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SHEEP IN WOLVES' CLOTHING: REMOVING PARENS PATRIAE SUITS UNDER THE CLASS ACTION FAIRNESS ACT

*Alexander Lemann**

This Note examines the applicability of the Class Action Fairness Act's (CAFA) removal provisions to parens patriae suits. CAFA expanded federal diversity jurisdiction to include class actions with minimal diversity, doing away with a rule that had kept most class actions in state court. Although CAFA does not mention parens patriae suits, their inherent similarity to class actions raised the question of whether they too could now be removed to federal court. The Fifth Circuit, in Louisiana ex rel. Caldwell v. Allstate Insurance Co., has held that the real parties in interest—those whose injuries form the basis of parens patriae standing—may be treated as a class of individuals for purposes of removal under CAFA. This Note examines the language and goals of CAFA as well as the concept of parens patriae standing and argues that the Fifth Circuit's approach should be abandoned. Allowing removal of parens patriae suits under CAFA works against the Act's goals, is not supported by its language, and violates principles of federalism enshrined in the Eleventh Amendment.

INTRODUCTION

The Class Action Fairness Act of 2005 (CAFA)¹ was the culmination of years of congressional effort to address widespread abuses in class action litigation.² Before the passage of CAFA, the requirements of federal diversity jurisdiction kept even the largest class actions out of federal court,³ while the number of plaintiffs involved allowed attorneys to file suit in virtually any jurisdiction in the country. One result was the emergence of a handful of magnet jurisdictions that attracted disproportionate numbers of large class action filings, thanks to real or perceived sympathies towards plaintiffs on the part of local judges and juries.⁴ This

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

2. See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1441 (2008) (noting “years of intense lobbying . . . partisan wrangling . . . filibusters, [and] fragile compromises”).

3. Federal jurisdiction required complete diversity, which was only present if all named plaintiffs were diverse from all defendants. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363–64 (1921).

4. John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case out of It . . . in State Court*, 25 Harv. J.L. & Pub. Pol'y 143, 160–64 (2001); Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483, 499 (2000) (“[O]ver a recent two-year period, a state court in rural Alabama certified almost as many class actions (thirty-five cases) as all 900 federal districts did in a year (thirty-eight cases).”). Madison County, Illinois, is another notorious example. S. Rep. No. 109-14, at 13 (2005); Beisner & Miller, *supra*, at 162.

situation was troubling not just because of misconduct on the part of state courts, but conceptually as well; the enormous power of state courts overseeing class actions of national scope offended traditional notions of federalism and was seen as unfair to defendants.⁵ Congress's solution to these problems was to expand the scope of federal diversity jurisdiction over class actions and to allow defendants to remove cases to federal court more easily.⁶

CAFA contained a stinging rebuke of the use of class action litigation brought by private parties to serve the public good ("private attorneys general"),⁷ but it did not explicitly mention suits brought by actual attorneys general. The doctrine of *parens patriae* gives a state standing to sue on behalf of its citizens. Although it derives from the "royal prerogative" granted to the King of England to sue on behalf of "helpless" subjects like children and the mentally incompetent, *parens patriae* has been expanded in the twentieth century by a series of Supreme Court decisions, and has been an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents.⁸

Because *parens patriae* suits necessarily involve the rights of a large number of people, they bear some resemblance to class actions, even if the only plaintiff is the state.⁹ This analogy did not escape the notice of Congress, which debated and eventually dropped an amendment exempting *parens patriae* suits from the scope of CAFA. In the first few cases dealing with the issue, federal courts universally treated *parens patriae* suits as not removable under CAFA. *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*¹⁰ was the first case to hold otherwise. Affirming the district court's grant of removal, the Fifth Circuit held that the presence of only one plaintiff on the pleadings did not end its inquiry. Instead, it reasoned, courts should "pierce the pleadings" to determine the "real parties in interest."¹¹ If those parties were a class of people, the court could apply CAFA's grant of diversity jurisdiction and allow removal.¹²

This Note argues that CAFA should not be applied to states' *parens patriae* actions. Part I provides an overview of CAFA's expansion of diver-

5. Congress expressed its displeasure at this situation by declaring that the stringent interpretation of diversity jurisdiction was "keeping cases of national importance out of Federal court," § 2(a)(4)(A), 119 Stat. at 5, and by noting that one purpose of CAFA was to "restore the intent of the framers," § 2(b)(2), 119 Stat. at 5.

6. 28 U.S.C. § 1332(d) (2006).

7. See S. Rep. No. 109-14, at 59 ("[T]he concept of class actions serving a 'private attorney general' or other enforcement purpose is illegal.").

8. See *infra* Part I.B.

9. Like class actions, *parens patriae* suits are representative and involve injuries to a large group of people who would not likely sue individually. See *infra* notes 92-95 and accompanying text.

10. 536 F.3d 418 (5th Cir. 2008).

11. *Id.* at 424-25.

12. See *id.* at 430 ("Having determined that the policyholders are the real parties in interest, we agree that this action was properly removed pursuant to CAFA because the requirements of a 'mass action' are easily met . . .").

sity jurisdiction and the motivations behind it, as well as a brief history of parens patriae standing. Part II explores the question of whether CAFA applies to parens patriae suits and the approaches to this issue taken by federal courts. Part III argues that CAFA should not be applied to parens patriae suits. Applying CAFA to these suits contravenes the most important motivations behind CAFA and creates unsound doctrine.

I. CAFA'S EXPANSION OF DIVERSITY JURISDICTION AND PARENS PATRIAE STANDING

In order to evaluate the application of CAFA to parens patriae suits, it is important to understand both CAFA's expansion of federal diversity jurisdiction and parens patriae standing. Part I.A provides a background survey of the problems CAFA sought to address, the solutions it enacted, and the effects of its passage. Part I.B explores the history, purposes, and current scope of parens patriae standing. This material provides the background for the question of whether CAFA allows removal of parens patriae suits, explored in Part II, and the argument made in Part III that reading CAFA to allow removal of these cases undermines its purposes and is doctrinally problematic.

A. CAFA's Removal Provisions and the Problems That Motivated Them

1. *Class Action Woes.* — Class action litigation has provoked controversy ever since the revision of Rule 23 of the Federal Rules of Civil Procedure in 1966.¹³ As the number of class action filings has increased,¹⁴ so have cries for reform¹⁵ and tales of abuse.¹⁶ By expanding the scope of federal subject matter jurisdiction and allowing defendants to remove to federal courts, CAFA did not address the broad dissatisfaction with class actions.¹⁷ Instead it limited its focus to the problems asso-

13. See, e.g., Deborah R. Hensler et al., RAND Inst. for Civil Justice, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 15–37 (2000) (providing history of controversy surrounding class actions and efforts at reform).

14. John H. Beisner, Matthew Shors & Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 *Stan. L. Rev.* 1441, 1444 (2005) (noting "exponential growth in the number of class actions"); see also Hensler et al., *supra* note 13, at 27 ("[M]ass personal injury class actions seemed to be growing in number and scope.").

15. See, e.g., Editorial, *Actions Without Class*, *Wash. Post*, Aug. 27, 2001, at A14; Editorial, *Class-Action Plaintiffs Deserve More than Coupons*, *USA Today*, Oct. 9, 2002, at A12; Editorial, *Class-Action Showdown*, *Wall St. J.*, July 8, 2004, at A14.

16. See Beisner & Miller, *supra* note 4, at 154 (noting failures in proper application of class certification requirements, "use of the class device as 'judicial blackmail' . . . and denials of defendant's due process rights").

17. In fact, CAFA contained an endorsement of class actions as "an important and valuable part of the legal system." Pub. L. No. 109-2, § 2(a)(1), 119 Stat. 4, 4 (2005). Some have seen this as mere "window dressing" or a political compromise designed to secure Democratic votes. Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 *Colum. L. Rev.* 1924, 1942 (2006) [hereinafter Burbank, *Aggregation*] ("Less charitably, they meet the philosopher Harry Frankfurt's definition of 'bullshit,' because they are made with apparent indifference to their truth content.").

ciated with class actions as handled by state courts.¹⁸ These problems are both practical—concerns about the way class actions are adjudicated in state courts—and conceptual—concerns about the very idea of adjudicating class actions in state courts. Both will be discussed in some depth to provide an accurate picture of the policy goals behind CAFA.

The practical concerns behind CAFA stem from two basic issues: the abuse of class action procedures in certain state courts and the attendant forum shopping by plaintiffs' attorneys. CAFA itself contains a rebuke of "[a]buses in class actions" by "State and local courts" that are "acting in ways that demonstrate bias against out-of-State defendants."¹⁹ The accompanying Senate Report paints a much richer picture, describing a "parade of abuses" and accusing state court judges of being "lax" in applying Rule 23,²⁰ of certifying frivolous class actions as a form of "black-mail,"²¹ and of denying defendants their due process rights.²² Congress also noted the problem of so-called magnet jurisdictions,²³ small counties that acquire a reputation for being plaintiff-friendly and attract more than their fair share of class actions.²⁴ Some empirical studies have questioned the argument that federal judges handle class actions more fairly than state court judges,²⁵ but others have found that there is a higher chance of certification in state court than in federal court.²⁶ While the

18. Some have argued that Congress's stated goals in enacting CAFA cannot justify the expansiveness of its removal provisions and that one should therefore be careful not to be "fooled" by them. Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 *Stan. L. Rev.* 1521, 1523 (2005). For the purposes of this Note, however, I will take Congress's statutory language at face value rather than ascribe to it covert motives that have no bearing on its stated policy goals. It seems counterproductive to simply read CAFA as a self-justifying boon to big business whose statutory language is not to be taken seriously.

19. § 2(a)(4), 119 Stat. at 5.

20. S. Rep. No. 109-14, at 6, 14 (2005).

21. *Id.* at 20 ("[Certification] can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits."); see also Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (calling settlements induced by class certification "blackmail settlements").

22. S. Rep. No. 109-14, at 21–22. The "most egregious" example being "drive-by class certification," in which a class is certified before the defendant "has even received the complaint." *Id.* at 22; Schwartz, Behrens & Lorber, *supra* note 4, at 501–02.

23. S. Rep. No. 109-14, at 13, 22.

24. See *supra* note 4 and accompanying text (discussing magnet jurisdictions).

25. See Hensler et al., *supra* note 13, at 482 ("[W]e have no empirical basis for assessing the argument that federal judges generally manage damage class actions better than state court judges."); Thomas E. Willging & Shannon R. Wheatman, *Fed. Judicial Ctr., An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation* 34–36 (2005), available at [http://www.fjc.gov/public/pdf.nsf/lookup/ClAct05.pdf/\\$file/ClAct05.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ClAct05.pdf/$file/ClAct05.pdf) (on file with the *Columbia Law Review*) (noting that "cases were almost equally likely to be certified" in state and federal courts and reporting slightly *lower* certification rate in state courts).

26. See Nicholas M. Pace et al., *RAND Inst. for Civil Justice, Insurance Class Actions in the United States* 40–41 (2007) (reporting higher percentage of insurance class actions certified in state court).

empirical argument still rages, it is clear that Congress was persuaded by, and acted on, evidence of plaintiff-friendly conditions in certain state courts.

Questionable practices by plaintiffs' attorneys were also a strong motivating force behind CAFA. The debate over class action reform saw invective hurled at plaintiffs' attorneys, both for forum shopping and for other less easily defensible practices.²⁷ Particularly disturbing to Congress was the practice of submitting "copy cat" filings in numerous jurisdictions at the same time in order to find the most sympathetic judge.²⁸ Congress also objected to "coupon settlements," in which lawyers receive massive windfalls while the plaintiffs themselves receive coupons that are little more than promotional tools.²⁹ Forum shopping is of course a legitimate tactic for lawyers,³⁰ and is inherent in the very idea of diversity jurisdiction;³¹ removal by defendants, the solution provided by CAFA, is itself a type of forum shopping.³² As with state court misconduct, there is an ongoing debate over whether the empirical evidence supports the widespread perception of attorney misconduct.³³ But the apparent facility with which plaintiffs' attorneys exploit the broad range of fora available to them has always motivated calls for "tort reform" and played a role in Congress's enactment of CAFA.

Conceptual arguments against hearing large class actions in state courts also played a role in CAFA's passage. To Congress, the litigation of large class actions in state courts was a perversion of federalism, a violation of the "intent of the framers."³⁴ Before CAFA was passed, federal diversity jurisdiction was present only when all named plaintiffs were diverse from all defendants.³⁵ In cases with large national classes, plaintiffs'

27. See Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Pa. L. Rev. 1593, 1593–94 (2008) ("Politicians and other CAFA proponents called class action lawyers self-interested, unscrupulous, unprincipled, and unaccountable." (footnotes omitted)).

28. S. Rep. No. 109-14, at 23; see also Beisner & Miller, *supra* note 4, at 166–68 (reporting widespread filing of "copy cat" class actions).

29. S. Rep. No. 109-14, at 15–20. The Senate Report contains a long list of such cases.

30. See Morrison, *supra* note 18, at 1524 ("If a lawyer did not at least explore the question of which forum is most advantageous for the client, his neglect might be considered malpractice"); see also Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. Pa. L. Rev. 1765, 1774–75 (2008) (listing motives for preference for state court, both strategic and otherwise).

31. Morrison, *supra* note 18, at 1524.

32. *Id.* at 1524–25.

33. See Hensler et al., *supra* note 13, at 58–61 (noting that some discrepancies can be explained by neutral factors and some cannot). The prevalence of petrochemical facilities in Louisiana, for instance, might lead to a disproportionate share in certain types of litigation. *Id.*

34. See Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (2005) (codified in scattered sections of 28 U.S.C.) (listing among purposes of CAFA desire to "restore the intent of the framers").

35. Pace et al., *supra* note 26, at 57 (citing *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)).

attorneys could therefore defeat federal diversity jurisdiction by naming any plaintiff who resided in the same state as any defendant.³⁶ Many saw this situation as an “anomaly” that kept even huge cases of “inherently federal character” out of federal court.³⁷ Both practices were seen as deeply troubling.³⁸

Congress also rejected the idea of class action litigation as a legitimate form of regulation. One of the arguments advanced by opponents of CAFA during debates was that class action litigation helps regulate where government has failed to do so.³⁹ Litigation in general can often perform a regulatory function,⁴⁰ and the class action is especially powerful in this respect. It “does more than aggregate claims; it augments government policing and generates external societal benefits.”⁴¹ This justification has many detractors. The problems with viewing plaintiffs’ lawyers as regulators start with their incentive structure. An attorney general, for instance, “is charged with promoting the public good and typically is paid the same modest salary regardless of . . . which alleged wrongdoers he or she chooses to pursue.”⁴² Private attorneys, on the other hand, are motivated by fees.⁴³ Nor can juries be trusted to act as regulators, since their approach to individual cases is not aimed at creating optimal social policy.⁴⁴ Indeed, the very concept of regulatory power for courts can be seen as “a frightening violation of the doctrine of separation of powers [that] undermines the checks and balances inherent in our constitutional republican form of government.”⁴⁵ Finally, there are empirical ar-

36. *Id.*

37. Beisner & Miller, *supra* note 4, at 145. For a critical take on this position, see Morrison, *supra* note 18, at 1531 (arguing that this rationale “would result in wholesale shifts of cases from state to federal court” and noting that unwillingness to allow a single state judge to oversee a national class action is not paired with similar concerns regarding federal judges).

38. Once again, empirical research has questioned the scope of this problem. See Pace et al., *supra* note 26, at 59–60 (“Just 17 percent of the insurance class actions . . . filed in state courts sought national or several-state classes.”).

39. See S. Rep. No. 109-14, at 58 (2005) (“[T]he most important function that class actions serve is to allow private attorneys general to step forward and hold corporations accountable for decisions that affect the public safety.” (quoting statement of Sen. Biden)); Beisner, Shors & Miller, *supra* note 14, at 1442, 1451–52 (noting use of this argument by supporters of class actions and plaintiffs’ attorneys).

40. See W. Kip Vicusi, Overview, *in* Regulation through Litigation 1, 3 (W. Kip Vicusi ed., 2002) [hereinafter Vicusi, Overview] (“[L]itigation can often help address gaps in the regulatory structure and stimulate regulatory activity.”).

41. Elizabeth Chamblee Burch, CAFA’s Impact on Litigation as a Public Good, 29 *Cardozo L. Rev.* 2517, 2518–19 (2008) (arguing that class action litigation produces “laundry list of positive externalities”).

42. Beisner, Shors & Miller, *supra* note 14, at 1443.

43. *Id.*

44. See Vicusi, Overview, *supra* note 40, at 2 (“Recent literature has documented the failings of juries in thinking systematically about risk, as jurors exhibit a wide variety of systematic biases . . .”).

45. James Wootton, Comment, The Regulatory Advantage of Class Action, *in* Regulation Through Litigation, *supra* note 40, at 304; see also Schwartz, Behrens &

guments that groundbreaking regulatory work is not in fact what class action lawyers really do,⁴⁶ and that this justification leads public servants like attorneys general to delegate their duties to private plaintiffs.⁴⁷ Although no mention is made of private attorneys general in CAFA itself, the Senate Report flatly declared that “the concept of class actions serving a ‘private attorney general’ or other enforcement purpose is illegal.”⁴⁸

2. *CAFA’s Solutions.* — Congress responded to this array of problems primarily by making it easier for defendants in class actions to remove to federal court.⁴⁹ CAFA expanded federal diversity jurisdiction over class actions to include any case with more than 100 plaintiffs and \$5 million in controversy in which “any member of a class of plaintiffs is a citizen of a State different from any defendant.”⁵⁰ CAFA also allowed any defendant to unilaterally remove a case at any time.⁵¹ However, a complex series of provisions did place limits on the scope of the jurisdictional grant: “A district court may . . . decline to exercise jurisdiction” where between one-third and two-thirds of the class members and the defendants are citizens of the forum state,⁵² and a district court “shall decline to

Lorber, *supra* note 4, at 508 (“Courts are not lawmakers and are not well-equipped to make broad public policy decisions . . .”). Under this view, even the widely heralded forty-six-state, \$206 billion tobacco settlement, which imposed significant new regulations on the industry, is seen as an illegitimate “encroachment” on the functions of legislature and regulatory agencies. W. Kip Vicusi, *Tobacco: Regulation and Taxation Through Litigation*, in *Regulation Through Litigation*, *supra* note 40, at 22, 23. Indeed, Vicusi sees the damages award not as a simple payment to injured parties, but as a highly regressive excise tax imposed on future buyers of cigarettes “without the usual input that accompanies the development of policies of this type.” *Id.* at 51.

46. See Beisner, Shors & Miller, *supra* note 14, at 1453 (arguing that class action lawyers file “coattail” lawsuits that follow on the heels of *government* investigations”).

47. See *id.* at 1461 (noting “willingness of many state attorneys general to team up with private plaintiffs’ lawyers”).

48. S. Rep. No. 109-14, at 59 (2005). Some of the objections discussed above stem from the idea of private attorneys serving public functions, while others stem from the inadequacy of regulation by courts in general. For more on this distinction, see *infra* text accompanying notes 167–174.

49. In addition to its expansion of federal diversity jurisdiction and removal provisions, CAFA also included reform of coupon settlements, 28 U.S.C. § 1712 (2006), and measures aimed at both preventing loss by class members, § 1713, and settlements that discriminate based on geographic location, § 1714.

50. *Id.* § 1332(d)(2)(A).

51. See *id.* § 1453(b) (noting that “[s]uch action may be removed by any defendant without the consent of all defendants” and “the 1-year limitation under section 1446(b) shall not apply”).

52. *Id.* § 1332(d)(3). District courts are instructed to base their decisions on “the interests of justice and . . . the totality of the circumstances,” as well as the consideration of six factors:

- (A) whether the claims asserted involve matters of national or interstate interest;
- (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed . . . ;
- (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
- (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- (E) whether the number of [in-state citizens] is

exercise jurisdiction” where more than two-thirds of the class members and a defendant are citizens of the forum state.⁵³ The exact scope of these exceptions has been the subject of some dispute among commentators.⁵⁴

The severity of CAFA’s impact on class action litigation is also disputed. Supporters of CAFA are quick to point to dramatic changes: Magnet courts have seen class action filings plummet, and “CAFA has effectively ended the practice of state court judges dictating the laws of the 49 other states.”⁵⁵ Others have seen a more measured response, observing that the increase in class actions in federal courts has been less dramatic than expected⁵⁶ and that “both the district courts and the courts of appeals have resisted an expansive reading of CAFA.”⁵⁷ There have also been hints that CAFA might not prove as defendant-friendly as it set out to be, especially if federal courts become more sympathetic to class actions⁵⁸ or defendants find that conditions are more favorable in state courts.⁵⁹

substantially larger than the number of citizens from any other State . . . ; (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

Id.

53. Id. § 1332(d)(4). Perhaps anticipating the addition of defendants with little connection to the litigation as a way to activate this subsection, Congress noted that the defendant mentioned here must be one “from whom significant relief is sought by members of the plaintiff class” and “whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class.” Id. § 1332(d)(4)(A)(i)(II)(aa)–(bb).

54. For instance, the inclusion of the defendants in these exceptions means that they will not have any effect on diversity jurisdiction unless the suit has been brought in the home state of a defendant. Morrison, *supra* note 18, at 1534. Morrison’s article was written before the passage of CAFA but responded to an identical proposal from the previous year. Id. at 1521. Commentators have also expressed concerns about the difficulty of applying these exceptions. See Marcus, *supra* note 30, at 1782–88 (arguing that CAFA “bristles with difficulties” and noting burdensome discovery required to apply exceptions); Morrison, *supra* note 18, at 1535 (discussing “complicated proceedings to determine whether the applicable percentages were met”).

55. John H. Beisner & Richard G. Rose, *CAFA: Realizing the Framers’ Goals*, in *The 10th Annual National Institute on Class Actions 2006*, at B-23 to B-24 (Am. Bar Ass’n 2006).

56. See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. Pa. L. Rev. 1723, 1725 (2008) (“[O]ur findings may represent a less dramatic increase than some anticipated.”); Marcus, *supra* note 30, at 1789 (“[A]lthough there were assertions that all or almost all state court class actions would end up in federal court under CAFA, at least in some states that certainly has not been the case.”).

57. Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. Pa. L. Rev. 1553, 1579–84 (2008) (reviewing authors’ empirical findings).

58. See Marcus, *supra* note 30, at 1769 (“There is no particular reason to assume the enduring attractiveness for business interests of federal courts’, compared to state courts’, views on class certification and related matters”); Morrison, *supra* note 18, at 1528–29 (noting historical shifts in relative sympathies of state and federal courts).

59. See Burbank, *Aggregation*, *supra* note 17, at 1941 & n.118 (noting existence of “potential settlement burdens in federal class actions” that might dissuade defendants

In sum, CAFA was a congressional response to specific practical and conceptual problems with class action litigation, especially abuse by state courts and plaintiffs' lawyers and the affront to federalism represented by national litigation being conducted in state court. CAFA's provisions could not and did not solve all of these problems, but they are the primary policy motivations that drove the legislation.

B. *The Evolving Doctrine of Parens Patriae*

The doctrine of parens patriae (literally, "parent of his or her country"⁶⁰) allows a state to sue in a representative capacity to protect the interests of its citizens.⁶¹ Although the concept was originally quite limited, the scope of parens patriae expanded gradually over the course of the twentieth century and now includes a broad range of "quasi-sovereign" interests.⁶² In order to appreciate why CAFA would be read to include parens patriae suits and what the ramifications of this reading might be, it is important to appreciate the conceptual scope of the quasi-sovereign interests at stake.⁶³

The concept of parens patriae derives from the English constitutional system, which recognized certain powers and duties as part of the King's prerogative.⁶⁴ The King was "the guardian of his people," a responsibility that entitled him to act in defense of those subjects who were unable to act for themselves.⁶⁵ This category included "infants, idiots, and lunatics" as well as charities.⁶⁶ In America, the royal prerogative

from seeking removal (quoting Memorandum of Kenneth B. Forrest et al., Wachtell, Lipton, Rosen & Katz, to Clients, *The Class Action Fairness Act of 2005 Becomes Law* (Feb. 24, 2005) (on file with the *Columbia Law Review*)).

60. Black's Law Dictionary 1221 (9th ed. 2009).

61. See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 602 (1982) (finding parens patriae standing based on "a set of interests that the State has in the well-being of its populace").

62. See Ann Woolhandler & Michael G. Collins, State Standing, 81 Va. L. Rev. 387, 393, 446-74 (1995) (tracing expansion of parens patriae standing).

63. The discussion that follows reviews the scope of state standing to sue as parens patriae in federal court, as laid down by the Supreme Court. State law sometimes differs from federal law in this area, presenting some conceptual difficulties. See *infra* notes 225-227 and accompanying text.

64. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972); George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DePaul L. Rev. 895, 896 (1976).

65. Curtis, *supra* note 64, at 896 (quoting J. Chitty, *A Treatise on the Law of the Prerogative of the Crown* 155 (London, Joseph Butterworth & Son 1820)).

66. *Hawaii*, 405 U.S. at 257 (quoting 3 William Blackstone, *Commentaries* *47). Curtis notes that the English common law concept of parens patriae was strictly limited to these three categories (children, mental incompetents, and charities). Curtis, *supra* note 64, at 896-98. In practice it was used when the crown stood to gain financially from assuming wardship of infants with income-producing property; "the profit motive was clearly at the forefront of the king's decision to offer his protection." *Id.* at 898.

passed to the states,⁶⁷ where it remained similarly limited for roughly a century.⁶⁸ Beginning at the turn of the twentieth century, the Court allowed states to sue to protect the general interests of their citizens.⁶⁹

The “quasi-sovereign” interest that forms the basis of modern *parens patriae* standing originated in this era. In *Louisiana v. Texas*, the Court dealt with Louisiana’s challenge of a quarantine imposed by the port of Galveston that effectively placed an embargo on goods from New Orleans.⁷⁰ Although the Court held that the case did not present a “controversy,”⁷¹ it recognized that even though there was no “infringement of the powers of the State of Louisiana, or any special injury to her property . . . the State is entitled to seek relief in this way because the matters complained of affect her citizens at large.”⁷² In *Missouri v. Illinois*, the Court presented a slightly different articulation: “[I]f the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.”⁷³ The *Missouri* Court analogized states to independent countries to determine that they should be able to vindicate certain rights in federal court.⁷⁴ In *Georgia v. Tennessee Copper Co.*, the Court further expanded the quasi-sovereign interest to include safeguarding the environment.⁷⁵ The reasoning behind both *Missouri* and *Tennessee Copper* was that the states, by joining the Union, had forfeited their right to deal with each other as normal sovereigns (either through diplomacy or war) and so were granted the right to de-

67. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982) (noting recognition of concept in American courts); *Hawaii*, 405 U.S. at 257 (“[T]he ‘parens patriae’ function of the King passed to the States.”).

68. See *Hawaii*, 405 U.S. at 257 (noting first instance of expansion in 1900); *Woolhandler & Collins*, *supra* note 62, at 446 (“Around the turn of the century . . . the Court quietly began allowing states to vindicate in federal court their general interest in protecting their citizens.”).

69. *Woolhandler & Collins*, *supra* note 62, at 447.

70. 176 U.S. 1, 19 (1900).

71. *Id.* at 18.

72. *Id.* at 19; see also Robert A. Weinstock, Note, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 *Colum. L. Rev.* 798, 805 (2009) (discussing origins of quasi-sovereign interest).

73. 180 U.S. 208, 241 (1901). The litigation arose out of the construction of an artificial channel that reversed the flow of the Chicago River, bringing the city’s sewage away from Lake Michigan and into the Mississippi River. *Id.* at 211–12. The Court found that Missouri had standing to sue to prevent the arrival of “fifteen hundred tons of poisonous undefecated sewage and filth,” *id.* at 214, despite the fact that the case involved no “direct property rights belonging to the complainant State,” *id.* at 241.

74. *Id.*; see also *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 603–04 (1982) (explaining reasoning behind *Missouri*); Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 *Wm. & Mary L. Rev.* 1701, 1760 (2008) (same).

75. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (“This is a suit by a State for an injury to it in its capacity of *quasi-sovereign*. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”); see also Mank, *supra* note 74, at 1760–61 (summarizing holding of *Tennessee Copper*).

fend their interests in federal court.⁷⁶ From this premise followed a line of cases establishing quasi-sovereign interests in preventing a wide variety of nuisances.⁷⁷

Economic interests have also been firmly established as quasi-sovereign. *Pennsylvania v. West Virginia* recognized a quasi-sovereign interest in access to natural gas.⁷⁸ *Georgia v. Pennsylvania Railroad Co.* was even more expansive, counting an antitrust claim as a quasi-sovereign interest because trade barriers caused harms just as serious as physical nuisances.⁷⁹ The passage of the Hart-Scott-Rodino Antitrust Improvements Act⁸⁰ allowed state attorneys general to sue as *parens patriae* for treble damages in antitrust cases,⁸¹ leading to actions in a broad array of fields.⁸²

Parens patriae standing's radical expansion beyond its common law origins makes it difficult to define with precision. In its most exhaustive exploration of the concept, *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*,⁸³ the Supreme Court noted that quasi-sovereign interests could be understood partly by comparison with what they were not: sovereign in-

76. See *Tennessee Copper*, 206 U.S. at 237 (“When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not . . . renounce the possibility of making reasonable demands on the ground of their still remaining *quasi-sovereign* interests . . .”); *Missouri*, 180 U.S. at 241 (“Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy . . .”).

77. See, e.g., *North Dakota v. Minnesota*, 263 U.S. 365, 373–74 (1923) (flooding); *New York v. New Jersey*, 256 U.S. 296, 298–302 (1921) (water pollution); *Kansas v. Colorado*, 206 U.S. 46, 99–105 (1907) (water diversion). *Tennessee Copper* itself dealt with the discharge of “noxious gas” from a mine that spread into Georgia, where it damaged forests and orchards. 206 U.S. at 236.

78. 262 U.S. 553, 592 (1923) (noting “health, comfort, and welfare” of substantial portion of State’s population was “seriously jeopardized” by threatened interruption in supply of gas).

79. 324 U.S. 439, 450 (1945) (“[Trade barriers] may affect the prosperity and welfare of a State as profoundly as any diversion of waters from rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets.”).

80. Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified in scattered sections of 15 U.S.C.).

81. 15 U.S.C. § 15c(a) (2006). In passing this provision, Congress set aside the Court’s resistance to the idea of allowing *parens patriae* suits for treble damages, a practice it had recently banned. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265 (1972); see Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 *Fordham L. Rev.* 361, 370–74 (1999) (discussing *Hawaii*).

82. See Farmer, *supra* note 81, at 362–63 (listing “broad range of consumer items” that have been the subject of *parens patriae* actions).

83. 458 U.S. 592 (1982). *Snapp* involved a suit brought by Puerto Rico against apple growers in Virginia who discriminated against Puerto Rican workers in favor of Jamaicans, violating federal law. *Id.* at 597–98 & n.5. Not being a state, Puerto Rico could not make the traditional argument in support of *parens patriae* standing in federal court. See *supra* text accompanying note 76. The Court was unconcerned by this wrinkle and noted that Puerto Rico “has a claim to represent its quasi-sovereign interests in federal court at least as

terests, proprietary interests, and the interests of private parties.⁸⁴ Sovereign interests include the exercise of power over individuals within a state⁸⁵ and issues involving relations between the states.⁸⁶ States also have proprietary interests that they may need to pursue in court.⁸⁷ Finally, states sometimes elect to pursue the interests of private parties.⁸⁸ Such interests “are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State’s aiding in their achievement.”⁸⁹ The Court noted that “[q]uasi-sovereign interests stand apart from all three of the above”⁹⁰ and concluded that “a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.”⁹¹

Parens patriae suits therefore bear an inherent resemblance to class actions. Like class actions, *parens patriae* suits necessarily involve injuries to a group of people.⁹² Suits brought pursuant to quasi-sovereign inter-

strong as that of any State.” *Snapp*, 458 U.S. at 608 n.15; see also Weinstock, *supra* note 72, at 807 n.51.

84. *Snapp*, 458 U.S. at 601–02.

85. *Id.* This sovereign interest concerns “the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal.” *Id.* A State thus has standing to litigate whenever it has the power to legislate; “there are few restrictions on the interests the state can seek to vindicate as a litigant in enforcing its own laws.” *Woolhandler & Collins*, *supra* note 62, at 398. One reading of *Massachusetts v. EPA*, 549 U.S. 497 (2007), suggests that the distinction between quasi-sovereign and sovereign interests has become functionally irrelevant. Weinstock, *supra* note 72, at 828.

86. *Snapp* calls this “the demand for recognition from other sovereigns” and notes that it most often “involves the maintenance and recognition of borders.” 458 U.S. at 601. An early example is *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838). See also *Woolhandler & Collins*, *supra* note 62, at 415–16 (arguing that boundary disputes were “largely exclusive example of the early Court’s willingness to allow states to vindicate sovereignty interests”).

87. *Snapp*, 458 U.S. at 601–02 (“A State may, for example, own land or participate in a business venture. As a proprietor, it is likely to have the same interests as other similarly situated proprietors.”). Mank notes that although “[a] state can sue both in its individual capacity and as *parens patriae* . . . the Supreme Court has treated such suits as analytically separate.” Mank, *supra* note 74, at 1763 n.358.

88. *Snapp*, 458 U.S. at 602. “[T]he State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest.” *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 396 (1938).

89. *Snapp*, 458 U.S. at 602 (“In such situations, the State is no more than a nominal party.”). On the other hand, a State is permitted to pursue the well-being of its citizens, who are of course private parties. The Court has addressed this tension by noting that there are no “definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well” *Id.* at 607.

90. *Id.* at 602.

91. *Id.* at 607.

92. See *supra* note 89.

ests are, like class actions, representative,⁹³ and deal with harms that would probably not lead to individual lawsuits.⁹⁴ Indeed, attorneys general often hire plaintiffs' lawyers to help prosecute *parens patriae* suits.⁹⁵ On the other hand, *parens patriae* suits do not involve a set class of citizens, nor are they required to satisfy Rule 23 or state equivalents. Still, the conceptual similarity between the two is unavoidable.

II. THE PROBLEM OF APPLYING CAFA TO PARENS PATRIAE SUITS

CAFA contained no explicit reference to *parens patriae* suits, and the question of whether it allows their removal presents an important issue. Part II.A explores the arguments made by courts on both sides of this issue, with particular attention given to the Fifth Circuit's groundbreaking conclusion, in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*,⁹⁶ that such suits are removable. Part II.B argues that the Fifth Circuit's approach is highly problematic, both as an extension of CAFA and from the perspective of federalism. This Part provides a foundation for Part III, which argues that courts should not apply CAFA to *parens patriae* suits when those suits are based on legitimate quasi-sovereign interests.

A. Does CAFA Authorize Removal of *Parens Patriae* Suits?

1. *The Majority View: CAFA Does Not Apply.* — Most courts and commentators who have examined the issue have concluded that CAFA does not allow for the removal of *parens patriae* suits. Some note that CAFA simply did not mention such suits and therefore should not apply to them.⁹⁷ Others read one of CAFA's provisions as specifically exempting

93. See Steven M. Puiszis, *Developing Trends with the Class Action Fairness Act of 2005*, 40 J. Marshall L. Rev. 115, 122 (2006) (“[A] ‘*parens patriae*’ action may resemble a class action in that an attorney general is representing a state’s citizens . . .”).

94. See *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (“That suits brought by individuals, each for personal injuries . . . would be wholly inadequate and disproportionate remedies, requires no argument.”).

95. See Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and *Parens Patriae* Product Litigation*, 49 B.C. L. Rev. 913, 964 (2008) (“In most but not all instances of *parens patriae* litigation against product manufacturers, state attorneys general or municipal officials have hired private attorneys . . . to prosecute the litigation for them.”); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of *Parens Patriae**, 74 Tul. L. Rev. 1859, 1861 (2000) (noting collaboration between attorneys general and plaintiffs’ lawyers in tobacco litigation).

96. 536 F.3d 418 (5th Cir. 2008).

97. See, e.g., Puiszis, *supra* note 93, at 122 (arguing, with respect to *parens patriae* suits, that “where a lawsuit is not filed as a class action, CAFA does not apply even if for all intents and purposes it resembles one” (citing *Tedder v. Beverly Enter.*, No. 3:05CV00264SWW, 2005 U.S. Dist. LEXIS 38694, at *5 (E.D. Ark. Dec. 12, 2005) (holding CAFA does not apply where suit “was not filed under Rule 23 or similar state statute as a class action”))).

them.⁹⁸ This provision holds that “the term ‘mass action’ shall not include any civil action in which all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action.”⁹⁹ At least one court has indeed read this subsection as preventing removal of representative suits,¹⁰⁰ but it has not been held to apply to *parens patriae* suits specifically.¹⁰¹

CAFA’s legislative history has also been interpreted to exclude *parens patriae* suits. During debates over CAFA, an amendment was proposed that specifically exempted “any civil action brought by, or on behalf of, any attorney general.”¹⁰² The amendment was rejected, but the principal argument made against it was that it was simply unnecessary: It was already clear that the statute did not apply.¹⁰³ To some courts, this

98. See Gregory P. Joseph, *Federal Class Action Jurisdiction After CAFA, Exxon Mobil and Grable*, 8 Del. L. Rev. 157, 180–81 (2006) (listing *parens patriae* suits as “carved out” of CAFA); Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. Pa. L. Rev. 1971, 1979 n.33 (2008) (“[CAFA] contains an exception for *parens patriae* actions.”).

99. 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (2006).

100. See *Breakman v. AOL*, 545 F. Supp. 2d 96, 101 (D.D.C. 2008). *Breakman* involved a representative suit by a private citizen brought pursuant to specific legislative authorization rather than a *parens patriae* suit by an attorney general. *Id.* at 100. *Breakman*’s suit was “representative” in that he sought relief “for each individual District of Columbia consumer” pursuant to a “private attorney general provision.” *Id.* Nevertheless, the court concluded that “because [this action] does not fall within the definition of a mass action,” it could not be removed under CAFA. *Id.* at 102.

101. This exception might not apply to most *parens patriae* actions for two reasons: (1) many such actions are based on court-made standing doctrine rather than statutory grants of authority, see *supra* Part I.B, and (2) *parens patriae* actions based on quasi-sovereign interests necessarily involve the interests of a group of individuals and are often not asserted *solely* “on behalf of the general public,” see, e.g., *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 597–98 (1982) (involving suit based on discrimination against discrete number of Puerto Rican apple pickers). Still, it is perhaps odd that this provision was neither discussed by the court in *Allstate*, 536 F.3d 418, nor mentioned in the plaintiff’s briefs, Brief of Plaintiff-Appellant, *Allstate*, 536 F.3d 418 (No. 08-30465).

102. 151 Cong. Rec. S1157 (daily ed. Feb. 9, 2005). Forty-six attorneys general wrote to Congress in support of the amendment, arguing that “certain provisions of S. 5 might be misinterpreted to hamper the ability of the Attorneys General to bring such actions, thereby impeding one means of protecting our citizens from unlawful activity and its resulting harm.” *Id.* at S1158–59.

103. This was one of the principal arguments made by CAFA’s sponsors, Senators Grassley and Hatch:

One reason this amendment is not necessary is because our bill will not affect those lawsuits. . . . The key phrase . . . is “class action.” Hence, because almost all civil suits brought by State attorneys general are *parens patriae* suits, similar representative suits or direct enforcement actions, it is clear they do not fall within this definition. That means that cases brought by State attorneys general will not be affected by this bill.

Id. at S1163 (statement of Sen. Grassley).

These suits, known commonly as *parens patriae* cases, are similar to class actions to the extent that the attorney general represents a large group of people. But let

history has provided convincing evidence that parens patriae suits are simply outside the scope of CAFA. In *Harvey v. Blockbuster, Inc.*,¹⁰⁴ the Attorney General and Director of Consumer Affairs of New Jersey sued Blockbuster in state court, alleging that the company's advertisements (which promised "The End of Late Fees") violated state consumer fraud law.¹⁰⁵ The district court rejected Blockbuster's argument that CAFA granted federal jurisdiction, concluding, based on the legislative history, that the suit was simply "not a class action as defined by the statute."¹⁰⁶ One other district court reached a similar conclusion, granting a motion to remand because "[t]his is a state enforcement action, and CAFA does not apply to such actions."¹⁰⁷

2. *The Fifth Circuit's Approach: Katrina Canal and Allstate.* — The only circuit court that has considered the question reached the opposite conclusion, holding that CAFA does allow removal of parens patriae actions. The Fifth Circuit began its examination of the issue in *In re Katrina Canal Litigation Breaches*, a class action filed in state court that named Louisiana and numerous citizens as plaintiffs.¹⁰⁸ The court held that federal jurisdiction existed, since the state's use of itself as the named representative for a class of plaintiffs did not alter the fact that the case was still a class action and therefore removable under CAFA.¹⁰⁹

In *Allstate*, the court confronted the issue of parens patriae litigation directly.¹¹⁰ *Allstate* arose out of a lawsuit filed by Louisiana against a host

me be perfectly clear that they are not class actions. . . . [T]he bill applies only to class actions, and not parens patriae actions.

Id. (statement of Sen. Hatch). The immediate rejoinder, advanced by the sponsor of the amendment, was that if the amendment did not alter the meaning of CAFA there could be no objection to its inclusion. Id. at S1165 (statement of Sen. Pryor). Senators Grassley and Hatch responded by arguing that it would be exploited: "That creates a very serious loophole in this bill. We should not risk creating a situation where State attorneys general can be used as pawns so that crafty class action lawyers can avoid the jurisdictional provisions of this bill." Id. at S1163 (statement of Sen. Grassley).

104. 384 F. Supp. 2d 749 (D.N.J. 2005).

105. Id. at 751.

106. Id. at 752–54.

107. *Connecticut v. Moody's Corp.*, No. 3:08CV1314, 2009 WL 3245888, at *5 (D. Conn. Sept. 30, 2009) (citing *Blockbuster*, 384 F. Supp. 2d at 752–54).

108. *In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 702 (5th Cir. 2008). Louisiana sued more than 200 insurance companies for failing to pay claims relating to damages from Hurricane Katrina. Under the state-administered (and federally-funded) Road Home program, homeowners could receive an advance on their insurance payments if they assigned their claims against their insurers in the amount of the advance. The State also gained the right to sue the insurer in the name of the policyholder. Id. at 702–03.

109. Id. at 705–06. The court admitted that states are not treated as persons for purposes of diversity jurisdiction, but found this argument unavailing: "CAFA only requires that the action be brought under Rule 23 or a state statute that *authorizes* class actions to be brought by a person." Id. at 705. In other words, it is not required that the named plaintiff *be* a person, only that he *might be*.

110. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008).

of insurance companies alleging decades of antitrust violations.¹¹¹ Unlike in *Katrina Canal*, the state did not establish a plaintiff class, instead calling the action a *parens patriae* suit brought pursuant to Louisiana law.¹¹² As a threshold matter, the court determined that CAFA did not exempt actions brought by states.¹¹³ This conclusion was based on the debate surrounding the amendment, proposed and rejected, that would have provided such an exemption.¹¹⁴ Where other courts focused on the insistence by CAFA's sponsors that the amendment was simply unnecessary,¹¹⁵ the *Allstate* court found more persuasive the idea that the amendment was rejected because it would have created a loophole that could be exploited by plaintiffs' lawyers.¹¹⁶

Reading in CAFA a mandate to avoid taking the complaint at face value, the court approved the district court's decision to "pierce the pleadings"¹¹⁷ and then determined that the policyholders, not the state, were the real parties in interest.¹¹⁸ The court therefore found that it could treat those policyholders as parties to the litigation for purposes of CAFA removal, despite the fact that they were not actually named.¹¹⁹

111. Louisiana charged the insurance companies with adopting a strategy developed by McKinsey & Company in which they employed a range of tactics (including price fixing) to consistently undervalue insurance claims and increase profits, particularly in the wake of Hurricane Katrina. *Id.* at 422–23.

112. See *id.* at 428 (noting statutory and constitutional authority).

113. *Id.* at 423–24.

114. See *supra* note 103 and accompanying text (discussing congressional debate concerning amendment).

115. See *supra* text accompanying notes 104–107.

116. See 536 F.3d at 424 ("If this legislation enables State attorneys general to keep all class actions in State court, it will not take long for plaintiffs' lawyers to figure out that all they need to do to avoid the impact of [CAFA] is to persuade a State attorney general to simply lend the name of his or her office to a private class action." (quoting 151 Cong. Rec. S1163–64 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch))).

117. *Id.* at 424–25 ("Federal courts should not sanction devices intended to prevent a removal to Federal court where one has that right . . ." (quoting *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907))).

118. *Id.* at 429 ("Accordingly, we agree with the district court and hold that . . . the policyholders, and not the State, are the real parties in interest."). The court seemed to feel that this was particularly true in relation to the treble damages, admitting that "[i]f Louisiana were only seeking [injunctive relief], which is clearly on behalf of the State, its argument that it is the only real party in interest would be much more compelling." *Id.* at 430.

119. *Id.* at 429. The court argued that "Louisiana's argument that it is the only real party in interest is belied by the petition it filed in state court, which makes clear that it is seeking to recover damages suffered by *individual policyholders*." *Id.* The petition mentioned did not contain a list of policyholders and the damages they suffered but rather various statements that the court found indicative of the fact that the policyholders were the real parties in interest. These statements were general allegations of the wrongs suffered by the policyholders at the hands of the insurance companies. For instance, according to the court, the petition alleged that "insurers have combined to accumulate vast wealth for themselves . . . by violating their fiduciary duties to their insureds" and that "[d]efendant Insurers intentionally deflate the value of the damaged property payments owed to Louisiana insureds." *Id.* at 429 n.9.

With the policyholders involved, the court was able to conclude that the suit qualified as a “mass action” under CAFA, since it involved the “claims of more than 100 Louisiana citizens who are minimally diverse from Defendants.”¹²⁰

The court also reviewed at some length the doctrine of *parens patriae*.¹²¹ Focusing in particular on the Supreme Court cases of *Hawaii* and *Snapp*,¹²² the court summed up the law by noting that while a state could not “sue for the particular benefit of a limited number of citizens,”¹²³ it was the real party in interest when it was seeking redress for an injury that it “either has addressed or would likely attempt to address through its laws to further the ‘well-being of its populace.’”¹²⁴

Crucially, the court did not conclude that Louisiana lacked *parens patriae* standing to bring the case. It accepted the argument that Louisiana “has statutory and constitutional authority to bring *parens patriae* antitrust actions,”¹²⁵ even with regard to the treble damages.¹²⁶ That, however, did not end the case. At the heart of the decision was the idea that even if the State possessed legitimate *parens patriae* authority to bring a suit, the shadowy presence of other real parties in interest could create a basis for removal under CAFA.¹²⁷ It was the policyholders who

120. *Id.* at 430. Neither the plaintiffs’ briefs nor the court’s decision mentioned CAFA’s exemption of claims “asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class).” 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (2006); see *supra* note 101 (discussing this provision). This may have been because the suit was based on the injuries of a subset of citizens, rather than the “general public” in the purest sense.

121. *Allstate*, 536 F.3d at 425–28.

122. *Id.* at 426–27. *Hawaii* and *California v. Frito-Lay*, 474 F.2d 774, 776–77 (9th Cir. 1973), both limited the scope of the quasi-sovereign interest in pursuing citizens’ economic rights. These cases were immediately followed by the passage of the Hart-Scott-Rodino Act, which effectively set aside the courts’ resistance to this idea. See *supra* notes 80–81 and accompanying text. The Fifth Circuit saw two sources of *parens patriae* authority, the common law doctrine and statutory grants, which it treated as distinct and independent. *Allstate*, 536 F.3d at 427 n.5 (“[T]he statutory *parens patriae* right of action is broader than the common law right.”). For this reason the court was able to treat *Hawaii* and *Frito-Lay* as good law regarding the common law doctrine of *parens patriae*, even if they had been overridden by statutory changes. The court also hinted that this distinction may have been important in its analysis, noting that Louisiana did not have a state equivalent of Hart-Scott-Rodino and that “[t]his court has never addressed whether such a statute could shield a representative action from removal under CAFA.” *Id.* at 428 n.5.

123. *Allstate*, 536 F.3d at 428 (quoting *Land O’Lakes Creameries v. La. State Bd. of Health*, 160 F. Supp. 387, 388 (E.D. La. 1958)).

124. *Id.* (quoting *Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 755 (D.N.J. 2005)).

125. *Id.* at 428–29 (citing La. Rev. Stat. Ann. § 51:138 (2003) (empowering Attorney General to enforce antitrust provisions) and La. Const. art. IV, § 8 (granting Attorney General power to “institute, prosecute, or intervene in any civil action or proceeding”).)

126. The court noted the vigorous debate between the parties on this point but concluded that it “need not address that issue.” *Id.* at 429.

127. See *id.* (“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.”).

mattered, not the state. The rule laid down by the Fifth Circuit can therefore be summed up as follows: A *parens patriae* case is removable under CAFA as a “mass action” if, ignoring the presence of the state, the court determines that there are other real parties in interest who satisfy CAFA’s requirements.¹²⁸

3. *Other Approaches: Illinois v. SDS West Corp.* — One district court has also addressed the problem of applying CAFA to *parens patriae* suits by looking to the real parties in interest, but with a radically different result. In *Illinois v. SDS West Corp.*, which arose out of a suit against two California companies for consumer fraud,¹²⁹ the court agreed that Illinois had a legitimate quasi-sovereign interest.¹³⁰ While recognizing the argument that it was dealing with a “two hat” case, in which the interests of numerous citizens were also implicated, the court declined to follow the approach of *Allstate*.¹³¹ Instead of analyzing each type of relief separately, the court looked “at the essential nature and effect of the complaint as a whole” and concluded that Illinois was the real party in interest, granting the request for remand.¹³² In other words, the court seemed to suggest that when the state is a real party in interest, other alleged parties will not count for purposes of diversity jurisdiction; only the legitimacy of the state’s interest matters.¹³³

B. *Removing Parens Patriae Cases: Why Allstate’s Approach is Problematic*

The approach to removal of *parens patriae* cases adopted by *Allstate* is awkward in several respects. Applying CAFA’s jurisdictional rules to allow removal based on the presence of “real parties in interest” who are not before the court is unsound doctrine, both because it is inconsistent with the nature of *parens patriae* litigation and because it fails to articulate a useful, workable test. It also expands the scope of CAFA in a way that cannot be justified by CAFA’s underlying goals; in fact, it may undercut those goals. Finally, it creates federalism problems, forcing states to appear in federal court without their consent and making them dependant on federal courts for the enforcement of their own laws.

128. The narrowest possible reading of *Allstate* is that it applies only when the state seeks treble damages in antitrust actions, but the court did not explicitly limit itself to such situations. How broadly the court would apply the real parties in interest inquiry to allow removal is therefore an open question. This issue is explored *infra* at note 138.

129. 640 F. Supp. 2d 1047, 1049 (C.D. Ill. 2009).

130. *Id.* at 1050–51.

131. *Id.* at 1052.

132. *Id.* at 1052–53.

133. *Id.* (“[T]he bulk of the relief . . . inures solely to the State of Illinois (actually, to its consumers but, because of quasi-sovereign interests, that is the same thing). This qualifies as a ‘substantial interest’ sufficient to render Illinois the real party in interest regardless of its concurrent and subsidiary pursuit of relief on behalf of certain individual citizens.”). This reasoning allowed the court to avoid reaching the question of whether the group of harmed consumers brought the case within CAFA’s jurisdictional ambit.

1. *The Allstate Approach Is Conceptually Inconsistent with the Nature of Parens Patriae Litigation.* — At the heart of *Allstate* was the determination that the policyholders were the real parties in interest.¹³⁴ This allowed the court to treat the policyholders as parties to the litigation for purposes of removal under CAFA without denying the Attorney General's authority to bring the suit as parens patriae.¹³⁵ Throughout its analysis, the court phrased its real party in interest inquiry in absolute terms, implying that the real party in interest must be either the state or the policyholders, but not both.¹³⁶ But all parens patriae actions, if they are based on legitimate quasi-sovereign interests, necessarily stem from a mixture of private and public interests; this is what makes them quasi-sovereign and neither fully sovereign nor fully private.¹³⁷ Every parens patriae action therefore stems from an injury to a group of individuals who could legitimately be said to be real parties in interest.¹³⁸ *Snapp*, the quintessential parens patriae case in the Court's recent jurisprudence, is a perfect example.¹³⁹ Under the Fifth Circuit's approach, the farmers in *Snapp* who lost their jobs because of the discrimination that formed the basis of the lawsuit would be real parties in interest, rendering the case a "mass action" under CAFA.¹⁴⁰

134. Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 430 (5th Cir. 2008); supra Part II.A.2.

135. *Allstate*, 536 F.3d at 430. One possible, and more narrow, reading of the holding that might offset some of this criticism is that it applies only to parens patriae suits that are based on common law quasi-sovereign interests, not statutory grants of authority. See id. at 427 n.5 (distinguishing cases brought pursuant to statutory authority); supra note 122 (discussing this distinction). On the other hand, the court elsewhere insisted that it could reach the same outcome "[e]ven assuming *arguendo* that the Attorney General has standing to bring such a representative action." *Allstate*, 536 F.3d at 429.

136. See supra note 127. For instance, the court asked whether the real parties in interest were "the individual policyholders or the State." *Allstate*, 536 F.3d at 429 (emphasis added). It also held that "the policyholders, and not the State, are the real parties in interest." Id. (emphasis added).

137. See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601–02 (1982) (noting that quasi-sovereign interests are neither solely private nor solely sovereign); supra notes 77–84 and accompanying text (describing range of interests courts have considered quasi-sovereign).

138. A real party in interest is anyone who has the right to prosecute an action. Fed. R. Civ. P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest."); 6A Charles Alan Wright et al., Federal Practice and Procedure § 1543 (3d ed. 2009) ("The effect of this passage is that the action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right."). The court based its conclusion on the fact that the statute authorizing treble damages for antitrust violations entitled "any person who is injured in his business or property" to enforce the law. *Allstate*, 536 F.3d at 429 (quoting Louisiana Monopolies Act § 137, La. Rev. Stat. Ann. § 51:137 (2003)). Of course, the Monopolies Act also entitles the Attorney General to bring "all suits for the enforcement of this Part." La. Rev. Stat. Ann. § 51:138; see supra note 125.

139. 458 U.S. 592; see supra notes 83–91 and accompanying text (discussing *Snapp*).

140. The growers certainly had a right to pursue the action themselves, Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Son, Inc., 469 F. Supp. 928, 934 (W.D. Va. 1979), rev'd, 632 F.2d 365 (4th Cir. 1980), aff'd sub nom. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex

It seems likely that under this approach the vast majority of *parens patriae* cases would be removable under CAFA. While the Court has declined to set “definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior,” a quasi-sovereign interest cannot be based solely on “injury to an identifiable group of individual residents.”¹⁴¹ It would therefore seem unlikely that a quasi-sovereign interest could or would be based on injury to less than 100 citizens or involve less than \$5 million in controversy, the thresholds for activation of CAFA.¹⁴² When the focus is on real parties in interest, all the Court’s classic *parens patriae* cases begin to seem like removable class actions.¹⁴³ *Allstate* therefore fails to articulate a test that performs any meaningful line-drawing function in the context of *parens patriae* litigation.

2. *Allstate Fails to Articulate a Test That Can Be Applied in the Context of Parens Patriae Suits.* — Applying CAFA’s complex framework to *parens patriae* suits also presents significant practical difficulties. CAFA has been accused of being difficult to apply even in typical class actions.¹⁴⁴ The most prominent example is the series of requirements that make remand mandatory or discretionary based on whether two-thirds or one-third, respectively, of the plaintiff class are citizens of the forum state.¹⁴⁵ Such provisions have been attacked for requiring “complicated proceedings” at early stages of class action litigation;¹⁴⁶ when there is no plaintiff class, the problem is even worse.¹⁴⁷ On a purely practical level, then, *Allstate*’s test is likely to present significant difficulties in application.

3. *This Expansion Does Not Comport with CAFA’s Goals.* — Further, the *Allstate* approach cannot be justified based on CAFA’s underlying goals. The public policy concerns that motivated the passage of CAFA can be broken into two basic categories: practical and conceptual.¹⁴⁸ On a prac-

rel. *Barez*, 458 U.S. 592 (1982) (noting lawsuits filed by individual workers), although the Fourth Circuit later questioned the practical efficacy of this approach, 632 F.2d at 370 (“They would, at best, achieve a piecemeal solution . . .”).

141. *Snapp*, 458 U.S. at 607.

142. 28 U.S.C. § 1332(d)(5)–(6) (2006). At least one defendant would also have to be a citizen of a different state. *Id.* § 1332(d)(2)(A).

143. The citizens of Missouri who were injured by the flow of sewage from Illinois in *Missouri v. Illinois* could be seen as a removable class. See *Missouri v. Illinois*, 180 U.S. 208, 211–12 (1901) (describing injuries to people and businesses); *supra* note 73 and accompanying text. The same could be said of the group of citizens who were deprived of access to natural gas in *Pennsylvania v. West Virginia*. See 262 U.S. 553, 592 (1923) (“The[] [citizens’] health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream.”); *supra* note 78 and accompanying text.

144. See *supra* note 54.

145. 28 U.S.C. § 1332(d)(3)–(4). Remand is only mandatory, though, if one of the principal defendants is also a citizen of the forum state. *Id.* § 1332(d)(4).

146. *Morrison*, *supra* note 18, at 1535.

147. Presumably the court would first determine the real parties in interest and then treat them as the plaintiff class.

148. See *supra* Part I.A.1.

tical level, Congress was concerned about the activities of both state judges¹⁴⁹ and plaintiffs' attorneys in handling class action litigation.¹⁵⁰ On a conceptual level, Congress objected to the idea of state courts handling national class actions and the idea of the class action as a form of regulation.¹⁵¹ None of these concerns is equally applicable to *parens patriae* litigation.

Congress's concerns with the handling of class action litigation by state judges do not apply to *parens patriae* litigation. Particularly troubling to Congress was the apparent frequency¹⁵² and rapidity¹⁵³ with which certain state judges granted class certification. *Parens patriae* litigation does not involve the preliminary judicial decision of certifying a class, so there is less opportunity for state judges to be overly receptive to the lawsuits¹⁵⁴ or grant "drive by certification" in a way that is unfair to defendants.¹⁵⁵ The phenomenon of magnet courts, which attract more than their fair share of class actions because of a reputation for being plaintiff-friendly, also troubled Congress.¹⁵⁶ But this problem is similarly diminished in *parens patriae* litigation, since an attorney general can choose only from the courts of his state and therefore cannot cross the country to make use of a notorious magnet court.¹⁵⁷

Plaintiffs' attorneys took advantage of the broad range of fora available to them in large class actions in similarly disturbing ways, but again these problems are not present in *parens patriae* litigation. In particular, attorneys often filed "copy cat" lawsuits in numerous jurisdictions to increase their chances of certification.¹⁵⁸ Again, the range of jurisdictions available in *parens patriae* litigation is much smaller, rendering this less

149. See *supra* notes 19–26 and accompanying text.

150. See *supra* notes 27–33 and accompanying text.

151. See *supra* notes 34–38 (state courts handling national class actions), 39–48 (class actions as regulation), and accompanying text.

152. See *supra* notes 20, 26, and accompanying text.

153. See *supra* note 22 (discussing "drive-by" certifications).

154. Of course, state court judges are not perfectly neutral as long as they are not certifying a class; judicial bias might be problematic in any phase of litigation. In certifying a class, judges perform an important gatekeeping function, screening out frivolous class actions. It is this function (and the potential for its abuse) that is not present in *parens patriae* litigation.

155. Granting class certification on the same day a request for it is filed, and before the defense has a chance to respond, gives plaintiffs an advantage that borders on coercive. See *supra* notes 21–22 and accompanying text. A *parens patriae* suit may be equally daunting to a defendant (the suit having the resources of the state behind it and presumably a large amount in controversy), but there is no procedural element unique to *parens patriae* litigation by which state court judges could manifest unfair bias in an equally coercive way.

156. See *supra* notes 23–24 and accompanying text.

157. Certain courts within a state may be "plaintiff-friendly" and therefore attract more than their fair share of litigation, but the problem is inherently reduced fifty-fold.

158. See *supra* note 28 and accompanying text.

of an issue.¹⁵⁹ The incentive structure of plaintiffs' attorneys, which often left them with a huge windfall and class members with worthless slips of paper, was also seen as a problem.¹⁶⁰ Attorneys general, by contrast, do not themselves receive commissions and so have no motivation to accept settlements that enrich them personally at the expense of their clients.¹⁶¹ They are also politically accountable and "may be voted out of office if their constituents disagree with their enforcement decisions."¹⁶²

Congress's conceptual objections to the handling of large class actions in state courts also do not apply with equal force to *parens patriae* litigation. One major concern regarded the potential for state courts to either create national law by applying their laws to national class actions¹⁶³ or to interpret the laws of other states, thereby telling other states the meaning of their laws.¹⁶⁴ In *parens patriae* litigation these concerns are minimized. Because courts are not dealing with a national class of plaintiffs, they do not turn state law into national law.¹⁶⁵ Nor would they have the same opportunity to interpret and apply the laws of other states.¹⁶⁶

159. Plaintiffs' attorneys can still file numerous lawsuits based on the same facts. This seems to be what happened in *Allstate* (and may have contributed to the outcome). *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 423 (2008) ("[S]everal other similar purported class actions are . . . pending before the same federal district court, where the same group of lawyers filed . . . nearly identical claims as those alleged in this case . . ."). What is not an issue here is the problem of filing the same lawsuit in scattered jurisdictions around the country.

160. See *supra* note 29 and accompanying text.

161. See Beisner, Shors & Miller, *supra* note 14, at 1443 ("A government enforcer is charged with promoting the public good and typically is paid the same modest salary regardless of (1) which alleged wrongdoers he or she chooses to pursue, and (2) the size of any settlement or verdict he or she obtains.").

162. *Id.* at 1456.

163. See Marcus, *supra* note 30, at 1804 (citing Linda Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 Hofstra L. Rev. 103 (1981)) (noting that Minnesota could "[b]ind the [n]ation" using state court class action). An example is *Mooney v. Allianz Life Insurance Co.*, 244 F.R.D. 531, 534–35 (D. Minn. 2007), in which Minnesota law was applied to the claims of non-Minnesota class members against a Minnesota company.

164. See S. Rep. No. 109-14, at 4 (2005) ("[M]any state courts freely issue rulings in class action cases that have nationwide ramifications, sometimes overturning well-established laws and policies of other jurisdictions."); *id.* at 61 ("Why should a state court judge elected by the several thousand residents of a small county in Alabama tell New York or California the meaning of their laws?").

165. Courts still apply their laws to nonresident defendants, but *parens patriae* litigation does not involve the application of state law to the claims of foreign plaintiffs against a foreign company.

166. *Parens patriae* litigation does not eliminate choice of law issues, but it does minimize them as compared with class action litigation. In national class actions, plaintiffs have the option of filing the litigation in any state where a class member happens to reside, virtually guaranteeing—due to the forum's minimal connection to the litigation—that the state court will be applying the law of another state. *Parens patriae* litigation, necessarily based on injuries to the well-being of one state's citizens, presents a much less complex picture.

Congressional discomfort with the idea of the class action as regulation is also minimized somewhat with *parens patriae* litigation. Supporters of class action litigation have long trumpeted its power as a regulatory tool,¹⁶⁷ but Congress explicitly rejected this argument during the passage of CAFA, calling it “illegal.”¹⁶⁸ One major argument was that the incentive structure of private attorneys does not make them well-suited to pursuing the public good.¹⁶⁹ This argument does not apply to attorneys general,¹⁷⁰ and in fact many who advanced it suggested that the regulatory powers of litigation be left to attorneys general and not private attorneys.¹⁷¹ On the other hand, many of the objections to regulatory class actions, like the inability of juries to act as regulators¹⁷² and the impermissibility of usurping the role of the legislature,¹⁷³ were grounded in the very idea of litigation as regulation, and these arguments apply with equal force to *parens patriae* litigation.¹⁷⁴

The debate surrounding the rejection of the amendment that would have explicitly exempted *parens patriae* suits from CAFA provides the most direct insight into congressional views on this subject. The repeated insistence by CAFA’s sponsors that it was not intended to apply to *parens patriae* litigation is certainly indicative, at the very least, of the intended scope of the legislation.¹⁷⁵ Besides suggesting that it was unnecessary, Senators Grassley and Hatch argued that the amendment would create a loophole for plaintiffs’ lawyers, allowing them to keep a class action out of federal court provided they had the cooperation of an attorney general.¹⁷⁶ The implication is that what concerned them was not true *parens patriae* suits, but merely class action litigation to which an attorney general had lent his name as a procedural ruse. This strongly supports the holding of *Katrina Canal*, in which the Fifth Circuit held that a class action suit could be subject to CAFA despite the fact that the state had

167. See *supra* notes 39–41.

168. S. Rep. No. 109-14, at 59.

169. See *supra* note 43 and accompanying text.

170. See *supra* notes 42, 161, and accompanying text (noting that attorneys general are charged with serving the public and receive modest salaries).

171. See generally Beisner, Shors & Miller, *supra* note 14 (arguing that private attorneys general should work under similar incentives and ethical constraints as attorneys general proper if they are to claim regulatory or enforcement function).

172. See *supra* note 44.

173. See *supra* note 45.

174. The tobacco settlement, for instance, ended forty-six separate actions by state attorneys general. It has been attacked as an illegitimate encroachment on the role of the legislature. See *supra* note 45. Although Congress certainly rejected the idea of regulatory class actions to the extent that it was used as an argument against CAFA itself, nothing in CAFA indicates congressional action against regulatory litigation on the part of state attorneys general.

175. See *supra* note 103 (citing remarks to this effect by CAFA’s sponsors).

176. See *supra* note 116.

joined as one of the named parties,¹⁷⁷ while undermining the holding of *Allstate*, which theoretically allows CAFA to apply to all parens patriae litigation.¹⁷⁸ The problems that motivated the passage of CAFA were problems specific to class action litigation; those problems do not generally support an expansion of CAFA to all parens patriae litigation.

4. *Allstate's Holding Creates Federalism Issues.* — The Fifth Circuit's reading of CAFA to allow removal of parens patriae suits also raises new issues of federalism and state sovereign immunity. A state is not considered to be a citizen for purposes of federal diversity jurisdiction,¹⁷⁹ and before CAFA complete diversity was required as well.¹⁸⁰ These requirements meant that suits like those brought in *Katrina Canal* and *Allstate*, in which the state joined as a plaintiff or brought suit itself as parens patriae, were not subject to removal unless they involved federal questions.¹⁸¹ As the panel noted in *Katrina Canal*, no court had confronted the precise issue of whether state sovereign immunity protected a state from removal under diversity jurisdiction, because the situation could not have arisen until CAFA expanded federal jurisdiction to include cases with minimal diversity.¹⁸²

Determining whether the Eleventh Amendment grants the state any immunity from removal involves two related questions: whether the state's sovereign immunity is implicated at all and, if it is, whether the state has waived it. As a purely textual matter, the Eleventh Amendment seems to restrict only suits *against* states, not suits brought by states.¹⁸³ As a matter of interpretation, though, the Eleventh Amendment has been held "to stand not so much for what it says, but for the presupposition . . .

177. *In re Katrina Canal Litig. Breaches*, 524 F.3d 700 (5th Cir. 2008); see *supra* note 108.

178. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008); see *supra* Part II.B.1. The difficulty that arises is distinguishing jurisdictional gamesmanship from "legitimate" parens patriae suits. See *infra* Part III.

179. *Postal Tel. Co. v. Alabama*, 155 U.S. 482, 487 (1894) ("A State is not a citizen. . . . [A] suit between a State and a citizen or a corporation of another State is not between citizens of different States; and . . . the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws or treaties of the United States."). The suit in *Postal Telegraph* was "one brought by the State to recover taxes and penalties imposed by its own revenue laws, the jurisdiction over which belongs to its own tribunals" except where Congress has provided otherwise. *Id.*

180. See *supra* note 35.

181. See *Katrina Canal*, 524 F.3d at 706 (noting that non-personhood of states and "companion insistence upon complete diversity[] made the presence of additional parties aligned with the State irrelevant to federal diversity jurisdiction").

182. *Id.* ("CAFA . . . pushes the question forward . . ."). The court noted that the issue, stated most strongly, was "the insulating force of any sovereign immunity of the State of Louisiana from removal of a suit filed by it alone in its own state courts, seeking enforcement of its state laws against insurers who each qualified to do business in the State and are subject to its regulation." *Id.*

183. U.S. Const. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by citizens of another State . . .").

which it confirms.”¹⁸⁴ Sovereign immunity as a concept derives from the very structure of the Constitution and not from the Eleventh Amendment; its scope “is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.”¹⁸⁵ It has therefore been expanded beyond the bounds that a literal reading would support. In *Hans v. Louisiana*, for instance, the Court held that sovereign immunity protects a state not just from suits “by citizens of another state,” as the Eleventh Amendment says, but also from suits by a state’s own citizens.¹⁸⁶ Generally speaking, the Court has read in the Constitution a broad grant of sovereign immunity, one that extends far beyond the bounds of the text.¹⁸⁷

The concept of sovereign immunity has at its core certain key concerns that have helped demarcate its scope. One key concern is the protection it affords a state’s dignity. The dignity interest in sovereign immunity stems partly from a conception of power: In Blackstone’s view, the King could not be sued because “no court can have jurisdiction over him.”¹⁸⁸ This aspect of English political theory “was universal in the States when the Constitution was drafted,”¹⁸⁹ and the states were resistant to the idea of a “new federal sovereign” that would subject them to suits “like lower English lords.”¹⁹⁰ Under this view of sovereign immunity, much turns on the idea of a state’s consent,¹⁹¹ and states are said to have

184. *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

185. *Alden v. Maine*, 527 U.S. 706, 729 (1999). The Court explained that “[b]ehind the words of the constitutional provisions are postulates which limit and control. . . . There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent” *Id.* (quoting *Monaco v. Mississippi*, 292 U.S. 313, 322 (1933)).

186. 134 U.S. 1, 15 (1890) (rejecting idea that “when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled”).

187. See Virginia F. Milstead, *State Sovereign Immunity and the Plaintiff State: Does the Eleventh Amendment Bar Removal of Actions Filed in State Court?*, 38 *J. Marshall L. Rev.* 513, 515 (2004) (noting consistent expansion of sovereign immunity).

188. 1 William Blackstone, *Commentaries* *242–*243 (“[N]o suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.”).

189. *Alden*, 527 U.S. at 715–16.

190. *Nevada v. Hall*, 440 U.S. 410, 418 (1979).

191. *The Federalist* No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”).

a dignity interest in not being “called,”¹⁹² “haled,”¹⁹³ or “dragged”¹⁹⁴ into federal court.

To some extent this aspect of sovereign immunity becomes indistinguishable from the question of waiver. Even if sovereign immunity does apply, a state can waive it in various ways, including through litigation,¹⁹⁵ but saying that a state has waived sovereign immunity by filing suit in state court amounts to the same thing as saying that the Eleventh Amendment simply does not protect states when they act as plaintiffs. The dignity aspect of sovereign immunity, though, might suggest that the waiver alleged here—the filing of a suit in state court—should be seen as limited to state court. If a state must consent to appear in federal court, then the dignity interest as articulated by the Court might tolerate a distinction between a voluntary appearance in state court and a subsequent involuntary appearance in federal court.¹⁹⁶ A state might choose to appear as a plaintiff in state court without consenting to subject itself to the jurisdiction of a higher sovereign.¹⁹⁷ When a defendant removes, the state is therefore being dragged into a federal court involuntarily, just as if it were being sued there. This argument has been unavailing in every circuit court to have considered it,¹⁹⁸ but it has never before arisen in the

192. “It is not in the power of individuals to call any state into court.” *Alden*, 527 U.S. at 717 (quoting 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1866) [hereinafter *Elliot’s Debates*] (statement of James Madison at the Virginia Ratifying Convention)).

193. “[The Eleventh Amendment] plainly protects states from being haled into federal courts as defendants.” *California ex rel. Lockyer v. Dynege*, 375 F.3d 831, 844–45 (9th Cir. 2004).

194. “It is not rational to suppose that the sovereign power should be dragged before a court.” *Alden*, 527 U.S. at 718 (quoting *Elliot’s Debates*, supra note 192, at 555 (statement of John Marshall at the Virginia Ratifying Convention)).

195. See Gil Seinfeld, Waiver-in-Litigation: Eleventh Amendment Immunity and the Voluntariness Question, 63 *Ohio St. L.J.* 871, 884–90 (2002) (finding “voluntariness principle” that runs through all waiver contexts); Jonathan R. Siegel, Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment, 52 *Duke L.J.* 1167, 1226–39 (2003) (considering types of waiver by litigation).

196. See *Lapides v. Bd. of Regents*, 535 U.S. 613, 622 (2002) (“[T]he Eleventh Amendment waiver rules are different when a State’s federal-court participation is involuntary.”). In *Lapides*, the State’s state court participation was involuntary but its federal court participation was voluntary. The court held that the State’s removal to federal court constituted waiver of its Eleventh Amendment immunity. A State appearing in state court voluntarily but in federal court *involuntarily* might therefore still enjoy some Eleventh Amendment protection.

197. When it waives by statute, for instance, a State can consent to suit in its own courts without consenting to suit in federal courts. See *Smith v. Reeves*, 178 U.S. 436, 441 (1900) (“[W]e think that it has not consented to be sued except in one of its own courts.”).

198. See, e.g., *California ex rel. Lockyer v. Dynege*, 375 F.3d 831, 848 (9th Cir. 2004) (“[A] state that voluntarily brings suit as a plaintiff in state court cannot invoke the Eleventh Amendment when the defendant seeks removal to a federal court of competent jurisdiction.”); *Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1239 (10th Cir. 2004) (“[The Eleventh Amendment] does not apply to suits

context of diversity jurisdiction.¹⁹⁹ These situations might well be distinguishable: When a state sues on federal questions it is in some way consenting to federal jurisdiction even if it sues in state court, but when a state sues on state law in state court it does not.²⁰⁰

Another motivation for sovereign immunity is the desire to avoid interfering with the independent functioning of states.²⁰¹ Here the danger is that without sovereign immunity, “‘the course of [states’] public policy and the administration of their public affairs’ may become ‘subject to and controlled by the mandates of judicial tribunals without their consent’”²⁰² Allowing removal of *parens patriae* suits under CAFA hinders state enforcement actions in a way that implicates this aspect of sovereign immunity. Historically, state enforcement actions were often seen as “penal in nature” and so could not be brought in other courts, since a state would thereby be using foreign courts to enforce its own laws.²⁰³

commenced or prosecuted by a State.”); *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1564–65 (Fed. Cir. 1997) (“[T]he Eleventh Amendment applies to suits ‘against’ a state, not suits by a state.”); see also *Illinois v. City of Milwaukee*, 406 U.S. 91, 101 (1972) (holding that state suits against non-states “may now be brought in or removed to the Circuit Courts” (quoting *Ames v. Kansas*, 111 U.S. 449, 470 (1883))). The Supreme Court cases cited here, though frequently mentioned in this context, are not precisely on-point, since they deal with the Court’s original jurisdiction and whether it is exclusive of jurisdiction in the lower federal courts, not Eleventh Amendment immunity. *Edmondson*, 359 F.3d at 1239.

199. *In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 711 (5th Cir. 2008). The precise question never addressed is “whether a state as a plaintiff suing defendants over whom it has regulatory authority in state court under its own *state laws* may be removed to federal court on diversity grounds under CAFA, rather than federal question jurisdiction.” *Id.*

200. A debate currently rages in Eleventh Amendment theory between the “official” reading, which the Court has adopted, and the far narrower “diversity” reading, which holds that the Eleventh Amendment applies only in diversity cases and not in federal question cases. See generally Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 *Stan. L. Rev.* 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *Colum. L. Rev.* 1889 (1983). While the diversity reading is pitched at a higher level of generality than the narrow issue considered here, it does lend credence to the idea that sovereign immunity might offer greater protection where jurisdiction is based on diversity rather than a federal question.

201. Milstead, *supra* note 187, at 539.

202. *Alden v. Maine*, 527 U.S. 706, 750 (1999) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

203. See *Woolhandler & Collins*, *supra* note 62, at 426–28 (“[A] Circuit Court of the United States cannot entertain jurisdiction of a suit in behalf of the State, or of the people thereof, to recover a penalty imposed by way of punishment for a violation of a statute of the State, ‘the courts of the United States . . . having no power to execute the penal laws of the individual States.’” (quoting *Huntington v. Attrill*, 146 U.S. 657, 672–73 (1892))). The analogy was drawn to the longstanding idea that state criminal prosecutions of noncitizens do not fall within the party-based grant of federal jurisdiction under Article III. See *id.* at 402 (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

While this is no longer the case,²⁰⁴ allowing removal of most or all *parens patriae* actions might still be troubling, since it would make states “dependent on federal instrumentalities for the enforcement of their own laws.”²⁰⁵ This would put federal courts in a position to interfere with the independent policy and statutory choices of states in a way that implicates the Eleventh Amendment.

However, one important concern—the desire to protect state coffers by insulating them from litigation—functions as a counterargument to the idea that the Eleventh Amendment applies here.²⁰⁶ Part of the reason for the importance of sovereign immunity in early America was the crushing debt in which many states found themselves after the Revolutionary War—debt that could have led to insolvency if states had been subject to suit.²⁰⁷ Even if a state is not on the brink of bankruptcy, giving courts access to state funds places them, at least theoretically, in a position of power over states, a situation that is seen as a violation of the political process.²⁰⁸ This concern does not apply in the state as plaintiff context; the most a state stands to lose is the cost of representation, which it has voluntarily set aside anyway.²⁰⁹ To some extent this factor might undermine the general argument, but it is not always dispositive on its own.²¹⁰

Overall, it is difficult to argue that removal of *parens patriae* suits filed by states in state court is clearly unconstitutional under the Eleventh Amendment or the principles it embodies. The law in the circuits is, after all, quite clear that a state voluntarily appearing as plaintiff in state court enjoys no immunity from removal.²¹¹ The situation here is different in two respects that might alter this analysis enough to sway the outcome. First, removal is based on diversity jurisdiction, which might imply that the state has not consented to appear in federal court the way it does

204. See *id.* at 488–502 (describing expansion of State standing in federal courts).

205. *Id.* at 437. This is seen as impermissible for the same reasons that federal prosecutions are not permitted in state courts: Doing so would turn the states into “bureaucratic arms of a central administration.” *Id.* Woolhandler and Collins also note that “routine removal of state prosecutions to federal court could make federal judicial approval a requirement for state prosecution.” *Id.* at 437 n.196.

206. See *Alden*, 527 U.S. at 750 (“Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States.”).

207. *Nevada v. Hall*, 440 U.S. 410, 418 (1979).

208. *Alden*, 527 U.S. at 750.

209. A weak response might be that litigating in federal court is more expensive, so a State that is subject to removal is involuntarily exposed to higher costs. See Milstead, *supra* note 187, at 538 & n.233 ([T]he cost of litigating in federal court is higher than in state court . . .). On the other hand, a State can simply drop the case if it is daunted by the costs associated with federal court. Furthermore, “[w]hile . . . the cost of litigating in federal court is higher than in state court, this does not necessarily mean that litigating in federal court is more expensive to the litigants.” *Id.*

210. For instance, in *Ex parte Young*, the court allowed a “suit for injunction against state officials but not against [the] state itself.” *Id.* at 538 n.236 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

211. See *supra* note 198.

when it sues on federal questions. Second, removal of virtually all *parens patriae* suits threatens to make states dependent on federal courts for the enforcement of state laws. At the very least, these issues cast doubt on the ability of the *Allstate* doctrine to function smoothly in the federal system.

III. PARENS PATRIAE SUITS SHOULD NOT BE REMOVABLE UNDER CAFA

Looking to the real parties in interest is an inadequate solution for determining whether a *parens patriae* suit is removable under CAFA. Faced with representative actions by states, courts must strike a balance between two poles: (1) allowing the presence of a state to automatically destroy jurisdiction, which would allow jurisdictional gamesmanship,²¹² and (2) allowing removal of virtually all *parens patriae* suits, which undercuts CAFA's goals and creates federalism problems.²¹³ This Part argues that the solution that best strikes this balance is to treat legitimate *parens patriae* suits as not removable. Instead of looking to the real parties in interest, courts should scrutinize the asserted quasi-sovereign interest to determine whether the state's *parens patriae* standing is legitimate. If it is, the case should not be removable under CAFA. Part III.A argues that examining the quasi-sovereign interest adequately prevents the jurisdictional gamesmanship CAFA sought to quash. Part III.B suggests that this approach would also solve the federalism problems associated with *Allstate*. Finally, Part III.C finds support for this solution within the text of CAFA itself.

A. *A Close Scrutiny of the State's Asserted Quasi-Sovereign Interest Adequately Prevents Jurisdictional Gamesmanship*

Faced with an apparently legitimate *parens patriae* suit, the *Allstate* court held that it must examine the real parties in interest as a possible basis for removal.²¹⁴ This conclusion was based on Congress's rejection of an amendment that would have exempted all suits brought by attorneys general as well as suggestions, in the accompanying debates, that such a provision would create a loophole that could be exploited by plaintiffs' lawyers.²¹⁵ As a solution to this problem, though, the real party in interest inquiry is overinclusive, theoretically allowing removal of virtually all *parens patriae* suits and not just class actions in disguise.²¹⁶ Senators Grassley and Hatch, whose comments formed the basis for this solution, insisted repeatedly that this result was not one CAFA was meant

212. See *supra* note 103 (discussing rejection of amendment that would have exempted all suits brought by States).

213. See *supra* Part II.B.

214. See *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 429 (5th Cir. 2008) ("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.").

215. *Id.* at 424; see also *supra* note 116.

216. See *supra* notes 141–143 and accompanying text.

to achieve.²¹⁷ Instead they maintained that *parens patriae* suits would be left undisturbed by CAFA.²¹⁸

Looking at the legitimacy of the quasi-sovereign interest that forms the basis of a *parens patriae* suit does an adequate job of preventing jurisdictional gamesmanship. A state cannot simply pursue the interests of private parties as a basis for *parens patriae* standing.²¹⁹ *Parens patriae* standing must instead be based on the health and well-being of a state's citizens in general.²²⁰ There are meaningful limits on a state's ability to sue as *parens patriae*, and there is little reason to think that plaintiffs' lawyers would be able to exploit *parens patriae* standing to avoid removal of class actions. To bring a *parens patriae* suit, a plaintiffs' attorney would have to secure the cooperation of the attorney general.²²¹ This alone is admittedly not an insurmountable obstacle.²²² In order to expand the litigation beyond one state, the attorney would have to work with numerous attorneys general and file suit in each individual state, since a state cannot file a *parens patriae* suit in the courts of another state. Exempting *parens patriae* suits would therefore not provide an easy loophole by which attorneys could keep class actions that are national in scope—the focus of CAFA—in state court.²²³ The cases that would still be subject to removal under this doctrine would be precisely those mentioned in congressional debates: class actions in which states are part of the plaintiff class.²²⁴

217. See *supra* note 103 (quoting statements to this effect).

218. Senator Grassley said that “cases brought by State attorneys general will not be affected by this bill,” and Senator Hatch observed that the bill “applies only to class actions, and not *parens patriae* actions.” 151 Cong. Rec. S1163–64 (daily ed. Feb. 9, 2005) (statements of Sens. Grassley and Hatch).

219. See *supra* notes 88–89.

220. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982); see *supra* note 89 (discussing tension between states' ability to protect general well-being of citizens and inability to sue on behalf of certain citizens).

221. “No one can add a State attorney general [to a lawsuit] without his or her express consent or permission.” 151 Cong. Rec. S1159 (daily ed. Feb. 9, 2005) (statement of Sen. Pryor).

222. Plaintiffs' attorneys, after all, often work with attorneys general. See *supra* note 95. On the other hand, the political accountability of attorneys general might help prevent improper collusion with plaintiffs' attorneys. See 151 Cong. Rec. S1159 (daily ed. Feb. 9, 2005) (statement of Sen. Pryor) (vigorously disputing idea that attorneys general might “allow their friends to use their names to avoid moving the case to Federal court”).

223. Of course, *parens patriae* suits in the aggregate can be national in scope. The tobacco litigation, which had sweeping national ramifications, ended when forty-six *parens patriae* suits joined in one master settlement. See *supra* note 45. What is more difficult to imagine is the highjacking of this doctrine by plaintiffs' attorneys as a way of bringing nationwide class actions in state court. Still, it is not completely inconceivable that this might occur.

224. “The way this [amendment] is drafted 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.” 151 Cong. Rec. S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley).

One counterargument that could be leveled against this solution is that it is too deferential to state *parens patriae* doctrine. The doctrine laid down by the Supreme Court delimits a state's ability to sue in federal court, but not its ability to sue in state court; individual states do that, either by statute or by common law.²²⁵ Under this solution, a state could expand its attorney general's *parens patriae* authority in order to help avoid CAFA's removal provisions. But CAFA contains a subsection exempting suits brought "pursuant to a State statute specifically authorizing such action,"²²⁶ and Congress also insisted that CAFA should not be interpreted as setting aside *Erie*: Federal courts are still to apply state law.²²⁷ These considerations, taken together, indicate a deferential stance toward state law on such matters, one that belies a sweeping distrust of all state policy decisions.

B. *This Approach Mitigates Federalism Problems Associated with Widespread Removal*

Removal of nearly all *parens patriae* suits raises Eleventh Amendment concerns that are substantially alleviated by a more deferential approach. Broad removal threatens to interfere with state enforcement of state law, hindering the independent functioning of states in a way that might run afoul of the Eleventh Amendment.²²⁸ This problem is avoided if legitimate enforcement actions are left undisturbed and only suits that are not based on quasi-sovereign interests are removed. Similarly, a state's dignity interest in not being haled unwillingly into federal court²²⁹ seems to be less of a concern if the state is merely engaging in jurisdictional gamesmanship.

C. *The Text of CAFA Lends Support to this Solution*

There is also strong textual support for this solution in CAFA itself. The holding of *Katrina Canal*, that class actions may be removable despite the presence of a state as a plaintiff, is unavoidable by the plain meaning of CAFA, since nothing in the statute exempts a class action on that basis. One provision of the bill, however, does exempt representative suits "asserted on behalf of the general public."²³⁰ Although some commentators assumed that this subsection was meant to exempt *parens patriae* suits,²³¹

225. See *id.* at S1159 (statement of Sen. Pryor) (noting dramatic variations in state *parens patriae* authority).

226. 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (2006). This provision also requires that the suit be "asserted on behalf of the general public," which might put the classic quasi-sovereign interest outside its scope. *Id.*

227. See S. Rep. No. 109-14, at 49, 61, 66 (2005) ("[C]lass action decisions rendered in federal court should be the same as if they were decided in state court—under the *Erie* doctrine, federal courts must apply state substantive law in diversity cases.").

228. See *supra* notes 201–205 and accompanying text.

229. See *supra* notes 188–200 and accompanying text.

230. 28 U.S.C. § 1332(d)(11)(B)(ii)(III).

231. See *supra* notes 98–99.

no court has ever accepted this reading.²³² So while this provision may not compel the exemption of *parens patriae* suits,²³³ it does provide support for the idea that *parens patriae* actions are in some sense outside the scope of CAFA.

Stronger textual support for the exemption of *parens patriae* suits comes from the absence of any provision making them subject to CAFA. CAFA applies to class actions, which are defined as those brought pursuant to Rule 23 (or state equivalent),²³⁴ and mass actions, which are defined as claims of more than 100 people tried jointly due to “common questions of law or fact.”²³⁵ A *parens patriae* action does not fit easily within either definition. In order to treat the *parens patriae* suit in *Allstate* as a “mass action,” the Fifth Circuit had to treat an action involving one plaintiff (the State of Louisiana) as involving, by virtue of unnamed real parties in interest, the “monetary claims of 100 or more persons.”²³⁶ Nowhere does CAFA instruct courts to perform this inquiry.²³⁷ By its plain meaning, CAFA therefore does not apply to *parens patriae* suits, which have only one plaintiff.

This solution is close to the approach used in *Illinois v. SDS West Corp.*²³⁸ In *SDS*, the court began by examining and approving the State’s asserted quasi-sovereign interest.²³⁹ Responding to the defendant’s argument, the court admitted that there were other real parties in interest but held that their presence did not diminish the interest of the state, since “[t]he fact that private parties may benefit monetarily from a favorable resolution of this case does not minimize nor negate [the state’s] substantial interest.”²⁴⁰ The *SDS* approach therefore retains the real party in interest inquiry, but with a different result. But as the court in *SDS* noted, this inquiry is unnecessary if the state’s quasi-sovereign interest has already been approved.²⁴¹ After all, a state that is bringing a legitimate

232. See *supra* notes 100–101. On the other hand, no court has explicitly rejected this reading either, and this provision has gone unmentioned in every case that has examined this issue.

233. Certain turns of phrase may, depending on one’s reading, render the subsection inapplicable to many *parens patriae* suits. See *supra* note 101.

234. 28 U.S.C. § 1332(d)(1)(B).

235. *Id.* § 1332(d)(11)(B)(i).

236. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008) (“Having determined that the policyholders are real parties in interest, we agree that this action was properly removed pursuant to CAFA because the requirements of a ‘mass action’ are easily met . . .”).

237. In establishing the boundaries of its jurisdictional grant, CAFA uses terms like “claims,” “plaintiffs,” and “members” of “plaintiff classes.” See generally Pub. L. No. 109-2, 119 Stat. 4 (2005). Nowhere does CAFA mention “real parties in interest.” *Id.*

238. 640 F. Supp. 2d 1047 (C.D. Ill. 2009); see *supra* Part II.A.3.

239. *SDS*, 640 F. Supp. 2d at 1050–51.

240. *Id.* at 1053 (alteration in original) (quoting *Hood ex rel. Mississippi v. Microsoft Corp.*, 428 F. Supp. 2d 537, 546 (S.D. Miss. 2006)).

241. See *id.* at 1052 (noting that although bulk of relief might inure to consumers rather than State, “because of quasi-sovereign interests, that is the same thing”).

parens patriae action is almost by definition a real party in interest.²⁴² It is therefore simpler, and functionally equivalent, to jettison the real party in interest inquiry completely and focus instead on the legitimacy of the state's quasi-sovereign interest.

Of course, courts are often required to look beyond complaints to prevent fraudulent pleadings.²⁴³ This Note does not argue that courts be bound by whatever "labels . . . the parties may attach."²⁴⁴ Courts would still scrutinize the basis for parens patriae standing by looking for a legitimate quasi-sovereign interest or authorizing statute. If a case is brought pursuant to legitimate parens patriae authority, though, it would not be removable based on the presence of others who might have been, but are not, parties to the litigation.

CONCLUSION

The application of CAFA's removal provisions to parens patriae actions is deeply problematic, embodying an expansion of CAFA that is justified by neither its text nor its legislative history. It is true that CAFA sought to stamp out jurisdictional gamesmanship by plaintiffs' attorneys, but looking to the purported real parties in interest who are not before the court is a troubling solution to this problem. Parens patriae actions are not a likely refuge for class action lawyers seeking shelter from CAFA's removal provisions. Even if some gamesmanship takes this form, the real party in interest inquiry is a vastly overinclusive solution to a minor problem, potentially allowing removal of virtually all parens patriae suits, regardless of their legitimacy. In order to avoid these problems, and in order to ensure that they do not run afoul of the principles of federalism embodied in the Eleventh Amendment, courts should instead scrutinize the quasi-sovereign interest that forms the basis for parens patriae standing. By doing so, courts would achieve CAFA's goals without finding themselves the arbiters of countless state enforcement actions brought to vindicate the interests of state citizens for violations of state law.

242. In defining the scope of parens patriae standing, the Supreme Court excluded actions brought by States for the sake of other real parties in interest, implying that a State would not have parens patriae standing if it were not itself a real party in interest. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982) ("A State may . . . pursue those interests only for the sake of the real party in interest. . . . In such situations, the State is no more than a nominal party.").

243. See *supra* text accompanying note 117.

244. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008).