GRANTED

No. 99-391

In The

Supreme Court of the United States

ROBIN FREE AND RENEE FREE,

Petitioners,

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB COMPANY AND MEAD-JOHNSON & COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATE OF LOUISIANA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The Louisiana Attorney General is statutorily and constitutionally charged with the duty of enforcing Louisiana laws. Thus, the State of Louisiana, through its Attorney General, has an important interest in preserving for Louisiana courts matters of Louisiana law which profoundly affect the economic welfare of its citizens as well as the Attorney General's ability to enforce that law in the manner intended by the Louisiana Legislature and its courts.

The *Free* courts' erroneous interpretations of that law stand as a significant impediment to that enforcement, particularly when a rule of substantive law has been declared operative in Louisiana by federal courts with no authority to do so. Such an ultra vires act offends principles of comity and federalism and robs both the Louisiana Legislature and its courts of their sovereign authorities. In addition, it tends to encourage anticompetitive behavior in a state with only limited resources to fight it.

The matters of whether federal antitrust law preempts state antitrust statutes and whether the federal policies of *Illinois Brick* may be used to declare rules of state law have been litigated previously and decided in the states' favor in *California v. ARC America*. While Louisiana does not have an *"Illinois Brick repealer"* as did the plaintiff states in that case, according to *Erie* principles, Louisiana had no duty to enact one, although antitrust defendants appear to have been successful in convincing federal lower courts, but not state courts, otherwise.

The 5th Circuit's decisions stand in contravention of other federal and state principles of law as well. No transcendental body of law outside of any particular state exists which is obligatory within it unless and until changed by statute. *Erie* at 79, 823. (A federal court may not substantially affect the enforcement of the right as given by the State. *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079)); (Federal antitrust law does not control Louisiana antitrust law. *LP&L v. United Gas Pipe Line Co.*, 493 So.2d 1149, 1158 (La. 1986)); (The public policy of a state is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the court. In Louisiana, the only authentic and admissible evidence of public policy of a state on any given subject is its Constitution, laws, and judicial decisions. Where the state has spoken through its legislators, there is no room for speculation as to what the policy of the state is. *State v. American Sugar Refining Co.*, 138 La. 1005, 1021, 71 So.137, 142-143 (La. 1916)). (Legislatively enacted statutes trump policy considerations. *State, ex rel. Ieyoub v. Brunswick Bowling and Billiards Dover, Inc.*, 665 So.2d 520, 522 (La. App. 5th Cir. 1995), *writ denied*).

In addition, the *Free* decision(s), have caused the people of Louisiana to be placed in an inferior economic position among their sister states, a harm frowned upon by this Court in [*Snapp v. Puerto Rico*, 486 U.S. 592, 605-606, 102 S.Ct. 3260, 3268, 73 L.Ed.2d 995 (1982); and in *Georgia v. Penn. R. Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945)], in this case and in a case now in litigation by the Attorney General, by placing limits on

Louisiana statutes, not intended by the Louisiana Legislature or its courts, and by affecting the state's ability to obtain full legal redress for serious antitrust violations perpetrated upon its citizens in *The State of Connecticut, et al., v. Mylan Laboratories, et al.*, Cv. No. 98-3115 (TFH), in the United States District Court for the District of Columbia. A copy of that court's order is presented in the Appendix.

The *Free* court expressly sought to teach the Louisiana Legislature and its courts a legally impermissible lesson in antitrust enforcement by collaterally overruling Louisiana jurisprudence.

For these reasons, the State of Louisiana, through its Attorney General, has an important legal stake in this matter.

SUMMARY OF ARGUMENT

No federal original jurisdiction exists in this matter; therefore, no supplementary jurisdiction exists. The failure to certify a class in these error-riddled decisions before removal, before considering Art. III standing and before reaching the merits, are factors fatal to these decisions. The 5th Circuit failed to realize that a critical standard for judging if removal is proper is whether the case could have been filed originally in federal court. 28 USCA 1367 does not overrule *Zahn* or any other federal principle of law. The lower courts erred in applying a Louisiana procedural class action statute to hypothesize jurisdiction over a technically non-existent class and thereby, bootstrapping this case into federal court, to

reach its merits. And, once the federal courts seized jurisdiction by overruling principles of federal law, they failed to apply Louisiana law as intended by its legislature and courts; they chose, instead, to collaterally overrule Louisiana jurisprudence as well.

ARGUMENT

BACKGROUND PROBLEMS WHICH PERVADE THIS CASE

To find diversity jurisdiction and thus, removal jurisdiction in this matter by using a Louisiana procedural class action statute (so classified by Louisiana Courts in *Dumas v. Angus*, 635 So.2d 446, 451 (La. App. 2nd Cir. 1994) and *Ford v. Murphy Oil USA, Inc.*, 703 So.2d 542, 544 (La. 1997), the 5th Circuit overruled sub-silentio principles of law contained in the *Erie* doctrine and its progeny, now codified at 28 U.S.C. § 1652, as well as numerous other federal principles of law found in numerous cases of this Court, and federal statutory law. Similarly, in reaching its decision that 28 USCA 1367 overruled *Zahn*, the 5th Circuit also overlooked cardinal principles of statutory interpretation and principles of law found in other pertinent decisions of this Court.

Even if no other statutory law or *stare decisis* jurisprudence were involved, common sense and the plain meaning of words dictate that because supplementary jurisdiction means jurisdiction *in addition to* original jurisdiction, supplemental jurisdiction does not and cannot exist without original jurisdiction.

In addition, the 5th Circuit failed at every try to grasp the fundamental principles of Louisiana law. And, to compound its error further, using hypothetical jurisdiction to reach the merits of this state law case, the 5th Circuit forced the lower court to seize jurisdiction of this matter, seemingly to collaterally overrule Louisiana cases adjudicating principles of Louisiana antitrust law. By all of these acts, the 5th Circuit overstepped its constitutional authority and ruled contrary to its controlling precedent, thus committing what this Honorable Court has previously termed ultra vires acts.

A. No federal original jurisdiction exists in this matter; therefore no supplementary jurisdiction exists.

No federal original jurisdiction exists in this matter; therefore no supplementary jurisdiction exists.

1. Failure to certify a class before removal, before Art. III considerations and before reaching the merits are fatal to these decisions

At the outset, it must be noted that at the time of removal in this matter, no class had been certified, under either state law or federal law. (Case filed in state court on 10/14/93, removed on 11/26/93, no class certified as of 6/21/94, Opinion: Ruling on Motion for Reconsideration, Plaintiffs' App. K, at p. 93a). Both State and Federal Procedural Rules demand class certification before further proceedings can begin. [Court certification is prerequisite to further proceedings or dismissal, Art. 593.1 of the La. C.C.P.) (FRCP Rule 23(a) and (b) require court certification before further proceedings)]. Without such

court certification, the lower federal courts embarked upon issuing advisory opinions, which are fatal to the case at bar. (The federal district court also refused to certify a settlement class in its attempt to remand this matter to state court where it properly belongs).

Moreover, because class certification was lacking, no class existed at the time of removal. Thus, on removal, amounts in controversy for diversity jurisdiction could not be based upon a technically non-existent class, whether under state or federal law.

This Court has already made clear in at least three cases that class certification issues are logically antecedent to the existence of any Art. III issues, much less merits issues, and it is appropriate to reach them first. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Caterpillar v. Lewis*, 519 U.S. 61, 73, 117 S.Ct. 467, 475, 136 L.Ed.2d 437 (1996) (28 USCA 1441(a) requires that the case be fit for federal adjudication at the time the removal petition is filed); and in *Ortiz v. Fibreboard Corp.*, 119 S.Ct. 2295, 2397, 144 L.Ed.2d 715 (1999), the propriety of class certification would be addressed before the issue of Art. III standing).

Thus, it appears that the 5th Circuit circumvented the controlling precedent in the case at bar by incorrectly reaching Art. III standing and the merits of the case without even looking at the propriety of the Louisiana class. This issue, alone, warrants vacating the lower courts' judgments in this matter and remanding the case to Louisiana state court.

"Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same

thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 1016, 140 L.Ed.2d 210 (1998), citing *Muskrat v. U.S.*, 219 U.S. 346, 362, 31 S.Ct. 250, 256, 55 L.Ed. 246 (1911) and *Hayburn's Case*, 2 Dall. 409 (1792).

2. This case could not have been filed originally in federal court under federal principles of law

Although the issue of original federal jurisdiction was not presented to this Court by petitioners, the issue of supplementary jurisdiction cannot be reached properly without considering it, because it is the foundation of the latter. It is conferred and invoked by constitutional authority supported by statutes. No court can proceed without it.

The failure of parties to urge objections [to diversity of citizenship] cannot relieve this court from the duty of ascertaining from the record whether the Circuit Court could properly take jurisdiction of this suit . . . The rule is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990), quoting *Mansfield*, C. & L.M.R.

Longstanding decisions of this Court make clear that in a removal case, the issue in subsequent proceedings on appeal is whether the federal district court would have

had original jurisdiction of the case had it been filed in that court. *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523, 529, 139 L.Ed.2d 525 (1997); *Caterpillar v. Lewis*, 519 U.S. 61, 72, 117 S.Ct. 467, 474-475, 136 L.Ed.2d 437 (1996).

The case at bar could not have been filed originally in federal court because no plaintiff would have met the $50,000 (then) jurisdictional amount. This statement is true because the federal court could not have resorted, then, to Louisiana procedural law, but would have been forced to rely entirely on La. R.S. 51:137, pursuant to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 260 FN 31, 95 S.Ct. 1612, 1623, FN 31, 44 L.Ed.2d 141 (1975), and federal law to determine the amounts in controversy. (In diversity action where the state law is not counter to a valid federal statute, state law giving a right to attorneys' fees should be followed). While the cited Louisiana substantive law statute awards attorneys' fees to successful plaintiffs, it is silent on the method of distribution of those attorneys' fees in class actions, in this case technically a non-existent class, thus, a hypothetical one.

On the other hand, the federal principles of the common fund doctrine as set forth in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 749, 62 L.Ed.2d 676 (1980), make clear that in federal court, attorneys fees are assessed against the entire fund recovered in class actions, and are spread proportionately among those benefited by the suit. Thus, not even the representative plaintiffs could have met the jurisdictional amount and the suit could not have been filed originally in federal court.

The *Free* courts erroneously relied on a Louisiana procedural statute, Art. 595 of the Louisiana Code of Civil Procedure, to bootstrap the action into the federal courts, particularly obvious because only a hypothetical class existed. As noted above, Louisiana courts classify this statute as procedural, rather than substantive. In so doing, not only did the courts fail to interpret Louisiana law properly, they also overlooked or overruled sub-silentio, principles of federal law as well.

Louisiana law requires that its statutes be applied *in pari materia*, a principle of law based on Art. 13 of the Louisiana Civil Code, which is always followed by Louisiana courts. *Comm-Care Corp. v. Bishop*, 696 So.2d 969 (La. 1997); *Shelton v. Chrysler First Financial Services Corp.*, 676 So.2d 591, 592 (1996); *Kellis v. Foster*, 523 So.2d 846 (La. 1988).

The 5th Circuit should have examined La. Code of Civ. Proc. Art. 4 regarding subject matter jurisdiction in *pari materia* with Art. 595, because a federal court interpreting state law must determine state law "with the aid of such light is afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991); *Meredith v. Winter Haven*, 320 U.S. 228, 238, 64 S.Ct. 7, 13, 88 L.Ed. 9 (1934).

At the time that the first appeal was decided in this matter, 1995, Art. 4 provided that *except as otherwise provided by law*, the amount in dispute includes attorney's fees, for subject matter jurisdiction purposes. This provision should have waved a red flag because federal law

provided the otherwise. FRCP 82 provides that the rules cannot be interpreted to expand jurisdiction and the federal rules, in this case, diversity and removal jurisdiction, must be interpreted with Art. 3 of the United States Constitution in mind.

Another red flag should have been apparent to the 5th Circuit in its determination that federal original jurisdiction existed. In 1995, Art. 4 of the La. C.C.P. was amended to now provide that attorney's fees *could not* be used to determine the amount in dispute for subject matter jurisdiction. This amendment would have been pending in the Legislature at the time of the 5th Circuit's first decision and was in effect at the time of both the second and third. Where the law has changed during the pendency of a suit and retroactive application of the new law is permissible, the new law applies on appeal even though it requires a reversal of a trial court judgment which was correct under the law in effect at the time it was rendered. *Segura v. Frank*, 630 So.2d 714, 725 (La. 1994). Thus, reliance on a Louisiana procedural statute is a precarious undertaking in Louisiana because, *contrary to federal law*, Louisiana law holds that procedural laws apply both retrospectively and prospectively based upon Art. 6 of the Civil Code. *Keith v. United States Fidelity & Guaranty Co.*, 694 So.2d 180, 183 (La. 1997); *Segura v. Frank*, 630 So.2d 714, 720-721, (La. 1994).

Federal law holds, on the other hand, that a presumption exists against retrospective effect and Congressional statutes, i.e., including procedural ones, are given prospective effect only. *Martin v. Hadix*, 119 S.Ct. 1998, 2003, 2006, 2008, 144 L.Ed.2d 347 (1999); *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 (1994); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 842-844, 855-856, 110 S.Ct. 1570, 1579-1581, 1586-1587, 108 L.Ed.2d 842 (1990).

The diversity jurisdictional statute, is narrowly construed. *Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934). The jurisdictional statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104, 61 S.Ct. 868, 870, 85 L.Ed. 1214 (1941); *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 357, 81 S.Ct. 1570, 1575, 6 L.Ed.2d 890 (1961). The Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from state to federal courts. *Shamrock*. Hence, these cases, like the *Erie* line of cases, prohibit the use of a local law, like Art. 595 of the La. C.C.P., to determine federal jurisdiction, particularly, when the class was merely hypothetical vis-à-vis, lack of certification.

The 5th Circuit should have been further cautioned against using a state procedural law to determine federal jurisdiction by the principles of law contained in *Hanna v. Plumer*, 380 U.S. 460, 474-475, 85 S.Ct. 1136, 1145, 14 L.Ed.2d 8 (1965), which held directly on point that "to hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." And further, "*Erie* recognized that there should not be two conflicting systems of law controlling the primary

activity of citizens . . . " *Id.* The foregoing were reasons given why federal courts sitting in diversity apply federal procedural rules and state substantive law. *Id.* at 465, 1141.

"The requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception.' " *Ruhrgas Ag v. Marathon Oil Company,* 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (quoting *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 119 S.Ct. 1003, 140 L.Ed.2d 210 (1998) and *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 383, 4 S.Ct. 510, 28 L.Ed. 462 (1884)); for " 'jurisdiction is power to declare the law,' " and " 'without jurisdiction the court cannot proceed at all in any cause.' " *Id.* (quoting *Steel Co.* and *Ex parte McCardle,* 7 Wall. 506, 514, 19 L.Ed. 264 (1868)).

Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Steel Co.,* at 1003, quoting *Mitchell v. Maurer,* 293 U.S. 237, 244, 55 S.Ct. 162, 165, 70 L.Ed. 338 (1934). When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' *Id.,* quoting *United States v. Corrick,* 298 U.S. 435, 440, 56 S.Ct. 829, 831, 80 L.Ed. 1263 (1936) and *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 1071, 137 L.Ed.2d 170 (1997), quoting from *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986).

For removals that are defective because of lack of subject matter jurisdiction, remand may take place without such a motion (to remand) and at any time. *Wisconsin Department of Corrections v. Schacht,* 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998).

Were it in truth a contention that the District Court lacked jurisdiction, we would be obliged to consider it, even as we are obliged to inquire sua sponte whenever a doubt arises as to the existence of federal jurisdiction. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1997), quoting *Liberty Mutual Ins. Co. v. Wetzel,* 424 U.S. 737, 740, 96 S.Ct. 1202, 1204, 47 L.Ed.2d 435 (1976), and *Louisville & Nashville R.Co. v. Mottley,* 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908).

The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 432, 116 S.Ct. 2211, 2222, 135 L.Ed.2d 659 (1996).

Fed. Rule Civ. Proc. 82 provides that the rules shall not be construed to extend . . . the [subject matter] jurisdiction of the United States district courts. *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 613, 117 S.Ct. 2231, 2244, 138 L.Ed.2d 689 (1997).

Yet, despite this plethora of long standing Supreme Court precedent, the federal 5th Cir. Court of Appeal chose to overrule all of these decisions *sub silentio,* by holding instead, in *Free v. Abbott Laboratories,* 264 F.3d 270, 272 (1999), that "(a)lthough appellants' argument bears

on federal courts' jurisdiction, this is not an issue that we will reconsider."

B. 28 USCA 1367 does not overrule *Zahn* or any other principle of federal law. Indeed, to find federal jurisdiction in the case, the court was required to overrule many more principles of law than just those found in *Zahn*

Using machiavellian analysis, the 5th Circuit in its first decision, erroneously held that 28 USCA 1367 overrules *Zahn* by interpreting a Congressional statute contrary to Congressional intent; that *Colorado River* abstention did not apply and reached a bizarre crescendo in holding that because the representative parties in *Free* would be compelled to remain in federal court with the same claims adjudicated, the interests of comity would not be served. This forced analysis springs from the federal courts' initial errors, *inter alia*, applying a Louisiana procedural class action statute to a hypothetical class, thereby overruling sub-silentio the *Erie* doctrine, 28 USCA 1652, and FRCP 82.

1. Interpreting a Congressional statute contrary to Congressional intent is an ultra vires act

In a long litany of cases, this Honorable Court has made crystal clear that the federal courts do not sit as a super-legislature to determine the wisdom of legislation or to decide policy, *Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 98 L.Ed. 469 (1952); *Griswold v. State of Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); *New Orleans v. Duke*, 427 U.S. 297, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976). Further, courts cannot assume that Congress did not know what it was doing, as the 5th Circuit expressly assumed, when it interpreted 28 USCA 1367 as overruling *Zahn*. *Cannon v. University of Chicago*, 441 U.S. 677, 696-697, 99 S.Ct. 1946, 1957-1958, 60 L.Ed.2d 560 (1979); *U.S. Railroad Ret. Board v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 461, FN2, 66 L.Ed.2d 368 (1980); *Albernaz v. U.S.*, 450 U.S. 333, 340, 101 S.Ct. 1137, 1143, 67 L.Ed.2d 275 (1981).

To so interpret a statute expressly against the intent of Congress, is in itself tantamount to an ultra vires act. The 5th Circuit noted its awareness that Congress did not intend to change the jurisdictional requirements of 28 U.S.C.A. 1367 in the 1995 *Free* decision. Thus, to interpret it as overruling *Zahn*, is also tantamount to an ultra vires act.

Such an act offends fundamental principles of separation of powers, as does pronouncing upon the meaning of a state statute without jurisdiction, an act condemned as an act ultra vires in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 1012, 1016, 140 L.Ed.2d 210 (1998) and *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 119 S.Ct. 1563, 1569, 143 L.Ed.2d 760 (1999). Further, as held in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2236, 138 L.Ed.2d 689 (1997), the federal rules of civil procedure must be interpreted in keeping with Art. III (Constitution) constraints, with the Rules Enabling Act, which instructs that the rules of procedure "shall not abridge, enlarge or modify and substantive right", and with FRCP 82 which provides that the rules shall not be constructed to extend the subject matter jurisdiction of the United States federal district

courts. The 5th Circuit's interpretation of 28 USCA 1367 extends the jurisdiction of the federal district courts, in direct contravention of that rule.

Moreover, the 5th Circuit's ruling means that the court believes it proper to aggregate claims in the procedural class action device to determine jurisdiction. However, in *Carden v. Arkoma*, 494 U.S. 185, 192, 110 S.Ct. 1015, 1020, 108 L.Ed.2d 157 (1990), this Court held that "looking to the citizenship of only some of the members of an artificial entity finds even less in our precedent than looking to the State of organization" when interpreting the federal diversity statute. "We have never held that an artificial entity, sued or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based upon the citizenship of some but not all of its members."

Similarly, not the plain language of 28 USCA 1367, Congressional intent, nor this Court's precedent, allow the invocation of the diversity jurisdiction of the federal courts based upon jurisdictional amount being met by some plaintiffs, but not all, using a state procedural standard. Consistency requires that the jurisdictional amount of the matter in controversy be interpreted in the same manner. Even though a class entity exists, each individual member should be required to meet the jurisdictional amount like each must meet the diversity requirement, to invoke federal diversity jurisdiction.

Defendants' reliance on *Supreme Tribe of Ben Hur v. Cauble*, 225 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921) is misplaced because *Ben Hur* was filed originally in federal court, unlike the case at bar which was prematurely

removed from state court, and the case contained principles of federal law, giving the federal courts in that matter a strong federal interest, again, dissimilar to the case at bar.

Thus, the 5th Circuit engaged in "hypothetical jurisdiction" to reach the merits of the case. As held in *Steel Company*, cited supra at page 1016, the statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

2. Principles of comity and federalism should have prevented the lower federal courts from seizing jurisdiction and collaterally overruling Louisiana

In truth, the federal court for the Middle District of Louisiana tried to avoid adjudicating this matter. It was forced to do so by the 5th Circuit's first appellate decision. The 5th Circuit erroneously found jurisdiction on the representative plaintiffs and refused to allow the lower court to abstain, based again, on faulty use of authority. The Fifth Circuit held that Colorado River abstention did not apply because "only exceptional circumstances, the 'clearest of justifications' can suffice under *Colorado River* to justify the surrender of federal jurisdiction," quoting *Moses Cone*, 460 U.S. at 25-26, 103

S.Ct. at 942. However, unlike the case at bar, in the *Cone* case, federal issues of law were present, as this Court made clear in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 707, 729, 116 S.Ct. 1712, 1727, 135 L.Ed.2d 1 (1996). Here, there are none.

This Court has also made crystal clear that 28 USCA 1367(c) discretion is independent from any abstention doctrine theory which *requires* district court to abstain or stay, in *City of Chicago,* cited supra, at page 534. The case at bar presented issues of state law in which the important state interest could be undermined by inconsistent rulings from the federal and state courts and those interests have importance beyond the case. Inconsistent rulings have indeed already occurred. In *State v. Bordens, Inc.*, 684 So.2d 1024, 1025 (La. App. 4th Cir. 1996), the facts as stated by the Court reveal that the State filed a treble damages action based upon a federal criminal judgment of antitrust bid-rigging, on behalf of school systems (direct purchasers) and Louisiana school children (indirect purchasers). The lower court held that the Louisiana Monopolies Act allowed such actions. The defendants chose not to appeal this issue.

In *State of Connecticut v. Mylan,* a multistate antitrust case in litigation in federal courts, referenced above and found in the State's Appendix, the federal district court held that La. R.S. 51:128 authorizes Louisiana, through its Attorney General, to sue for violations of the Monopolies Act and found that provision to be unlimited in equitable relief, totally ignoring La. R.S. 51:138 which mandates that the Attorney General file all actions under the Act and La. R.S. 51:1414, which grants to the Attorney General the right to pursue any action under any statute

available to any other party. The Court found itself unable, vis-à-vis the *Free* decision, to follow Louisiana law and Louisiana jurisprudence. Such a holding, similar to that of the 5th Circuit, defies logic, reason and common sense and has no place in a country purporting to follow the rule of law.

Principles of comity and federalism should have ruled the day, as well as 28 USCA 1367(c) authorized discretion.

C. The Fifth Circuit's Determination of State Law was Erroneous on Federal as Well as State Law Grounds

The Fifth's Circuit's determination of Louisiana law was erroneous on federal as well as state law grounds.

1. Erroneousness based on federal law grounds

Obviously, the 5th Circuit did not feel competent to rule on issues of state law as expressed by their attempted certification of certain issues to the Louisiana Supreme Court. When that failed, the court decided the Louisiana indirect purchaser issue along federal grounds, expressly forbidden by this Court in *California v. ARC America Corp.*, 409 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). (It is improper to consider Congressional policies as defining what federal law allows states to do under their own antitrust law. Nothing in *Illinois Brick* suggests it would be contrary to congressional purposes for states to allow indirect purchasers to recover under their own laws, at pgs. 102, 1666).

Sadly, the 5th Circuit in *Free* espoused the losing positions of the *California v. Arc America* defendants rather than follow its precedent; thus, overruling it sub-silentio. The 5th Circuit erred in holding that *California* does not advocate increasing penalties on antitrust defendants or maximizing Louisiana plaintiffs' recovery as compared with federal law remedies. *California*, in fact held that based upon the *Silkwood v. Kerr-McGee* case neither Congress nor the courts frown upon additional liability, over and above that authorized by federal law. (*California*, at pgs. 105, 1667).

The 5th Circuit further erred by holding that the *Illinois Brick* scheme of recovery is preferable to Louisiana law. A court cannot sit as a super-legislature. *Day-Brite Lighting, Inc.* and *Griswold*, cited supra. Further, as Justices Brennan, Marshall, Blackmun and Stevens have so eloquently stated previously in concurrence with the decision *Snapp*, cited supra at page 3271, a state is a sovereign entity, entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention. I know of nothing – except the Constitution or overriding federal law – that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest. Yet, superimposing its judgment for that of Louisiana was exactly the forbidden action taken by the *Free* court.

The 5th Circuit's clear alternative to avoid such was discretional refusal to hear the case, a position expressly advocated in *California*. Instead, it chose to embark on issuing advisory opinions through ultra vires acts and sub-silentio overruling its clear precedent.

While Louisiana law does not contain what is popularly known as an *Illinois Brick* repealer as did the plaintiff states in *California*, because it is not obliged to follow federal law, the principles of *California* apply equally to this matter, pursuant to the principles of *Erie*. Under *Erie v. Tompkins*, 304 U.S. 64, 79, 58 S.Ct. 817, 923, 82 L.Ed. 1188 (1938), no transcendental body of law outside of any particular State exists which is obligatory within it unless and until changed by statute. Thus, the 5th Circuit's focus should have been on whether the Louisiana Legislature was obligated to amend its already unlimited antitrust law. Similarly, a federal court may not substantially affect the enforcement of a right as given by the state. *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079 (1945).

Thus, the 5th Circuit's holdings overruled sub-silentio this Court's controlling precedent.

2. Erroneousness based on state grounds

The concept of granting a dispensation from liability to a class of defendants based upon the level of market participation by plaintiffs is as foreign to Louisiana law as is granting a dispensation based upon a per se rule of non-liability. Louisiana tort law speaks of absolute and strict liabilities. To hold that such a concept rules Louisiana law is to overrule collaterally Louisiana's Civil Code, its statutory law and its jurisprudence, and to deny its very existence as a sovereign entity. Our courts have held that the plain language of the Louisiana Monopolies Act

and its Unfair Trade and Consumer Protection Act must be given effect by the Courts of this State.

Ultra vires acts of judgment undermine the sovereign authority of the State of Louisiana as held by its Supreme Court in *Louisiana Power & Light,* cited and discussed infra, and have been disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. Further, these ultra vires acts are forbidden by Art. III concerns as noted by this Court in *Steel* and *Ruhrgas,* cited infra. The 5th Circuit failed to analyze state law according to state principles.

The 5th Circuit erroneously held that *Louisiana Power & Light v. United Gas Pipeline Co,* 493 So.2d 1149 (La. 1986) was distinguishable from its case at bar. The situation is exactly the same in *Free* as in *LP&L,* the existence of controlling Louisiana court precedent, which keeps the particular principle of federal antitrust law from applying in Louisiana. To reach the conclusion that indirect purchasers cannot recover under Louisiana law, in the face of *LP&L,* no other explanation seems justified, except that, the 5th Circuit collaterally and sub-silentio overruled important principles of Louisiana law and its jurisprudence.

The 5th Circuit court erroneously held that *LP&L* held *only* that the federal interpretation of federal antitrust law has a persuasive effect on Louisiana law. To stop at this juncture was to overrule the case sub-silentio and collaterally. The *LP&L* Louisiana Supreme Court, in fact, held at pages 1157, 1160 that while persuasive, the federal law is not controlling and refused to apply to Louisiana antitrust law, a then recent decision of the United States

Supreme Court in *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). A significant and fatal gap exists in the 5th Circuit's version.

The 5th Circuit further erroneously held that the issue of the plain meaning of the remedy statute while "superficially formidable," can be overcome with federal policy considerations. However, the Louisiana Supreme Court held in *LP&L,* at page 1154, that appropriate statutory analysis begins with an examination of the language of the statute and that La. R.S. 51:122 is sweeping in its breadth. Words and phrases *shall be* read with their context and *shall be* construed according to the common usage. And at page 1159, this Court does not choose, . . . an inflexible approach which adopts a per se rule of nonliability . . . Such a choice would run counter to the Legislature's intent in enacting the antitrust legislation and divest our courts of the authority which reposes in them by virtue of this legislation.

An indirect purchaser exclusion from the broad sweep of the Louisiana antitrust law would be a per se rule of nonliabilty exactly like the kind the Court has been so eloquent in condemning and refusing to apply in Louisiana. Thus, either the 5th Circuit overruled *LP&L* collaterally and sub-silentio, or its principles were simply beyond the court's perception. Either way, the 5th Circuit's error-riddled decisions should be vacated.

The *in pari materia* rule of legislative construction further requires that Louisiana's Unfair Trade and Consumer Protection Act, which is a statute having the same purpose as the Louisiana Monopolies Act, be read in

conjunction with the latter, because it forbids unfair competition as well. The former act expressly allows consumers, or indirect purchasers, to recover for unfair methods of competition. Thus, the plain language of both statutes expressly allow indirect purchaser actions, and must be given effect by the Courts of this State. *State v. Classic Soft Trim, Inc.*, 663 So.2d 835 (La. App. 5th Cir. 1995), *writ denied*, Jan. 26, 1996.

Besides superimposing its judgment over Louisiana's *LP&L* decision, the 5th Circuit also overruled other decisions of Louisiana courts to reach its erroneous conclusions regarding Louisiana law. In *State, ex rel. Ieyoub v. Brunswick Bowling Dover, Inc.*, 665 So.2d 520, 522 (La. App. 5th Cir. 1995), *writ denied*, 667 So.2d 1053 (1996), the Louisiana appellate court held that Louisiana statutes trump policy considerations. In *State v. American Sugar Refinery, Inc*, 238 La. 1005, 1021, 71 So. 137, 142-143 (La. 1916), the Louisiana Supreme Court held that the only authentic and admissible evidence of the public policy of a state on any given subject are its Constitution, laws, and judicial decisions. In *Jenkins v. Waste Management of Louisiana, Inc.*, 709 So.2d 848 (La. App. 3rd Cir, 1998), *writ denied*, May 15, 1998, the Louisiana appellate court held that Louisiana jurisprudence leaves no question but that restraints to free trade shall not be tolerated under any guise. And see analysis of *State v. Bordens, Inc.*, discussed supra at page 18., regarding indirect purchaser status of Louisiana school children as indirect purchasers allowed right to recovery.

Thus, to hold that Louisiana indirect purchasers have no right to recovery in the face of this jurisprudence, is to overrule the cases both collaterally and *sub-silentio*.

In addition, in the second *Free* ruling to justify the first, the 5th Circuit held that the law of the case doctrine granted it a dispensation from redetermining original jurisdiction. The 5th Circuit, then, attempted to use, a Louisiana decision, *In re Gas Water Heater Prods. Liab. Litig.*, 711 So.2d 264 (La. 1998), ignoring federal jurisprudence, to justify its seizure of jurisdiction. The problem, however, is that even if federal law would allow such, which it does not, it appears that the 5th Circuit completely misunderstood the text of the cases and principles of law involved.

The 5th Circuit held, that *Gas Water Heater* "reinforced" its position that it could exercise subject matter jurisdiction, because the Louisiana Appellate Court distinguished the *Free* case in making its ruling. The Louisiana appellate position held that in a class action, claims could not be aggregated for jurisdictional purposes, following the federal rule of *Zahn*, and (failing to follow the 5th Circuit's). The case further noted that the federal court for the Eastern District of Louisiana limited the holding in *Free*. (This jurisprudence does not support the 5th Circuit's position).

The Louisiana Supreme Court rejected this position and held the opposite, that, contrary to federal law, such class action claims could be aggregated for jurisdictional purposes, to keep the matter out of a court of limited jurisdiction peculiar to the Jefferson Parish Louisiana court system. The court reasoned that a class action is not a series of individual claims, but rather is merely the claim of one entity, the class. This position also fails to support the 5th Circuit's because the controlling federal decisions hold that subject matter jurisdiction must be

decided on federal grounds, regardless of state law. Louisiana law has never held that individual claims could not be aggregated for jurisdictional purposes. Thus, another conflict exists between state and federal laws.

Finally, alluding to *HMC Management Corp. v. New Orleans Basketball Club*, 375 So.2d 700, 706-07 (La.App. 4th Cir. 1979), was improper as well, because that decision was influenced by *Flood v. Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972), which adjudicated the "baseball exemption to the antitrust laws."

CONCLUSION

For all of the foregoing reasons, the judgment of the 5th Circuit should be reversed in its entirety.

Respectfully submitted,

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