No. 15-1427

IN THE

Supreme Court of the United States

ABM INDUSTRIES, INC., *ET AL.*,

Petitioners,

v.

MARLEY CASTRO AND LUCIA MARMOLEJO,
on behalf of themselves and others similarly situated,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this case, the district court remanded a case removed from state court under the Class Action Fairness Act (CAFA) because it did not meet CAFA's amount-in-controversy requirement. The grounds for the district court's order were that amounts sought in representative actions under California's Private Attorneys General Act, which are not class actions within the meaning of CAFA's jurisdictional provisions, 28 U.S.C. § 1332(d), may not be aggregated with class-action claims to satisfy CAFA's amount-in-controversy requirement. Accordingly, the question presented is:

Did the Ninth Circuit abuse its discretion in denying permission to appeal the district court's order remanding this case to state court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Constitutional Provisions, Statutes, and Rules:

Other:

INTRODUCTION

Petitioners (collectively referred to as ABM) ask this Court to review an unpublished decision of the Ninth Circuit that denied their request for permission to appeal an order remanding this case to state court. The remand order rejected ABM's second attempt to remove the case under the Class Action Fairness Act (CAFA).[1]

Two prior Ninth Circuit decisions in other cases hold that: (1) "representative actions" under California's Private Attorneys General Act (PAGA), in which individual plaintiffs seek statutory penalties on behalf of the State of California, are not "class actions" subject to removal under CAFA, *see Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117 (9th Cir.), *cert. denied*, 135 S. Ct. 870 (2014); and (2) amounts sought in claims not brought on behalf of a class, such as PAGA claims, may not be added to amounts sought in a class action to satisfy CAFA's over-$5,000,000 amount-in-controversy requirement, *see Yocupicio v. PAE Group, LLC*, 795 F.3d 1057 (9th Cir. 2015). ABM asks the Court to use this case to review *Baumann* and *Yocupicio*, but offers no persuasive reason why the Court should do so.

Relying solely on two decisions addressing very different circumstances, ABM wrongly asserts that *Baumann* conflicts with decisions of other circuits. ABM's argument recycles the claim of conflict in the *Baumann* petition for certiorari nearly two years ago—a claim no more persuasive now than it was

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[1] The first attempt ended when, after granting ABM permission to appeal an earlier remand order, the Ninth Circuit held that ABM's second removal mooted the issue appealed.

then. In the intervening two years, no court has disagreed with *Baumann*'s holding or reasoning. *Baumann* remains consistent with the circuits' agreement that CAFA's language means what it says: Actions that are not brought on behalf of a class under procedures resembling those of Federal Rule of Civil Procedure 23 are not class actions removable under CAFA. *See* 28 U.S.C. § 1332(d)(1)(B).

As for *Yocupicio*, ABM does not even contend that it implicates an intercircuit conflict. Nor could it. No appellate court has held that CAFA requires inclusion of non-class claims in determining a class action's amount in controversy, and *Yocupicio*'s holding reflects CAFA's language and purpose. There is no need for this Court to address the correctness of what is so far the only reported appellate decision on the issue.

ABM's warning that this is the Court's very last chance to address these issues is false. Issues concerning the application of CAFA's class-action definition, as well as the question of whether non-class-action claims can be added to class-action claims to meet CAFA's amount-in-controversy requirement, may arise in any circuit. If real conflicts among the circuits were to develop over those issues, there would be ample opportunity for this Court to address them. But unless and until such conflicts arise, there is no need for the Court to resolve them.

STATEMENT

1. The Private Attorneys General Act

The California statute involved here, PAGA, provides an enforcement mechanism for California's Labor Code by enlisting individual plaintiffs as private attorneys general to recover statutory penalties on behalf of the state for Labor Code violations. Under

PAGA, a share of the penalties goes to the affected employees, including the individual plaintiffs. Before PAGA's enactment in 2003, those penalties could be obtained only by the state. *See Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 145–46 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015).

PAGA provides that civil penalties for Labor Code violations may be sought not only by state agencies, but also in a representative action by "an aggrieved employee." Cal. Labor Code § 2699(g); *see also id.* § 2699(a). Any penalties recovered in a PAGA representative action "shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency …; and 25 percent to the aggrieved employees." *Id.* § 2699(i).

"A PAGA representative action is … a type of *qui tam* action," *Iskanian*, 327 P.3d at 148, in that it deputizes an individual to recover penalties for the state, with a portion of that recovery going to the individual and other affected employees. PAGA reflects the California legislature's determination that because of fiscal limitations on the capacity of state agencies, it is "in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts." *Arias v. Super. Ct.*, 209 P.3d 923, 929–30 (Cal. 2009).

Because a PAGA action is aimed at deterring and penalizing Labor Code violations, and not compensating individuals for damages, "[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." *Iskanian*, 327 P.3d at 151. Thus, before filing a PAGA action, an "ag-

grieved employee" must give notice of the claimed Labor Code violations to the California Labor and Workforce Development Agency. Cal. Labor Code § 2699.3(a)(1). The agency is deemed to authorize the employee to sue on behalf of the state if it does not take its own action within time limits set by the statute. *Id.* §§ 2699.3(a)–(c), 2699(h).

PAGA actions need not be prosecuted as class actions and are commonly maintained by individual plaintiffs. *See Arias*, 209 P.3d at 929–34. PAGA actions thus require neither class certification nor notice to similarly situated employees. *See id*.

Importantly, employees are not bound by the result of a PAGA action in the same way that class actions bind members of a class, who are treated as parties once the class is certified. *See Smith v. Bayer Corp.*, 564 U.S. 299, 312–14 (2011). In contrast, other employees are bound by the result of a PAGA action only to the extent that a nonparty "would be bound by a judgment in an action brought by the government." *Arias*, 209 P.3d at 933; *see also id.* at 934 (citing Restatement (2d) of Judgments § 41(1)(d), comt. d (1982)). That is, they are bound only with respect to claims for statutory penalties, not with respect to their own, personal damages claims. *Id*.

In short, a PAGA action is not a class action. Rather, it is "representative" in the sense that the individual plaintiff represents the "same legal right and interest" as the state in seeking penalties (but not compensatory damages) for Labor Code violations. *Id.* at 933. Fundamentally, the action "is a dispute between an employer and the state, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—

that the employer has violated the labor code." *Iskanian*, 327 P.3d at 151.

2. The *Baumann* Decision

Baumann originated as a PAGA action in a California state court, seeking civil penalties for California wage-and-hour law violations. The complaint asserted only PAGA claims and sought neither money damages nor certification of a class. Claiming both conventional diversity jurisdiction under 28 U.S.C. § 1332(a) and CAFA jurisdiction under § 1332(d), the defendant removed. The district court sustained the removal on conventional diversity grounds, and the plaintiff obtained permission to appeal under 28 U.S.C. § 1292(b).

While the appeal was pending, the Ninth Circuit decided in another case that PAGA statutory penalties for violations affecting multiple employees cannot be aggregated to satisfy § 1332(a)'s $75,000 amount-in-controversy requirement. *See Urbino v. Orkin Servs. of Cal., Inc.,* 726 F.3d 1118 (9th Cir. 2013). That holding foreclosed conventional diversity jurisdiction in *Baumann*. *See Baumann*, 747 F.3d at 1120 n.1.[2] *Baumann* therefore addressed the defendant's argument for CAFA jurisdiction. The court unanimously rejected that argument, holding that a PAGA action is not a "class action" as defined in CAFA's jurisdictional provision, 28 U.S.C. § 1332(d). *Id*. at 1119.

Because the issue presented was "simply one of statutory construction," *id*. at 1124, the court began with CAFA's statutory language. CAFA defines a class

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[2] Here, ABM does not invoke conventional diversity jurisdiction, so *Urbino* is not at issue.

action potentially subject to jurisdiction under § 1332(d) 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." *Id*. at 1120 (quoting 28 U.S.C. § 1332(d)(1)(B)). Thus, the dispositive question was whether a PAGA action is "sufficiently 'similar'" to a Rule 23 class action to fall within the statutory definition. *Id*. at 1122.

The court started its analysis of that question by recognizing that the PAGA action did not invoke California's analog to Rule 23, California Code of Civil Procedure § 382. *See* 747 F.3d at 1121. Moreover, in forgoing a class action, the plaintiff had proceeded consistently with the California Supreme Court's recognition that "PAGA actions are not class actions under state law." *Id*. (quoting *Arias*, 209 P.3d at 926).

But the court did not stop there. It recognized that a PAGA action would still meet the statutory definition if it resembled a Rule 23 class action "in substance or in essentials." *Id*. (quoting *W. Va. ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169, 174 (4th Cir.) , *cert. denied*, 132 S. Ct. 761 (2011)). *Baumann* therefore conducted a detailed comparison of PAGA actions and Rule 23 class actions, guided by the Ninth Circuit's prior decision in *Washington v. Chimei Innolux Corp.*, 659 F.3d 842 (9th Cir. 2011). *Chimei* held that "*parens patriae* suits filed by state Attorneys General may not be removed to federal court because the suits are not class actions within the plain meaning of CAFA." *Id*. at 847.

The *Baumann* court cataloged a long list of fundamental differences between PAGA actions and Rule

23 class actions. Like *parens patriae* actions, and unlike Rule 23 class actions, PAGA actions lack requirements of numerosity, commonality, typicality, adequacy of representation, and notice and opt-out rights. *See* 747 F.3d at 1122–23. The court also explained that "the finality of PAGA judgments differs distinctly from that of class action judgments." *Id*. at 1123. The latter (assuming compliance with the due process requisites of notice and opt-out rights) bind class members as parties and are preclusive of all claims that class members could have brought in the action. *Id*. A PAGA action, by contrast, does not bar employees from proceeding separately to pursue available individual remedies for violations at issue in the PAGA action: It precludes only claims for statutory penalties, in the same way that an enforcement action brought directly by the state would. *Id*.

The nature of the recovery in a PAGA action also differs from claims typically asserted in class actions. PAGA penalties "primarily seek to vindicate the public interest in enforcement of California's labor law," redound primarily to the state's benefit, and do not affect the employer's liability for wages wrongfully withheld or other individual claims. *Id*.

Based on this thorough analysis, the court concluded that, "[i]n the end, Rule 23 and PAGA are more dissimilar than alike. A PAGA action is at heart a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class relief." *Id*. at 1124. Thus, the court concluded, "PAGA is not sufficiently similar to Rule 23 to establish the original jurisdiction of a federal court under CAFA." *Id*.

The defendant in *Baumann* sought review by this Court. *See* Pet. for Cert., *Chase Investment Servs*.

Corp. v. Baumann, No. 14-260 (filed Sept. 3, 2014) ("*Baumann* Pet."). This Court denied certiorari. 135 S. Ct. 870 (2014).

3. The *Yocupicio* Decision

In *Yocupicio*, the plaintiff filed a California state-court case that combined a class action seeking damages for labor code violations with a PAGA representative action seeking civil penalties. The damages sought in the class action were only about $1.7 million, far less than the over $5,000,000 required under CAFA. 28 U.S.C. § 1332(d)(2). The penalties sought for the PAGA claim totaled about $3.3 million.

The defendant removed the case under CAFA. The district court denied the plaintiff's motion to remand, holding that, although the PAGA claim was not itself a class action, the amounts sought under PAGA could nonetheless be aggregated with the amounts sought in the class action to reach the jurisdictional amount.

The Ninth Circuit granted the plaintiff permission to appeal and reversed. The court noted that the class claims in the case would satisfy CAFA's requirements of numerosity (100 class members) and minimal diversity (at least one class member must be a citizen of a different state from at least one defendant), but not its over-$5,000,000 amount-in-controversy requirement. 795 F.3d at 1060. And the PAGA claim, under *Baumann*, was not "deemed to be a class action." *Id*.

To determine whether the class and non-class claims could be aggregated, the court applied "the plain language" of CAFA in light of "the structure of the statute as a whole," and "its object and policy." *Id*. at 1060. It concluded that:

> Where a plaintiff files an action containing class claims as well as non-class claims, and the class claims do not meet the CAFA amount-in-controversy requirement while the non-class claims, standing alone, do not meet diversity of citizenship jurisdiction requirements, the amount involved in the non-class claims cannot be used to satisfy the CAFA jurisdictional amount, and the CAFA diversity provisions cannot be invoked to give the district court jurisdiction over the non-class claims."

Id. at 1062.

The court noted that, under CAFA, the "action" that must seek more than $5,000,000 is one "'filed under' class action rules 'as a class action.'" *Id*. at 1060. Moreover, the statute requires aggregation of "the claims of the individual class members." *Id*. at 1061. In both respects, "the focus is on class actions and on claims of individuals as members of the class. The provisions do not speak to claims that are not part of the class action itself." *Id*.

The court concluded that the statutory language reflected Congress's intent to confer jurisdiction over "interstate cases of national importance," *id*. at 1060 (quoting *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013)), not cases where relatively trivial class actions were combined with other claims that, by themselves, would not qualify for federal jurisdiction. "Congress showed no intent to have actions with insufficiently large class components heard in the federal courts, and filing them in or removing them to the federal courts would not comport with the language or purpose of CAFA." *Id*. at 1061.

A contrary holding, the court observed, would create federal jurisdiction over even an insignificant class action if one member happened to have a large individual claim against the defendant. *Id*. That result would amount to bootstrapping of federal jurisdiction over two claims even though there was no federal jurisdiction over either one by itself. *Id.* at 1062.

4. Facts and Proceedings in This Case

a. The Complaint—ABM (a group of several affiliated companies) provides janitorial services to other businesses. ABM requires employees to use personal cell phones to carry out their duties. Employees must use cell phones to request cleaning supplies, ask for assistance from supervisors and other employees, receive work instructions, report job-related issues, and even, in some cases, clock in and out. ABM does not permit employees to use its clients' on-site telephones for these purposes.

ABM does not reimburse workers for any of their cell phone expenses. Instead, it requires its low-paid work force to bear this burden in full, in violation of California wage laws.

This case began in October 2014, when respondents Marley Castro and Lucia Marmolejo, two of ABM's California employees, filed an action in a California state court on behalf of ABM's California employees. The action is based entirely on California law and seeks reimbursement for cell-phone expenses the workers incurred that were attributable to their work. The action as originally filed contained no PAGA claim, and its claims for reimbursement were brought as a class action.

b. First Removal and Remand—In December 2014, ABM removed the action under CAFA. ABM

contended that the action sought more than $5,000,000 on behalf of the class and thus satisfied CAFA's amount-in-controversy requirement.

On January 23, 2015, respondents filed an amended complaint, adding a PAGA claim for statutory penalties.[3] The complaint stated specifically that the reimbursement claims, but not the PAGA claim, were brought as a class action.[4] On February 24, 2015, respondents moved to remand the case to the state court because the evidence did not show that the class's reimbursement claims exceeded CAFA's $5,000,000 jurisdictional threshold.[5]

ABM responded with calculations attempting to show that the reimbursement claims barely exceeded $5,000,000.[6] ABM also argued that the amount of the new PAGA claim should be added to the amount of the class claims to determine the jurisdictional amount. ABM did not, however, assert that a PAGA representative action is itself a class action. Instead, citing the district court's opinion in *Yocupicio*, it relied on the theory that non-class claims must be aggregated with class-action claims to determine the amount in controversy.[7]

The district court remanded the case. It found that the amount in controversy on the class claims was less

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[3] PAGA requires that aggrieved employees wait a certain amount of time after providing notice to the state and the employer before amending their complaint to add claims for PAGA penalties. Cal. Labor Code § 2699.3(a).

[4] No. 4:14-cv-5359, Doc. 21, at 5 (N.D. Cal. Jan. 23, 2015).

[5] No. 4:14-cv-5359, Doc. 25, at 4–8 (N.D. Cal. Feb. 24, 2015).

[6] No. 4:14-cv-5359, Doc. 28, at 8–9 (N.D. Cal. Mar. 10, 2015).

[7] *See id.* at 11–15.

than $5,000,000 even under a "reasonable interpretation of defendants' data." Pet. App. 19a. The court held that the PAGA claim should not be considered because the validity of the removal depended solely on the claims in the complaint as originally filed, which did not include a PAGA claim. *Id*. at 15a n.4.

c. First Appeal and Second Removal—ABM sought permission to appeal under 28 U.S.C. § 1453(c) (which allows permissive appeals of CAFA remand orders), on the sole ground that the district court erred in considering only the original state-court complaint.[8] The Ninth Circuit granted permission. Before merits briefs were filed, the Ninth Circuit decided *Yocupicio*.

ABM's merits brief thus argued both that the district court erred in not considering the amended complaint containing the PAGA claim and that *Yocupicio* was wrongly decided and should be overruled. ABM's brief did not mention *Baumann*.[9]

Meanwhile, after the first remand, ABM had removed the case again. The operative state-court complaint for that removal was the amended complaint, which included the PAGA claim.

ABM's second removal notice stated that the case satisfied the amount-in-controversy requirement because the amounts sought under PAGA should be aggregated with the class claims. The notice asserted that the amount in controversy for the class claims was approximately $2.4 million, and that the PAGA claim totaled $5.6 million. The removal notice did not,

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[8] No. 15-80064, Doc. 1-2, at 3 (9th Cir. Apr. 13, 2015).

[9] No. 15-16627, Doc. 8-1 (9th Cir. Aug. 28, 2015).

however, assert that a PAGA representative action is in itself a class action (though it did incorrectly suggest that respondents' complaint asserted their particular PAGA claim on a class basis, notwithstanding the complaint's express disclaimer in that regard).[10]

The Ninth Circuit addressed ABM's appeal of the first remand order five months after the second removal. Because the second removal was undisputedly based on the amended complaint containing the PAGA claim, respondents argued that the issue on appeal—whether the district court should have considered the amended complaint rather than the original state-court complaint—was moot. After full briefing and argument, the Ninth Circuit agreed and dismissed the appeal. Pet. App. 6a–8a.

d. Second Remand and Attempted Appeal— Activity then shifted back to the district court, where respondents had again moved to remand. Relying on the Ninth Circuit's just-issued opinion in *Yocupicio*, respondents argued that the PAGA claim could not be aggregated with the class-action claims. ABM's opposition to the motion for remand conceded that *Yocupicio* resolved the issue against it.[11]

ABM argued, however, that *Yocupicio* "was wrongly decided," and asserted that "[i]t is likely that ABM will convince the Supreme Court or the en banc Ninth Circuit to overrule *Yocupicio* because it is clearly wrong for a number of reasons." Pet. App. 4a. Again, ABM did not argue that the PAGA claim was itself a

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[10] No. 4:15-cv-1947, Doc. 1, at 8–10 (N.D. Cal. Apr. 29, 2015).

[11] No. 4:15-cv-1947, Doc. 32, at 1 (N.D. Cal. Sept. 11, 2015).

class claim or that *Baumann* was wrongly decided; in fact, it did not mention *Baumann* at all.[12]

The district court remanded the case. It noted that ABM did "not directly claim *Yocupicio* is inapplicable" but only that it was wrongly decided. Pet. App. 4a. The court not surprisingly ruled that "*Yocupicio* is directly applicable here and binding authority." *Id*.

ABM again sought permission to appeal. For the first time, its petition raised a challenge to *Baumann* as well as *Yocupicio*.[13] Respondents' opposition pointed out that binding Ninth Circuit precedent foreclosed both arguments and that this Court had denied certiorari in *Baumann*.[14] Respondents argued that the balance of harms to the parties weighed against granting leave to appeal under the multifactor test the Ninth Circuit uses to determine whether to allow § 1453(c) appeals. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010). Respondents also argued that ABM's multiple removals and attempted appeals had substantially delayed the case and that another appeal would add yet more delay.[15]

A two-judge motions panel denied permission to appeal in a two-paragraph, unpublished order citing *Coleman*. Pet. App. 1a. ABM did not request en banc rehearing of the denial.

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[12] No. 4:15-cv-1947, Doc. 32 (N.D. Cal. Sept. 11, 2015).

[13] No. 15-81097, Doc. 1-2, at 1 (9th Cir. Nov. 20, 2015).

[14] No. 15-80197, Doc. 3 (9th Cir. Nov. 30, 2015).

[15] No. 15-80197, Doc. 3, at 2, 11 (9th Cir. Nov. 30, 2015).

REASONS FOR DENYING THE WRIT

I. ABM's argument that a PAGA representative action is a CAFA class action does not merit review.

A. ABM waived its challenge to *Baumann*.

A notice of removal must provide a "short and plain statement of the grounds for removal." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 553 (2014) (quoting 28 U.S.C. § 1441(a)). ABM's notice of removal *omitted* the ground for removal it belatedly asserts here: that, contrary to *Baumann*, a PAGA action is by nature a CAFA class action.

ABM now trains its fire on *Baumann*. But its assault comes too late. ABM litigated this case up and down in the lower courts for months before mentioning *Baumann*. Instead, it made a strategic decision to focus on the *Yocupicio* aggregation issue only.

ABM switched gears and took aim at *Baumann* only in its second request for a discretionary appeal. That belated change of strategy came too late to preserve the issue for review.

In particular, in the removal notice currently at issue, ABM did not purport to remove the case on the ground that a PAGA representative action is itself necessarily a class action under CAFA. Instead, ABM asserted that the PAGA claims should be considered together with the class claims in computing the amount in controversy. ABM also deliberately omitted any argument about *Baumann* in its first appeal and its opposition to the second motion for remand. ABM urged that *Yocupicio* was wrongly decided and should be overruled but never even cited *Baumann*.

Only when seeking a second remand appeal—to which it had no entitlement as a matter of right—did ABM first assert that a PAGA representative action is by nature a class action. A theory first raised in a request that a court exercise discretion to permit an appeal comes too late in the game to be considered here. *Cf.*, *e.g.*, *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013) (finding waiver based in part on failure to timely assert argument in district court and court of appeals).

B. The courts of appeals that have addressed the issue all agree on how to determine whether an action is a "class action" under CAFA.

CAFA's plain language limits federal jurisdiction over class actions under 28 U.S.C. § 1332(d) to actions filed under state laws or procedures that authorize actions to be brought "as … class action[s]" and that are "similar" to Rule 23. *Id.* § 1332(d)(1)(B). The courts of appeals that have addressed the issue agree that CAFA's language requires a comparison of the state statute or rule under which the action is brought to Rule 23 to determine whether the state procedure "closely resembles Rule 23 or is like Rule 23 in substance or in essentials." *McGraw*, 646 F.3d at 174; *see also Purdue Pharma L.P. v. Ky.*, 704 F.3d 208, 216–17 (2d Cir. 2013); *Erie Ins. Exch. v. Erie Indem. Co.*, 722 F.3d 154, 156 (3d Cir. 2013); *Miss. ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 799 (5th Cir. 2012), *rev'd on other grounds*, 134 S. Ct. 736 (2014);[16] *LG*

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[16] This Court's *Hood* decision held that a *parens patriae* action brought by a state attorney general is not a "mass action" subject to CAFA jurisdiction under 28 U.S.C. § 1332(d)(11). 134

(*Footnote continued*)

Display Co. v. Madigan, 665 F.3d 768, 772 (7th Cir. 2011); *Chimei*, 659 F.3d 842.

In particular, each court that has addressed the issue has held that *parens patriae* actions brought on behalf of states by state officials for the benefit of the public are not class actions, although individual citizens may ultimately share in the recoveries sought. The circuits have based their holdings on the dissimilarities between *parens patriae* actions and class actions, including the absence of requirements of numerosity, commonality, typicality, adequacy of representation, and notice that characterize Rule 23 class actions. The decisions of the Second, Fourth, Fifth, Seventh, and Ninth Circuits on this issue are consistent not only in their method of analysis, but also in their conclusion: Actions brought under statutes that lack the essential characteristics of Rule 23 class actions are not class actions under § 1332(d)(1)(B).

The decision below differs from cases involving *parens patriae* actions only in that a PAGA action is brought on the state's behalf not by a state official,

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S. Ct. at 739. That holding is not directly applicable here. In addition, however, the Fifth Circuit in *Hood* agreed with every other circuit to address the issue that a *parens patriae* action is not a *class* action under CAFA because it is not brought as such under a law or rule similar to Rule 23. *See* 701 F.3d at 799 (*parens patriae* action was not a class action because it was brought under a statute that "does not require that suits brought by the State satisfy any requirements that resemble the adequacy, numerosity, commonality, and typicality requirements of class action lawsuits under Rule 23"). This Court did not disturb that holding, and the Fifth Circuit reaffirmed it on remand. *Miss. ex rel. Hood v. AU Optronics Corp.*, 559 F. App'x 375 (5th Cir. 2014) (holding that the original panel's decision on the class action issue was "a proper holding" and remains valid and binding).

but by a person aggrieved by the defendant's alleged violations. But as ABM acknowledges, the analysis of the courts of appeals concerning *parens patriae* actions "appl[ies] equally to representative actions brought by private individuals." Pet. 19.

As the court of appeals concluded in *Baumann*, a PAGA action remains "at heart a civil enforcement action filed on behalf of and for the benefit of the state." 747 F.3d at 1124. The essential features that distinguish it from a class action are the same as those that the courts of appeals have focused on in holding that *parens patriae* actions lack sufficient similarity to Rule 23. *Baumann*'s conclusion that a PAGA action is not a class action under CAFA is thus fully consistent with the decisions of other courts of appeals that have addressed the issue.

C. ABM's claims of intercircuit conflict are unfounded.

ABM does not assert that any court of appeals has held that a PAGA claim, or any comparable private attorney general action, *qui tam* suit, or *parens patriae* action, is a class action under CAFA. Nor does ABM identify any appellate decisions that have departed from the analysis developed by *McGraw* (and other decisions concerning *parens patriae* actions) and applied by *Baumann*. Indeed, ABM concedes that *Baumann* is consistent with the Second, Third, and Fourth Circuits' holdings that *parens patriae* actions and other actions brought under procedures that do not resemble those of Rule 23 are not class actions under CAFA. ABM overlooks that the Fifth Circuit also adopted the same analysis in *Hood*'s holding that a *parens patriae* action is not a class action, which is still good law. *See supra* n.16.

ABM contends, however, that the Seventh and Eighth Circuits have rejected the approach taken by the other circuits in favor of what ABM refers to as a "functional" approach. This contention is without merit. Seventh Circuit precedent states explicitly that that court *agrees* with the consensus of the other circuits about how to apply the CAFA class action definition. *See Madigan*, 665 F.3d at 771–72. And the Eighth Circuit has not addressed the issue in any factual context that has called for it to express either agreement or disagreement.

ABM's claim of conflict rests entirely on two opinions that do not address the issue here. And, critically, neither opinion adopted a rule that is inconsistent with the standards applied by the Second, Third, Fourth, Fifth and Ninth Circuits, or even hinted at a criticism of those standards.

1. Seventh Circuit—ABM asserts that the Seventh Circuit has adopted a fundamentally different view of CAFA's class action definition than have the Second, Third, Fourth, Fifth, and Ninth Circuits. But ABM fails to mention that in its most pertinent decision, the Seventh Circuit expressly endorsed the approach of the Fourth and Ninth Circuits (the only appellate courts that had weighed in at the time).

In its 2011 decision in *Madigan*, the Seventh Circuit held that a state attorney general's *parens patriae* action is not a class action removable under CAFA because "[a] class action must be brought under Rule 23 or the state equivalent," and "must be brought *as a class action*"—which a *parens patriae* action is not because it need not meet, "for example, requirements for adequacy, numerosity, commonality, or typicality." 665 F.3d at 772. The Seventh Circuit emphasized that

its decision was "consistent with recent decisions from the Fourth and Ninth Circuits," *id.*—specifically, *McGraw*, 646 F.3d at 172, and *Chimei*, 659 F.3d at 848, which the Seventh Circuit characterized as "helpful and persuasive." 665 F.3d at 771.[17]

Conveniently ignoring *Madigan*, ABM instead invokes *Addison Automatics, Inc. v. Hartford Cas. Ins. Co.*, 731 F.3d 740 (7th Cir. 2013). Yet that case involved highly idiosyncratic facts and resulted in a decision entirely consistent with the prevailing approach among the circuits. Nothing in *Addison* remotely suggested any retreat by the Seventh Circuit from *Madigan*. *Addison* cited *Madigan* approvingly and adhered to its approach even while holding that the unusual case in *Addison* was a class action. *Id.* at 744.

The plaintiff in *Addison* purported to bring a suit in its individual capacity, but the suit asserted insurance claims that were assigned to the plaintiff "as class representative" to settle an earlier class action. *Id.* at 741. "The settlement made clear that Addison's status as assignee depended on its continuing role as class representative." *Id.* Addison purported to sue in its individual capacity only because an earlier suit it brought as representative of the class had been removed by the defendant (and then dismissed by Addi-

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[17] The Seventh Circuit stated that its approach differed from that of the Fourth and Ninth Circuits in only one technical respect: Instead of granting permission to appeal and affirming the district court's remand order, as those courts had done in *McGraw* and *Chimei*, the Seventh Circuit denied leave to appeal because it found the defendants' argument that a *parens patriae* action is really a class action to be so insubstantial that it supported neither district court nor appellate jurisdiction. *Id.*

son so that it could refile in state court while dropping the class allegation).

The Seventh Circuit held that despite this subterfuge, the case was a class action because the plaintiff "ha[d] standing to pursue relief … only in its capacity as class representative," *id*. at 742, its claims were brought to secure the rights provided to the class in the earlier settlement, *id.*, and the plaintiff conceded that in pursuing the claims it "owe[d] continuing fiduciary obligations to the class it represents." *Id*. Under these circumstances, the court held that "[b]y pursuing the rights assigned to it as class representative in the state court class action, Addison is necessarily continuing that class action." *Id*. at 744.

Addison therefore stands only for the proposition that when a class representative in a traditional, Rule 23-type class action seeks relief for the certified class that he can obtain only in the capacity of class representative, the action is a CAFA class action because the plaintiff "remains the representative of a class that was actually certified 'under Rule 23 or the state equivalent.'" *Id*. That reasoning is wholly inapplicable to a PAGA plaintiff. That *Addison* has no application beyond its particular circumstances is confirmed by the fact that it has not been cited by any appellate court as a basis for asserting CAFA jurisdiction over any case not sharing its unusual facts.

2. Eighth Circuit—ABM asserts that the Eighth Circuit has upheld CAFA jurisdiction over an action that lacks the features of Rule 23 that the other circuits "have held are necessary for a state law or rule to qualify as a 'class action' under CAFA." Pet. 21. That claim rests entirely on *Brown v. Mortgage Electronic Registration Systems, Inc.*, 738 F.3d 926 (8th

Cir. 2013). But the unique, judicially created Arkansas procedure at issue in *Brown* expressly provides for "class actions" to contest illegal tax exactions. *See*, *e.g.*, *City of W. Helena v. Sullivan*, 108 S.W.3d 615, 617 (Ark. 2003) ("[A]n illegal-exaction claim is, by its nature, in the form of a class action.").

The class in such an action consists of similarly situated taxpayers, and the class action is brought for them, not for the state. *See id*. Illegal exaction classes are not certified directly under Arkansas Rule of Civil Procedure 23, but plaintiffs in such cases (including *Brown*) do request certification orders. *See Brown*, 738 F.3d at 931. Moreover, Arkansas courts have developed procedures for such actions, including notice requirements, that are guided by Arkansas Rule 23. *See Worth v. City of Rogers*, 89 S.W.3d 875, 881 (Ark. 2002); *Carson v. Weiss*, 972 S.W.2d 933, 935 (Ark. 1998).

Brown relied on these features of Arkansas illegal-exaction class actions to find them sufficiently similar to Rule 23 class actions to qualify under CAFA. Citing the Arkansas Supreme Court's decision in *Worth*, the court emphasized that the illegal-exaction procedure "provides a mechanism for plaintiffs to pursue a class action," and that "[i]n bringing an illegal-exaction claim, the Arkansas Supreme Court instructs courts to use Arkansas Rule 23 as a procedural guide." 738 F.3d at 931.

For those reasons, the court held that the illegal-exaction procedure was a rule of judicial procedure authorizing a plaintiff to bring an action "as a class action." *Id*. That holding is fully consistent with the approach, pioneered by the Fourth Circuit in *McGraw* and applied by the Second, Third, Fifth, Seventh, and

Ninth Circuits (including in *Baumann*), of examining the extent to which a state procedure "closely resembles Rule 23 or is like Rule 23 in substance or in essentials." *McGraw*, 646 F.3d at 174.

Nothing in *Brown* indicates that the Eighth Circuit would find that an action to enforce statutory penalties brought by an employee as a representative of the state constitutes a class action, nor does the decision take issue with the analysis of such decisions as *McGraw* and *Chimei*, on which *Baumann* relied. Indeed, nothing in *Brown* suggests that the decision has any broader application than to the highly unusual type of proceeding before it. Neither the Eighth Circuit nor any other circuit has ever applied *Brown*'s jurisdictional holding to any other circumstances.

3. ABM's resort to *Addison* and *Brown* shows that its claim of intercircuit conflict is without merit.—*Addison* and *Brown* were also the bases for the circuit split claimed in the petition for certiorari in *Baumann*. *See Baumann* Pet. 11–13. ABM's petition differs in only two ways. First, the *Baumann* petition unsuccessfully attempted to distinguish the Seventh Circuit's decision in *Madigan*. *Id*. at 13 n.4. ABM ignores *Madigan* altogether. Second, the *Baumann* petition asserted a "tension" between *Baumann* and *McGraw*, *id*. at 14. ABM expressly disclaims this argument by conceding that *McGraw*'s analysis "would apply equally" to PAGA actions. Pet. 19. That ABM acknowledges it can muster nothing better than *Addison* and *Brown* nearly two years after the decision in *Baumann* is a telling indication that there is no conflict.

D. ABM's policy preferences cannot displace the statute Congress enacted.

Despite the lower courts' consistent rejection of CAFA jurisdiction over actions that do not meet the statutory definition of class actions, and this Court's recent unanimous decision in *Hood*, 134 S. Ct. 736, similarly confining CAFA jurisdiction over "mass actions" to the limits defined by the statute, ABM contends that not asserting CAFA jurisdiction over PAGA claims would conflict with what it sees as CAFA's paramount goal: Allowing removal to federal court of any large, consequential case involving minimal diversity.

As *Hood* makes clear, the statute, and not overbroad assumptions about Congress's objectives in enacting it, governs the scope of jurisdiction under CAFA, and courts must honor the limits as well as the breadth of that jurisdiction. *See* 134 S. Ct. at 741, 744. CAFA tempered its objective of allowing federal jurisdiction over large, multistate class actions with what Judge Niemeyer has described as "sentivit[ity] to deeply-rooted principles of federalism." *McGraw*, 646 F.3d at 178. Adherence to CAFA's proper bounds respects the balance that Congress drew.

Moreover, contrary to ABM's view, it would be anomalous to recognize CAFA jurisdiction over this case. Had this exact claim for statutory penalties been filed directly by the state, the circuits would unanimously reject the argument that it was subject to CAFA jurisdiction, even though the stakes for ABM would be just as great. That the state here has authorized the same enforcement action to be brought on its behalf by a private employee should not alter the case's jurisdictional status.

ABM's assertion that *Baumann* undercuts the due process protections afforded to class members by refusing to treat PAGA actions as class actions even though they bind other potential plaintiffs in the same way that class actions do is flatly wrong. The preclusive effect of PAGA actions is much more limited than that of class actions because PAGA actions bar only duplicative claims for statutory penalties on behalf of the state, not any personal claims that a party may seek to assert in an individual or class action.

That limited preclusive effect is exactly the same effect that a government enforcement action has on a private attorney general or *qui tam* action seeking the same relief on behalf of the state (and vice versa). *See*, *e.g.*, *United States ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 936 (2009); *United States ex rel. Chovenec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 362 (2d Cir. 2010). It reflects only that the state is bound by a resolution of its claims, whether it pursues them directly or through a private attorney general. It implicates none of the due process concerns of class action litigation, in which a representative plaintiff litigates not only her own claims, but the claims of other class members.

Nor is it the case, as ABM argues, that denying CAFA jurisdiction over such an action would provide states the opportunity for an end-run around CAFA. Actions such as this one fall outside of CAFA because they are procedures through which states have permitted their enforcement powers to be exercised by private persons on their behalf. California chose to do so in PAGA because of concerns about the limits on the state's own labor enforcement resources. But there is no indication that either California, or states

generally, will broadly cede enforcement powers to citizens out of a desire to evade CAFA. And should it ultimately appear that such actions have proliferated and pose concerns similar to those that led Congress to enact CAFA, Congress can address any perceived problem by further expanding federal jurisdiction.

That Congress did not do so in CAFA itself, however, is evident from the basic definition of class actions, which does not encompass enforcement actions brought on behalf of a state. It is also evident from Congress's deliberate exclusion of private attorney general actions from the "mass action" provision of CAFA. 28 U.S.C. § 1332(d)(11)(B)(ii)(III). That provision was substituted for provisions in earlier versions of CAFA that would have specifically provided that private attorney general actions would be treated as class actions. *See* H.R. 2341, 107th Cong. § 4(a)(2) (2001); H.R. 1115, 108th Cong. § 4(a)(2) (2003); S. 274, 108th Cong. § 4(a)(2) (2003).

Neither the original proposals to treat private attorney general actions as class actions, nor Congress's ultimate passage of a provision excluding them from coverage under the mass action provision, would have made sense if Congress thought they were already covered by CAFA's basic definition of class actions. Indeed, the earlier versions of CAFA that would have treated them as class actions recognized that a private attorney general action was "not otherwise a class action as defined in paragraph (1)(B) of this subsection." *See*, *e.g.*, H.R. 1115, 108th Cong. § 4(a)(2) (2003). Distorting CAFA's class action definition to cover PAGA actions would thus be contrary to specific congressional intent underlying the law's words.

ABM complains that carrying out the terms of the statute and its manifest intent involves "formalism" when courts inquire into whether an action shares essential similarities with a class action. ABM's label is misplaced, because the analysis of the courts of appeals in general, and *Baumann* in particular, focuses on differences of substance between private attorney general and *parens patriae* claims and class actions.

But even if the "formalism" label were accurate, the analytic approach the courts have taken is the one CAFA dictates. The fact that it does not yield federal jurisdiction over some large actions that particular defendants might wish to see in federal courts is the consequence of Congress's legislative choice.

II. ABM's challenge to *Yocupicio* does not merit review.

ABM's petition relegates the principal issue it preserved and argued below—whether the Ninth Circuit's *Yocupicio* decision was correct—to an afterthought. ABM does not contend that *Yocupicio* conflicts with a decision of any other court of appeals. Indeed, ABM cites no authority other than the district court decision in *Yocupicio* itself for the proposition that claims not asserted on behalf of a class should be considered in determining whether a class action satisfies CAFA's amount-in-controversy requirement.

ABM's failure to cite authority supporting it on the point is no mere oversight. *Yocupicio* was a true matter of first impression, and no other appellate court appears to have even considered the issue. Nor has *Yocupicio*'s holding prompted any disagreement from other courts. It has not even been cited in any precedential appellate decision.

The *Yocupicio* issue, moreover, is by no means one that could arise only in the Ninth Circuit. As *Yocupicio* pointed out, any case in which substantial non-class claims (whether private attorney general claims, *parens patriae* claims, or other claims) are joined with a class action could present the issue. *See* 795 F.3d at 1061. That no such case has yet been decided by another circuit indicates that the issue is not a frequently recurring one (itself a reason not to grant certiorari). However, if another court takes up the issue, and if a conflict does arise, this Court can consider it then.

The absence of conflicting appellate authority forces ABM to resort to a claim that *Yocupicio* conflicts with decisions of this Court. But the "conflict" it cites is only with decisions holding generally that CAFA and other statutes should be construed in accordance with their language, not with actual on-point holdings of the Court.

ABM unsuccessfully tries to conjure a more specific conflict with this Court's decision in *Knowles* by seizing on *Knowles*'s paraphrase of CAFA's jurisdictional amount requirement. Pet. 26–27 (quoting 133 S. Ct. at 1348). But *Knowles* concerned only whether a court is bound by a plaintiff's stipulation purporting to limit a class's recovery on claims explicitly sought on behalf of the class. *Knowles* did not involve whether non-class claims (of which there were none in the case) could be added to class claims to meet the amount-in-controversy requirement, and it did not decide the issue.

At bottom, ABM's claim of "conflict" with decisions of this Court is just another way of saying that ABM believes that *Yocupicio* misread the statute. This Court does not generally review claims of error in the

reading of a statute absent disagreement among the lower courts. *See* S. Ct. R. 10.

ABM's claim of error is in any event groundless. CAFA provides that the relevant unit whose amount in controversy must be determined is a "class action," defined as an action brought under Rule 23 or a state analog. 28 U.S.C. § 1332(d)(1)(B). To the extent a lawsuit asserts PAGA representative claims, the PAGA claims are not filed under Rule 23 or any state analog. Those claims, even if joined in the same suit with a class action, are thus not part of the class action in which the amount in controversy must exceed $5,000,000 million to confer CAFA jurisdiction. *See* 28 U.S.C. § 1332(d)(2).[18]

Moreover, as *Yocupicio* pointed out, CAFA provides specifically that the claims that must be aggregated to determine the amount in controversy in a "class action" are the claims of "class members." *See* 795 F.3d at 1061 (quoting 28 U.S.C. § 1332(d)(6)). Claims possessed separately from those asserted on behalf of the class are not claims *of class members*. That is especially true of PAGA claims, which do not belong to the "individual class members" (28 U.S.C. § 1332(d)(6)), but to the state. Because the interest asserted in a PAGA action is that of the state, *see Iskanian*, 327 P.3d at 151; *Arias*, 209 P.3d at 933, PAGA claims are not "claims of individual class mem-

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[18] Likewise, although § 1332(a) also provides that a court must determine whether an "action" satisfies the amount-in-controversy requirement for conventional diversity, courts have long held that the mere fact that two or more plaintiffs' separate claims are joined in the same case does not make those claims part of the same unit that must be considered to determine the jurisdictional amount. *See Snyder v. Harris*, 394 U.S. 332 (1969).

bers," and § 1332(d)(6) does not provide for their aggregation to meet the over-$5,000,000 amount in controversy requirement.

Yocupicio's reading of the statute accords not only with CAFA's language, but also with its structure and evident purposes. As this Court recognized in *Knowles*, the objective of CAFA is to confer federal jurisdiction on "interstate cases of national importance." 133 S. Ct. at 1350. But CAFA does not provide jurisdiction over just any large or important case—only over "certain class actions." *Dart Cherokee*, 135 S. Ct. at 554.

In conferring jurisdiction over large "interstate class actions," *id*. (quoting S. Rep. No. 109-14, at 43 (2005)), Congress evinced no desire to have large *non-class* actions moved to federal court (unless they meet the requirements for removal of mass actions), nor to have relatively trivial class actions in federal court. A non-class action over which there is no CAFA jurisdiction plus a small class action over which there is no CAFA jurisdiction do not add up to a federal case.

III. ABM's arguments that the Court must review this case are unpersuasive.

ABM repeatedly asserts that the Court should grant review because this case may present its last opportunity to decide the *Baumann* and *Yocupicio* issues. ABM contends that absent review now, those decisions will be "frozen in time and immune from further review in the Ninth Circuit" (Pet. 15) because future litigants, unlike ABM itself, will lack the temerity to ask the Ninth Circuit to overrule them.

ABM's argument wrongly presupposes that these issues can only arise in the Ninth Circuit. But ABM acknowledges that the Ninth Circuit's ruling in *Bau-*

mann is conceptually indistinguishable from rulings in other circuits holding that *parens patriae* actions are not class actions. *See* Pet. 19. That issue has so far been decided by five circuits and will likely arise in others as well.

If some circuit eventually sees the issue ABM's way and creates a conflict, this Court would certainly have the opportunity to resolve it. And even if the issue is more narrowly viewed as whether PAGA and other private attorney general or *qui tam* actions are class actions, the issue can arise in other circuits in cases under private attorney general and *qui tam* laws of other states,[19] or in actions brought outside California under PAGA.[20] Likewise, as noted above, the *Yocupicio* aggregation issue is not limited to PAGA cases or to the Ninth Circuit.

If another circuit were to uphold CAFA jurisdiction in a decision that genuinely conflicted with *Yocupicio* or *Baumann*, there is every likelihood that the losing party would present this Court with the op-

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[19] In actions brought under analogous laws of the District of Columbia, for example, federal courts in the District have consistently held that private attorney general actions are not class actions under CAFA. *See*, *e.g.*, *Zuckman v. Monster Beverage Corp.*, 958 F. Supp. 2d 293 (D.D.C. 2013), *leave to appeal denied*, No. 13-8006 (D.C. Cir. Dec 16, 2013); *Nat'l Consumers League v. General Mills, Inc.*, 680 F. Supp. 2d 132 (D.D.C. 2010); *Breakman v. AOL LLC*, 545 F. Supp. 2d 96 (D.D.C. 2008).

[20] Examples of PAGA claims being brought outside the Ninth Circuit include: *Cohen v. UBS Fin. Servs., Inc.*, 799 F.3d 174 (2d Cir. 2015); *In re Bank of Am. Wage & Hour Employment Litig.*, 286 F.R.D. 572, 587 (D. Kan. 2012); *Zaitzeff v. Peregrine Fin. Group, Inc.*, 2010 WL 438158, at *2–3 (N.D. Ill. Feb. 1, 2010); *Westerfield v. Wash. Mut. Bank*, 2007 WL 2162989, at *4 (E.D.N.Y. July 26, 2007).

portunity to resolve the split. But even if that did not occur, an on-point ruling from another court of appeals would surely allay any fears of litigants in the Ninth Circuit that they might be sanctioned if they raised the issue again there. In any event, concern that a future conflict might not be presented to this Court for resolution provides no reason for this Court to resolve the hypothetical conflict before it arises.

In this respect, *Dart Cherokee* could not be more different from this case. The Court granted review there in part because the Tenth Circuit's position was in conflict with seven other circuits, including two that had expressly rejected it. *See* Pet. for Cert. 9–12, *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-719 (filed Dec. 13, 2013). Absent such a conflict, the possibility that the Ninth Circuit may have no occasion to reconsider *Baumann* or *Yocupicio* is no reason for review.

The principal relevance of *Dart Cherokee* is that it counsels that the Court exercise caution in granting review of cases in this posture. Although the Court there held, over the dissent of four Justices, that it has the authority to review a court of appeals' denial of permission to appeal under 28 U.S.C. § 1453(c), it acknowledged that review is limited to whether the court of appeals abused its discretion. 135 S. Ct. at 555. The Court held that it is an abuse of discretion to deny leave to appeal based on "an erroneous view of the law," *id*., but it also recognized that where an order does not explicitly rest on any particular legal proposition, "[c]aution is in order when attributing a basis to an unreasoned decision." *Id*. at 557 n.7.

Here, the court of appeals' order said only that the court was denying permission to appeal. The only ex-

planation for that ruling was a citation to the court's decision in *Coleman* setting forth the multiple factors it considers in determining whether to permit an appeal. Pet. App. 1a. Unlike in *Dart Cherokee*, there is no dissent to signal the probable basis of the ruling.

The court of appeals *may*, as ABM assumes, have rested its ruling on the view that both *Baumann* and *Yocupicio* were correctly decided. Or it may have considered only the correctness of the district court's reliance on *Yocupicio*, and not the *Baumann* issue that the district court did not address because ABM had not raised it in its removal notice, its response to the remand motion, or its earlier appeal. *Cf. Dart Cherokee*, 135 S. Ct. at 557–58 (inferring that the court of appeals rested its denial of review on the district court's reasoning). Or the court of appeals may have accepted respondents' argument that, having previously wasted the court's time with full briefing and argument of an issue that it had already mooted by filing a second removal notice, ABM did not deserve another bite at the apple. Residual uncertainty over which, if any, of the issues ABM now raises were decided by the court of appeals is another reason for declining review here.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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