No. _____

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

The questions presented are:

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

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

ABM Onsite Services - West, Inc., ABM Services, Inc. (now known as ABM Onsite Services - West, Inc.), ABM Janitorial Services - Northern California, Inc. (now known as ABM Onsite Services - West, Inc.), ABM Janitorial Services, Inc. (now known as ABM Onsite Services, Inc.), and ABM Onsite Services, Inc. are all wholly owned subsidiaries of ABM Industries Incorporated (erroneously sued as ABM Industries, Inc.).

ABM Industries Incorporated is a publicly traded corporation. No other publicly held corporation owns ten percent or more of ABM Industries Incorporated stock or any of its subsidiaries.

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OPINIONS BELOW

The Ninth Circuit's order denying permission to appeal under 28 U.S.C. § 1453(c) (App. 1a) and the district court's order granting plaintiffs' motion to remand (App. 2a) are unreported.

JURISDICTION

ABM removed this putative class action to federal court under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2). The district court remanded this case to state court, and ABM filed a timely petition for permission to appeal under 28 U.S.C. § 1453(c). The Ninth Circuit denied ABM's petition on February 24, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See Dart Cherokee Basin Operating Co.* v. *Owens*, 135 S. Ct. 547, 558 (2014).

RELEVANT STATUTORY PROVISIONS

Pertinent provisions of CAFA and the California Labor Code Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code § 2698 et seq., are reproduced in the appendix to the petition. App. 21a, 23a.

STATEMENT

This case presents important questions about the scope of federal jurisdiction under CAFA. In enacting CAFA, Congress expanded the jurisdiction of federal courts to ensure that parties have access to a federal forum for "interstate cases of national importance" brought under state law. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5. Under CAFA, federal courts have jurisdiction "to hear a 'class action' if the class has more than 100 members, the parties are minimally diverse, and the 'matter in controversy exceeds the sum or value of $5,000,000.'" *Standard Fire Ins. Co.* v. *Knowles*, 133 S. Ct. 1345, 1348 (2013) (quoting 28 U.S.C. § 1332(d)(2), (d)(5)(B)).

This is exactly the type of "interstate case[]" that Congress had in mind when it enacted CAFA—a suit on behalf of hundreds of absent California residents seeking in excess of $5 million from out-of-state defendants. The named plaintiffs—two individuals who worked as janitorial employees for ABM—do not deny that they are demanding more than $5 million, that they seek a binding adjudication of the claims of more than 100 current and former ABM employees, that minimal diversity exists, and that none of CAFA's exceptions apply. Yet, because plaintiffs styled their PAGA claim as a supposedly "non-class" representative claim brought on behalf of more than 100 diverse absent persons, the district court remanded this multimillion dollar class action to state court. App. 2a.

Two Ninth Circuit precedents tied the district court's hands and will continue to prevent removal to federal court of actions involving "high stakes" PAGA claims, *Sakkab* v. *Luxottica Retail N. Am., Inc.*, 803

F.3d 425, 437 (9th Cir. 2015), which are materially indistinguishable from traditional class actions.

The first, *Baumann* v. *Chase Investment Services Corp.*, 747 F.3d 1117 (9th Cir.), *cert. denied*, 135 S. Ct. 870 (2014), held that an action asserting a single, purportedly "non-class" representative PAGA claim on behalf of absent persons is not a "class action," as defined by 28 U.S.C. § 1332(d)(1)(B), because the Ninth Circuit believed that such actions do not "closely resemble[]" class actions authorized under Federal Rule of Civil Procedure 23. *Baumann*, 747 F.3d at 1121 (quotation marks and citation omitted).

The second, *Yocupicio* v. *PAE Group, LLC*, 795 F.3d 1057 (9th Cir. 2015), held that where an action asserts both "class" claims and allegedly "non-class" representative PAGA claims on behalf of the same group of absent persons, the PAGA claims cannot be considered when determining whether CAFA's $5 million threshold is satisfied, even though 28 U.S.C. § 1332(d)(6) requires aggregation of the "claims of the individual class members." *Yocupicio*, 795 F.3d at 1059, 1062.

Taken together, *Baumann* and *Yocupicio* preclude district courts in the Ninth Circuit from considering purportedly "non-class" representative PAGA claims—no matter their significance or scope—in assessing whether they have jurisdiction under CAFA. This approach "exalt[s] form over substance," conflicts with CAFA's plain language, and undermines its "primary objective" to "ensur[e] 'Federal court consideration of interstate cases of national importance.'" *Standard Fire*, 133 S. Ct. at 1350 (quoting § 2(b)(2), 119 Stat. at 5). It also defies "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo.*

River Water Conservation Dist. v. *United States*, 424 U.S. 800, 817 (1976). And given that Rule 23's procedural protections are "grounded in due process," *Taylor* v. *Sturgell*, 553 U.S. 880, 901 (2008), it is particularly troubling that, under the Ninth Circuit's approach, the fewer protections a State provides in authorizing representative adjudication, the more likely it is that removal under CAFA will be unavailable.

This interpretation of CAFA, which has been adopted by the Second, Third, Fourth, and Ninth Circuits, conflicts with decisions of the Seventh and Eighth Circuits, which have held that removal under CAFA is not limited to state laws or rules that mirror each of Rule 23's procedural requirements. Rather than requiring precise correlation between state law and Rule 23, or giving talismanic significance to the labels used in a complaint, these courts have instead employed a functional approach to determine whether actions are removable under CAFA.

ABM urged the Ninth Circuit to reconsider its decisions in *Baumann* and *Yocupicio* when it sought permission to appeal under 28 U.S.C. § 1453(c). But the Ninth Circuit denied ABM's petition, and thus effectively froze "the law applied by the District Court . . . in place for all venues within" its jurisdiction. *Dart Cherokee Basin Operating Co.* v. *Owens*, 135 S. Ct. 547, 556 (2014). The Court should grant review and hold that plaintiffs and States cannot use statutes like PAGA as an end run around CAFA.

1. In 2005, Congress enacted the Class Action Fairness Act in response to widespread "abuses of the class action device" that had "harmed class members with legitimate claims and defendants that

[had] acted responsibly," "adversely affected interstate commerce," and "undermined public respect for our judicial system." § 2(a)(2), 119 Stat. at 4.

Congress specifically found that a "key reason for these problems" was that "most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements." S. Rep. No. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5. "In too many cases, state court judges [were] readily approving class action settlements that offer[ed] little—if any—meaningful recovery to the class members and simply transfer[red] money from corporations to class counsel." *Id.* And the presence of "[m]ultiple class action cases purporting to assert the same claims on behalf of the same people . . . proceed[ing] simultaneously in different state courts" led to "judicial inefficiencies and promot[ed] collusive activity." *Id.* "Finally, many state courts freely issue[d] rulings in class action cases that ha[d] nationwide ramifications, sometimes overturning well-established laws and policies of other jurisdictions." *Id.*

In enacting CAFA, Congress's "primary objective" was "ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire*, 133 S. Ct. at 1350 (quoting § 2(b)(2), 119 Stat. at 4); *see also Dart Cherokee*, 135 S. Ct. at 554 ("CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'" (quoting S. Rep. No. 109-14, at 43)).

Congress was concerned that the pre-CAFA diversity jurisdiction regime "enable[d] lawyers to 'game' the procedural rules." S. Rep. No. 109-14, at 4.

CAFA furthered this objective by amending the diversity jurisdiction statute to "give[] federal courts jurisdiction over certain class actions, defined in § 1332(d)(1), if the class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million." *Dart Cherokee*, 135 S. Ct. at 552 (citing 28 U.S.C. § 1332(d)(2), (5)(B)); *see also Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 594 n.12 (2005) (Ginsburg, J., dissenting) ("CAFA's enlargement of federal-court diversity jurisdiction was accomplished, 'clearly and conspicuously,' by amending § 1332.").

CAFA defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). The Senate Judiciary Committee report on CAFA noted that this definition should be "interpreted liberally." S. Rep. No. 109-14, at 35. According to that report, CAFA's "application should not be confined solely to lawsuits that are labeled 'class actions' by the named plaintiff or the state rulemaking authority." *Id.* "Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions." *Id.*

CAFA also "abrogate[d] the rule against aggregating claims" of absent class members. *Exxon Mobil Corp.*, 545 U.S. at 571. Rather, for purposes of determining whether CAFA's $5 million amount-in-controversy requirement is satisfied, "the claims of

the individual class members shall be aggregated." 28 U.S.C. § 1332(d)(6). The statute defines "class members" as "the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action." 28 U.S.C. § 1332(d)(1)(D). CAFA therefore authorizes aggregation of all "claims" of those persons "who fall within the definition of the proposed . . . class." Like the definition of "class action," Congress specifically noted that the provision requiring aggregation of all "claims of the individual class members"—"new subsection 1332(d)(6)"—should "be interpreted expansively." S. Rep. No. 109-14, at 42.

Finally, CAFA relaxed the complete diversity requirement established in *Strawbridge* v. *Curtis*, 7 U.S. (3 Cranch) 267, 267–68 (1806), by expanding federal jurisdiction to interstate cases—like this one—where "*any* member of the class of plaintiffs is a citizen of a State different from *any* defendant." 28 U.S.C. § 1332(d)(2)(A) (emphasis added).

2. PAGA authorizes the recovery of civil penalties for certain California Labor Code violations "through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." Cal. Lab. Code § 2699(a). For California Labor Code provisions that do not themselves specify a monetary penalty, PAGA provides statutory penalties of $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). 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)(1).

PAGA provides that civil penalties collected from an employer "shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency . . . ; and 25 percent to the aggrieved employees." Cal. Lab. Code § 2699(i). PAGA further provides that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs." *Id.* § 2699(g)(1). PAGA penalties can run into the hundreds of millions of dollars. *See Sakkab*, 803 F.3d at 448 (Smith, J., dissenting) ("A representative PAGA claim could . . . increase the damages awarded . . . by a multiplier of a hundred or thousand times . . . ."); *Kilby* v. *CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013) ("Even a conservative estimate would put the potential penalties [under PAGA] in these cases in the tens of millions of dollars.").

The California Supreme Court has held that while PAGA claims "may be brought as class actions," *Arias* v. *Superior Court*, 209 P.3d 923, 930 n.5 (Cal. 2009), they need not comply with California's class action statute. *See id.* at 933. As a result, in California state court, a plaintiff suing on behalf of other allegedly aggrieved employees under PAGA is not required to seek or obtain class certification or provide notice of the action to absent persons. *Id.* at 929–34.

These purportedly "non-class" PAGA actions can bind absent employees without notice or an opportunity to opt out. *See Arias*, 209 P.3d at 934 ("[N]onparty employees . . . are bound by the judgment in an action brought under the act."). They are also preclusive as to the defendant employers: "[I]f

an employee plaintiff prevails in an action under [PAGA] for civil penalties by proving that the employer has committed a Labor Code violation, the defendant employer will be bound by the resulting judgment" and "[n]onparty employees may then, by invoking collateral estoppel, use the judgment against the employer to obtain remedies other than civil penalties for the same Labor Code violations." *Id.*

3. Plaintiff Marley Castro filed a "class action" on behalf of herself and similarly situated ABM janitorial employees in California state court on October 24, 2014. App. 42a. The initial complaint alleged that ABM had violated the California Labor Code by failing to reimburse or indemnify Castro and her fellow employees for cell-phone expenses incurred on the job. *Id.* at 43a.

ABM timely removed the action under CAFA. Over a month later, Castro, joined by plaintiff Lucia Marmolejo, filed an amended complaint in federal court. App. 26a. The amended complaint asserted in its first paragraph that "[t]his is a class action under California Code of Civil Procedure § 382" and "in the event this matter remains in federal court, the class allegations will be governed by Federal Rule of Civil Procedure 23." *Id.* at 26a–27a (footnote omitted). Plaintiffs sought to represent a class of "all janitorial employees who worked for Defendants and were paid on an hourly basis in the State of California at any time during the Class Period." *Id.* at 31a. The amended complaint also added a claim under PAGA for the same purported California Labor Code violations. *Id.* at 27a, 38a–39a.

Although plaintiffs styled the entire action as "a class action under California Code of Civil Procedure

§ 382," the amended complaint sought to distinguish the purportedly "non-class" representative PAGA claim from the "class" claims under the California Labor Code. Thus, the amended complaint asserts that "[f]or the First and Second Causes of Action, but not with respect to the Third Cause of Action under PAGA, Plaintiffs bring this lawsuit as a class action . . . on behalf of themselves and all similarly situated janitorial employees." App. 31a. The amended complaint nevertheless alleged that plaintiffs were seeking to pursue the PAGA claim and the "class" claims on behalf of the same group of absent individuals: "Plaintiffs allege as follows a representative cause of action [under PAGA] on behalf of themselves and the *above-described Class*." *Id.* at 38a (emphasis added).

4. After filing the amended complaint, plaintiffs moved to remand on the ground that the claims in the initial complaint did not meet CAFA's $5 million amount-in-controversy requirement. The district court remanded without considering the amended complaint. App. 15a n.4, 20a. ABM sought permission to appeal the district court's remand order under 28 U.S.C. § 1453(c), and the Ninth Circuit granted review.

While that appeal was pending, ABM again removed this case based on the PAGA claim in the amended pleading. App. 7a. At that time, the Ninth Circuit had not yet decided whether the amount that a representative PAGA claim puts in controversy should be taken into account in assessing whether jurisdiction exists under CAFA. ABM thus removed on the basis that plaintiffs' representative PAGA claim—asserted on behalf of the same group of individuals as their two claims expressly styled as

"class" claims—must be considered a "claim[] of the individual class members," 28 U.S.C. § 1332(d)(6), and included in the calculation of the amount in controversy under CAFA.

Two months later, however, the Ninth Circuit decided *Yocupicio*, which held that a PAGA claim styled as a purportedly "non-class" representative claim could not "be deemed to be a class claim," 795 F.3d at 1060 & n.7 (citing *Baumann*, 747 F.3d at 1124), and "the amount involved in the non-class claims cannot be used to satisfy the CAFA jurisdictional amount." *Id.* at 1062.[1]

Plaintiffs then moved to remand again, arguing that, under *Baumann* and *Yocupicio*, the district court could not consider PAGA penalties in determining the amount in controversy. *See Castro* v. *ABM Indus. Inc.*, N.D. Cal. No. 4:15-cv-01947-YGR, Dkt. 31 at 1, 3–5. In opposition, ABM established that plaintiffs' PAGA claim, standing alone, satisfied CAFA's $5 million amount-in-controversy requirement even under a conservative estimate. *See Castro* v. *ABM Indus. Inc.*, N.D. Cal. No. 4:15-cv-01947-YGR, Dkt. 32 at 8. This estimate was conservative because it included only 25% of the total penalties sought and assumed that plaintiffs were not seeking heightened statutory penalties for subsequent alleged violations. *See id.* at 8 n.2.

Before the district court resolved plaintiffs' second remand motion, the Ninth Circuit dismissed ABM's appeal of the district court's first remand order as moot because "the district court [was] al-

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[1] The defendant in *Yocupicio* did not file a petition for a writ of certiorari.

ready considering" "Castro's motion to remand on the basis of the amended complaint." App. 7a.

5. On November 10, 2015, the district court, after considering the amended complaint, granted plaintiffs' motion to remand. App. 2a. Relying on *Yocupicio*—which was "directly applicable here and binding authority," *id.* at 4a—the district court concluded that "PAGA penalties asserted as non-class claims cannot be added to amounts recoverable as class claims to reach the $5 million amount-in-controversy threshold in CAFA cases." *Id.* at 3a (citing *Yocupicio*, 795 F.3d at 1062); *see also id.* (citing *Yocupicio*, 795 F.3d at 1060 n.7).

On November 20, 2015, ABM filed a petition for permission to appeal under 28 U.S.C. § 1453(c) in which it urged the Ninth Circuit to grant review and, sitting en banc, reconsider its decisions in *Baumann* and *Yocupicio*. On February 24, 2016, the Ninth Circuit denied permission to appeal. App. 1a. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decisions in *Baumann* v. *Chase Investment Services Corp.*, 747 F.3d 1117 (9th Cir.), *cert. denied*, 135 S. Ct. 870 (2014), and *Yocupicio* v. *PAE Group, LLC*, 795 F.3d 1057 (9th Cir. 2015), have created a roadmap for plaintiffs seeking to evade federal jurisdiction over cases involving high-value claims brought against out-of-state defendants on behalf of absent persons. By focusing only on PAGA's lack of Rule 23-like protections, the Ninth Circuit overlooked the critical similarity between representative PAGA actions and traditional class actions: both can extinguish the claims of absent persons. *See Arias* v. *Superior Court*, 209

P.3d 923, 934 (Cal. 2009) (holding that PAGA judgments bind both nonparty employees and defendants); *Cooper* v. *Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation."); *see also Taylor* v. *Sturgell*, 553 U.S. 880, 894 (2008) (explaining that nonparties can be bound in "properly conducted class actions").

The Ninth Circuit is the latest jurisdiction to adopt an unduly crabbed view of what constitutes a "class action" under CAFA, but it is not the first. The Third Circuit has also held that a representative action does not qualify as a "class action" unless it has the same procedural protections as Rule 23. And the Second and Fourth Circuits, in assessing removal of *parens patriae* actions, have adopted a similarly formalistic interpretation of CAFA's definition of a "class action" that would apply equally to representative actions brought by private individuals. Those decisions defy this Court's teaching that CAFA does not "exalt form over substance." *Standard Fire Ins. Co.* v. *Knowles*, 133 S. Ct. 1345, 1350 (2013). By contrast, the Seventh and Eighth Circuits have refused to limit removal under CAFA to actions brought under state statutes and rules that contain all of the procedural requirements of Rule 23.

The Ninth Circuit's decisions in *Baumann* and *Yocupicio* will likely embolden States to insulate other claims from removal to federal court—as California has done here with PAGA—by adopting statutes or rules that authorize representative actions which bind absent persons without requiring the same procedural protections as Rule 23. Under

these precedents, a State can simply strip away Rule 23-like procedures and thereby prevent removal of what are, in substance, class actions. Given "CAFA's primary objective" is to provide more protection and uniformity to litigants involved in "'interstate cases of national importance,'" *Standard Fire*, 133 S. Ct. at 1350 (quoting Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5), and that Rule 23's notice and opt-out requirements are "grounded in due process," *Taylor*, 553 U.S. at 901, it is particularly troubling that under *Baumann* and *Yocupicio*, state statutes can defeat federal jurisdiction by providing *fewer* protections to both defendants and absent persons.

This case likely presents this Court's last opportunity to prevent plaintiffs in the Ninth Circuit from circumventing CAFA by pursuing "high stakes" representative PAGA actions, *Sakkab* v. *Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 437 (9th Cir. 2015), rather than traditional class actions. Future defendants will be loath to remove actions asserting representative PAGA claims in the face of this binding precedent, especially because courts may award attorney's fees for improper removals. *See* 28 U.S.C. § 1447(c); *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 141 (2005) (holding that courts can award attorney's fees incurred as a result of a removal under § 1447(c) where the removing party "lacked an objectively reasonable basis for seeking removal").

Indeed, ABM removed this action because *Yocupicio* had not yet been decided. It is "hardly probable" that a future "lawyer may be irresponsible or fail to learn from [ABM's] experience" and "that the [Ninth] Circuit would then seize the very opportunity it passed up in [this] case" to overrule *Bau-*

mann and *Yocupicio*. *Dart Cherokee Basin Operating Co.* v. *Owens*, 135 S. Ct. 547, 556 n.5 (2014).

The Court should therefore grant the petition to ensure that an "erroneous" interpretation of CAFA's text and purpose is not frozen in time and immune from further review in the Ninth Circuit, *see Dart Cherokee*, 135 S. Ct. at 558, to resolve the ripe conflict among the courts of appeals, to deter States from removing procedural protections to evade federal courts, and to reaffirm that CAFA does not "exalt form over substance." *Standard Fire*, 133 S. Ct. at 1350.

I. COURTS ARE DIVIDED OVER WHAT CONSTITUTES A "CLASS ACTION" UNDER CAFA.

CAFA defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure *or similar State statute* or rule of judicial procedure *authorizing an action to be brought by 1 or more representative persons as a class action*." 28 U.S.C. § 1332(d)(1)(B) (emphasis added). CAFA's definition of a "class action" thus trains on whether the "statute or rule of judicial procedure" authorizes "representative persons" to bring an "action" on behalf of a "class"—i.e., a group of similarly situated persons.

The courts of appeals are divided over how to interpret CAFA's definition of a "class action." The Second, Third, Fourth, and Ninth Circuits have adopted a restrictive interpretation limiting "class actions" to those formally brought under state rules and statutes that have the same procedural protections as Rule 23. By contrast, the Seventh and Eighth Circuits have construed CAFA's "class action" definition in accordance with the statute's text and

purpose, refusing to artificially limit removal under CAFA to actions brought under state rules and statutes that mirror the type of class actions authorized by Rule 23.

1. In *Baumann*, the Ninth Circuit held that a PAGA action styled as a "non-class" representative action is not sufficiently "similar" to the "substance and essentials of Rule 23," and thus is not a "class action" removable under CAFA even though PAGA judgments bar absent persons from relitigating their PAGA claims. *Baumann*, 747 F.3d at 1121. It reached this result because, under California state law, PAGA claims can be pursued on behalf of absent persons without satisfying all of the procedural protections of Rule 23. The Ninth Circuit emphasized that "PAGA has no notice requirements for unnamed aggrieved employees," employees may not "opt out of a PAGA action," and PAGA does not require the court to "inquire into the named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees." *Id.* at 1122.

Three other courts of appeals—two over vigorous dissents—have also adopted an unduly formalistic construction of CAFA's definition of a "class action" that focuses on whether a state law or rule tracks Rule 23.

In *Erie Insurance Exchange* v. *Erie Indemnity Co.*, 722 F.3d 154 (3d Cir. 2013), a divided Third Circuit panel held that an action brought under a state statute authorizing members of an insurance exchange to bring a misappropriation claim "on behalf of" all other members was not a "class action" removable under CAFA. *Id.* at 156. Like the Ninth Circuit in *Baumann*, the Third Circuit emphasized that the state statute at issue did not "provide for

class certification mechanisms," "list requirements such as numerosity or commonality that a suit must meet to constitute a class action," "specify the form and substance of notice that must be given to absent class members," or "permit individual class members to opt-out or provide for the appointment of a lead plaintiff or class counsel." *Id.* at 159. The Third Circuit has thus adopted an interpretation of CAFA that forecloses federal jurisdiction when state law does not provide for the procedural protections required by Rule 23.

The *Erie* dissent, however, relied on this Court's admonition that "courts should not 'exalt form over substance' when determining jurisdiction under CAFA," and concluded that "if it quacks like a class action, it is a class action." *Erie Ins.*, 722 F.3d at 163, 166 (Roth, J., dissenting) (quoting *Standard Fire*, 133 S. Ct. at 1350). The dissent also criticized the majority's approach as "inconsistent with Congress's intent that CAFA broadly confer jurisdiction on federal courts to hear class actions." *Id.* at 168.

The Second and Fourth Circuits have adopted similarly flawed readings of CAFA in holding that a *parens patriae* action is not a "class action."

In *West Virginia ex rel. McGraw* v. *CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir. 2011), a divided panel of the Fourth Circuit held that a state statute or rule is "similar" to Rule 23 only "if it closely resembles Rule 23 or is like Rule 23 in substance or in essentials." *Id.* at 174. It therefore concluded that an action brought by the West Virginia attorney general under a state consumer protection statute was not a "class action" removable under CAFA because the statute lacked Rule 23's numerosity, commonality,

and typicality requirements, and did not require notice to absent consumers. *Id.* at 173–76.

Like the dissent in *Erie*, the dissent in *CVS Pharmacy* concluded that the claims at issue "quack[ed]" like a class action. *CVS Pharmacy*, 646 F.3d at 185 (Gilman, J., dissenting). The dissent would have adopted a rule requiring courts to "determine the essence of the action." *Id.* at 180. And as the dissent explained, "the essence of a class action is set forth in the first sentence of the term's definition in Black's Law Dictionary: 'A lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group,'" and the West Virginia attorney general's action fell both within that definition and the "definition of a class action" under CAFA. *Id.* at 179 (quoting *Black's Law Dictionary* 284 (9th ed. 2009)).

In *Purdue Pharma L.P.* v. *Kentucky*, 704 F.3d 208 (2d Cir. 2013), the Second Circuit considered whether an action brought by the Kentucky attorney general under state consumer protection statutes constituted a class action under CAFA. Relying heavily on the Fourth Circuit's decision in *CVS Pharmacy*, the Second Circuit concluded that none of the consumer protection statutes at issue bore "any resemblance to Rule 23." *Id.* at 216; *see also id.* at 217 (citing *CVS Pharmacy*, 646 F.3d at 175–76). In particular, the statutes had none of "the familiar hallmarks of Rule 23 class actions," including "adequacy of representation, numerosity, commonality, typicality, or the requirement of class certification," or "notice or opt-out rights to protect absentees who may find themselves unknowingly bound by the court's judgment." *Id.* at 216.

Although *Purdue Pharma* and *CVS Pharmacy* differ from *Baumann* and *Erie* in that they involved *parens patriae* actions brought by the government, their narrow interpretation of CAFA's definition of a "class action" would apply equally to representative actions brought by private individuals. *See CVS Pharmacy*, 646 F.3d at 176 n.2 ("[W]hile we conclude that this action is a *parens patriae* action, based on the State's deterrence and consumer protection interests, that conclusion is not essential to the separate, and more meaningful determination that the action in this case was not brought under a procedure 'similar' to Rule 23."); *Purdue Pharma*, 704 F.3d at 220 n.11 (same).[2]

2. Unlike the Second, Third, Fourth, and Ninth Circuits, the Seventh and Eighth Circuits have refused to artificially limit CAFA's definition of "class action" to actions brought under state statutes or rules that mirror the procedural requirements of Rule 23.

In *Addison Automatics, Inc.* v. *Hartford Casualty Insurance Co.*, 731 F.3d 740 (7th Cir. 2013), the Seventh Circuit held that a declaratory judgment action was removable under CAFA where it asserted claims against an insurer that a third-party insured had assigned to a class as part of a class settlement of a prior action. The plaintiff—who was the class representative in the prior action—initially styled its complaint as a class action, but dismissed that complaint immediately after removal, and filed a

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[2] Neither *Purdue Pharma* nor *CVS Pharmacy* considered the separate question whether a *parens patriae* action is a "mass action" under 28 U.S.C. § 1332(d)(11), which this Court resolved in *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 134 S. Ct. 736 (2014).

new complaint in state court restyled as an individual action in an attempt to evade CAFA. Although the declaratory judgment action lacked all the procedural safeguards of Rule 23, the Seventh Circuit held that plaintiff's "coy pleading [could not] disguise the true nature of its claim" and would leave his "fellow class members to pursue for themselves claims they were entitled to expect [the plaintiff] to prosecute on their behalf." *Id.* at 743, 745. The court thus held that the declaratory judgment action was a "class action" under CAFA even though it lacked each of the procedural protections of Rule 23. *See id.* at 743–45.

Similarly, in *Brown* v. *Mortgage Electronic Registration Systems, Inc.*, 738 F.3d 926 (8th Cir. 2013), the Eighth Circuit held that an action filed under an Arkansas procedure that allows citizens to "collectively resist illegal taxation" and does not "depend upon, or require, certification under the provisions of [Arkansas] Rule 23" was removable as a "class action" under CAFA. *Id.* at 931 (quotation marks and citation omitted). An Arkansas illegal-exaction suit is brought by a representative on behalf of himself and "similarly situated" individuals. *See T&T Chem., Inc.* v. *Priest*, 95 S.W.3d 750, 751 (Ark. 2003). And the procedural requirements of Rule 23(a) do not apply, as "[n]umerosity, superiority, typicality, and adequacy are not considered in an illegal-exaction suit," and "[t]he right of opt out as developed under Rule 23 does not apply" even though absent persons are "bound by the judgment." *Worth* v. *City of Rogers*, 89 S.W.3d 875, 879–80, 882 n.1 (Ark. 2002).[3] The state law at issue in *Brown* thus

[3] Although the Eighth Circuit did note that Arkansas courts look to Arkansas Rule of Civil Procedure 23 "as a procedural

lacked the procedural protections of Rule 23 that the Second, Third, Fourth, and Ninth Circuits have held are necessary for a state law or rule to qualify as a "class action" under CAFA, but the Eighth Circuit nonetheless held that removal was proper under CAFA.

In adopting a functional test for determining whether an action is a "class action" removable under CAFA, the Seventh and Eighth Circuits have effectuated Congress's intent for this definition to be "interpreted liberally," S. Rep. No. 109-14, 35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 34, and furthered CAFA's primary goal: to expand diversity jurisdiction to "'interstate cases of national importance.'" *Standard Fire*, 133 S. Ct. at 1350 (quoting § 2(b)(2), 119 Stat. at 5).

3. The Second, Third, Fourth, and Ninth Circuits, by contrast, have adopted a narrow, formalistic interpretation of CAFA's definition of a "class action" that focuses on whether representative actions authorized under state law mirror those authorized under Rule 23. Under that flawed interpretation, the *fewer* procedural protections a state action provides for absent persons and defendants, the *more* likely such an action is to remain in state court—in direct conflict with Congress's intent in enacting CAFA. *See* S. Rep. No. 109-14, at 14. Indeed, as Congress itself recognized, it is where a State authorizes representative adjudication without providing sufficient procedural protections that federal oversight is *most* needed.

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guide," "an illegal-exaction claim does not require a 'certification' in Arkansas." *Brown*, 738 F.3d at 931.

The Ninth Circuit's decision in *Baumann*, for example, precludes removal of a PAGA representative action, even though such an action has the same characteristics as what is ordinarily understood to be a class action—namely, a binding adjudication of claims brought by a representative plaintiff on behalf of himself and similarly situated persons not before the court.[4] Whether or not brought formally on a "class" basis, PAGA allows "an aggrieved employee" to pursue claims on a representative basis on behalf of "other current or former employees" not before the court. Cal. Lab. Code § 2699(a). Together, this group of "aggrieved employee[s]" is entitled to retain 25% of their recovery along with attorney's fees and costs, and absent "nonparty employees . . . are *bound by the judgment* in an action brought under" PAGA. *Arias*, 209 P.3d at 934 (emphasis added). PAGA judgments are also preclusive as to defendants. *See id.* Representative PAGA actions, like traditional

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[4] *See, e.g.*, *Black's Law Dictionary* 304 (10th ed. 2014) (defining "class action" as "[a] lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group" and "in which a person whose interests are or may be affected does not have an opportunity to protect his or her interests by appearing personally or through a personally selected representative"); William B. Rubenstein, *Newberg on Class Actions* § 1:1 (5th ed. 2015) ("Class actions are a form of representative litigation. One or more class representatives litigate on behalf of many absent class members, and those class members are bound by the outcome of the representative's litigation."); 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1751 (3d ed. 2016) (describing the "English bill of peace that developed into what is now known as the class action" as a procedure in which a "court allowed [a] suit to proceed on a representative basis" and "the resulting judgment would bind all members of the group, whether they were present in the action or not").

class actions, are thus "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700–01 (1979).

Reading CAFA to exclude state laws like PAGA "exalt[s] form over substance." *Standard Fire*, 133 S. Ct. at 1350. Nothing in the text of CAFA suggests that a state "statute or rule of judicial procedure" must provide for the procedural protections of Rule 23 to constitute a "class action" removable under CAFA—rather, the state statute or rule must merely be "similar" to Rule 23 in that it "authoriz[es] an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B).

The Second, Third, Fourth, and Ninth Circuits' decisions also undermine Congress's intent to address the problem that, before CAFA, States frequently authorized class actions without "following the strict requirements of Rule 23 . . . which are intended to protect the due process rights of both unnamed class members and defendants." S. Rep. No. 109-14, at 14; *cf. Taylor*, 553 U.S. at 901 (expressing concern that courts might "create *de facto* class actions at will" and "circumvent[]" the "procedural protections prescribed in . . . Rule 23," which are "grounded in due process" (quotation marks and citation omitted)).

The Court should grant review to resolve this conflict, and hold that jurisdiction under CAFA does not hinge on whether a state law or rule incorporates the procedural requirements of Rule 23.

II. THE NINTH CIRCUIT'S DECISION IN *YOCUPICIO* CONFLICTS WITH THE PLAIN TEXT OF CAFA AND THIS COURT'S DECISIONS.

In *Yocupicio*, the Ninth Circuit took *Baumann*'s holding a step further, ruling that purportedly "non-class" representative PAGA claims "cannot be used to satisfy the CAFA jurisdictional amount." 795 F.3d at 1062; *see also id.* at 1060 & n.7 ("The tenth cause of action, the PAGA claim, was not brought as a class claim; it was brought as a representative claim and cannot be deemed to be a class claim." (footnote omitted) (citing *Baumann*, 747 F.3d at 1124)). This holding conflicts with the statute's text and this Court's cases interpreting CAFA.

1. *Yocupicio* contravenes CAFA's straightforward text, which expressly sets forth the mechanism for calculating the "sum or value" of the "matter in controversy": "[T]he *claims* of the *individual class members* shall be *aggregated* to determine whether" the total exceeds the $5 million jurisdictional threshold. 28 U.S.C. § 1332(d)(6) (emphasis added). The statute also defines "class members" as "the *persons (named or unnamed)* who fall within the definition of the *proposed* or certified *class* in a class action." *Id.* § 1332(d)(1)(D) (emphasis added). The statute thus authorizes aggregation of all "claims" of the "persons who fall within the definition of the proposed . . . class." *Id.* § 1332(d)(1), (6).

Because the plaintiff in *Yocupicio* sought PAGA penalties on behalf of the same "past and present employees" as the "class" claims, *see Yocupicio* v. *PAE Group, LLC*, C.D. Cal. No. 2:14-cv-08958-GW-JEM, Dkt. 1, Ex. A ¶¶ 2, 3, 24, 107–112, the potential PAGA penalties were "claims" of those "individual class members," and thus should have been in-

cluded in the calculation of the amount in controversy under 28 U.S.C. § 1332(d)(6). Yet instead of applying this unambiguous statutory language, the Ninth Circuit improperly added the word "class" to modify "claims," held that only the "class" claims must be aggregated, and thus concluded that PAGA penalties sought on a "representative" basis on behalf of putative class members must be excluded when calculating the amount in controversy. *See Yocupicio*, 795 F.3d at 1062.

This Court, however, has repeatedly rejected attempts to add to statutes words that Congress did not use. *See, e.g.*, *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (refusing "to add words to the law to produce what is thought to be a desirable result" because that is "Congress's province"). And the plain meaning of "the claims of the individual class members" unquestionably covers the allegations of PAGA violations and the demand for penalties that plaintiffs have made on behalf of the absent employees here. *See, e.g.*, *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723, 1728–29 (2011) (defining "claim" as the right to relief that arises from a set of "operative facts"); *Black's Law Dictionary* 301 (10th ed. 2014) (defining "claim" as a "demand for money, property, or a legal remedy to which one asserts a right").

Yocupicio further departs from CAFA's text by suggesting that *part* of a civil action might be a "class action," as defined by CAFA, while the rest is not. *See* 795 F.3d at 1060–61. But CAFA calls for a determination whether "*any* civil action" as a whole "*is a* class action," 28 U.S.C. § 1332(d)(2) (emphasis added), and, for purposes of assessing the amount in controversy, requires aggregation of the "the claims

of the individual class members," *id.* § 1332(d)(6), which are defined as "the persons (named or unnamed) who fall within the definition of the proposed or certified class in *a* class action." *Id.* § 1332(d)(1)(D) (emphasis added); *cf. Hertz Corp.* v. *Friend*, 559 U.S. 77, 93 (2010) (concluding that a corporation's "principal place of business" is "a single place" in part because the "[t]he word 'place' is in the singular, not the plural" (quoting 28 U.S.C. § 1332(c)(1))). *Yocupicio*'s conclusion that CAFA's amount in controversy may not include any "claims that are not part of the class action itself," 795 F.3d at 1061, cannot be reconciled with the statutory definition of a "class action," which covers the "civil action" as a whole.

2. *Yocupicio* also conflicts with this Court's interpretation of CAFA in *Standard Fire*, 133 S. Ct. 1345, and *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 134 S. Ct. 736 (2014).

In *Standard Fire*, this Court refused to allow class action plaintiffs to evade CAFA with "stipulations" not to seek more than $5 million because doing so would "exalt form over substance" and "run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" 133 S. Ct. at 1350 (quoting § 2(b)(2), 119 Stat. at 5). This Court reasoned that a contrary holding would "have the effect of allowing the subdivision of a $100 million action into 21 just-below-$5-million state-court actions simply by including nonbinding stipulations." *Id.* As the Court explained, CAFA "tells the District Court to determine whether it has jurisdiction by adding up the value of *the claim of each person* who falls within the definition of [the] proposed class and determine

whether the resulting sum exceeds $5 million." *Id.* at 1348 (emphasis added).

Yet instead of "adding up the value of the *claim of each person* who falls within the definition of [the] proposed class," *Standard Fire*, 133 S. Ct. at 1348 (emphasis added), the Ninth Circuit in *Yocupicio* added up only the value of the "*class* claims" of each person falling within the definition of the proposed class. *Yocupicio*, 795 F.3d at 1062 (emphasis added). This approach artificially bisects a case into a "class action" portion and a "non-class action" portion in determining the amount in controversy under CAFA, and excludes the non-class portion. By distinguishing "class" claims from purportedly "non-class" representative PAGA claims asserted on behalf of the same group of absent individuals, *Yocupicio* "exalt[s] form over substance," "squarely conflict[s] with the statute's objective," and encourages the same sort of pleading manipulation to evade CAFA's $5 million amount-in-controversy threshold that this Court unanimously rejected in *Standard Fire*. 133 S. Ct. at 1350.

Nor can *Yocupicio* be reconciled with this Court's decision in *Hood*. In addressing CAFA's "mass action" provision, this Court refused to read language into the statute that Congress did not actually use. *See* 134 S. Ct. at 742 ("[T]he statute says '100 or more persons,' not '100 or more named or unnamed real parties in interest.' Had Congress intended the latter, it easily could have drafted language to that effect."). Just as "Congress chose not to use the phrase 'named or unnamed' in CAFA's mass action provision," *id.*, it also chose not to use the phrase "class claims" in CAFA's aggregation provision. The Ninth Circuit in *Yocupicio*, however, failed to apply

this Court's reasoning in *Hood*, and instead concluded that Congress meant "class claims" even though the statute actually says "claims." 795 F.3d at 1062.

If *Yocupicio* stands, plaintiffs in the Ninth Circuit can defy Congress's intent to "ensure that . . . fraudulent pleading practices can no longer be used to thwart federal jurisdiction," S. Rep. No. 109-14, at 50, by framing their most valuable claims as supposedly "non-class" representative claims to avoid removal under CAFA. *See id.* at 5 (intending for CAFA to "make[] it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction"); *see also United States* v. *Naftalin*, 441 U.S. 768, 777 (1979) (avoiding a statutory construction that would "create a loophole in the statute that Congress simply did not intend to create"). This Court should grant review and reaffirm that plaintiffs may not evade CAFA through procedural gamesmanship and creative pleading.

III. THIS CASE IS LIKELY THE LAST OPPORTUNITY FOR THIS COURT TO ADDRESS CAFA'S APPLICATION TO CALIFORNIA'S PAGA.

Because *Baumann* and *Yocupicio* have "fastened on district courts within the [Ninth] Circuit's domain" an "erroneous view of the law," *Dart Cherokee*, 135 S. Ct. at 558, this case likely presents the last opportunity for this Court to address the interplay between CAFA and PAGA—an exceedingly important and recurring issue for litigants in the Ninth Circuit.

In 2014, this Court declined to review *Baumann*'s holding that representative PAGA suits do not constitute "class actions" under CAFA. *See Chase Inv. Servs. Corp.* v. *Baumann*, 135 S. Ct. 870

(2014). After ABM removed the amended complaint in this case, the Ninth Circuit reaffirmed and expanded *Baumann* in *Yocupicio* by holding that purportedly "non-class" representative PAGA claims cannot be aggregated with "class" claims to satisfy CAFA's $5 million amount-in-controversy requirement. *See Yocupicio*, 795 F.3d at 1060 & n.7 (citing *Baumann*, 747 F.3d at 1124). This Court did not have an opportunity to review *Yocupicio* because the defendant in that case did not file a petition for a writ of certiorari.

This case is likely the Court's last opportunity to review the erroneous interpretations of CAFA adopted in these decisions. ABM removed this case to federal court because *Yocupicio* had not been decided at the time of removal. Now that the Ninth Circuit has conclusively held that courts must ignore purportedly "non-class" representative claims in assessing whether they have jurisdiction under CAFA, defendants will be reluctant to attempt removal in future cases involving PAGA claims. Indeed, in the face of the Ninth Circuit's now-settled precedent, doing so would risk being ordered to pay attorney's fees and costs. *See* 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."); *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 141 (2005) (holding that courts may award attorney's fees under § 1447(c) "where the removing party lacked an objectively reasonable basis for seeking removal"); *Lussier* v. *Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1066 (9th Cir. 2008) (courts considering motions for fees under § 1447(c) may consider "whether the relevant case law clearly foreclosed the defendant's basis of removal").

This was precisely the scenario in *Dart Cherokee*. There, the Tenth Circuit had held in a prior decision that "to remove successfully, a defendant must present with the notice of removal evidence proving the amount in controversy." 135 S. Ct. at 556. Given that precedent, this Court recognized that "[t]he likelihood is slim that a later case will arise in which the Tenth Circuit will face a plea to retract [that] rule," because "[d]efendants seeking to remove under CAFA must be sent back to state court unless they submit with the notice of removal evidence proving the alleged amount in controversy." *Id.* Thus, if this Court had not granted certiorari and reversed, an "erroneous view of the law" would have been "frozen in place for all venues within the Tenth Circuit" in perpetuity. *Id.* at 556, 558.

PAGA actions have multiplied exponentially over the last decade, making this Court's review all the more critical. *See* Emily Green, *State Law May Serve as Substitute for Employee Class Actions*, L.A. Daily J., Apr. 16, 2014 (observing that "[b]etween 2005 and 2013, the number of lawsuits filed under the Private Attorneys General Act more than quadrupled from 759 to 3,137," and "[t]hat number could rise much higher as PAGA emerges as the clear alternative for unhappy workers looking to circumvent contracts requiring them to arbitrate grievances on an individual basis").[5] This trend is unsurprising,

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[5] PAGA actions also continue to proliferate because waivers of representative PAGA claims are unenforceable under California law, even where the parties have agreed to bilateral arbitration. *See Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 148–49 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015). Both the California Supreme Court and the Ninth Circuit have reached the (dubious) conclusion that the Federal Arbitration

as PAGA actions subject defendants to dizzying levels of liability. *See Sakkab*, 803 F.3d at 437 ("PAGA actions . . . involve high stakes."); *id.* at 448 (Smith, J., dissenting) ("A representative PAGA claim could . . . increase the damages awarded . . . by a multiplier of a hundred or thousand times . . . ."); *Kilby* v. *CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013) (noting that a representative PAGA action could result in "tens of millions of dollars" of potential penalties even under a "conservative estimate"); *Urbino* v. *Orkin Servs. of Cal., Inc.*, 726 F.3d 1118, 1121 (9th Cir. 2013) (noting that the plaintiff sought on behalf of 811 employees "statutory penalties for initial violations" under PAGA that "would total $405,500 and penalties for subsequent violations [that] would aggregate to $9,004,050").

At the same time, under California law, representative PAGA actions deprive defendants and absent persons of Rule 23's procedural protections—which are "grounded in due process," *Taylor*, 553 U.S. at 901—while simultaneously binding absent persons without adequate notice. These are the very type of state court actions that concerned Congress when it enacted CAFA. *See* S. Rep. No. 109-14, at 66 (expressing concern that "indiscriminate[]" certification of class actions causes "unnamed plaintiffs [to] lose important legal rights," including "appropriate awards for their injuries").

PAGA actions pursued in California state court thus expose defendants and absent persons to all of the dangers of class actions with none of the protections. By holding that CAFA does not reach repre-

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Act does not preempt that rule. *Id.* at 149–53; *Sakkab*, 803 F.3d at 434–40.

sentative PAGA claims, the Ninth Circuit has effectively sanctioned the very class action abuses that drove Congress to enact CAFA. Because this misguided approach allows plaintiffs to evade CAFA and frustrates Congress's intent to expand diversity jurisdiction in cases where a federal forum is needed most, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 24, 2016

APPENDIX

APPENDIX A

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARLEY CASTRO, on behalf of herself and all others similarly situated and LUCIA MARMOLEJO, on behalf of herself and all others similarly situated, Plaintiffs - Respondents, v. ABM INDUSTRIES INCORPORATED; et al., Defendants - Petitioners.	No. 15-80197 D.C. No. 4:15-cv-01947-YGR Northern District of California, Oakland ORDER

Before: RAWLINSON and FRIEDLAND, Circuit Judges.

Petitioner's motion for leave to file a reply in support of the petition for permission to appeal is granted. The reply has been filed.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010) (per curiam).

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARLEY CASTRO, ET AL., Plaintiffs, v. **ABM INDUSTRIES, INC., ET AL.**, Defendants.	Case No. 15-cv-01947-YGR **ORDER GRANTING PLAINTIFFS' MOTION TO REMAND** Re: Dkt. No. 31

This putative class action was previously removed to this Court from the Superior Court of the State of California, County of Alameda, on December 5, 2014. *Castro v. ABM Industries Inc., et al.*, Case No. 14-CV-05359-YGR, at Dkt. No. 1. Thereafter, plaintiffs successfully moved for remand. *Castro v. ABM Indus. Inc.*, No. 14-CV-05359-YGR, 2015 WL 1520666, at *1 (N.D. Cal. Apr. 2, 2015). After summarizing the relevant portions of the complaint and notice of removal and recounting the applicable legal standard, the Court found that defendants had failed to establish that the aggregate amount in controversy exceeded $5 million under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2). *Id*. at *4-5. The Court rejected defendants' argument that penalties available under the Private Attorneys General Act of 2004 ("PAGA"), California Labor Code sections 2698 *et seq.*, should be considered in determining the amount in controversy, as the PAGA

claims were not added until plaintiffs filed a First Amended Complaint post-removal. *Id*. at *3 n.4 (noting that "[f]or purposes of evaluating whether removal was proper, the Court looks to the operative complaint at the time the action was removed").

Defendants appealed the remand order and filed a new notice of removal in light of the First Amended Complaint. (Dkt. No. 1.) Because a new notice of removal had been filed, the Ninth Circuit denied the appeal as moot. *See Castro v. ABM Indus. Inc.*, 616 F. App'x 353 (9th Cir. 2015). Also after the operative notice of removal was filed, the Ninth Circuit held in a different case that PAGA penalties asserted as non-class claims cannot be added to amounts recoverable as class claims to reach the $5 million amount-in-controversy threshold in CAFA cases. *See Yocupicio v. PAE Grp., LLC*, 795 F.3d 1057, 1062 (9th Cir. 2015) ("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."). As in *Yocupicio*, and contrary to defendants' argument (Dkt. No. 32 at 2-3), plaintiffs in the First Amended Complaint specifically disclaim seeking class action status for the PAGA claims (Dkt. No. 3-1 ¶ 24). *See Yocupicio*, 795 F.3d at 1060 n.7 (noting a similar election was "'fatal to CAFA jurisdiction'").

Plaintiffs filed a motion to remand in light of *Yocupicio*. (Dkt. No. 31.)[1] In opposition thereto, defendants do not directly claim *Yocupicio* is inapplicable, but rather argue that case "was wrongly decided" and note their intention to "petition for rehearing en banc in the Ninth Circuit and/or [file] a petition for a writ of certiorari in the U.S. Supreme Court challenging *Yocupicio*'s holding." (Dkt. No. 32 at 1-2, 9 ("It 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.").) The Court finds *Yocupicio* is directly applicable here and binding authority. As such, and having carefully considered the papers submitted, the motion to remand is **GRANTED**. This action is hereby **REMANDED** to the Superior Court of the State of California, County of Alameda.

This Order terminates Docket Numbers 31 and 42[2] and the Clerk shall close the file.

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[1] The Court **VACATES** the hearing set for November 17, 2015, finding the motion suitable for decision without oral argument as permitted by Civil Local Rule 7-1(b) and Federal Rule of Civil Procedure 78. *See also Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir. 1991).

[2] The stipulation to continue the case management conference (Dkt. No. 42.) is **DENIED** as moot.

IT IS SO ORDERED.

Dated: November 10, 2015

s/

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

FILED
SEP 29 2015
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARLEY CASTRO and LUCIA MARMOLEJO, Plaintiffs - Appellees, v. ABM INDUSTRIES INCORPORATED; et al., Defendants - Appellants.	No. 15-16627 D.C. No. 4:14-cv-05359-YGR MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted September 15, 2015
San Francisco, California

Before: W. FLETCHER, BERZON, and BEA, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

ABM appeals the district court's remand of this suit to California state court. The district court evaluated Castro's motion to remand on the basis of the complaint Castro originally filed in state court, rather than on the basis of the amended complaint Castro filed in federal court.

ABM petitioned for permission to appeal based on the question whether the district court considered the correct complaint. Because ABM removed this case a second time after appealing the first remand order, the district court is currently reviewing Castro's motion to remand on the basis of the amended complaint.

This appeal is moot.

ABM did not challenge or brief on appeal the complex amount-in-controversy issue regarding the original complaint. So this Court cannot evaluate ABM's assertion that the non-PAGA claims, standing alone, would satisfy CAFA's jurisdictional threshold. *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 487-88 (9th Cir. 2010). The only relief this Court could order, therefore, would be a remand to the district court to consider Castro's motion to remand on the basis of the amended complaint. But the district court is already considering exactly the same issue after the second removal. Any decision we might issue as to whether it should have done so earlier could have no impact on the ultimate question whether this case proceeds in state or federal court. *See Blair v. Martel*, 645 F.3d 1151, 1157 (9th Cir. 2011) (holding that a claim became moot when lower court undertook the very action sought, as an order by the appellate court "to do something

faster" could at that point have no effect). Where resolution of a question "cannot affect the rights of litigants in the case before" an Article III court, the court "loses its power to render a decision on the merits of [the] claim." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 834 (9th Cir. 2014).

The mootness exception for cases "capable of repetition yet evading review" does not apply because this controversy is not "of inherently limited duration." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 836 (9th Cir. 2014). The issue ABM raises regarding which complaint to consider where a complaint is amended after removal can well arise in contexts allowing for review of the question without mootness concerns. That happened just recently in *Benko v. Quality Loan Service Corp.*, 789 F.3d 1111, 1117 (9th Cir. 2015). Because no mootness exception applies, dismissal is proper. *See W. Coast Seafood Processors Ass'n v. NRDC*, 643 F.3d 701, 705 (9th Cir. 2011).

This appeal is therefore dismissed.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARLEY CASTRO, ET AL., Plaintiffs, v. **ABM INDUSTRIES INCORPORATED, ET AL.**, Defendants.	Case No. 14-cv-05359-YGR **ORDER GRANTING PLAINTIFFS' MOTION TO REMAND** Re: Dkt. No. 25

This putative class action generally stems from allegations that defendants required their janitorial employees to use personal cell phones for work-related purposes without reimbursement, in violation of California Labor Code section 2802 and California Business and Professions Code section 17200 *et seq*. (Dkt. No. 1-2 ("Complaint") ¶¶ 3-5.) The case was initially filed in the Superior Court of the State of California, County of Alameda.

Defendants removed the action to federal court, arguing this Court has original jurisdiction pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2). (Dkt. No. 1.) The parties are presently before the Court on plaintiffs' motion to remand. (Dkt. No. 25 ("Mot.").) Defendants oppose the motion. (Dkt. No. 28 ("Oppo.").)

Having carefully considered the papers submitted,[1] the record in this case,[2] and good cause shown, the Court hereby **GRANTS** plaintiffs' motion and **REMANDS** this action to the Superior Court.

I. RELEVANT BACKGROUND

In the original complaint filed in state court on October 24, 2014, the proposed class includes "[a]ll individuals who worked for Defendants as nonexempt janitorial employees paid on an hourly basis in the State of California at any time during the Class Period," defined as the period beginning four years prior to the date the case was filed through "the pre-

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1 Pursuant to Federal Rule of Evidence 201(b)(2) and defendants' unopposed request for judicial notice (Dkt. No. 5) filed in conjunction with their notice of removal, the Court takes judicial notice of Table 1800 from the Consumer Expenditure Survey, U.S. Bureau of Labor Statistics ("BLS"), dated September 2014 (Dkt. No. 1-5). *See Jackson v. Specialized Loan Servicing, LLC*, No. 14-CV-05981, 2014 WL 5514142, at *3 (C.D. Cal. Oct. 31, 2014) ("A court can consider evidence proffered by the parties in deciding a remand motion, including documents that can be judicially noticed."); *Floyd v. Astrue*, No. 04-CV-9433, 2008 WL 4184662, at *2 (C.D. Cal. Sept. 5, 2008) (taking judicial notice of Bureau of Labor Statistics data). Although not subject to formal requests, the Court also takes judicial notice of similar data proffered by both parties pursuant to Federal Rule of Evidence 201(c)(1). (Declaration of Hunter Pyle in Support of Plaintiffs' Reply in Support of Remand [Dkt. No. 31-1 ("Pyle Decl."), Ex. A ("Table 1202")]; Declaration of Theane Evangelis in Opposition to Remand [Dkt. No. 28-1 ("Evangelis Decl."), Exs. A-E].)

2 The Court previously vacated the hearing on this motion pursuant to Civil Local Rule 7-1(b) and Federal Rule of Civil Procedure 78. (Dkt. No. 33.)

sent."[3] (Complaint ¶¶ 9, 22.) The complaint generally seeks relief for defendants' purported failure to reimburse employees for expenses associated with their work-related use of personal cell phones. (*Id*. ¶ 3.)

Defendants purportedly "employed thousands of nonexempt janitorial employees in California and have, at various points, paid those janitorial employees using weekly, bi-weekly, and/or semi-monthly pay periods." (Nedy Decl. ¶ 5.) Collectively, defendants assert those employees worked for a total of 796,338 semi-monthly pay periods (or their equivalent) between October 24, 2010 and October 24, 2014. (*Id*. ¶ 9.)

II. LEGAL STANDARD

A defendant may remove a civil action filed in state court if the action could have originally been filed in federal court. 28 U.S.C. § 1441. A plaintiff may seek to have a case remanded to the state court from which it was removed if the district court lacks jurisdiction or if there is a defect in the removal pro-

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[3] Plaintiffs suggest the relevant time period continues "through the date of the final disposition of this action." (Mot. at 2.) To the contrary, defendants' calculations submitted to the Court were apparently premised upon the assumption that the relevant period ended October 24, 2014, when the initial complaint was filed. (*See, e.g.*, Declaration of Nedy Warren in Support of Defendants' Notice of Removal [Dkt. No. 6 ("Nedy Decl.")] ¶¶ 6-9.) Because defendants provided employee data and calculations only for the more restricted time period, the Court will limit its analysis to that interval. The Court will similarly not address the value of any prospective injunctive relief, to the extent it was sought in the state court complaint.

cedure. 28 U.S.C. § 1447(c). The removal statutes are generally construed restrictively, so as to limit removal jurisdiction. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941).

The district court must remand the case if it appears before final judgment that the court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). There is typically a "strong presumption" against finding removal jurisdiction. *Gaus v. Miles Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The burden of establishing federal jurisdiction for purposes of removal is on the party seeking removal. *See Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004). Doubts as to removability are generally resolved in favor of remanding the case to state court. *See Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003).

CAFA provides that district courts have original jurisdiction over any class action in which: (1) the amount in controversy exceeds five million dollars, (2) any plaintiff class member is a citizen of a state different from any defendant, (3) the primary defendants are not states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief, and (4) the number of plaintiffs in the class is at least 100. *See* 28 U.S.C. §§ 1332(d)(2), (d)(5). District courts also have original jurisdiction over "all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different states." 28 U.S.C. § 1332(a)(1). Section 1332(a)'s amount-in-controversy requirement excludes only "interest and costs," so awardable attorneys' fees are included in

the calculation. *See Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700 (9th Cir. 2007).

"[U]nder CAFA the burden of establishing removal jurisdiction remains, as before, on the proponent of federal jurisdiction." *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 685 (9th Cir. 2006); *see also Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015) ("Whether damages are unstated in a complaint, or, in the defendant's view are understated, the defendant seeking removal bears the burden to show by a preponderance of the evidence that the aggregate amount in controversy exceeds $5 million when federal jurisdiction is challenged."). In the CAFA context, the applicable burden of proof is by a preponderance of the evidence. *See Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 977 (9th Cir. 2013). "Conclusory allegations as to the amount in controversy are insufficient." *Matheson*, 319 F.3d at 1090-91. However, "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014).

When measuring the amount in controversy, a court must assume that the allegations of the complaint are true and that a jury will return a verdict for the plaintiff on all claims made in the complaint. *See Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002). "The ultimate inquiry is what amount is put 'in controversy' by the plaintiff's complaint, not what a defendant will *actually* owe." *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1205 (E.D. Cal.

2008) (emphasis in original); *see Rippee v. Boston Market Corp.*, 408 F. Supp. 2d 982, 986 (S.D. Cal. 2005). In order to determine whether the removing party has met its burden, a court may consider the contents of the removal petition and summary-judgment-type evidence relevant to the amount in controversy at the time of the removal. *See Valdez*, 372 F.3d at 1117. A court may also consider supplemental evidence later proffered by the removing defendant, which was not originally included in the removal notice. *See Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n. 1 (9th Cir. 2002).

III. DISCUSSION

Defendants here bear the burden, by a preponderance of the evidence, of establishing the existence of removal jurisdiction. Defendants have failed to meet this burden as to CAFA's $5 million amount-in-controversy requirement. To the contrary, plaintiffs have persuasively argued—largely using the same data put forth by defendants, but employing more compelling interpretive methodologies—that the rel-

evant amount in controversy is below CAFA's $5 million threshold based on the removed complaint.[4]

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[4] Defendants argue the Court should consider plaintiffs' First Amended Complaint (Dkt. No. 21 ("FAC")), filed in this Court subsequent to removal, for purposes of determining whether removal was proper. The FAC adds a claim under the Private Attorneys General Act, Labor Code section 2698 *et seq.* ("PAGA"), which was not part of the state court complaint. Defendants argue relevant PAGA penalties alone exceed CAFA's $5 million jurisdictional threshold. However, defendants' calculations regarding PAGA penalties are not relevant at this juncture. For purposes of evaluating whether removal was proper, the Court looks to the operative complaint at the time the action was removed. *See Williams v. Costco Wholesale Corp.*, 471 F.3d 975, 976 (9th Cir. 2006) ("[P]ost-removal amendments to the pleadings cannot affect whether a case is removable, because the propriety of removal is determined solely on the basis of the pleadings filed in state court."); *see also Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013) ("For jurisdictional purposes, our inquiry is limited to examining the case 'as of the time it was filed in state court.'"); *Amaya v. Van Beek*, 513 F. App'x 652, 653 (9th Cir. 2013) ("[J]urisdiction must be analyzed on the basis of the pleadings filed at the time of removal without reference to subsequent amendments." (quoting *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir. 1998))); *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th Cir. 2002); *but see Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64-75 (1996) (holding a trial court's erroneous denial of a motion for remand was not fatal to a final judgment where jurisdiction was proper at the time the judgment was entered, because "once a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming"). Defendants fail to cite any binding authority supporting their contention that in the absence of the unusual circumstances at issue in *Caterpillar*—where a final judgment had already issued after the Court earlier failed to remand an improperly removed case—a subsequent amendment to the complaint cures a removal that was

Defendants point to BLS regional data[5] regarding average cell phone plan costs. Those tables provide average costs per "consumer unit," which comprise on average 2.6 individuals. (*See* Dkt. No. 1-5 at 2.) The applicable average monthly cost is $78.25 per consumer unit. (Oppo. at 5; Dkt. No. 1-5 at 5.) Defendants propose 20 percent as a "reasonable estimate of the potential reimbursement rate"—assuming work-related use of cell phones was below that benchmark. (Oppo. at 6) While initially disputed by plaintiffs, they ultimately adopted the same percentage in their calculations. (Dkt. No. 31 ("Reply") at 3, 6, 7.) Thus, the Court will follow suit at this juncture. Both parties have also utilized an attorney's fees estimate of 25 percent of the total recovery.[6]

Because the available data relates to consumer units—not individuals—the Court must determine

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improper ab initio. In *Williams*, for instance, removal was appropriate on the face of the removed state court complaint, and remained appropriate—but on different jurisdictional grounds—in light of an amended complaint subsequently filed in federal court. *See* 471 F.3d at 976-77. In that particular circumstance, remand was improper. Under the present circumstances, where the notice of removal was flawed on the date of its filing, claims added in a subsequent amended complaint cannot be considered.

[5] The data at issue relates to the "West region," which includes California. (Oppo. at 5.)

[6] Since the estimated total amount in controversy falls below CAFA's $5 million requirement even including the 25 percent fee calculation, the Court need not reach at this time the question of whether such prospective fees may be properly considered when determining removal jurisdiction.

what percentage of the average cost per consumer unit is attributable to each putative class member.[7] The parties proffer two different approaches to this question:

First, defendants suggest arbitrarily or, at least, without explanation (other than noting the cell phone industry generally provides bundling discounts) that the Court should subtract only 35 percent from the total to adjust this figure. (*See* Oppo. at 8.) Conveniently, use of this particular percentage rate results in a purported total amount in controversy of $5,066,700.53—a mere 1.316 percent above CAFA's minimum. The approach also assigns to each putative class member 65 percent of the costs attributable to a group of, on average, 2.6 individuals.

Plaintiffs, by contrast, propose a per capita approach, which assigns to each individual a pro rata share of the total cost per consumer unit to reach the applicable figure per putative class member (i.e., dividing the relevant consumer unit figure by 2.6). Utilizing plaintiffs' approach and defendants' data, the average monthly cell phone service expenditure per consumer unit in the West region ($78.25) adjusts to $30.10 per individual. Twenty percent of that figure—the agreed-upon estimate of work-related usage—is $6.02 per month or $3.01 on a semi-monthly basis. Multiplying that figure by

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[7] To the extent defendants suggest using the BLS "consumer unit" overall cost with *no* adjustment to account for expenditures attributable to each class member's cell service, the Court finds that approach unreasonable.

796,338—defendants' calculation of the number of semi-monthly pay periods at issue—yields a total of $2,396,977.38. Adding 25 percent thereof for attorney's fees ($599,244.35) results in a sum of $2,996,221.73, still well below the required $5 million.

Finally, and alternatively, defendants ask the Court to look instead to Federal Communications Commission ("FCC") data providing wireless companies' average revenue per subscriber. (Oppo. at 8-9.) That revenue average is $50.74 monthly, including an estimated 4 percent added to account for local utility taxes. (*See* Evangelis Decl., Ex. A at 19; Oppo. at 9.) Performing the same calculation as above, 20 percent of the semi-monthly cost is $5.07. Multiplied by 796,338, the total is $4,037,433.66 or $5,046,792.08 with 25 percent added for fees.

For present purposes, the Court finds the BLS regional data more useful. The FCC data apparently includes revenue not attributable to subscribers—such as fees derived from "roamers in a provider's market." (*See* Evangelis Decl., Ex. A at 19.) That difference alone could easily account for the insubstantial $46,792.08—or 0.936 percent—amount by which this estimate exceeds the $5 million threshold. Moreover, the Court finds plaintiffs' approach to using the BLS data most reasonable because it seeks to accurately account for class members' shares of household cell phone bills.

As an additional context for the analysis, plaintiffs suggest the Court consider the impact of subscriber income levels on their average monthly bills. Plaintiffs submit a BLS Consumer Expenditure Sur-

vey that is apparently not region-specific but rather estimates a U.S. consumer unit's annual expenditure on cell phone service based on income levels. (*See* Pyle Decl. Ex. A.) These figures show a substantial variance, from a mean of $441 for the lowest income group (below $5,000) to $1,349 for the highest ($70,000 and above). The overall mean of the survey is $913 annually or approximately $76.08 monthly. Plaintiffs suggest putative class members—as janitorial workers—fall into the $20,000-$29,999 bracket according to BLS data and therefore spend on average $607 annually or approximately $50.58 monthly. This determination rests on a number of assumptions, such as that the putative class members make, on average, the same as janitorial workers nationwide (i.e., there is no cost-of-living adjustment or consideration of employer-specific pay rates) and that income of *all* members of putative class members' applicable consumer units—who also contribute to the household income level—fall within the same income bracket. Because income levels are apparently correlated with annual cell phone service expenditures, the Court agrees that such data is relevant—to the extent it is used properly. However, the Court need not tackle this issue on the present record, where a reasonable interpretation of defendants' data suggests the amount in controversy is less than $5 million.

Thus, adopting plaintiffs' justified modification to defendants' methodology and proffered data, the Court finds that the relevant amount for jurisdictional purposes at the time of removal fell below CAFA's $5 million threshold. As a result, removal was improper and remand is warranted.

IV. CONCLUSION

For the foregoing reasons, plaintiffs' Motion to Remand is **GRANTED**. This action is hereby **REMANDED** to the Superior Court of the State of California, County of Alameda.

This Order terminates Docket Number 25 and the Clerk of the Court shall close the file.

IT IS SO ORDERED.

Dated: April 2, 2015

s/

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

APPENDIX E

28 U.S.C. § 1332 provides in relevant part:

§ 1332. Diversity of citizenship; amount in controversy; costs

* * *

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means 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;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

* * *

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

* * *

28 U.S.C. § 1453 provides in relevant part:

§ 1453. Removal of class actions

* * *

(c) REVIEW OF REMAND ORDERS.—

(1) IN GENERAL.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

* * *

Cal. Lab. Code § 2699 provides in relevant part:

§ 2699. Actions brought by an aggrieved employee or on behalf of self or other current or former employees; authority; gap-filler penalties; attorneys fees; exclusion; distribution of recovered penalties

(a) Notwithstanding any other provision of law, any provision of this 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 recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

* * *

(c) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

* * *

(e)

* * *

(2) In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to

do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars ($500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

* * *

(g)(1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

* * *

(i) Except as provided in subdivision (j), civil penalties recovered by aggrieved employees 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.

* * *

(l) The superior court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to this part.

* * *

APPENDIX F

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MARLEY CASTRO and LUCIA MARMOLEJO, on behalf of themselves and all others similarly situated, Plaintiffs, vs. ABM INDUSTRIES, INC.; ABM ONSITE SERVICES—WEST, INC.; ABM SERVICES, INC.; ABM JANITORIAL SERVICES—NORTHERN CALIFORNIA, INC.; and ABM JANITORIAL SERVICES, INC., Defendants.	Case No.: 4:14-cv-05359-YGR **FIRST AMENDED COMPLAINT**

INTRODUCTION

1. This is a class action under California[1] Code of Civil Procedure § 382, brought by Plaintiffs MAR-

[1] All statutory and regulatory references herein are to California law unless otherwise noted.

LEY CASTRO and LUCIA MARMOLEJO ("Plaintiffs"). As noted herein, in the event this matter remains in federal court, the class allegations will be governed by Federal Rule of Civil Procedure 23.

2. Plaintiffs seek to represent a class comprised of janitorial employees who were, are, or will be employed by Defendants ABM INDUSTRIES, INC.; ABM ONSITE SERVICES—WEST, INC.; ABM SERVICES, INC.; ABM JANITORIAL SERVICES—NORTHERN CALIFORNIA, INC.; ABM JANITORIAL SERVICES, INC. (collectively, "Defendants") in the State of California, (hereinafter "Class Members") during the relevant time.

3. Plaintiffs bring a claim on behalf of Class Members for Defendants' failure to reimburse business expenses under the Labor Code. Plaintiffs also bring a claim under the Private Attorneys General Act, Labor Code § 2698 et seq. ("PAGA"). Defendants fail to reimburse or indemnify Class Members' expenses for use of their own cell phones. Defendants require their janitorial employees, including individuals working as janitors, utility cleaners, and forepersons, to use their personal cell phones for work-related communications throughout their shifts. In certain locations, Defendants require their janitorial employees to use their personal cell phones in order to clock in and out of their shifts, breaks, and meal periods. Defendants have not and do not reimburse employees for the costs of this cell phone usage.

4. This action seeks payments for reimbursement of business expenses, interest thereon, and reasonable attorneys' fees and costs pursuant to Labor Code § 2698 et seq. 2802 and Code of Civil Proce-

dure § 1021.5. Plaintiffs, on behalf of themselves and Class Members, also seek equitable and injunctive relief for these violations pursuant to Business and Professions Code § 17200 et seq. (also referred to herein as the "UCL").

5. Plaintiffs also seek civil penalties, as described further below, pursuant to PAGA.

JURISDICTION

6. Plaintiffs filed the original complaint in this case in the Superior Court of California—County of Alameda.

7. On December 8, 2014, Defendants removed this case to the United States District Court for the Northern District of California.

PARTIES

Plaintiffs

8. Plaintiffs and Class Members are janitorial employees of Defendants who are, were, or will be employed in the State of California at some time during the period beginning four years prior to the filing of the original complaint through the date of the final disposition of this action (the "Class Period").

9. Plaintiff MARLEY CASTRO is a resident of Pleasanton, California in Alameda County and has worked as a janitorial employee for Defendants since approximately June 2013.

10. Plaintiff LUCIA MARMOLEJO is a resident of San Lorenzo, California in Alameda County and worked as a janitorial employee for Defendants since approximately 2006.

Defendants

11. ABM INDUSTRIES, INC. is a provider of building maintenance and facility services. On information and belief, ABM INDUSTRIES, INC. has its principal place of business in New York and is incorporated in the State of Delaware.

12. On information and belief, ABM ONSITE SERVICES—WEST, INC. is a wholly-owned subsidiary of ABM INDUSTRIES, INC. and has employed Class Members in California since approximately December 2013. ABM ONSITE SERVICES—WEST, INC. has its principal place of business in Texas and is incorporated in the State of Delaware.

13. On information and belief, ABM SERVICES, INC. is a wholly-owned subsidiary of ABM INDUSTRIES, INC. and employed Class Members in California prior to December 2013. The principal place of business and state of incorporation for ABM SERVICES, INC. is unknown.

14. On information and belief, ABM JANITORIAL SERVICES—NORTHERN CALIFORNIA, INC. was a wholly-owned subsidiary of ABM INDUSTRIES, INC. and employed Class Members in California prior to the formation of ABM SERVICES, INC. ABM JANITORIAL SERVICES—NORTHERN CALIFORNIA, INC. was incorporated in the State of California.

15. On information and belief, ABM JANITORIAL SERVICES, INC. is a wholly-owned subsidiary of ABM INDUSTRIES, INC. and has employed Class Members in California during the Class Period. The principal place of business and state of incorporation

for ABM JANITORIAL SERVICES, INC. are unknown.

16. Plaintiffs are informed and believe that each of the Defendants is liable to Plaintiffs and Class Members as an "employer," as that term is defined in Section 18 of the Labor Code. As employers of Plaintiffs and Class Members throughout the Class Period, each Defendant is either solely or jointly and severally liable for the economic damages, including statutory penalties, owed to Plaintiffs and Class Members under common law and by statute.

STATEMENT OF FACTS

17. During the Class Period, Defendants have employed Plaintiffs and other similarly situated hourly janitorial employees at worksites throughout California.

18. Plaintiffs are informed, believe, and thereon allege that, throughout the Class Period, at least 500 hourly janitorial employees have been employed by Defendants.

19. At all times relevant hereto, Labor Code § 2802 has applied to Plaintiffs, Class Members, and Defendants.

20. Plaintiffs are informed, believe, and thereon allege that, through common practices, policies, and/or schemes, Defendants, and each of them, have systematically failed to reimburse employees for out-of-pocket expenses for work-related use of their personal cell phones.

21. Defendants regularly require Plaintiffs and Class Members to use their personal cell phones in discharging their duties. For example, Defendants

require that Plaintiffs and Class Members use their personal cell phones to request necessary cleaning supplies, to request assistance from each other and their supervisors, to ask questions regarding the scope of their job duties, to receive work instructions, and to report any job-related issues. Further, Defendants regularly call or text message Plaintiffs and Class Members with work-related communications and require that Plaintiff and Class Members respond to those communications.

22. Plaintiffs and Class Members are not permitted to use any on-site telephones belonging to Defendants' customers and clients.

23. Further, Defendants require that Plaintiffs and Class Members who work at locations without time clock systems use their personal cell phones to clock in and out of their shifts, breaks, and meal periods.

CLASS ACTION ALLEGATIONS

24. For the First and Second Causes of Action, but not with respect to the Third Cause of Action under PAGA, Plaintiffs bring this lawsuit as a class action pursuant to Code of Civil Procedure § 382, or Federal Rule of Civil Procedure 23, on behalf of themselves and all similarly situated janitorial employees.

25. The class that Plaintiffs seek to represent is all janitorial employees who worked for Defendants and were paid on an hourly basis in the State of California at any time during the Class Period ("Class").

26. The claims herein have been brought and may properly be maintained as a class action under

Code of Civil Procedure § 382 because there is a well-defined community of interest among Class Members with respect to the claims asserted herein, and the proposed class is easily ascertainable:

a. Ascertainability and Numerosity: The potential members of the Class as defined herein are so numerous that joinder would be impracticable. Plaintiffs are informed, believe, and allege that Defendants have employed hundreds of Class Members in California during the Class Period. The names and addresses of Class Members are available to Defendants. Notice may be provided to Class Members via first class mail using a form of notice similar to those customarily used in class action lawsuits of this nature.

b. Commonality: There are questions of law and fact common to Plaintiffs and Class Members that predominate any questions affecting only individual members of the Class. These common questions of law and fact include, without limitation:

    i. Whether Defendants have violated Labor Code § 2802 by failing to reimburse or indemnify employees for employment-related expenses, including but not necessarily limited to the costs incurred by using their personal cell phones in the course of performing their work duties;

    ii. Whether Defendants' failure to indemnify employees for their necessary employment-related expenses and losses constitutes an unlawful, unfair, and/or fraudu-

lent business practice under Business and Professions Code § 17200 et seq.;

iii. What relief is necessary to remedy Defendants' unfair and unlawful conduct as herein alleged; and,

c. Typicality: Plaintiffs' claims are typical of the claims of the Class. Plaintiffs and all Class Members have sustained injuries-in-fact and damages arising out of and caused by Defendants' common course of unlawful conduct, as alleged herein.

d. Adequacy of Representation: Plaintiffs are members of the Class that they seek to represent, and will fairly and adequately represent and protect the interests of the Class Members. Counsel representing Plaintiffs are competent and experienced in litigating wage and hour class actions.

e. Superiority of Class Action: A class action is superior to other available means in order to obtain fair and efficient adjudication of this controversy. Individual joinder of all putative Class Members is not practicable, and questions of law and fact common to the proposed Class predominate over any questions affecting only individual members of the proposed Class. Each Class Member has suffered injury and is entitled to recover by reason of Defendants' unlawful policies and/or practices as alleged herein. Class action treatment will allow those similarly situated persons to litigate their claims in the manner that is most efficient and economical for the

parties and the judicial system. Further, the prosecution of separate actions against Defendants by individual proposed Class Members would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants.

27. Alternatively, in the event this matter remains in the federal court, the action would be brought under Federal Rule of Civil Procedure 23. The requirements of Fed. R. Civ. P. 23(a) are met because the class is numerous, common questions of law and fact exist, the named plaintiffs are typical of the class and will adequately represent the interests of the class with no conflicts, as factually explained abvo3d [*sic*]. Class counsel is experienced in class action litigation. Further, this case may be brought under Rule 23(b)(2) for declaratory and injunctive relief because Defendants have acted or refuse dot act on ground that apply generally to the Class, as alleged herein. Further, this case may be brought under Fed. R. Civ. P. 23(b)(3) because common questions of law or fact predominate over any individual issues, and a class action is superior to other available method to fairly and efficiently adjudicate the controversy, as alleged above. Finally, this case may be brought under Rule 23(c)(4) as a class action for particular issues.

DAMAGES

28. As a direct, foreseeable, and proximate result of Defendants' conduct, Plaintiffs and similarly situated janitorial employees are owed, among other things, reimbursements for business expenses in-

curred by the work-related use of their personal cell phones under Labor Code § 2802, and other statutory penalties, in an amount that exceeds $25,000, the precise amount of which will be proven at trial.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Failure to Indemnify Employees for Business-Related Expenses
(Labor Code § 2802)

29. The allegations of each of the preceding paragraphs are re-alleged and incorporated herein by reference, and Plaintiff alleges as follows a cause of action on behalf of themselves and the above-described Class of similarly situated janitorial employees employed by Defendants in California.

30. Labor Code § 2802 provides, in pertinent part: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful. […] For purposes of this section, the term 'necessary expenditures or losses' shall include all reasonable costs, including, but not limited to, attorney's fees incurred by the employee enforcing the rights granted by this section."

31. While acting on the direct instruction of Defendants and discharging their work duties, Plaintiffs and Class Members have incurred work-related business expenses, including but not limited to costs of maintaining cell phones and cell phone service

plans, for which Defendants have failed to reimburse Plaintiffs and Class Members.

32. By requiring Plaintiffs and Class Members to incur business expenses in direct consequence of the discharge of their duties for Defendants and/or in obedience to Defendants' direction without fully reimbursing or indemnifying employees for these expenses, Defendants have violated Labor Code § 2802.

33. As a direct and proximate result of Defendants' unlawful practices and policies, Plaintiffs and Class Members have suffered monetary losses, and are entitled to restitution of all expenses incurred in the performance of their work duties, interest thereon, reasonable attorneys' fees and costs, and all applicable statutory penalties available for the Defendants' violations of Labor Code § 2802.

34. Plaintiffs, on behalf of themselves and the proposed Class, request reimbursement and/or indemnification for their required business expenses as stated herein, and other relief as described below.

SECOND CAUSE OF ACTION
Unfair Competition and
Unfair Business Practices
(Business and Professions Code § 17200 et seq.)

35. The allegations of each of the preceding paragraphs are re-alleged and incorporated herein by reference, and Plaintiffs allege as follows a cause of action on behalf of themselves and the above-described Class of similarly situated janitorial employees employed by Defendants in California.

36. Defendants' failure to reimburse or indemnify employees for all business expenses incurred, in

violation of Labor Code § 2802, constitutes unlawful and/or unfair activities prohibited by Business and Professions Code § 17200. Plaintiffs reserve the right to identify additional unfair and unlawful practices by Defendants as further investigation and discovery warrants.

37. Moreover, Business and Professions Code § 17203 provides that the Court may restore to an aggrieved party any money or property acquired by means of unlawful and unfair business practices. Plaintiffs seek a court order requiring an audit and accounting of work-related cell phone expenses to determine the amount of restitution of all unreimbursed business expenses owed to them and Class Members, according to proof, as well as a determination of the amount of funds to be paid to current and former employees that can be identified and located pursuant to a court order and supervision.

38. Plaintiffs and all proposed Class Members are "persons" within the meaning of Business and Professions Code § 17204 who have suffered injury in fact as a result of Defendants' unfair competition, and who comply with the requirements of Code of Civil Procedure § 382, as set forth above, and therefore have standing to bring this claim for injunctive relief, restitution, and other appropriate equitable relief.

39. As a result of unlawful and/or unfair acts, Defendants have reaped unfair benefits and illegal profits at the expense of Plaintiffs and Class Members. Defendants should be enjoined from this activity and made to restore to Plaintiffs and Class Members their necessary business expenses, interest

thereon, and related statutory penalties, pursuant to Business and Professions Code §§ 17202 and 17203.

40. Private enforcement of these rights is necessary, as no other agency has raised a claim to protect these workers. There is a financial burden incurred in pursuing this action that would be unjust to place upon Plaintiffs, as the burden of enforcing workforce-wide rights is disproportionately greater than that of enforcing only Plaintiffs' individual claims. Additionally, Plaintiffs and Class Members are low-income workers who cannot afford to spend part of their wages on enforcing others' wage rights. Therefore, it would be against the interests of justice to force payment of attorneys' fees from Plaintiffs' recovery in this action. Therefore, attorneys' fees are appropriately sought pursuant to Code of Civil Procedure § 1021.5.

41. Plaintiffs, on behalf of themselves and Class Members, request restitution of unreimbursed businesses expenses, injunctive relief and other relief as described below.

THIRD CAUSE OF ACTION
Penalties Under the Private Attorneys General Act
(Labor Code § 2698 et seq.)

42. The allegations of each of the preceding paragraphs are re-alleged and incorporated herein by reference, and Plaintiffs allege as follows a representative cause of action on behalf of themselves and the above-described Class.

43. Pursuant to Labor Code § 2699.3(a), prior to the filing of the original complaint, Plaintiffs gave written notice by certified mail on November 24,

2014 to Defendants and the Labor Workforce Development Agency ("LWDA") of the factual and legal basis for the labor law violations alleged in this complaint.

44. Plaintiffs are aggrieved employees as defined by Labor Code § 2699(a).

45. Defendants violated the Labor Code § 2802 by failing to indemnify all work-related expenditures.

46. Labor Code § 2699(f) provides as follows: "For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows: "If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation."

47. The LWDA has not provided notice pursuant to Labor Code § 2699.3(a)(2)(A), and 33 calendar days have passed since the postmark date of Plaintiffs' LWDA notice. Therefore, Plaintiffs are entitled to commence a civil action pursuant to Labor Code § 2699.

48. Plaintiffs request civil penalties against Defendants for violations of the Labor Code, as provided under Labor Code § 2699(f), plus reasonable attorneys' fees and costs, in amounts to be proved at trial.

REQUEST FOR JURY TRIAL

49. Plaintiffs request a trial by jury on behalf of themselves and the above-described Class of similarly situated janitorial employees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the above-described Class of similarly situated janitorial employees, request relief as follows:

a. Certification of this action as a class action, pursuant to Code of Civil Procedure § 382, or Federal Rule of Civil Procedure 23;

b. Declaratory judgment that Defendants have knowingly and intentionally violated Labor Code § 2802 for failure to reimburse or indemnify Plaintiffs and the Class for work-related business expenses incurred in carrying out their job duties and/or Defendants' instructions; and Business and Professions Code § 17200 et seq., by the conduct set forth above;

c. Declaratory judgment that Defendants' violations as described above are unlawful;

d. Injunctive relief requiring an equitable accounting to identify, locate, and restore to all current and former janitorial employees the reimbursement for business expenses that are due;

e. An award of damages and/or restitution to be paid by Defendants according to proof;

f. Pre-judgment and post-judgment interest;

g. For an award of civil penalties under Labor Code § 2698 et seq.;

h. An award to Plaintiffs and Class Members of reasonable attorneys' fees and costs, pursuant to Code of Civil Procedure § 1021.5 and Labor Code § 2802, and any other applicable law; and

i. An award to Plaintiffs and Class Members of such other and further relief as this Court deems just and proper.

Dated: January 23, 2015

* * *

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial.

Dated: January 23, 2015

* * *

APPENDIX G

* * *

**IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA**

MARLEY CASTRO, Plaintiff, vs. ABM INDUSTRIES, INC.; ABM JANITORIAL SERVICES, INC.; ABM ONSITE SERVICES—WEST, INC.; and Does 1-10, inclusive, Defendants.	Case No.: RG14745764 **CLASS ACTION** **1. FAILURE TO INDEMNIFY EMPLOYEES FOR BUSINESS-RELATED EXPENSES (Labor Code § 2802); and** **2. VIOLATIONS OF UCL (Business and Professions Code § 17200 et seq.)** **DEMAND FOR JURY TRIAL**

I. INTRODUCTION

1. This is a class action under Code of Civil Procedure section 382, brought by Plaintiff MARLEY CASTRO ("Plaintiff").

2. Plaintiff seeks to represent a class comprised of the current and former janitorial employees em-

ployed by Defendant ABM INDUSTRIES, INC.; ABM JANITORIAL SERVICES, INC.; ABM JANITORIAL SERVICES-NORTHERN CALIFORNIA; ABM ONSITE SERVICES-WEST, INC.; and Does 1-10 ("Defendants") in the State of California, (hereinafter "Class Members").

3. Plaintiff seeks to bring a claim on behalf of the Class Members for failure to reimburse business expenses. Specifically, Defendants failed to reimburse or indemnify employees' expenses for use of their personal cell phones. Defendants require their janitorial employees to use their personal cell phones for work-related communications throughout their shifts, and in order to clock in and out of their shifts and meal periods. Defendant did not reimburse employees for the costs of this cell phone usage.

4. At all times relevant hereto, Defendants' unlawful policies and practices were centrally devised and commonly applied to all Class Members.

5. This action seeks payments for reimbursement of business expenses, interest thereon, and reasonable attorneys' fees and costs pursuant to Labor Code section 2802, and Code of Civil Procedure section 1021.5. Plaintiff, on behalf of herself and the putative class members, also seeks equitable and injunctive relief for these violations pursuant to Business and Professions Code sections 17200-17208 (also referred to herein as the "UCL").

II. JURISDICTION

6. Venue is proper in this judicial district, pursuant to Code of Civil Procedure section 395(a). Defendants maintain offices and transact business in Alameda County. The unlawful acts alleged herein

have occurred in and have a direct effect on Plaintiff and those similarly situated within the State of California and Alameda County. Defendants employ or have employed Plaintiff and putative class members in Alameda County.

7. The Court has jurisdiction over this class action pursuant to Article 6, section 10 of the California Constitution and California Code of Civil Procedure section 410.10.

8. On information and belief, Plaintiff's claims and the putative class members' monetary claims total less than $75,000.00 per person.

III. PARTIES

A. PLAINTIFF

9. Plaintiff and all putative class members as set forth below are current or former nonexempt janitorial employees of Defendants who are or were employed in the State of California, at some time during the period beginning four years prior to the filing of the original Complaint in this action to the present (the "Class Period").

10. Plaintiff MARLEY CASTRO is a resident of Oakland, California in Alameda County and has worked as a janitorial employee for Defendants since approximately June 2013. Throughout her employment with Defendants, Plaintiff CASTRO was paid approximately $10.00 per hour for her work.

B. DEFENDANTS

11. ABM INDUSTRIES, INC. is a provider of building maintenance and facility services. ABM has

its corporate headquarters in New York, New York and is incorporated in the state of Delaware.

12. Upon information and belief, ABM Industries, Inc. went through a corporate restructuring in 2013 and now operates as ABM ONSITE SERVICES-WEST, INC. within California.

13. Upon information and belief, ABM JANITORIAL SERVICES, INC. is a subsidiary wholly owned and operated by ABM Industries, Inc. Plaintiff is informed, believes and alleges, that at all times mentioned herein, ABM Janitorial Services, Inc. was engaged in the business of providing building maintenance services in California.

14. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants sued herein as DOES 1 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues Defendants by such fictitious names under Code of Civil Procedure section 474. Plaintiff is informed and believes, and based thereon alleges, that each of the Defendants designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and capacities of the Defendants designated hereinafter as DOES when such identities become known.

15. Plaintiff is informed and believes that each of the Defendants are liable to Plaintiff and the putative class members as an "employer," as that term is defined in section 18 of the Labor Code. As employers of Plaintiff and the putative class members throughout the relevant time period hereto, Defend-

ants, and each of them, are either solely or jointly and severally liable for the economic damages, including statutory penalties, owed to Plaintiff and putative class members under common law and by statute.

IV. STATEMENT OF FACTS

16. During the Class Period, Defendants have employed Plaintiff and other similarly situated hourly janitorial employees at worksites throughout California.

17. Plaintiff is informed and believes and thereon alleges that, throughout the relevant time period of this action, at least 500 hourly employees have been employed by Defendants.

18. At all times relevant hereto, Labor Code section 2802 has applied to Plaintiff and to all putative class members.

19. Plaintiff is informed and believes and thereon alleges that, through common practices, policies, and/or schemes Defendants, and each of them, have systematically failed to reimburse employees for out-of-pocket expenses for work-related use of their personal cell phones.

20. Specifically, Defendants require that Plaintiff and Class Members use their personal cell phones in order to clock in and out of their shifts, and in order to clock in and out for their meal periods.

21. Further, Defendants regularly require Plaintiff and Class Members to use their personal cell phones as a direct consequence of the discharge of their duties, as Defendants regularly call or text

Plaintiff and Class Members with work-related communications and require that Plaintiff and Class Members respond to these communications.

V. CLASS ACTION ALLEGATIONS

22. Plaintiff brings this lawsuit as a class, action pursuant to Code of Civil Procedure section 382 on behalf of herself and all similarly situated janitorial employees. The class Plaintiff seeks to represent ("Class") is defined as:

> All individuals who worked for Defendants as nonexempt janitorial employees paid on an hourly basis in the State of California at any time during the Class Period.

23. The claims herein have been brought and may properly be maintained as a class action under Code of Civil Procedure section 382 because there is a well-defined community of interest among Class Members with respect to the claims asserted herein and the proposed class is easily ascertainable:

a. Ascertainability and Numerosity: The potential members of the Class as defined herein are so numerous that joinder would be impracticable. Plaintiff is informed and believes and on such information and belief alleges that Defendants have employed hundreds of Class Members in California during the Class Period. The names and addresses of the Class Members are available from Defendants. Notices can be provided to the Class Members via first class mail using techniques and a form of notice similar to those customarily used in class action lawsuits of this nature.

b. Commonality: There are questions of law and fact common to Plaintiff and the Class that predominate over any questions affecting only individual members of the class. These common questions of law and fact include, without limitation:

i. Whether Defendants have violated Labor Code section 2802 by failing to reimburse or indemnify employees for business-related expenses, including but not necessarily limited to the costs incurred by using their personal cell phones in the course of performing their jobs;

ii. What relief is necessary to remedy Defendants' unfair and unlawful conduct as herein alleged; and,

iii. Other questions of law and fact.

c. Typicality: Plaintiff's claims are typical of the claims of the proposed Class. Plaintiff and all members of the proposed Class have sustained injuries-in-fact and damages arising out of and caused by Defendants' common course of conduct in violation of law, as alleged herein.

d. Adequacy of Representation: Plaintiff is a member of the proposed Class that she seeks to represent, and will fairly and adequately represent and protect the interests of the proposed Class Members. Counsel representing Plaintiff are competent and experienced in litigating wage and hour class actions.

e. Superiority of Class Action: A class action is superior to other available means for the fair and efficient adjudication of this controversy. Individual

joinder of all putative Class members is not practicable, and questions of law and fact common to the proposed Class predominate over any questions affecting only individual members of the proposed Class. Each proposed Class Member has suffered injury and is entitled to recover by reason of Defendants' illegal policies, and/or practices as alleged herein. Class action treatment will allow those similarly situated persons to litigate their claims in the manner that is most efficient and economical for the parties and the judicial system. Further, the prosecution of separate actions against Defendants by individual proposed Class Members would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants.

VI. DAMAGES

24. As a direct, foreseeable, and proximate result of Defendants' conduct, Plaintiff and similarly situated janitorial employees are owed, among other things, reimbursements for business expenses incurred by the work-related use of their personal cell phones under Labor Code 2802, and other statutory penalties, in an amount that exceeds $25,000, but is less than $5,000,000, the precise amount of which will be proven at trial.

VII. CAUSES OF ACTION

FIRST CAUSE OF ACTION
FAILURE TO INDEMNIFY EMPLOYEES FOR BUSINESS-RELATED EXPENSES
(Labor Code § 2802)

25. The allegations of each of the preceding paragraphs are realleged and incorporated herein by reference, and Plaintiff alleges as follows a cause of action on behalf of herself and the above-described Class of similarly situated tow-truck drivers and battery technicians employed by Defendants in California.

26. Labor Code section 2802 provides, in pertinent part: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful. [...] For purposes of this section, the term 'necessary expenditures or losses' shall include all reasonable costs, including, but not limited to, attorney's fees incurred by the employee enforcing the rights granted by this section."

27. While acting on the direct instruction of Defendants and discharging their duties for them, Plaintiff and other Class Members have incurred work-related business expenses, including but not limited to costs of maintaining cell phones and cell phone service plans, for which Defendants have failed to reimburse them.

28. By requiring Plaintiff and members of the proposed Class to incur business expenses in direct consequence of the discharge of their duties for Defendants and/or in obedience to Defendants' direction without fully reimbursing or indemnifying employees for these expenses, Defendants have violated and continue to violate Labor Code section 2802.

29. As a direct and proximate result of Defendants' unlawful practices and policies, Plaintiff and members of the proposed Class have suffered monetary losses, and are entitled to restitution of all expenses incurred in the performance of their work duties, interest thereon, reasonable attorneys' fees and costs, and all applicable statutory penalties available for the Defendants' violations of Labor Code section 2802.

30. Plaintiff, on behalf of herself and the proposed Class, requests reimbursement and/or indemnification for their required business expenses as stated herein and other relief as described below.

SECOND CAUSE OF ACTION
UNFAIR COMPETITION AND UNFAIR BUSINESS PRACTICES
(BUSINESS & PROFESSIONS CODE §§ 17200, et seq.)

31. The allegations of each of the preceding paragraphs are realleged and incorporated herein by reference, and Plaintiff alleges as follows a cause of action on behalf of herself and the above-described Class of similarly situated janitorial employees employed by Defendants in California.

32. Defendants' failure' to pay legally required compensation under the applicable Labor Code pro-

vision, failure to reimburse or indemnify employees for all business expenses incurred, in violation of Labor Code section 2802, constitutes unlawful and/or unfair activities prohibited by Business and Professions Code section 17200. Plaintiff reserves the right to identify additional unfair and unlawful practices by Defendants as further investigation and discovery warrants.

33. Moreover, Business and Professions Code section 17203 provides that the Court may restore to an aggrieved party any money or property acquired by means of unlawful and unfair business practices. Plaintiff seeks a court order requiring an audit and accounting of work-related cell phone expenses to determine the amount of restitution of all unreimbursed business expenses owed to herself and members putative class, according to proof, as well as a determination of the amount of funds to be paid to current and former employees that can be identified and located pursuant to a court order and supervision.

34. Plaintiff and all proposed Class members are "persons" within the meaning of Business and Professions Code section 17204 who have suffered injury in fact as a result of Defendants' unfair competition, and who comply with the requirements of Code of Civil Procedure Section 382, as set forth above, and therefore have standing to bring this claim for injunctive relief, restitution, and other appropriate equitable relief.

35. As a result of its unlawful and/or unfair acts, Defendants have reaped and continue to reap unfair benefits and illegal profits at the expense of Plaintiff

and proposed Class members. Defendants should be enjoined from this activity and made to restore to Plaintiff and proposed Class members their necessary business expenses, interest thereon, and related statutory penalties, pursuant to Business and Professions Code sections 17202 and 17203.

36. Private enforcement of these rights is necessary, as no other agency has raised a claim to protect these workers. There is a financial burden incurred in pursuing this action that would be unjust to place upon Plaintiff, as the burden of enforcing workforce-wide rights is disproportionately greater than that of enforcing only Plaintiff individual claims. Additionally, Plaintiff and Class Members are low-income workers who cannot afford to spend part of their wages on enforcing others' wage rights. Therefore, it would be against the interests of justice to force payment of attorneys' fees from Plaintiff's recovery in this action. Therefore, attorneys' fees are appropriate and sought pursuant to the Code of Civil Procedure section 1021.5.

37. Plaintiff, on behalf of herself and the proposed Class, request restitution of unreimbursed businesses expenses, injunctive relief and other relief as described below.

VIII. REQUEST FOR JURY TRIAL

38. Plaintiff requests a trial by jury on behalf of herself and the above-described Class of similarly situated janitorial employees.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiff on behalf of herself and the above-described Class of similarly situated janitorial employees, requests relief as follows:

a. Certification of the above-described Class as a class action, pursuant to Code of Civil Procedure section 382;

b. Certification of the above-described Class as a representative class under Business and Professions Code section 17200;

c. Provision of Class Notice to all Class Members who worked for Defendants in California during the Class Period described above;

d. A declaratory judgment that Defendants have knowingly and intentionally violated Labor Code section 2802 for failure to reimburse or indemnify Plaintiff and the Class for work related business expenses they have incurred in carrying out their job duties and/or the Defendants' instructions; and Business and Professions Code sections 17200-17208, by the conduct set forth above.

e. A declaratory judgment that Defendants' violations as described above were willful;

f. An equitable accounting to identify, locate, and restore to all current and former janitorial employees the reimbursement for business expenses that are due;

g. An award to Plaintiff and the Class Members of damages in the amount of reimbursement for business expenses, including interest thereon, subject to proof at trial;

h. An order requiring Defendants to pay restitution of all amounts owed to Plaintiff and similarly situated janitorial employees for Defendants' failure to reimburse business expenses, and interest thereon, in an amount according to proof, pursuant to Business & Professions Code section 17203;

i. An award to Plaintiff and the Class Members of reasonable attorneys' fees and costs, pursuant to Code of Civil Procedure section 1021.5 and Labor Code sections 2802, and/or other applicable law; and

j. An award to Plaintiff and the Class Members of such other and further relief as this Court deems just and proper.

Dated: October 24, 2014

* * *