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P R O C E E D I N G S

(11:06 a.m.)

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

Mr. Massey.

ORAL ARGUMENT OF JONATHAN S. MASSEY

ON BEHALF OF THE PETITIONER

MR. MASSEY: That you, Mr. Chief Justice, and may it please the Court:

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

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

Our friends on the other side want to use

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

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

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

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

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

1 they have received compensation.

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

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

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

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

23 MR. MASSEY: Pardon me, Your Honor?

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

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

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

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

11 MR. MASSEY: Yes.

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

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

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

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

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

11 MR. MASSEY: It is --

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

15 MR. MASSEY: Yes, named plaintiffs. The --
16 the simplest resolution of the case is simply a
17 statutory argument, that on its face, the mass action
18 definition refers to plaintiffs. The only plaintiff is
19 the State. Even if the State has statutory authority to
20 seek restitution, it is still the only plaintiff. So
21 you would not even need to get into the real
22 party-in-interest test, because the statute doesn't
23 refer to unnamed parties or to people who might be real
24 parties in interest. It refers simply to the
25 plaintiffs. So it's simple --

1 JUSTICE ALITO: What do you do with
2 reference to persons?

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

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

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

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

20 MR. MASSEY: Yes.

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

24 MR. MASSEY: Well --

25 JUSTICE ALITO: The persons could be here,

1 the citizens of Mississippi, who were damaged by the
2 activity in question. The plaintiff -- plaintiffs, here
3 there's one named plaintiff. The plaintiffs can refer
4 to -- to the person or entity or multiple people or
5 entities who were named as plaintiffs. So why -- I
6 don't see what the inconsistency is.

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

17 And that -- that can't be what Congress was
18 thinking of, because then you would have a license for
19 an unadministrable -- this is clearly a reference to the
20 kind of Rule 23 inquiry where, as this Court has
21 emphasized in class action case after class action case,
22 there has to be a rigorous analysis to ensure that there
23 are actual common questions based on the -- the actual
24 claims asserted. And -- and we think that there's --
25 that any other reading produces confusion, not just in

1 this section, but also in the remand section, the
2 \$75,000 remand section of the statute.

3 CAFA provides that if a claim does not make
4 -- does not reach the amount in controversy requirement,
5 it has to be remanded to State court.

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

11 MR. MASSEY: That, of course, is a different
12 case when it is not involving the government. But we
13 think Navarro would essentially address that situation.
14 That's this Court's decision in 1980 that held that the
15 trustees of a business trust were the sole real parties
16 in interest and that the beneficiaries were not, even
17 though they stood to get money as a result of the
18 action. So I think that would address Your Honor's
19 question.

20 The text of the statute still would refer to
21 "plaintiff." So you would inquire in that instance
22 whether under State law -- this is what happened in
23 Navarro -- the Court inquired, does the executor have
24 the legal authority to represent the beneficiaries as
25 the sole plaintiff; and if he or she does, then you

1 would have the single plaintiff situation and you would
2 not be under CAFA.

3 JUSTICE GINSBURG: Mr. Massey, you envision
4 one proceeding, it could be a class action on behalf of
5 the individuals, that doesn't require everybody tot
6 satisfy the amount in controversy, and then this action
7 by the Attorney General, which does, among other things,
8 seek restitution.

9 Isn't there an overlap between those two
10 claims, and how do we sort out -- you said -- at one
11 point I think you described the restitution as
12 "disgorgement of ill gotten gains."

13 MR. MASSEY: Yes, Your Honor.

14 JUSTICE GINSBURG: But now we have the
15 consumers who were affected, they've already been paid.
16 So how does it work for the Attorney General's suit?
17 What is the impact of the class action that has already
18 gone forward and been completed on the Attorney
19 General's claim?

20 MR. MASSEY: Yes, Your Honor.

21 The -- when the MDL judge entered the
22 settlement in the class, she indicated her view that it
23 would not preclude a parens case. Of course, it's open
24 on remand for the defendants to argue that the consumer
25 settlement bars the Attorney General's action. That

1 will have to be adjudicated on the merits in
2 Mississippi. States are free to adopt different rules
3 about this. There is no case that we have found in
4 Mississippi squarely addressing this. There have been a
5 dozen or so parens cases in the last 10 years.

6 There is a case, though, from the State of
7 Washington which is illustrative. It's actually on page
8 35 of the red brief, from our friend's brief, and it's a
9 case from the Washington Supreme Court in 1976 called
10 Ralph Winters Chrysler Plymouth. In that case the
11 Washington Supreme Court encountered the situation where
12 the State had sought restitution on behalf of consumers
13 and sought to distribute the money to consumers, and
14 consumers also brought separate damages actions. And
15 the Washington court said, there was no double recovery,
16 no preclusion problem, because the restitution remedies
17 were public in nature, and the private damages actions
18 proceeded under different statutory authority for
19 different claims.

20 And whether Mississippi would adopt that
21 approach, I don't know. But that illustrates, I think,
22 ultimately that these are questions of State law and
23 there is a longstanding tradition of restitution being a
24 public remedy. After all, the government -- we've cited
25 some cases in the brief involving everything from rent

1 control to energy price regulation. The government
2 brings -- the Federal government, as well as State
3 governments, has brought restitution actions where it
4 has not returned money to consumers, has sometimes
5 done -- also sometimes has returned money. Has -- but
6 in all those cases consumers never participate. They
7 are never permitted to intervene.

8 CHIEF JUSTICE ROBERTS: Then it would make
9 -- it would make no sense for a defendant in a class
10 action brought by consumers to ever settle the case.
11 It's going to have to pay twice. It's going to have to
12 pay consumers, and then it's going to have to pay you
13 because you can: Say, well, we want restitution and we
14 are not going to distribute it to the class members, but
15 we're entitled to it. And I assume the amount of the
16 restitution is based on some estimate of the class, the
17 consumers' claims.

18 MR. MASSEY: Well, the evidence, the
19 evidence of loss is relevant. But the law is actually
20 well-settled in the lower courts -- - there's not a
21 decision of this Court -- that a consumer releasing his
22 claim or her claim does not bar the State from
23 proceeding with a public parens patriae action.

24 The defendants, when they settled, there is
25 a little bit of disagreement in the brief, but the MDL

1 judge took the defendants as conceding that their
2 settlement with consumers would not bar a parens --

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

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

10 MR. MASSEY: That would be a very different
11 case, Your Honor.

12 CHIEF JUSTICE ROBERTS: Well, I know but I'm
13 trying --

14 MR. MASSEY: I think very unlikely. It
15 depends on the -- for example, let me just --

16 CHIEF JUSTICE ROBERTS: Unlikely as a
17 practical matter or as a legal matter?

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

19 There are, there's no bright line. And
20 after all, Snapp, which is the lodestar parens case from
21 this Court in 1982, involved only 787 workers. They
22 were agricultural workers from Puerto Rico. And the
23 Court -- one of the objections was, this was not a
24 sufficient quasi-sovereign interest to support a parens
25 patriae case. And what this Court said was that you

1 can't just look at numbers, because those people
2 represent a public interest. They were -- they alleged
3 wage discrimination, and there was a deterrent effect.
4 So that it wasn't really just 787; it was the entire
5 population of Puerto Rico.

6 JUSTICE KENNEDY: Are there parens patriae
7 actions where the State Attorney General brings the
8 action in what is really a suit on behalf of private
9 parties? And if so, do you call it private parens
10 patriae?

11 MR. MASSEY: Well, we do not think that
12 would be -- that is not a proper parens patriae case,
13 and the Attorney General --

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

16 MR. MASSEY: Well, no. No. The parens
17 patriae case, for example, here involves injunctive
18 relief, civil penalties, harm to the State as a
19 purchaser itself of LCD panels. And so restitution --
20 the remedy doesn't matter. But the Attorney General has
21 statutory authority in this case to bring a case in the
22 name of the State. He is actually prohibited under the
23 State Consumer Protection Act, all parties are
24 prohibited, from bringing a damages case on behalf of a
25 private consumer except in that consumer's name, so --

1 CHIEF JUSTICE ROBERTS: Did the State
2 interest that's being -- the State interest that is
3 being asserted is damage to the consumers?

4 MR. MASSEY: Well, no. I mean, the State
5 interest is broader than that. It is the -- it is the
6 harm to Mississippi as a -- as a population, as an
7 entity from this price-fixing conspiracy. Just as the
8 Federal government --

9 CHIEF JUSTICE ROBERTS: Because it harmed
10 members of the population of Mississippi, right?

11 MR. MASSEY: Well, yes, but I think in Snapp
12 the Court discussed how the -- when a harm is broad
13 enough, when it affects a substantial segment of the
14 population and affects them in their economic capacity,
15 there are indirect as well as direct effects that the
16 State could be concerned with.

17 Now, let me just --

18 JUSTICE SCALIA: What are those?

19 MR. MASSEY: Well, in other words, there
20 are -- if people are harmed by a price fixing
21 conspiracy, they have less money, they're --

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

24 MR. MASSEY: Well, but that has a ripple
25 effect in the economy. Price fixing conspiracies have a

1 public dimension.

2 And of course, of course, if this -- any
3 challenge to whether this is a proper *parens patriae*
4 case or any case would be heard on the merits. We know
5 the defendants will argue back in the Mississippi courts
6 that they have a series of defenses as to why this case
7 should not be brought. One of them will be the Attorney
8 General should not have brought it because it's outside
9 his authority. And that issue will be decided in
10 Mississippi. There is a case, a vitamin price fixing
11 conspiracy case called the BASF case --

12 CHIEF JUSTICE ROBERTS: What prevents --
13 what prevents attorneys general from around the country
14 sitting back and waiting until every -- as private class
15 actions proceed, and as soon as one settles or the
16 plaintiffs' class prevails, taking the same complaint,
17 maybe even hiring the same lawyers, to go and say, well,
18 now we are going to bring our *parens patriae* action. We
19 know how the trial is going to work out or we know what
20 the settlement is going to look like, and we are going
21 to get the same amount of money for the State?

22 MR. MASSEY: Well, if there is a harm, as
23 there was in this case, Federal criminal allegations --
24 there were guilty pleas and there were 800 --

25 CHIEF JUSTICE ROBERTS: Well, that's got not

1 nothing to do with it, does it?

2 MR. MASSEY: Those are serious matters, and
3 I think the --

4 CHIEF JUSTICE ROBERTS: I'm sure it's a
5 serious matter when a plaintiff class recovers for, as
6 in this case, an antitrust violation or whatever.
7 What's the answer? I'm sorry, repeating my question.

8 MR. MASSEY: Well, I think the answer is
9 that the State has separate interests. The interest
10 that the State has qua State, yes, it should bring cases
11 where the public has been harmed. Of course --

12 CHIEF JUSTICE ROBERTS: So the answer is
13 that there is nothing to prevent 50 attorneys general,
14 51, from saying, every time there is a successful class
15 action as to which somebody in my State purchased one of
16 the items, we are going to file a parens patriae action,
17 the complaint is going to look an awful lot like the
18 class action complaint, and we want our money?

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

24 JUSTICE KENNEDY: Well, that means that it
25 could happen?

1 MR. MASSEY: Well, it could happen, right.
2 The State -- if the State has its own rights and its own
3 interests, it should sue. The Attorney General is --

4 CHIEF JUSTICE ROBERTS: I'm sorry, counsel,
5 but you told me the State's own interest was in
6 protecting its consumers, so it would be able to file
7 this suit every time its consumers have been harmed as
8 demonstrated either through settlement or suit. That's
9 the State interest, protecting its consumers.

10 MR. MASSEY: If -- if -- if a State -- some
11 States may adopt a different rule from Washington, as
12 the Washington court said, the State -- the consumer
13 claims would preclude a State attorney general action.
14 If a State does not -- if the State legislature
15 authorizes its attorney general to bring a suit when
16 this attorney general can identify harms to the State
17 that are separate from harms to consumers.

18 Your Honor is saying that -- that the two
19 are identical. They are not. And Snapp makes clear
20 that they are not. The State has a broader interest
21 than simply the compensation interest that an individual
22 has.

23 JUSTICE KENNEDY: Well, as a matter of
24 efficiency, take the Chief Justice's hypo, the
25 hypothetical and back it up. The moment the class is

1 certified, why can't the attorney general join it and
2 say, now, our interest is a little different, but it's
3 so much the same that we want to join it, and we want to
4 join it as *parens patriae*. Would that prevent its
5 removal?

6 MR. MASSEY: If -- if the State attorney
7 general was combined with thousands of individual
8 claimants that otherwise would trigger CAFA, then
9 CAFA -- then you would be forced into this whole case
10 situation. The whole case test, which you'd need not
11 reach here because the statute and the real party in
12 interest tests are clear, but under the whole case test,
13 you weigh whether the States has an -- the essential
14 nature proceed -- the essential nature of the proceeding
15 is that the State is the real party in interest.

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

21 That hasn't ever -- has never happened,
22 and in all of the districts outside the Fifth Circuit,
23 because the Fifth Circuit is the only court that has
24 adopted the rule that we -- that you're reviewing today,
25 every other circuit court has held that CAFA does not

1 extend to State parens patriae actions. In all of those
2 cases, the attorneys general are not running around
3 following class actions to try to piggyback on top of
4 them. They are not joining other class actions.
5 Those -- those --

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

10 MR. MASSEY: Well --

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

16 MR. MASSEY: Well, we don't think so. And
17 it certainly the State -- a State would be free to adopt
18 a -- a different rule as to preclusion. In other words,
19 a State legislature could say that a -- if -- if
20 consumers have recovered, the attorney general can't, or
21 that the attorney general doesn't have statutory
22 authority in such cases. But when the State legislature
23 has told the attorney general to enforce the public
24 interest and given him statutory authority to do so, he
25 would be derelict if he didn't honor the legislature's

1 directive.

2 And that's what's happening here, that in a
3 series of cases involving vitamin price-fixing,
4 adulterated products, Google street view where Google
5 found -- you know, downloaded data from people's
6 wireless networks, the attorney generals have responded
7 in those cases. Those are what these numbers are about.

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

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

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

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

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

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

1 JUSTICE GINSBURG: And so they would all be
2 named plaintiffs.

3 MR. MASSEY: That's correct. That's clearly
4 -- the sort of mass consolidation is what the mass
5 action definition is addressing.

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

9 MR. MASSEY: There are. I don't -- I don't
10 know particular the numbers. There are such cases
11 that -- that are filed in Federal courts and when the --
12 when the plaintiffs are individually identifiable.

13 JUSTICE GINSBURG: Why would you bring such
14 a claim in Federal courts in this mass action formula?
15 I can see in Mississippi doesn't have class actions, but
16 if you're in Federal court, why would you ever have a
17 mass action instead of a class action?

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

24 JUSTICE KAGAN: Mr. Massey, if you are right
25 about what mass action means in this statute, what is

1 this exception about the general public doing?

2 MR. MASSEY: The general public. The --
3 it's doing two things. First, the -- as the amicus
4 brief of public citizen describes the legislative
5 genesis of it, it was really to address the California
6 unfair competition law situation where there are private
7 attorneys general who are able to bring suits in the
8 name of the general interest, the general public. And
9 they -- that was sort of the original genesis of it.

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

15 And here, because restitution is a public
16 remedy and because the individual claimants cannot be
17 identified, the State is proceeding on the basis of the
18 general public of Mississippi. If anyone -- the
19 district court found -- it's in the Petition Appendix at
20 49a and 50. The district court discusses the
21 traceability problems -- I'm sorry, I say the Petition
22 Appendix, not the Joint Appendix.

23 JUSTICE BREYER: Can you tell me when you
24 come back where the money goes if you win?

25 MR. MASSEY: Yes. The money probably goes

1 to the State treasury, because in this case it would be
2 too difficult to trace who gets -- who has been harmed.
3 The -- that's why the district court found that the --
4 given the ubiquity of the product and the fact that
5 there is no central record of whoever purchased a cell
6 phone in Mississippi, that the cost of -- of finding all
7 these people is -- is just not worth it.

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

13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Massey.

16 Mr. Curran?

17 ORAL ARGUMENT OF CHRISTOPHER M. CURRAN

18 ON BEHALF OF THE RESPONDENTS

19 MR. CURRAN: Mr. Chief Justice, and may it
20 please the Court:

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

1 squared with the statutory language, the purpose of the
2 Act and the structure of the Act.

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

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

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

24 Those provisions don't make sense unless
25 it's possible for a mass action to be a representative

1 action.

2 JUSTICE SOTOMAYOR: So how do you remand a
3 case when it involves unnamed plaintiffs? Not a
4 proposed class, because you -- if you have a proposed
5 class, that could be persons, and you could identify
6 those. But under your theory, what does a court do to
7 figure out which of all of those unnamed people have
8 claims above or below \$75,000?

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

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

25 JUSTICE SOTOMAYOR: You know, this language

1 is very reminiscent in what's in Federal Rule of Civil
2 Procedure 20, the joinder rule.

3 MR. CURRAN: Well --

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

9 MR. CURRAN: Well --

10 JUSTICE SOTOMAYOR: -- or the proposed class
11 in essence.

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

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

24 But recall this Court's jurisprudence on
25 supplemental jurisdiction. Allapattah allows for

1 supplemental jurisdiction in a situation like this,
2 where certain plaintiffs do not satisfy the
3 jurisdictional minimum. As long as there are some that
4 do, the district court has discretion to allow those
5 that don't to stay in the same action.

6 JUSTICE SOTOMAYOR: It seems that that would
7 be hard, to invoke that case when a statute commands
8 differently.

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

10 JUSTICE SOTOMAYOR: In that case, it's in
11 the -- in the absence of statutory language that
12 requires remand.

13 MR. CURRAN: Well --

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

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

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

1 So I would submit that this language about
2 the 75,000, that does not preclude supplemental
3 jurisdiction. In fact, I think that -- that argument is
4 foreclosed by Breuer.

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

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

19 The fact that those citizens, many of those
20 citizens, not all of them, the fact that many of them
21 have settled and have resolved the claims in the
22 multidistrict litigation, that means that there is going
23 to be a fight in one court or another -- we think it
24 should be in a Federal court; the Attorney General
25 thinks the State court -- over what the preclusive

1 effects are of that prior settlement. We view this case
2 as nothing more than an attempt to double dip. It's the
3 same --

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

10 MR. CURRAN: That is under Federal law.

11 JUSTICE BREYER: Yes. All right. So this
12 is a State law case.

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

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

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

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

24 MR. CURRAN: The named plaintiff.

25 JUSTICE BREYER: And moreover, the State of

1 Mississippi is suing in order to obtain money, is what
2 we just heard, for its treasury. And third, the State
3 of Mississippi is suing because of their belief that the
4 defendants injured the economy of Mississippi and they
5 injured it by hurting the pocketbooks of many
6 individuals in Mississippi, the names of whom they don't
7 even know. All right?

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

15 MR. CURRAN: Because we are not disputing
16 that the Attorney General has standing to bring a claim
17 as a nominee for the real parties in interest.

18 JUSTICE BREYER: I understand that, but why
19 does that fall within this statute?

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

25 JUSTICE KAGAN: If you go on and read that a

1 little bit further, Mr. Curran --

2 MR. CURRAN: I'm getting there.

3 JUSTICE KAGAN: -- it says "claims of 100 or
4 more persons that are proposed to be tried jointly on the
5 ground that the plaintiffs' claims involve common
6 questions of law or fact."

7 MR. CURRAN: Yes.

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

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

22 JUSTICE KAGAN: But again, this clearly --

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

25 JUSTICE KAGAN: But they don't have to

1 show -- and this is clearly referring to a kind of Rule
2 23 inquiry, which they don't have to go through to do a
3 parens patriae.

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

9 JUSTICE KAGAN: Yes, but they do have to
10 show that --

11 MR. CURRAN: Why?

12 JUSTICE KAGAN: -- in a massive --

13 MR. CURRAN: No, they --

14 JUSTICE KAGAN: -- consolidation case --

15 MR. CURRAN: -- file a complaint.

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

23 MR. CURRAN: Well, Your Honor, I think -- I
24 submit that when a State attorney general files a
25 complaint on behalf of 100 or more persons claiming to

1 have standing and to be seeking to recover for the
2 damages to those 100 or more persons, he's proposing to
3 try those claims together.

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

8 JUSTICE SCALIA: Yes, but the Attorney
9 General says that that's not what's going to happen
10 here. How do you square that with his statement that
11 that money will not get to these people?

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

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

21 MR. CURRAN: Well, that is -- that doesn't
22 hold up. Obviously, those people were identified in the
23 class action. They're getting the money that's being
24 distributed. People can turn in receipts. There are
25 records. Every antitrust case has this issue

1 identifying the victims and compensating them. It's no
2 different here.

3 And another thing. There was a suggestion
4 that, oh, everybody in the world has LCD panels, that
5 the period of time at issue in this case is 1996 to
6 2006. LCD panels, which we now take for granted and are
7 ubiquitous, back then were just an emerging technology.
8 And for that I cite to the Attorney General's brief at
9 page -- their complaint, page 32a of our cert ap,
10 paragraph 104, which acknowledges that LCDs were not
11 even the leading technology for televisions back during
12 this period of time.

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

19 MR. CURRAN: That's right.

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

1 some person hurt our citizens.

2 And so now we will get into the instantly
3 interesting, but very difficult question of well, when
4 you say hurt your citizens, do you mean hurt them by
5 giving them rise to an independent cause of action for
6 each of them, who we don't know who they are and we
7 don't know if the statute of limitations has run to
8 some, and we don't know if others have other
9 disabilities; but, nonetheless, we're not certain this
10 suit is entirely for that. It may be mixed up with
11 other things.

12 Do you see the problem once I start down
13 your road?

14 MR. CURRAN: I do. I do.

15 JUSTICE BREYER: I've departed from the
16 clear and simple.

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

23 JUSTICE GINSBURG: That seems to be -- that
24 seems to be disputed, because I understood Mr. Massey to
25 say that the restitution claim would go to the State.

1 And you say that that -- the restitution couldn't go to
2 the State.

3 MR. CURRAN: That's right. There is a
4 dispute on that issue.

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

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

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

12 MR. CURRAN: Well, the Mississippi statute
13 is clear. The Attorney General cited that. The case
14 law is clear on that. So -- and the Fifth Circuit found
15 that Mississippi law required the money to go to the
16 individuals. I think this Court should defer to those
17 prior rulings of -- of those courts. And -- so
18 basically, that's in the statutory language.

19 And by the way, *parens patriae* is such a
20 loose label that's thrown around. The -- the attorney
21 generals seem to raise that up as a Latin shield of some
22 kind, suggesting that as long as they invoke that term,
23 that issues of federalism prevents removal or something.
24 That doesn't hold up. The statutory language, which is
25 in English, says that specific -- specific cases are

1 removable. And so we -- so I don't think we should -- I
2 don't think it's productive to talk about whether
3 something is *parens patriae* or not.

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

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

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

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

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

25 MR. CURRAN: Well, I -- I view that language

1 as contemplating a Rule 23 type analysis.

2 JUSTICE SCALIA: Yes, I understand that.

3 MR. CURRAN: Okay. And in this case, we've
4 got a State attorney general who's suing not only for
5 the consumers, but also for himself, right? He's got
6 propriety claims in there. He's also suing on -- for
7 all the counties and municipalities in Mississippi. I
8 think a basis for his combination of those claims in a
9 single lawsuit is the inescapable commonality of fact
10 and maybe law in those claims. So I -- I do think that
11 it -- it satisfies that language.

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

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

25 JUSTICE KAGAN: But he does not have to show

1 any common questions of law or fact in the typical way
2 that we demand. I mean, that's actually a very
3 demanding showing that we have forced lawyers to make in
4 the class action context. All that the attorney general
5 has to do is to stand up and say, I have a State
6 interest in protecting my citizens and in deterring
7 improper behavior and here is my substantive right.

8 MR. CURRAN: Well, I guess -- I suppose we
9 could move for bifurcation to separate the -- the
10 proprietary claims from the claims on behalf of citizens
11 and then he would say, no, it makes sense to keep them
12 all together. But -- but the -- the sequencing of those
13 arguments, I don't think should be dispositive here. By
14 filing a complaint, again, I invoke Rule -- Rule 42 of
15 the Code of Federal Civil Procedure.

16 JUSTICE KAGAN: I guess I don't understand
17 the bifurcation point. It seems to me that what the
18 attorney general is saying is he has a set of claims.
19 They're his claims on behalf of the -- the populace,
20 but -- but to further State's own interests. And
21 there -- there's none of this Rule 23 kind of business
22 about common questions of law or fact. So it's not a
23 question of, you know, one set of claims or another set
24 of claims now or later. He has a claim. That's all he
25 has.

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

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

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

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

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

18 JUSTICE KENNEDY: Where's the language?

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

22 JUSTICE KENNEDY: I have 79.

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

1 claim, then the civil action's removable. And it
2 doesn't matter if there are additional claims or
3 extraneous claims. So the -- the claim here for
4 restitution on behalf of Mississippi citizens is in and
5 of itself enough to make this a mass action.

6 And, again -- and, Justice Kagan, maybe this
7 is getting back to -- to your point. I referred to the
8 references to representative actions in the -- in the
9 General Public Provision and in the 1407 provision that
10 inescapably mean that -- that this provision can apply
11 to representative actions. Maybe that doesn't satisfy
12 your commonality point, but -- but it gets part of the
13 way there.

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

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

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

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

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

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

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

21 JUSTICE KAGAN: I might not answer it.

22 (Laughter.)

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

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

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

6 MR. CURRAN: No.

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

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

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

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

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

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

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

18 (Laughter.)

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

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

24 JUSTICE KAGAN: But more than that --

25 MR. CURRAN: And if there are competing

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

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

7 MR. CURRAN: And they failed.

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

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

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

1 Now, a response that some on the Senate
2 floor gave to that proposal was: It's not really
3 necessary. But the reason it was not really necessary
4 is because the bona fide interests of the State were
5 already protected, through the local controversy rule
6 and through the general public exception. Congress did
7 not intend for State attorneys general to be able to use
8 their offices to hire outside counsel, out-of-State
9 outside counsel, to copycat a class action complaint
10 from an MDL, bring it again --

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

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

22 JUSTICE SCALIA: You mean it's contrived
23 legislative history?

24 (Laughter.)

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

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

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

10 Now, in my remaining time perhaps, Justice
11 Kagan, at the end of the day there was no carve-out in
12 the statute for attorney general actions, even though
13 that was sought. But the Act does reflect some
14 sensitivity for federalism concerns. It's got an
15 exception for situations where States are the primary
16 defendants, or State officials are the primary
17 defendants. There is also a notification to State
18 attorneys general when there's a settlement of a class
19 action.

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

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

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

12 A couple of other things. There was a
13 suggestion in the reply brief that the complaint here
14 was not in fact a copycat case, a copycat complaint, but
15 instead was a summary of the Federal indictments, and
16 that that explains the eerie similarity between the
17 class action complaint and the Attorney General's
18 complaint. That's just factually not right. Some
19 companies who were defendants, like my client, Toshiba,
20 was never charged or convicted of anything in this case,
21 yet we're a defendant in this case, and that's because
22 we were a defendant in the class action case that was
23 copied.

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

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

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

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

8 Mr. Massey, you have four minutes remaining.

9 REBUTTAL ARGUMENT OF JONATHAN S. MASSEY

10 ON BEHALF OF THE PETITIONER

11 MR. MASSEY: Thank you.

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

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

18 The simplest route -- the simplest
19 interpretation is the one we have shown, that these --
20 the statute is directed at actual plaintiffs with
21 concrete claims that are proposed to be tried jointly.
22 The only thing our friends on the other side have
23 pointed out is the use of the -- is the word "persons."
24 Justice Sotomayor is 100 percent correct that the word
25 "persons" is basically -- is an echo of Rule 20, of the

1 joinder rule, which also refers to persons and
2 plaintiffs.

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

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

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

17 MR. MASSEY: No, Your Honor, we don't
18 believe so. That the Fifth Circuit ruled on its -- the
19 interpretation of CAFA and said that for purposes of the
20 statute, the claims were removable. But it didn't
21 decide the attorney general's authority to sue in the
22 name of the State under the statutes which give him that
23 authority. The -- we don't think the Fifth Circuit
24 decided that question, and I read the red brief at page
25 33 as saying the attorney general's authority is not at

1 issue here, that we assume the attorney general has the
2 authority to bring the claims in the complaint as he
3 pled them, which is the restitution claimed in the name
4 of the State.

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

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

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

20 So he says that sounds as if what you're
21 talking about is you want restitution, though, given to
22 the State, the restitution is for individual purchases
23 of individual citizens, because there could be no other.
24 And, therefore, you have a list of people in mind, or
25 you must find one, where there were particular

1 individual purchases by individual citizens and get that
2 restitution into the treasury.

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

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

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

12 JUSTICE BREYER: Right.

13 MR. MASSEY: -- "for its purchases and the
14 purchases of its citizens."

15 JUSTICE BREYER: Yes, and the purchases of
16 its citizens.

17 MR. MASSEY: So the State will get the
18 money --

19 JUSTICE BREYER: I know they'll get the
20 money --

21 MR. MASSEY: Right.

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

24 MR. MASSEY: Well, it --

25 JUSTICE BREYER: And to get the money, which

1 money means you better have a list of the individual
2 people who bought something, or otherwise, there is no
3 such money, and that's enough to make those in respect
4 to this paragraph, individual people whose claims the
5 State of Mississippi is pursuing. Something like that
6 is his argument. And I just wanted to know your
7 response.

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

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

18 MR. MASSEY: In many cases, we are. It is
19 still a public remedy of restitution. In many cases,
20 the individuals may be identified.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Counsel.

23 The case is submitted.

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

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