No. 15-1427

In the Supreme Court of the United States

ABM INDUSTRIES, INC., ABM ONSITE SERVICES-WEST, INC., ABM SERVICES, INC., ABM JANITORIAL SERVICES-NORTHERN CALIFORNIA, INC., and ABM JANITORIAL SERVICES, INC.,

Petitioners,

v.

MARLEY CASTRO and LUCIA MARMOLEJO, on behalf of themselves and all other similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, and has participated as *amicus curiae* in numerous cases addressing jurisdictional issues.

The Chamber's members are frequently defendants in class actions and representative proceedings removed to federal courts on the basis of diversity jurisdiction. In addition, the Chamber was involved—on behalf of its members—in organizing support for the class action reforms reflected in the Class Action Fairness Act (CAFA). The Chamber's members have a strong interest in ensuring that CAFA's rules governing removal are applied as Congress intended: to establish the federal courts as an available forum for all important interstate class actions.

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[1] Pursuant to Rule 37.6, 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. All parties have granted blanket consent to the filing of *amicus* briefs, and their consent letters are on file with the Clerk's office. Pursuant to Rule 37.2(a), timely notice was provided to petitioners. Respondents were provided with late notice of the intent to file this brief, but have indicated that they consent to the filing of this brief.

Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC has filed *amicus* briefs on behalf of the retail industry in several of the Court's recent class action cases, including *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011).

Amici have a strong interest in the questions presented by the petition. If the Ninth Circuit's refusal to permit removal of representative actions under California's Private Attorney General Act is permitted to stand, plaintiffs will be able to construct complaints to avoid federal jurisdiction under CAFA—thereby denying employers, including many of *amici*'s members, access to federal courts and frustrating Congress's objectives in enacting CAFA.

INTRODUCTION AND SUMMARY OF ARGUMENT

Two recent decisions of the Ninth Circuit have placed so-called representative actions under California's Private Attorney General Act (PAGA) beyond the reach of the Class Action Fairness Act (CAFA). See *Baumann* v. *Chase Inv. Servs. Corp.*, 747 F.3d 1117 (9th Cir.), *cert. denied*, 135 S. Ct. 870 (2014); *Yocupicio* v. *PAE Grp., LLC*, 795 F.3d 1057 (9th Cir.

2015). These cases hold that PAGA claims cannot be removed under CAFA or aggregated with other class claims in order to satisfy CAFA's $5 million amount in controversy—even though there is rarely a dispute that well over $5 million is at stake in most PAGA cases.

As petitioners explain, the Ninth Circuit's approach to CAFA jurisdiction cannot be squared with the statutory text or this Court's precedents and conflicts with the approach of other circuits to defining a "class action" under CAFA. Pet. 12-28.

Those are reasons enough to grant the petition. But review here is also essential because of the issue's exceptional importance to employers throughout the country's most populous State. The Ninth Circuit's decisions will have serious repercussions for businesses with employees in California, and this petition likely presents this Court's last opportunity to rectify them.

PAGA litigation is growing rapidly. Representative PAGA actions allow plaintiffs (and their counsel) to seek the enormous potential recoveries that result from aggregating the claims of other persons through traditional class actions. They are brought on behalf of large classes of absent employees; the aggregated statutory penalties under PAGA easily match or even exceed the potential recovery in a class action; and absent employees are bound by the resulting judgment.

But by styling their class claims as PAGA representative actions, California plaintiffs can avoid the strictures of CAFA and secure a state-court forum for those claims—despite Congress's clear intent in en-

acting CAFA to have interstate cases of national importance heard in *federal* court.

Plaintiffs' lawyers are taking advantage of this opportunity. The number of PAGA claims filed has been increasing annually as plaintiffs have sought to circumvent the class certification requirements of Federal Rule 23 or their state law analogs. And that number has further skyrocketed since both the California Supreme Court and the Ninth Circuit have exempted PAGA claims from the coverage of employment arbitration agreements. The growth in PAGA actions will continue to accelerate if the decision below is permitted to stand, allowing plaintiffs to bring massive cases that look and feel like interstate class actions in state court free from removal under CAFA.

Finally, it is imperative that the Court seize *this* opportunity to review the Ninth Circuit's erroneous interpretation of CAFA in the PAGA context because this case could well be the last opportunity to do so. *Baumann* and *Yocupicio* are binding precedents in the Ninth Circuit, and any defendant who seeks to remove a PAGA case would therefore face certain losses in the district court and court of appeals, and would further run the risk of being ordered to pay the other side's attorney's fees under CAFA.

Few, if any defendants in the Ninth Circuit will be willing to expose themselves to such risk in order to again tee up the issues here for this Court's review. And there is no point in waiting for a circuit split to arise: because PAGA is a California-specific statute, it is hard to imagine PAGA claims arising anywhere *but* the Ninth Circuit.

In short, the need for review here could scarcely be more urgent. This Court should grant review and affirm that representative PAGA actions are removable under CAFA and that PAGA claims can be aggregated with other "class" claims for amount-in-controversy purposes.

ARGUMENT

I. The Ninth Circuit's Approach To CAFA Removal Will Allow Plaintiffs To Evade Federal Jurisdiction By Repleading Class Actions As PAGA Claims.

CAFA was enacted to "ensur[e] Federal court consideration of interstate cases of national importance." *Standard Fire Ins. Co.* v. *Knowles*, 133 S. Ct. 1345, 1350 (2013) (internal quotation marks omitted). Congress intended to prevent lawyers from "gam[ing] the procedural rules" by structuring class actions to avoid federal diversity jurisdiction. S. Rep. No. 109-14, at 4 (2005). Thus, as this Court has explained, CAFA's provisions "'should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed.'" *Dart Cherokee Basin Operating Co.* v. *Owens*, 135 S. Ct. 547, 554 (2014) (quoting S. Rep. No. 109-14, at 43).

The Ninth Circuit's approach to CAFA removal undermines Congress's "strong preference" for federal jurisdiction in significant class actions. That court has held that PAGA actions are not "class actions" removable under CAFA, *Baumann*, 747 F.3d at 1120-24; and that PAGA claims cannot be aggregated with other class claims for purposes of satisfying CAFA's amount in controversy requirement. *Yocupicio*, 795 F.3d at 1060-62. The court of appeals' decisions thus

provide plaintiffs' lawyers with an easy-to-follow roadmap for evading CAFA: recast as a representative PAGA action those claims that would ordinarily be brought as sizable employment class actions, and thereby avoid federal jurisdiction.

A. Plaintiffs Are Increasingly Turning To PAGA Actions As A Substitute For Employment Class Actions.

Dressing up employment class actions in the garb of representative PAGA actions has become an attractive strategy for plaintiffs' lawyers for two principal reasons: (1) PAGA actions closely resemble class actions in numerous respects—but without the certification requirements rooted in due process; and (2) PAGA actions have afforded plaintiffs the opportunity to circumvent federal jurisdiction under CAFA.

1. PAGA actions are indistinguishable from class actions in most material respects.

First, PAGA claims are brought on behalf of the plaintiff employee "and other current or former employees" who are not parties to the action. Cal. Lab. Code § 2699(a); see also *id.* § 2699(g)(1) (providing that penalties may be obtained on behalf of absent employees "against whom one or more of the alleged violations was committed"). As petitioners explain, such virtual representation is the quintessential characteristic of a class action. *See, e.g.*, *Black's Law Dictionary* 304 (10th ed. 2014) (defining "class action" as "[a] lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group"); see also Pet. 22 & n.4 (collecting other authorities).

Second, PAGA actions typically present the same high stakes as traditional class actions. Like a class action, PAGA aggregates monetary claims on behalf of named and absent employees alike. See Cal. Lab. Code § 2699(g)(1). Remedies in a representative PAGA action are assessed against the employer on a "per pay period" basis for each "aggrieved employee" affected by each claimed violation of the California Labor Code. Cal. Lab. Code § 2699(f)(2). Specifically, PAGA authorizes a statutory penalty of $100 per employee per pay period for the first violation, and $200 per employee per pay period for any subsequent violation (unless the underlying provision of the California Labor Code specifically provides for a different civil penalty). *Ibid.*

These penalties add up fast—because cases usually involve large numbers of employees and pay periods extending for a year or more—and quickly can reach massive amounts comparable to the potential damages in class actions. Compare *Kilby* v. *CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013) ("Even a conservative estimate would put the potential penalties in [PAGA] cases in the tens of millions of dollars."), with *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("Even in the mine-run case, a class action can result in potentially ruinous liability.") (internal quotation marks omitted). Indeed, in some PAGA cases, the fines to which an employer could be subject are substantially *higher* than the actual damages that would have been awarded had the suit been brought as a class action. Matthew J. Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 415 (2016).

Third, in PAGA cases, as in class actions, absent employees are "bound by the judgment"; their rights are determined by the outcome of the PAGA action. *Arias* v. *Superior Court*, 209 P.3d 923, 933-34 (Cal. 2009). Indeed, PAGA actions are class actions, but without the safeguards required by due process: Because PAGA does not provide for basic class procedures such as notice and the opportunity to opt out, absent employees can have their PAGA claims released without even the potential to contest that result.

2. At one time, PAGA claims were brought only on "the coattails of traditional class claims," largely because of the way in which the monetary judgment in a PAGA case is allocated. Robyn Ridler Aoyagi & Christopher J. Pallanch, *The PAGA Problem: The Unsettled State of PAGA Law Isn't Good for Anyone*, 2013-7 Bender's California Labor & Employment Bulletin 1-2 (2013). Employees receive 25% of the recovery; the remaining 75% is remitted to the state's Labor and Workforce Development Agency. Cal. Lab. Code § 2699(i). As a result, plaintiffs preferred the larger share of the recovery available to them in class actions. See Aoyagi & Pallanch, *supra*, at 1-2 (noting the "strong incentive" for plaintiffs to prefer class claims over PAGA claims because of the allocation of PAGA proceeds).

In recent years, however, the business of PAGA litigation has exploded. The number of PAGA suits filed increased by 400% between 2005 and 2013. Emily Green, *An alternative to employee class actions*, L.A. Daily J. (Apr. 16, 2014). Counsel's review of California state court dockets using electronic databases shows that this increase in PAGA claims has continued to the present, with hundreds of PAGA

claims already filed in California state courts in the first half of 2016.[2]

The Ninth Circuit's restrictive approach to CAFA removal is fueling this trend. More and more representative employee-plaintiffs invoke PAGA in order to preclude removal to federal court.

The rise in PAGA litigation also results from plaintiffs' efforts to evade their arbitration agreements: Both the California Supreme Court and the Ninth Circuit have held that employees cannot waive their right to bring PAGA claims by agreeing to arbitrate disputes on an individual basis, notwithstanding the Federal Arbitration Act (FAA). *Iskanian* v. *CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015); *Sakkab* v. *Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015).

In *amici*'s view, neither of these decisions can be squared with *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011), in which this Court held that the FAA preempts California's state-law rule against arbitration agreements containing class action waivers. See also *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468 (2015) ("The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authorita-

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[2] Counsel searched California state court dockets in Bloomberg Law for each year going back to 2005 using the following search terms: "private attorney general act" OR "PAGA" OR "private attorneys general act" OR "private attorney generals act" OR "private attorney general" OR (labor n/20 2699) OR (labor n/20 2698). That search yielded 592 results for 2016. While not every result represents a separate claim filed under PAGA, the results show that many of them do represent distinct PAGA actions filed this year.

tive interpretation of that Act."). And in an appropriate case, this Court should hold that the rules announced in *Iskanian* and *Sakkab* are preempted by the FAA.

For the time being, however, the ability of plaintiffs to circumvent *Concepcion* and avoid arbitration of representative PAGA claims is a compelling reason why employees and their lawyers are filing PAGA actions raising claims that otherwise would be asserted as traditional class actions. See Tim Freudenberger et al., *Trends in PAGA claims and what it means for California employers*, Inside Counsel (Mar. 19, 2015) (noting that in the wake of *Concepcion* PAGA has become "a particularly attractive vehicle for plaintiffs' attorneys to bring claims against employers that instituted mandatory arbitration agreements"); Erin Coe, Iskanian *Ruling to Unleash Flood of PAGA Claims*, *Law360* (June 24, 2014).

A number of commentators have expressly endorsed the strategy of using PAGA claims to circumvent federal jurisdiction, class certification requirements, and arbitration agreements. One has advocated, for instance, that plaintiffs use PAGA or state *qui tam* lawsuits to avoid arbitration clauses and "bypass[]" both "class certification requirements and CAFA's removal jurisdiction." Aaron Blumenthal, *Circumventing* Concepcion: *Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 Cal. L. Rev. 699, 744 (2015). And a law professor has described PAGA claims as a model for "private aggregate enforcement of * * * employment laws without triggering FAA preemption or vulnerability to contractual class waivers."

Janet Cooper Alexander, *To Skin A Cat: Qui Tam Actions As A State Legislative Response to* Concepcion, 46 U. Mich. J.L. Reform 1203, 1208-09 (2013).

The tactic of reframing employment class actions as PAGA suits is likely to proliferate further if this Court leaves undisturbed the Ninth Circuit's holdings that PAGA suits cannot be removed under CAFA. See Erin Coe, *9th Circ.'s* Chase *Ruling to Trigger More PAGA Suits*, *Law360* (Mar. 17, 2014). And that means an ever-increasing number of representative actions will fall outside CAFA's scope—precisely the opposite of what Congress intended.

B. The Rise In PAGA Litigation Is An Issue Of Exceptional Importance.

These dramatic increases in PAGA litigation will have serious consequences for employees, employers, and the courts.

Though PAGA is a California-specific statute, the sheer size of California's labor market means that an outsized portion of the American workforce is covered by PAGA. California today is home to about 12% of the nation's workers, meaning that over a tenth of the *entire American workforce* is affected by PAGA suits.[3]

California also is a popular magnet for much of the Nation's class action litigation; more class ac-

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[3] According to the Bureau of Labor Statistics, as of April 2016 California had an employed workforce of 18,070,900. Bureau of Lab. Statistics, *California*, https://perma.cc/9HDF-JL7S. At that time, the United States employed workforce was 151,075,000. Bureau of Lab. Statistics, *Employment status of the civilian population by sex and age*, https://perma.cc/GNW6-5YYY.

tions are filed there than in any other State. 1-1 Littler Mendelson on Employment Law Class Actions § 1.3.7 (2014). That is especially true with respect to *employment* class actions—most California class actions involve wage and hour claims, *ibid.*, and the four federal district courts in California accounted for *40 percent* of all employment class actions heard in federal court in recent years. Theodore Eisenberg & Geoffrey Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 258 (2010); see also Cal. Chamber of Commerce, *Employment Litigation on the Rise*, *in* 2016 CALIFORNIA BUSINESS ISSUES 154, 154 (2016) (observing that "wage-and-hour class action is the top area of litigation," and that "the most dominant trend has been a steep rise in the number of class action lawsuits filed in state courts alleging violations of California's overtime laws or the California Labor Code and wage & hour regulations") (alterations and quotation marks omitted).

Due to the size of the California labor market and the propensity of plaintiffs to file employment class actions there, the Ninth Circuit's precedents allowing class claims to be repackaged as PAGA claims significantly erode Congress's goal of federal adjudication of large-scale cases of nationwide importance.

Moreover, at present, PAGA is "a unique statute," *Urbino* v. *Orkin Servs. of California, Inc.*, 726 F.3d 1118, 1120 (9th Cir. 2013), with no true analog in other states. But many observers have suggested that PAGA provides a model that other states could adopt in order to keep representative actions in their courts despite CAFA (and *Concepcion*). See, *e.g.*, Blumenthal, *supra*, at 742; Alexander, *supra*, at 1234. Were that to occur at some point in the future,

employment plaintiffs across the country would have a means to avoid the provisions of CAFA.

Likewise, while PAGA is limited to labor claims, the Ninth Circuit's reasoning would presumably apply with equal force if California enacted a similar statute applying to claimed violations of the state's consumer protection or unfair competition laws—or any other form of massive aggregate litigation it wanted to exempt from federal court scrutiny. Review is warranted to avoid the spread of this already-disturbing evasion of CAFA.

II. This Petition Presents The Court's Best—And Possibly Only—Chance To Review The Critical Issue Of CAFA's Application To PAGA Actions.

Review in this case is further warranted because the question presented regarding the application of CAFA to PAGA actions is unlikely to be presented in a future case if the Ninth Circuit's approach here is permitted to stand.

Future litigants will almost certainly be deterred from removing PAGA cases to federal court because they will fear efforts by plaintiffs' counsel to seek attorney's fees under 28 U.S.C. § 1447(c), which authorizes awards of attorneys' fees "where the removing party lacked an objectively reasonable basis for seeking removal." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 141 (2005)).

Amici believe that a defendant would have an objectively reasonable basis to remove a PAGA suit to preserve its right to seek en banc reconsideration by the Ninth Circuit or review by this Court. Yet as a practical matter a defendant is unlikely to be willing to do so, faced with the prospect of certain losses be-

fore the district court and the Ninth Circuit in light of *Baumann* and *Yocupicio*—particularly if review is denied in this case.[4]

Similar circumstances were cited by this Court in *Dart Cherokee*, where the Court emphasized the importance of reviewing a significant question under CAFA that was unlikely to arise again in the Tenth Circuit because "no responsible attorney [was] likely to renew the fray" by raising the issue again. *Dart Cherokee*, 135 S. Ct. at 556. As in *Dart Cherokee*, review is warranted to prevent the Ninth Circuit's "erroneous view of the law" from becoming "frozen in place" and "fastened on district courts within the Circuit's domain." *Id.* at 555, 556, 558.

Nor is there any reason for this Court to delay review. PAGA is a California statute and the application of CAFA to PAGA actions is thus incapable of arising outside of the Ninth Circuit. Accordingly, delaying review would not lead to any further percolation of the issue among the lower courts. The Court should grant review to correct the Ninth Circuit's pernicious interpretation of CAFA.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] Petitioners here removed the operative complaint at a time when *Yocupicio* had not been decided. See Pet. 10-11, 28-29.

Respectfully submitted.

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