

COMMENT

CAFA and Parens Patriae Actions

Dwight R. Carswell[†]

INTRODUCTION

This Comment explores whether lawsuits brought by state attorneys general on behalf of state citizens, often called parens patriae actions, can be removed to federal court under the Class Action Fairness Act of 2005¹ (CAFA). To be removable under CAFA, a parens patriae action must be either a class action or a mass action as CAFA defines these terms. Even if the action is a mass action, it may fall within a mass action exception for actions brought on behalf of the general public, in which case CAFA would not provide federal courts with jurisdiction. Given that CAFA defines 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,”² there is little dispute that CAFA applies when an attorney general brings a class action under a state’s normal class action procedures. This Comment focuses on attorney general lawsuits brought directly under other state statutes or under an attorney general’s common law authority.

Whether parens patriae actions based on state law are removable under CAFA is an important issue. Forcing state attorneys general to go to federal court to enforce state laws would have significant federalism implications, and the forum may affect the outcome of the case. Furthermore, removal to federal court will seldom be available by other means. Article III extends the federal judicial power to controversies “between a State and Citizens of another State,”³ but Congress

[†] BA 2008, The University of Chicago; JD Candidate 2011, The University of Chicago Law School.

¹ Pub L No 109-2, 119 Stat 4, codified in various sections of Title 28. Congress enacted CAFA in 2005 to address what it saw as widespread abuses involving class action litigation. See Class Action Fairness Act of 2005, S Rep No 109-14, 109th Cong, 1st Sess 4, reprinted in 2005 USCCAN 3, 5. CAFA grants federal district courts original jurisdiction over certain class actions with an aggregate amount in controversy exceeding \$5 million and with minimal diversity between the parties. 28 USC § 1332(d)(2).

² 28 USC § 1332(d)(1)(B).

³ US Const Art III, § 2.

has passed no statute conferring such jurisdiction on lower federal courts. The Supreme Court has also held that a state is not a citizen of a state for purposes of 28 USC § 1332(a) diversity jurisdiction, so plaintiffs seeking removal of *parens patriae* actions under § 1332(a) must argue that state citizens, and not the state, are the real parties in interest.⁴ The same may be true of CAFA. Because CAFA gives federal courts original jurisdiction over class actions in which “any member of a class of plaintiffs is a citizen of a State different from any defendant,” it appears to have been enacted under Article III’s grant of diversity jurisdiction for controversies “between Citizens of different states.”⁵ Section 1332(a), however, requires complete diversity, and courts have therefore held that the presence of a state in the action prevents removal.⁶ By contrast, CAFA requires only minimal diversity and thus could provide for federal jurisdiction even when the state is a party, as long as state citizens are also real parties in interest.

Courts have taken various approaches to the question whether *parens patriae* actions are removable under CAFA. In *Caldwell v Allstate Insurance Co.*,⁷ the Fifth Circuit held that an action brought by the Louisiana attorney general seeking treble damages on behalf of state citizens was a removable mass action because the state citizens were the real parties in interest.⁸ Judge Leslie Southwick dissented, suggesting that only those actions with one hundred or more actual parties are mass actions.⁹ A federal district court recently took a different approach and held that a *parens patriae* action was removable under CAFA as a class action, rather than as a mass action.¹⁰ Other courts, however, have rejected claims that *parens patriae* actions are removable, holding that *parens patriae* actions are not class actions¹¹

⁴ See *Postal Telegraph Cable Co v Alabama*, 155 US 482, 487 (1894) (“A State is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different States.”). For a discussion of real party in interest doctrine, see text accompanying notes 144–60.

⁵ 28 USC § 1332(d)(2)(A).

⁶ See *In re Katrina Canal Litigation Breaches*, 524 F3d 700, 706 (5th Cir 2008) (“[I]t has been long settled that 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.”); *Hood v F. Hoffman-La Roche, Ltd.*, 639 F Supp 2d 25, 33–34 & n 10 (DDC 2009) (dismissing the case for lack of subject matter jurisdiction where the parties were otherwise diverse because a state was also a real party in interest).

⁷ 536 F3d 418 (5th Cir 2008).

⁸ *Id.* at 429–30.

⁹ See *id.* at 434 (Southwick dissenting).

¹⁰ See *McGraw v Comcast Corp.*, 705 F Supp 2d 441, 443 (ED Pa 2010).

¹¹ See, for example, *Koster v Portfolio Recovery Associates, Inc.*, 686 F Supp 2d 942, 947 (ED Mo 2010).

and that these actions fall within an exception to CAFA's mass action provision for claims brought on behalf of the general public.¹²

This Comment proceeds as follows: Part I provides an overview of *parens patriae* actions. Part II offers background on CAFA and presents the relevant statutory text and legislative history, while Part III summarizes court decisions on this issue. Part IV.A argues that *parens patriae* actions are not class actions as defined by CAFA. Part IV.B argues that courts should use a federalism canon of statutory construction and hold that *parens patriae* actions are not mass actions unless one hundred or more state citizens are named as plaintiffs. Part IV.C argues that even if *parens patriae* actions are mass actions, they will often fall within CAFA's mass action exception for actions in which all of the claims are brought on behalf of the general public.

I. PARENS PATRIAE ACTIONS

The doctrine of *parens patriae*, which means "parent of the country," originated in England with the idea of the royal prerogative.¹³ As the Supreme Court explained, "the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves."¹⁴ In the United States, "the 'parens patriae' function of the King passed to the States," and "[t]he nature of the *parens patriae* suit has been greatly expanded . . . beyond that which existed in England."¹⁵ Many of the earliest Supreme Court cases that recognized an expanded use of the doctrine in federal court involved litigation over environmental issues and natural resources.¹⁶ Today, the *parens patriae* standing doctrine allows a state to bring an action on behalf of its citizens under a federal statute whenever the state can demonstrate a quasi-sovereign interest.¹⁷

The focus of this Comment is not on *parens patriae* actions to enforce federal law, which can be removed to federal court under 28 USC § 1331's grant of federal question jurisdiction, but rather on *parens patriae* actions brought by state attorneys general under state

¹² See, for example, *Breakman v AOL LLC*, 545 F Supp 2d 96, 101 (DDC 2008).

¹³ See *Alfred L Snapp & Son, Inc v Puerto Rico*, 458 US 592, 600 (1982). For an introduction to *parens patriae* actions, see generally Jack Ratliff, *Parens Patriae: An Overview*, 74 Tulane L Rev 1847 (2000); Richard P. Ieyoub and Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 Tulane L Rev 1859 (2000).

¹⁴ *Hawaii v Standard Oil Co of California*, 405 US 251, 257 (1972) ("For example, Blackstone refers to the sovereign or his representative as 'the general guardian of all infants, idiots, and lunatics,' and as the superintendent of 'all charitable uses in the kingdom.'").

¹⁵ *Id.*

¹⁶ See, for example, *Missouri v Illinois*, 180 US 208, 241 (1901); *Georgia v Tennessee Copper Co*, 206 US 230, 237–38 (1907); *Pennsylvania v West Virginia*, 262 US 553, 591–92 (1923).

¹⁷ See text accompanying notes 169–81.

law to recover damages or restitution on behalf of state citizens. State statutes most commonly authorize these actions, although some states also recognize a common law right of state attorneys general to bring parens patriae actions.¹⁸ Parens patriae statutes are most common in the antitrust and consumer protection contexts, but they exist in other areas of law as well.¹⁹ For example, a provision of New York's Martin Act authorizes the state attorney general to bring an action for restitution of money obtained as a result of fraudulent practices in connection with the sale of securities.²⁰ There are many other examples of parens patriae actions, and whether these actions will remain in state court or be removed to federal court not only matters to the parties but also raises important federalism concerns.

II. THE CLASS ACTION FAIRNESS ACT

Part II.A provides an introduction to CAFA. Part II.B then presents the relevant statutory text. Part II.C discusses the portions of CAFA's legislative history that relate to whether CAFA authorizes removal of parens patriae actions.

¹⁸ See *State v City of Dover*, 891 A2d 524, 528–30 (NH 2006) (holding that the New Hampshire attorney general had parens patriae standing to bring a product liability action seeking damages from the manufacturers of a gasoline additive found in the water supply of most counties in the state); *State v First National Bank of Anchorage*, 660 P2d 406, 420–21 (Alaska 1982) (holding that the Alaska attorney general had authority to bring a parens patriae lawsuit seeking restitution for state citizens who were injured by common law fraud despite the lack of express statutory authorization).

¹⁹ For examples of parens patriae statutes, see DC Code § 28-4507(b) (West) (“The Corporation Counsel may bring a civil action . . . as parens patriae on behalf of any individual residing in the District of Columbia . . . for injury sustained by such individual to such individual’s property by reason of any violation of this chapter.”); NY Gen Bus Law § 349(b) (McKinney) (“Whenever the attorney general shall believe . . . that any person . . . has engaged in . . . any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people . . . to obtain restitution.”); Mo Ann Stat § 407.100(4) (Vernon):

The court, in its discretion, may enter an order of restitution, payable to the state, as may be necessary to restore to any person who has suffered any ascertainable loss, including, but not limited to, any moneys or property, real or personal, which may have been acquired by means of any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter. It shall be the duty of the attorney general to distribute such funds to those persons injured.

One important variation is whether the statute provides for a private right of action or authorizes recovery only by the attorney general.

²⁰ See NY Gen Bus Law § 353(1) (“Whenever the attorney-general shall believe . . . any person . . . has engaged in . . . fraudulent practices, he may bring an action in the name and on behalf of the people of the state of New York against such person.”). The New York attorney general recently relied on this provision to bring a lawsuit against Bank of America. See Complaint, *Cuomo v Bank of America Corp*, No 4501152010, *8–9 (NY S Ct filed Feb 4, 2010) (available on Westlaw at 2010 WL 430118).

A. An Introduction to CAFA

CAFA was enacted to address what Congress saw as abuses in class action litigation. As the Senate committee report explained, “most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements.”²¹ The lack of proper supervision by state courts was especially problematic given that plaintiffs’ lawyers were strategically joining parties to destroy the complete diversity required for federal jurisdiction under 28 USC § 1332(a) and were engaging in forum shopping to get their class actions in front of state court judges known to be biased in favor of plaintiffs.²² In particular, some state courts were far more willing than federal courts to certify nationwide class actions.²³

Congress was also motivated by federalism concerns about state courts “overturning well-established laws and policies of other jurisdictions” when dealing with interstate class actions.²⁴ As one commentator explains, “multistate class actions based on state law claims raised complex choice of law problems and generated pressure for the application of a single state’s law or for the creation of supervening national rules that would allow class actions to be relatively easily and uniformly resolved.”²⁵ CAFA addressed these problems by allowing more interstate class actions to be litigated in federal courts, which Congress believed would provide better supervision and would more faithfully apply the relevant state laws.

B. CAFA’s Text

CAFA grants federal district courts original jurisdiction over class actions “in which the matter in controversy exceeds the sum or value of \$5,000,000” and in which “any member of a class of plaintiffs

²¹ S Rep No 109-14 at 4 (cited in note 1).

²² Id (“[C]urrent law enables lawyers to ‘game’ the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests.”). See also Edward A. Purcell, Jr, *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdiction Reform*, 156 U Pa L Rev 1823, 1854 (2008) (“Class action attorneys shopped for the most promising forum, and when they wished to avoid the federal courts in suits raising state law claims they were able to do so by adding diversity-destroying parties.”).

²³ See Justin D. Forlenza, Note, *CAFA and Erie: Unconstitutional Consequences?*, 75 Fordham L Rev 1065, 1084–86 (2006).

²⁴ S Rep No 109-14 at 4 (cited in note 1).

²⁵ Purcell, 156 U Pa L Rev at 1854 (cited in note 22).

is a citizen of a State different from any defendant.”²⁶ The term “class action” is defined 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.”²⁷

Section 1332(d)(11)(A) provides that, for the purposes of CAFA, a mass action shall be considered a class action. 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.”²⁸ But “jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy” the \$75,000 amount-in-controversy requirement established by § 1332(a).²⁹ CAFA also contains four exceptions to its definition of a mass action.³⁰ The exception relevant to this Comment provides that a civil action is not a mass action when “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.”³¹

C. CAFA’s Legislative History

1. Senate committee report.

Portions of CAFA’s legislative history may be helpful in determining whether *parens patriae* actions brought by state attorneys general can be removed to federal court.³² The Senate Judiciary Committee’s report on CAFA stated that “the overall intent of [CAFA] is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications” and that, for this reason, CAFA’s definition of class action should be “interpreted liberally.”³³ The report noted that CAFA’s “application should not be confined solely to lawsuits that are labeled ‘class actions’ by the named plaintiff or the state rulemaking

²⁶ 28 USC § 1332(d)(2).

²⁷ 28 USC § 1332(d)(1)(B).

²⁸ 28 USC § 1332(d)(11)(B)(i).

²⁹ 28 USC § 1332(d)(11)(B)(i).

³⁰ 28 USC § 1332(d)(11)(B)(ii).

³¹ 28 USC § 1332(d)(11)(B)(ii)(III).

³² Of course, there are compelling arguments against the use of legislative history in interpreting statutes. See, for example, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law*, in Amy Gutmann, ed., *A Matter of Interpretation: Federal Courts and the Law* 3, 29–37 (Princeton 1997).

³³ S Rep No 109-14 at 35 (cited in note 1).

authority,” and that instead “lawsuits that resemble a purported class action should be considered class actions.”³⁴

The committee report described mass actions as “suits that are brought on behalf of numerous named plaintiffs who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status.”³⁵ It explained that the mass action exception contained in § 1332(d)(11)(B)(ii)(III) “addresses a very narrow situation, specifically a law like the California Unfair Competition Law, which allows individuals to bring a suit on behalf of the general public.”³⁶ The report noted that “[s]uch a suit would not qualify as a mass action. However, the vast majority of cases brought under other states’ consumer fraud laws, which do not have a parallel provision, could qualify as removable mass actions.”³⁷

2. Senate floor action.

The Senate floor debate also sheds light on whether CAFA authorizes removal of *parens patriae* actions, because the Senate specifically considered an amendment that would have exempted from CAFA lawsuits brought by state attorneys general. Forty-six state attorneys general wrote a letter to Congress expressing their concern that CAFA might be “misinterpreted” to affect their ability to bring *parens patriae* actions under state antitrust and consumer protection

³⁴ *Id.* It should be noted that the Senate committee report was not issued until after CAFA was enacted, so some courts have given it very little weight. Compare *Blockbuster, Inc v Galeno*, 472 F3d 53, 58 (2d Cir 2006) (“[T]he Senate report was issued ten days after the enactment of the CAFA statute, which suggests that its probative value for divining legislative intent is minimal.”), with *Lowery v Alabama Power Co*, 483 F3d 1184, 1206 n 50 (11th Cir 2007) (“While the report was issued ten days following CAFA’s enactment, it was submitted to the Senate on February 3, 2006—while that body was considering the bill.”). See also Guyon Knight, Note, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L Rev 1875, 1891–92 (2010) (concluding that “there is no clear answer to the question of the Report’s timing”).

³⁵ S Rep No 109-14 at 46 (cited in note 1).

³⁶ *Id.* at 47. The California Unfair Competition Law allows an injured party to “pursue representative claims or relief on behalf of others.” Cal Bus & Prof Code § 17203 (West). The law was amended by Proposition 64 in 2004 to require that plaintiffs have suffered injury-in-fact and to impose class action-type procedural requirements. See 2004 Cal Legis Serv Prop 64 (West), amending Cal Bus & Prof Code § 17203. See also John H. Beisner, Matthew Shors, and Jessica Davidson Miller, *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 Stan L Rev 1441, 1459 (2005). It is unclear whether the Senate committee report is referring to the law as it existed before or after this amendment. Because the report was issued on February 28, 2005, the most natural interpretation would be that it is referring to the law as amended, because Proposition 64 was approved on November 2, 2004. Either way, the Senate committee report suggests that the mass action exception for claims brought on behalf of the general public was designed to exclude private attorney general actions from CAFA’s scope.

³⁷ S Rep No 109-14 at 47 (cited in note 1).

statutes.³⁸ In response, Senator Mark Pryor offered an amendment that would have excluded from CAFA “any civil action brought by, or on behalf of, any attorney general,”³⁹ but the Senate rejected this amendment by a 60–39 vote.⁴⁰

The senators who spoke against the Pryor Amendment expressed their view that it was unnecessary because *parens patriae* actions brought by state attorneys general would not be covered by CAFA. According to Senator Chuck Grassley, while *parens patriae* actions are “similar to class actions in the sense that the State attorney general represents the people of that State,” these actions “are not class actions; rather, they are very unique attorney general lawsuits authorized under State constitutions or under statutes.”⁴¹ Senator John Cornyn noted that the state attorneys general who wrote the letter expressed concern only that CAFA might be “misinterpreted,” but he claimed that it was “very plain that no power of the State attorney general is impeded by virtue of [CAFA], or will be once it is signed into law.”⁴² Similarly, Senator Orrin Hatch argued that CAFA’s text “makes it perfectly clear that the bill applies only to class actions, and not *parens patriae* actions.”⁴³ He noted that class actions are “lawsuits filed in Federal district court under rule 23 of the Federal rules of civil procedure or lawsuits brought in State court as a class action.”⁴⁴ Because “[n]either of these conditions are met when compared to the nature of a *parens patriae* action,” Senator Hatch explained that *parens patriae* actions “are excluded from the reach of this bill.”⁴⁵

The Pryor Amendment would have excluded from CAFA not only *parens patriae* actions but also attorney general lawsuits brought under a state’s normal class action procedures.⁴⁶ For this reason, the senators opposing the amendment argued that its language would create a loophole. For example, Senator Grassley claimed that the amendment as drafted “could lead to gaming by class action lawyers,”

³⁸ 151 Cong Rec S 1158 (daily ed Feb 9, 2005) (Sen Pryor).

³⁹ Id at S 1157–58 (“My amendment simply clarifies that State attorneys general should be exempt from [CAFA] and be allowed to pursue their individual State’s interests as determined by themselves and not by the Federal Government.”).

⁴⁰ 151 Cong Rec at S 1164–65 (cited in note 38).

⁴¹ Id at S 1163 (Sen Grassley).

⁴² Id at S 1161–62 (Sen Cornyn) (commenting on the clarity of the bill and the potential for misinterpretation of any law, as well as expressing confidence in the courts to rectify any potential future misinterpretation).

⁴³ Id at S 1164 (Sen Hatch).

⁴⁴ 151 Cong Rec at S 1164 (cited in note 38) (Sen Hatch).

⁴⁵ Id.

⁴⁶ Id at S 1159 (Sen Pryor). This Comment argues that lawsuits brought under a state’s normal class action procedures are “class actions” under CAFA. See text accompanying notes 105–07.

because it “would allow plaintiffs’ lawyers to bring class actions and simply include in their complaint a State attorney general’s name as a purported class member, arguably to make their class action completely immune to the provisions of this bill.”⁴⁷ Some senators also opposed the amendment because the bill was a compromise, and they feared that any amendment might delay its passage.⁴⁸

III. EXISTING APPROACHES TO THE REMOVAL OF PARENS PATRIAE ACTIONS UNDER CAFA

This Part discusses judicial opinions that address whether CAFA authorizes removal of parens patriae actions. A parens patriae action is removable under CAFA only if it constitutes either a class action or a mass action that does not fall into the mass action exception. Part III.A covers cases dealing with the question whether parens patriae actions are mass actions. Specifically, Part III.A.1 discusses the Fifth Circuit’s decision in *Caldwell v Allstate Insurance Co*, in which the court held that a parens patriae action was a mass action because state citizens were the real parties in interest. Part III.A.2 discusses a federal district court case holding that a private attorney general suit fell within CAFA’s mass action exception for claims brought on behalf of the general public. Finally, Part III.B turns to the issue whether parens patriae actions are class actions as defined by CAFA and discusses two recent district court cases that have reached opposite conclusions.

A. Cases Applying CAFA’s Mass Action Provision to Parens Patriae Actions

1. *Caldwell*: A parens patriae action is a mass action as defined by CAFA when state citizens are the real parties in interest.

The most thorough consideration of whether CAFA applies to parens patriae actions brought by state attorneys general is the Fifth

⁴⁷ 151 Cong Rec at S 1163 (cited in note 38) (Sen Grassley).

⁴⁸ See *id* at S 1161 (Sen Carper); *id* at S 1163 (Sen Grassley). As Senator Thomas Carper explained:

I did not support this amendment because I think it would simply invite the adoption of other amendments and, frankly, put us in the situation which will end in a conference with the House of Representatives with a bill that is frankly far different than this one and will provide an end product not to my liking and I suspect even less to the liking of those who are opposed to this compromise. I reluctantly oppose this amendment with that in mind, but it is not something I do easily or lightly.

Id at S 1161 (Sen Carper).

Circuit's decision in *Caldwell*.⁴⁹ There, the Louisiana attorney general filed a civil complaint against several insurance and consulting companies alleging that they violated the Louisiana Monopolies Act⁵⁰ by conspiring to suppress competition in the insurance industry, fix prices, and underpay the claims of insurance policyholders.⁵¹ The attorney general sought forfeiture of illegal profits, treble damages on behalf of insurance policyholders, and injunctive relief.⁵² The defendants removed the case to federal court, arguing that it constituted either a class action or a mass action under CAFA.⁵³ The district court denied the attorney general's motion to remand the case, and the attorney general filed a petition to appeal the decision to the Fifth Circuit, which the court granted.⁵⁴

The Fifth Circuit held that CAFA provided federal courts with jurisdiction over the case.⁵⁵ The court began by citing the Senate committee report on CAFA for the proposition that the term "class action" should be "interpreted liberally," and then noted that "[i]t is well-established that in determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels that the parties may attach."⁵⁶ Additionally, the court observed that the Senate rejected an amendment that would have exempted from CAFA lawsuits brought by state attorneys general.⁵⁷

The court next provided a detailed overview of *parens patriae* actions, ultimately determining that it was unnecessary to decide whether

⁴⁹ The Fifth Circuit is the only court of appeals to address the topic of this Comment so far. The Tenth Circuit, however, recently granted leave to appeal in a case considering whether *parens patriae* actions can be removed under CAFA. See *BP America, Inc v Edmondson*, 613 F3d 1029, 1035 (10th Cir 2010) (noting that the "case raises the important and unsettled legal questions whether CAFA's mass action provision applies to suits by a state attorney general; whether the 'general public' exception covers such suits . . . ; and how, if at all, the 'real party in interest' analysis pertains to such suits"). Another case is pending before the Fourth Circuit. See Defendants-Appellants' Opening Brief, *McGraw v CVS Pharmacy, Inc*, No 10-267, *3 (4th Cir filed Dec 28, 2010) (available on Westlaw at 2010 WL 5383915).

⁵⁰ La Rev Stat Ann §§ 51:121–51:152 (West).

⁵¹ *Caldwell*, 536 F3d at 422–23 (claiming that the defendants took actions amounting to horizontal price fixing when, in the wake of Hurricanes Katrina and Rita, they conspired to "deny, delay, and defend" under the advice of a high-profile consulting firm and to use software that manipulated policy values).

⁵² *Id.* at 423.

⁵³ *Id.*

⁵⁴ *Id.* Under 28 USC § 1453(c), courts of appeals may review district courts' remand orders in cases removed under CAFA.

⁵⁵ See *Caldwell*, 536 F3d at 430.

⁵⁶ *Id.* at 424.

⁵⁷ *Id.* See also text accompanying notes 46–48. The court did admit in a footnote, however, that some senators opposed the amendment because they believed it was unnecessary, as CAFA would not affect *parens patriae* actions. *Caldwell*, 536 F3d at 424 n 4. See also text accompanying notes 41–45.

the attorney general had authority to bring a parens patriae suit for treble damages under Louisiana law.⁵⁸ In this discussion, the court paid particular attention to the Supreme Court's decision in *Hawaii v Standard Oil Co of California*,⁵⁹ in which the Court held that Hawaii could not bring an action under § 4 of the Clayton Act for damages to its economy, because § 4 authorized only a person "injured in his business or property" to recover treble damages.⁶⁰ The Fifth Circuit noted that Congress responded to *Standard Oil* and the Ninth Circuit's decision in *California v Frito-Lay, Inc*⁶¹ by passing a statute specifically authorizing state attorneys general to bring parens patriae actions under the Clayton Act.⁶² Like the Clayton Act at the time of *Standard Oil* and *Frito-Lay*, Louisiana's Monopolies Act authorizes treble damages suits only by persons "injured in [their] business or property."⁶³ Thus, the court might have been skeptical about the Louisiana attorney general's authority to bring a parens patriae claim for treble damages as a matter of state law. In particular, the court noted that Louisiana had not followed other states in adopting a provision similar to the parens patriae provision enacted by Congress, and the court held that it therefore did not need to decide whether "such a statute could shield a representative action from removal under CAFA."⁶⁴

Instead of resting its holding on state law, the court focused on determining who the "real parties in interest" were for the treble damages claims.⁶⁵ The court held that the real parties in interest were the insurance policyholders, because the Monopolies Act authorized these policyholders to bring actions for treble damages and because the attorney general was attempting to recover the damages on their

⁵⁸ *Caldwell*, 536 F3d at 425–29 ("Even assuming *arguendo* that the Attorney General has standing to bring such a representative action, the narrow issue before this court is who are the real parties in interest: the individual policyholders or the State."). For a discussion of parens patriae standing, see text accompanying notes 166–81.

⁵⁹ 405 US 251 (1972).

⁶⁰ *Id.* at 262–63 & n 14.

⁶¹ 474 F2d 774 (9th Cir 1973).

⁶² *Caldwell*, 536 F3d at 427 n 5 (arguing that Congress's emendation of the Clayton Act created a statutory parens patriae right of action that "is broader than the common law right"). The legislation authorizing parens patriae actions was the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub L No 94-435, 90 Stat 1383, codified in relevant part at 15 USC § 15c ("Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State . . . to secure monetary relief.").

⁶³ La Rev Stat Ann § 51:137.

⁶⁴ *Caldwell*, 536 F3d at 427–28 n 5.

⁶⁵ See *id.* at 428–29 ("The parties vigorously debate whether the Attorney General's *parens patriae* authority is extensive enough to allow the State to sue for treble damages in a representative capacity under state law. We need not address that issue.").

behalf.⁶⁶ Having concluded that one hundred or more policyholders were the real parties in interest, the court held that the action fell within CAFA's definition of a mass action.⁶⁷ The court did not discuss the mass action exception for lawsuits in which "all of the claims . . . 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."⁶⁸

Judge Southwick dissented, arguing that "[d]oubts about propriety of removal are resolved in favor of remand" and that this standard is "particularly appropriate when the argument is that the suit is removable under CAFA despite the disguise that it wears."⁶⁹ He went on to explain that CAFA's definition of "class action" is a lawsuit brought under a state statute or rule equivalent to Rule 23 of the Federal Rules of Civil Procedure and noted that Louisiana has a statute that is equivalent to Rule 23.⁷⁰ The Louisiana attorney general's action was not brought under this statute but rather the Louisiana Monopolies Act.⁷¹ Judge Southwick maintained that, for this reason, the action was not a class action under CAFA.

Judge Southwick argued that the lawsuit was not a "mass action" even if the policyholders were the real parties in interest—an issue on which he took no position.⁷² In his view, only those lawsuits with one hundred or more parties are "mass actions."⁷³ At most, the attorney general "filed a defective pleading under Louisiana law."⁷⁴ But CAFA's mass action provision was not "meant to confer federal jurisdiction simply because the removing party suggests that the best way to cure a defective pleading is to join 100 additional parties."⁷⁵

⁶⁶ Id at 429–30 (noting that the "purpose of antitrust treble damages provisions [is] to encourage private lawsuits by aggrieved individuals" and observing that the Attorney General's petition sought to "recover damages suffered by *individual policyholders*"). The court ordered that, on remand, the district court join the real parties in interest. Id at 430. The court did not consider Rule 17 of the Federal Rules of Civil Procedure, however, which states that although actions must generally be brought in the name of the real party in interest, parties authorized by statute to bring representative actions may "sue in their own names without joining the person for whose benefit the action is brought." FRCP 17(a)(1)(G).

⁶⁷ *Caldwell*, 536 F3d at 430. The court noted that its holding might have been different if Louisiana were seeking only injunctive relief, and it suggested that on remand the district court consider whether the claim for injunctive relief might be severed and remanded to state court. Id.

⁶⁸ 28 USC § 1332(d)(11)(B)(ii)(III).

⁶⁹ *Caldwell*, 536 F3d at 433 (Southwick dissenting).

⁷⁰ Id at 434 & n 1.

⁷¹ Id at 435. Louisiana's Rule 23 equivalent is La Code Civ Pro Ann arts 591–97 (West).

⁷² *Caldwell*, 536 F3d at 434 (Southwick dissenting).

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id at 435.

The parties disagreed on whether the Louisiana attorney general could bring a representative action for treble damages under the Louisiana Monopolies Act without bringing a class action or joining the injured parties as plaintiffs. But because Judge Southwick believed that the lawsuit before the court was neither a class action nor a mass action, he argued that the case should have been remanded to state court for resolution of this issue, particularly because there was “no statute, caselaw, or learned commentator” that clearly supported either side.⁷⁶ He noted that federalism principles supported this approach because Louisiana state courts are “[t]he authoritative judicial interpreters” of Louisiana law and because their decisions on matters of state law are dispositive, as opposed to “*Erie* guesswork.”⁷⁷

2. *Breakman*: A private attorney general action falls within CAFA’s mass action exception for claims brought on behalf of the general public.

In *Breakman v AOL LLC*,⁷⁸ a private plaintiff brought a representative action under the District of Columbia Consumer Protection Procedures Act⁷⁹ (DCCPPA) alleging that AOL engaged in unfair trade practices by failing to disclose information about its pricing plans.⁸⁰ The plaintiff sought an injunction as well as actual and statutory damages “for each individual District of Columbia consumer.”⁸¹ The district court held that CAFA did not authorize federal jurisdiction, because the lawsuit did not constitute either a class action or a mass action as defined by CAFA.⁸² The case was not a class action, the court noted, because the “DCCPPA specifically authorizes a private

⁷⁶ *Caldwell*, 536 F3d at 435 (Southwick dissenting). Judge Southwick noted that if the state court then determined that the lawsuit could proceed as a nonclass representative action, it would remain in state court. Consider *id.* at 433 (“[P]erhaps under Louisiana law [the Attorney General] really may pursue the claims just as he asserts them We have no jurisdiction until there is removed to federal court an action brought in the manner that CAFA requires.”). If, however, the state court determined that the attorney general could maintain the suit only by either complying with Louisiana’s class action procedures or joining the real parties in interest, the attorney general could then decide whether to drop the claims for treble damages or make the action removable under CAFA by refiling it as a class action or by joining the injured parties as plaintiffs. See *id.*

⁷⁷ *Id.* at 435 (“I can perceive no reason to rush questions of state law into the federal courts.”).

⁷⁸ 545 F Supp 2d 96 (DDC 2008).

⁷⁹ DC Code § 28-3901 et seq.

⁸⁰ *Breakman*, 545 F Supp 2d at 99–100. The DCCPPA authorizes “[a] person, whether acting for the interests of itself, its members, or the general public” to bring an action “seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia” and to recover restitution for the consumers as well as either treble damages or \$1,500, whichever is greater. DC Code § 28-3905(k)(1).

⁸¹ *Breakman*, 545 F Supp 2d at 100.

⁸² *Id.* at 102.

attorney general suit without any reference to class action requirements” and because the plaintiff did not bring his lawsuit pursuant to Rule 23 of the DC Superior Court Rules of Civil Procedure or otherwise seek class certification.⁸³ The court concluded that a representative action under the DCCPPA is “a separate and distinct procedural vehicle from a class action.”⁸⁴

The court also held that the lawsuit could not be removed as a mass action under CAFA because it fell within the mass action exception for claims brought on behalf of the general public.⁸⁵ AOL did not contest that the mass action exception applied,⁸⁶ so the court did not attempt to distinguish between actions brought on behalf of the general public and those brought on behalf of specific individuals. The court also did not discuss whether the lawsuit would be removable as a mass action were it not for this exception.

B. Cases That Consider Whether *Parens Patriae* Actions Are Class Actions as Defined by CAFA

1. *Koster*: A *parens patriae* action is a class action only when brought under a Rule 23 equivalent.

In *Koster v Portfolio Recovery Associates, Inc.*,⁸⁷ the Missouri attorney general brought a lawsuit under the Missouri Merchandizing Practices Act⁸⁸ (MMPA) alleging that the defendants engaged in deceptive and unfair debt collection practices.⁸⁹ The State of Missouri sought restitution on behalf of injured citizens as well as injunctive relief and civil penalties. The defendants removed the case to federal court, arguing that the case was a class action as defined by CAFA, and the state moved to remand.⁹⁰

The district court granted the attorney general’s motion to remand the case. The court first rejected the defendants’ attempt to use

⁸³ Id at 101. As the comment to DC Rule 23 explains, “[DC] Rule 23 is identical to Fed[eral] Rule of Civil Procedure 23 except for certain changes in subsections (c)(1) and (c)(2) which specifically authorize the judge to shift the costs of notice to the defendant, in whole or in part, under limited circumstances.” DC R Civ Pro 23, comment.

⁸⁴ *Breakman*, 545 F Supp 2d at 101.

⁸⁵ Id. Although this was technically not a *parens patriae* action because it was brought by a private party and not by a state, the holding would likely apply to *parens patriae* actions authorized by statute given that a representative action brought by an attorney general is more likely to be considered “on behalf of the general public” than representative actions brought by private parties.

⁸⁶ See id (“[E]ven AOL concedes that this DCCPPA case falls squarely within the definitional exclusion of mass action.”) (quotation marks omitted).

⁸⁷ 686 F Supp 2d 942 (ED Mo 2010).

⁸⁸ Mo Ann Stat § 407.010 et seq.

⁸⁹ *Koster*, 686 F Supp 2d at 943.

⁹⁰ Id at 943–44.

the Fifth Circuit's *Caldwell* decision to support their position, reasoning that *Caldwell* was based on CAFA's mass action provision, while the defendants in *Koster* removed the action under CAFA's class action provision.⁹¹ Additionally, the court noted that it did not "find the legal analysis in the *Caldwell* majority opinion to be persuasive," but rather found that Judge Southwick's dissent was "better reasoned."⁹² The majority's approach in *Caldwell*, the court noted, was "counter to the Supreme Court's directive that removal statutes are to be 'strictly construed,' especially those that undermine the authority of the state."⁹³ The court also criticized the Fifth Circuit for relying on cases "involving fraudulent joinder or fraudulent pleading to justify 'piercing' the plaintiffs' pleadings."⁹⁴ After all, there was no allegation "that the plaintiffs used fraud to destroy federal jurisdiction," and "the Fifth Circuit acknowledged that the State of Louisiana had the authority to bring *parens patriae* antitrust actions under the Louisiana Monopolies Act."⁹⁵ Because the action was not brought under Missouri Supreme Court Rule 52.08, Missouri's Rule 23 equivalent, and because the attorney general has authority under the MMPA to bring a *parens patriae* action without certifying a class, the court concluded that "under the plain meaning of § 1332(d)(1)(B), the suit does not qualify as a 'class action.'"⁹⁶

2. *McGraw*: A *parens patriae* action is a class action when the statute authorizing the action contains certain procedural requirements.

In *McGraw v Comcast Corp.*,⁹⁷ a federal district court denied the West Virginia attorney general's motion to remand an antitrust and consumer protection *parens patriae* action against Comcast, holding that the lawsuit constituted a class action removable under CAFA.⁹⁸ The court first considered whether CAFA's minimal diversity requirement was satisfied, which involved determining the identity of the real parties in interest. Relying substantially on the Fifth Circuit's decision in *Caldwell*, the court found that the affected state citizens

⁹¹ Id at 945. The court later noted that even if the defendants had claimed that the action was a mass action, it would have rejected this argument because the Missouri attorney general had not joined ninety-nine additional plaintiffs. Id at 947.

⁹² Id at 945–46.

⁹³ *Koster*, 686 F Supp 2d at 945, citing *Syngenta Crop Protection, Inc v Henson*, 537 US 28, 32 (2002); *Healy v Ratta*, 292 US 263, 270 (1934).

⁹⁴ *Koster*, 686 F Supp 2d at 945.

⁹⁵ Id at 946.

⁹⁶ Id at 947 & n 3.

⁹⁷ 705 F Supp 2d 441 (ED Pa 2010).

⁹⁸ Id at 443.

were the real parties in interest, at least for the treble damages claim, and thus concluded that minimal diversity existed.⁹⁹

The court next considered whether the action was a class action as defined by CAFA—that is a “civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure.”¹⁰⁰ The court noted, “[w]hile it is true that the [West Virginia Antitrust Act (WVAA)] does not match federal Rule 23 perfectly, CAFA does not require such exactitude. The Senate Judiciary Committee Report notes that the definition of a class action should be ‘interpreted liberally.’”¹⁰¹ Accordingly, the court concluded that “[t]he WVAA, with its procedural protections for consumers represented by the State, is sufficiently similar to federal Rule 23 to meet CAFA’s requirement for class actions.”¹⁰² The court attempted to distinguish its holding from *Koster* by noting that in *Koster* the relevant statute did not contain procedural elements such as notice to the affected citizens and an ability of the citizens to opt out of the action.¹⁰³ The presence of these procedural protections, the *McGraw* court concluded, was sufficient to render the WVAA “similar” to Rule 23.

IV. PARENS PATRIAE ACTIONS ARE NEITHER CLASS ACTIONS NOR MASS ACTIONS AND WILL OFTEN FALL WITHIN CAFA’S MASS ACTION EXCEPTION

This Part first argues that parens patriae actions are class actions as defined by CAFA only when these actions are brought under a state equivalent of Rule 23. Part IV.B then argues that because the text of CAFA’s mass action provision is ambiguous, courts should use a federalism canon of construction to hold that parens patriae actions are not mass actions unless at least one hundred citizens are named as plaintiffs. Part IV.C.1 recognizes that even if parens patriae actions were mass actions, they would often fall within CAFA’s mass action exception for lawsuits brought on behalf of the general public. Part IV.C.2 argues that the standard that should define the scope of this exception is the quasi-sovereign-interest standard used to determine when a state has parens patriae standing to sue in federal court. Part IV.C.3 concludes that courts should presume that the state has a quasi-sovereign interest whenever the state attorney general brings a parens patriae action pursuant to a statute specifically authorizing the action.

⁹⁹ See *id.* at 447–52.

¹⁰⁰ *Id.* See also Part II.B.

¹⁰¹ *McGraw*, 705 F Supp 2d at 452, citing S Rep No 190-14 at 35 (cited in note 1).

¹⁰² *McGraw*, 705 F Supp 2d at 452.

¹⁰³ *Id.* at 454.

A. Parens Patriae Actions Are Not Class Actions

Parens patriae actions are not class actions as defined by CAFA unless they are brought under a state's normal class action procedures. While parens patriae actions are similar to class actions in some ways, CAFA defines 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."¹⁰⁴ This provision clearly applies when an attorney general brings a lawsuit under a state equivalent of Rule 23. For instance, in *In re Katrina Canal Litigation Breaches*,¹⁰⁵ the attorney general of Louisiana brought a class action against more than two hundred insurance companies, alleging that they were liable under various contract and insurance causes of action arising out of their failure to pay insurance claims for damage caused by Hurricane Katrina.¹⁰⁶ The Fifth Circuit held that because the class action was brought under Louisiana Code of Civil Procedure Article 591(A)—Louisiana's Rule 23 equivalent—it fell within CAFA's definition of a class action.¹⁰⁷

Although CAFA should apply when a state attorney general brings a lawsuit under the state's normal class action procedures, a parens patriae action brought directly under a statute authorizing such actions should not be considered a class action. This is the best reading of the text of CAFA, which states that "the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or *similar* State statute or rule of judicial procedure."¹⁰⁸ The word "similar" is ambiguous out of context and raises line-drawing problems regarding how closely a rule or statute must resemble Rule 23.¹⁰⁹ Nevertheless, there are significant differences between the typical parens patriae statute and Rule 23 that make it very difficult to argue that these statutes are similar to Rule 23.¹¹⁰ First, Rule 23 authorizes any

¹⁰⁴ 28 USC § 1332(d)(1)(B).

¹⁰⁵ 524 F3d 700 (5th Cir 2008).

¹⁰⁶ *Id.* at 703–04.

¹⁰⁷ *Id.* at 705.

¹⁰⁸ 28 USC § 1332(d)(1)(B) (emphasis added).

¹⁰⁹ According to the *Oxford English Dictionary*, "similar" means "[o]f the same substance or structure throughout" or "[h]aving a marked resemblance or likeness." *Oxford English Dictionary* 490 (Clarendon 2d ed 1989). *Webster's Dictionary* defines "similar" as meaning "alike in substance or essentials" or "having characteristics in common: strictly comparable." *Webster's Third New International Dictionary* 2120 (Merriam-Webster 2002). See also *Payless Shoesource, Inc v Travelers Companies, Inc*, 585 F3d 1366, 1373 (10th Cir 2009) (using these definitions to interpret the use of the word "similar" in a contract).

¹¹⁰ Even if the statute were deemed ambiguous, the federalism canon of construction introduced in Part IV.B would nonetheless suggest that parens patriae actions are not class actions.

“members of a class” to sue as “representative parties on behalf of all members,” while *parens patriae* actions can be brought only by a state, usually through its attorney general. Second, Rule 23 can be used to bring class actions in many areas of law. *Parens patriae* actions, by contrast, are generally limited to particular state laws, such as antitrust or consumer protection statutes. Furthermore, the procedural requirements for *parens patriae* actions often diverge significantly from the typical class action. For instance, attorneys general bringing *parens patriae* actions are not required to comply with the certification procedures set forth in Rule 23 or to prove that the requirements for a class action are satisfied.¹¹¹ Additionally, attorneys general are not always required to provide notice to the citizens whose damages they are recovering, and the citizens may not be able to opt out.¹¹²

The district court in *McGraw* held that the WVAA was similar to Rule 23 because, unlike the Missouri statute at issue in *Koster*, the WVAA required the attorney general to provide notice to the affected citizens, provided the citizens with an opportunity to opt out of the action, and bound them to the judgment if they did not opt out.¹¹³ It is true that these procedural protections make the WVAA more similar to Rule 23 than it would be without them. But the other significant differences noted above remain—unlike class actions, *parens patriae* actions are limited to particular areas of law, they may be brought only by state officials, and they are not subject to class action-type certification requirements. Also, the *McGraw* court, in attempting to distinguish *Koster*, appeared to concede that *parens patriae* statutes that lack these procedural requirements are not similar to Rule 23.¹¹⁴ Holding that the existence of such requirements alone is sufficient to make a *parens patriae* statute similar to Rule 23 would have a perverse effect—state legislatures would be forced to deny their citizens these procedural protections if they want *parens patriae* actions to remain in state court.¹¹⁵ For

¹¹¹ In particular, most *parens patriae* statutes do not include a predominance requirement, a requirement that prevents many class actions from being certified. See FRCP 23(b)(3) (stating that “questions of law or fact common to class members” must “predominate over any questions affecting only individual members”). See also *Amchem Products, Inc v Windsor*, 521 US 591, 597, 609 (1997) (affirming the Third Circuit’s denial of class certification for failure to show “that questions common to the class ‘predominate over’ other questions”).

¹¹² See Jim Ryan and Don R. Sampen, *Suing on behalf of the State: A Parens Patriae Primer*, 86 Ill Bar J 684, 688–89 (1998).

¹¹³ See *McGraw*, 705 F Supp 2d at 453 (“In summary, the three baseline requirements necessary to protect the interests of absent class members are: 1) notice, 2) an opt-out opportunity, and 3) adequate representation.”).

¹¹⁴ Consider *id.*

¹¹⁵ For an argument that such protections are not constitutionally required, see Ryan and Sampen, 86 Ill Bar J at 689 (cited in note 112) (“Because the state is proceeding in its own right,

this reason, the presence of these protections should not be sufficient to make a *parens patriae* action a removable class action.

The *McGraw* court also relied on language in the Senate committee report that suggests that CAFA should be “interpreted liberally.”¹¹⁶ This ignores not only the Supreme Court’s instruction that removal statutes should be strictly construed but also the Senate’s floor action, which is the only part of CAFA’s legislative history that deals specifically with *parens patriae* actions. Although the Senate rejected an amendment to CAFA that would have categorically excluded actions brought “on behalf of an attorney general” from CAFA, senators on both sides of the amendment agreed that *parens patriae* actions would not constitute class actions as defined by CAFA unless these actions were brought under a state’s normal class action procedures.¹¹⁷ For some reason, the *McGraw* court dismissed these senators’ statements as “conflicting and contradictory.”¹¹⁸ There was nothing conflicting about these speeches, however. Every senator who spoke on the issue agreed that *parens patriae* actions are not class actions. The senators who opposed the amendment did so primarily because they believed that the amendment as drafted was overbroad in that it might prevent class actions brought pursuant to a state’s normal class action procedures from being removed simply because an attorney general was named as a party in a complaint.¹¹⁹ For example, Senator Grassley argued that if the amendment passed, “[p]laintiffs’ lawyers could simply ask State attorneys general to lend their name to a class action lawsuit so as to keep them in the State court.”¹²⁰ This is not a threat with *parens patriae* actions, which can be brought only by the state. If anything, CAFA’s legislative history supports holding that *parens patriae* actions are not class actions as long as they are not brought under a state Rule 23 equivalent. As the district court in *Koster* noted, however, it is unnecessary to rely on CAFA’s legislative history, because the plain meaning of CAFA supports this interpretation.¹²¹

B. *Parens Patriae* Actions Are Not Mass Actions

This section argues that courts should use a federalism canon of statutory construction to hold that *parens patriae* actions are not mass

due process should not necessarily require that the citizen beneficiaries be given an opportunity to sue separately.”).

¹¹⁶ 705 F Supp 2d at 448 & n 6, citing S Rep No 109-14 at 35 (cited in note 1).

¹¹⁷ See text accompanying notes 41–45.

¹¹⁸ 705 F Supp 2d at 448 n 6.

¹¹⁹ See text accompanying notes 46–47.

¹²⁰ 151 Cong Rec at S 1163 (cited in note 38) (Sen Grassley).

¹²¹ 686 F Supp 2d at 947 n 3.

actions unless one hundred or more citizens are named as plaintiffs. Under this interpretation of CAFA's mass action provision, neither common law nor statutory *parens patriae* actions would be removable to federal court.

The text of CAFA is ambiguous about whether *parens patriae* actions are mass actions. On the one hand, when an attorney general seeks to recover damages or restitution on behalf of a large number of state citizens who could have brought an action in their own names, it might be said that the "monetary relief claims of 100 or more persons are proposed to be tried jointly."¹²² This reading of the provision is also supported by the fact that there is a mass action exception for claims brought on behalf of the general public, which suggests that some nonclass representative actions will be mass actions.

On the other hand, there are arguments in favor of reading CAFA's definition of a mass action to require one hundred or more named plaintiffs.¹²³ When a state, acting through its attorney general, is the sole plaintiff and has complete control over the litigation, it can be said that the claims belong to the state, even when these claims ultimately benefit third parties.¹²⁴ After all, restitution is sometimes ordered in criminal cases, yet these cases are not often thought to involve the legal claims of the victims.¹²⁵ Additionally, CAFA provides that a removable mass action must propose that the claims of one hundred or more persons "be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."¹²⁶ The use of the word "plaintiffs" here suggests that the persons whose claims are being tried must actually be named as plaintiffs.¹²⁷

CAFA's legislative history is equally unhelpful in determining whether a mass action must contain one hundred or more *named* plaintiffs. There are scattered references to "named plaintiffs" in the

¹²² 28 USC § 1332(d)(11)(B)(i). This would not apply to statutes that authorize the attorney general to recover restitution or damages but that do not provide for an individual right of action, because the phrase "claims of 100 or more persons" suggests that the persons must have the ability to bring the claims on their own.

¹²³ Consider Knight, 78 Fordham L Rev at 1924 (cited in note 34).

¹²⁴ This is especially true when state citizens have no ability to opt out of the action and bring the claims separately. The Clayton Act's *parens patriae* provision states that an affected citizen "may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him" and provides that the *parens patriae* action will have a *res judicata* effect on citizens who do not opt out. 15 USC § 15c(b)(2). Many state *parens patriae* statutes lack this feature, however. See, for example, Mo Ann Stat § 407.100(4). See also Ryan and Sampen, 86 Ill Bar J at 688-89 (cited in note 112).

¹²⁵ Although CAFA applies only to "civil actions," the analogy to restitution in criminal cases is apt. *Parens patriae* actions are often a form of civil enforcement, as demonstrated by the fact that *parens patriae* statutes frequently authorize state attorneys general to collect civil fines.

¹²⁶ 28 USC § 1332(d)(11)(B)(i).

¹²⁷ See Knight, 78 Fordham L Rev at 1924 (cited in note 34).

legislative history. The Senate committee report described mass actions as “suits that are brought on behalf of numerous named plaintiffs” and stated that “any civil action in which 100 or more named parties seek to try their claims for monetary relief together will be treated as a class action for jurisdictional purposes.”¹²⁸ This Senate report is of debatable authority, however.¹²⁹ And, while several senators spoke of named plaintiffs on the Senate floor, these were isolated statements and were not made in the context of a specific debate about the meaning of the mass action provision.¹³⁰ Finally, even the senators who opposed exempting lawsuits brought by state attorneys general from CAFA expressed their belief that CAFA would not apply to parens patriae actions.¹³¹ These senators focused exclusively on CAFA’s class action provision, however, and did not consider whether or how the mass action provision might apply.

Because both the text and the legislative history of CAFA are ambiguous, federalism principles should lead courts to hold that parens patriae actions are not mass actions unless at least one hundred persons are named as plaintiffs. As the district court in *Koster* noted, the Supreme Court has instructed that removal statutes should be strictly construed.¹³² Furthermore, the Supreme Court has adopted several canons of statutory construction to protect federalism interests¹³³ and has suggested that the Tenth Amendment is implicated by the removal of lawsuits from state courts.¹³⁴ These federalism interests

¹²⁸ S Rep No 109-14 at 46 (cited in note 1).

¹²⁹ See notes 32 and 34.

¹³⁰ See, for example, 151 Cong Rec S 1079 (daily ed Feb 8, 2005) (Sen Dodd).

¹³¹ See text accompanying notes 41–45.

¹³² See, for example, *Syngenta Crop Protection, Inc v Henson*, 537 US 28, 32 (2002) (“[S]tatutory procedures for removal are to be strictly construed.”); *Healy v Ratta*, 292 US 263, 270 (1934) (“Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”). See also *Dixon v Coburg Dairy, Inc*, 369 F3d 811, 816 (4th Cir 2004) (en banc) (“We are obliged to construe removal jurisdiction strictly because of the significant federalism concerns implicated. Therefore, if federal jurisdiction is doubtful, a remand to state court is necessary.”) (quotation marks omitted). This is particularly true when the state is the plaintiff. See *Kansas v Bradley*, 26 F 289, 292 (CC D Kan 1885):

[I]n questions of doubt as to jurisdiction, the federal courts should remand. They should not be covetous, but miserly, of jurisdiction. . . . [T]his court should not be loaded with removed cases, unless its jurisdiction is clear and the mandates of the law imperatively require it. Especially is that true of cases in which the state is attempting, in its own courts, to enforce its statutes, designed for the peace and good order of its citizens.

¹³³ See *Gregory v Ashcroft*, 501 US 452, 460–61 (1991) (“Congress should make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States.”); *Pennhurst State School and Hospital v Halderman*, 451 US 1, 16–17 (1981) (adopting a plain statement rule for congressional intrusions on state authority pursuant to § 5 of the Fourteenth Amendment).

¹³⁴ See *Healy*, 292 US at 270 (discussing “[t]he power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts”).

are particularly significant when one of the issues in the lawsuit is the power of the state attorney general to bring the action. For instance, in *Caldwell* the parties debated whether Louisiana's Monopolies Act authorized the attorney general to bring a parens patriae action for treble damages.¹³⁵ As Judge Southwick argued in his dissent, state courts should decide these issues.¹³⁶ Even when the legal authority of the attorney general is not disputed, federalism principles weigh in favor of allowing state rather than federal courts to interpret state law.¹³⁷ Although there is no doubt that Congress could authorize removal of parens patriae actions as long as there is minimal diversity, Congress should be required to do so, if not by a clear statement, at least less ambiguously than CAFA.

Furthermore, although CAFA was designed to allow for the removal of class actions with interstate ramifications, the concerns that gave rise to CAFA do not generally apply to lawsuits brought by state attorneys general.¹³⁸ State attorneys general are not likely to engage in the sort of interstate forum shopping that troubled Congress. Attorneys general also are not as likely to represent injured parties inadequately. Even though attorney general lawsuits might be politically motivated at times, the interests of attorneys general are better aligned with those of the injured parties than the interests of private plaintiffs' attorneys would be with class members.¹³⁹

¹³⁵ In other situations, there may be serious questions about whether the attorney general has common law authority to bring a parens patriae action.

¹³⁶ See notes 76–77 and accompanying text.

¹³⁷ See *Bristol-Myers Squibb Co v Safety National Casualty Corp*, 43 F Supp 2d 734, 741 (ED Tex 1999) (“Concerns of comity are particularly significant in diversity cases, since state courts should be allowed to decide state cases unless the action falls squarely within the bounds Congress has created.”).

¹³⁸ Consider Beisner, Shors, and Miller, 57 *Stan L Rev* at 1456–58 (cited in note 36) (arguing that officeholders should be subject to different class action rules because officeholders are politically accountable, unlike private attorneys); Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 *Tulane L Rev* 1919, 1931–38 (2000) (arguing that government parens patriae suits are not subject to the same costs, such as monitoring and asymmetric stakes, as private attorney general suits).

¹³⁹ See Beisner, Shors, and Miller, 57 *Stan L Rev* at 1456 (cited in note 36) (“[S]tate attorneys general are politically accountable. Most directly face the ballot box. They may be voted out of office if their constituents disagree with their enforcement decisions.”); 151 *Cong Rec* at S 1159 (cited in note 38) (Sen Pryor) (arguing that attorneys general have a political incentive and a sensitivity to criticism, both from the bench and from the public, that make them more accountable than private lawyers to the interests they represent in suits). Unlike most private plaintiffs' attorneys, state attorneys general do not personally make money from parens patriae actions, so there is less threat of them selling out state citizens. Even when a state attorney general hires private counsel to represent the state, the attorney general's office is in a better position to monitor the counsel than class members would be. See Brunet, 74 *Tulane L Rev* at 1931–34 (cited in note 138).

Another concern underlying CAFA was that when class action plaintiffs brought interstate class actions involving the laws of multiple states, state court judges were in fact applying only their own states' laws and ignoring important differences between their states' laws and the law of the other states.¹⁴⁰ This federalism problem also does not pertain to attorney general lawsuits, because attorneys general do not have parens patriae authority to enforce other states' laws. In fact, as noted above, federalism interests are best served by not allowing parens patriae actions to be removed under CAFA.¹⁴¹ The problems that motivated Congress to pass CAFA do not generally apply to parens patriae actions filed by state attorneys general; this provides further support for not interpreting CAFA's definition of mass action to cover these actions.

C. Parens Patriae Actions Will Often Fall within the Scope of § 1332(d)(11)(B)(ii)(III)'s Mass Action Exception

Part IV.B argued that courts should use a federalism canon of statutory construction to hold that parens patriae actions are not mass actions unless one hundred or more affected state citizens are named as plaintiffs. This section argues that even if parens patriae actions were considered to be mass actions, they would often fall within CAFA's mass action exception for actions in which "all of the claims . . . 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."¹⁴² No court has thoroughly considered the scope of this provision. In fact, the Fifth Circuit in *Caldwell* completely ignored it, and the district court in *Breakman* agreed with the parties that it applied without offering any analysis.¹⁴³

There are at least two possible approaches for determining when all of the claims in an action are brought on behalf of the general public. One approach would be to focus on the type of relief sought, as has been done in determining whether a state is a real party in interest for diversity jurisdiction purposes. Part IV.C.1 argues that this interpretation should be rejected because it is inconsistent with the overall structure of CAFA's mass action provision. Part IV.C.2 argues that the better approach would be to hold that a parens patriae action is brought on behalf of the general public whenever the state has a quasi-sovereign interest in the litigation. Part IV.C.3 discusses how this

¹⁴⁰ See notes 24–25 and accompanying text.

¹⁴¹ See text accompanying notes 132–37.

¹⁴² 28 USC § 1332(d)(11)(B)(ii)(III).

¹⁴³ See Part III.A.

quasi-sovereign-interest standard might be applied and concludes that when a state attorney general brings a *parens patriae* action pursuant to a state statute specifically authorizing such an action, courts should presume that the state has a quasi-sovereign interest.

1. Whether a *parens patriae* action is brought on behalf of the general public should not depend on the type of relief sought.

One approach to interpreting the mass action exception would be to read the distinction between claims brought on behalf of the general public and those brought on behalf of individual claimants as turning on the type of relief sought. Under this interpretation, courts would hold that *parens patriae* actions seeking only injunctive relief or monetary relief that will go to the state treasury are brought on behalf of the general public, while *parens patriae* actions seeking damages or restitution for state citizens are brought on behalf of individual claimants.

Such a focus on the relief sought has been used in determining whether a state is a real party in interest for diversity jurisdiction under 28 USC § 1332(a).¹⁴⁴ Because a state is not a “citizen of a state,” courts have held that the presence of a state in an action destroys the complete diversity required by § 1332(a).¹⁴⁵ This is not true, however, if the state is merely a nominal party and not a real party in interest.¹⁴⁶ In *Missouri, Kansas, & Texas Railway Co v Hickman*,¹⁴⁷ the Supreme Court held that an action brought by the Missouri Board of Railway and Warehouse Commissioners could be removed to federal court when state citizens and not the state were the real parties in interest.¹⁴⁸ The board of railway commissioners ordered the Missouri, Kansas, & Texas Railway to lower the price that it charged for crossing a bridge.¹⁴⁹ When the railroad refused, the commissioners sought an order from a state court. The railroad removed the case to federal court, and the federal court denied a request to remand to state court. The state court determined that removal was not appropriate, however, and proceeded to try the case. The railway appealed to the Missouri Supreme Court and then to the United States Supreme Court.¹⁵⁰ Analyzing the real party in interest issue, the United States Supreme

¹⁴⁴ Perhaps this is the standard implicitly adopted by the Fifth Circuit in *Caldwell*, for the court did not consider the mass action exception after it determined that the policyholders were the real parties in interest. See *Caldwell*, 536 F3d at 430; text accompanying note 68.

¹⁴⁵ See *Katrina Canal Litigation*, 524 F3d at 706; *Hood v F. Hoffman-La Roche, Ltd*, 639 F Supp 2d 25, 33–34 & n 10 (DDC 2009).

¹⁴⁶ See, for example, *Louisiana v Union Oil Co of California*, 458 F3d 364, 366 (5th Cir 2006).

¹⁴⁷ 183 US 53 (1901).

¹⁴⁸ *Id* at 59.

¹⁴⁹ *Id* at 57.

¹⁵⁰ *Id*.

Court held that a state “is such [a] real party when the relief sought is that which enures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate.”¹⁵¹ Because the commissioners were seeking to lower the cost of crossing the bridge, the Court held that the people who cross the bridge were the real parties in interest and that diversity jurisdiction therefore existed.¹⁵²

Although the “enures to it alone” language in *Hickman* suggests that all of the relief sought must go to the state for the state to be a real party in interest, most courts have not read *Hickman* in this way. Instead, they have asked whether the state is a real party in interest with respect to the lawsuit as a whole and not with respect to each claim.¹⁵³ *Hood v F. Hoffman-La Roche, Ltd.*,¹⁵⁴ a recent district court opinion, illustrates this approach. The Mississippi attorney general filed a civil complaint against several drug manufacturers alleging violations of Mississippi’s antitrust laws and seeking statutory damages for the state as well as compensatory damages for Mississippi citizens.¹⁵⁵ The defendants removed the case to federal court, alleging that the court had jurisdiction under 28 USC § 1332(a).¹⁵⁶ The district court, relying on the Fifth Circuit’s decision in *Caldwell*, determined that Mississippi citizens were the real parties in interest for the compensatory damages.¹⁵⁷ But the court held that the state of Mississippi was the real party in interest with respect to the claims for civil penalties and that complete diversity therefore did not exist. Accordingly, the court remanded the case to state court.¹⁵⁸

If a real party in interest standard is used to determine the scope of CAFA’s mass action exception for actions brought on behalf of the general public, then the distinction between the state’s interest in each claim and its interest in the entire lawsuit will probably not be relevant. Unlike § 1332(a), which requires complete diversity, CAFA requires only minimal diversity.¹⁵⁹ Thus, diversity jurisdiction would be available as long as state citizens are the real parties in interest for at least one of the claims in the action and at least one defendant is from

¹⁵¹ *Hickman*, 183 US at 59.

¹⁵² See *id.* at 59–60.

¹⁵³ See *People v LiveDeal, Inc.*, 2009 WL 383434, *2–3 (CD Ill) (declining to read *Hickman* “so narrowly” and instead proposing that the relevant question is whether Illinois has a “substantial stake in the outcome of the suit”), citing *Wisconsin v Abbott Laboratories, Inc.*, 341 F Supp 2d 1057, 1061, 1063 (WD Wis 2004); *Hood v Microsoft Corp.*, 428 F Supp 2d 537, 545–56 (SD Miss 2006).

¹⁵⁴ 639 F Supp 2d 25 (DDC 2009).

¹⁵⁵ *Id.* at 27 & n 2.

¹⁵⁶ *Id.*

¹⁵⁷ See *id.* at 31–32.

¹⁵⁸ See *F. Hoffman-LaRoche*, 639 F Supp 2d at 33–34.

¹⁵⁹ 28 USC § 1332(d)(2)(A).

another state. Furthermore, CAFA's mass action exception requires that "*all of the claims*" be asserted on behalf of the general public.¹⁶⁰

There are several reasons why a standard that focuses solely on the type of relief requested should not be used to determine whether an action is brought on behalf of the general public for the purposes of CAFA's mass action exception. First, this interpretation of CAFA's mass action exception would render the exception practically meaningless. A civil action is not a mass action to begin with unless the *monetary* claims of one hundred or more persons are involved.¹⁶¹ Lawsuits that seek only injunctive relief or money that will go to the state treasury rather than to state citizens are not mass actions as defined by CAFA. Thus, it does not make sense to argue that these are the only lawsuits that will fall within the mass action exception.

A second reason for rejecting the claim that *parens patriae* actions seeking damages or restitution are not brought on behalf of the general public is that damages suits—as well as injunctions—can often serve important public policy goals. As one commentator observed:

A state's goal of securing an honest marketplace in which to transact business, for example, is clearly a quasi-sovereign interest. To achieve that goal, most states have exercised their lawmaking powers to enact consumer fraud and other laws, many of which provide for the recovery of damages by private entities. Private recovery thus becomes a part of the state's enforcement mechanism. Where it does, an award to the state on behalf of individual citizens plainly furthers the state's quasi-sovereign interests.¹⁶²

To hold that the mass action exception applies when a state seeks injunctive relief but not when it seeks damages or restitution on behalf of citizens would place too much weight on the distinction between injunctions and damages. It is not necessarily true that an injunction prohibiting violations of a statute is any more "on behalf of the general public" than claims for damages or restitution, even if this money ends up in the pockets of the injured citizens.¹⁶³

¹⁶⁰ 28 USC § 1332(d)(11)(B)(ii)(III) (emphasis added).

¹⁶¹ See 28 USC § 1332(d)(11).

¹⁶² Ryan and Sampen, 86 Ill Bar J at 688 (cited in note 112).

¹⁶³ For example, suppose a person is defrauding elderly consumers. An injunction that prevents that person from committing fraud in the future is clearly on behalf of the general public. Yet, the risk of damages liability will also deter the conduct and thus will be equally on behalf of the general public. There are differences between damages and injunctions, of course. If only injunctive relief is threatened, then the person can practice fraud with impunity until a lawsuit is filed. But this does not mean injunctive relief is any more "on behalf of" the general public. If anything, it means the opposite—damages liability may be more effective at protecting consumers.

Finally, CAFA's legislative history does not support holding the mass action exception inapplicable whenever an attorney general pursues damages or restitution on behalf of state citizens. The Senate committee report stated that CAFA's mass action exception "addresses a very narrow situation, specifically a law like the California Unfair Competition Law, which allows individuals to bring a suit on behalf of the general public."¹⁶⁴ Yet, the California Unfair Competition Law allows representative suits seeking restitution.¹⁶⁵ Whether the mass action exception for actions brought on behalf of the general public applies to a particular *parens patriae* action should not turn solely on the nature of the relief sought.

2. A *parens patriae* action is brought on behalf of the general public whenever the state has a quasi-sovereign interest.

Rather than focusing solely on the type of relief sought in determining whether an action is brought on behalf of the general public, courts should instead look to the level of the state's interest in the action, as has been done in determining whether a state has standing under a federal statute to sue in federal court. Under this approach, a *parens patriae* action would fall within CAFA's mass action exception whenever the state has a "quasi-sovereign interest" in the case.

The Supreme Court's most detailed discussion of the *parens patriae* doctrine of state standing is found in *Alfred L. Snapp & Son, Inc v Barez*.¹⁶⁶ In that case, the Commonwealth of Puerto Rico brought a *parens patriae* action in federal district court against apple growers on the East Coast, alleging that they violated the Wagner-Peyser Act and the Immigration and Nationality Act by discriminating against Puerto Rican migrant farm workers.¹⁶⁷ The defendants argued that Puerto Rico did not have *parens patriae* standing to maintain the suit.¹⁶⁸

The Court held that to have *parens patriae* standing under a federal statute, a state must have a quasi-sovereign interest distinct from the interests of private individuals.¹⁶⁹ The Court noted that the "articulation of such interests is a matter for case-by-case development—neither an exhaustive formal definition nor a definitive list of qualifying

¹⁶⁴ S Rep No 109-14 at 46–47 (cited in note 1). Note, however, that the authority of this committee report is debated. See note 34.

¹⁶⁵ Cal Bus & Prof Code § 17203.

¹⁶⁶ 458 US 592 (1982).

¹⁶⁷ Id at 597–98 (claiming in part that the defendants caused irreparable injury to Puerto Rico by harming its efforts to reduce unemployment).

¹⁶⁸ Id at 599.

¹⁶⁹ See id at 600–01.

interests can be presented in the abstract.”¹⁷⁰ The Court determined, however, that a “State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.”¹⁷¹ Additionally, the Court declared that it was not drawing “any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior” and stated that

[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.¹⁷²

Applying these principles to the case, the Court held that Puerto Rico had a quasi-sovereign interest in “securing residents from the harmful effects of discrimination” and therefore had standing to sue.¹⁷³ Since *Snapp* was decided, lower federal courts have held that state attorneys general can maintain *parens patriae* actions in federal court under various federal statutes, including the Fair Housing Act,¹⁷⁴ 42 USC § 1983,¹⁷⁵ the Americans with Disabilities Act,¹⁷⁶ and several civil rights acts.¹⁷⁷

If a quasi-sovereign-interest standard is used to determine whether actions are brought on behalf of the general public, one question that might arise is whether *parens patriae* actions brought in state court can be removed to federal court when the state has no quasi-sovereign interest. If the *parens patriae* doctrine were a constitutional limitation on state standing in federal court, then the answer would be no, in which case no *parens patriae* actions would be removable under CAFA’s mass action provision. *Parens patriae* actions in which a state has a quasi-sovereign interest would fall within the exception, while those in which a state lacks a quasi-sovereign interest would be dismissed for lack of standing.

¹⁷⁰ *Snapp*, 458 US at 607.

¹⁷¹ *Id.* at 607.

¹⁷² *Id.* at 607 & n 14.

¹⁷³ *Id.* at 609.

¹⁷⁴ See, for example, *Support Ministries for Persons with AIDS, Inc v Village of Waterford*, 799 F Supp 272, 277 (NDNY 1992).

¹⁷⁵ See, for example, *Pennsylvania v Porter*, 659 F2d 306, 318 (3d Cir 1981).

¹⁷⁶ See, for example, *Vacco v Mid Hudson Medical Group*, 877 F Supp 143, 149 (SDNY 1995).

¹⁷⁷ See, for example, *Abrams v 11 Cornwell Co*, 695 F2d 34, 39 (2d Cir 1982), vacd on other grounds, 718 F2d 22 (2d Cir 1983) (en banc); *New York v Peter & John’s Pump House, Inc*, 914 F Supp 809, 813 (NDNY 1996). Several courts have rejected *parens patriae* actions under RICO. See *Abrams v Seneci*, 817 F2d 1015, 1017 (2d Cir 1987); *Illinois v Life of Mid-America Insurance Co*, 805 F2d 763, 766 & n 5 (7th Cir 1986).

Language in *Snapp* does suggest that the *parens patriae* standing doctrine finds its basis in Article III: “[T]he concept [of a quasi-sovereign interest] risks being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant.”¹⁷⁸ Subsequent cases, however, suggest that *parens patriae* is only a prudential standing doctrine. In *United Food and Commercial Workers Union Local 751 v Brown Group, Inc.*,¹⁷⁹ a union brought a lawsuit under the Worker Adjustment and Retraining Notification Act, which explicitly allowed the union to recover damages on behalf of its members. Because the traditional understanding of associational standing did not allow associations to recover damages, the Court considered whether this limitation on associational standing was a constitutional limitation based on Article III’s case or controversy requirement or whether it was a prudential limitation that Congress could abrogate.¹⁸⁰ The Court held that it was the latter, because all the Constitution requires is that the association’s members have Article III standing and that the association “have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant’s natural adversary.”¹⁸¹

Likewise, if the *parens patriae* doctrine is only a prudential limitation on state standing in federal court, it can be modified as long as the citizens on whose behalf the state is suing meet Article III’s standing requirements of injury, causal connection to the defendant, and redressability.¹⁸² A court could conclude that if CAFA authorizes removal of *parens patriae* actions, it provides standing to states even in the absence of a quasi-sovereign interest.

3. The application of a quasi-sovereign-interest standard.

Assuming that courts adopt a quasi-sovereign-interest standard for determining when an action is brought on behalf of the general public, courts will have to determine when *parens patriae* actions assert such an interest. The best approach would be for courts to presume that a

¹⁷⁸ 458 US at 602.

¹⁷⁹ 517 US 544 (1996).

¹⁸⁰ *Id.* at 551.

¹⁸¹ *Id.* at 555–56.

¹⁸² See *Lujan v Defenders of Wildlife*, 504 US 555, 560–61 (1992). It may be the case that the state is not even required to prove that its citizens would have Article III standing. Consider *Massachusetts v EPA*, 549 US 497, 516–21 (2007) (dismissing the argument that widespread harm to Massachusetts’s citizens was itself an obstacle to the state having standing to sue the EPA and noting Massachusetts was “entitled to special solicitude in [the Court’s] standing analysis” due to its quasi-sovereign interests); *id.* at 538 (Roberts dissenting) (arguing that the majority opinion “takes what has always been regarded as a necessary condition for *parens patriae* standing—a quasi-sovereign interest—and converts it into a sufficient showing for purposes of Article III”).

state has a quasi-sovereign interest in any *parens patriae* action brought pursuant to a state statute.¹⁸³ This approach has its basis in the Supreme Court's *Snapp* opinion, which noted that

[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.¹⁸⁴

The fact that a state legislature has passed a law allowing the attorney general to bring *parens patriae* actions and that the attorney general has decided to bring such an action strongly suggests that the state has a compelling interest in the case. This is particularly true given that a *parens patriae* action must involve the claims of one hundred or more persons to be a mass action under CAFA, so the lawsuits in question will always involve more than a very small group of state citizens.

One potential problem with this approach is that it might allow a state legislature to pass a statute authorizing the attorney general to bring representative actions even when the state has no interest, thereby allowing these cases to remain in state court. For this reason, the presumption should not be absolute. When the defendants can show that a *parens patriae* action is being brought solely to benefit a small number of individuals or when the action seeks relief only for a particular group of affected citizens, courts should remain free to reject the state's claim that the action is brought on behalf of the general public. Nevertheless, such exceptions will likely be rare, in part due to federalism concerns about federal courts second-guessing the determinations of state officials regarding whether particular actions serve the general public.¹⁸⁵

Another argument is that presuming the existence of a quasi-sovereign interest will eliminate CAFA's distinction between actions brought on behalf of the general public and those brought on behalf of particular individuals. After all, the mass action exception already requires that there be a state statute specifically authorizing the mass action; the "on behalf of the general public" requirement must mean

¹⁸³ Recall that a mass action by definition must be brought pursuant to a "State statute specifically authorizing such action" in order to fall within the mass action exception for claims brought on behalf of the general public. 28 USC § 1332(d)(11)(B)(ii)(III).

¹⁸⁴ 458 US at 607.

¹⁸⁵ Federal courts have been reluctant to examine the real motives of state actors in other areas. See, for example, *Williamson v Lee Optical of Oklahoma, Inc.*, 348 US 483, 487–88 (1955) (rejecting an Equal Protection Clause challenge to state interest group legislation designed to benefit optometrists). While removal is not as extreme as declaring a law unconstitutional, there is no reason to think that courts will want to get into the business of deciding which state actions are truly public-regarding and which are designed solely to benefit particular parties.

something more than this. It is important to remember, however, that the mass action exception may apply to both parens patriae actions and actions brought by private parties.¹⁸⁶ Because many statutes specifically authorize private individuals to sue, the “on behalf of the general public” language will still play a significant role in limiting which private actions fall within the exception.

While this rule may not be perfect, it is a suitable method for determining when a parens patriae action is brought on behalf of the general public. The Supreme Court’s statement that a state “has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general” is incredibly vague and offers little guidance.¹⁸⁷ As one commentator noted:

Almost any private cause of action has behind it some overriding state interest or policy. Otherwise, it could hardly be the law. A state has a sufficient interest in protecting its citizens from bad water, price-fixing, discrimination, and consumer scams. That much we know. But what about breaches of contract, disease or injury from toxic exposure, or inflated utility rates? Any of these causes can be made to fit the *Snapp* requirements—or not—depending on the view of the court.¹⁸⁸

Presuming that states have a quasi-sovereign interest in parens patriae actions specifically authorized by statute is a much clearer rule that courts can easily apply. This approach also best serves federalism interests by giving due regard to the determinations of state legislatures and attorneys general regarding which actions serve the general public.

Existing case law supports the idea that a state has a quasi-sovereign interest in a parens patriae action authorized by a state statute. In *In re Edmond*,¹⁸⁹ the Fourth Circuit held that the Maryland Attorney General’s Consumer Protection Division had parens patriae standing to recover restitution on behalf of Maryland consumers under Maryland’s consumer protection laws.¹⁹⁰ The court noted that “Maryland law has construed the restitution provision of the Act to embody the state’s interest in disgorging the benefit from the violator” and concluded that “the Act embodies a broad state interest in protecting all consumers, present and future. The Division’s authority and interest under the Act extend beyond mere representation of particular

¹⁸⁶ In fact, this Comment argues that parens patriae actions should not be considered mass actions to begin with unless the state attorney general joins at least ninety-nine state citizens as plaintiffs.

¹⁸⁷ *Snapp*, 458 US at 607.

¹⁸⁸ Ratliff, 74 Tulane L Rev at 1857 (cited in note 13).

¹⁸⁹ 934 F2d 1304 (4th Cir 1991).

¹⁹⁰ *Id* at 1310–13.

individual consumers. When proceeding under the Act, the Division serves a quasi-sovereign interest.”¹⁹¹

Under this interpretation of CAFA’s mass action exception, common law *parens patriae* actions would not fall within the exception. This interpretation clashes with the legislative history of CAFA, which suggests that neither common law nor statutory *parens patriae* actions are removable under CAFA unless the attorney general brings an actual class action.¹⁹² Nevertheless, the text of the exception requires that there be a statute specifically authorizing such actions. Of course, this is an issue only if *parens patriae* actions are mass actions in the first place, and this Comment argues that they are not.

CONCLUSION

This Comment examines whether *parens patriae* actions brought by state attorneys general may be removed to federal court under CAFA, which would require these actions to be either class actions or mass actions as defined by CAFA. But *parens patriae* actions are not class actions unless they are brought under a state’s normal class action procedures, as typical *parens patriae* statutes are substantially different from Rule 23 of the Federal Rules of Civil Procedure.

Parens patriae actions are not mass actions under CAFA unless one hundred or more persons are named as plaintiffs. Because both the text and legislative history of CAFA are ambiguous on this point, courts should apply a federalism canon of construction to require that Congress clearly express its intention to allow removal of these actions.

Even if *parens patriae* actions were mass actions, they would often fall within CAFA’s mass action exception for actions brought on behalf of the general public. This exception should not be based solely on the type of the relief sought but rather on the state’s interest in the action. *Parens patriae* actions should not be removable when the state has a quasi-sovereign interest in the case, and such an interest should be presumed when a *parens patriae* action is specifically authorized by statute.

¹⁹¹ *Id.* at 1310–11, citing *State v. Andrews*, 533 A2d 282, 287–88 n 7 (Md App 1987). See also *In re Sclater*, 40 BR 594, 597 (Bankr D Conn 1984) (“The Attorney General is thus seeking to protect Michigan residents from fraudulent and deceptive practices under a mandate from the state legislature addressing this specific type of injury. The use of the *parens patriae* doctrine . . . is in direct conformity with [] *Snapp*.”).

¹⁹² See Part I.C.2. See also note 32.