

A ROSE BY ANY OTHER NAME: WHY A *PARENS PATRIAE* ACTION CAN BE A “MASS ACTION” UNDER THE CLASS ACTION FAIRNESS ACT

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The Class Action Fairness Act of 2005 confers federal diversity jurisdiction over a “mass action,” defined as “any civil action in which monetary relief claims of 100 or more persons are proposed to be tried jointly.” Despite this plain language, courts are divided on whether CAFA applies to lawsuits brought by state attorneys general on behalf of state citizens, called parens patriae actions, where those actions seek monetary relief for hundreds of consumers in the state. Several courts uphold CAFA jurisdiction over such actions on the ground that consumers, who are not named plaintiffs, are nonetheless real parties in interest who constitute the one-hundred or more “persons” of a mass action and whose citizenship establishes the minimal diversity required by CAFA. Other courts reject jurisdiction on the ground that the State, which has no citizenship for diversity purposes, is the only real party in interest. Such divergent analysis is the basis of a growing circuit split. This article endorses the former approach of courts upholding CAFA jurisdiction because that approach comports with CAFA’s plain language, applies the correct real-party-in-interest analysis, and recognizes these parens patriae actions not for what they are called but for what they are: mass actions.

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INTRODUCTION

One of law school’s most familiar lessons is that federal courts are courts of limited subject-matter jurisdiction: They can hear only those cases authorized by Article III of the Constitution and the statutes of Congress.¹ In the Judiciary Act of 1789, Congress first author-

1. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552–53 (2005).

ized federal courts to exercise diversity-of-citizenship jurisdiction over civil actions between citizens of different states,² the purpose being to ensure a neutral forum for important cases where state courts might favor, or be perceived as favoring, home-state litigants.³ For over two centuries, the relevant statute authorized federal diversity jurisdiction only where the matter in controversy exceeded a certain value, currently \$75,000, and where “complete diversity” existed such that each defendant was from a state different from each plaintiff.⁴

Then, in 2005, Congress enacted the Class Action Fairness Act (CAFA)⁵ to ensure “[f]ederal court consideration of interstate cases of national importance under diversity jurisdiction.”⁶ CAFA “alters the landscape for federal court jurisdiction,”⁷ amending the diversity jurisdiction statute to give federal district courts original jurisdiction over cases that either are brought as “class actions” pursuant to statutes or rules comparable to Rule 23 of the Federal Rules of Civil Procedure,⁸ or meet CAFA’s definition of a “mass action.”⁹ A mass action is defined as “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly.”¹⁰ Unlike the traditional diversity jurisdiction statute described above, CAFA requires only “minimal diversity”—that “any member of a class of plaintiffs is

2. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990); *see* U.S. CONST. art. III, § 2, cl. 1 (“[J]udicial Power shall extend to all Cases . . . between Citizens of different States . . .”).

3. *Allapattah*, 545 U.S. at 552–54; *City of Ketchikan v. Cape Fox Corp.*, 85 F.3d 1381, 1384 (9th Cir. 1996) (stating that the aim is “to protect out-of-state corporations from local prejudices”).

4. 28 U.S.C. § 1332(a) (2006). Since *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), the Supreme Court has “read the statutory formulation ‘between . . . citizens of different States’ to require complete diversity between all plaintiffs and all defendants.” *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005) (quoting § 1332(a)).

5. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C. (2006)).

6. Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (codified as a note to 28 U.S.C. § 1711 (2006)); *see also, e.g.*, *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952 (9th Cir. 2009) (stating that CAFA was designed to curb litigation of “multi-state or even national class actions in state courts”); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1197 (11th Cir. 2007) (noting that CAFA was intended to provide “more uniform federal disposition of class actions affecting interstate commerce”).

7. *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 677 (9th Cir. 2006); *accord Lowery*, 483 F.3d at 1193 (stating that CAFA “works a sea change in diversity jurisdiction”).

8. § 1332(d)(1)–(10).

9. § 1332(d)(11).

10. § 1332(d)(11)(B)(i).

a citizen of a State different from any defendant”¹¹—thereby facilitating the removal of otherwise non-removable actions to federal court.¹²

One such previously non-removable action, often called a *parens patriae* action,¹³ was a lawsuit brought in state court by a state attorney general on behalf of state citizens pursuant to state consumer-protection or antitrust laws. Traditional diversity jurisdiction generally did not exist over such an action because the presence of the State, which is not a citizen for diversity purposes, usually destroyed *complete* diversity.¹⁴ But CAFA requires only *minimal* diversity of citizenship, which raises the possibility that *parens patriae* actions can indeed be heard in federal court under certain circumstances, even where those actions lack the procedural hallmarks of a typical class action.¹⁵ Nevertheless, courts are divided on whether CAFA applies to *parens patriae* actions brought on behalf of citizens, even where those actions seek monetary relief for hundreds of consumers in a given state. The Fifth Circuit has held that such cases can be removed to

11. § 1332(d)(2)(A); *see, e.g.*, *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 569 (5th Cir. 2011) (“at least one plaintiff and one defendant are from different states”).

12. 28 U.S.C. §§ 1441(a) (authorizing a defendant to remove a state-court action within the federal district courts’ original jurisdiction), 1453 (providing that a “class action may be removed to a district court of the United States”) (2006); *see* § 1332(d)(11)(A) (providing that, for removal purposes, “a mass action shall be deemed to be a class action”); *see also Lowery*, 483 F.3d at 1193 (“CAFA plainly expands federal jurisdiction over class actions and facilitates their removal.” (internal quotation marks and brackets omitted)).

13. A State has common-law standing to sue in its capacity as *parens patriae*—literally, “parent of the country”—where it can “articulate an interest apart from the interests of particular private parties.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Several state consumer-protection laws now give States statutory standing to sue *parens patriae*. *See, e.g.*, CAL. BUS. & PROF. CODE § 16760(a)(1) (authorizing the state attorney general “to secure monetary relief . . . for injury sustained by those natural persons to their property” from alleged antitrust violations).

14. *See, e.g.*, *Dep’t of Fair Emp’t and Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 749 (9th Cir. 2011) (Ikuta, J., dissenting) (“If DFEH is an interested party, then complete diversity is lacking, because DFEH is equivalent to the state and a state cannot be a citizen of itself.” (citing *Moor v. Alameda Cnty.*, 411 U.S. 693, 717 (1973))). But, in the rare *parens patriae* action, the State may be only a nominal party whose presence does not destroy complete diversity. *See id.* at 740 (affirming the exercise of traditional diversity jurisdiction over a *parens patriae* action brought on behalf of an individual whom the panel majority determined was the only real party in interest).

15. Under CAFA, a mass action—unlike a class action—need not be brought under a statute or rule similar to Rule 23. *Compare* § 1332(d)(1)(B) (defining a class action), *with* § 1332(d)(11)(B)(i) (defining a mass action). For more on class actions, see note 19 below.

federal court as CAFA mass actions, but the Fourth, Seventh, and Ninth Circuit have held that such cases cannot be so removed.¹⁶

This article argues that a *parens patriae* action can be a CAFA mass action where a State sues out-of-state defendants for valuable monetary relief for hundreds of its residents who, as real parties in interest, constitute the one-hundred or more persons of a mass action and whose citizenship establishes minimal diversity.¹⁷ Specifically, this article argues that a *parens patriae* action is subject to mass action diversity jurisdiction if: (1) a State seeks monetary relief against out-of-state defendants for hundreds of consumers; (2) the consumers have a right to pursue such relief on their own in private actions; (3) the State's action proposes to try monetary relief claims based on common legal or factual questions; and (4) the sought-after relief is valuable in the aggregate and for the State in particular as the sole named plaintiff.¹⁸ If any condition fails, the action cannot be a mass action and would not be subject to CAFA jurisdiction.¹⁹ This understanding

16. Compare Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 428–30 (5th Cir. 2008) (removable), with AU Optronics Corp. v. South Carolina, 699 F.3d 385, 392–94 (4th Cir. 2012) (not removable), Nevada v. Bank of Am. Corp., 672 F.3d 661, 669–72 (9th Cir. 2012) (not removable), and LG Display Co. v. Madigan, 665 F.3d 768, 772–74 (7th Cir. 2011) (not removable). In Mississippi *ex rel.* Hood v. AU Optronics Corp., 701 F.3d 796, 799–803 (5th Cir. 2012), the Fifth Circuit reaffirmed that a *parens patriae* action can be a removable CAFA mass action, following its prior precedent in *Allstate*. For more on the conflict of authority, including divergent views of the district courts, see Part II below.

17. As set forth in Parts II and III below, diversity depends on the citizenship of real parties in interest, even if they are not named plaintiffs, and one federal court of appeals has held that a *parens patriae* action can be removed as a CAFA mass action. *Allstate*, 536 F.3d at 428–30; cf. BP Am., Inc. v. Oklahoma *ex rel.* Edmondson, 613 F.3d 1029, 1035 (10th Cir. 2010) (“[W]hether CAFA’s mass action provision applies to suits by a state attorney general . . . and how, if at all, the ‘real party in interest’ analysis pertains to such suits . . . appear to be eminently debatable legal questions.”). But most circuits have held that *parens patriae* actions are not removable mass actions based on a flawed analysis, which assumes that consumers cannot be real parties in interest if the State is a real party in interest to the complaint as a whole. *AU Optronics*, 699 F.3d at 392–94 (following the approach in *Bank of America* and *LG Display*); *Bank of America*, 672 F.3d at 669–72 (following the approach in *LG Display*); *LG Display*, 665 F.3d at 772–74 (diverging from the Fifth Circuit’s approach in *Allstate*).

18. This article draws lessons directly from CAFA’s text and the case law on real parties in interest, though some commentators take a contrary position based on other reasons less grounded in the statutory text and real-party-in-interest case law. See, e.g., Alexander Lemann, Note, *Sheep in Wolves’ Clothing: Removing Parens Patriae Suits under the Class Action Fairness Act*, 111 COLUM. L. REV. 121 (2011); Dwight R. Carswell, Comment, *CAFA and Parens Patriae Actions*, 78 U. CHI. L. REV. 345 (2011).

19. This article does not argue that a *parens patriae* action can qualify as a CAFA class action. The Second, Fourth, Fifth, Seventh, and Ninth Circuits have all held otherwise on the ground that a *parens patriae* action is not “filed under a statute that

would promote uniformity in the exercise of federal jurisdiction and give notice of such jurisdiction to States that choose to pursue individualized monetary relief, in the form of damages or restitution, for distribution to a discrete group of its resident consumers.²⁰

This article has four parts. Part I provides background on CAFA's mass action provisions, including the statutory requirements of mass action diversity jurisdiction and express statutory exclusions from that jurisdiction. Part II surveys conflicting authority on whether CAFA's mass action provisions can reach a *parens patriae* action, including a split in the circuit decisions. Part III explains why a *parens patriae* action can qualify as a mass action based on CAFA's plain language and the correct real-party-in-interest analysis, employing a functional test focused not on the form of an action but on its substance. Finally, Part IV describes how this approach comports with public policy interests.

I.

BACKGROUND ON CAFA'S MASS ACTION PROVISIONS

CAFA gives federal district courts original jurisdiction over a "class action."²¹ For purposes of original jurisdiction, CAFA provides that "a mass action shall be deemed to be a class action."²² CAFA defines a mass action as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."²³ The definition of a "mass action" expressly excludes a *traditional* class action;²⁴ therefore, a mass action need not be brought

is both 'similar' to Rule 23 and authorizes an action 'as a class action.'" *Washington v. Chimei Innolux Corp.*, 659 F.3d 843, 849 (9th Cir. 2011) (quoting § 1332(d)(1)(B)); *accord* *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 217 (2d Cir. 2013); *Mississippi*, 701 F.3d at 799; *LG Display*, 665 F.3d at 772; *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169, 172 (4th Cir. 2011) (requiring a statute or rule that includes class action provisions for "adequacy of representation, numerosity, commonality, and typicality").

20. See *infra* note 171 and accompanying text.

21. 28 U.S.C. § 1332(d)(1)(B) (2006) (defining a class action as any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or a similar state statute or rule of judicial procedure).

22. § 1332(d)(11)(A).

23. § 1332(d)(11)(B)(i).

24. The mass action definition excludes any class action defined by 28 U.S.C. § 1711(2), which is nearly *in haec verba* with CAFA's class action definition at § 1332(d)(1)(B). Compare § 1711(2) (defining a class action as "any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing

under Rule 23 or a similar state statute or judicial rule.²⁵ The result is a functional definition of a mass action, which encompasses any civil action in which monetary relief claims of one-hundred or more persons are proposed to be tried together—by any means or procedure, without limitation.

Determining whether CAFA confers original jurisdiction over an action as a mass action is by no means straightforward.²⁶ Instead, this task requires careful attention to both the words and structure of CAFA's mass action provisions, which one court has criticized as "an opaque, baroque maze of interlocking cross-references that defy easy interpretation"²⁷ CAFA's mass action provisions are contained in the amended diversity statute, 28 U.S.C. § 1332(d)(11), and are composed of four sub-paragraphs. Based on CAFA's definition of a mass action and on its other mass action provisions,²⁸ courts have distilled four statutory requirements for a mass action:²⁹

- (1) a numerosity requirement of "100 or more persons";³⁰

an action to be brought by 1 or more representatives as a class action"), with § 1332(d)(1)(B) (defining a class action as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action").

25. The mass action provisions would be superfluous if they required compliance with Rule 23. *Cf.* *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476–77 (2003) ("[W]e should not construe the statute in a manner that . . . would render a statutory term superfluous."). One court has characterized this definition as a "statutory Janus" by which "a mass action simultaneously is a class action (for CAFA's purposes) and is not a class action (in the traditional sense of Rule 23 and analogous state law provisions)." *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1195 n.27 (11th Cir. 2007).

26. A state-court action within a federal district court's original jurisdiction may be removed to the district where the action is pending. 28 U.S.C. § 1441(a) (2006). Accordingly, a defendant may remove an action to federal district court if that action satisfies CAFA's mass action provisions. *See* 28 U.S.C. §§ 1453 (2006) (providing that a "class action may be removed to a district court of the United States"); § 1332(d)(11)(A) (providing that, for removal purposes, "a mass action shall be deemed to be a class action"); *see also Lowery*, 483 F.3d at 1193 ("CAFA plainly expands federal jurisdiction over class actions and facilitates their removal." (internal quotation marks and brackets omitted)).

27. *Lowery*, 483 F.3d at 1198 (footnote omitted); *see Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 678 (9th Cir. 2006) (deferring a "detailed consideration of CAFA's muddled 'mass action' provisions").

28. CAFA's mass action definition appears at § 1332(d)(11)(B)(i), and other relevant provisions appear in § 1332(d)(2). *See infra* notes 30–32.

29. *See Lowery*, 483 F.3d at 1202–03; *see also Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952–53 (9th Cir. 2009) (identifying similar CAFA mass action requirements).

30. § 1332(d)(11)(B)(i) ("monetary relief claims of 100 or more persons are proposed to be tried jointly").

- (2) a diversity requirement of “minimal diversity”;³¹
- (3) a commonality requirement of claims involving “common questions of law or fact”;³² and
- (4) an amount-in-controversy requirement of over \$5 million in the aggregate and over \$75,000 for at least one plaintiff.³³

The party invoking federal jurisdiction,³⁴ including the party removing an action to federal court, has the burden of proving each of these requirements.³⁵ By contrast, the party who opposes federal jurisdiction, even in the removal context, has the burden of establishing the applicability of one of the four express statutory exclusions from mass action jurisdiction.³⁶ The two most relevant exclusions provide that a mass action shall not include any civil action in which: (1) “all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action”;³⁷ or (2) “all of the claims in the action arise from an event or occurrence in the State in which the action was filed.”³⁸ This article refers to the former as the “general public exception” and the latter as the “event or occurrence exception.”

In addition to the stated statutory requirements and exclusions, CAFA’s mass action provisions include a tolling provision: “The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled

31. § 1332(d)(2)(A) (“any member of a class of plaintiffs is a citizen of a State different from any defendant”).

32. § 1332(d)(11)(B)(i) (“claims involve common questions of law or fact”).

33. § 1332(d)(2) (“matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs”); 1332(d)(11)(B)(i) (“jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the [\$75,000] amount requirements” of traditional diversity jurisdiction).

34. Either the State or the defendant may invoke federal jurisdiction. *See supra* notes 21, 26, and accompanying text.

35. *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069, 1071 (8th Cir. 2012) (“In the CAFA context, the party seeking removal bears the burden of proving by a preponderance of the evidence that the jurisdictional requirements for removal are met.”).

36. *Id.* (“If the removing party meets this burden, the party seeking remand must establish to a legal certainty that the requirements for federal jurisdiction are *not* met.”); *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 26 (2d Cir. 2010) (collecting cases). CAFA expressly excludes from mass action jurisdiction any civil action in which: (1) “all of the claims in the action arise from an event or occurrence in the State in which the action was filed . . .”; (2) “the claims are joined upon motion of a defendant”; (3) “all of the claims in the action are asserted on behalf of the general public . . . pursuant to a State statute specifically authorizing such action”; or (4) “the claims have been consolidated or coordinated solely for pretrial proceedings.” § 1332(d)(11)(B)(ii)(I)–(IV).

37. § 1332(d)(11)(B)(ii)(III).

38. § 1332(d)(11)(B)(ii)(I).

during the period that the action is pending in Federal court.”³⁹ Although no court has discussed, let alone analyzed, how this provision applies,⁴⁰ it appears to approximate *American Pipe* tolling where “commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.”⁴¹ The most sensible interpretation of CAFA’s tolling provision is that the pendency of a mass action in federal court tolls the statute of limitations on claims asserted by a named plaintiff on behalf of interested non-plaintiffs, if those claims are later brought by the non-plaintiffs. This tolling provision, as discussed in Part III.A below, provides an important clue as to the proper interpretation of the one-hundred or more “persons” in the definition of a CAFA mass action.

In sum, CAFA extends federal diversity jurisdiction to mass actions that satisfy each of the above statutory requirements and fall outside of the statutory exclusions. Congress crafted CAFA’s mass action provisions in this way to ensure that, under certain circumstances, federal courts could exercise diversity jurisdiction over interstate cases of national importance.⁴²

II.

CONFLICT OF AUTHORITY ON THE SCOPE OF A CAFA MASS ACTION

The central issue in this article is whether a *parens patriae* action can be a removable mass action under CAFA. As detailed below, this issue has divided courts across the country: The Fifth Circuit has split with the Fourth, Seventh, and Ninth Circuits, the Fifth Circuit holding that a *parens patriae* action is removable as a CAFA mass action.⁴³ The Tenth Circuit, without deciding whether CAFA’s mass action provisions apply to actions brought by a State, has described this issue as “eminently debatable.”⁴⁴ Not surprisingly, the issue has divided the lower courts as well. This Part details the conflict in authority, starting

39. § 1332(d)(11)(D).

40. Only one court has ever acknowledged this provision for “the tolling of statutes of limitations in mass actions,” glossing over it as irrelevant to disputed issues there. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1198–99 n.34 (11th Cir. 2007) (no issue of CAFA applicability to *parens patriae* actions).

41. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (reasoning that, unless the filing of a class action tolled the statute of limitations, potential class members would be induced to file motions to intervene or to join).

42. *See supra* note 6 and accompanying text.

43. *See supra* note 16.

44. *BP Am., Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1035 (10th Cir. 2010).

with cases that recognize a *parens patriae* action for what it can be under certain circumstances: a CAFA mass action.

A. *Authority for a Parens Patriae Action as a Mass Action*

In *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, the Fifth Circuit held that a *parens patriae* action is removable as a mass action under CAFA.⁴⁵ In *Allstate*, the Louisiana Attorney General sued insurance companies and others in state court for alleged state-law anti-trust violations.⁴⁶ The Attorney General sought injunctive relief, forfeiture of illegal profits, and treble damages for injured insurance policyholders.⁴⁷ The defendants removed the case to federal court, and the district court denied the Attorney General's motion to remand to state court, concluding that the action was properly removed under CAFA.⁴⁸ On interlocutory review,⁴⁹ the Fifth Circuit affirmed in a split decision, holding that the *parens patriae* action was a removable mass action.⁵⁰

The majority held that individual policyholders were real parties in interest to treble-damage claims that they could have pursued on their own in private actions,⁵¹ and which the Attorney General brought for their "particular benefit."⁵² It reasoned that, "as far as the State's request for treble damages is concerned, the policyholders are the real parties in interest," emphasizing that the plain language of the state statutory provision for treble damages "makes clear that individuals have the right to enforce this provision."⁵³ It rejected the argument that the State was the "only" real party in interest to the action, as the complaint clearly sought "to recover damages suffered by *individual policyholders*."⁵⁴ It explained: "If Louisiana were only seeking [in-

45. 536 F.3d 418, 430 (5th Cir. 2008).

46. *Id.* at 421–22.

47. *Id.* at 423.

48. *Id.*

49. CAFA authorizes interlocutory review of a CAFA removal order, 28 U.S.C. § 1453(c) (2006), as an exception to the general rule that remand orders are not reviewable on appeal, 28 U.S.C. § 1447(d) (2006). See *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447, 451–52 (7th Cir. 2005).

50. *Allstate*, 536 F.3d at 430. The Fifth Circuit in *Allstate*, having concluded that the action was properly removed as a CAFA mass action, declined to "address whether this lawsuit could . . . properly proceed as a class action under CAFA." *Id.*

51. *Id.* at 428–29.

52. *Id.* at 428 (internal quotation marks omitted).

53. *Id.* at 429. That is, the policyholders were real parties in interest who were "directly and personally concerned in the outcome of the litigation . . ." primarily because their right to seek treble damages was at issue. See *id.* at 428 (internal quotation marks omitted).

54. *Id.*

junctive relief], which is clearly on behalf of the State, its argument that it is the only real party in interest would be much more compelling.”⁵⁵ It then concluded that the action “easily met” CAFA’s mass action requirements.⁵⁶

The majority then left “to the district judge’s capable hands the manner by which the individual policyholders are to be added to this action,” as a downstream issue that would not affect federal jurisdiction in the first instance.⁵⁷ The dissent recognized that the State “may have no business bringing the treble damage claims because they belong to others,” and that jurisdiction exists over “an action brought in the manner that CAFA requires, by whatever name used as a disguise.”⁵⁸ But the dissent incorrectly assumed that the action could not be a mass action until the policyholders were in fact joined as additional parties.⁵⁹ The dissent was correct that some claims belonged to other real parties in interest, but misapprehended what constitutes federal jurisdiction under the mass action provisions in the first instance. Thus, as discussed in Parts III.A and III.B below, the majority approach in *Allstate* effectuates the plain language of CAFA’s mass action provisions and employs the correct real-party-in-interest analysis to determine minimal diversity for purposes of the statute.

In *Mississippi ex rel. Hood v. AU Optronics Corp.*, a split panel of the Fifth Circuit reaffirmed that a *parens patriae* action can be removed as a CAFA mass action.⁶⁰ The majority applied *Allstate* to

55. *Id.* at 430.

56. *Id.* (“[G]iven the factual circumstances of this case . . . [.] the aggregate amount in controversy is at least \$5 million, this action involves claims of more than 100 Louisiana citizens who are minimally diverse from Defendants, and it is being brought in a representative capacity on behalf of those who allegedly suffered harm.”).

57. *Id.* It presumably did so in anticipation of a procedural objection. *See* Fed. R. Civ. P. 17(a)(3) (“The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action.”).

58. *Id.* at 433 (Southwick, J., dissenting).

59. *Id.* (“If . . . the suit is presently deformed, I find we do not have jurisdiction until the necessary transformation into a mass or class action occurs.”); *see id.* at 434 (noting that the State has not “join[ed] additional parties”). At least one federal district court has likewise assumed that only the policyholders’ “inclusion would make the case a removable mass action.” *In re Vioxx Prods. Liab. Litig.*, 843 F. Supp. 2d 654, 667 (E.D. La. 2012) (internal quotation marks omitted). But this interpretation ignores the plain language of CAFA’s mass action definition. *See infra* note 139–140 and accompanying text.

60. 701 F.3d 796, 803 (5th Cir. 2012). Unlike in *Allstate*, the Fifth Circuit in *Mississippi* went further and held that the State’s action could not be a CAFA class action, as it was not brought under a statute or rule that authorized class actions or that was similar to Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 799.

hold that the State of Mississippi's action, filed against various LCD-panel manufacturers and distributors under state consumer-protection and antitrust laws, satisfied CAFA's mass action definition and fell outside of the general public exception.⁶¹ The majority reasoned that consumers, along with the State, were real parties in interest because the State sought monetary damages on their behalf, even though the consumers had authority to seek such relief on their own.⁶² If the State and consumers both sought relief for the same harm, the majority worried about the prospect of double recovery or that the State "could obtain restoration for harm to individual citizens, yet keep that money for itself."⁶³ A concurring judge wrote separately to urge the Fifth Circuit to reconsider *Allstate*, primarily agreeing with the dissent in *Allstate* and echoing objections to *Allstate* voiced by others courts.⁶⁴

The Fifth Circuit is not alone in recognizing that consumers not named in a *parens patriae* action could still be real parties in interest for CAFA purposes. In *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, the West Virginia Attorney General sought, among other things, the recovery of alleged excess pharmacy charges on behalf of consumers.⁶⁵ The Fourth Circuit held in a split opinion that a *parens patriae* action was not a class action under CAFA, without deciding whether it could be a mass action.⁶⁶ The majority noted that the analysis relied on by *Allstate* was "helpful," albeit not dispositive of a "separate" determination under CAFA: that the action be brought under a procedure similar to Rule 23,⁶⁷ which is required for a class action but not a mass action.⁶⁸ The dissent then cited *Allstate* with approval, relying on it to argue that consumers were real parties in interest to claims for "refunds that the Pharmacies will be required to pay directly to the affected consumers" if the State prevailed on those

61. *Id.* at 799–803.

62. *Id.* at 800–01.

63. *Id.* at 801–02.

64. *Id.* at 803–08 (Elrod, J., concurring). The concurrence went on to develop one objection in particular: that *Allstate*, by "deny[ing] the applicability of the general public exception when individual consumers are parties in interest," "will have eliminated the exception in this circuit" as mere surplusage. *Id.* at 807. But this objection, while noteworthy, has several problems. See *infra* note 220. For more on the objections to *Allstate* and answers to those objections, see Part III below.

65. 646 F.3d 169, 172 (4th Cir. 2011).

66. *Id.*; see also *West Virginia ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984, 996 (S.D. W. Va. 2012) ("Whether [the] action may be a 'mass action' under CAFA was not directly addressed in *CVS Pharmacy* because it was not raised by those parties on appeal.").

67. *CVS Pharmacy*, 646 F.3d at 176 n.2.

68. See *supra* notes 21, 23–25 and accompanying text.

claims.⁶⁹ Although a different panel of the Fourth Circuit has since disagreed with *Allstate* and held that a *parens patriae* action cannot be a CAFA mass action,⁷⁰ *CVS Pharmacy* itself does not contradict—and can even be read to support—the *Allstate* approach.

Moreover, several district courts have followed the *Allstate* approach.⁷¹ For example, in *West Virginia ex rel. McGraw v. Comcast Corp.*, a district court in the Eastern District of Pennsylvania held that the Fifth Circuit’s approach in *Allstate* “is most consistent with Congress’s intent under CAFA to expand federal jurisdiction.”⁷² The State in *Comcast*, as in *Allstate*, sought in pertinent part treble damages for consumers under a state antitrust statute.⁷³ The *Comcast* court upheld the removal of the action as a CAFA class action without reaching the mass action issue;⁷⁴ however, its reasoning supports removal on the mass action basis as well.

The *Comcast* court, acknowledging the general rule that “diversity jurisdiction cannot exist where a state is the only plaintiff,” emphasized an exception where “the essential nature and effect of the proceeding reveals that the state should not be considered the only

69. *CVS Pharmacy*, 646 F.3d at 182 (Gilman, J., dissenting). The majority did not disagree but rejected that a case “as a whole must be classified as a class action” on this sole basis. *Id.* at 176 n.2.

70. *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 392–94 (4th Cir. 2012). In holding that a *parens patriae* action was not a mass action, *AU Optronics* found *CVS Pharmacy* “somewhat instructive,” noting that the majority in *CVS Pharmacy* had recognized that the action there was “‘essentially a *parens patriae* type of action for enforcement of [the State’s] own laws on behalf of itself and its citizens’” *Id.* at 393 (quoting *CVS Pharmacy*, 646 F.3d at 179) (alteration added). But the quoted language from *CVS Pharmacy* says little, if anything, about whether a *parens patriae* action could also be a mass action.

71. *See, e.g., In re Vioxx Prods. Liab. Litig.*, 843 F. Supp. 2d 654, 667 (E.D. La. 2012) (remanding consumer-protection action in which the State sued a drug manufacturer only for “injunctive relief, declaratory relief, civil penalties, and attorneys’ fees”—with no monetary relief claims for consumers—because, under *Allstate*, “Kentucky is the real party in interest as to all relief sought in the complaint”); *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 748 F. Supp. 2d 580, 597 (S.D. W. Va. 2010) (remanding consumer-protection action because, unlike in *Allstate*, the State sought only “disgorgement, injunctive relief and civil penalties reserved to the State for repeated and willful violations”), *aff’d in part*, 646 F.3d 169 (4th Cir. 2011); *Hood v. F. Hoffman-La Roche, Ltd.*, 639 F. Supp. 2d 25, 33–34 (D.D.C. 2009) (non-CAFA case holding that, although “Mississippi citizens are real parties in interest with respect to the compensatory damages claims” based on *Allstate*, traditional diversity jurisdiction did not exist “because complete diversity is lacking so long as the State of Mississippi also is a real party in interest”).

72. 705 F. Supp. 2d 441, 447 (E.D. Pa. 2010).

73. *Id.* at 444.

74. *Id.* at 443 & n.1.

plaintiff.”⁷⁵ The court then held that the exception applied to the case at hand because, as in *Allstate*, the State was “not seeking relief for its residents in general but for a discrete group of Comcast’s premium subscribers.”⁷⁶ In so holding, the *Comcast* court acknowledged that a lawsuit could be a *parens patriae* action in form and nonetheless be a mass action in substance.

In *Nevada v. Bank of America Corp.*, a district court in the District of Nevada relied partly on *Allstate* to uphold the removal of a *parens patriae* action as a CAFA class action.⁷⁷ The State of Nevada sued several bank entities under, in relevant part, a state deceptive trade practices law for alleged misrepresentations related to mortgage modifications and wrongful foreclosures on borrowers’ homes.⁷⁸ The complaint prayed for declaratory and injunctive relief, civil penalties, and monetary restitution for hundreds of individual borrowers.⁷⁹ The court held that the action met the elements of a CAFA class action, including that of minimal diversity based on the citizenship of the borrowers who, along with the State, were real parties in interest.⁸⁰ It noted that the action “could” qualify as a CAFA mass action too, “because the monetary claims of at least 100 persons are proposed to be tried jointly due to common issues of law or fact,” but summarily concluded that the event or occurrence exception to mass action jurisdiction applied.⁸¹

Additionally, at least two district courts outside the Fifth Circuit have, much like the dissent in *CVS Pharmacy*, cited *Allstate* in dicta with approval.⁸² Thus, the Fifth Circuit’s approach in *Allstate* is not an

75. *Id.* at 445–46 (citing, *inter alia*, *Allstate*, 536 F.3d at 424) (internal quotation marks omitted).

76. *Id.* at 450.

77. No. 11-135-RCJ-RAM, 2011 WL 2633641, at *6 (D. Nev. July 5, 2011), *rev’d*, 672 F.3d 661 (9th Cir. 2012). As mentioned above, I participated as an advocate in this case.

78. *Id.* at *1.

79. *Id.*

80. *Id.* at *3–4 (emphasizing that sought-after restitution would effectively operate in favor of borrowers who could obtain such relief on their own in private actions).

81. *Id.* at *6 (citing 28 U.S.C. § 1332(d)(11)(B)(ii)(I) (2006)). As set forth in Part III.D.2 below, the district court in *Bank of America* was incorrect: The exception did not apply in that case because mortgage-related allegations were intertwined with complex national policies, not a single event or occurrence in Nevada.

82. *See, e.g.*, *AT & T Mobility LLC v. Smith*, No. 11-cv-5157, 2011 WL 5924460, at *5 (E.D. Pa. Oct. 7, 2011) (granting a preliminary injunction, and citing *Allstate* to support the proposition that courts “prioritize substance and function over form when characterizing the nature of a dispute or claim”); *Sample v. Big Lots Stores, Inc.*, No. C 10-3276, 2010 WL 4939992, at *5 (N.D. Cal. Nov. 30, 2010) (remanding an action brought by a former employee under a state private attorneys general act, and concluding that, unlike in *Allstate* where “the state [was] seeking to recover damages

anomaly in the case law; indeed, as explained in Part III, that reasoning properly construes CAFA's mass action provisions.

B. Authority Against a Parens Patriae Action as a Mass Action

In *LG Display Co. v. Madigan*, the Seventh Circuit adopted a different approach.⁸³ There, the Illinois Attorney General sued eight LCD-panel manufacturers in state court for alleged violations of a state antitrust statute.⁸⁴ The Attorney General sought injunctive relief, civil penalties, and treble damages for itself, as well as treble damages for injured consumers.⁸⁵ The defendants removed the action under CAFA, and the district court granted the Attorney General's motion to remand.⁸⁶ The Seventh Circuit affirmed, holding that the *parens patriae* action was not a mass action involving monetary relief claims of one-hundred or more persons because "only the Illinois Attorney General makes a claim for damages."⁸⁷ It cited for this proposition *Anderson v. Bayer Corp.*, a non-*parens patriae* case holding that several private actions asserting only the claims of named plaintiffs were not removable mass actions because each contained "fewer than 100 plaintiffs."⁸⁸

The Seventh Circuit in *LG Display* failed to explain the relevance of *Anderson* to the unique *parens patriae* action at issue: In *LG Display*, the State sought monetary relief not only for itself as the named plaintiff, but also for hundreds of individual consumers who were not named plaintiffs. Instead, the *LG Display* court noted that, in any event, an exception to mass action jurisdiction would apply because "'all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action.'"⁸⁹ But the court failed to explain why *all* claims were for the general public and why *some* claims were not for individual claimants or members of a purported mass action class. The court then concluded that the State was the only real party in interest to the

suffered by private parties," the present action "involves the opposite situation where an individual litigant is stepping into the role of the state attorney general *on behalf of the State*, to recover civil penalties for the State").

83. 665 F.3d 768 (7th Cir. 2011).

84. *Id.* at 770.

85. *Id.*

86. *Id.*

87. *Id.* at 772. The court also held that the action was not a CAFA class action. *Id.*

88. 610 F.3d 390, 393 (7th Cir. 2010).

89. 665 F.3d at 772 (quoting the general public exception at 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (2006)).

parens patriae action, rejecting the *Allstate* approach of analyzing whether consumers were also real parties in interest based on the claims at issue in the complaint.⁹⁰

In *Nevada v. Bank of America Corp.*, the Ninth Circuit followed a similar approach to the court in *LG Display*.⁹¹ Although, as discussed above, the district court in *Bank of America* upheld the removal of a *parens patriae* action as a CAFA class action, the Ninth Circuit reversed on appeal, holding that the State was the only real party in interest.⁹² It noted that the State's interest in the suit was "not diminished merely because it has tacked on a claim for restitution."⁹³ It therefore determined that the action could satisfy neither numerosity nor minimal diversity, emphasizing that the "action falls 99 persons short of a 'mass action.'"⁹⁴ In so doing, the Ninth Circuit simply repeated and compounded the Seventh Circuit's mistakes in *LG Display*.

Most recently, the Fourth Circuit has followed the Seventh and Ninth Circuits down the same path, repeating and compounding their mistakes still further. In *AU Optronics Corp. v. South Carolina*, the Fourth Circuit held that two cases, in which the State sued LCD-panel manufacturers under state antitrust and consumer-protection laws, were not removable under CAFA's mass action provisions.⁹⁵ It reached this holding even though the State sought monetary restitution for individual citizens, "agree[ing] with the Ninth and Seventh Circuits that a claim for restitution, when tacked onto other claims being properly pursued by the State, alters neither the State's quasi-sovereign interest in enforcing its own laws, nor the nature and effect of the proceedings."⁹⁶ That is, the court held that a claim for "restitution to injured citizens is incidental to the State's overriding interests . . ." in claims for civil forfeitures and penalties.⁹⁷ The Fourth Circuit thus concluded that the State was the only real party in interest and that the

90. *Id.* at 773–74. The *LG Display* court also voiced concerns about federalism and comity. *Id.* at 774. Those concerns, though sensible, were misplaced. *See infra* Part IV.

91. 672 F.3d 661 (9th Cir. 2012).

92. *Id.* at 667 (holding that prior precedent in *Washington v. Chimei Innolux Corp.*, 659 F.3d 843 (9th Cir. 2011), controlled); *see supra* note 19.

93. *Id.* at 671.

94. *Id.* at 672.

95. 699 F.3d 385, 387, 392–94 (4th Cir. 2012). The cases were consolidated on appeal. *Id.* at 387 n.1.

96. *Id.* at 394.

97. *Id.*

cases at hand could not satisfy CAFA's minimal diversity requirement.⁹⁸

Several district courts have likewise held that a *parens patriae* action was not a mass action because the State was the only real party in interest, even though it sought monetary relief for hundreds of consumers. On this basis, some courts have asserted that the action did not meet the numerosity element of CAFA's mass action provisions, many going so far as to read the element as requiring one-hundred or more named *plaintiffs*, rather than *persons*.⁹⁹ In so doing, these courts rely on many of the same assumptions as not only *LG Display* (finding no numerosity where the State was the only plaintiff),¹⁰⁰ but also the *Allstate* dissent (arguing that mass action required joinder of additional plaintiffs).¹⁰¹ Other courts have held that minimal diversity, in addition to numerosity, is lacking where the State is the only real party in interest.¹⁰² Still others have asserted, as in *LG Display*, the general public exception to mass action jurisdiction.¹⁰³

In sum, courts are divided on whether a *parens patriae* action can be a removable mass action.¹⁰⁴ But, despite differences in reasoning, most agree that the determination of CAFA jurisdiction depends not

98. *Id.*

99. *See, e.g.,* West Virginia *ex rel.* McGraw v. JPMorgan Chase & Co., 842 F. Supp. 2d 984, 997 (S.D. W. Va. 2012) (“[T]he Attorney General is the real party in interest . . . , there is only one plaintiff, and the action is not a mass action.”); Illinois v. AU Optronics Corp., 794 F. Supp. 2d 845, 859 (N.D. Ill. 2011); Arizona *ex rel.* Horne v. Countrywide Fin. Corp., No. 11-cv-131-PHX-FJM, 2011 WL 995963, at *3 (D. Ariz. Mar. 21, 2011) (“The State is the real party in interest and thus the numerosity requirement of 100 or more plaintiffs is not met. Moreover, the State is the only named party. Plaintiffs in a mass action must be individually named with their own direct claims.”); *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. C07-1827-SI, 2011 WL 560593, at *3 (N.D. Cal. Feb. 15, 2011) (same); *see also* Missouri *ex rel.* Koster v. Portfolio Recovery Assocs., Inc., 686 F. Supp. 2d 942, 947 (E.D. Mo. 2010) (“[T]his suit is not a ‘mass action’ because the Missouri Attorney General has not joined 99 additional plaintiffs”).

100. *See supra* note 87 and accompanying text.

101. *See supra* note 59 and accompanying text.

102. *See, e.g.,* South Carolina v. LG Display Co., No. 11-cv-729, 2011 WL 4344074, at *7 (D.S.C. Sept. 14, 2011) (“Because the State is a real party in interest, the minimal diversity required for mass actions under CAFA does not exist . . . [and] the State does not satisfy the numerosity requirement” (citation omitted)).

103. *See, e.g.,* Connecticut v. Moody's Corp., No. 10-cv-546-JBA, 2011 WL 63905, at *4 (D. Conn. Jan. 5, 2011) (emphasizing that the State sues “on behalf of the general public”).

104. *See also* Purdue Pharma L.P. v. Kentucky, 704 F.3d 208, 219 (2d Cir. 2013) (“[D]istrict courts within this Circuit . . . appear to be split.”) (collecting cases that both follow and reject the *Allstate* approach). In *Purdue Pharma*, the Second Circuit held that a *parens patriae* action was not a class action under CAFA, without deciding whether it could be a mass action. *Id.* at 217–20.

on how the action is labeled but on the substance of the proceeding.¹⁰⁵ The next Part endorses the analysis most faithful to controlling precedent, the language of CAFA's mass action provisions, and the principle to which nearly all courts adhere: CAFA jurisdiction turns not on what an action is *called* but on what it *is*.

III.

WHY A *PARENS PATRIAE* ACTION CAN BE A CAFA MASS ACTION

This article argues that, where the State seeks valuable monetary relief, in the form of damages or restitution, for hundreds of individual consumers who could pursue such relief on their own in private actions, a *parens patriae* action can be a CAFA mass action. This type of *parens patriae* action satisfies the mass action elements of numerosity, minimal diversity, commonality, and amount in controversy, and falls outside all the relevant statutory exclusions to CAFA jurisdiction.

Numerosity exists where the action seeks to try monetary relief claims of one-hundred or more "persons," not named plaintiffs. Minimal diversity exists because courts must rest jurisdiction on the citizenship of consumers who, under the correct analysis, are real parties in interest to monetary relief claims that they have a right to bring on their own in private actions and which the State brought for their benefit. Even if the State were also a real party in interest, no rule establishes that the State and private citizens cannot *both* be real parties in interest; in fact, the case law suggests that they can.¹⁰⁶ The amount in controversy for a *parens patriae* action often exceeds minimum thresholds where the State seeks to try the claims of hundreds of per-

105. See, e.g., *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012) (analyzing real parties in interest based on the "substance of these proceedings"); *LG Display Co. v. Madigan*, 665 F.3d 768, 773 (7th Cir. 2011) (stating that real parties in interest are "to be determined from the essential nature and effect of the proceeding" (internal quotation marks omitted)); *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169, 180 (4th Cir. 2011) (Gilman, J., dissenting) ("[O]ne must determine the essence of the action."); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008) ("[F]ederal courts look to the substance of the action and not only at the labels that the parties may attach."); *West Virginia ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984, 997–98 (S.D. W. Va. 2012) (emphasizing the essential nature and effect of the proceeding); *Illinois v. AU Optronics Corp.*, 794 F. Supp. 2d 845, 849 (N.D. Ill. 2011) (same); see also *infra* note 203 and accompanying text; cf. S. REP. NO. 109-14, 35, reprinted in 2005 U.S.C.C.A.N. 3, 34 (noting that CAFA "should not be confined solely to lawsuits that are labeled 'class actions' by the named plaintiff").

106. See discussion *infra* Part III.B. For particularly relevant analysis, see notes 164–166 below and their accompanying text.

sons together, precisely because they involve common questions of law or fact. And no exception to mass action jurisdiction necessarily applies.

A. *The Case Can Involve Monetary Relief Claims of One-Hundred or More Persons Who Need Not Be Named Plaintiffs*

In contrast to CAFA's class action provisions, CAFA offers a functional definition of a mass action: any civil action in which "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."¹⁰⁷ Logic, controlling precedent, and several canons of statutory interpretation dictate that this definition includes *parens patriae* actions brought on behalf of individual citizens. For starters, the plain text of the definition clearly distinguishes between statutory "persons" and "plaintiffs," establishing that representative suits brought on behalf of those not named as plaintiffs can be considered mass actions under CAFA. Moreover, CAFA's general purpose exception and tolling provisions would be rendered inconsequential surplusage if representative *parens patriae* actions could not qualify as mass actions.

1. *The Plain Text of the Mass Action Definition Accommodates Parens Patriae Actions*

Statutory interpretation of the mass action definition "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."¹⁰⁸ Although several courts have stressed that CAFA is a removal statute that must be "'strictly construed,'"¹⁰⁹ the rule of strict construction does not require courts to ignore the plain language and

107. 28 U.S.C. § 1332(d)(11)(B)(i) (2006); *compare with* § 1332(d)(1)(B) (defining a class action as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action").

108. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted).

109. *See, e.g., Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 667 (9th Cir. 2012) (quoting *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002)); *LG Display Co. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011) (same); *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 945 (E.D. Mo. 2010) (criticizing *Allstate* as "counter to the Supreme Court's directive that removal statutes are to be 'strictly construed'" (quoting *Syngenta*)); *see also Healy v. Ratta*, 292 U.S. 263, 270 (1934) (noting that jurisdictional statutes should be strictly construed generally); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 806 (5th Cir. 2012) (Elrod, J., concurring) (citing *Syngenta*).

structure of CAFA's mass action provisions where it is unambiguous.¹¹⁰ To the contrary, the rule recognizes both that Congress has "ultimate authority to shape the jurisdiction of the lower federal courts,"¹¹¹ and that statutory language is usually the best evidence of congressional intent because courts "must assume that Congress meant what it said."¹¹² For this reason, several courts have recognized that broad phraseology in a federal jurisdictional statute evinces congressional intent "to confer jurisdiction liberally," even though such statutes must generally be given a narrow construction.¹¹³ Moreover, by encompassing both class actions *and* mass actions, the very structure of CAFA strongly suggests that Congress intended mass actions to extend beyond traditional class actions.

When read with these principles in mind, CAFA's broad mass action definition reveals a congressional intent to bestow a liberal grant of jurisdiction.¹¹⁴ Furthermore, an overly restrictive interpretation of the mass action provisions makes little sense, as Congress intended CAFA to have a broad remedial purpose:¹¹⁵ to prevent litigants

110. Some courts have suggested that CAFA's mass action provisions contain ambiguity. *See* *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 687 (9th Cir. 2006) (noting "ambiguity of the statutory language"); *see also supra* note 27 and accompanying text. This Part demonstrates that, in context, the provisions are not ambiguous, and thus plain meaning should control. To the extent there is ambiguity, what little useful legislative history there is supports the view that Congress, by rejecting an amendment to exempt *parens patriae* actions categorically, intended CAFA to reach at least some of those actions. *See infra* notes 130–132 and accompanying text. The Senate report on CAFA also confirms that its "provisions should be read broadly," S. REP. NO. 109-14 at 43, *reprinted in* 2005 U.S.C.C.A.N. 3, 41, although the report is of "minimal, if any, value in discerning congressional intent, as it was not before the Senate at the time of CAFA's enactment." *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954 n.5 (9th Cir. 2009).

111. *Beiser v. Weyler*, 284 F.3d 665, 674 (5th Cir. 2002).

112. *Cf. Pinter v. Dahl*, 486 U.S. 622, 653 (1988) (emphasizing plain language despite rule that remedial statutes should be liberally construed); *United States v. Dangdee*, 616 F.2d 1118, 1119 (9th Cir. 1980) ("The language of criminal statutes must be strictly construed, but should be accorded its plain meaning when it is unambiguous.").

113. *Beiser*, 284 F.3d at 674 (holding that an action alleging only state-law claims "relates to" an international arbitration agreement for removal purposes under 9 U.S.C. § 205); *see also* *Infuturia Global Ltd. v. Sequus Pharm., Inc.*, 631 F.3d 1133, 1138 (9th Cir. 2011) ("Although we generally construe removal statutes strictly, the plain language of § 205 provides federal courts with remarkably broad removal authority." (citations omitted)).

114. *See supra* notes 15, 23–25 and accompanying text.

115. A countervailing rule of liberal construction applies insofar as CAFA is a remedial statute: "Remedial statutes are liberally construed to suppress the evil and advance the remedy." 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 60:1 (7th ed. 2010); *accord* *Peyton v. Rowe*, 391 U.S. 54, 65 (1968).

from keeping cases of national importance out of federal court.¹¹⁶ As the Eleventh Circuit observed in a non-*parens patriae* case, “[t]o read the plain language of the removal provisions narrowly . . . would frustrate congressional intent that CAFA be used to provide for more uniform federal disposition” of aggregated actions affecting interstate commerce.¹¹⁷ A narrow reading of the mass action provisions would also contradict congressional intent to avoid loopholes in the exercise of CAFA jurisdiction, including one that would allow private lawyers to collude with state attorneys general to insulate class actions against federal jurisdiction by bringing them as *parens patriae* cases.¹¹⁸ Thus, the interpretation of CAFA’s mass action provisions should not deviate from the general rule that plain language controls.

The numerosity requirement, by its plain language, extends to *parens patriae* actions that assert monetary relief claims for hundreds of individual consumers.¹¹⁹ Significantly, numerosity is defined by reference to monetary relief claims of one-hundred or more “persons”; it does not require one-hundred or more “plaintiffs” (or even “parties”),¹²⁰ nor does it state that the relevant persons must be named plaintiffs. To the contrary, it contemplates that at least some of the one-hundred or more persons could be real parties in interest not included as named plaintiffs: “monetary relief claims of 100 or more *persons* are proposed to be tried jointly on the ground that the *plaintiffs*’ claims involve common questions of law or fact.”¹²¹ By using

116. See *supra* note 6 and accompanying text; *infra* notes 228–231 and accompanying text; see also S. REP. NO. 109-14 at 43, *reprinted in* 2005 U.S.C.A.N. 3, 41 (stating that CAFA’s “provisions should be read broadly” in light of its statutory purpose).

117. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1197 (11th Cir. 2007) (effectuating CAFA’s plain language that removal applies to all claims in the “action,” not simply the claims against a removing defendant).

118. See *infra* notes 130–132 and accompanying text.

119. Some *parens patriae* actions seek monetary relief in the form of damages, see, e.g., *LG Display Co. v. Madigan*, 665 F.3d 768, 770 (7th Cir. 2011); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 423 (5th Cir. 2008), others in the form of restitution, see, e.g., *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 387 (4th Cir. 2012); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 666 (9th Cir. 2012); *Arizona ex rel. Horne v. Countrywide Fin. Corp.*, No. 11-cv-131-PHX-FJM, 2011 WL 995963, at *1 (D. Ariz. Mar. 21, 2011).

120. Congress chose here the broader term “persons” over the narrower term “parties,” which is used elsewhere in the diversity jurisdiction statute, 28 U.S.C. § 1332(a)(3) (2006), and which would ordinarily have encompassed counter- and cross-plaintiffs but not interested non-parties.

121. § 1332(d)(11)(B)(i) (emphases added); cf. *Allstate*, 536 F.3d at 430 (leaving to the district court “the manner by which the individual policyholders are to be added to this action”). Consumers are real parties in interest here, as discussed in Part III.B below.

different terminology for “persons” as opposed to “plaintiffs,” Congress clearly intended to differentiate between those who have an interest in the claims versus those who are named in the action. If Congress meant to say “plaintiffs” instead of “persons,” it could have done so and, in fact, did so elsewhere in CAFA.¹²² Any interpretation of “persons” to mean “plaintiffs” violates the “well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.”¹²³

The takeaway here is that Congress knew how to say “plaintiffs” and deliberately chose not to limit mass actions to those with one-hundred or more plaintiffs. This makes sense given that Congress not only sought to avoid loopholes that might be used by private class action attorneys to subvert CAFA jurisdiction, but also recognized that some state statutes facilitate the aggregated litigation of monetary relief claims without the use of a class action device under state law.¹²⁴ Congress therefore included in CAFA a functional definition of a mass action that is not anchored to the number of plaintiffs. Congress could have limited a CAFA mass action to certain types of joinders, but it did not. Nor did it limit or define mass actions by reference to a specific procedural device used to achieve the necessary aggregation of monetary relief claims.¹²⁵ Thus, the plain language of CAFA’s mass action provisions provides that numerosity exists where the

122. See § 1332(d)(2)(A)–(C), 1332(d)(3), 1332(d)(4)(A)(i)(I)–(II), 1332(d)(4)(B), 1332(d)(5)(B), 1332(d)(7), 1332(d)(11)(C)(i)–(ii). Congress also used “plaintiffs” as opposed to “persons” in the amount-in-controversy requirement of the mass action definition. See § 1332(d)(11)(B)(i) (conferring mass action “jurisdiction . . . only over those *plaintiffs* whose claims” exceed \$75,000 in controversy) (emphasis added).

123. *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003); cf. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476–77 (2003) (no statutory term should be construed as surplusage).

124. See *infra* notes 130–131 and accompanying text; see also 151 CONG. REC. S1235–36 (daily ed. Feb. 10, 2005) (statement of Sen. Durbin) (noting that some States allow for aggregated actions absent a class action device). One court has relied entirely on such scattered floor statements to suggest that mass actions involve “claims by multiple plaintiffs ‘consolidated by State court rules,’ but not otherwise pled as class actions.” *Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285, 297 (S.D.N.Y. 2009) (quoting 151 CONG. REC. S1151 (daily ed. Feb. 9, 2005) (statement of Sen. Reid)). But Senator Reid, far from saying that a mass action would be so limited, opposed CAFA as written because it would encompass at least this much—“those consolidated individual claims would be removed to Federal Court.” See 151 CONG. REC. S1151 (daily ed. Feb. 9, 2005). In any event, legislative history cannot trump statutory text, see *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992), especially where, as here, that history is so thin.

125. This contrasts with a CAFA class action, which requires use of a procedural statute or rule similar to Rule 23. See *supra* notes 21, 23–25 and accompanying text.

State, as the only named plaintiff in a *parens patriae* action, nonetheless proposes to try jointly monetary relief claims of hundreds of non-plaintiff consumers.¹²⁶

2. *Other CAFA Provisions Contemplate a Broad Mass Action Definition*

Other CAFA provisions make no sense unless Congress intended a mass action to reach proceedings in which a named plaintiff pursues monetary relief claims on behalf of interested non-plaintiffs. For example, the general public exception to mass action jurisdiction applies where “all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants *or members of a purported class*) pursuant to a State statute specifically authorizing such action.”¹²⁷ As CAFA’s mass action definition already excludes traditional class actions,¹²⁸ the exception to mass action jurisdiction for an action brought on behalf of “members of a purported class” makes sense only if non-class, representative actions fall within the scope of a CAFA mass action.

Moreover, the general public exception to mass action jurisdiction does not categorically exempt *parens patriae* actions in which the State is a plaintiff from CAFA’s reach. By contrast, CAFA explicitly exempts proceedings in which “the primary *defendants* are States, State officials, or other governmental entities.”¹²⁹ What is more, Congress even expressly considered and rejected an amendment that would have exempted *parens patriae* actions from the scope of CAFA.¹³⁰ Congress rejected this amendment, fearing that it would create a loophole through which private attorneys could avoid CAFA

126. CAFA’s mass action definition does refer to “the plaintiffs’ claims,” the plural noun suggesting that more than one plaintiff must bring a representative action on behalf of one-hundred or more persons. § 1332(d)(11)(B)(i). Although the State is typically the only plaintiff in a *parens patriae* action, the plural of plaintiff should embrace the singular, as “words importing the plural include the singular” in a federal statute. 1 U.S.C. § 1 (2006); *cf.* *Cochran v. Montgomery Cnty.*, 199 U.S. 260, 273 (1905) (recognizing that, in a removal statute, “the singular embraces the plural” of defendant). This is especially true here, as numerosity hinges on the number of *persons*—one-hundred or more—and not on the number of *plaintiffs*.

127. § 1332(d)(11)(B)(ii)(III) (emphasis added).

128. *See supra* note 24 and accompanying text.

129. § 1332(d)(5)(A) (emphasis added); *cf.* *United States v. Vonn*, 535 U.S. 55, 65 (2002) (“expressing one item . . . excludes another left unmentioned”). The balance of the quotation above reflects Eleventh Amendment concerns that “the district court may be foreclosed from ordering relief” against such State-related defendants. § 1332(d)(5)(A).

130. 151 CONG. REC. S1157, 1157–58 (daily ed. Feb. 9, 2005) (statement of Sen. Pryor) (proposing amendment to CAFA to exempt actions by state attorneys general).

jurisdiction by serving as outside counsel for state attorneys general seeking valuable monetary relief.¹³¹ This tactic would keep such cases in state court, thereby circumventing Congress's intent to ensure that federal courts resolve interstate cases of national importance. Any suggestion that CAFA includes a categorical exemption for *parens patriae* actions fails under the canon of statutory construction that counsels against interpreting a statute in a manner that would give effect to a rejected amendment.¹³²

Likewise, the provision that tolls the statute of limitations on "claims asserted in a mass action" has meaning only if a mass action includes certain actions involving both plaintiff and non-plaintiff "per-

131. *See, e.g., id.* at S1161 (daily ed. Feb. 9, 2005) (statement of Sen. Specter) (opposing amendment as "a pretty broad loophole" for "attorney general to deputize private attorneys to bring their class actions"); *id.* at S1162 (daily ed. Feb. 9, 2005) (statement of Sen. Cornyn) (opposing amendment because the "problems presented by outside counsel performing the duties of an attorney general under an exception like this just go on and on"); *id.* at S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley) (opposing amendment as "a very serious loophole" through which "State attorneys general can be used as pawns so that crafty class action lawyers can avoid the jurisdictional provisions" of CAFA); *id.* at S1164 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch) ("[I]t will not take long for plaintiffs' lawyers to figure out that all they need to do to avoid the impact of [CAFA] is to persuade a State attorney general to simply lend the name of his or her office to a private class action."); *see also id.* at S1159 (daily ed. Feb. 9, 2005) (statement of Sen. Pryor) (advocating amendment over objection that it "would create a major loophole because suits could be brought on behalf of State attorneys general"). Recent *parens patriae* actions may validate this concern: the Arizona and Nevada attorneys general were represented by the same class-action law firm in nearly identical consumer-fraud actions filed against the same Bank of America entities, on the same day, and alleging substantially similar claims. *Arizona v. Countrywide Fin. Corp.*, No. 2:11-cv-00131-FJM (D. Ariz.) (Doc. 22-2) (Close Decl.); *Nevada v. Bank of Am. Corp.*, No. 3:11-cv-00135-RCJ-RAM (D. Nev.) (Doc. 23-2) (Close Decl.).

Two of the above Senators also rejected the foregoing amendment because they thought it unnecessary, on the ground that *parens patriae* actions "do not fall within" the strict definition of a class action, with no mention of the broader mass action provisions at issue here. 151 CONG. REC. S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley); *see also id.* at S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch) ("At best, this amendment is unnecessary. At worst, it will create a loophole . . ."). That the amendment was proposed and debated in the first place suggests that some Senators understood CAFA's plain language to reach at least some *parens patriae* actions.

132. *Tyler v. United States*, 929 F.2d 451, 456 n.8 (9th Cir. 1991). *But see Lockhart v. United States*, 546 U.S. 142, 147 (2005) ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." (internal quotation marks and brackets omitted)). Not surprisingly, courts that have rejected mass action jurisdiction over particular *parens patriae* actions have done so based on a case-specific analysis, declining to read into the statute a categorical exemption for all such actions. *See, e.g., LG Display Co. v. Madigan*, 665 F.3d 768, 772-74 (7th Cir. 2011). *But see Connecticut v. Moody's Corp.*, 664 F. Supp. 2d 196, 202 (D. Conn. 2009).

sons.”¹³³ Such statutory tolling has no place unless a mass action, which by its terms excludes a class action, includes other types of representative litigation. If mass actions can exist only in cases of mass joinder of plaintiffs, this tolling provision is surplusage: A court need not toll the claim of one who is already a plaintiff in the pending case. Hence, the most sensible interpretation is that this provision affords tolling to absent persons whose claims a named plaintiff or plaintiffs seek to litigate. This reading of CAFA’s mass action provisions, including its tolling provision, comports not only with the canon against surplusage,¹³⁴ but also with the rule that courts must not “construe statutory phrases in isolation” but must “read statutes as a whole.”¹³⁵ Thus, various provisions in CAFA clearly contemplate a *parens patriae* action as a mass action.

3. *The Fifth Circuit in Allstate Provides the Best Reading*

The Fifth Circuit in *Allstate*, by holding that treble-damage claims for hundreds of Louisiana consumers satisfied the numerosity requirement of one-hundred or more persons, effectuated the plain language of CAFA’s mass action definition.¹³⁶ The Seventh Circuit in *LG Display*, by contrast, flouted this plain language by holding that a *parens patriae* action was not a mass action, primarily because only the attorney general asserted a monetary relief claim.¹³⁷ District courts that fail to follow the *Allstate* approach often make this same mistake, either overlooking the plain language of CAFA’s mass action definition altogether or failing to analyze that language according to sound principles of statutory construction.¹³⁸

133. See § 1332(d)(11)(D); see also *supra* note 41 and accompanying text (analogizing CAFA’s mass action tolling provision to *American Pipe* tolling).

134. *Dole*, 538 U.S. at 476–77; see also ANTONIN SCALIA & BRYAN A. GARNER, *READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (1st ed. 2012).

135. *United States v. Morton*, 467 U.S. 822, 828 (1984).

136. 536 F.3d at 430 (“Having determined that the policyholders are real parties in interest, . . . this is a civil action involving the monetary claims of 100 or more persons . . .”).

137. 665 F.3d at 772; see also *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012) (noting that “South Carolina is the sole named plaintiff in these lawsuits”). Unlike the Fourth and Seventh Circuits, the Ninth Circuit in *Bank of America* did not suggest that the one-hundred or more persons must be named plaintiffs, holding that the action fell 99 persons short only because the State was the sole real party in interest. 672 F.3d at 671–72.

138. See, e.g., *Illinois v. AU Optronics Corp.*, 794 F. Supp. 2d 845, 859 (N.D. Ill. 2011); *Arizona ex rel. Horne v. Countrywide Fin. Corp.*, No. 11-cv-131-PHX-FJM, 2011 WL 995963, at *3 (D. Ariz. Mar. 21, 2011); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C07-1827-SI, 2011 WL 560593, at *8 (N.D. Cal. Feb. 15, 2011); *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 947

Moreover, the *Allstate* dissent employed circular logic that simply assumed, without reasoning, that a *parens patriae* is not a mass action until additional parties are joined in the action: “[W]hether a suit is removable under CAFA, we should determine what the case is, not what it must be if all the relief requested is to be part of the litigation.”¹³⁹ In other words, the dissent began from the premise that a mass action includes one-hundred or more plaintiffs, summarily concluding on this basis that an action cannot be a mass action unless the one-hundred or more persons are already joined as plaintiffs to the action. But this ignores the language of the mass action definition, which turns only on whether the action “proposes” to try the monetary relief claims of one-hundred or more “persons.”¹⁴⁰ A mass action need not join one-hundred or more persons—it need only *propose* to do so. This point is buttressed by the earlier point that CAFA speaks in terms of “persons” rather than “plaintiffs.”

Accordingly, the Fifth Circuit provides the most faithful reading of CAFA’s simple, functional definition of a mass action. CAFA’s mass action definition focuses on whether any procedural rule or substantive statute is invoked to permit monetary relief claims of one-hundred or more persons to be tried together. Courts should resist any invitation to impose an extra-statutory requirement that the complaint include one-hundred or more named plaintiffs before CAFA’s mass action provisions can apply. As discussed in Part III.B below, this understanding dovetails with the threshold rule that requires courts to rest diversity jurisdiction on the citizenship of real parties in interest, making sense of the requirement that a mass action include claims of

(E.D. Mo. 2010). One case cited *Tanoh v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009), for the proposition that “CAFA’s requirement of 100 or more plaintiffs refers only to actual, named plaintiffs.” *Illinois*, 794 F. Supp. 2d at 859. *Tanoh* affirmed the remand of cases that had been removed to federal court on the ground that plaintiffs had strategically sought to avoid CAFA jurisdiction by filing several separate state-court actions in groups, each with fewer than one-hundred plaintiffs. 561 F.3d at 857. Critically, it was undisputed that each complaint asserted monetary relief claims only for those persons who were named as plaintiffs. Thus, dictum from *Tanoh*—that “plaintiffs in a mass action, unlike in a class action, do not seek to represent the interests of parties not before the court,” *id.* at 952—lacks effect. See *United States v. Johnson*, 256 F.3d 895, 952 (9th Cir. 2001) (en banc) (observing that a statement in an opinion is not binding where “made casually and without analysis”).

139. *Allstate*, 536 F.3d at 432–33 (Southwick, J., dissenting); *id.* at 434 (noting that, even if consumers were real parties in interest, “I do not agree that such a conclusion makes this suit a mass action,” only that the State “filed a defective pleading under Louisiana law”); see *id.* at 434 (arguing that a *parens patriae* action is not a mass action unless the State “join[s] additional parties”).

140. § 1332(d)(11)(B)(i).

one-hundred or more persons who need not be named plaintiffs.¹⁴¹ Under this threshold rule, they need only be real parties in interest for their citizenship to count for diversity purposes.

B. Citizenship of Real Parties in Interest Can Establish Minimal Diversity

Unlike traditional diversity jurisdiction, for which complete diversity of citizenship must exist between all plaintiffs and all defendants, CAFA mass action jurisdiction requires only minimal diversity in which “any member of a class of plaintiffs is a citizen of a State different from any defendant.”¹⁴² Notably, CAFA defines minimal diversity not in terms of named *plaintiffs* but class *members*, which would include interested non-parties to a representative action that asserts claims on their behalf. This definition of minimal diversity applies to a mass action for CAFA purposes, just as it does to a class action.¹⁴³

In any event, even for traditional diversity jurisdiction, “a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.”¹⁴⁴ The correct real-party-in-interest analysis depends primarily on who has the right to seek such relief and, to a lesser extent, on who will benefit from such relief. Accordingly, where a *parens patriae* action seeks monetary relief for consumers who have the right to pursue such relief on their own in private actions, consumers are real parties in interest whose citizenship can establish the minimal diversity required by

141. Thus, courts are wrong to suggest that *Allstate* is not based on “any language in CAFA itself . . .” *Madigan*, 665 F.3d at 773; *see also Mississippi*, 701 F.3d at 805 (Elrod, J., concurring) (“[T]he claim-by-claim approach does not find a foothold in CAFA’s text.”). CAFA even emphasizes “claims” in the mass action definition itself. § 1332(d)(11)(B)(i).

142. 28 U.S.C. § 1332(d)(2)(A) (2006).

143. *See* § 1332(d)(11)(A).

144. *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 461 (1980); *accord Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1183 (9th Cir. 2004). Relatedly, Rule 17(a) of the Federal Rules of Civil Procedure states that “[a]n action must be prosecuted in the name of the real party in interest.” While it refers to “the” real party in interest, perhaps suggesting that a case may have only one real party in interest, such a literal understanding is not possible given cases involving multiple real parties in interest to the same dispute. *See infra* notes 164–166 and accompanying text; *cf. Cochran v. Montgomery Cnty.*, 199 U.S. 260, 273 (1905) (explaining that, although the act refers only to plaintiff or defendant in the singular, “the singular embraces the plural” in the statute). In any event, despite “rough symmetry between the ‘real party in interest’ standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy,” these “two rules serve different purposes and need not produce identical outcomes.” *Navarro*, 446 U.S. at 462–63 n.9.

CAFA.¹⁴⁵ How a state statute defines interested parties, and who has control over the action, are less relevant questions and by no means dispositive.

1. *CAFA Shifts the Focus of the Real-Party-In-Interest Analysis from the State to Individual Consumers*

The ordinary meaning of a real party in interest is the “person entitled under the substantive law to enforce the right sued upon *and* who generally, but not necessarily, benefits from the action’s final outcome.”¹⁴⁶ Federal courts have long recognized that, for diversity purposes, private citizens may be real parties in interest to *parens patriae* actions in which the State was only a nominal party.¹⁴⁷ For more than two centuries before CAFA’s enactment in 2005, the jurisdictional inquiry focused not on whether to designate private citizens as real parties in interest, but on whether to designate the State as a nominal party. Given that pre-CAFA, traditional diversity jurisdiction required complete diversity, and given that a State is not a citizen for diversity purposes,¹⁴⁸ federal courts were oriented toward identifying nominal parties that *destroyed* jurisdiction, as opposed to real parties in interest that *enabled* jurisdiction.¹⁴⁹

145. Minimal diversity exists where any consumer is diverse from at least one defendant.

146. BLACK’S LAW DICTIONARY 1232 (9th ed. 2009) (emphasis added).

147. *See, e.g.,* Kansas v. United States, 204 U.S. 331, 340 (1907) (“[T]he state of Kansas is only nominally a party, and . . . the real party in interest is the railroad company.”); Connecticut v. Levi Strauss Co., 471 F. Supp. 363, 371 (D. Conn. 1979) (holding that, if the State “claims refunds to be distributed to identifiable purchasers, the citizen status of the purchasers rather than the sovereign status of their benefactor controls for diversity”); *cf.* Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 394 (1938) (no original jurisdiction in suit brought “in the name of the State but in reality for the benefit of particular individuals”); California v. Frito-Lay, Inc., 474 F.2d 774, 775–76 (9th Cir. 1973) (noting rejection of “*parens patriae* as a basis for invoking the court’s original jurisdiction where individuals were the real parties in interest”), *superseded on other grounds by statute*, 15 U.S.C. § 15c (2006), *as recognized in Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 427 n.5 (5th Cir. 2008).

148. *Moor v. Alameda Cnty.*, 411 U.S. 693, 717 (1973) (citing *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894)).

149. *See, e.g., id.*; *Minnesota v. N. Sec. Co.*, 194 U.S. 48, 63 (1904) (finding no “controversy between citizens of different states, for the state of Minnesota is not a citizen”); *Dep’t of Fair Emp’t & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 737 (9th Cir. 2011) (holding that “general governmental interests will not satisfy the real party to the controversy requirement for the purposes of defeating diversity”) (internal quotation marks and alteration omitted); *Ramada Inns, Inc. v. Rosemount Mem’l Park Ass’n*, 598 F.2d 1303, 1306 (3d Cir. 1979) (“[I]f . . . the state of New Jersey is a real party in interest, the district court would be without power . . . under the diversity statute.”).

By contrast, under CAFA, the State cannot *destroy* jurisdiction because only minimal diversity is required: The presence of even one diverse state citizen as a real party in interest *enables* jurisdiction, even if the State were also a real party in interest.¹⁵⁰ Courts must presume that Congress enacted CAFA (and rejected the amendment seeking an express exemption for *parens patriae* actions)¹⁵¹ fully aware of the common-law rule that diversity of citizenship is based on real parties in interest rather than named plaintiffs.¹⁵² Nothing in CAFA rejects this jurisdictional principle, which remains in effect as to *parens patriae* actions in which the State seeks monetary relief for consumers.¹⁵³ Thus, the focus of the analysis under CAFA should be not on whether the State is a real party in interest but on whether consumers are.

It is well established that the identity of real parties in interest depends on substantive state law,¹⁵⁴ especially on *who has the right* to seek relief and *who will benefit* from such relief. Where the State in that action seeks monetary relief for consumers, who have a right to pursue such relief on their own in private actions, the consumers are real parties in interest. This shift in focus—from the State to consumers—is essential under CAFA to the correct real-party-in-interest analysis for a *parens patriae* action because that analysis depends on those “who, by the substantive law, possess the *right* sought to be enforced.”¹⁵⁵ The determination hinges, to a large extent, on who is enti-

150. See *In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 706 (5th Cir. 2008) (“[A] State is not a person for purposes of diversity jurisdiction. This, with the long time companion insistence upon complete diversity, made the presence of additional parties aligned with the State irrelevant to federal diversity jurisdiction. CAFA, with its grant of jurisdiction to the federal district courts of qualifying class actions with minimal diversity of parties, pushes the question forward . . .”).

151. See *supra* note 130–131 and accompanying text.

152. See *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (noting that Congress is “understood to legislate against a background of common-law . . . principles”).

153. See *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (“[T]he common law ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose”) (internal quotation marks, alteration, and ellipsis omitted).

154. See, e.g., *Lucent*, 642 F.3d at 738; *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1183 (9th Cir. 2004) (whether corporation is real party in interest is question of state law); *Farrell Const. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990) (“A federal court sitting in diversity must look to state law to determine which party holds the substantive right.”); see also BLACK’S LAW DICTIONARY 1232 (9th ed. 2009) (emphasizing “the substantive law”); 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1541, at 320–21 (3d ed. 2010) (same); CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 70, at 490 (5th ed. 1994) (same).

155. WRIGHT, *supra* note 154, at 490 (emphasis added); cf. *Wieburg v. GTE Sw. Inc.*, 272 F.3d 302, 306 (5th Cir. 2001) (holding that, for Rule 17(a), the real party in

tled to enforce a “right”—that is, who has a cause of action to pursue a given claim for relief.¹⁵⁶ Not surprisingly, the Supreme Court has cited with approval cases holding that the real party in interest is the “legal holder of the *claim*.”¹⁵⁷ The Court explained that this results, in part, from “rules that permitted *any* ‘real party in interest’ to bring suit.”¹⁵⁸ Courts therefore cannot simply ignore a particular claim, which several parties may have a right to pursue, on the sole ground that another party has the right to pursue most claims in the whole complaint.¹⁵⁹ Thus, for a *parens patriae* action, a key part of the correct real-party-in-interest analysis turns on whether the same relief could be obtained by an interested party other than the State.

A correct real-party-in-interest analysis must recognize that, where the State alleges that defendants should pay consumers damages or restitution, based on injury to consumers or ill-gotten gain by defendants, respectively,¹⁶⁰ the consumers have a substantive right that is represented by the State. In a *parens patriae* mass action, individual consumers are actors with a substantive right whose interests may be represented in litigation by another.¹⁶¹ This is what the court recognized in *Allstate*: As the underlying state statute permitted recovery of treble damages to any injured person, and because the purpose of the provision was “to encourage private lawsuits by aggrieved indi-

interest is “the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery”) (internal quotation marks omitted).

156. See BLACK’S LAW DICTIONARY 1347 (8th ed. 2004) (stating that a right is, among other things, a “legally enforceable claim”).

157. See, e.g., *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 280 (2008) (quoting *Meeker v. Claghorn*, 44 N.Y. 349, 350, 353 (1871)) (emphasis added). In *Sprint*, the Court held that the assignee of “a legal claim for money” could sue even when that assignee had promised to give all proceeds back to the assignor. *Id.* at 279–80. It explained that, “rather than abolish the assignor’s well-established right to sue on the basis of naked legal title alone, many courts instead *extended the same right to an assignee.*” *Id.*

158. *Id.* (emphasis added).

159. In *Lucent*, the Ninth Circuit held the State was not a real party in interest, as “most of the[] forms of equitable relief could be obtained by the individual aggrieved.” 642 F.3d at 739. But it so held only because the State’s status as a real party in interest would have defeated complete diversity there; CAFA, by contrast, requires only minimal diversity. And the *Lucent* dissent argued that the State’s interest in equitable relief would have rendered it a real party in interest that defeated traditional diversity jurisdiction, regardless whether an individual was also a real party in interest. *Id.* at 749, 752–53 (Ikuta, J., dissenting).

160. See RESTATEMENT (SECOND) OF TORTS § 902 (1977) (damages); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 1, 51 (2010) (restitution).

161. See *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934–35 (2009) (defining a real party in interest as “an actor with a substantive right whose interests may be represented in litigation by another”).

viduals for injuries to their businesses or property,” the State could not be “the *only* real party in interest,” even if the injunctive relief sought was “clearly on behalf of the State.”¹⁶² Ultimately, consumers are real parties in interest based on monetary relief claims, regardless of the State’s interest in other forms of sought-after relief, such as an injunction or civil penalties.

To the extent both the State and consumers have a right to seek monetary relief in the form of damages or restitution, they both have a legitimate basis for real-party-in-interest status.¹⁶³ At least some authority supports the view that both the State and individuals can be real parties in interest to the same action, even the same claim. In *In re Katrina Canal Litigation Breaches*, the Fifth Circuit held that “both the State and the citizens are likely real parties in interest,” even though essentially only one claim was brought, for breach of contract.¹⁶⁴ Cases in the insurance and assignment contexts are also helpful in this respect. If an insurer has paid the entire loss of the insured, the insurer is the only real party in interest to a related tort action; but if the insurer has paid only part of the loss and the insured has paid another part, “both the insured and the insurer (and other insurers, if any, who have also paid portions of the loss) have substantive rights . . . which qualify them as real parties in interest.”¹⁶⁵ Similarly, “when there has been . . . a partial assignment the assignor and the assignee each retain an interest in *the claim* and are both real parties in interest.”¹⁶⁶ These insurance and assignment cases underscore that the real parties in interest depend on the claims at issue.

162. 536 F.3d at 429–30 (emphasis added).

163. *Id.* (assuming that, even if a state antitrust act “gives the Attorney General authority to enforce all [its] provisions,” individual policyholders also have “the right to enforce th[e] provision” authorizing the recovery of treble damages and, therefore, are real parties in interest to treble-damage claims (citing LA. REV. STAT. § 51:137)). Consumers in recent cases likewise had a right to enforce provisions invoked by the State to recover restitution on their behalf. *See Nevada v. Bank of Am. Corp.*, No. 11-135-RCJ-RAM, 2011 WL 2633641, at *3–4 (D. Nev. July 5, 2011) (citing NEV. REV. STAT. § 598.0993 and *Nev. Power Co. v. Eighth Judicial Dist. Court*, 102 P.3d 578, 583 n. 7 (Nev. 2004), which recognized an express right of action), *rev’d*, 672 F.3d 661 (9th Cir. 2012); *Arizona ex rel. Home v. Countrywide Fin. Corp.*, No. 11-cv-131-PHX-FJM, 2011 WL 995963, at *2–3, n.4 (D. Ariz. Mar. 21, 2011) (citing ARIZ. REV. STAT. § 44-1528 and *Sellinger v. Freeway Mobile Home Sales*, 521 P.2d 1119, 11212 (Ariz. 1974), which recognized an implied right of action).

164. 524 F.3d at 706.

165. *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 380–81 (1949).

166. 6A WRIGHT ET AL., *supra* note 154, § 1545, at 496–97 (emphasis added); *see United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934–35 (2009).

Another relevant, albeit less important, question to the real-party-in-interest analysis is who will benefit from such relief.¹⁶⁷ A common understanding of a real party in interest is a “[p]erson who will be entitled to [the] benefits of action if successful[;] that is, the one who is actually and substantially interested in [the] subject matter as distinguished from one who has only a nominal, formal, or technical interest in or connection with it.”¹⁶⁸

In the *parens patriae* context, several authorities have recognized that individuals who will receive monetary or individualized relief sought in a case are real parties in interest for purposes of diversity jurisdiction.¹⁶⁹ This rule follows from the Supreme Court’s general conclusion that “a State’s presence in a lawsuit will defeat [diversity] jurisdiction . . . only if ‘the relief sought is that which inures to it alone.’”¹⁷⁰ Regardless whether a State is a nominal party to an action, consumers entitled to damages or restitution won by the State can be real parties in interest for diversity purposes. This is true because, in many cases, such monetary relief will not—and cannot—inure to the State alone or its citizens as a whole.¹⁷¹ The State’s interest in recovery is attenuated because it will pass the relief along to consumers and because it typically seeks other relief for itself or the general public as

167. See *supra* notes 146, 155, and accompanying text.

168. BLACK’S LAW DICTIONARY 1264 (6th ed. 1990).

169. See, e.g., *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 396 (1938) (noting that the State cannot “merely seek recovery for the benefit of individuals who are the real parties in interest”); *Dep’t of Fair Emp’t & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 740 n.8 (9th Cir. 2011) (reasoning that the individual was the real party in interest, in part because the State sought back pay, front pay, and other damages “for the benefit” of that individual); *id.* at 751 (Ikuta, J., dissenting) (“[E]ither control of the case or a tangible interest in it suffices to make the citizenship of a party of record count for diversity purposes.”) (emphasis added); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 428 (5th Cir. 2008) (stating that where a State sues “for the particular benefit of a limited number of citizens,” those citizens are real parties in interest for diversity purposes (internal quotation marks omitted)).

170. *Lucent*, 642 F.3d at 737–38 (quoting *Mo., Kan. & Tex. Ry. Co. v. Hickman (Missouri Railway)*, 183 U.S. 53, 59 (1901)); see also *Ex parte Nebraska*, 209 U.S. 436, 446 (1908) (declaring that a State is not a real party in interest where “nothing . . . affected the state as such,” “the relief sought did not inure to the state alone,” and “a decree in favor of the plaintiff would not effectively operate in favor of the state”).

171. In *Allstate*, state law did not authorize the State to retain treble damages it sought for injured citizens, nor to distribute such restitution among the entire citizenry. See 536 F.3d at 428 (discussing LA. REV. STAT. § 51:138). The same was true of the sought-after restitution in *Nevada v. Bank of America Corp.*, 672 F.3d 661, 672 (9th Cir. 2012), where state law required that “[m]oney collected for restitution . . . must be deposited by the Attorney General . . . for distribution to the person for whom the restitution was ordered.” NEV. REV. STAT. § 598.0975(3)(b).

a whole, such as injunctive relief and civil penalties.¹⁷² That such equitable relief may apply statewide, and benefit many consumers who are not real parties in interest to the litigation, does not perforce render the State the *sole* real party in interest.¹⁷³ Thus, in the *parens patriae* context, consumers who receive monetary damages can be real parties in interest for purposes of diversity jurisdiction.

Moreover, language in a state statute designating “that any judgment will effectively operate in favor of the person claiming to be aggrieved” can support a determination that individuals represented by the State are real parties in interest, but it is not dispositive of that determination.¹⁷⁴ State consumer-protection statutes vary in their precise remedies and wording, but these subtle differences do not drive the diversity analysis. Similarly, the State’s control over a *parens patriae* action is relevant but not dispositive.¹⁷⁵ On a related note, the State’s statutory authority and standing to seek monetary relief on behalf of consumers does not mean the State is a real party in interest for diversity purposes, let alone the *only* real party in interest to the exclusion of affected consumers.¹⁷⁶ To the contrary, “a state could have

172. Cf. *Allstate*, 536 F.3d at 428 (“[A] party is a real party in interest when it is directly and personally concerned in the outcome of the litigation to the extent that his participation therein will insure a genuine adversary issue between the parties Such an interest is lacking when a state undertakes to sue for the particular benefit of a limited number of citizens”) (internal quotation marks and citations omitted).

173. See, e.g., *Lucent*, 642 F.3d at 739 (noting that the State was not a real party in interest, let alone the only real party in interest, even though it sought significant equitable relief); *id.* at 753 (Ikuta, J., dissenting) (stating that even if the individual was a real party in interest, the State should also be a real party in interest based on its “interest in vindicating the state’s non-discrimination policies”); *Allstate*, 536 F.3d at 430 (“If Louisiana were only seeking [injunctive relief], . . . its argument that it is the only real party in interest would be much more compelling.”).

174. *Lucent*, 642 F.3d at 739 & n.7 (discussing CAL. GOV’T CODE § 12965(c)(2), which states “the person claiming to be aggrieved shall be the real party in interest”). Similar language appears in state statutes at issue in other *parens patriae* actions removed under CAFA. See, e.g., *Arizona ex rel. Horne v. Countrywide Fin. Corp.*, No. 11-cv-131-PHX-FJM, 2011 WL 995963, at *2–3 (D. Ariz. Mar. 21, 2011) (complaint seeking restitution for consumers pursuant to ARIZ. REV. STAT. § 44-1528, which refers to the person receiving restitution as a “person in interest”); *Nevada v. Bank of Am. Corp.*, No. 11-135-R CJ-RAM, 2011 WL 2633641, at *6 (D. Nev. July 5, 2011) (complaint seeking restitution pursuant to NEV. REV. STAT. § 598.0993, which refers to those receiving restitution as “injured persons” (title of section) and as “person[s] in interest”).

175. *Lucent*, 642 F.3d at 738 n.4 (“control alone cannot render California a real party in interest because a state can always bestow upon itself control over virtually any lawsuit via legislation”); cf. *Missouri Railway*, 183 U.S. at 60 (stating that the State’s potential liability in the conduct of litigation for attorneys’ fees of the opposing party did not render the State a real party in interest).

176. See *Ex parte Nebraska*, 209 U.S. 436, 444 (1908); *Missouri Railway*, 183 U.S. at 60; cf. *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 391 (4th Cir. 2012)

statutory *parens patriae* authority to bring an action without . . . being a real party in interest.”¹⁷⁷ The bottom line here is that, although several factors may be relevant to the correct real-party-in-interest analysis, both the State and individual consumers may be real parties in interest to a *parens patriae* action depending on the claims at issue.

2. *The Seventh Circuit’s “Whole Complaint” Approach in LG Display Is Flawed*

In *LG Display Co. v. Madigan*, the Seventh Circuit misapprehended the-real-party-in-interest analysis and rejected the premise that the State could be a real party in interest to enforcement-related claims of injunctive relief and civil penalties but not to damages asserted on behalf of Illinois consumers.¹⁷⁸ In so doing, the court drew a false dichotomy, not supported by case law, between a real-party-in-interest analysis that focuses on the real party in interest to each claim and one that focuses on the real party in interest to the complaint as a whole.¹⁷⁹ The court rejected the former approach, which it referred to as the “claim-by-claim analysis” of *Allstate*, and embraced a so-called “whole complaint analysis.”¹⁸⁰ The *LG Display* court did so on the

(conceding that *Missouri Railway* offers “arguable support” for the proposition that individual citizens are real parties in interest).

177. *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 452 (E.D. Pa. 2010); *accord Lucent*, 642 F.3d at 738 n.5 (“[A] state can possess standing to bring forth a claim, but lack status as a real party”); *Hood v. F. Hoffman-La Roche, Ltd.*, 639 F. Supp. 2d 25, 32 n.9 (D.D.C. 2009) (same); WRIGHT, *supra* note 154, at 490 n.2 (“The concept of real party in interest should not be confused with the concept of standing.”); *see also Lucent*, 642 F.3d at 737 (noting that general government interest is not enough). But several courts continue to conflate the State’s statutory authority to sue on behalf of its citizens with the State’s identity as a real party in interest. *See, e.g., Illinois v. AU Optronics Corp.*, 794 F. Supp. 2d 845, 850 (N.D. Ill. 2011) (holding that “a quasi-sovereign interest is enough to make a State a real party in interest”); *Harvey v. Blockbuster*, 384 F. Supp. 2d 749, 755–56 (D.N.J. 2005) (same). This is not surprising, as “confusion between standing on the one hand and real party in interest or capacity on the other has been increasing.” WRIGHT, *supra* note 154, at 490 n.2.

178. 665 F.3d 768, 772–73 (7th Cir. 2011).

179. *Id.* at 773. The Ninth Circuit in *Bank of America*, 672 F.3d at 668–72, and later the Fourth Circuit in *AU Optronics*, 699 F.3d at 391–94, simply adopted the same flawed reasoning.

180. 665 F.3d at 773–74 (internal quotation marks omitted). Although *Allstate* is credited with initiating a “claim-by-claim approach,” the Fifth Circuit never used that term in *Allstate*. Apparently, the term was coined by a district court in Pennsylvania, *Comcast*, 705 F. Supp. 2d at 447, and later adopted by other courts. *See, e.g., AU Optronics*, 699 F.3d at 391–94; *Bank of America*, 672 F.3d at 669–70; *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169, 181 (4th Cir. 2011) (Gilman, J., dissenting); *see also Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 219 (2d Cir. 2013) (noting that “the claim-by-claim approach has been roundly criticized, and the

ground that, to determine whether “a state is the real party in interest to a suit,” a court must look to the “‘essential nature and effect of the proceeding.’”¹⁸¹

The real-party-in-interest analysis of *LG Display* is flawed for at least three reasons. First, the focus of the analysis is misplaced: The issue is not whether the State is a real party in interest, but whether consumers are.¹⁸² Second, the analysis presupposes that either the State or consumers can be real parties in interest—but not both.¹⁸³ Nowhere in *LG Display*, however, does the court cite authority for the proposition that a State and consumers cannot both be real parties in interest to a *parens patriae* action or a given claim within such an action. This “either–or” analysis is wrong. The correct analysis recognizes that, as in *Allstate*, both the State and consumers can be real parties in interest to the suit.¹⁸⁴ For decades, courts have acknowledged that different parties can be real parties in interest to the same action or claim.¹⁸⁵ Third, the analysis in *LG Display* conflates the “essential nature and effect of the proceeding” with an approach focusing on the whole complaint rather than the claims that compose it.¹⁸⁶ The

whole-complaint approach has emerged as the majority rule” (internal quotation marks omitted).

181. 665 F.3d at 773 (indirectly quoting *Ford Motor Co. v. Treasury*, 323 U.S. 459, 464 (1945)).

182. *See id.* at 773–74 (framing issue as “whether a State is the real party in interest in a *parens patriae* case” (internal quotation marks omitted)); *see also AU Optronics*, 699 F.3d at 391 (noting two alternative approaches by which a court considers either “what interest the state possesses in the lawsuit as a whole” or “whether the state is the beneficiary of each basis for relief”); *Bank of America*, 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 and brackets omitted). The focus is likewise misplaced by lower courts. *West Virginia ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984, 997–98 (S.D. W. Va. 2012); *South Carolina v. LG Display Co.*, No. 11-cv-729, 2011 WL 4344074, at *6 (D.S.C. Sept. 14, 2011); *see also Illinois*, 794 F. Supp. 2d at 851 (criticizing *Allstate* because it “did not expressly determine whether the State was a real party in interest or only a nominal party in the action as a whole”).

183. *See LG Display*, 665 F.3d at 773–74 (framing the jurisdictional inquiry as whether the State was “the” real party in interest); *see also AU Optronics*, 699 F.3d at 394 (noting that “a claim for restitution, when tacked onto other claims being properly pursued by the State,” does not alter “the State’s quasi-sovereign interest in enforcing its own laws”); *Bank of America*, 672 F.3d at 669 (stating that the mass action issue “turns on whether the State of Nevada or the hundred-plus consumers on whose behalf it seeks restitution are the real party(ies) in interest”) (emphasis added).

184. *See supra* notes 162–163 and accompanying text. Many courts misread *Allstate* as holding that “individuals rather than the State” were “the real parties in interest.” *JPMorgan*, 842 F. Supp. 2d at 997; *Illinois*, 794 F. Supp. 2d at 851.

185. *See supra* notes 164–166 and accompanying text.

186. *See* 665 F.3d at 773–74; *see also AU Optronics*, 699 F.3d at 392 (citing *LG Display*); *Bank of America*, 672 F.3d at 668–71 (same); *cf. Mississippi ex rel. Hood*

relevant case law, however, does not lend itself to this “whole complaint” approach.

As recognized in *LG Display*,¹⁸⁷ the quote about the “essential nature and effect of the proceeding” derives from *Ford Motor Co. v. Department of Treasury*, in which the Supreme Court stated that “the nature of a suit as one against the state is to be determined by the *essential nature and effect of the proceeding*.”¹⁸⁸ In *Ford Motor*, a car manufacturer sued in federal court the Indiana Department of Treasury and various state officers to recover gross income taxes paid on sales.¹⁸⁹ The Court held that the officers were not real parties in interest, only the State was.¹⁹⁰ The Court, however, did not rest this holding on the general nature of the complaint but, to the contrary, on the absence of a *specific claim* that would have rendered the officers real parties in interest.¹⁹¹ Because the officers were only “nominal defendants,” the Court concluded that the entire action was barred by the Eleventh Amendment.¹⁹² Thus, far from suggesting that “the essential nature and effect of the proceeding” depends on most claims in the complaint to the exclusion of other claims, *Ford Motor* relied on a real-party-in-interest analysis that turns on the presence or absence of particular claims.¹⁹³

Ultimately, the “whole complaint” approach endorsed by *LG Display* and other jurisdictions arises from several mistakes. First, these cases pluck a quote out of context from a different setting (where the relevant inquiry was whether the State was a real party in interest that

v. AU Optronics Corp., 701 F.3d 796, 806 (5th Cir. 2012) (criticizing *Allstate* for not considering the “essential nature and effect of the proceedings”).

187. See *supra* note 181 and accompanying text.

188. 323 U.S. 459, 464 (1945) (emphasis added), *overruled on other grounds by* *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002).

189. 323 U.S. at 460.

190. *Id.* at 463–64.

191. *Id.* at 464 (“The petitioner did not assert *any claim* to a personal judgment against these individuals for the contested tax payments.”) (emphasis added).

192. *Id.* (“[T]he state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit . . .”).

193. See also *In re New York*, 256 U.S. 490, 500 (1921) (“As to what is to be deemed a suit against a state [for Eleventh Amendment purposes], . . . the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.”); *Ex parte Ayers*, 123 U.S. 443, 492 (1887) (“Whether [the State of Virginia] is the actual party, in the sense of the prohibition of the [Eleventh Amendment], must be determined by a consideration of the nature of the case as presented on the whole record.”); see also *Worcester Cnty. Trust Co. v. Riley*, 302 U.S. 292, 296 (1937) (“[A] suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in substance a suit against the state, which the [Eleventh Amendment] forbids . . .”).

would give rise to Eleventh Amendment immunity). Second, they misconstrue the quote to mean something other than what it says (not “proceeding” or “entire record” but “whole complaint,” with no attention given to each specific claim that composes the complaint). Third, they misapply the quote to reach a dubious result in a different context (where the relevant inquiry is whether individual consumers are real parties in interest whose citizenship establishes minimal diversity for CAFA mass action jurisdiction).¹⁹⁴

Part of the confusion here is that the “whole complaint” approach is, in fact, a misnomer. The prescribed approach in *LG Display* and similar cases does not look to the whole complaint so much as it looks to the majority of claims. In this approach, the one who is the real party in interest to the majority of the claims is the sole real party in interest to the action. As discussed above, this approach is at odds with the case law. It also fails to recognize that CAFA has worked a profound change in federal diversity jurisdiction,¹⁹⁵ shifting the focus away from whether the State is a real party in interest that defeats complete diversity, to whether others are real parties in interest whose citizenship can establish minimal diversity.¹⁹⁶ Even before CAFA, courts identified real parties in interest with respect to claims, rather than with respect to the complaint as a whole.¹⁹⁷ Accordingly, the “whole complaint” approach is flawed.

194. See, e.g., *LG Display Co. v. Madigan*, 665 F.3d 768, 773–74 (7th Cir. 2011); *West Virginia ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984, 997 (S.D. W. Va. 2012); *Illinois v. AU Optronics Corp.*, 794 F. Supp. 2d 845, 849 (N.D. Ill. 2011); *Arizona ex rel. Horne v. Countrywide Fin. Corp.*, No. 11-cv-131-PHX-FJM, 2011 WL 995963, at *2 (D. Ariz. Mar. 21, 2011); see also *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 392–94 (4th Cir. 2012); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 666 (9th Cir. 2012).

195. See *LG Display*, 665 F.3d at 773–74 (arguing that courts should not “deviate from the traditional ‘whole complaint’ analysis when evaluating whether a State is the real party in interest” (internal quotation marks omitted) (emphasis added)); see also *Bank of America*, 672 F.3d at 669–72 (relying on *Dep’t of Fair Emp’t and Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 740 (9th Cir. 2011), a traditional diversity case).

196. See *supra* notes 7, 150 and accompanying text. For example, the court in *South Carolina* held that, because the State has a “quasi-sovereign interest in enforcing its own antitrust and consumer protection laws,” the State is “a real party in interest to the action” and, therefore, “minimal diversity does not exist.” 2011 WL 4344074, at *6 (D.S.C. Sept. 14, 2011). This is a non-sequitur. That the State is a real party in interest says nothing about whether *minimal* diversity exists.

197. See *supra* notes 191, 193 and accompanying text.

3. *The Fifth Circuit's Approach in Allstate Employs the Correct Analysis*

Contrary to what *LG Display* and other cases have suggested, the *Allstate* court determined that both the State and individual citizens were real parties in interest based on the entire record, including the text and structure of the relevant statute, filings in the state court, the language of the complaint, and the nature of the sought-after relief.¹⁹⁸ Unlike these other cases, the *Allstate* court correctly identified the “central” inquiry under CAFA as follows: “whether . . . the *policyholders*[] are the real parties in interest.”¹⁹⁹ The court then properly reasoned that, even if the State was a real party in interest as to injunctive relief and civil penalties, the policyholders were real parties in interest to the treble-damage claims that the attorney general brought for their benefit and that they could have brought on their own in private actions.²⁰⁰ Thus, where a State seeks monetary relief for a discrete group of its citizens who have the right to pursue such relief on their own in private actions,²⁰¹ the citizens are real parties in interest.²⁰² And where at least one defendant is a citizen of another state, minimal diversity exists.

By recognizing this much, *Allstate* validates the central theme of this article: A *parens patriae* label cannot defeat CAFA jurisdiction where the case is, at bottom, a mass action.²⁰³

198. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 428–30 (5th Cir. 2008); *see also In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 706 (5th Cir. 2008) (holding that both the State and certain citizens were real parties in interest for CAFA purposes, especially given that the citizens had been joined in the action).

199. 536 F.3d at 429–30 (emphasis added).

200. *Id.*

201. The analysis would differ if the State were not seeking such monetary relief but only injunctive relief and civil penalties. *See Allstate*, 536 F.3d at 430 (“If Louisiana were only seeking [injunctive relief], . . . its argument that it is the only real party in interest would be much more compelling.”).

202. Considerations of *res judicata* also support this conclusion. Although a *parens patriae* action can be a mass action if it *proposes* to try monetary relief claims of one-hundred or more consumers, those consumers would likely be barred from pursuing the same relief again in private actions if the State in fact *tries* their claims. *Cf. Wieburg v. GTE Sw. Inc.*, 272 F.3d 302, 306 (5th Cir. 2001) (noting that purpose of the rule for prosecution of an action in the name of a real party in interest is “to assure a defendant that . . . *res judicata* will protect it from having to twice defend an action, once against an ultimate beneficiary of a right and then against the actual holder of the substantive right”) (internal quotation marks omitted). Of course, with respect to restitution, plaintiffs may still seek damages above any wrongful gain to defendants.

203. *Allstate*, 536 F.3d at 424, 429–30; *see also id.* at 433 (Southwick, J., dissenting) (“We are not limited by the labels that a party chose.”). Several district courts have cited *Allstate* for this proposition that an action may be a mass action even when it bears a different label. *See, e.g., In re Vioxx Prods. Liab. Litig.*, 843 F. Supp. 2d 654,

C. *A Parens Patriae Action Can Satisfy CAFA's Remaining Requirements*

Parts III.A and III.B above show that, based on the plain language of CAFA and under the correct real-party-in-interest analysis, a *parens patriae* action can satisfy both the numerosity and minimal-diversity requirements of a CAFA mass action. Those requirements are most at issue in the case law and are the genesis of the circuit split regarding whether a *parens patriae* action can be a mass action. What parties less often dispute and courts less often consider are the remaining requirements of commonality and amount in controversy. The reason is simple: A *parens patriae* action that proposes to try monetary relief claims of hundreds of consumers can easily satisfy these elements.

Commonality exists where monetary relief claims of the one-hundred or more persons “involve common questions of law or fact.”²⁰⁴ Where the State seeks monetary relief for hundreds of consumers, it almost always does so based on allegations of a common pattern or practice of misconduct.²⁰⁵ The grounds for seeking such monetary relief therefore involve substantial legal and factual overlap across individual consumers.

The amount-in-controversy requirement is met where “the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs,”²⁰⁶ except that for a mass action “jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy

660 (E.D. La. 2012) (noting that *Allstate* “looked past the *parens patriae* label on the suit”); *AT & T Mobility LLC v. Smith*, No. 11-cv-5157, 2011 WL 5924460, at *5 (E.D. Pa. Oct. 7, 2011) (noting that *Allstate* “refused to elevate form over function, seeing through the formal label of a dispute (*parens patriae*) and recognizing that the action was, in fact, a mass action”); *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 449 (E.D. Pa. 2010) (noting that *Allstate* “instructs a court to ferret out hidden plaintiffs to see if elements of CAFA are met”); *cf. id.* at 452–53 (noting that the Senate report for CAFA “calls upon federal district court judges to look beyond the face of a complaint when determining whether federal jurisdiction exists”).

204. 28 U.S.C. § 1332(d)(11)(B)(i) (2006). This mirrors the commonality requirement of a traditional class action. *See* Fed. R. Civ. P. 23(a)(2) (“questions of law or fact common to the class”).

205. *See, e.g., AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 387 (4th Cir. 2012) (complaints alleged “a price-fixing conspiracy”); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 665 (9th Cir. 2012) (“Complaint alleges . . . a pattern of misconduct”); *LG Display Co. v. Madigan*, 665 F.3d 768, 770 (7th Cir. 2011) (same); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 422 (5th Cir. 2008) (complaint alleged “a scheme to thwart policyholder indemnity” (internal quotation marks omitted)).

206. § 1332(d)(2).

the [\$75,000] amount requirements” of traditional diversity jurisdiction.²⁰⁷ There are two prongs here: (1) the “matter” in controversy must exceed \$5 million; and (2) the claims of at least one “plaintiff” must put over \$75,000 in controversy.²⁰⁸

Most *parens patriae* actions satisfy the first prong, especially where a State seeks monetary relief in the form of damages or restitution for hundreds of consumers, in addition to civil penalties and injunctive relief. In those cases, each form of relief can put over \$5 million in controversy independently, and there is no question that they can do so cumulatively.²⁰⁹ This approach tracks CAFA’s language, which looks only to “monetary relief claims” of one-hundred or more persons (and real parties in interest) to define a mass action, but to the entire “matter” to determine the amount in controversy.²¹⁰ The second prong, on the other hand, refers to “plaintiffs.” In a *parens patriae* action the State is the only named plaintiff, but its claims almost always exceed \$75,000. If so, the district court can exercise supplemental jurisdiction over any remaining claims that arise from the same controversy, including the monetary relief claims of one-hundred or more consumers who, as discussed in Part III.B above, can be

207. § 1332(d)(11)(B)(i). Traditional diversity jurisdiction requires the matter in controversy to exceed “\$75,000, exclusive of interest and costs.” § 1332(a).

208. The Eleventh Circuit has held that the second prong does not require that the claims of each plaintiff put more than \$75,000 in controversy, persuasively reasoning that if “individual claims cannot be removed unless the claims of each plaintiff exceed \$75,000,” it would render the \$5-million-in-controversy clause “mere surplusage,” as “the aggregate value of the claims of each of the 100 plaintiffs would be, at a minimum, \$7,500,000.” *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1204 (11th Cir. 2007); *cf. Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 n.4 (9th Cir. 2009) (leaving the issue open).

209. For example, in *Bank of America*, the State identified to the defendants complaints from 334 individual borrowers whom the defendants allegedly mislead about mortgage modifications and foreclosures, putting in controversy over \$3.5 million in restitution and over \$5 million in civil penalties. *See* No. 3:11-cv-00135-RCJ (D. Nev.) (Doc. 23-1) (Endicott Decl. ¶¶ 3–4); NEV. REV. STAT. § 598.0999(1) (\$10,000 per violation of state deceptive trade practices act), 598.0999(2) (\$5,000 per willful violation); *see also* § 598.0973(1) (\$12,500 for each violation directed toward elderly or disabled person). The costs imposed by sought-after restrictions and regulatory oversight arising from declaratory and injunctive relief, though not readily quantifiable, would have been substantial. *See Molina v. Lexmark Int’l, Inc.*, No. 08-cv-04796 MMM (FMx), 2008 WL 4447678, at *3 (C.D. Cal. Sept. 30, 2008) (emphasizing that CAFA’s \$5-million-in-controversy requirement may be established regardless of type of relief sought, including injunctive or declaratory relief).

210. *Compare* § 1332(d)(11)(B)(i) (defining a mass action as one that puts in issue the “monetary relief claims” of one-hundred or more persons), *with* § 1332(d)(2) (requiring that the “matter in controversy” exceed \$5 million).

real parties in interest to the action.²¹¹ Thus, the remaining elements of a mass action are easily met.

D. Exceptions to Mass Action Jurisdiction Do Not Necessarily Apply

So far, this article has argued that CAFA mass action jurisdiction exists over a *parens patriae* action where the party asserting jurisdiction establishes the requirements of numerosity, minimal diversity, commonality, and amount in controversy. A party who objects to such jurisdiction may then attempt to carry its burden to prove the applicability of one of four CAFA exceptions to mass action jurisdiction.²¹² Of the two exceptions that arguably may apply to a *parens patriae* action, neither does so as a matter of course. Accordingly, a *parens patriae* action is not automatically excluded from CAFA's mass action provisions.

1. The General Public Exception Does Not Apply Where Some Claims Are Asserted on Behalf of Individual Consumers

The general public exception excludes from the mass action definition any civil action in which “all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action.”²¹³ In *LG Display Co. v. Madigan*, the Seventh Circuit concluded that, even if the Illinois Attorney General's action satisfied the numerosity requirement of a CAFA mass action, the general public exception would apply.²¹⁴ This flouts the plain language of the exception, which requires that “all” claims be asserted for the general public. By extension, *no* claims can be asserted for individual claimants or members of a purported class

211. 28 U.S.C. § 1367(a) (2006) (providing that “the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III”).

212. See *supra* note 36.

213. 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (2006) (emphasis added).

214. 665 F.3d 768, 772 (7th Cir. 2011). The Ninth Circuit in *Nevada v. Bank of America Corp.* declined to determine whether this exception would apply to a *parens patriae* action. 672 F.3d 661, 672 n.5 (9th Cir. 2012). The Fourth Circuit in *AU Optronics Corp. v. South Carolina* did not even mention this exception. See 699 F.3d 385 (4th Cir. 2012). Several commentators think the exception applies to a *parens patriae* action. See Marcy Hogan Greer & Paul L. Peyronnin, *The Class Action Fairness Act of 2005*, in A PRACTITIONER'S GUIDE TO CLASS ACTIONS 241, 282 (Marcy Hogan Greer, ed. 2010); Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971, 1979 n.33 (2008).

for mass action purposes, including interested persons who are not named plaintiffs.²¹⁵

The exception therefore should not apply to a *parens patriae* action that seeks, among other things, monetary relief for a discrete group of injured consumers.²¹⁶ Because some claims are asserted on behalf of a discrete group of consumers, it makes no difference that all claims may indirectly benefit the public at large. Any suggestion that the exception applies simply because all claims may have some indirect benefit on the general public contradicts the statutory text and congressional intent not to create a categorical exemption.²¹⁷ That monetary relief claims may fall within the State's quasi-sovereign interest in the health and well-being of its residents does not mean that those claims are not also brought on behalf of individual claimants.²¹⁸ To the contrary, although those claims may benefit the general public through deterrence and the like, the fact that they are brought on behalf of individual claimants precludes application of CAFA's general public exception.²¹⁹ The general public exception thus does not apply where the State asserts, among other things, monetary relief claims for consumers.²²⁰

215. See *supra* notes 89, 127, and accompanying text.

216. In *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, the Fifth Circuit correctly noted that the State sought monetary relief, in the form of treble damages, "for the particular benefit of a limited number of citizens." 536 F.3d 418, 428 (5th Cir. 2008) (internal quotation marks omitted).

217. See *supra* notes 130–132 and accompanying text.

218. See, e.g., *West Virginia ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984, 998 (S.D. W. Va. 2012) ("A state may have a quasi-sovereign interest in bringing an action to enforce its laws, disgorge the proceeds of ill-gotten gains, and refund them to its citizens.") (internal quotation marks omitted).

219. This understanding does not render the exception superfluous, as it may still apply where hundreds of private parties assert monetary claims *only* on behalf of the general public under, for example, a private attorney general act (PAGA). Cf. *Sample v. Big Lots Stores, Inc.*, No. C 10-3276, 2010 WL 4939992, at *5 (N.D. Cal. Nov. 30, 2010) (involving a PAGA action "where an individual litigant is stepping into the role of the state attorney general . . . to recover civil penalties for the State"); *Breakman v. AOL LLC*, 545 F. Supp. 2d 96, 101 (D.D.C. 2008) (holding that a PAGA action fell within the general public exception).

220. This point divided the panel in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 802 (5th Cir. 2012), the Fifth Circuit case that reaffirmed *Allstate*. In *Mississippi*, all the judges readily assumed that *Allstate* may render the general public exception superfluous, the majority arguing that any such result "must yield to our responsibility to apply the unambiguous, express language of a statute as written." *Id.* at 802. The concurring judge disagreed, arguing that the problem "is not CAFA's plain text . . . , but rather our approach in applying the text." *Id.* at 807 (Elrod, J., concurring). She explained: Because *Allstate* "specifies that a case is a mass action if more than 100 persons are the real parties in interest as to *any* claim for relief," and because "the general public exception cannot apply *unless* the case is a mass action" in which *all* claims are for the general public, it is difficult under *Allstate* "to imagine

2. *The Event or Occurrence Exception Does Not Apply Where Liability Is Based on More than a Single Event or Occurrence*

The event or occurrence exception applies where “all of the claims in the action arise from an event or occurrence in the State in which the action was filed.”²²¹ In *Nevada v. Bank of America Corp.*, the district court correctly held that the *parens patriae* action at issue satisfied the threshold elements of a CAFA mass action, but incorrectly concluded, without explanation, that the event or occurrence exception applied.²²² On this basis alone, the court concluded that it lacked mass action jurisdiction.²²³

The Ninth Circuit properly reversed the district court on this point, holding that the exception applies “only where all claims arise from a *single* event or occurrence.”²²⁴ Indeed, “courts have consistently construed the ‘event or occurrence’ language to apply only in cases involving a single event or occurrence, such as an environmental accident, that gives rise to the claims of all plaintiffs.”²²⁵ This makes sense because the language of the exclusion applies only where all claims arise from “*an* event or occurrence,” not “events or occurrences.”

Parens patriae actions seeking monetary relief for hundreds of consumers seldom arise from a single event or occurrence. In several of these actions, the complaints identify many unique consumer inter-

a case that could be a mass action that also falls within the general public exception.” *Id.* But it is not impossible to imagine such a case. *See supra* note 219. Plus, the concurring judge did not offer specific examples of how the exception would apply, or confront other instances of surplusage that would arise, if a *parens patriae* action could not be a mass action. *See* 701 F.3d at 808 & n.7 (not illustrating how, but for *Allstate*, the circuit “could give effect to both the mass action provision and the general public exception”); *supra* notes 134–135 and accompanying text (explaining how the *Allstate* approach avoids surplusage). All else failing, Congress may have included the general public exception in CAFA as a backstop: to ensure that no court, even if it were inclined to exercise mass action jurisdiction over a *parens patriae* action, would do so where the State sought *only* generalized relief for the public at large, rather than individualized monetary relief.

221. § 1332(d)(11)(B)(ii)(I).

222. No. 11-135-RCJ-RAM, 2011 WL 2633641, at *5–6 (D. Nev. July 5, 2011), *rev'd*, 672 F.3d 661 (9th Cir. 2012).

223. *Id.* at *6.

224. *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 668 (9th Cir. 2012).

225. *Lafalier v. Cinnabar Serv. Co., Inc.*, No. 10-cv-5-CVE-TLW, 2010 WL 1486900, at *4 (N.D. Okla. Apr. 13, 2010) (collecting cases); *see also Bank of America*, 672 F.3d at 668 (citing *Lafalier* and legislative history on the event or occurrence exception).

actions that give rise to liability.²²⁶ And the fact that attorneys general in different states file similar actions at similar times refutes the notion that “all” of the claims in any given action arise from a single “event or occurrence” in one state.²²⁷ Surely, these are the type of far-reaching, aggregated actions that Congress had in mind when it enacted CAFA.

Accordingly, a *parens patriae* action can qualify as a CAFA mass action where a State seeks valuable monetary relief for hundreds of consumers who could pursue such relief on their own in private actions. Under these circumstances, consumers are real parties in interest who can constitute the one-hundred or more persons of a mass action and whose citizenship can establish minimal diversity. Such an action can meet the remaining statutory requirements of commonality and amount in controversy, and fall outside of statutory exceptions.

IV.

PUBLIC POLICY

This article argues that a *parens patriae* action can be a CAFA mass action only under limited circumstances: (1) a State must seek monetary relief against out-of-state defendants for hundreds of consumers; (2) the consumers must have a right to pursue such relief on their own in private actions; (3) the State’s action must propose to try monetary relief claims based on common legal or factual questions; and (4) the sought-after relief must be sufficiently valuable in the aggregate, and for the State, in particular, as the sole named plaintiff. If any of these conditions fails, the action cannot be a mass action. This approach accords proper deference to important considerations of federalism and federal–state comity and promotes the public interest in judicial efficiency and fairness.

226. See, e.g., Complaint ¶¶ 20, 23, 25, *Arizona v. Countrywide Fin. Corp.*, No. 2:11-cv-00131-FJM (D. Ariz. Feb. 25, 2011) (Doc. 1-1) (alleging as grounds for liability various management decisions made outside of the State, as well as the implementation of nationwide policies); Amended Complaint ¶¶ 2–8, *Nevada v. Bank of Am. Corp.*, No. 3:11-cv-00135-RCJ-RAM (D. Nev. Apr. 8, 2011) (Doc. 87) (same).

227. See, e.g., *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 805 n.3 (5th Cir. 2012) (“Several other states’ attorneys general . . . filed actions against the makers of LCD flat panels based on the same alleged conduct that forms the basis for this suit.”); *Bank of America*, 672 F.3d at 671 (comparing similar actions brought by Arizona and Nevada attorneys general for alleged misrepresentations related to mortgage modifications and wrongful foreclosures in those states); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C07-1827-SI, 2011 WL 560593, at *1 (N.D. Cal. Feb. 15, 2011) (involving consolidating cases brought by the Washington and California attorneys general for an alleged conspiracy to fix the price of LCD panels in those states).

First, this approach most readily fulfills Congress's federalism goals in CAFA: to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction."²²⁸ Prior to CAFA's enactment, congressional findings evinced that state and local courts were "keeping cases of national importance out of Federal court," and "sometimes acting in ways that demonstrate bias against out-of-State defendants."²²⁹ CAFA, as a bipartisan bill, represented "a carefully crafted legislative solution"²³⁰ to extend federal jurisdiction to actions that might otherwise remain in state court.²³¹ By design, CAFA accounts for deeply rooted principles of federalism by reserving to state courts matters that are primarily local.²³²

Federal courts may have a strong interest in exercising jurisdiction over *parens patriae* actions that have national significance,²³³ because state courts may favor (or be perceived as favoring) their own state attorneys general.²³⁴ Even if the federalism "problems that motivated Congress to pass CAFA do not generally apply to *parens patriae* actions,"²³⁵ failing to exercise federal jurisdiction over the

228. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5; accord *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1034 (9th Cir. 2008) (emphasizing this purpose); see Lemann, *supra* note 18, at 125 ("To Congress, the litigation of large class actions in state courts was a perversion of federalism.").

229. Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 4, 5; accord *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 408 (6th Cir. 2008) (emphasizing first finding above); see 151 CONG. REC. S999, S1000-01 (daily ed. Feb. 7, 2005) (statement of Sen. Specter) (decrying "settlements that primarily benefit the class counsel, rather than the injured class members."). The Supreme Court has long observed that the U.S. Constitution presumes that "state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816).

230. 151 CONG. REC. S1157, S1006 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch).

231. 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3601, at 9-10 (2009) ("As was expected and intended, the effect of CAFA is to expand substantially federal court subject matter jurisdiction over class and mass actions and correspondingly to reduce state court jurisdiction over these cases.").

232. *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169, 178 (4th Cir. 2011) (citing 28 U.S.C. § 1332(d)(3)-(5) (2006)). Congress, by exempting from CAFA jurisdiction actions that arise from an event within the same state where the action is filed, included a clear nod to federalism within the statute itself. See *supra* notes 221-225 and accompanying text.

233. See *supra* note 226-227 and accompanying text.

234. See *supra* note 3 and accompanying text. Of course, this interest in federal jurisdiction must be harmonized with the Eleventh Amendment. See *supra* note 129; see also *infra* note 243 and accompanying text.

235. Carswell, *supra* note 18, at 367 (emphasis added).

specific *parens patriae* actions discussed in this article would contradict CAFA's plain language, the correct real-party-in-interest analysis, and also "undermine the National judicial system . . . and the concept of diversity jurisdiction."²³⁶ *Parens patriae* actions aimed at interstate activities, involving citizens across many different states, clearly implicate national interests. Federal jurisdiction over such actions, far from eroding federalism principles, may actually further the proper federal–state balance.

Second, this approach comports with notions of federal–state comity, a principle related to federalism that cautions federal courts not to interfere with a state court's legitimate exercise of its own jurisdiction.²³⁷ Although consumer-protection laws "fall in an area that is traditionally within the state's police powers to protect its own citizens,"²³⁸ Congress has power to confer federal jurisdiction over *parens patriae* actions in this area that satisfy minimal diversity.²³⁹ As demonstrated in this article, Congress exercised such power when it enacted CAFA's mass action provisions. The *Allstate* opinion appropriately recognizes Congress's power and accordingly comports with CAFA's purpose to expand substantially federal jurisdiction over class actions, including mass actions as defined by the statute. CAFA provides a federal forum for such actions precisely because they are likely to have far-reaching interstate effects and, hence, implicate significant federal interests. Thus, even if "considerations of comity make [courts] reluctant to snatch cases which a State has brought [in] the courts of that State,"²⁴⁰ these interests favor removal of a *parens patriae* action that fits the bill of a mass action.

236. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 4, 5.

237. See, e.g., *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2336 (2010) ("[T]he National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.") (internal quotation marks omitted).

238. *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011) (involving a private action under a state consumer-protection law that was removed on diversity grounds).

239. See U.S. CONST. art. III, § 2, cl. 1 (judicial power may extend to cases "between Citizens of different States"); cf. *id.* ("between a State and Citizens of another State"). Similarly, although "[f]ederalism concerns animate the rule requiring strict construction of removal statutes," courts "nevertheless recognize Congress's power, within constitutional limitations, to permit removal when it so desires." *Beiser v. Weyler*, 284 F.3d 665, 674 (5th Cir. 2002). Even commentators that think CAFA should not extend to *parens patriae* actions acknowledge this power. See *Carswell*, *supra* note 18, at 366 (recognizing "that Congress could authorize removal of *parens patriae* actions as long as there is minimal diversity").

240. *LG Display Co. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011) (internal quotation marks omitted).

Some commentators argue that applying federal jurisdiction to *parens patriae* actions “forc[es] states to appear in federal court without their consent.”²⁴¹ However, no rule requires *parens patriae* actions to be litigated exclusively in state courts. To the contrary, at least one federal statute provides that suits brought by state attorneys general should be heard exclusively in federal court, even though the same action by an individual consumer could be brought in state court.²⁴² More to the point, where a State itself initiates an action as a plaintiff seeking monetary relief for hundreds of consumers, the State “has waived its Eleventh Amendment immunity.”²⁴³ That federal jurisdiction may apply to certain *parens patriae* actions does not preclude States from bringing those actions.

The only question is whether Congress has provided the right to have some of those actions adjudicated before federal judges. Indeed it has: Mass action jurisdiction under CAFA exists only where the State *elects* to take *parens patriae* standing to its outer boundaries by seeking individualized monetary relief for hundreds of consumers. Rather than “threaten[] to make states dependent on federal courts for the enforcement of state laws,”²⁴⁴ this approach gives the State a measure of discretion in a narrow subset of *parens patriae* actions with respect to state statutory provisions that authorize the State to seek individualized monetary relief on behalf of consumers. What is more, to the extent the proof and distribution of such individualized monetary relief may implicate federal due process concerns, federal courts would have a further interest in exercising jurisdiction over *parens patriae* actions where States invoke these particular statutory provisions.²⁴⁵

241. Lemann, *supra* note 18, at 138.

242. See *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 750–53 (2012) (discussing the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227).

243. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 432 (5th Cir. 2008); see *id.* at 431 (stating that the Eleventh Amendment “was designed to prevent states from having to *defend* themselves in litigation that was brought in the federal courts”) (emphasis added); *id.* at 432 n.12 (“[C]ircuit courts have interpreted the Eleventh Amendment as only applicable when a state is a defendant.” (collecting cases)). But see *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011) (although State “voluntarily entered into its own courts to enforce its laws, it did not voluntarily consent to removal of its case to a federal court”).

244. Lemann, *supra* note 18, at 149.

245. Cf. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2560–61 (2011) (disapproving of “Trial by Formula” that denies to defendants the opportunity to challenge the entitlement to and scope of individual relief, which would not “comply with the Due Process Clause”); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232–33 (2d Cir. 2008) (holding that, for a given “mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation”), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *In re Hotel Tel. Charges*, 500 F.2d 86, 88 (9th Cir.

Therefore, the exercise of federal jurisdiction over such actions does not constrain the power of the State, as there is no power to avoid federal jurisdiction where it exists.

Finally, treating a *parens patriae* action as a CAFA mass action comports with judicial economy and fairness. A State that brings a *parens patriae* action in state court pursuant to state consumer-protection or antitrust laws faces a clear choice: If the State wants to avoid a federal forum, it should not seek monetary relief on behalf of a discrete group of injured consumers. If it desires to pursue such relief, it must simply accept the possibility that a defendant may remove the action to federal court as a CAFA mass action. Removal in such instances often serves an interest in judicial efficiency and fairness, as Senator Hatch explained in the floor debates on CAFA:

[I]f the lawsuit is aimed at an out-of-State corporation for conduct that affects citizens in multiple States, or if the lawsuit is interstate in nature, then that suit should be removed to Federal court. Removal of such a case is particularly appropriate because there would likely be similar suits brought in a number of courts, and one of the central purposes of this legislation is to promote judicial efficiency and fairness by allowing copy-cat class actions to be coordinated in one Federal proceeding.²⁴⁶

These interests are implicated here,²⁴⁷ as similar *parens patriae* actions across different states often seek monetary relief for hundreds of consumers on common legal and factual grounds.²⁴⁸ CAFA was designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction, including where state attorneys general

1974) (refusing to credit the “imagination” of counsel that “at some point in the future” plaintiffs could conjure some methodology for resolving individual proof in a class action). A more detailed discussion of relevant due process concerns, particularly in cases absent a mechanism like Rule 23 that serves as a procedural safeguard, is beyond the scope of this article.

246. 151 CONG. REC. S1157, 1164 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch); *cf. id.* at S1001 (daily ed. Feb. 7, 2005) (statement of Sen. Specter) (noting that “multiple class action lawsuits asserting the same claims on behalf of the same plaintiffs are routinely filed in different State courts, thus creating judicial inefficiencies”).

247. But these interests are attenuated to the extent a removed mass action, unlike a removed class action, cannot be transferred to a multidistrict litigation without the consent of a majority of the plaintiffs. § 1332(d)(11)(C)(i); *see also* *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 219 n.9 (2d Cir. 2013).

248. *See supra* note 227 and accompanying text. For example, in the *Bank of America* case that went before the district court and the Ninth Circuit, the State’s action challenged nationwide bank policies and procedures, was identical to an action in Arizona, and was also similar to a multidistrict litigation, *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, 10-md-02193-RWZ, 2011 WL 2637222, at *5–7 (D. Mass. July 6, 2011).

brought mass actions disguised as *parens patriae* actions.²⁴⁹ Accordingly, the exercise of CAFA mass action jurisdiction over such actions advances several important national interests.

CONCLUSION

Diversity jurisdiction is enshrined in the Constitution and is predicated on the notion that, in certain cases, opening federal courts to state-law claims increases the fairness and integrity of the judicial process. CAFA extends diversity jurisdiction to mass actions not brought under any specific statute or procedural rule but that nonetheless propose to try, in either a direct or representative capacity, the monetary relief claims of one-hundred or more persons. The rationale for diversity jurisdiction applies where a State files a civil action against out-of-state defendants and seeks individualized monetary relief for some of its residents. Where those residents have the right to pursue such relief on their own in private actions, they are real parties in interest. If so, they can constitute the one-hundred or more persons of a mass action, and their citizenship can establish the minimal diversity required by CAFA. The other requirements of mass action jurisdiction can be easily met, and no exception necessarily applies. Under such limited circumstances, the case can be a disguised mass action. Just as a rose is a rose by any other name, so is a mass action a mass action even when it bears the label *parens patriae*.²⁵⁰

249. See *supra* note 6 and accompanying text; *supra* notes 130–131 and accompanying text; cf. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008 (CAFA meant to avoid “jurisdictional gamesmanship”) (internal quotation marks omitted).

250. See WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2 (“What’s in a name? that which we call a rose By any other name would smell as sweet; So Romeo would, were he not Romeo call’d”).

