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 others similarly situated,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR *AMICI CURIAE* INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS


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## INTEREST OF THE *AMICI CURIAE*[1]

*Amicus curiae* International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practices concentrate on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without incurring unreasonable cost.

The IADC has a particular interest in the fair and efficient administration of class actions. The IADC has participated as *amicus curiae* in a number of class and representative actions, as well as Class Action Fairness Act (CAFA) cases before this Court, including: *The Proctor & Gamble Co. v. Dino Rikos*, U.S. Supreme Court Case No. 15-835; *Exxon Mobil Corp. v. State of New Hampshire*, U.S. Supreme Court Case No. 15-933; *Microsoft Corp. v. Baker*, U.S. Supreme Court Case No. 15-457; *Tyson Foods, Inc. v. Bouaphakeo*, U.S. Supreme

[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amici curiae* and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties were timely notified of *amici*'s intent to file this brief under Supreme Court Rule 37.2(a), and all parties have filed general letters with the Clerk's office consenting to the filing of *amicus* briefs.

Court Case No. 14-1146; *Dart Cherokee Basin Operating Company, LLC v. Owens*, U.S. Supreme Court Case No. 13-719; *Standard Fire Insurance v. Knowles*, U.S. Supreme Court Case No. 11-1450; and *Wal-Mart Stores, Inc. v. Dukes*, U.S. Supreme Court Case No. 10-277.

*Amicus curiae* the Atlantic Legal Foundation (Atlantic Legal) is a non-profit public interest law firm founded in 1976. Its mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists.

Atlantic Legal has focused on issues affecting the market economy, and constitutional and procedural issues, including abuse of class actions. Atlantic Legal has recently filed *amicus curiae* briefs in a number of class action cases in this Court, including *Dow Chemical Company v. Industrial Polymers, Inc.*, U.S. Supreme Court Case No. 14-1091; *Mullins v. Direct Digital*, U.S. Supreme Court Case No. 15-549; *Tyson Foods v. Bouaphakeo*, U.S. Supreme Court Case No. 14-1146; and *Wal-Mart Stores, Inc. v. Dukes*, U.S. Supreme Court Case No. 10-277.

Atlantic Legal believes that the decision of the Ninth Circuit in this case is inconsistent with fundamental protections against abusive class actions and the preservation of class action defendants' due process rights embodied in CAFA.

## SUMMARY OF THE ARGUMENT

We elaborate on the first issue raised in the petition for writ of certiorari in this case: whether an action brought under state law authorizing a plaintiff to pursue claims on behalf of absent persons and to obtain a judgment binding them is a "class action" that is removable to federal court under CAFA. We urge that such an action is removable under CAFA, and that the rule articulated by the Ninth Circuit is inconsistent with the plain language and legislative history of CAFA.

CAFA provides for federal jurisdiction over class actions and similar representative actions to protect absent class members and defendants. Litigants have circumvented CAFA, however, by bringing alleged "non-class" representative actions under state statutes, which are really class actions in disguise.

One such state statute is the California Labor Code Private Attorneys General Act of 2004 (PAGA). A PAGA plaintiff brings claims on behalf of a defendant's current and former employees, and a judgment in a PAGA action binds all aggrieved employees, even those who are not a party to the proceeding. However, the

safeguards provided by Federal Rule of Civil Procedure 23 – including numerosity, commonality, or typicality – are not required in PAGA claims.

The Ninth Circuit, and three other circuits, have held that CAFA does not apply to such "non-class" representative claims because they are not sufficiently similar to Rule 23. This approach disregards Congress's directive that "lawsuits that *resemble* a purported class action should be considered class actions" under CAFA. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14 at 35 (2005) (emphasis added). The approach also disregards the key purpose of CAFA by denying class-action defendants their statutorily protected right to defend the action in federal court.

Unless this Court grants certiorari, the result will be a massive CAFA loophole, under which representative actions that offer the least protections to nonparties and defendants are exempted from CAFA.

## ARGUMENT

### I. PAGA claims are class actions in disguise, but without the procedural protections of Rule 23.

PAGA is a California statute that allows an aggrieved employee, acting as a private attorney general, to recover civil penalties for Labor Code violations. CAL. LAB. CODE § 2699; *Sakkab v. Luxottica Retail N.*

*Am., Inc.*, 803 F.3d 425, 429-31 (9th Cir. 2015); *Arias v. Superior Court*, 209 P.3d 923, 929 (Cal. 2009). The statute was enacted to address a shortage of government resources to enforce violations of the Labor Code. *Sakkab*, 803 F.3d at 429-31; *Arias*, 209 P.3d at 933.

Under PAGA, an "aggrieved employee" may bring a civil action "on behalf of himself or herself and other current or former employees." CAL. LAB. CODE § 2699(a). Of the penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the aggrieved employees. *Arias*, 209 P.3d at 929-30.

PAGA claims share key characteristics with class actions. As in a class action, a PAGA plaintiff brings claims on behalf of current and former employees, and a judgment in a PAGA action binds all aggrieved employees who are not a party to the proceeding. *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 147 (Cal. 2014); *Arias*, 209 P.3d at 933; *see also* Laura Reathaford, *PAGA Performance*, LOS ANGELES LAWYER (June 2016) ("PAGA litigations, like class actions, represent other current and former aggrieved employees for purported Labor Code violations.").

In a traditional class action, Rule 23(a) imposes four requirements to ensure that the named plaintiffs are appropriate representatives of the class – numerosity, commonality, typicality, and adequate representation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). A money judgment can bind nonparties only if class representatives adequately represent absent

class members at all times, and absent members are afforded notice, an opportunity to be heard, and a right to opt out of the class. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011).

In contrast, the California Supreme Court has held that PAGA claims need not satisfy class action requirements. *Arias*, 209 P.3d at 926. PAGA contains no requirements of numerosity, commonality, or typicality. *Sakkab*, 803 F.3d at 436. In a PAGA case, the court does not inquire into the named plaintiff's ability to fairly and adequately represent unnamed employees. *Id*. PAGA also has no requirements for notice to nonparty aggrieved employees, and nonparty employees cannot opt out of the action. *Id*.

Thus, PAGA actions have the key characteristics of a class action, without the procedural safeguards that protect nonparties and defendants.

## II. PAGA claims have become increasingly popular, in part because of their lack of representative action procedural safeguards.

PAGA actions have become an increasingly attractive way for plaintiffs to circumvent the requirements for class actions. Between 2005 and 2013, the number of PAGA lawsuits increased more than 400%, from 759 to 3,137. Cale Ottens, *Nuisance Cases Ramp Up Before High Court Weighs In*, LOS ANGELES BUSINESS JOURNAL, Nov. 10, 2014. As one commentator has explained, recent class action jurisprudence has "made obtaining

class action certification more difficult in California state court and federal court, and consequently increased the attractiveness of PAGA claims. Unsurprisingly, California plaintiffs will most likely pursue PAGA claims instead of class actions in the future." Matthew J. Goodman, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 SANTA CLARA L. REV. 413, 426-27 (2016).

The allure of PAGA claims is heightened by the potential recovery for plaintiffs and their attorneys. Although PAGA allocates just 25% of a recovery to the group of aggrieved employees, this can still result in multi-million dollar payouts. Civil penalties under PAGA are $100 for each aggrieved employee per pay period for an initial violation, and $200 for each aggrieved employee per pay period for each subsequent violation, unless a different civil penalty is specified by the Labor Code. CAL. LAB. CODE § 2699(f)(2). Prevailing employees also receive attorney's fees and costs. CAL. LAB. CODE § 2699(g)(1). Because there is no limit on the number of violations, represented employees, or pay periods, these alleged Labor Code violations can result in astronomical awards.

## III. CAFA is designed to cover representative litigation like PAGA actions.

When Congress enacted CAFA, it was concerned about sprawling and unpredictable representative litigation, such as PAGA actions.

CAFA's primary objective is to expand federal jurisdiction over large, nationally important class actions. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013); Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14 at 43 (2005). "By providing a federal forum, Congress sought to check what it considered to be the overreadiness of some state courts to certify class actions." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 459 (2010) (Ginsburg, J., dissenting).

In enacting CAFA, Congress expressed grave concerns about the proliferation of state-court class actions that employed procedures unfair to non-resident defendants. It also sought to protect the rights of absent class members in light of the harm that results from those cases in which "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." Pub. L. No. 109-2, § 2(a)(2)(A); *see also* S. Rep. No. 109-14, at 15 (lamenting the proliferation of "class action settlements approved by state courts in which most – if not all – of the monetary benefits went to class counsel" instead of class members themselves). Congress also found that "[a]buses in class actions undermine[d] the National judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution. . . ." Pub. L. No. 109-2, § 2(a)(4).

To address these concerns, CAFA lowered the barriers to federal court in class actions and "similar" lawsuits. 28 U.S.C. § 1332. CAFA adjusts the amount in

controversy requirement, dispenses with the rule that there be complete diversity (i.e., that all plaintiffs must be diverse from all defendants), and eliminates the absolute bar on removal by home-state defendants in diversity actions. *Id*.

Recognizing that class actions can take different forms, the legislature was careful to define class actions broadly. The Committee on the Judiciary noted:

> [T]he definition of "class action" is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labeled "class actions" by the named plaintiff or the state rulemaking authority. Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions.

S. Rep. No. 109-14, at 35. In keeping with this objective, Section 1332(d)(1)(B) of CAFA liberally defines a class action as "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure ***or similar State statute*** or rule of judicial procedure ***authorizing an action to be brought by 1 or more representative persons as a class action***." 28 U.S.C. § 1332(d)(1)(B) (emphasis added). A PAGA action easily falls under Section 1332(d)(1)(B) because PAGA is a "similar" state statute authorizing an action to be brought by one or more representative persons.

## IV. The Second, Third, Fourth, and Ninth Circuits have created a CAFA loophole, which encourages the proliferation of representative actions with no procedural safeguards.

Although CAFA was designed to cover representative claims like PAGA, a circuit split has arisen concerning removability of these claims under CAFA, which creates a significant loophole in CAFA's coverage.

The Ninth Circuit has construed Section 1332(d)(1)(B) to mean that a statute or rule is "similar" to Rule 23 only if it provides the same kinds of substantive protections – such as numerosity, commonality, and typicality. *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1121 (9th Cir. 2014). The Second, Third, and Fourth Circuits have reached similar conclusions. *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 216 (2d Cir. 2013); *Erie Ins. Exch. v. Erie Indemnity Co.*, 722 F.3d 154, 159 (3d Cir. 2013); *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 173-76 (4th Cir. 2011).

These courts hold that statutes like PAGA – which do not require such substantive protections – cannot be the basis for removal under CAFA. The result turns CAFA on its head: those representative actions that offer the greatest protections to nonparties and defendants can be removed under CAFA, but those representative actions that offer the least protections cannot be removed.

The Ninth Circuit's interpretation deprives absent class members and defendants of the protections that CAFA offers. When Congress enacted CAFA, it did not intend to "extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it." *McKinney v. Bd. of Trustees of Mayland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992).

The Seventh and Eighth Circuits take a different approach. These courts have held that actions may be removed under CAFA even if the action is brought under a state statute or rule that does not require compliance with Rule 23-like protections. *Addison Automatics, Inc. v. Hartford Cas. Ins. Co.*, 731 F.3d 740, 743-45 (7th Cir. 2013); *Brown v. Mort. Elec. Registration Sys., Inc.*, 738 F.3d 926, 931 (8th Cir. 2013). The dissents in *Erie Insurance* and *CVS Pharmacy* advanced similar positions and reason that "lawsuits that resemble a purported class action should be considered class actions." *Erie Ins.*, 722 F.3d at 163 (Roth, J., dissenting) ("Simply put, if it quacks like a class action, it is a class action."); *accord CVS Pharmacy*, 646 F.3d at 185 (Gilman, J., dissenting).

This Court should grant review in this case to resolve the circuit split, and then close the CAFA loophole, which encourages the proliferation of representative actions with no procedural safeguards, and denies CAFA removal to those cases that need it the most.

## CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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