No. 15-1427

**In the**
# Supreme Court of the United States

ABM INDUSTRIES INCORPORATED, et al.,
*Petitioners,*
v.
MARLEY CASTRO, et al.,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS


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## QUESTIONS PRESENTED

The California Labor Code Private Attorneys General Act of 2004 (PAGA) authorizes an "aggrieved employee" to file an action "on behalf of himself or herself and other current or former employees" to collect civil penalties for California Labor Code violations. Cal. Lab. Code § 2699(a). These "nonparty employees . . . are bound by the judgment in an action brought under" PAGA. *Arias v. Superior Court*, 209 P.3d 923, 934 (Cal. 2009).

ABM removed this action under the Class Action Fairness Act of 2005 (CAFA) because plaintiffs seek more than $5 million under PAGA on behalf of more than 100 diverse absent persons. But the district court remanded after applying Ninth Circuit precedent holding that "representative" PAGA claims are not "class actions" under CAFA and that such claims cannot be considered in determining whether CAFA's amount-in-controversy requirement is satisfied. The Ninth Circuit denied review.

The questions presented are:

1. Whether an action brought under a state law authorizing a plaintiff to pursue claims on behalf of absent persons and to obtain a judgment binding them is a "class action," as defined by 28 U.S.C. § 1332(d)(1)(B).

2. Whether, in an action that asserts both "class" and purportedly "non-class" representative claims on behalf of the same group of absent persons, the representative claims are "claims of the individual class members" that "shall be aggregated to determine whether the matter in controversy exceeds . . . $5,000,000" under 28 U.S.C. § 1332(d)(6).

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## INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) and the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) respectfully submit this brief amicus curiae in support of Petitioners.[1] Founded in 1973, PLF is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF's Free Enterprise Project engages in litigation, including the submission of amicus briefs, in cases affecting America's economic vitality, and in particular in cases involving abuses of class action procedures, which harm businesses, and stifle entrepreneurialism and job creation. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1970 (2012); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009).

NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. The NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses such as the ability to remove significant class actions to federal court. *See, e.g.*, *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014) (right to remove cases is essential for ensuring basic fairness for small business defendants).

Both Amici believe that the Private Attorney General Act "representative" actions should be considered equivalent to standard class actions for the purpose of determining whether a case is subject to removal under the Class Action Fairness Act.

## INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Marley Castro, purporting to represent employees of ABM Industries, Inc. (a janitorial service company), sued in state court under PAGA and other laws,

alleging that ABM failed to properly reimburse business-related expenses related to personal cell phone use. Pet. App. 9a, 11a. PAGA is a California bounty-hunter statute that invites employees, as "representatives" of all similarly situated employees, to sue employers and seek significant statutory penalties, which are payable in part to the plaintiffs (and plaintiffs' counsel) and in part to the state. Cal. Lab. Code § 2699(a). PAGA claims are especially popular in California since the California Supreme Court and the Ninth Circuit Court of Appeals both held that arbitration contracts cannot cover such claims. *See CLS Transportation Los Angeles v. Iskanian*, 59 Cal. 4th 348, 359 (2014), *cert. denied*, 135 S. Ct. 1155 (2015); *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 427 (9th Cir. 2015) (adopting *Iskanian* rule). PAGA claims must be litigated in court, and plaintiffs prefer state court. ABM sought removal of the case because CAFA allows removal of class actions when the amount in controversy exceeds $5 million, as this case does.

Ninth Circuit law forbids consideration of PAGA claims to determine the amount in controversy and the case was remanded to state court. This case plainly demonstrates how the Ninth Circuit uses a two-step process to effectively carve out employees' class actions from the federal courts: First, in *Baumann v. Chase Investment Services Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014), the court held that a PAGA representative action is not a "class action" as defined by CAFA because PAGA actions lack the procedural protections of Federal Rule of Civil Procedure 23. This decision conflicts with other Circuits, which have held that a defendant may remove state law representative actions, even when those actions lack the federal

procedural safeguards. Second, in *Yocupicio v. PAE Group, LLC*, 795 F.3d 1057 (9th Cir. 2015), the Ninth Circuit held that courts must disregard PAGA claims brought concurrently with class action claims in assessing CAFA's amount-in-controversy requirement. Together, as shown by the decision below, these cases require courts in the Ninth Circuit to ignore the existence of representative PAGA claims in assessing whether they have jurisdiction under CAFA—no matter how significant these representative claims may be and no matter how many absent persons are bound by the result of the litigation. *See Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009) (future plaintiffs and defendants bound by results of PAGA litigation).

The Ninth Circuit's holding defies common sense and undermines the intent and policy of CAFA, which allows defendants to remove significant cases of "national importance" to federal court. *See* CAFA, 28 U.S.C. § 1711, 119 Stat. 4 § 2 (2005). The decision below provides parties and state legislatures hostile to CAFA with a blueprint to circumvent removal under the Act even when pursuing the type of large-scale litigation contemplated by CAFA. Here, ABM removed the case to federal district court after *Baumann* was decided and before *Yocupicio*. While the case was pending in the district court, the Ninth Circuit decided *Yocupicio* and the district court subsequently remanded the case to state court. This case may present the only opportunity for this Court to review the Ninth Circuit's doctrine because no defendant can reasonably seek removal of PAGA claims in light of *Yocupicio*.

Moreover, private attorney general acts abound in multiple states such that the consequences of the decision below are not confined to California; this is an issue of nationwide importance. The Ninth Circuit decision isolates many massive suits against CAFA removal, and threatens to undercut the Act in every state that authorizes representative suits that do not require certification akin to Rule 23. Worse, it encourages states to create new causes of action, with broad application, that lack the important due process protections of Rule 23, in order to stave off CAFA removal.

The petition for writ of certiorari should be granted.

## REASONS FOR GRANTING THE PETITION

### I

### THE NINTH CIRCUIT'S DECISION IGNORES THE OVERRIDING SIMILARITIES BETWEEN PAGA ACTIONS AND CLASS ACTIONS, IN CONFLICT WITH OTHER CIRCUITS

Congress intended CAFA as a necessary reform to class action abuse. The law's committee report recounts the gamesmanship of class action counsel in seeking state jurisdictions most friendly to their claims. S. Rep. No. 109-14, at 23 n.100 (in litigation over Firestone tires, approximately 100 virtually identical class actions seeking to represent the same purported class members were filed in courts all over the country). The report also documents how class action counsel leverage these cases to obtain fees for themselves—while class members receive very little.

*Id.* at 14 (An Alabama state court approved a settlement awarding less than *nine dollars* to each class member and nearly *$9 million* to class counsel). In response, CAFA expanded federal courts' jurisdiction over class action lawsuits, and enacted a "Consumer Class Action Bill of Rights" to limit class action settlements practices. *See* 28 U.S.C. § 1332, *et seq*. CAFA relies on federal courts to police class actions more rigorously and protect absent class members' and defendants' constitutional due process rights. *See Hay v. Indiana State Bd. of Tax Comm'rs*, 312 F.3d 876, 879 (7th Cir. 2002) ("Jurisdiction is the . . . power to declare law, . . . and without it the federal courts cannot proceed. Accordingly, not only may the federal courts police subject matter jurisdiction *sua sponte*, they must.").

Private attorney general actions, such as those authorized by PAGA, share many of the same characteristics as typical class action lawsuits brought pursuant to Rule 23 or the state equivalent. *See, e.g.*, John C. Coffee Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 671-72 (1986) (using "class action" and "private attorney general" interchangeably); William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 Vand. L. Rev. 2129, 2148 (2004) (A private attorney general is a "class action attorney who pursues representative litigation on behalf of a group of private citizens" and whose "role is often authorized by the class action rules enabling representative litigation and by common law or statutory rules authorizing fee shifting."); *see also Hansberry v. Lee*, 311 U.S. 32, 39 (1940) (using "class" and

"representative" action interchangeably). Both PAGA representative claims and class actions involve several plaintiffs aggregating their claims for purposes of deterrence and efficiency, often seeking massive potential damages. *See* Lauren D. Fredricks, *Removal, Remand, and Other Procedural Issues Under the Class Action Fairness Act of 2005*, 39 Loy. L.A. L. Rev. 995, 997 (2006). This case has all of the hallmarks of a "class action." *Id.* (A class action "is a representative suit on behalf of a group of people similarly situated" that "aim[s] to promote judicial economy and efficiency, protect defendants from inconsistent obligations . . . provide access to judicial relief for small claimants, and . . . deter wrongdoing.").

Like class actions, representative actions are subject to abuse. Matthew J. Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 446 (2016) (PAGA's lack of due process protection "allows complex representative actions to advance through the court system far longer than the normal class action—accruing litigation expenses all along the way," thereby creating "an incentive for employers to settle even in the face of a potentially meritless claim."). For example, because PAGA actions bind absent plaintiffs and provide for attorney fees, they present the same possibility as in class actions that the class representative's and attorney's interests will differ among themselves and with the absent members' best interests. *See, e.g.*, *Rodriguez v. Disner*, 688 F.3d 645, 651 (9th Cir. 2012) (noting conflicts between class counsel, named plaintiffs, and absent class members). PAGA cases are subject to blackmail settlements in cases where the infractions are trivial, but the damages and transaction costs at stake are colossal.

*See* Goodman, *How to Manage the Unmanageable*, 56 Santa Clara L. Rev. at 447-48 (Because PAGA claims need not meet predominance standards, employer-defendants are faced with costly individual assessments on top of the damages and fees sought by counsel.); *Urbino v. Orkin Servs. of Cal., Inc.*, 726 F.3d 1118, 1121 (9th Cir. 2013) (representative PAGA claim on behalf of 800 plaintiffs).

It is no secret that class action attorneys and plaintiffs prefer state courts. Although intended to stop "artful pleading," CAFA "inspired some of the most creative lawyering in recent decades," as class action attorneys labored to keep their cases in state court. *See* Linda S. Mullenix, *Class Actions Shrugged: Mass Actions and the Future of Aggregate Litigation*, 32 Rev. Litig. 591, 593, 614 (2013). Plaintiffs have tried the tactic of stipulating to damages below CAFA's minimum threshold, *see Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (holding that a non-binding stipulation cannot prevent removal under CAFA; but a binding stipulation can defeat removal), and filing multiple, identical suits with fewer than 100 plaintiffs to evade removal. *See Anderson v. Bayer Corp.*, 610 F.3d 390, 392-93 (7th Cir. 2010) (plaintiffs filed five separate cases, each with under 100 plaintiffs). The decision below encourages class action plaintiffs to re-style their class action lawsuit as a "non-class" representative suit—by simply adding a PAGA claim—in order to achieve their goal of avoiding federal court.

The overriding similarities between class actions and "representative actions" under PAGA suggests that PAGA actions are subject to the same type of abuse that motivated CAFA, and would benefit from

removal to federal courts. Goodman, *How to Manage the Unmanageable*, 56 Santa Clara L. Rev. at 420 ("PAGA potentially functions as a 'back-door' route to a class action lawsuit, which greatly increases the potential liability for an employer-defendant."). Nevertheless, the Ninth Circuit ignored these overriding similarities and held that massive actions brought under PAGA evade CAFA removal because they do not contain Rule 23-like procedures. *See Baumann*, 747 F.3d at 1123.[2]

The Ninth Circuit decision conflicts with other circuits holding that cases that contain a fiduciary duty to absent class members, however denominated, are equivalent to class actions, and are therefore removable to federal court under CAFA. *See Addison Automatics, Inc. v. Hartford Cas. Ins. Co.*, 731 F.3d 740, 743-44 (7th Cir. 2013) (permitting removal of a case that was "in substance a class action," despite the plaintiff's attempt to "disguise the true nature of the suit"); *Brown v. Mort. Elec. Registration Sys., Inc.*, 738 F.3d 926, 931-33 (8th Cir. 2013) (treating an "illegal-exaction action" authorized by state law as a class action for purposes of CAFA removal). This split will generate the forum shopping that Congress sought to prevent, and therefore requires resolution by this Court.

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[2] This evasion of Rule 23 cannot be reconciled with this Court's decision in *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, which held that Rule 23 automatically applies in all civil actions in district courts "regardless of its incidental effect upon state-created rights." 559 U.S. 393, 410 (2010).

## II

## THE NINTH CIRCUIT'S END-RUN AROUND CAFA IS A MATTER OF NATIONAL IMPORTANCE

### A. States Across the Nation Have Laws Similar to PAGA

The increasing number of "representative actions" will expand the significant loophole created by the Ninth Circuit, creating a national issue of great importance. States within and outside the Ninth Circuit encourage bounty-hunting private parties to bring lawsuits on behalf of large groups to enforce state labor laws. *See, e.g.*, 820 Ill. Comp. Stat. Ann. 115/11 (Illinois Wage Payment and Collection Act authorizes actions "brought by one or more employees for and on behalf of themselves and other employees similarly situated"); Mass. Gen. Laws Ann. ch. 149, § 150 (permitting representative action for any lost wages or other benefits); *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 611, 618 (Minn. 2008) (Minnesota's Fair Labor Standards Act and Payment of Wages Act can be enforced by privately brought civil actions with penalties payable to the employees); *Gafur v. Legacy Good Samaritan Hosp. & Med. Ctr.*, 185 P.3d 446, 449 (Or. 2008) (Or. Rev. Stat. § 653.055 provides private right of action to pursue claims that employer failed to provide paid rest breaks); Okla. Stat. Ann. tit. 40, § 165.9 (employee can sue to enforce labor law on behalf of self or others); *German v. Wisconsin Dep't of Transp., Div. of State Patrol*, 235 Wis. 2d 576, 585, 596 (1998) (employees authorized by Wis. Stat. § 109.03(5) to enforce administrative wage regulations).

The PAGA loophole will not be restricted to employment law. Many states also have consumer protection statutes that deputize private parties to sue on behalf of large classes to enforce laws that prohibit false or misleading advertisements, and other unfair trade practices. Indeed, every state has authorized some form of a private cause of action to enforce its consumer protection laws. *See, e.g.*, Tenn. Code Ann. §§ 47-18-1509(b), 47-18-1510(b) (any individual may sue on behalf of others to enforce consumer protection laws with civil penalties payable to the general fund); La. Rev. Stat. Ann. § 45:817 (same); Kan. Stat. Ann. § 50-634 (individual may sue to obtain declaratory and injunctive relief, civil penalties, or damages, or may sue in a class to obtain declaratory and injunctive relief); Or. Rev. Stat. § 646.638 (authorizing civil action on behalf of others); Conn. Gen. Stat. Ann. § 42-110g (same); Alaska Stat. Ann. § 45.50.531 (permitting civil action with portion of punitive damages payable to state); Wash. Rev. Code Ann. § 19.86.090 (permitting individual civil action for violation of unfair business practices law); Wis. Stat. § 100.20 (same); Minn. Stat. § 8.31 (same); *see also* Rebecca Eschler Russell, *Unlawful Versus Unfair: A Comparative Analysis of Oregon's and Connecticut's Statutes Encouraging Private Attorneys General to Protect Consumers*, 47 Willamette L. Rev. 673, 675 (2011).

Labor and consumer protection laws are the very types of lawsuits most likely to be brought as class actions. Courts may likewise find these representative actions to be outside the purview of the CAFA, expanding the Ninth Circuit's already gaping loophole.

### B. The Decision Below Encourages States to *Reduce* Nonparty Protections in Representative Actions, Raising Due Process Concerns

While aggregate litigation offers certain benefits—such as efficiency and deterrence—it also limits the ability of class members to participate in judicial proceedings, and makes it difficult for defendants to present individualized defenses. Class and representative actions are thus, by their nature, in tension with due process. Though CAFA was enacted with the intent of bolstering due process protections for parties in lawsuits involving large numbers of absent parties, the Ninth Circuit's decision turns CAFA on its head, and creates an incentive for states to minimize due process protections in representative actions.

In class actions certified under Rule 23 or a state equivalent, class certification serves an important gatekeeping role that protects the due process rights of absent class members. Numerosity, commonality, and typicality requirements ensure that the class representatives' interest are aligned with the absentee members. *See Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001) (Rule 23 has "constitutional dimensions," and "implicates the due process rights of all members who will be bound by the judgment."). Rule 23 also ensures that the defendants are able to present sufficiently individualized defenses. *See Wal-Mart Stores*, 564 U.S. at 356-57. Class certification further provides a bulwark against frivolous litigation. Because it is expensive for the party that loses a class certification decision to continue the litigation, class certification

determinations are often outcome-determinative. *See* Manual for Complex Litigation § 30.1, at 212 (3d ed. 1995). This is especially true for defendants, who are under tremendous pressure to settle after a class is certified due to the potential for high, aggregated damages. *See, e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (defendants facing large damage awards against certified classes "will be under intense pressure to settle").

The Ninth Circuit's PAGA exception allows those parties that are hostile to federal removal to cloak their class actions in the garb of a PAGA representative suits to evade CAFA, while still binding nonparties. This Court generally demands that any litigation that intends to bind nonparties comport with class certification rules. *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (general rule forbids nonparty preclusion outside the limited, narrow exception of certified class actions); *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (The Court "could not allow 'circumvent[ion]' of Rule 23's protections through a 'virtual representation doctrine that allowed courts to 'create de facto class actions at will.'"). PAGA is particularly subversive when it is combined with class action claims, as is in this case. Plaintiffs' counsel can pressure the defendant-employer to allocate the bulk of a settlement to the class action claims, which are not shared with the state, with just a nominal amount allocated to the PAGA claims. Goodman, *How to Manage the Unmanageable*, 56 Santa Clara L. Rev. at 449.[3] The problem is increasing: PAGA claims have

[3] Citing *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324 AWI SKO, 2012 WL 5364575, at *2-3 (E.D. Cal. Oct. 31, 2012) (continued...)

increased over 200% since 2000, and over 400% since 2004. *Id.* at 415.

Representative actions under PAGA present the same due process concerns as class actions. Yet the Ninth Circuit has created an incentive for states that wish to evade CAFA to enact new, mass actions that lack Rule 23's important protections. This flips CAFA, which sought to protect absent parties and defendants in large, aggregate litigation, on its head, and presents serious due process concerns for both parties.

## CONCLUSION

PAGA representative actions should be either construed as "class actions" under CAFA or considered equivalent to class actions for the purpose of determining whether a case may properly be removed to federal court under CAFA. Otherwise, state legislatures are encouraged to create "representative actions" that offer fewer due process protections than traditional class actions with the object of evading the Supremacy Clause and preventing those actions from being litigated in a federal forum.

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[3] (...continued)
(approving settlement for $3.7 million with $10,000 allocated towards PAGA); *Reed v. Thousand Oaks Toyota*, No. 56-2012-00419282-CU-OE-VTA, 2013 WL 8118716 (Cal. Super. Ct. Apr. 8, 2013) (class action settlement approved for $108,624, with $1,500 allocated towards PAGA penalties); *Bolton v. U.S. Nursing Corp.*, No. C 12-4466 LB, 2013 WL 5700403 (N.D. Cal. Oct. 18, 2013) (approving class action settlement for $1,700,000, with $15,000 allocated towards PAGA).

The petition for a writ of certiorari should be granted.

DATED: June, 2016.

Respectfully submitted,

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