IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No. 12-55644

JOSEPH BAUMANN, an individual,
Plaintiff-Appellant,

v.

CHASE INVESTMENT SERVICES CORP., ET AL.,
Defendants-Appellees.

PETITION FOR REHEARING *EN BANC*

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
CASE NO. 2:11-CV-06667-GHK-FMO

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CORPORATE DISCLOSURE STATEMENT

On October 1, 2013, Defendant/Appellant Chase Investment Services Corp. ("CISC") merged into J.P. Morgan Securities, LLC ("JPMS"). JPMS is the successor in interest to CISC and has assumed all of CISC's rights and obligations. JPMS is a wholly owned subsidiary of J.P. Morgan Broker-Dealer Holdings, Inc., which in turn, is a wholly owned subsidiary of JPMorgan Chase & Co.

JPMorgan Chase Bank, N.A. is not a publicly traded company. JPMorgan Chase Bank, N.A.'s sole parent is JPMorgan Chase & Co.

JPMorgan Chase & Co. is a publicly traded company listed on the NYSE under the symbol JPM. No publicly held company owns ten percent or more of JPMorgan Chase & Co.'s stock.

Dated: April 10, 2014

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

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STATUTES AND RULES

I. STATEMENT SUPPORTING REHEARING *EN BANC*

Rehearing *en banc* is warranted under both subparts of FED. R. APP. P. 35(b)(1) to review a panel decision that was compelled in part by the same panel's earlier, two-to-one decision in *Urbino v. Orkin Services of California, Inc.*, 726 F.3d 1118 (9th Cir. 2013), with Judge Thomas dissenting. Rehearing *en banc* is necessary:

(A) to secure and maintain uniformity of decisions. The two-to-one panel decision categorically rejecting diversity jurisdiction over plaintiff's private party representative suit, brought under California's Labor Code Private Attorneys General Act ("PAGA"), CAL. LAB. CODE §§2698–2699.5, directly conflicts with a controlling decision of the United States Supreme Court, a controlling decision of this Court, and two California Supreme Court decisions. These precedents establish that diversity jurisdiction is available for PAGA-representative claims;

(B) to resolve a question of exceptional importance, namely, whether federal subject-matter jurisdiction can extend to PAGA-representative claims based on diversity, 28 U.S.C. §1332(a), or the Class Action Fairness Act ("CAFA"), 28 U.S.C. §1332(d)(2).

Placing this issue in context, PAGA authorizes private plaintiff representative suits seeking penalties for violations of worker protections codified in California's Labor Code. PAGA creates no substantive employee rights. It allows private plaintiffs to pursue employer violations of other codified rights when California's state enforcement agency declines to sue. Thus, the PAGA penalty remedy is potentially available in addition to other remedies aggrieved employees can pursue.

By rejecting federal jurisdiction, the panel decision produces an undesirable, multi-jurisdictional universe where a single cause of action PAGA suit is restricted to State court while other employee suits, seeking other remedies for the same employer conduct, may be simultaneously maintained in or removed to federal court under diversity and/or CAFA jurisdiction. Petitioner faces exactly this situation: this PAGA-representative suit, now relegated to State court, and a federal, putative class action where present and former employees seek other, non-PAGA remedies, based on the same underlying allegations. Duplicative—potentially conflicting—litigation over the same alleged conduct is a result to be avoided and worthy of *en banc* scrutiny.

The panel majority erroneously holds that the State is a real party in interest on a PAGA-representative claim, thereby defeating diversity jurisdiction. The United States Supreme Court, however, has held that a State can only be a real-

party-plaintiff in a case where it is not named if the relief sought is solely for the State's benefit. *See Mo., Kan. & Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 59 (1901) ("*Missouri Railway*") (holding State a real-party-plaintiff only where "the relief sought is that which enures to [the State] alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate") This Court applied *Missouri Railway* in *Department of Fair Employment & Housing v. Lucent Technologies, Inc.*, 642 F.3d 728, 737 (9th Cir. 2011), concluding that even where the State was the named plaintiff (suing on behalf of one worker), the State was not a real party in interest because the broader injunctive relief it sought on behalf of others was "tangential" to relief sought for the one named worker. *Id*. at 739.

Applying the *Missouri Railway* test—and contrary to the panel majority holding—the State is not a real-party-plaintiff, and diversity jurisdiction is not defeated for PAGA-representative actions, because relief does not "enure[] to [the State] alone." The State cannot be a party to a PAGA-representative claim, which lies only if the State declines to sue, whereupon 25% of any penalties recovered are available to employees aggrieved by the offending employer practices at issue. CAL. LAB. CODE §2699(i), 2699.3(b), (c). Moreover, while the State is surely interested in enforcing its labor laws, both *Lucent* and *Missouri Railway* hold that California's interest in protecting persons from unlawful workplace conduct is too

general an interest to render the State a real-party-plaintiff. *Lucent*, 642 F.3d at 738-39.

The two-to-one panel decision also merits rehearing *en banc* because of the unacceptable decisional conflict it creates with the California Supreme Court. The majority concludes that penalties at issue in a PAGA-representative action cannot be aggregated to reach diversity jurisdiction's amount in controversy threshold because PAGA-representative actions vindicate the separate, individual rights of aggrieved employees. But the California Supreme Court has held that a PAGA-representative action "does not create property rights or any other substantive rights" in aggrieved employees. *Amalgamated Transit Union, Local 1756 v. Superior Court*, 209 P.3d 937, 943 (Cal. 2009). "[T]he employee plaintiff [in a PAGA case] represents the same legal right and interest as state labor law enforcement agencies." *Arias v. Superior Court*, 209 P.3d 923, 933 (Cal. 2009). Applying this precedent, Judge Thomas properly concluded in his *Urbino* dissent: "[b]ecause [the plaintiff] pursues a common and undivided claim in his role as proxy for the State, the district court correctly calculated the amount in controversy based on the aggregate civil penalty sought in this action, and properly determined that total exceeded $75,000." 726 F.3d at 1124. This conflict between the panel majority decision and controlling California Supreme Court precedent merits *en*

banc review because the rights created by a California law cause of action are determined using State law. *Lucent*, 642 F.3d at 737 & n.3, 739 n.7.

There is nothing inconsistent in concluding that the State is not a real party in interest even though the private PAGA plaintiff acts as a substitute for State labor law enforcement. The *Missouri Railway* test is used to determine whether diversity jurisdiction exists and here it does because PAGA relief does not "enure to [the State] alone." The test is not whether the State may also benefit, by receiving a share of the total relief awarded, or through enforcement of State labor laws. Rather, *Missouri Railway* limits the circumstances where the plaintiff's pleading is disregarded and a new party injected to defeat the diversity jurisdiction plaintiff's complaint establishes.

Rehearing *en banc* is also warranted because the availability of federal jurisdiction, based on either diversity or CAFA, is an issue of exceptional importance. This case, and *Urbino*, sanction exactly what petitioner faces: duplicative, piecemeal litigation of the same alleged employer conduct in both federal and state courts. As a result of the erroneous reasoning of the panel majority, the PAGA-only representative suit on behalf of all aggrieved employees must remain in State court, while simultaneous litigation over the same employer conduct can trigger diversity and/or CAFA jurisdiction. The undesirable

consequences of this result raise the exceptionally important issue of whether federal jurisdiction has properly been withheld by this panel's decisions.

We acknowledge rehearing *en banc* was sought and denied in *Urbino*, where the Court addressed only diversity jurisdiction. But petitioner in *Urbino* focused on a constitutional claim and did not demonstrate the same decisional conflicts identified in this petition. The compelling grounds advanced here for rehearing *en banc* differ significantly from those asserted in *Urbino*.

II. STATUTORY AND PROCEDURAL FRAMEWORK

A. California's Labor Code Private Attorney General Act (PAGA) Creates A Representative Claim That Cannot Exist If The State Sues The Defendant

California's Labor Code creates various worker rights. Aggrieved employees can enforce them using several different remedies.

In addition, California's Labor and Workforce Development Agency can prosecute employers who violate Labor Code protections. But prosecutorial resources are limited. So California's Legislature enacted PAGA, which permits "aggrieved employees" to pursue violations, and secure codified civil penalty amounts against violators if the State elects not to take enforcement action.[1] Thus, in a case like this one, seeking overtime pay, either the State or an employee may

[1] Under PAGA, an aggrieved employee must first give the State notice and an opportunity to sue. It is only when the State declines to sue that an aggrieved employee PAGA action is permitted. CAL. LAB. CODE §§2699(g)(1)(b)(i); 2699.3(b), (c).

sue under the Labor Code's substantive provisions and seek various remedies for the unpaid overtime. The employee may also bring a claim for penalties under PAGA for the very same failure to pay overtime if the State does not pursue the employer.

PAGA is a parallel enforcement method. But PAGA does not add to or subtract from the substantive rights created elsewhere in the Labor Code. Moreover, recovery on the PAGA claim is limited to specified civil penalties, and attorney's fees and costs to a prevailing plaintiff. If the PAGA claim is successful, aggrieved employees are allotted 25% of penalties awarded; 75% of such penalties are paid to the State. *Arias*, 209 P.3d at 930.

B. Procedural History: Plaintiff's Single Cause-Of-Action PAGA Suit Is Removed To Federal Court; The Two-To-One Panel Decision Refuses Federal Jurisdiction

Plaintiff Baumann, a Financial Advisor, sued his employer—defendant Chase Investment Services Corporation—in California state court on a single cause of action under PAGA. Panel Slip Opinion ("Op")-5. He alleges that he is suing as a representative of himself and other allegedly aggrieved Chase Financial Advisors. He claims Financial Advisors were not paid overtime, timely reimbursed for expenses, or provided the meal and rest breaks contemplated by California's Labor Code. Op-5.

Meanwhile, other Chase Financial Advisors sued in federal court. They allege a class action and seek other State law remedies for the same alleged employer violations: unpaid overtime; unreimbursed expenses; failure to provide compliant meal and rest breaks. These are the identical underlying Labor Code violations alleged in Baumann's PAGA-only suit. Plaintiff Baumann is a member of the alleged *Alakozai* class.[2]

Chase removed Baumann's case on two grounds: diversity of citizenship, 28 U.S.C. §1332(a), and CAFA, 28 U.S.C. §1332(d)(2), based on a class of more than one hundred member-claimants and an amount in controversy exceeding $5 million. Op.-5. The district court sustained diversity jurisdiction by aggregating potentially recoverable PAGA penalties to exceed $75,000 based on the number of aggrieved employees and alleged violations. The district court did not address CAFA. Op.-5; ER-4-5.

This Court granted plaintiff's 28 U.S.C. §1292(b) appeal. In disputing jurisdiction, plaintiff did not argue that the State should be treated as a real-party-plaintiff whose presence would defeat complete diversity, so that issue was not briefed before the panel.

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[2] *See Alakozai v. Chase Inv. Servs. Corp.*, No. CV 11-09178, 2012 WL 748584, at *1-2 (C.D. Cal. Mar. 1, 2012) (comparing *Baumann* allegations), *aff'd*, —F. App'x—, 2014 WL 487075 (9th Cir. Feb. 7, 2014).

This appeal was argued on the same day as *Urbino*, where the same panel held, over Judge Thomas' dissent, that the penalties recoverable under PAGA may not be aggregated based on all the aggrieved employees in order to cross diversity's $75,000 jurisdictional hurdle. The *Urbino* majority held:

> Aggrieved employees have a host of claims available to them—e.g., wage and hour, discrimination, interference with pension and health coverage—to vindicate their employer's breaches of California's Labor Code. All of these rights are held individually …. Thus, diversity jurisdiction does not lie because their claims cannot be aggregated.

726 F.3d at 1122.

The *Urbino* majority rejected defendants' argument that, because a PAGA-representative action substitutes for a State law enforcement action, the amount in controversy is the aggregate amount of PAGA penalties at issue:

> To the extent Plaintiff can—and does—assert anything but his individual interest, however, we are unpersuaded that such a suit, the primary benefit of which would will inure to the state, satisfies the requirements of federal diversity jurisdiction. The state, as the real party in interest, is not a 'citizen' for diversity purposes.

Id. at 1122-23.

Judge Thomas dissented because the California Supreme Court has held that the PAGA plaintiff is the State's substitute or proxy meaning "the amount in controversy [is] based on the aggregate civil penalties sought in [the] action." *Id*. at 1124.

In deciding this case—*Baumann*—the panel held, two-to-one, that *Urbino* dictated the absence of diversity jurisdiction. Op.-4 Judge Thomas noted his continuing disagreement, but concurred under *Urbino*'s compulsion. Op.-15. The panel then held, without dissent, that federal jurisdiction could not be sustained under CAFA because a PAGA-representative action is insufficiently similar to a Rule 23 class action to fall within CAFA's grant of jurisdiction over "class actions." Op.-15.

III. REASONS TO GRANT REHEARING *EN BANC*

A. The Two-To-One Decision Denying Diversity Jurisdiction Is In Direct Conflict With Controlling U.S. Supreme Court, Ninth Circuit And California Supreme Court Precedent

Rehearing *en banc* is warranted because the panel majority decision rejecting diversity jurisdiction conflicts with United States Supreme Court, Ninth Circuit and California Supreme Court precedent.

1. The Panel Majority Creates Decisional Conflict By Holding The State Is A Real Party To A PAGA Claim, Thereby Defeating Diversity Jurisdiction

Missouri Railway states the rule used to decide whether a State will be treated as a real party in interest, thereby defeating complete diversity, even though it is not a named plaintiff: "it may fairly be held that ***the State is such real party when the relief sought is that which enures to it alone***, and in its favor the judgment or decree, if for the plaintiff, will effectively operate." 183 U.S. at 59 (emphasis added).

The panel majority decision is irreconcilable with the *Missouri Railway* rule, which governs the PAGA scenario: a suit where the State is not a party, remedies do not enure to the State's benefit alone, and the share of any penalty money the State might receive relates to California's interests in enforcing its labor laws. Those interests are insufficient to make California a real-party-plaintiff.

In *Missouri Railway*, the lower court rejected diversity jurisdiction by holding the State to be a real-party-plaintiff to a suit brought by railroad commissioners to enforce State laws against a railroad. The Supreme Court reversed, rejecting the argument that Missouri's governmental interests in enforcing its laws were sufficient to make the State a real-party-plaintiff. The Supreme Court also rejected the lower court's determination that Missouri was financially interested in the commissioners' suit because the State could have been liable for litigation costs. *Missouri Railway*, 183 U.S. at 60-61.

The penalties allocable to California under PAGA are also insufficient to make the State a real-party-plaintiff. *Missouri Railway* rejected the lower court's conclusion that the State was necessarily a real party in interest because one of its political subdivisions could have benefitted by collecting penalties if the suit against the defendant-railroad was successful. *Ibid*.; *see also Lucent*, 642 F.3d at 738-39 & nn.4 & 6; *Nw. Pub. Commc'ns Council ex rel. State of Or. v. Quest Corp.*, 877 F. Supp. 2d 1004, 1013 (D. Or. 2012) (sustaining diversity jurisdiction

even though State might obtain penalties; relief would not "inure to the State of Oregon 'alone'"), *aff'd*, —F. App'x—, 2014 WL 983998 (9th Cir. Mar. 14, 2014).

Lucent applied the *Missouri Railway* test to a case where a California state agency sued on behalf of one worker but also sought more broadly applicable injunctive relief. According to *Lucent*, "a State's presence in a lawsuit will defeat jurisdiction under [§1332(a)(1)] only if 'the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate. '" 642 F.3d at 737 (quoting *Missouri Railway*, 183 U.S. at 59). *Lucent* held benefits associated with more broadly applicable injunctive relief were "tangential" to remedies sought on behalf of the one named worker and insufficient to turn California into a real-party-plaintiff.

This case does not require the Court to go as far as *Lucent*, where the State's named plaintiff status was disregarded. Indeed, Judge Ikuta dissented in *Lucent*, but nevertheless recognized *Missouri Railway* as governing when the issue is whether the State must be added as a real-party-plaintiff in a case where it is not named. 642 F3d at 750. When the State is a named plaintiff, this Court rarely disregards its presence when assessing diversity.[3] When the State is not named—and cannot be a plaintiff under controlling State law defining the claim—this Court

[3] *See, e.g.*, *Nev. v. Bank of Am. Corp.*, 672 F.3d 661, 670-71 (9th Cir. 2012) (distinguishing *Lucent* and refusing to disregard State's presence as named plaintiff when assessing diversity for CAFA's "mass action" definition).

should be equally reluctant to destroy diversity by injecting the State as a party in violation of *Missouri Railway*.

The panel majority decision also conflicts with Rule 17(a)'s requirement that "[a]n action must be prosecuted in the name of the real party in interest." Under California law, which governs the issue of the identity of a real party in interest on a State law claim, *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093-94 (9th Cir. 2003), a PAGA-representative claim cannot be pursued unless the State declines to prosecute. The panel majority creates the anomalous result that the State is deemed a mandatory party in a case that could not have been brought if the State sued. This odd outcome, coupled with the 'rough symmetry' between the real party in interest requirements of Rule 17(a) and diversity jurisdiction, *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462-63 n.9 (1980), are additional factors favoring *en banc* review.

2. The Panel Majority Creates Decisional Conflict By Holding That The Amount In Controversy On A PAGA Claim May Not Be Aggregated Across Aggrieved Employees

The alternative basis for the majority's denial of diversity jurisdiction is that PAGA penalties may not be aggregated because aggrieved employees hold rights to sue on an individual basis, triggering the conclusion that "plaintiffs who assert separate and distinct claims are precluded from aggregating them to satisfy the amount in controversy requirement." *Urbino*, 726 F.3d at 1122.

This holding directly conflicts with two California Supreme Court cases establishing that aggrieved employees do not have individual, separate PAGA claims. *Arias*, 209 P.3d at 933-34, and *Amalgamated Transit*, 209 P.3d at 943, establish, as Judge Thomas explained in his *Urbino* dissent, that a PAGA plaintiff "pursues a common and undivided claim in his role as proxy for the State,…[meaning] the amount in controversy [is] based on the aggregate civil penalties sought in this action…," 726 F.3d at 1124, just as the amount of the claim would be if the State pursued the employer-defendant. In deciding the nature of a plaintiff's interest, federal courts look to State law. *Lucent*, 642 F.3d at 738. That makes the panel majority's conflict with California precedent grounds for rehearing *en banc*. Moreover, rehearing *en banc* is warranted when a panel decision conflicts with important State law precedent. *See Beeman v. Anthem Prescription Mgmt.*, 682 F.3d 779, 782 (9th Cir. 2012) (*en banc* granted on California law issue; certified to State court).

Additionally, no aggregation is even required to establish jurisdiction in this case, for two reasons. First, PAGA awards the successful private-party-plaintiff attorney's fees and costs, no part of which is payable to the State. Attorneys fees are properly included when determining the amount in controversy. *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 698 (9th Cir. 2007). The fees at issue in this case are alone enough to cross diversity's jurisdictional threshold. ER-12. Second,

25% of the penalties put at issue are potentially payable to Baumann, as a reward, *Urbino*, 726 F.3d at 1123 (Thomas, J., dissenting), and that amount exceeds $75,000. ER-5, 10-12.

Rehearing *en banc* is warranted to address conflicts between the panel majority decision and four directly applicable U.S. Supreme Court, Ninth Circuit, and California Supreme Court precedents.

B. The Existence Of Federal Jurisdiction Under Either Diversity Or CAFA Is A Question Of Exceptional Importance Warranting *En Banc* Consideration Because The Panel's Erroneous Decision Promotes Adverse Jurisprudential Consequences That Can Be Avoided If Federal Jurisdiction Is Available

The existence of federal jurisdiction over PAGA claims under either diversity or CAFA is an issue of exceptional importance meriting *en banc* rehearing.

Since PAGA took effect in 2004, growing numbers of claims have been filed. The aggrieved employees here followed the blueprint sanctioned by the decision here denying federal jurisdiction. One plaintiff sued petitioner in California State court via a single cause of action complaint that seeks only the PAGA remedy for petitioner's alleged overtime, expense reimbursement, and meal and rest break violations of California's labor laws. Meanwhile, another aggrieved employee filed a federal court class action complaint seeking other remedies for

the same employer conduct put at issue on the PAGA claim. *See Alakozai*, *supra*, at *1-2.

Under the decision here, these interconnected claims seeking different remedies for the same alleged conduct can proceed via duplicative, piecemeal litigation in two different court systems without the potential benefits of consolidation. Making matters worse, the California Supreme Court has held that a judgment favoring the defendant in a PAGA-representative action may have limited *res judicata* effect in other cases where aggrieved employees seek different remedies for the same employer conduct unsuccessfully challenged in the PAGA-only case. *Arias*, 209 P.3d at 932-33.[4] Allegedly aggrieved employees are thus given serial bites at the apple to prevail or extract settlements. Courts, moreover, must devote limited resources to repetitive relitigation of the same issues.

An interpretation of federal statutes that produces this result deserves the extra scrutiny *en banc* review provides. Federal jurisdiction over PAGA claims would foster unified, single-forum litigation that would conserve judicial resources and minimize litigation over the myriad of additional issues that can be generated when multi-jurisdictional litigation ensues: stays; conflicting rulings; conflicting legal principles; collateral estoppel; and so on. For example, despite California's

[4] Under *Arias*, a judgment in a PAGA-representative action will have preclusive effect on further pursuit of PAGA remedies, but not on non-parties who seek in other cases other remedies for the same alleged violations. 209 P.3d at 932-33.

Arias decision, federal court judgments in non-PAGA class action will raise *res judicata* issues in State court PAGA actions. *In re Baldwin-United Corp*., 770 F2d 328, 341 (2d Cir. 1985). And even California precedent suggests issues adjudicated in a state court, representative-type action may not be relitigated by those whose interests were represented. *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n*, 60 Cal.App.4th 1053, 1072-73 (1998). The multi-jurisdictional world sanctioned by the majority's decision will create all manner of similar, vexing issues that will expand rather than limit the proceedings necessary in both federal and state courts.

That is why this Court should scrutinize *en banc* each alternative basis for federal jurisdiction. Congress created diversity and CAFA jurisdiction to "provide a federal forum for out-of-state litigants," *Lively v. Wild Oaks Mkts.*, 456 F.3d 933, 940 (9th Cir. 2006), in order to minimize the impact of local prejudice. The amount in controversy requirement "ensure[s] that a dispute is sufficiently important to warrant federal-court attention." *Exxon Mobil Corp. v. Allapath Servs., Inc*., 545 U.S. 546, 548 (2005). These principles surely support both diversity and CAFA jurisdiction over large value PAGA-representative claims, like this case where plaintiff seeks more than $13 million in PAGA penalties. ER-5.

In rejecting CAFA jurisdiction, the panel scrutinized the prototype PAGA-representative action, considered whether it is comparable to a Rule 23 "class

action," and concluded it was not. Op.-15. But that approach to CAFA is at odds with the statutory language and other precedents. CAFA defines a "class action" as "any civil action filed under":

> [1] rule 23 of the Federal Rules of Civil Procedure ***OR***
>
> [2] similar State statute ***OR***
>
> [3] rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.

§1332(d)(1)(B) (emphasis added).

Given the first part of this definition addresses Rule 23, the third part's "brought as a class action" clause cannot be read to require Rule 23 compliance. The panel erred in focusing on how a PAGA-representative action compares against Rule 23's requirements.

The hallmark of a class action is not a particular set of certification procedures, but the need for some procedural device to ensure the protection of absent class members. *Brown v. Mortg. Elec. Registration Sys., Inc.*, 738 F.3d 926, 931 (8th Cir. 2013) (Arkansas law complaint met CAFA's "class action" definition although class "certification" not required). This Court too has recognized that there are types of "class actions" other than those requiring Rule 23 certification. *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 907 n.9 (9th Cir. 2004) ("The FLSA allows for a type of class action, known as a 'collective action,' where a

named plaintiff is authorized to bring an action on behalf of others 'similarly situated.'");

PAGA shares essential features of class litigation. It is a procedural statute allowing aggrieved persons to bring claims on behalf of groups of others (*i.e.*, a class) who also have been aggrieved (*i.e.*, the named plaintiff's claims are typical). ER-18, ¶21 (alleging systematic practices). A share of the available recovery is potentially spread among those affected. CAL. LAB. CODE §2699(i). The entire represented group is bound to the resulting judgment to the extent that they are precluded from relitigating their entitlement to PAGA relief. *Arias*, 209 P.3d at 933.

IV. CONCLUSION

Rehearing *en banc* is warranted to consider whether diversity and/or CAFA jurisdiction is available over a PAGA-representative action.

Date: April 10, 2014

Respectfully submitted,

/s/ *Carrie A. Gonell*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed by electronic case filing and served on counsel of record through the Court's Notice of Docket Activity on April 10, 2014.

/s/ *Carrie A. Gonell*
Thomas M. Peterson

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(c)(2) and 9th Circuit Rule 40-1 because it contains 4,136 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Undersigned counsel further certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2007.

/s/ *Carrie A. Gonell*
Carrie A. Gonell

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH BAUMANN, individually, and on behalf of other members of the general public similarly situated, *Plaintiff-Appellant*, v. CHASE INVESTMENT SERVICES CORP., a Delaware corporation; JPMORGAN CHASE BANK NA; JPMORGAN CHASE & CO., a Delaware corporation, *Defendants-Appellees*.	No. 12-55644 D.C. No. 2:11-cv-06667-GHK-FMO OPINION

Appeal from the United States District Court
for the Central District of California
George H. King, Chief District Judge, Presiding

Argued and Submitted March 5, 2013
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Pasadena, California

Filed March 13, 2014

Before: Michael Daly Hawkins, Sidney R. Thomas, and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Hurwitz;
Concurrence by Judge Thomas

SUMMARY*

Class Action Fairness Act

The panel reversed the district court's order denying plaintiff's motion to remand an action, brought in state court under the California Labor Code Private Attorneys General Act of 2004, and then removed by defendants on the basis of diversity jurisdiction and pursuant to the Class Action Fairness Act of 2005.

Plaintiff sued his employer, Chase Investment Services Corporation, under the Private Attorney General Act in California superior court, alleging that Chase had failed to pay him and other "aggrieved parties" (Chase financial advisors) for overtime, provide for meal breaks, allow rest periods, and timely reimburse expenses. The complaint sought statutory civil penalties for each alleged violation, and asserted that plaintiff''s potential share of any penalties recovered and attorneys' fees would be less than $75,000.

The panel held that the district court could not exercise jurisdiction over this removed California Private Attorney General action under the Class Action Fairness Act. The panel conclude that California Private Attorney General Act actions are not sufficiently similar to Rule 23 class actions to

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

establish the original jurisdiction of a federal court under the Class Action Fairness Act. The panel also noted that because plaintiff's portion of the recovery would be less than $75,000, there was also no diversity jurisdiction under 28 U.S.C. § 1332(a), and therefore plaintiff's motion to remand should have been granted. The panel reversed with instructions to grant that motion.

Judge Thomas concurred in the majority opinion. He wrote separately only to note his prior disagreement on the question of whether claims under the Labor Code Private Attorney General Act of 2004 can be aggregated in determining whether diversity jurisdiction exists. *Urbino v. Orkin Services of California, Inc.*, 726 F.3d 1118, 1123 (9th Cir. 2013) (Thomas, J., dissenting).

COUNSEL

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OPINION

HURWITZ, Circuit Judge:

This is a civil action filed in California state court under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code §§ 2698–2699.5, and then removed to the United States District Court for the Central District of California. PAGA authorizes aggrieved employees, acting as private attorneys general, to recover civil penalties from their employers for violations of the Labor Code. *See Arias v. Super. Ct.*, 209 P.3d 923, 929–30 (Cal. 2009). The sole question presented on appeal is whether the district court had subject matter jurisdiction over this removed action.

In *Urbino v. Orkin Services*, 726 F.3d 1118 (9th Cir. 2013), we held that potential PAGA penalties against an employer may not be aggregated to meet the minimum amount in controversy requirement of 28 U.S.C. § 1332(a). The remaining issue in this appeal is whether a district court may instead exercise original jurisdiction over a PAGA action under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d), 1453, 1711–15. We hold that CAFA provides no basis for federal jurisdiction.

I.

Factual and Procedural Background

Joseph Baumann sued his employer, Chase Investment Services Corporation ("Chase"), under PAGA in California superior court, alleging that Chase had failed to pay him and other "Aggrieved Parties" (Chase financial advisors) for overtime, provide for meal breaks, allow rest periods, and timely reimburse expenses. The complaint sought PAGA statutory civil penalties for each alleged violation, and asserted that Baumann's potential share of any penalties recovered and attorneys' fees would be less than $75,000.

Chase filed a notice of removal, invoking diversity jurisdiction under § 1332(a) and alleging that the amount in controversy exceeded $75,000 if all potential statutory penalties and attorneys fee awards were aggregated. The notice of removal also invoked CAFA jurisdiction under § 1332(d)(2), alleging minimal diversity, a class of more than 100 members, and an amount in controversy exceeding $5,000,000. The district court denied Baumann's motion to remand, aggregating the potential claims against Chase and finding subject matter jurisdiction under § 1332(a). The court accordingly declined to address CAFA jurisdiction.

The district court certified its order denying Baumann's motion to remand, and we permitted an appeal to be taken from that order. *See* 28 U.S.C. § 1292(b). Section 1292(b) authorizes appeals from orders, not questions, so "our review of the present controversy is not automatically limited solely to the question deemed controlling by the district court." *In re Cinematronics, Inc.*, 916 F.2d 1444, 1449 (9th Cir. 1990). And, because the sole question remaining in this appeal—

whether a PAGA suit is a "class action" as defined in CAFA, 28 U.S.C. § 1332(d)(1)(B)—is a purely legal issue, which we review de novo, *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 846–47 (9th Cir. 2011), we choose as a matter of judicial economy to address it in the first instance.[1]

II.

CAFA Jurisdiction

CAFA confers original jurisdiction to the district courts "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 – 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). The claims of class members may be aggregated to determine whether the amount in controversy requirement has been satisfied. *Id.* § 1332(d)(6). The class also must have at least 100 members. *Id.* § 1332(d)(5)(B). There is no question that this PAGA action involves statutory violations allegedly suffered by more than 100 Chase employees, that the citizenship of one of those employees is different than Chase's, or that the aggregated statutory penalties sought exceed $5,000,000. Therefore, the only issue for decision is whether this is a "class action."

A "class action" is defined by CAFA as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or

[1] Because it is undisputed that Baumann's portion of any recovery (including fees) would be less than $75,000, we hold for the reasons explained in *Urbino* that the district court erred in finding the amount in controversy requirement in § 1332(a) satisfied.

similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." *Id.* § 1332(d)(1)(B). Because this action was commenced in California state court, it clearly was not filed pursuant to Federal Rule of Civil Procedure 23. The question before us thus boils down to "whether the suit was 'filed under' a state statute or rule of judicial procedure 'similar' to Rule 23 that authorizes a class action." *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 214 (2d Cir. 2013). We therefore begin with an overview of PAGA, the state statute under which this suit was filed.

1. PAGA

The California legislature enacted PAGA because of inadequate financing and staffing to enforce state labor laws. 2003 Cal. Stat. Ch. 906, §§ 1–2. The legislature declared it "in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts." *Arias*, 209 P.3d at 929–30. If the California Labor and Workforce Development Agency ("LWDA") declines to investigate an alleged labor law violation or issue a citation, an aggrieved employee may commence a PAGA action against an employer "personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations." *Id.* at 930. "[T]he 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." Cal. Lab. Code § 2699(f)(2). An aggrieved employee is "any person who was employed by the alleged violator and against whom one

or more of the alleged violations was committed." *Id.* § 2699(c). The LWDA receives seventy-five percent of the penalties collected in a PAGA action, and the aggrieved employees the remaining twenty-five percent. *Id.* § 2699(i).

2. PAGA and Class Actions

Section 382 of the California Code of Civil Procedure authorizes a class action if "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." In addition, before a class may be certified

> a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members. The community of interest requirement involves three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.

Linder v. Thrifty Oil Co., 2 P.3d 27, 31 (Cal. 2000) (internal quotation marks and citations omitted).

The complaint in this case did not invoke the California class action statute. The state Labor Code is silent as to whether a PAGA action is a "class action," but the California Supreme Court has authoritatively addressed that issue, holding that PAGA actions are not class actions under state law. *Arias*, 209 P.3d at 926. The court found PAGA actions fundamentally different from class actions, chiefly because

the statutory suits are essentially law enforcement actions. *Id.* at 933–34.

The state high court's decision, however, does not end our inquiry. CAFA does not require that a suit be filed under a state class action statute or rule, but only that the action be brought under a "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). "A state statute or rule is 'similar' to Federal Rule of Civil Procedure 23 if it closely resembles Rule 23 or is like Rule 23 in substance or in essentials." *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 174 (4th Cir. 2011).

The substance and essentials of Rule 23 are familiar. Rule 23 allows for class actions "only if":

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition, a class action cannot be maintained unless one of the three requirements of Rule 23(b) is also met. A class certification order is subject to the

detailed requirements of Rule 23(c) both as to form and notice.[2]

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[2] (1) ***Certification Order***.

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel*. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice***.

(A) *For (b)(1) or (b)(2) Classes*. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

In determining whether PAGA is sufficiently "similar" to Rule 23 to qualify under CAFA as a statute "authorizing a[] [class] action," we do not write on a blank analytical slate. In *Chimei*, we held that "*parens patriae* suits filed by state Attorneys General may not be removed to federal court because the suits are not 'class actions' within the plain meaning of CAFA." 659 F.3d at 847; *cf. Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014) (holding that a *parens patriae* suit is also not a CAFA "mass action"). We noted that *parens patriae* suits "lack statutory requirements for numerosity, commonality, typicality, or adequacy of representation that would make them sufficiently 'similar' to actions brought under Rule 23, and . . . do not contain certification procedures." *Chimei*, 659 F.3d at 850. Accordingly, we concluded that *parens patriae* suits "lack the defining attributes of true class actions. As such, they only 'resemble' class actions in the sense that they are representative suits." *Id.*; *accord Purdue Pharma*, 704 F.3d at 216–17.

Applying the *Chimei* rubric, we conclude that PAGA actions are also not sufficiently similar to Rule 23 class

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> (iv) that a class member may enter an appearance through an attorney if the member so desires;
>
> (v) that the court will exclude from the class any member who requests exclusion;
>
> (vi) the time and manner for requesting exclusion; and
>
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c).

actions to trigger CAFA jurisdiction. Unlike Rule 23(c)(2), PAGA has no notice requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA action. In a PAGA action, the court does not inquire into the named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees—critical requirements in federal class actions under Rules 23(a)(4) and (g). *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."); *Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1165–69 (9th Cir. 2013) (noting the importance of class counsel's ability to adequately represent the class and absent class members). Moreover, unlike Rule 23(a), PAGA contains no requirements of numerosity, commonality, or typicality. *Cf. Purdue Pharma*, 704 F.3d at 216–17 (noting that *parens patriae* suits contain none of the "hallmarks of Rule 23 class actions; namely, adequacy of representation, numerosity, commonality, typicality, or the requirement of class certification" and thus "lack the equivalency to Rule 23 that CAFA demands"); *CVS Pharmacy*, 646 F.3d at 175–76 (noting that the West Virginia law at issue does not "contain[] any numerosity, commonality, or typicality requirements, all of which are essential to a class action.").

In addition, the finality of PAGA judgments differs distinctly from that of class action judgments. The Federal Rules ensure that members of the class receiving notice and declining to opt out are bound by a judgment. Fed. R. Civ. P. 23(c)(3). Class action judgments are also preclusive as to all claims the class could have brought. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984).

In contrast, PAGA expressly provides that employees retain all rights "to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part." Cal. Lab. Code § 2699(g)(1). "[I]if the employer defeats a PAGA claim, the nonparty employees, because they were not given notice of the action or afforded an opportunity to be heard, are not bound by the judgment as to remedies other than civil penalties." *Ochoa-Hernandez v. Cjaders Foods, Inc.*, No. C 08-2073 MHP, 2010 WL 1340777, at *4 (N.D. Cal. Apr. 2, 2010); *see Arias*, 209 P.3d at 934.

In short, "a PAGA suit is fundamentally different than a class action." *McKenzie v. Fed. Express Corp.*, 765 F. Supp. 2d 1222, 1233 (C.D. Cal. 2011). These differences stem from the central nature of PAGA. PAGA plaintiffs are private attorneys general who, stepping into the shoes of the LWDA, bring claims on behalf of the state agency. *See Arias*, 209 P.3d at 929–30. Because an identical suit brought by the state agency itself would plainly not qualify as a CAFA class action, no different result should obtain when a private attorney general is the nominal plaintiff.

The nature of PAGA penalties is also markedly different than damages sought in Rule 23 class actions. In class actions, damages are typically restitution for wrongs done to class members. But PAGA actions instead primarily seek to vindicate the public interest in enforcement of California's labor law. *See Sample v. Big Lots Stores, Inc.*, No. C 10-03276 SBA, 2010 WL 4939992, at *3 (N.D. Cal. Nov. 30, 2010); *Franco v. Athens Disposal Co.*, 90 Cal. Rptr. 3d 539, 556 (Ct. App. 2009). The bulk of any recovery goes to the LDWA, not to aggrieved employees. And, the twenty-five percent portion of the penalty awarded to the aggrieved

employee does not reduce any other claim that the employee may have against the employer—in this case, for example, for withheld overtime pay. *See Caliber Bodyworks, Inc. v. Super. Ct.*, 36 Cal. Rptr. 3d 31, 40 (Ct. App. 2005). The employee's recovery is thus an incentive to perform a service to the state, not restitution for wrongs done to members of the class.

In the end, Rule 23 and PAGA are more dissimilar than alike. A PAGA action is at heart a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class relief.

Despite these fundamental differences, Chase argues that PAGA actions are "class actions" under CAFA because PAGA is a state procedural law that would be displaced by Rule 23 in federal court under the rationale of *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010). But *Shady Grove* is of no help to Chase. In *Shady Grove*, the Supreme Court considered whether a New York law, which precluded suits seeking recovery of penalties from proceeding as class actions, deprived a federal district court of jurisdiction over a diversity suit proposed as a Rule 23 class action. *Id*. at 397. The issues were whether Rule 23 conflicted with the New York law, and if so, whether the Rule exceeded the authorization of the Rules Enabling Act or Congress's rulemaking power. *Id.* at 398. The Supreme Court held that the New York law conflicted with Rule 23, and after applying the analysis mandated by *Hanna v. Plumer*, 380 U.S. 460 (1965), concluded that the Federal Rule was not ultra vires. *Shady Grove*, 559 U.S. at 398–410; *id.* at 429–36 (Stevens, J., concurring).

In contrast, the issue before us is simply one of statutory construction—whether the action sought to be removed was "*filed under*" a state statute "similar" to Rule 23. We do not today decide whether a federal court may allow a PAGA action otherwise within its original jurisdiction to proceed under Rule 23 as a class action. We hold only that PAGA is not sufficiently similar to Rule 23 to establish the original jurisdiction of a federal court under CAFA.

III.

Conclusion

For the reasons above, we hold that the district court could not exercise jurisdiction over this removed PAGA action under CAFA. And because, in light of *Urbino*, there was also no federal subject matter jurisdiction under § 1332(a), *see supra* n.1, Baumann's motion to remand should have been granted. We reverse with instructions to grant that motion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

THOMAS, Circuit Judge, concurring:

I concur in the majority opinion. I write separately only to note my prior disagreement on the question of whether claims under the Labor Code Private Attorney General Act of 2004, Cal. Lab.Code § 2698 et seq, can be aggregated in determining whether diversity jurisdiction exists. *Urbino v. Orkin Services of California, Inc.*, 726 F.3d 1118, 1123 (9th

Cir. 2013) (Thomas, J., dissenting). *Urbino* is law of the circuit, of course, and binds this panel. However, if I were writing on a clean slate, I would hold otherwise as to the question of aggregation.