way to make sure
16 that the named plaintiffs, who, after all, are being
17 given the keys to Federal discovery and maybe the
18 ability to negotiate settlements, that they've got some
19 skin in the game, that the plaintiffs, the named
20 plaintiffs controlling the litigation, have 75,000 or
21 more at stake.

22 JUSTICE SOTOMAYOR: You know, this language
23 is very reminiscent in what's in Federal Rule of Civil
24 Procedure 20, the joinder rule.

25 MR. CURRAN: Well --

1 JUSTICE SOTOMAYOR: And if I look at the
2 joinder rule, it uses "persons" and "plaintiffs"
3 essentially in the same way. It's talking about persons
4 being proposed plaintiffs, as opposed to unnamed
5 people --

6 MR. CURRAN: Well --

7 JUSTICE SOTOMAYOR: -- or the proposed
8 class, in essence.

9 MR. CURRAN: Your Honor, I see similarities
10 between this provision and the PSLRA, the Private
11 Securities Litigation Reform Act, that reformed class
12 actions in the securities context. And there, there
13 was -- there were provisions requiring that the named
14 plaintiff be a prominent victim of the alleged fraud.

15 And -- and here, I think it's got a similar
16 idea, that we want to make sure that the named
17 plaintiffs have that kind of stake. And this is an
18 important point because I think there's been some
19 suggestion that this is unwieldy or does it make sense,
20 if all the claimants under 75,000 get remanded.

21 But recall this Court's jurisprudence on
22 supplemental jurisdiction. Allapattah allows for
23 supplemental jurisdiction in a situation like this,
24 where certain plaintiffs do not satisfy the
25 jurisdictional minimum. As long as there are some that

1 do, the district court has discretion to allow those
2 that don't to stay in the same action.

3 JUSTICE SOTOMAYOR: It seems that that would
4 be hard to invoke that case when a statute commands
5 differently.

6 MR. CURRAN: Well, I mean, I don't see --

7 JUSTICE SOTOMAYOR: In that case, it's in
8 the -- in the absence of statutory language that
9 requires remand.

10 MR. CURRAN: Well --

11 JUSTICE SOTOMAYOR: I -- I'm hard-pressed to
12 think that we can be exercising supplemental
13 jurisdiction in a case where Congress has expressly
14 spoken and said you can't or shouldn't.

15 MR. CURRAN: Well, I don't understand that
16 because Section 1367 says supplemental jurisdiction
17 shall exist, unless it's expressly provided otherwise in
18 a Federal statute.

19 And this Court, interpreting similar
20 language in the Breuer case, which is cited in the
21 papers, said "expressly" means it's got to be direct,
22 it's got to be explicit, it has to be inescapable.

23 So I would submit that this language about
24 the 75,000, that does not preclude supplemental
25 jurisdiction. In fact, I think that -- that argument is

1 foreclosed by Breuer.

2 JUSTICE GINSBURG: In this particular case,
3 the individual claims were settled in the -- in the
4 class action, so if there -- if there are no individual
5 claimants to be -- to be represented, why doesn't this
6 end up being a claim where only the State of Mississippi
7 has a stake because the individuals that the State might
8 have been representing have already been satisfied, so
9 if this is --

10 MR. CURRAN: There are -- there are a couple
11 of aspects to this. First of all, our position, of
12 course, is that the Mississippi statute requires that
13 the money goes to the Mississippi citizens and that the
14 attorney general here is basically suing as a
15 representative or a conduit for those citizens.

16 The fact that those citizens, many of those
17 citizens, not all of them, the fact that many of them
18 have settled and have resolved the claims in the
19 multidistrict litigation, that means that there is going
20 to be a fight in one court or another -- we think it
21 should be in a Federal court; the attorney general
22 thinks the State court -- over what the preclusive
23 effects are of that prior settlement.

24 We view this case as nothing more than an
25 attempt to double dip. It's the same --

1 JUSTICE BREYER: Why is that? I thought
2 that in a -- maybe it's changed since I knew the law in
3 this area. But I thought, because of Illinois Brick,
4 the ultimate consumers couldn't recover, but rather --
5 you have to be a direct purchaser rather than an
6 indirect purchaser of the price-fixed good.

7 MR. CURRAN: That is under Federal law.

8 JUSTICE BREYER: Yes. All right. So this
9 is a State law case.

10 MR. CURRAN: The IPT case, that was a State
11 law case in Federal court. Okay.

12 JUSTICE BREYER: I know your case is, but
13 the one that settled previously?

14 MR. CURRAN: Yes. That's what I'm referring
15 to. That was in Federal court, but it was asserting
16 State claims. That's included --

17 JUSTICE BREYER: All right. So you have a
18 double dip claim. I guess my question, procedurally, is
19 that, here, the State of Mississippi is the named
20 plaintiff.

21 MR. CURRAN: The named plaintiff.

22 JUSTICE BREYER: And moreover, the State of
23 Mississippi is suing in order to obtain money, is what
24 we just heard, for its treasury. And, third, the State
25 of Mississippi is suing because of their belief that the

1 defendants injured the economy of Mississippi, and they
2 injured it by hurting the pocketbooks of many
3 individuals in Mississippi, the names of whom they don't
4 even know. All right?

5 Now, they say, look at -- read the statute.
6 Read the cases which say if you are a nominal plaintiff,
7 that's good enough, as long as you are not suing as some
8 kind of -- I forget the words -- quasi-sovereign,
9 whatever it was, one way or the other. You know the
10 cases better than I. But why isn't what they just said
11 sufficient?

12 MR. CURRAN: Because we are not disputing
13 that the attorney general has standing to bring a claim
14 as a nominee for the real parties in interest.

15 JUSTICE BREYER: I understand that, but why
16 does that fall within this statute?

17 MR. CURRAN: Because the statutory language
18 says if it's a civil action in which monetary relief
19 claims -- we clearly got that -- of 100 or more persons,
20 we think those claims under the Mississippi statute
21 inescapably belong to those persons --

22 JUSTICE KAGAN: If you go on and read that a
23 little bit further, Mr. Curran --

24 MR. CURRAN: I'm getting there.

25 JUSTICE KAGAN: -- it says, "claims of 100

1 or more persons that are proposed to be tried jointly on
2 the ground that the plaintiffs' claims involve common
3 questions of law or fact."

4 MR. CURRAN: Yes.

5 JUSTICE KAGAN: And here, of course -- you
6 know, there's no joinder, let alone, any proposed -- you
7 know, there's no -- there nothing that the Mississippi
8 attorney general has to go through, to show that the
9 plaintiffs' claims involve common questions of law or
10 fact, right? They don't -- there's no showing of that
11 kind that has to be made in a parens patriae case.

12 MR. CURRAN: Well, they filed a single
13 complaint, right, under Rule 42 and -- of the Federal
14 Rules of Civil Procedure, the State analog to that, and
15 pre-existing jurisprudence. When you file a single
16 complaint, you're asking for a single trial. And if you
17 want to bifurcate a trial of some kind, you have to make
18 a motion.

19 JUSTICE KAGAN: But, again, this clearly --

20 MR. CURRAN: So I submit there is a
21 proposed -- a proposal to try these claims jointly.

22 JUSTICE KAGAN: But they don't have to
23 show -- and this is clearly referring to a kind of Rule
24 23 inquiry, which they don't have to go through to do a
25 parens patriae.

1 MR. CURRAN: That would be the same thing,
2 Your Honor, in the case that they say is the
3 quintessential mass -- mass action case. They say a
4 mass action case is one where a bunch of plaintiffs have
5 joined together in a single suit --

6 JUSTICE KAGAN: Yes, but they do have to
7 show that --

8 MR. CURRAN: Why?

9 JUSTICE KAGAN: -- in a massive --

10 MR. CURRAN: No, they --

11 JUSTICE KAGAN: -- consolidation case --

12 MR. CURRAN: -- file a complaint.

13 JUSTICE KAGAN: -- the judge is going to
14 say, you have 100 claims; we want to see that those 100
15 claims have common questions of law or fact. But in a
16 parens patriae case, the State never has to make that
17 showing. It can just stand up and say, here we are. We
18 are the State. We're representing the interests of the
19 State qua State. Here's our claim.

20 MR. CURRAN: Well, Your Honor, I think -- I
21 submit that, when a State attorney general files a
22 complaint on behalf of 100 or more persons claiming to
23 have standing and to be seeking to recover for the
24 damages to those 100 or more persons, he's proposing to
25 try those claims together.

1 And as to -- as to whose claims they are, I
2 mean, the Mississippi statute is pretty clear that the
3 claim for restitution is -- is necessary to restore to
4 the persons in interest, the victims.

5 JUSTICE SCALIA: Yes, but the attorney
6 general says that that's not what's going to happen
7 here. How do you square that with his statement that
8 that money will not get to these people?

9 MR. CURRAN: He cited the statute that has
10 that plain language. That plain language was
11 interpreted by the Fifth Circuit. There are -- it's a
12 model act that's been interpreted by the State Supreme
13 Courts of other States, Iowa and Arizona. They looked
14 at that language. Oh, yeah, the money goes to the
15 people.

16 JUSTICE SCALIA: He says you can't -- he
17 says you can't even identify those people.

18 MR. CURRAN: Well, that is -- that doesn't
19 hold up. Obviously, those people were identified in the
20 class action. They're getting the money that's being
21 distributed. People can turn in receipts. There are
22 records. Every antitrust case has this issue
23 identifying the victims and compensating them. It's no
24 different here.

25 And another thing, there was a suggestion

1 that, oh, everybody in the world has LCD panels, that
2 the period of time at issue in this case is 1996 to
3 2006. LCD panels, which we now take for granted and are
4 ubiquitous, back then, were just an emerging technology.

5 And for that, I cite to the attorney
6 general's brief at page -- their complaint, page 32a of
7 our cert ap, paragraph 104, which acknowledges that LCDs
8 were not even the leading technology for televisions
9 back during this period of time.

10 JUSTICE BREYER: What about -- see, I can
11 understand a complaint where they have taken 100
12 individuals, or 102, and they list them as plaintiffs,
13 and they don't call it a class action. And that would
14 fall right within the meaning of mass action, if the
15 numbers are right.

16 MR. CURRAN: That's right.

17 JUSTICE BREYER: But if we take
18 your approach and depart from that mechanical, but
19 simple -- simply administered interpretation, what is
20 worrying me, and perhaps you can help me with that, is
21 that there are perhaps all kinds of State actions where
22 one of the motivating reasons is -- behind the lawsuit
23 is some person hurt our citizens.

24 And so, now, we will get into the instantly
25 interesting, but very difficult question of, well, when

1 you say hurt your citizens, do you mean hurt them by
2 giving them rise to an independent cause of action for
3 each of them, who we don't know who they are, and we
4 don't know if the statute of limitations has run to
5 some, and we don't know if others have other
6 disabilities; but, nonetheless, we're not certain this
7 suit is entirely for that, it may be mixed up with other
8 things.

9 Do you see the problem once I start down
10 your road?

11 MR. CURRAN: I do. I do.

12 JUSTICE BREYER: I've departed from the
13 clear and simple.

14 MR. CURRAN: Okay. But to be clear, our --
15 in our position, the only basis we have for removal here
16 is the inclusion of the restitution claim, which, under
17 Mississippi law, says that the claim belongs to the
18 citizens, and it's their money. If -- if that claim
19 wasn't in this action --

20 JUSTICE GINSBURG: That seems to be -- that
21 seems to be disputed because I understood Mr. Massey to
22 say that the restitution claim would go to the State.
23 And you say that that -- the restitution couldn't go to
24 the State.

25 MR. CURRAN: That's right. There is a

1 dispute on that issue.

2 JUSTICE BREYER: You can hold him to that,
3 and I guess he can say, no, I don't want to be held to
4 that or -- but that seemed to be not for this Court.
5 Once he says it, I guess --

6 MR. CURRAN: We don't care where it goes.

7 JUSTICE BREYER: But can we not take him at
8 his word? He said it wasn't.

9 MR. CURRAN: Well, the Mississippi statute
10 is clear. The attorney general cited that. The case
11 law is clear on that. So -- and the Fifth Circuit found
12 that Mississippi law required the money to go to the
13 individuals. I think this Court should defer to those
14 prior rulings of -- of those courts.

15 And -- so basically, back to the statutory
16 language -- and by the way, *parens patriae* is such a
17 loose label that's thrown around. The -- the attorney
18 generals seem to raise that up as a Latin shield of some
19 kind, suggesting that, as long as they invoke that term,
20 that issues of federalism prevents removal or something.
21 That doesn't hold up.

22 The statutory language, which is in English,
23 says that specific -- specific cases are removable. And
24 so we -- so I don't think we should -- I don't think
25 it's productive to talk about whether something is

1 parens patriae or not.

2 But, Justice Breyer, there are a lot of
3 cases that can be brought by State attorney generals
4 that would not be mass actions, like this case without
5 the restitution claim. Okay?

6 Also, if there's a big pollution problem
7 or -- or some public nuisance or some other thing like
8 that, where -- where there's no identifiable victims,
9 but the public as a whole is injured, that -- that
10 probably is a quasi-sovereign claim.

11 JUSTICE SCALIA: What -- what do you do
12 about this -- this language in the definition? I
13 haven't heard you explain it.

14 It -- it says -- it means any -- mass action
15 means "any civil action in which monetary relief claims
16 of 100 or more persons are proposed to be tried jointly
17 on the ground that the plaintiffs' claims involve common
18 questions of law or fact."

19 Now, they're not proposed to be tried
20 jointly here on that ground. They're being tried
21 jointly on the ground that the suit is being brought by
22 the attorney general under this State statute.

23 MR. CURRAN: Well, I -- I view that language
24 as contemplating a Rule 23 type analysis.

25 JUSTICE SCALIA: Yes, I understand that.

1 MR. CURRAN: Okay. And in this case, we've
2 got a State attorney general who's suing, not only for
3 the consumers, but also for himself, right? He's got
4 propriety claims in there. He's also suing on -- for
5 all the counties and municipalities in Mississippi.

6 I think a basis for his combination of those
7 claims in a single lawsuit is the inescapable
8 commonality of fact and maybe law in those claims. So
9 I -- I do think that it -- it satisfies that language.

10 JUSTICE KAGAN: Well, Mr. Curran, really, do
11 you -- are you saying that, as a matter of State law,
12 that, in this suit, the attorney general has to make a
13 proposal that -- that the plaintiff -- that -- that he
14 can bring the suit on the grounds that the plaintiffs'
15 claims involve common questions of law or fact and that
16 that proposal has to be adjudicated by the Court?

17 MR. CURRAN: I think, Justice Kagan, that
18 the attorney general has already done that. I think
19 that his complaint, beginning on the first page, says,
20 I'm bringing this claim on behalf of purchases by the
21 State and by its citizens of these LCD panels, and it's
22 a single complaint. So I think -- I think --

23 JUSTICE KAGAN: But he does not have to show
24 any common questions of law or fact in the typical way
25 that we demand. I mean, that's actually a really

1 demanding showing that we have forced lawyers to make in
2 the class action context. All that the attorney general
3 has to do is to stand up and say, I have a State
4 interest in protecting my citizens and in deterring
5 improper behavior, and here is my substantive right.

6 MR. CURRAN: Well, I guess -- I suppose we
7 could move for bifurcation to separate the -- the
8 proprietary claims from the claims on behalf of
9 citizens, and then he would say, no, it makes sense to
10 keep them all together. But -- but the -- the
11 sequencing of those arguments, I don't think should be
12 dispositive here.

13 By filing a complaint, again, I invoke
14 Rule -- Rule 42 of the Code of Federal Civil Procedure.

15 JUSTICE KAGAN: I guess I don't understand
16 the bifurcation point. It seems to me that what the
17 attorney general is saying is he has a set of claims.
18 They're his claims on behalf of the -- the populace,
19 but -- but to further State's own interests.

20 And there -- there's none of this Rule 23
21 kind of business about common questions of law or fact.
22 So it's not a question of -- you know, one set of claims
23 or another set of claims, now or later. He has a claim.
24 That's all he has.

25 MR. CURRAN: Well, certainly, he -- he at

1 least is attempting to combine the claims of all the
2 various individuals in the State on the grounds of
3 commonality, right? I mean, even if you separate his
4 claims out, I mean, it's -- the reason is --

5 JUSTICE KENNEDY: Suppose it's a given that
6 we all concede that the complaint is both for
7 private-named persons and for restitution. Both. What
8 result?

9 MR. CURRAN: Well, certainly, it's -- it's a
10 mass action in that circumstance because restitution,
11 under Mississippi law, is for those specified
12 individuals.

13 JUSTICE KENNEDY: No, the rest of my
14 hypothetical, part of the restitution goes to the State.

15 MR. CURRAN: Well, then, again, the
16 statutory language says if it's a civil action --

17 JUSTICE KENNEDY: Where's the language?

18 MR. CURRAN: Well, it's at the beginning of
19 the mass action definition. You can look at it on
20 either 65(a) and 66(a) or 79(a).

21 JUSTICE KENNEDY: I have 79.

22 MR. CURRAN: Okay. 79(a), "Mass action
23 means any civil action in which monetary relief claims of
24 100 or more persons." So as long as you've got a
25 qualifying claim, then the civil action's removable.

1 And it doesn't matter if there are additional claims or
2 extraneous claims.

3 So the -- the claim here for restitution on
4 behalf of Mississippi citizens is, in and of itself,
5 enough to make this a mass action.

6 And, again -- and, Justice Kagan, maybe this
7 is getting back to -- to your point. I refer to the
8 references to representative actions in the -- in the
9 General Public Provision and in the 1407 provision that
10 inescapably mean that -- that this provision can apply
11 to representative actions.

12 Maybe that doesn't satisfy your commonality
13 point, but -- but it gets part of the way there.

14 JUSTICE KAGAN: And this is the main
15 provision where they're trying to define what mass
16 action means. And I take your point that there are --
17 there's some slippage between this provision and the
18 various provisions that it refers back to because those
19 provisions -- we're talking about class actions, and
20 this one is talking about mass actions.

21 But this is the essential definition. And
22 this one seems to be pointing to a very different kind
23 of suit, one in which there are 100 individual claims
24 that -- that 100 people seek to have joined in which a
25 court is going to make a determination about whether

1 those 100 individual claims have questions of common law
2 or fact.

3 MR. CURRAN: If that's all this statute was
4 meant to reach, that would have been such an easy
5 statute to write. Instead of this more convoluted
6 language, it could have just said if it's a civil action
7 in which 100 or more named plaintiffs are asserting
8 monetary relief claims for joint --

9 JUSTICE SOTOMAYOR: But that would have
10 required this Court --

11 JUSTICE KAGAN: That's essentially what it
12 says. I mean, the only -- the only thing it doesn't say
13 in what you just said is that it says persons, instead
14 of named plaintiffs. But then, if you read the
15 sentence, it's pretty clear that persons and plaintiffs
16 are the same.

17 MR. CURRAN: Well, how -- well, first of
18 all, how do you explain -- I don't mean to pose a
19 question to you -- it's inexplicable that the word
20 "persons" --

21 JUSTICE KAGAN: I might not answer it.

22 (Laughter.)

23 MR. CURRAN: It's -- it's inexplicable that
24 Congress would use the word "persons" and then, 12 words
25 later, use "plaintiffs," if it signifies the exact same

1 thing and then continue to use the term "plaintiffs"
2 throughout.

3 JUSTICE SOTOMAYOR: But isn't your
4 proposal mean that before someone can remove, they have
5 to decide whether the class is certifiable?

6 MR. CURRAN: No.

7 JUSTICE SOTOMAYOR: Because you're not going
8 to decide whether these plaintiffs are actually going to
9 be plaintiffs and part of this class until you decide
10 the class question. If you use the word "persons" and
11 you use the language of the statute, it's the class
12 that's being proposed. It's the named plaintiffs and
13 the class that's being proposed of persons that are
14 being proposed to be tried together.

15 MR. CURRAN: There's another provision in
16 here that is incorporated into the mass action -- you
17 know, you will recall that if something qualifies as a
18 mass action then the provisions dealing with class
19 actions apply as well. And sub-part 8, which is found
20 at the bottom of 77a, specifically says, "This
21 subsection shall apply to any class action before or
22 after the entry of a class certification order by the
23 court with respect to that action."

24 So it's -- what this statute is addressing
25 is possible class actions. And, in fact, I think -- I

1 think it makes sense to -- to view this -- this
2 statutory question in light of the overriding statutory
3 purpose here.

4 And, Justice Breyer, you address this in
5 your opinion in Standard Fire. The driving force behind
6 this statute was to put interstate claims of national
7 importance into Federal court, to provide the option of
8 a Federal forum. And in that case, in Standard Fire,
9 this Court unanimously examined the statutory question
10 there through that lens.

11 Here -- so Congress dealt with class actions
12 proper, if you will, under Rule 23, in the class action
13 section. And then it's got the mass action section,
14 which is inescapably designed to catch other devices
15 that have the same problems.

16 JUSTICE SCALIA: Sometimes, Congress doesn't
17 do it right, you know?

18 (Laughter.)

19 JUSTICE SCALIA: Sometimes, they try to
20 catch everything, but the language they use doesn't do
21 it.

22 MR. CURRAN: But, here, I think it does do
23 it.

24 JUSTICE KAGAN: But more than that --

25 MR. CURRAN: And if there are competing

1 interpretations, then that purpose should drive the
2 decision.

3 JUSTICE KAGAN: But more than that,
4 Mr. Curran, is that there was actually a considered
5 effort by the attorneys generals here to take themselves
6 out of this statute --

7 MR. CURRAN: And they failed.

8 JUSTICE KAGAN: -- and that that -- well,
9 you say they failed, and -- I mean, that's the statutory
10 question. But it's not just Congress didn't do it right
11 this time. It was that there was a very serious effort
12 to get attorneys general out of this statute. And
13 that's -- and -- you know, it seems to me that they did
14 pretty well.

15 MR. CURRAN: No, no, no, no. No. They made
16 their proposal to -- to modify the statute after the Act
17 was in this form. They saw the Act in this form -- and
18 including Attorney General Hood sent a letter to
19 Congress saying this is going to infringe upon our
20 rights to parens patriae cases. That amendment
21 sponsored by Senator Pryor failed.

22 So I -- I think the only conclusion that can
23 be drawn from that is that Attorney General Hood and
24 many of his counterparts in other States saw this
25 problem, saw this -- this threat.

1 Now, a response that some on the Senate
2 floor gave to that proposal was it's not really
3 necessary. But the reason it was not really necessary
4 is because the bona fide interests of the State were
5 already protected, through the local controversy rule
6 and through the general public exception.

7 Congress did not intend for State attorneys
8 general to be able to use their offices to hire outside
9 counsel -- out-of-State outside counsel, to copycat a
10 class action complaint from an MDL, bring it again --

11 JUSTICE GINSBURG: Maybe -- maybe they
12 didn't, but if you look at the committee report, what is
13 the definition of mass action? And it is, under this
14 new subsection D-11, "expands the jurisdiction over suits
15 that are brought on behalf of numerous" -- numerous --
16 "named plaintiffs." "Numerous named plaintiffs."

17 MR. CURRAN: Yes, I am familiar with that
18 sentence in that Senate report. I am also aware that
19 that Senate report was issued and dated a week or ten
20 days after Senate -- after President Bush signed this
21 Act, so I question its value and its credibility.

22 JUSTICE SCALIA: You mean it's contrived
23 legislative history? I can't imagine.

24 (Laughter.)

25 MR. CURRAN: But -- but even if it somehow

1 could be considered, I don't think that -- that sentence
2 is definitional. That, certainly, is one alternative
3 to -- to conventional class actions that Congress was
4 concerned about.

5 Our point is it wasn't the only one.
6 Congress was trying to close loopholes and trying to
7 prevent abuses, and a miserly interpretation of the
8 class -- of the mass action definition would undermine
9 that -- that purpose.

10 Now, in my remaining time perhaps, not --
11 Justice Kagan, at the end of the day there was no
12 carve-out in the statute for attorney general actions,
13 even though that was sought. But the Act does reflect
14 some sensitivity for federalism concerns.

15 It's got an exception for situations where
16 States are the primary defendants -- or State officials
17 are the primary defendants. There is also a
18 notification to State attorneys general when there's a
19 settlement of a class action.

20 Those kinds of provisions show that Congress
21 was trying to be sensitive, and it was horse trading, it
22 was cutting deals, it was log rolling, coming up with an
23 Act here that was at once sensitive to federalism
24 concerns, but also trying to solve the very real abuses
25 that it had identified.

1 And on the federalism point, the attorney
2 general's brief has a lot of citations to Eleventh
3 Amendment issues, and some of this Court's precedents
4 dealing with State sovereign immunity. I submit that
5 those precedents and that Amendment deal only with
6 situations where the State is a defendant.

7 And here, where we are talking about the
8 State as a plaintiff -- and the only intrusion we are
9 talking about is removal from State court to Federal
10 court, that is not on the same playing field as the
11 authorities relied on by the attorney general.

12 A couple of other things. There was a
13 suggestion in the reply brief that the complaint here
14 was not, in fact, a copycat case -- a copycat complaint,
15 but instead, was a summary of the Federal indictments,
16 and that that explains the eerie similarity between the
17 class action complaint and the attorney general's
18 complaint. That -- that's just factually not right.

19 The -- some companies who were defendants,
20 like my client, Toshiba, was never charged or convicted
21 of anything in this case, yet we're a defendant in this
22 case, and that's because we were a defendant in the
23 class action case that was copied.

24 And, in fact, the indictments against some
25 companies bear very little resemblance to the complaint

1 that the attorney general has filed here, in terms of
2 the duration of the conspiracy and the subject matter of
3 the products that are alleged -- were allegedly
4 price-fixed.

5 Unless there are any further questions,
6 thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 Mr. Curran.

9 Mr. Massey, you have four minutes remaining.

10 REBUTTAL ARGUMENT OF JONATHAN S. MASSEY

11 ON BEHALF OF THE PETITIONER

12 MR. MASSEY: Thank you.

13 Mr. Chief Justice, and may it please the
14 Court:

15 The issues that I'd like to raise on
16 rebuttal are limited. The -- the most important thing
17 is that jurisdictional schemes should be simple,
18 administrable, predictable.

19 The simplest route -- the simplest
20 interpretation is the one we have shown, that these --
21 the statute is directed at actual plaintiffs with
22 concrete claims that are proposed to be tried jointly.

23 The only thing our friends on the other side
24 have pointed out is the use of the -- is the word
25 "persons." Justice Sotomayor is 100 percent correct

1 that the word "persons" is basically -- is an echo of
2 Rule 20, of the joinder rule, which also refers to
3 persons and plaintiffs.

4 So the fact that Congress used the word
5 "person" once in a mass action definition simply
6 confirms our point that the statute is really directed
7 at the mass joinder, mass consolidation situation, and
8 does not have anything to do with actions by sovereign
9 States.

10 Their primary argument seems to be that the
11 attorney general doesn't really own the claims in this
12 case, that these are claims that are owned by the
13 citizens of Mississippi. That is a classic State law
14 issue, which should be raised on remand in the State
15 court. A very similar --

16 JUSTICE SCALIA: Did not the Fifth Circuit
17 decide that State law question?

18 MR. MASSEY: No, Your Honor, we don't
19 believe so. That the Fifth Circuit ruled on its -- the
20 interpretation of CAFA and said that, for purposes of
21 the statute, the claims were removable. But it didn't
22 decide the attorney general's authority to sue in the
23 name of the State under the statutes which give him that
24 authority.

25 The -- we don't think the Fifth Circuit

1 decided that question, and I read the Red Brief at page
2 33 as saying the attorney general's authority is not at
3 issue here, that we assume the attorney general has the
4 authority to bring the claims in the complaint as he
5 pled them, which is the restitution claimed in the name
6 of the State.

7 And the -- there was a decision in
8 Mississippi in 2006, the only really relevant authority.
9 It's called the BASF case. And there, a lower court in
10 Mississippi, the Chancery Court, upheld the attorney
11 general's authority to bring a very similar *parens*
12 *patriae* case.

13 JUSTICE BREYER: What he says is -- in the
14 complaint, it says -- "prays that the defendant be
15 ordered to retribute any and all monies for the
16 purchases of its citizens."

17 All right. Now, you look at the statute he
18 quoted, the Mississippi statute, and it says there is
19 the authority to have restitution to restore to any
20 person in interest any monies which may have been
21 acquired by means of a practice prohibited.

22 So he says that sounds as if what you're
23 talking about is you want restitution, though, given to
24 the State, the restitution is for individual purchases
25 of individual citizens because there could be no other.

1 And, therefore, you have a list of people in mind, or
2 you must find one, where there were particular
3 individual purchases, by individual citizens, and get
4 that restitution into the treasury.

5 All right. Now, that -- I think something
6 like that was his argument, and I wanted to know what
7 you were going to say. Are you going to give up these
8 last five words, "and the purchases of its citizens"?

9 JUSTICE SCALIA: And that's what I
10 understood the Fifth Circuit to have held.

11 MR. MASSEY: Well, what the -- what the --
12 what the prayer for relief says is the -- "restitute to
13 the State" --

14 JUSTICE BREYER: Right.

15 MR. MASSEY: -- "for its purchases and the
16 purchases of its citizens."

17 JUSTICE BREYER: Yes, and the purchases of
18 its citizens.

19 MR. MASSEY: So the State will get the
20 money --

21 JUSTICE BREYER: I know they'll get the
22 money --

23 MR. MASSEY: Right.

24 JUSTICE BREYER: -- but he's saying, to get
25 the money, you have to say which money.

1 MR. MASSEY: Well, it --

2 JUSTICE BREYER: And to get the money, which
3 money means you better have a list of the individual
4 people who bought something, or otherwise, there is no
5 such money.

6 And that's enough to make those, in respect
7 to this paragraph, individual people whose claims the
8 State of Mississippi is pursuing. Something like that
9 is his argument. And I just wanted to know your
10 response.

11 MR. MASSEY: Well, the -- the evidence will
12 be proven through statistical aggregate evidence, rather
13 than a list of names. The list of names is impractical.
14 The -- the State will show, basically, on the basis of
15 gross sales --

16 JUSTICE SOTOMAYOR: But that has to go with
17 the facts of this case. Don't go with the facts. Go
18 with the -- with the -- the point, which is that you --
19 in -- in a normal case, aren't you, in fact, suing for
20 the citizens? The named citizens. Or the citizens --

21 MR. MASSEY: In many cases, we are. It is
22 still a public remedy of restitution. In many cases,
23 the individuals may be identified.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Counsel.

2 The case is submitted.

3 (Whereupon, at 12:06 p.m., the case in the
4 above-entitled matter was submitted.)

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