No. 14-260

IN THE

Supreme Court of the United States

CHASE INVESTMENT SERVICES CORP., *ET AL.*,

Petitioners,

v.

JOSEPH BAUMANN,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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November 2014

QUESTIONS PRESENTED

1. Whether an action under California's Labor Code Private Attorneys General Act of 2004 (PAGA), in which an individual plaintiff seeks penalties for legal violations on behalf of the state, and a portion of the penalties recovered goes to victims of the violations, is a "class action" within the meaning of the jurisdictional provisions of the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d).

2. Whether a PAGA action in which the state is the real party in interest and the individual plaintiff's potential recovery is less than $75,000 satisfies the requirements for conventional diversity jurisdiction under 28 U.S.C. § 1332(a).

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INTRODUCTION

This case was brought under California's Labor Code Private Attorneys General Act of 2004 (PAGA). Cal. Lab. Code §§ 2698, *et seq*. PAGA allows an individual employee who has suffered at least one covered violation of California's labor laws to bring an action on behalf of the state to recover civil penalties payable mostly to the state and partly to the individual and other employees who were victims of the violations. The court of appeals held that this PAGA action was not removable from the state court where it was filed to federal court under the Class Action Fairness Act (CAFA), 28 U.S.C. §§ 1332(d) & 1453, because it is not a class action. The court also held that the case was not removable on the basis of conventional diversity jurisdiction, 28 U.S.C. § 1332(a), because the plaintiff's claims do not meet the $75,000 amount-in-controversy requirement.

Petitioners Chase Investment Services Corp., *et al*. (Chase) seek review of both holdings, but neither merits a grant of certiorari. As to CAFA, the courts of appeals are in agreement that the statute's plain 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 within the meaning of CAFA's jurisdictional provisions. *See* 28 U.S.C. § 1332(d)(1)(B). Chase cites no authority holding any action similar to a PAGA action to be a class action.

The Ninth Circuit's rejection of CAFA jurisdiction, moreover, is consistent with this Court's recent unanimous rejection of an attempt to shoehorn *parens patriae* actions brought by state officials into CAFA's jurisdictional grant in *Mississippi ex rel. Hood v. AU*

Optronics Corp., 134 S. Ct. 736 (2014). *Hood*'s emphasis on the primacy of the "statutory text" in defining the scope of CAFA jurisdiction, *id.* at 741, likewise calls for rejection of Chase's attempt to expand the definition of class actions to encompass not only claims brought on behalf of a class of similarly situated individuals, but also claims brought by an individual on behalf of the state.

Chase's challenge to the court of appeals' ruling that the action does not satisfy the amount-in-controversy requirement for conventional diversity jurisdiction similarly does not merit review. Chase contends that the individual plaintiff's claims should be aggregated with penalties that may be distributed to the state and other employees to bring them above the $75,000 threshold set by 28 U.S.C. § 1332(a). Chase's argument ignores that the action asserts claims on behalf of the state, and the state's claims cannot satisfy § 1332(a)'s requirements because the state is not a citizen for diversity purposes. *See Moor v. County of Alameda*, 411 U.S. 693, 717 (1973). In any event, it is firmly established law that recoveries of multiple persons may not be aggregated to satisfy § 1332(a)'s amount-in-controversy requirement unless all those persons have a "common and undivided interest" in the same recovery. *See Snyder v. Harris*, 394 U.S. 332, 335 (1969).

In light of these settled principles, Chase unsurprisingly identifies no decisions accepting its aggregation theory in a case similar to this one. Chase argues only that *Snyder*'s "common and undivided interest" standard is "mystifying" and has caused "confusion" in other types of cases, Pet. 23–25, but it offers neither an alternative standard nor an explanation of

how distorting the standard to encompass this case would make it any easier to apply to the other kinds of cases where it has supposedly caused confusion. Instead, Chase resorts to contradicting arguments it made below and faulting the court of appeals for accepting the analytical framework Chase itself advocated for determining the "common and undivided interest" issue.

Ultimately, Chase's petition rests on the supposition that there must be federal jurisdiction over this case on some basis. Pet. 28–29. Chase overlooks another possibility—that Congress, as in *Hood*, has not provided federal jurisdiction for a case that does not meet the specific requirements of the relevant jurisdictional statutes.

STATEMENT

1. The Private Attorneys General Act

The California statute involved here, PAGA, provides a unique enforcement method for California's Labor Code by enlisting individual plaintiffs as private attorneys general who may recover statutory penalties for Labor Code violations on behalf of the state, with a share of the penalties going to the individual plaintiffs as well as other employees. 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).

PAGA provides that "any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recov-

ered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." Cal. Labor Code § 2699(a). For Labor Code provisions that do not themselves specify a monetary penalty, PAGA provides its own penalties, generally $100 per employee subjected to a violation per pay period for the first violation, and $200 per employee per pay period for each subsequent violation. *Id.* § 2699(f)(2). PAGA provides that these penalties may be recovered by "an aggrieved employee … in a civil action … filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed." *Id*. § 2699(g). Any penalties recovered in a PAGA action "shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees." *Id.* § 2699(i).

As California's Supreme Court has recently explained, "[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. PAGA differs from a classic *qui tam* action only insofar as "a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation." *Id*. Nonetheless, because a PAGA action is aimed at deterring and punishing violations of the Labor Code, and not compensating individuals for violations suffered, "[t]he government entity on whose behalf the plaintiff files

suit is always the real party in interest in the suit." *Id*. at 151.

Thus, before filing a PAGA action, an "aggrieved employee" must give notice of the claimed Labor Code violations on which the action is based to both the employer and the California Labor and Workforce Development Agency. *Id.* § 2699.3(a)(1). The agency is deemed to authorize the employee to sue on behalf of the state if it fails to respond to the notice within 33 days, responds that it does not intend to investigate, or investigates and does not issue a citation within 158 days. *Id.* §§ 2699.3(a)(2), 2699(h).[1]

PAGA actions need not be prosecuted as class actions and are commonly maintained by individual plaintiffs. *See Arias v. Super. Ct.*, 209 P.3d 923, 929–34 (Cal. 2009). PAGA actions thus require neither class certification nor notice to similarly situated employees. *See id*. Employees whose rights are adjudicated in a PAGA action are not bound by its result by virtue of membership in a class whose members become parties when the class is certified; rather, "a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government." *Id*. at 933. The effect of a PAGA judgment thus rests not on the principles that make class action judgments binding on class members, *see Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379–80 (2011), but on the very different proposition that "[w]hen a government agency is authorized to bring an action on be-

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[1] Slightly different procedures apply to claimed violations of the occupational safety provisions of the Labor Code and certain other types of violations. *See* Cal. Labor Code §§ 2699.3(b) & (c).

half of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party." *Arias*, 209 P.3d at 934 (citing Restatement (2d) of Judgments § 41(1)(d), comt. d (1982)).

California's creation of a right of action in which an individual litigant may recover penalties on behalf of the state, with a portion distributed to himself and other employees, reflected the legislature's determination that "adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore 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*, 209 P.3d at 929-30. Thus, "[i]n a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies." *Id*. at 933.

In short, a PAGA action is not a collective action, but is "representative" in the sense that the individual plaintiff represents the interest of the state, acting to impose penalties (but not to provide compensatory damages) for violations suffered by the plaintiff and any other employees who were victims of wrongdoing. 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. Facts and Proceedings Below

a. The PAGA Action.—Respondent Baumann was employed by Chase as a "Financial Advisor Associate." Pet. App. 27a. Although that title might suggest that he was in a managerial or professional position of some kind, Baumann's duties in fact consisted almost entirely of selling standardized investment products using a detailed script prepared by Chase, from which he was not permitted to deviate. *Id*. at 28a. Despite the non-managerial nature of Baumann's work, Chase improperly classified him as an "exempt" employee and therefore did not comply with California laws requiring that he be paid overtime, even though he was regularly required to work 52 to 58 hours a week. *Id.* at 27a, 29a. Chase likewise denied him meal periods and rest breaks (or additional pay when meal periods and rest breaks were not offered), and failed to reimburse him for business-related expenses, all in violation of California wage laws. *Id.* at 29a-31a. Chase also misclassified other employees designated as "Investment Advisors" and failed to pay them overtime, to provide meal and rest breaks, and to reimburse them for expenses. *Id.*

Baumann filed this action in a California state court, seeking civil penalties under PAGA for Chase's violations. Baumann's complaint asserted no claims other than claims under PAGA, did not seek any money damages, and did not seek certification of a class. The complaint specifically alleged that Bau-

mann's potential share of statutory penalties and attorney fees would amount to less than $75,000.

b. The District Court Proceedings.—Chase removed the action to the United States District Court for the Central District of California. Chase invoked both conventional diversity jurisdiction under 28 U.S.C. § 1332(a) and CAFA diversity jurisdiction under § 1332(d). With respect to § 1332(a), Chase did not dispute that Baumann's own personal recovery would not exceed $75,000, but contended that all the penalties and fees Baumann sought were part of a "common and undivided" claim and hence could be aggregated to meet the amount-in-controversy requirement. Chase alternatively argued that the PAGA action was a class action within the meaning of CAFA, and that the "class" consisted of more than 100 members and asserted claims aggregating more than $5,000,000.

Baumann moved to remand the action, but the district court accepted Chase's aggregation argument and upheld the removal under § 1332(a). The district court therefore did not address whether it had jurisdiction under CAFA. Recognizing that its order involved a controlling question as to which there were substantial grounds for difference of opinion, the district court certified the order for immediate appeal under 28 U.S.C. § 1292(b), and stayed further proceedings pending appeal. The court of appeals accepted the appeal.

c. The *Urbino* Decision.—While the appeal was pending, the court of appeals issued its opinion in *Urbino v. Orkin Services of California, Inc.,* 726 F.3d 1118 (9th Cir. 2013). *Urbino* ruled that PAGA penalties attributable to violations committed against dif-

ferent employees cannot be aggregated to satisfy the amount-in-controversy requirement under § 1332(a). The court in *Urbino* held that individual employees do not have a common and undivided interest in PAGA penalties because the PAGA defendant does not "owe[] an obligation to the group of plaintiffs as a group" rather than "to the individuals severally." *Id.* at 1122 (quoting *Gibson v. Chrysler Corp.,* 261 F.3d 927, 944 (9th Cir. 2001) (quoting *Morrison v. Allstate Indem. Co.,* 228 F.3d 1255, 1262 (11th Cir. 2000))). The court reasoned that the underlying statutory rights vindicated by PAGA claims "are held individually" and that each employee's "unique injury … can be redressed without the involvement of other employees." *Id.* (citing *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 41 (1911)). Thus "[d]efendants' obligation to them is not 'as a group,' but as 'individuals severally.'" *Id.* (quoting *Gibson*, 261 F.3d at 944).

Urbino further rejected the theory that PAGA penalties can be aggregated to meet the amount-in-controversy requirement because they reflect not employees' individual interests "but rather the state's collective interest in enforcing its labor laws through PAGA." *Id.* That theory, the court pointed out, was unavailing because, to the extent that the *state* possesses an undivided interest in pursuing PAGA penalties, that interest cannot "satisf[y] the requirements of federal diversity jurisdiction" because "[t]he state, as the real party in interest, is not a 'citizen' for diversity purposes." *Id.* at 1123.

d. The Decision Below.—Because *Urbino* had already rejected the argument that PAGA claims can be aggregated for purposes of § 1332(a) jurisdiction, and because it was "undisputed that Baumann's por-

tion of any recovery (including fees) would be less than $75,000," the panel in this case held "for the reasons explained in *Urbino* that the district court erred in finding the amount in controversy requirement in § 1332(a) is satisfied." Pet. App. 6a, n.1. Judge Thomas, who had dissented in *Urbino*, concurred on this issue because the panel was bound by *Urbino* but noted his continuing disagreement with that decision.

Having rejected the district court's stated ground for denying remand, the panel turned to Chase's alternative argument for federal jurisdiction under CAFA. The panel 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).

Because the issue before it was "simply one of statutory construction," Pet. App. 15a, the court began with the statutory language, which defines a class 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 7a (quoting 28 U.S.C. § 1332(d)(1)(B)). Thus, as the court recognized, the issue before it was whether a PAGA action is sufficiently "similar" to a Rule 23 class action to fall within the statutory definition. *Id*. at 11a, 15a.

The court started its analysis of that question by recognizing that Baumann's PAGA action did *not* invoke California's analog to Rule 23, California Code of Civil Procedure § 382, which, like Rule 23, permits a case involving numerous parties with claims present-

ing common questions of law or fact to be pursued as a class action by a class representative whose claims are typical of those of the class and who can adequately represent the class. *See* Pet App. 8a–9a. The court further recognized that in forgoing a class action, Baumann had proceeded consistently with the California Supreme Court's recognition that "PAGA actions are not class actions under state law." *Id*. at 9a (quoting *Arias v. Super. Ct.*, 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. 2011)). It therefore proceeded to analyze the nature of a PAGA action in detail, guided by its prior decision in *Washington v. Chimei Innolux Corp.*, 659 F.3d 842 (9th Cir. 2011), which held (consistent with all other federal appellate decisions to address the issue) 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 11a (quoting *Chimei*, 659 F.3d at 847).

The 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 the requirements of numerosity, commonality, typicality, adequacy of representation, and notice and opt-out rights that define Rule 23 class actions. *See id*. at 12a. The court also explained that "the finality of PAGA judgments differs distinctly from that of class action judgments." *Id*. at 13a. 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 the violations that are the subject of the action, but is preclusive only of claims for statutory penalties, in the same way that an enforcement action brought directly by the state would be. *Id*. at 13a–14a. The nature of the recovery sought in a PAGA action also differs from claims typically asserted in class actions, in that PAGA penalties "primarily seek to vindicate the public interest in enforcement of California's labor law," redound primarily to the benefit of the state, and (to the extent payable to individual employees) do not reduce the employer's liability for wages wrongfully withheld or other individual claims. *Id*. at 14a.

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*. (emphasis added). Thus, the court concluded, "PAGA is not sufficiently similar to Rule 23 to establish the original jurisdiction of a federal court under CAFA." *Id*. at 16a.

Chase sought rehearing en banc. Judge Thomas, evidently based on his disagreement with *Urbino*, voted to grant the petition, but no other judge on the court of appeals requested a vote on the petition.

REASONS FOR DENYING THE WRIT

I. Chase's argument that CAFA provides jurisdiction does not merit review.

A. The courts of appeals 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). Consistent with the decision below, the courts of appeals broadly agree that the statutory language requires a comparison of the salient features of an action brought under a state statute or rule to those of a Rule 23 class action 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); *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);[2] *LG*

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[2] In *Hood*, this Court reversed the Fifth Circuit's holding, which conflicted with holdings of every other circuit to address the issue, that a *parens patriae* action brought by a state attorney general was a "mass action" subject to CAFA jurisdiction under 28 U.S.C. § 1332(d)(11). However, every circuit to address the issue, *including* the Fifth Circuit in *Hood*, has agreed that such an action is not a "class action" within the meaning of § 1332(d)(1)(B) because it is not brought as a class action under a law or rule similar to Rule 23. This Court left that holding of *Hood* intact.

Display Co. v. Madigan, 665 F.3d 768, 772 (7th Cir. 2011); *Chimei*, 659 F.3d at 848–50.[3]

In each of these cases, the courts held that *parens patriae* actions brought on behalf of states by state officials for the benefit of the public were not class actions, although individual citizens might ultimately share in the recoveries sought. Like the court below in this case, the courts in each case based their holdings on the dissimilarities between such 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 are consistent not only in their method of analysis, but also in their conclusion: Actions asserting the interests of states in the enforcement of their laws are not class actions within the meaning of §1332(d)(1)(B).

The decision below differs only in that a PAGA action is brought on the state's behalf not by a state official, but by a person aggrieved by at least one of the defendant's alleged violations. Still, as the court of appeals concluded, the action remains "at heart a civil enforcement action filed on behalf of and for the benefit of the state," *id*. at 16a, and it has none of the features that courts of appeals have focused on in other cases as suggesting a sufficient similarity to Rule 23. The court's conclusion that such an action is not a class action under CAFA is thus fully consistent with

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[3] *See also Erie Ins. Exch. v. Erie Indem. Co.*, 722 F.3d 154, 156 (3d Cir. 2013) (holding that an action brought by an insurance exchange on behalf of its members is not a class action because it is "brought under state rules that bear no resemblance to Rule 23").

the most analogous decisions of other courts of appeals.

B. Chase's claims of intercircuit conflict are unfounded.

Chase does not assert that any court of appeals has held that a PAGA claim, or any similar private attorney general action or *qui tam* suit, is a class action under CAFA. Nor does Chase identify any appellate decisions that have departed from the analysis developed by *McGraw* and other decisions concerning *parens patriae* actions and applied by the court below. Instead, Chase's claim of a conflict among the circuits rests primarily on two one-off decisions, each of which addressed entirely different issues.

Chase first invokes *Brown v. Mortgage Electronic Registration Systems, Inc.*, 738 F.3d 926 (8th Cir. 2013). Chase describes *Brown* as holding that a "representative action" that "bore none of the hallmarks that the Ninth Circuit deemed the defining characteristics of Rule 23 class actions" was nonetheless a removable CAFA class action, Pet. 11, but that description is far from accurate. The unique Arkansas procedure at issue in *Brown* in fact expressly provides for "class actions" to contest illegal tax exactions: The Arkansas Supreme Court has repeatedly held that "an illegal-exaction claim is, by its nature, in the form of a class action." *City of W. Helena v. Sullivan*, 108 S.W.3d 615, 617 (Ark. 2003).

The class in such an action consists of similarly situated taxpayers, and the class action is brought for their benefit, not on behalf of the state. *See id*. Illegal exaction classes are not certified *under Arkansas Rule 23*, but plaintiffs in such cases do appear to request certification orders, *see Brown*, 738 F.3d at 931, and

the Arkansas courts have developed procedures for the pursuit of 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).

In *Brown*, the Eighth Circuit relied on these features of Arkansas illegal-exaction class actions to find them sufficiently similar to Rule 23 class actions to qualify under CAFA. Whether or not that decision was correct, it relied on "hallmarks" of class actions that are wholly absent in a PAGA action. Nothing in *Brown* indicates that the Eighth Circuit would find 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 the court below relied. Indeed, nothing in *Brown* suggests that the decision has any broader application than to the highly unusual type of proceeding before it.

Chase's reliance on *Addison Automatics, Inc. v. Hartford Cas. Ins. Co.*, 731 F.3d 740 (7th Cir. 2013), is even less persuasive than its invocation of *Brown*. In *Addison*, the plaintiff purported to bring a suit solely in its individual capacity, but the suit was brought on insurance claims that had been assigned to the plaintiff "as class representative" in order to settle an earlier class action against another defendant. *Id.* at 741. "The settlement made clear that Addison's status as assignee *depended on its continuing role as class representative*." *Id.* (emphasis added). The plaintiff purported to sue in its individual capacity because an earlier suit properly brought in its capacity as repre-

sentative of the class had been removed by the defendant (and then promptly dismissed by the plaintiff so that it could refile in state court while dropping the class allegation). The Seventh Circuit held that despite this subterfuge, the case was properly treated as 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. The case stands only for the proposition that when a class representative in a traditional, Rule 23-type class action seeks relief for the class that he can obtain only in the capacity as class representative, he is pursuing a class action even if he tries to deny it. The decision quite evidently has no bearing on whether the entirely distinct type of action at issue here is a class action.

Moreover, nothing in *Addison* remotely suggests any retreat by the Seventh Circuit from the analysis it employed in *LG Display v. Madigan*, 665 F.3d at 772, to find that a *parens patriae* action was not a class action. Indeed, *Addison* cites *Madigan* approvingly and distinguishes it on the ground that the plaintiff in *Addison* "remains the representative of a class that was *actually certified 'under Rule 23 or the state equivalent.'*" *Id*. (emphasis added). That reasoning is wholly inapplicable to a PAGA plaintiff.

Beyond its misplaced reliance on *Brown* and *Addison*, Chase attempts to argue that the decision below conflicts with the Fourth Circuit's decision in *McGraw*. *McGraw*, however, developed the analysis applied by the court below to determine whether a PAGA action is a class action. Moreover, the application of that analysis in *McGraw* and the decision below is consistent: Both courts cataloged the many procedural differences between an enforcement action brought on behalf of the state and a Rule 23 class action and concluded that the former is not a class action under PAGA because it is not similar to a Rule 23 class action "in substance or in essentials." Pet. App. 9a (quoting *McGraw*, 646 F.3d at 174). Far from conflicting with *McGraw*, the decision below is based on *McGraw*'s analysis.

Chase, however, contends that *McGraw* turned on a single factor that differentiates it from this case: The state attorney general who pursued the action in *McGraw* was not an injured person who sought a recovery for himself as well as for others who would benefit from the case. *See* 646 F.3d at 177. According to Chase, *McGraw* implies that any representative action in which the representative would share in a recovery is a class action. Pet. 15-16.[4]

Chase's reading of *McGraw* is, at best, highly selective. It reads out of the opinion the primary basis

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[4] Chase's attempt to bolster this view with dictionary definitions of "class action," Pet. 17–18, not only discounts the statutory requirement that a class action be brought under a state law or rule *similar to Rule 23*, but also fails on its own terms because none of the definitions encompasses an action brought on behalf of the state.

for the court's holding, which was that the *parens patriae* action included "virtually none of the essential requirements for a Rule 23 class action," including numerosity, commonality, typicality, adequacy of representation, and notice. *Id*. at 175–76. That the attorney general was not a member of the supposed "class" was only the first requirement that was absent. *See id*. at 176. The court's statement that "at a minimum" a class action must involve a class representative who seeks recovery for claims typical of those of the class, *see id*. at 175, does not imply that *every* action where the individual plaintiff seeks a recovery in which he as well as others may share is a CAFA class action: That requirement is necessary, but not sufficient, to define a class action under CAFA.

In any event, a PAGA claim does not meet even this "minimum" criterion for class action status as defined by *McGraw*. According to *McGraw*, to qualify as a procedure "similar" to a Rule 23 class action for purposes of CAFA, an action "must, at a minimum, provide a procedure by which a member of a class whose claim is typical of all members of the class can bring an action not only on his own behalf but also on behalf of all others in the class, such that it would not be unfair to bind all class members to the judgment entered for or against the representative party." *Id*. at 175. A PAGA action requires no showing that the plaintiff's claims are "typical" of those of other employees.[5] And, as the court of appeals pointed out, its

[5] As long as the PAGA plaintiff has suffered at least one covered Labor Code violation, he may seek penalties on behalf of non-party aggrieved employees for any number of other violations, regardless of whether the plaintiff also suffered those same violations. *See* Cal. Labor Code § 2699(c).

binding effect (unlike that of a class action) does not rest on the proposition that it comports with due process to bind a class member to the result of an action brought by someone else whose claims are similar and who has been certified by a court as adequately representing the class's interest. Rather, the result of a PAGA action is binding on employees because the *state's claims for penalties* based on particular violations can only be adjudicated once. *See* Pet. App. 13a–14a; *see also Arias*, 209 P.3d at 933–34.

C. Chase'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 decision in *Hood* similarly confining CAFA jurisdiction over "mass actions" to the limits defined by the statute, Chase 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 an out-of-state defendant. As *Hood* makes clear, however, the statutory text, and not assumptions about Congress's objectives in enacting CAFA, 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, after all, 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 Chase'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, there would be no argument that it was subject to CAFA jurisdiction, even though the stakes for Chase 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.

Nor is it the case, as Chase 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 cede enforcement powers to citizens willy-nilly 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 expanding federal jurisdiction still further.

That Congress did not do so in CAFA itself, however, is evident not only from the basic definition of class actions, which does not encompass enforcement actions brought on behalf of a state, but also 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 not only to the statute's language and the consensus among the circuits about its meaning, but also to specific congressional intent underlying the law's words.

II. Chase's arguments for conventional diversity jurisdiction also fail to justify review.

A. Chase's arguments overlook that the state is the real party in interest.

Chase's argument that this Court should grant review to determine whether the potential recoveries in this case represent separate entitlements of individual employees or a "common and undivided" claim that may be aggregated and attributed solely to the individual plaintiff ignores a significant aspect of the ruling in *Urbino* that obviates the need to address the issue Chase seeks to argue: namely, the court's recognition that, insofar as the claim for penalties reflects

"the state's collective interest in enforcing its labor laws through PAGA," it is the state that is the "real party in interest." *Urbino*, 726 F.3d at 1122, 1123. The amount of a state's claim cannot satisfy § 1332(a)'s jurisdictional amount requirement because a state is not a "citizen" within the meaning of § 1332. *See*, *e.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 290 n.44 (1985); *Postal Tel. Cable Co. v. Ala.,* 155 U.S. 482 (1894). The state's claims can never count toward establishing that there is a "matter in controversy" between "citizens of different States" that "exceeds the sum of $75,000." 28 U.S.C. § 1332(a).

After the decision in *Urbino*, the California Supreme Court ruled definitively as a matter of state law that the state is "always the real party in interest" in a PAGA case. *Iskanian*, 327 P.3d at 148. *Iskanian* reflects an authoritative construction of PAGA by the state's highest court, and it is "substantive state law" that determines who is a real party to a claim. *See Dept. of Fair Employment & Housing v. Lucent Tech., Inc.*, 642 F.3d 728, 738 (9th Cir. 2011). Nonetheless, Chase neither mentions *Iskanian* nor acknowledges *Urbino*'s real party in interest analysis, which *Iskanian* effectively confirms.

The significance of the state's status as the real party in interest is twofold. First, because the claim to penalties belongs to the state, the amount of penalties cannot, by definition, satisfy the amount-in-controversy requirement of § 1332(a), which refers only to the amount that is in controversy between citizens of different states. Second, leaving amount in controversy aside, the presence of a real party in interest that is not a citizen is fatal to jurisdiction under

§ 1332(a), as such jurisdiction requires complete diversity of citizenship between plaintiffs and defendants. As this Court reiterated just last Term in *Hood*, "in cases involving a State or state official, we have inquired into the real party in interest because a State's presence as a party will destroy complete diversity." 134 S. Ct. at 745. Absent complete diversity, Chase's arguments about the amount in controversy are irrelevant.

B. Chase identifies no issue concerning the "common and undivided interest" standard that merits review.

Even if the state's role as real party in interest did not obviate any inquiry into whether penalties attributable to violations affecting other employees could be aggregated and ascribed to Baumann for purposes of § 1332(a), Chase offers no reason why this Court should review the question whether claims for PAGA penalties assert a common and undivided interest permitting aggregation. There is no conflict among the lower courts over that issue, nor any substantial argument that *Urbino*'s application of the common and undivided interest standard was incorrect.

Indeed, Chase does not contend that there is any division among the lower courts over the application of the common and undivided interest standard to PAGA claims or claims for penalties under any analogous statutes. In fact, Chase cites no other cases even addressing the issue.

Instead, Chase argues broadly that the common and undivided interest standard—which has controlled when claims may be aggregated to satisfy the amount-in-controversy requirement for decades—is

confusing and unclear, and has led to inconsistent results in other kinds of cases, such as those involving disgorgement and punitive damages. However, as even Chase appears to acknowledge, seemingly inconsistent results in those cases are largely attributable to differences in state law that affect the nature of the rights at issue. *See* Pet. 24 (citing *Everett v. Verizon Wireless, Inc.*, 460 F.3d 818, 826 (6th Cir. 2006), in which Judge Sutton explained that the treatment of disgorgement claims depends on their nature under state law).[6] More importantly, despite its broad criticism of the common and undivided interest test, Chase does not advocate some alternative approach, but merely requests that this Court second-guess the Ninth Circuit's application of that standard to the facts here. Chase offers no explanation of how doing that would clear up any confusion that may attend the application of the standard to other, very different circumstances.

The closest Chase comes to asserting that the decision below implicates any disagreement among the lower courts is in its assertion that the Ninth Circuit should not have focused on the fact that the aggrieved employees possessed rights held individually and that Chase's "obligation to them is not 'as a group.'" *Urbino*, 726 F.3d at 1122 (quoting *Gibson v. Chrysler Corp.*, 261 F.3d at 944). Instead, Chase asserts, the

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[6] Chase also overreaches in attempting to illustrate the claimed disparate treatment of punitive damages for aggregation purposes with a 19-year-old Fifth Circuit decision, *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), which that court has subsequently *disavowed* as inconsistent with controlling Fifth Circuit precedent. *See H&D Tire & Auto.-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000).

court should have followed what it claims is the conflicting approach of the Second Circuit in *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997), and focused not on the source of the employees' rights, but instead on their unity of interest in a "common fund" remedy. Pet. 23.

The flaws in this contention are manifold. First, it *directly* contradicts Chase's argument below. In its briefs in the court of appeals, Chase expressly told the court it should focus on *the nature of the right asserted* by the claimants, and cited *Gibson* as exemplifying the proper approach. Chase C.A. Br. 26–27. Chase went on to urge the court very specifically to reject a "common fund" approach. *Id.* at 31. Now, after its own framing of the decision did not yield the result it hoped for, Chase faults the court in *Urbino* for following the approach it advocated below. But Chase forfeited any argument that the Ninth Circuit should have adopted a "common fund" approach rather than following *Gibson* when it argued just the opposite below.

Second, the conflict between the two approaches that Chase posits does not actually exist. The Second Circuit in *Gilman* emphasized that "what controls is the nature of the right asserted, not whether successful vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs." 104 F.3d at 1427. Thus, "[c]ourts apply the common fund doctrine, and permit aggregation of claims to satisfy the jurisdictional amount, 'only when several parties have a common, undivided interest and a single title or right is involved.'" *Id.* at 1423 (quoting 14A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3704, at 83 (2d ed. 1985)). Such a com-

mon right or title is exactly what the court in *Urbino* held was absent.

Third, even if the "common fund" approach differed in some fashion from the analysis applied in *Urbino*, a PAGA claim would fail to satisfy its critical requirements. As *Gilman* itself explains, the paradigmatic "common fund" case is one where the claimants assert an entitlement to "a single indivisible res," 104 F.3d at 1423—a property or fund the size of which does not vary with the number of claimants. Thus, as another court has explained, "[a]n identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased." *Kessler v. Nat'l Enters., Inc.,* 347 F.3d 1076, 1079 (8th Cir. 2003).

The PAGA recoveries that may be obtained by individual claimants lack these essential characteristics. A PAGA action seeks no preexisting common fund or indivisible res: The size of the recovery depends entirely on how many violations of rights of individual employees are proved. And each employee receives a share of penalties attributable to violations he or she suffered: Thus, if one employee does not collect his or her share of penalties, the shares of remaining employees do not increase. Just as in *Gilman* itself—where, it should be noted, the Second Circuit found that claims could *not* be aggregated—there is no common fund because the employees "never *possessed* anything in common prior to the litigation," 104 F.3d at 1424, and they share only an interest in recovering a portion of the penalties attributable to the discrete violations they individually suffered.

Chase finally circles back to arguing that a PAGA recovery is not based on the individual rights of the employees, but reflects a *public* interest in recovering civil penalties. Pet. 26. That reasoning, however, leads inevitably to *Urbino*'s conclusion (never mentioned by Chase) that if there is an undivided interest in the recovery of penalties, it is an interest of the *state*—a conclusion confirmed by *Iskanian*'s holding that the state is the real party in interest in a PAGA action. Far from advancing Chase's cause, that conclusion is, as explained above, fatal to any attempt to assert jurisdiction under § 1332(a).

III. This case is far from an ideal candidate for review.

Characterizing the court of appeals' decision as "schizophrenic," Chase asserts that this case *must* somehow qualify for federal diversity jurisdiction either as a CAFA class action or as a conventional diversity case with an amount in controversy exceeding $75,000. Pet. 21. But there is no logical reason why a PAGA action must be one or the other: The possibility that Chase overlooks is that it could be neither, because Congress has not provided for jurisdiction over such an action. Moreover, Chase's suggestion that the court of appeals' reasons for finding the case to fall outside of either branch of diversity jurisdiction are inconsistent is wrong. The same fundamental characteristics of a PAGA action explain why it is neither a class action nor a diversity case: It is an enforcement action whose principal function is to seek penalties on behalf of the state.[7]

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[7] In actions brought under analogous laws of the District of Columbia, federal courts in the District have likewise consistent-

(*Footnote continued*)

Moreover, the case is hardly an "ideal vehicle" for review of the issues Chase presents. *See* Pet. 29. Chase forfeited the principal argument it now advances for why potential PAGA recoveries attributable to violations affecting different employees should be aggregated to meet § 1332(a)'s amount-in-controversy requirement when it urged the court of appeals to reject the "common fund" theory that its petition champions. More fundamentally, the issue of aggregation need not even be reached here because the state's status as real party in interest, a point Chase does not even address, eliminates any possibility of diversity jurisdiction under § 1332(a).

Finally, Chase's contention that the Court should grant review now because the limits on appellate review of remand orders make it unlikely that these issues will again rise to the appellate level is unpersuasive. Chase's argument rests on the notion that permissive appeals of CAFA remand orders under 28 U.S.C. § 1453(c) are highly unusual because the time limits for appellate decision under § 1453(c)(2) make the procedure impractical. The courts of appeals, however, have regularly managed to decide such appeals because, as they unanimously recognize, the time limit does not begin to run until the court of appeals accepts review, and there is no limit on the

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ly held that private attorney general actions qualify neither for CAFA jurisdiction as class actions nor for conventional diversity jurisdiction under an aggregation theory. *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).

amount of time a court may take to consider a petition for leave to appeal. *See Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675, 678 (7th Cir. 2006). Moreover, decisions denying remand may be reviewed either after final judgment or, as in this case, under § 1292(b) if they present a substantial legal issue. Thus, should a court depart from the consensus view of the CAFA class action definition or from ordinary aggregation principles under § 1332(a) and hold that there is diversity jurisdiction over a private attorney general action under either § 1332(a) or 1332(d), review would then be available, and this Court would have the opportunity to address the issues should a conflict arise at the appellate level.

Until that occurs, however, there is no substantial reason to review either issue. Indeed, where, as here, the issues presented do not merit review, the possibility that they might not be presented again is no reason to grant review. Rather, that possibility is yet another reason to deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 2014