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COMMENT

Parens Patriae, the Class Action Fairness Act, and the Path Forward: The Implications of *Mississippi ex rel. Hood v. AU Optronics Corp.*

Few issues in the law of federal courts generate more excitement than the relative strengths of state and federal courts and the power of the states to sue on behalf of their injured citizens. Since Congress passed the Class Action Fairness Act of 2005 (CAFA),¹ a tension has developed between these two issues in federal courts. This Comment addresses that tension, the circuit split it engendered, and the Supreme Court's attempt to resolve the split in its January 2014 opinion, *Mississippi ex rel. Hood v. AU Optronics Corp.*²

The legal issue was as follows: CAFA permits a defendant in a class or mass action to remove the action from state to federal court;³ the states, meanwhile, frequently bring lawsuits on behalf of their injured citizens in their respective state courts. States possess this power through the doctrine of parens patriae: literally “parent of the country,” parens patriae permits a state to bring an action as a single party on behalf of a number of its injured citizens.⁴ As CAFA has channeled more class actions and other aggregated claims into the federal courts, the state attorneys general have more frequently brought parens patriae actions in state court—and, in some cases, those actions have looked increasingly like the class actions that CAFA seemed to target. The question in *Hood*,

1. 28 U.S.C. § 1332(d) (2012).

2. 134 S. Ct. 736 (2014).

3. 28 U.S.C. § 1332(d).

4. The roots of parens patriae trace back to the “royal prerogative” of the king, as “father of the country,” to “act as the guardian for those under legal disabilities to act for themselves.” *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 335 n.4 (1st Cir. 2000). For further background on the doctrine of parens patriae, see generally *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982); and Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 391 n.5, 475-77 (1995).

then, was whether *parens patriae* actions, given their similarities to class actions, fell within the ambit of CAFA and could thus be removed from state to federal court.

In *Hood*, the Supreme Court answered this question, which had divided the circuits, with a decisive “no.” Without acknowledging the sensitive issues of federalism and state sovereignty that this question could have involved, the Court’s opinion was straightforward: as a matter of statutory interpretation, a *parens patriae* action is not a mass action and is not removable to federal court under CAFA.

This Comment discusses what *Hood* said, what it didn’t, and where we should go from here. Specifically, I argue that *Hood* signals at least two important developments with respect to CAFA: (1) a new emphasis on CAFA’s text, not its general purposes or legislative history, and (2) an apparent tolerance of litigation strategies designed to maneuver around CAFA and resist removal to federal court.

Left unresolved, however, is the question of what should be done to address the real risk of abuse of *parens patriae*. *Hood* seems to invite a legislative fix. Prior to the decision, the Seventh Circuit argued that “protection against excesses in the *parens patriae* context lies in the electoral process,”⁵ and at least one commentator proposed amending CAFA to “specifically exempt *parens patriae* suits from removal.”⁶ In *Hood*, the Court focused on what CAFA “says,” noted that Congress “easily could have” drafted different language if it intended otherwise, and implicitly directed disappointed litigants to their representatives for relief.⁷

I argue, by contrast, that a better solution might be found through the law of *parens patriae* standing. Standing doctrine provides the appropriate analytical frame for determining whether a state fairly represents the interests of its citizens or whether it is merely acting as a class action representative in disguise. In particular, this Comment recommends that *parens patriae* standing analysis consider whether class actions are procedurally and practically available to the injured parties. Where such an alternative remedy exists, courts should generally find that the state lacks standing to proceed as *parens patriae*. At least one state has embraced this approach of considering the availability of class actions in *parens patriae* standing analysis, and such an approach could close the *parens patriae* loophole if accepted more widely.

5. *Addison Automatics, Inc. v. Hartford Cas. Ins. Co.*, 731 F.3d 740, 744 (7th Cir. 2013).

6. Michael Jaeger, Note, *Should They Stay or Should They Go: Can State Attorneys General Avoid Removal of Parens Patriae Suits to Federal Court Under the Class Action Fairness Act?*, 46 LOY. L.A. L. REV. 327, 356 (2012).

7. 134 S. Ct. 736, 742 (2014).

I. CAFA, PARENS PATRIAE, AND THE CIRCUIT SPLIT

CAFA responded to concerns about abuses of class actions at the state court level by channeling certain class actions from state to federal courts.⁸ Born out of suspicion regarding jurisdictional gamesmanship, CAFA and its legislative history seemed to evince a spirit of substance over form: the statute invited courts to look beyond the labels parties might affix to their actions and determine whether the action is, in effect, a class action that should be subject to CAFA's removal provisions.⁹

In the effort to bring "real" class actions to federal court, courts quickly encountered an interesting issue of potential gamesmanship: *parens patriae* actions brought by state attorneys general but often representing the interests of a small group of their citizens. In 2008, the Fifth Circuit addressed the issue first and, relying on CAFA's overarching purpose of extending federal court jurisdiction and removing class action look-alikes, held that *parens patriae* actions were indeed mass actions subject to CAFA removal.¹⁰ The other circuits, however, disagreed. Specifically, the Second,¹¹ Fourth,¹² Seventh,¹³ and Ninth¹⁴ Circuits all rejected the Fifth Circuit's approach and, relying on the plain meaning of CAFA's text, held that a *parens patriae* action has only one plaintiff—the state—and therefore "falls 99 persons short of a 'mass action,'" which requires at least 100 persons.

II. THE HOOD DECISION, IMPLICATIONS FOR CAFA, AND UNANSWERED QUESTIONS

A. *The Supreme Court's Opinion*

In January 2014, the Supreme Court rejected the Fifth Circuit's approach and endorsed that of its sister circuits. *Hood's* facts are typical of cases considering the tension between *parens patriae* and CAFA. AU Optronics is one of sev-

8. See 28 U.S.C. § 1332(d) (2012); S. REP. NO. 109-14, at 4–27 (2005).

9. S. REP. NO. 109-14, at 47; see also *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407-08 (6th Cir. 2008).

10. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008).

11. *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 219–20 (2d Cir. 2013).

12. *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012).

13. *LG Display Co. v. Madigan*, 665 F.3d 768, 772–74 (7th Cir. 2011).

14. *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670–72 (9th Cir. 2012).

15. *Id.* at 672.

eral manufacturers of liquid crystal display panels, or LCDs, to be sued for price-fixing; from 2006 to 2011, more than 150 actions were brought against LCD manufacturers for antitrust violations—over one hundred of which were styled as class actions.¹⁶ In March 2011, the Mississippi Attorney General filed a complaint against AU Optronics in the Mississippi Chancery Court asserting causes of action under both the Mississippi Consumer Protect Act and Mississippi's antitrust laws.¹⁷ The Mississippi Attorney General's action was virtually identical to the class actions brought against AU Optronics,¹⁸ and private contingency fee attorneys represented the Mississippi Attorney General.¹⁹ AU Optronics, seeking a federal forum, successfully removed the action to federal court under the theory, then accepted in the Fifth Circuit, that Mississippi's action was in substance a "mass action" under CAFA.²⁰ Although the district court initially remanded the case to state court on other grounds,²¹ the Fifth Circuit ultimately affirmed the removal.²²

At the Supreme Court, the major issues involved in this dispute were on full display. Mississippi accused the Fifth Circuit of "violat[ing] the 'etiquette of federalism.'"²³ Supporting Mississippi's position, forty-six state attorneys general argued as amici that "forcing an unwilling State to proceed in federal court" is an "affront to the sovereign dignity of the State" and "an affront to established principles of federal-state comity."²⁴ With equal passion, AU Optronics and its amici argued that "[i]f state attorneys general and their outside counsel are permitted to rely on their *parens patriae* authority to circumvent CAFA . . . the very purpose of CAFA will be eviscerated."²⁵

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16. Brief for Respondents at 5, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) (No. 12-1036).
 17. See Complaint at 50-53, *Mississippi ex rel. Hood v. AU Optronics Corp.*, No. G2011-516 T/1 (Miss. Ch. Mar. 25, 2011).
 18. Brief for Respondents at 5, *Hood*, 134 S. Ct. 736 (No. 12-1036).
 19. *Id.* at 10.
 20. *Id.* at 10-11.
 21. *Id.* at 11.
 22. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 803 (5th Cir. 2012), *rev'd*, 134 S. Ct. 736 (2014).
 23. Brief for Petitioner at 30, *Hood*, 134 S. Ct. 736 (No. 12-1036) (quoting *United States v. Lopez*, 515 U.S. 549, 583 (1995) (Kennedy, J., concurring)).
 24. Brief of Amici Curiae State of Illinois and 45 Other States in Support of Petitioner at 5-6, *Hood*, 134 S. Ct. 736 (No. 12-1036).
 25. Brief of Washington Legal Foundation as Amicus Curiae in Support of Respondents at 20, *Hood*, 134 S. Ct. 736 (No. 12-1036); see also Brief for Respondents at 51-52, *Hood*, 134 S. Ct. 736 (No. 12-1036) ("Congress's purpose in passing CAFA was to make sure high-exposure, class-like cases could be brought to federal court.").

Yet against this backdrop, the Supreme Court’s unanimous opinion, authored by Justice Sotomayor, was moderate in tone and straightforward in its analysis. The Court—never once mentioning federalism, dignity, sovereignty, or bias—focused on the text of the statute and reasoned that a single state is not “100 or more persons” as required by CAFA’s definition of “mass action.” “[T]he statute says ‘100 or more persons,’” Justice Sotomayor explained, “not ‘100 or more named or unnamed real parties in interest.’”²⁶ The Court rejected the notion that federal courts are free to “look behind the pleadings to ensure that parties are not improperly creating or destroying diversity jurisdiction” in all instances. That power, the Court explained, can come only from Congress, and here, the straightforward text and structure of CAFA’s “mass action” provision provided no such license.²⁷

B. Implications for CAFA

The *Hood* opinion is, generally speaking, a model of textualist interpretation and judicial restraint. Although it resisted the sensitive issues looming in the background of this dispute, the Court signaled at least two important developments with respect to CAFA.

First, the Court’s largely textualist approach to interpreting CAFA is striking. Just one term ago, the Court had emphasized that interpretations of CAFA should not “exalt form over substance, and run directly counter to CAFA’s primary objective” of extending federal jurisdiction over matters of “national importance.”²⁸ *Hood*, by contrast, focuses on CAFA’s text—without mentioning its “primary objective”—and hence departs from the Court’s earlier guidance on how to interpret this statute. Moreover, while lower courts had previously made much of CAFA’s legislative history and the policies that the statute seemed to promote,²⁹ the Court seemed to remind lower courts that, “when ‘the statute’s language is plain, the sole function of the courts . . . is to enforce it according to its terms.’”³⁰ CAFA, the Court suggested, is no exception. Additionally, because the Court seemed to find little ambiguity in the text of CA-

26. *Hood*, 134 S. Ct. at 742. The Court’s opinion was not, however, entirely formalist; it noted that the Fifth Circuit’s approach would, as a practical matter, result in an “administrative nightmare.” *Id.* at 743.

27. *Id.* at 745-46.

28. *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013).

29. See, e.g., *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407-08 (6th Cir. 2008); *Brook v. UnitedHealth Grp. Inc.*, No. 06-CV-12954, 2007 WL 2827808, at *4 (S.D.N.Y. Sept. 27, 2007).

30. *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

FA's mass action provision,³¹ *Hood* casts doubt on the relevance of the oft-cited (but much-disputed) legislative history of CAFA, or at least its mass action provision. Therefore, the *Hood* decision may come not only to the aid of states resisting removal of their *parens patriae* actions, but also to the aid of all plaintiffs whose adversaries invoke CAFA's spirit and history to support removal from state to federal court.

Second, by adopting a more formalist interpretation of the statute, *Hood* suggests some tolerance of the jurisdictional maneuvering that CAFA has long been thought to resist. By declining to probe into Mississippi's purposes in structuring its action the way that it did, the Court gives an implicit nod to the "well-established rule that plaintiffs, as masters of their complaint, may choose their forum by selecting state over federal court."³² Furthermore, because the Court hews so closely to CAFA's text without discussing the uniquely sensitive issues associated with *parens patriae* standing, *Hood* seems to provide a more general invitation to the jurisdictional gamesmanship that many had considered to be at odds with the basic spirit of the statute.³³

C. Unresolved Issues

For all that *Hood* might say about CAFA, it says remarkably little about the dilemma at the heart of this dispute: what should we do about the potential abuse of *parens patriae* actions?³⁴

The risk of abuse is real. To provide just three considerations: we now know that contingency fee lawyers routinely approach and represent state attorneys general in actions virtually identical to the class actions they bring in other states;³⁵ that the state attorneys general can be vulnerable to political

31. See *Hood*, 134 S. Ct. at 742. It is possible, of course, that other sections of CAFA are less clear and may call for a different analysis.

32. *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009).

33. See discussion *supra* note 9 and accompanying text.

34. This Comment seeks to avoid taking a normative view on whether *parens patriae* actions belong in state or federal courts. Rather, my goal is to suggest that some uses of *parens patriae* may be inconsistent with the doctrine's core goals of protecting the interests of (1) sovereign states and (2) citizens who are less able to vindicate their own interests through judicial and political processes. See discussion *supra* note 4 and accompanying text; see also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-59 (1972) (discussing historical function of *parens patriae*).

35. In arguing that the Fourth Circuit should have adopted the Fifth Circuit's approach and called *parens patriae* actions "mass actions" under CAFA, Judge Gilman explained:

I believe that my analysis is strengthened by the fact that some of the same private attorneys representing the Attorney General here are simultaneously representing individuals who have filed essentially identical claims against the same defendants

pressure³⁶ and to manipulation by deep-pocketed private plaintiffs;³⁷ and that parens patriae actions brought in state courts have nearly doubled since CAFA was enacted.³⁸ These developments suggest that parens patriae actions may present serious risks to the independence of state attorneys general, to the fair representation of citizens in parens patriae actions brought by their states, and to the rights of out-of-state defendants whose actions would be removable under CAFA but for the availability of parens patriae.

in Michigan and Minnesota If one were to close one's eyes as to who the named plaintiff is in the three lawsuits, there is no way to detect a material difference between the Attorney General's request . . . in the present case and the same claims that are pending in Michigan and Minnesota.

West Virginia *ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 182 (4th Cir. 2011) (Gilman, J., dissenting); see also Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 493 (2012) (“[S]tate attorneys general can and do engage in litigation that bears a striking resemblance to the much-maligned damages class action.”); *id.* at 524 (“[A]ttorneys general sometimes hire private counsel to litigate state cases on a contingency basis.”); Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CALIF. L. REV. 885, 897 (2007) (discussing the use of contingency fee lawyers as representatives of state attorneys general).

36. The state attorney general is directly elected in forty-three states. Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973, 974 (2014). Several commentators have expressed concern over the potential politicization of the attorney general's role. See, e.g., Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 23 (1993) (“[T]he politicization problem cuts in favor of the appointive model.”). *But see* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2467-68, 2475-76 (2006) (arguing that the election of state attorneys general disperses power and promotes public accountability).
37. The recent controversy surrounding hedge fund manager William Ackman's campaign against Herbalife illustrates this concern: Ackman stated that he would pressure the attorneys general of every state to file complaints against the company, and the attorneys general of several states complied before realizing that they were not representing real victims from their states. Instead, they were merely supporting Ackman's investment position. See Michael S. Schmidt, Eric Lipton & Alexandra Stevenson, *After Big Bet, Hedge Fund Pulls the Levers of Power*, N.Y. TIMES, Mar. 9, 2014, <http://www.nytimes.com/2014/03/10/business/staking-1-billion-that-herbalife-will-fail-then-ackman-lobbying-to-bring-it-down.html> [http://perma.cc/YJ4B-7N77].
38. A search on Westlaw for parens patriae actions in the eight years preceding CAFA's enactment (that is, 1997-2004) and the eight years after it (that is, 2006-2013) reveals that the average annual number of parens patriae actions brought in state court has increased from approximately 77 to 148—an increase, in other words, of 93%. This growth cannot be attributed solely to CAFA; many factors have led to the expansion of the offices and litigation capabilities of attorneys general in the past two decades. However, the growth does suggest that at least some would-be class actions have found their way into state courts as parens patriae actions.

These risks of abuse are not present in all *parens patriae* actions. Many present-day uses of *parens patriae* bear the hallmarks of the doctrine: the state comes to court asserting an interest either independent of its citizens or on behalf of identifiable citizens who would otherwise be unable to sue. For example, states continue to sue as *parens patriae* to protect sovereign interests in water and other natural resources,³⁹ or to challenge acts of private discrimination affecting marginalized groups that may be unable to bring suit on their own.⁴⁰ In actions such as these, *parens patriae* serves as an important means—and, at times, the *only* means—to protect interests shared by a large number of the state’s citizens. Recent examples of states using *parens patriae* for such purposes illustrate the positive role that the doctrine continues to play.

The viability of *parens patriae* is undermined, however, when the doctrine is exploited by private individuals who are capable of bringing private actions but seek the benefits of coming to court in the name of the state—including the ability to evade CAFA and stay in state court. The filing of *parens patriae* actions nearly identical to class action complaints brought by the same attorneys in other states, or a hedge fund’s alleged exploitation of state attorneys general as part of a well-coordinated shareholder activism strategy,⁴¹ provide vivid illustrations of *parens patriae* abuse.

Hood does little to address this problem. Rather, the decision leaves unanswered a question that Chief Justice Roberts posed to Mississippi in oral argument: “[W]hat prevents attorneys general from around the country sitting back and . . . as private class actions proceed . . . taking the same complaint, maybe even hiring the same lawyers, to go and say, well, now we are going to

39. See, e.g., *State v. City of Dover*, 891 A.2d 524 (N.H. 2006) (permitting New Hampshire to bring a products liability action against manufacturers, distributors, and suppliers of gasoline additives that allegedly polluted the state’s water supplies). Courts have long approved of states’ use of *parens patriae* in suits involving natural resources—akin to public nuisance actions—as an important means of protecting a statewide interest. See, e.g., *North Dakota v. Minnesota*, 263 U.S. 365, 375-76 (1923) (confirming “[t]he right of a State as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants” against flooding caused by the “action of another State”); *Kansas v. Colorado*, 185 U.S. 125, 142 (1902) (finding that Kansas’s suit “as *parens patriae* . . . representing and on behalf of her citizens” was the proper means to seek redress from Colorado’s diverting river water away from Kansas and its residents).

40. See, e.g., *Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 96 (D. Mass. 1998) (permitting the Massachusetts Attorney General as *parens patriae* to sue a Massachusetts employer for age-based discrimination).

41. See Schmidt, Lipton & Stevenson, *supra* note 37.

bring our parens patriae action?”⁴² It is this question—the elephant left in the room after *Hood*—that I next address.

III. PARENS PATRIAE STANDING AND THE PATH FORWARD

The remedy to this problem might come from an unlikely source: the federal court doctrine of parens patriae standing. After all, the analytical issue at the heart of the perceived abuse is not one about removability or the superiority of the federal forum; rather, it is whether the state is truly acting as a state—not as a class action representative in disguise.

This inquiry bears a striking resemblance to standing analysis: it asks whether or not the state is seeking to redress its own injury or that of only a handful of its citizens. This is precisely the inquiry that federal courts have developed in determining whether a state has standing to bring an action as parens patriae. Under *Alfred L. Snapp & Son v. Puerto Rico* and its progeny, a state may not proceed as parens patriae if it acts as “only a nominal party without a real interest of its own”;⁴³ rather, it must “(1) articulate an interest apart from the interests of particular private parties, (2) express a quasi-sovereign interest, and (3) allege injury to a sufficiently substantial segment of its population.”⁴⁴ This inquiry—which is independent from the question of removal under CAFA—is the appropriate analytical starting point for evaluating whether a state is abusing its authority to proceed as parens patriae.

Why, then, has the issue of standing been overlooked by those, like Chief Justice Roberts, who have puzzled over the tension between CAFA and parens patriae? One reason might be the view that standing doctrine governs only *federal* courts and does not control what the Mississippi Attorney General might do in the courts of his own state.⁴⁵ This view is right as a formal matter but wrong in practice.⁴⁶ The reality is that state courts have incorporated *Snapp*’s

42. Transcript of Oral Argument at 17, Mississippi *ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) (No. 12-1036), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1036_hgcj.pdf [<http://perma.cc/B4QC-8XVZ>].

43. 458 U.S. 592, 600 (1982).

44. 15 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE - CIVIL ¶ 101.60 (4)(c)(i) (citing *Snapp*, 458 U.S. at 607 (1982)).

45. See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (noting that “the constraints of Article III do not apply to state courts.”).

46. Helen Hershkoff aptly points out that, more generally, “many state court judges conform their role to Article III limits, on the view that the federal model reflects the proper measure of the adjudicative function.” Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1876 (2001). Hershkoff attributes this

standing requirements in determining whether the state attorney general has the *authority* to bring an action as *parens patriae*. In fact, state courts routinely apply *Snapp's* general standard—set forth by federal actors, including Chief Justice Roberts himself—to see whether the interests of their attorneys general are sufficient.⁴⁷ State courts have often found that the state may proceed as *parens patriae*,⁴⁸ but they have also often found such authority lacking.⁴⁹

Federal actors may therefore continue to play a role in determining what state attorneys general may do in their own courts by refining the law of *parens patriae* standing and allowing this law to filter down to the state courts. In particular, if federal judges are concerned about class actions masquerading as *parens patriae* actions to evade CAFA, then they could clarify that the availability of a class action for harmed individuals is a factor counseling against a finding of *parens patriae* standing. Considering the availability of class actions in *parens patriae* standing analysis is consistent with *Snapp*, since this consideration helps courts understand whether a state has an “interest apart from the interests of particular private parties.” A state is less likely to have such an interest when its *parens patriae* action mirrors the class action “particular private parties” could bring instead. So by considering whether class actions would be available to private parties, courts would vindicate the core teachings of *Snapp* and clarify the relationship between class actions and *parens patriae*.

As an illustration of this approach, the Supreme Court of New Hampshire recently considered the availability of class actions as an alternative to a *parens patriae* action.⁵⁰ Remanding the state’s action against gasoline suppliers seeking damages for groundwater contamination, the New Hampshire Supreme Court explained that in evaluating the state’s *parens patriae* authority, the trial

phenomenon, in part, to the common law foundations of federal justiciability doctrine. *Id.* at 1877-82.

47. Indeed, one state judge even remarked that *parens patriae* is, in general, “a creature of federal jurisprudence” and explained that the states follow federal court standards in evaluating *parens patriae* authority. *Louisiana v. Twin Cities Mem’l Gardens, Inc.*, 997 So. 2d 16, 19 (La. Ct. App. 2008).

48. See, e.g., *State v. Native Vill. of Curyung*, 151 P.3d 388, 399-402 (Alaska 2006); *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 552 (Ga. 2006); *Twin Cities Mem’l Gardens*, 997 So. 2d at 22; *Hood ex rel. State v. BASF Corp.*, No. 56863, 2006 WL 308378, at *3 (Miss. Ch. Jan. 17, 2006); *State v. City of Dover*, 891 A.2d 524, 529-30 (N.H. 2006).

49. See, e.g., *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1261 (Fla. 2006); *State v. Daicel Chem. Indus., Ltd.*, No. 02-CH-19575, 2003 WL 25564146 (Ill. App. Ct. Mar. 10, 2003); *Hood ex rel. State v. Microsoft Corp.*, No. G2004-1542 O/3, 2007 WL 1108450 (Miss. Ch. Mar. 30, 2007); *People ex rel. Spitzer v. Grasso*, 836 N.Y.S.2d 40, 51-52 (Sup. Ct. 2007), *aff’d*, 893 N.E.2d 105 (N.Y. 2008); *State ex rel. Abrams v. N.Y.C. Conciliation & Appeals Bd.*, 472 N.Y.S.2d 839, 842 (N.Y. Sup. Ct. 1984); *Farmers Grp., Inc. v. Lubin*, 222 S.W.3d 417, 423 (Tex. 2007).

50. *State v. Hess Corp.*, 20 A.3d 212, 223 (N.H. 2011).

court should consider as a factor whether individual property owners could bring a class action against the gasoline companies.⁵¹ By adopting this consideration in analyzing parens patriae standing, federal courts thus prevent the use of parens patriae to evade CAFA; states would generally not be able to bring parens patriae actions where class actions are available, and the injured individuals would be forced to bring a separate action—one likely subject to CAFA’s provisions.

The question of whether class actions are available should be practical in nature. The goal I endorse here is to limit the use of parens patriae to situations in which private litigants cannot, as either a formal or practical matter, bring suit on their own. In some cases, the practical availability of a class action will be obvious based on real world examples of class actions asserting identical or similar claims. In *Hood*, for example, over one hundred claims against LCD manufacturers had successfully been certified as class actions before Mississippi filed a similar claim.⁵² In other instances, however, a court may need to consider several factors in evaluating the feasibility of a class action. These factors could include, for example, procedural barriers, such as sovereign immunity⁵³ or statutes of limitations,⁵⁴ that may stand in the way of a class action but not a parens patriae suit. Courts could also consider the challenge of ascertaining class members,⁵⁵ the amount of recovery sought,⁵⁶ and the relative resources of

51. *Id.*

52. See Brief for Respondents at 5, *Mississippi ex rel. Hood v. AU Optronics*, 134 S. Ct. 736 (2014) (No. 12-1036).

53. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (a parens patriae action is appropriate where individual consumers would lack standing to challenge the constitutionality of a Louisiana state tax).

54. See, e.g., *Page v. Pension Benefit Guar. Corp.*, 130 F.R.D. 510, 513-14 (D.D.C. 1990) (excluding from class action parties with time-barred claims); Nancy Morawetz, *Underinclusive Class Actions*, 71 N.Y.U. L. REV. 402, 421-22 (1996) (discussing challenges facing parties who are excluded from narrow class definitions and whose claims are ultimately barred by statutes of limitations).

55. See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 164-66 (2d Cir. 1987) (explaining that ascertaining class members is often difficult in the mass tort context because of the number of individuals affected and because causation often varies among individuals); *In re MTBE Prod. Liab. Litig.*, 209 F.R.D. 323, 348 (S.D.N.Y. 2002) (explaining difficulties in identifying private well owners harmed by defendants’ contamination, where each well must be examined by a professional and where individuals often fail to detect contamination).

56. See, e.g., *Maryland v. Louisiana*, 451 U.S. at 739 (approving of the use of parens patriae where individual consumers, though identifiable, “cannot be expected to litigate . . . given that the amounts paid by each consumer are likely to be relatively small”).

the parties⁵⁷ in determining whether a *parens patriae* claim could instead be brought as a class action. These factors will, of course, be resolved as a matter of degree, but courts could apply them flexibly with the goal of ensuring that a state becomes neither beholden to class action lawyers nor incapable of protecting those of its citizens who cannot protect themselves.

This Comment thus proposes that courts engaging in *parens patriae* standing analysis consider the availability of class actions as a factor counting against standing. This approach yields three key advantages over the most obvious – and most likely – alternative: a legislative fix providing for the removability of *parens patriae* actions to federal courts. First, the standing-based approach preserves the states' general ability to sue in their own courts. As a result, this approach respects the states' dignity and sovereignty interests, provides the convenience that state attorneys general want in accessing courts, and – given the role of state attorneys general as regulators whose actions often jump-start national regulation – provides for the variance and experimentation across court systems that makes the most of the modern state attorney general's role. Second, the standing-based approach is preferable to amending CAFA because it is analytically cleaner: whereas any amendments to CAFA necessarily involve questions regarding the superiority of one forum over another, standing analysis allows decision makers to focus squarely on the issue of whether a state attorney general is truly acting on behalf of the state's citizens, without allowing concerns about removability and forum to cloud the analysis.

Finally, as a matter of institutional competence, state courts are likely superior at determining whether their attorneys general are truly representing state interests. Whereas federal courts may balk at questioning a state's self-stated interest in suing as *parens patriae*,⁵⁸ state courts – however less effective they might be in managing class actions – are perfectly capable of distinguishing between “real” state interests and private actions under the veil of *parens patriae*.⁵⁹ So, for example, a New York judge can determine whether its attorney

57. See, e.g., *State v. Hess Corp.*, 20 A.3d 212, 223 (N.H. 2011) (noting that “individual plaintiffs would have to litigate against many of the largest gasoline companies in the world”).

58. See, e.g., *In re Oxycontin Antitrust Litig.*, 821 F. Supp. 2d 591, 603 (S.D.N.Y. 2011); *Alabama v. U.S. Army Corps of Engineers*, 229 F.R.D. 669, 673 (N.D. Ala. 2005).

59. State courts' proficiency in evaluating state interests in the *parens patriae* context may relate, in part, to state courts' greater familiarity with local conditions and with state attorneys general. See Hershkoff, *supra* note 46, at 1886 (noting that “[s]tate judicial districts tend to be smaller than their federal counterparts; commentators hypothesize that ‘state trial judges are likely to feel closer links to their local communities than federal judges’”) (quoting Donald W. Brodie & Hans A. Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537, 542)). For more on state courts' expertise in understanding local conditions, see Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L.

general has parens patriae authority to challenge excessive executive compensation at a stock exchange,⁶⁰ while a Mississippi judge can determine whether a scheme to fix the prices of certain household goods affected a sufficient number of households in its state to support parens patriae authority.⁶¹ To summarize, the standing solution is superior to a legislative fix because it allows the right actors to do the right analysis in the right forum.

CONCLUSION

The clash between CAFA and parens patriae raises deep questions about federalism and state sovereignty, and *Hood* presented the Supreme Court with an opportunity to weigh in. The Court did not take the bait. Its all-business opinion suggests that lower courts should put aside CAFA's general purposes and legislative history, zero in on the text of the statute, and let Congress fill in whatever gaps the statute might have. But *Hood* failed to resolve the core issue at the heart of this dispute and may prompt an unwise legislative fix. To close the parens patriae loophole in CAFA, this Comment instead suggests, federal and state courts should turn to the law of parens patriae standing and indicate that a state may lack parens patriae authority where class actions are available to its citizens. This approach appreciates both the potential abuse of parens patriae and the importance of legitimate parens patriae actions; in this way, it helps courts draw the difficult line that *Hood* avoids.

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REV. 1141, 1155 (1988); and Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 YALE L.J. 1134, 1145-46 (1980).

60. New York *ex rel.* Spitzer v. Grasso, 836 N.Y.S.2d 40, 51-52 (N.Y. Sup. Ct. 2007), *aff'd*, 893 N.E.2d 105 (N.Y. 2008).

61. Hood *ex rel.* State v. BASF Corp., No. 56863, 2006 WL 308378 (Miss. Ch. Jan. 17, 2006).

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